NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Callahan-Tucker*, 2025 NSCA 35

Date: 20250522
Docket: CAC 529712
Registry: Halifax

Between:

David Callahan-Tucker

Appellant

v.

His Majesty the King

Respondent

Judges:	Van den Eynden, Derrick and Gogan, JJ.A.
Appeal Heard:	April 14, 2025, in Halifax, Nova Scotia
Facts:	The appellant, a casual friend of the complainant, was convicted of sexual assault after an incident at a house party. The complainant alleged that the appellant engaged in non-consensual penile-vaginal penetration. The appellant claimed the complainant consented to the sexual activity, citing prior consensual interactions that night, including kissing and touching (paras 7-24).
Procedural History:	Provincial Court: October 25, 2019 – the first trial judge recused himself after dismissing the appellant's s. 276 application; February 21, 2020 – evidence concluded before the second trial judge and final submissions scheduled; June 15, 2022 – following the second judge's prolonged illness, subsequent retirement, and COVID-19 court closures, the trial is set to re-commence before a third judge; November 18, 2021 – rehearing of the s. 276 application; June 8, 2022 – s. 11(b) delay application hearing; September 13-14, 2022 – trial proceeds before

	the third judge; December 16, 2022 – dismissal of the s. 11(b) application (*R. v. Callahan-Tucker*, 2022 NSPC 58) and decision on conviction.
Parties' Submissions:	Appellant: Argued that the trial judge erred in applying s. 276 to evidence of sexual activity preceding the offence, and that the delay in proceedings violated his right to a trial within a reasonable time (paras 55-56, 129-131). Respondent: Contended that the s. 276 application was correctly dismissed as the proposed evidence did not form part of the offence and its purpose relied on prohibited reasoning, and that the delays were justified due to defence conduct and exceptional circumstances (paras 57, 164-166).
Legal Issues:	Did the trial judge err in dismissing the appellant's s. 276 application? Was the appellant's right to a trial within a reasonable time violated?
Disposition:	The appeal was dismissed.
Reasons:	Per Derrick J.A. (Van den Eynden and Gogan JJ.A. concurring): s. 276 Application: The trial judge correctly determined that the proposed evidence, occurring both before and after the offence, constituted sexual activity to which the s. 276 screening regime applied, as this evidence was not activity that formed the subject-matter of the charge. He further correctly dismissed the s. 276 application as the proposed evidence was not relevant to the issue of consent and its only purpose relied on prohibited twin-myth reasoning (paras 58-104). s. 11(b) Delay: The trial judge correctly found that the majority of delays were attributable to the appellant's actions and exceptional circumstances, including the first judge's recusal, the second judge's illness/retirement, and the impact of the COVID-19 pandemic on the Court

system. Although the trial judge made some accounting errors, the correct net delay was below the 18-month ceiling established in *R. v. Jordan*, and thus, the appellant's right to a trial within a reasonable time was not violated (paras 107-205).

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 207 paragraphs.

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Respondent

Restriction on Publication: s.486.4 of the Criminal Code

Judges:	Van den Eynden, Derrick and Gogan, JJ.A.
Appeal Heard:	April 14, 2025, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Derrick, J.A.; Van den Eynden and Gogan, JJ.A. concurring.
Counsel:	Zeb Brown, for the appellant Timothy O'Leary, for the respondent

Order restricting publication – sexual offences

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

…

Limitation

(4) An order made under this section does not apply in either of the following circumstances:

(a) the disclosure of information is made in the course of the administration of justice when the purpose of the disclosure is not one of making the information known in the community; or

(b) the disclosure of information is made by a person who is the subject of the order and is about that person and their particulars, in any forum and for any purpose, and they did not intentionally or recklessly reveal the identify of or reveal particulars likely to identify any other person whose identity is protected by an order prohibiting the publication in any document or the broadcasting or transmission in any way of information that could identify that other person.

(5) Victim or witness – An order made under this section does not apply in respect of the disclosure of information by the victim or witness when it is not the purpose of the disclosure to make the information known to the public, including

when the disclosure is made to a legal professional, a health care professional or a person in a relationship of trust with the victim or witness.

Reasons for judgment:

Introduction

[1] The appellant raises two issues in his appeal against conviction for sexual assault: (1) whether the trial judge, Judge Alain Bégin of the Provincial Court of Nova Scotia, committed reversible error by dismissing the appellant's motion to adduce evidence of sexual activity the appellant says occurred with the complainant on the same night as the alleged sexual assault; and (2) whether the proceedings should have been stayed for delay the appellant says violated his right to a trial within a reasonable time.

[2] Judge Bégin found beyond a reasonable doubt that the appellant subjected the complainant, K.M., to penile-vaginal penetration without her consent. Evidence from the appellant did not include a description of sexual activity he claimed had occurred shortly before and just after the sexual intercourse. The appellant was prohibited from describing this "other sexual activity" because the judge had dismissed his motion brought pursuant to s. 276 of the *Criminal Code* and ruled the evidence inadmissible. This is the focus of the appellant's first ground of appeal.

[3] The second ground of appeal concerns the appellant's right, protected by s. 11(b) of the *Charter*, to a trial within a reasonable time. The Information charging the appellant with sexually assaulting K.M. was laid on May 17, 2018. The parties agreed the delay to be assessed fell between that date and June 16, 2022, the anticipated end of the trial—a total of 49 months. Between May 2017 and June 2022 a number of events occurred: the first trial judge—Judge Del Atwood—recused himself, the second trial judge—Judge Richard MacKinnon—was ultimately unable to complete the trial due to illness, and the COVID-19 pandemic impacted court proceedings. In addition, the appellant brought a motion pursuant to s. 276 before each of the three trial judges to adduce the other sexual activity evidence. None of the three motions were successful.[1]

[4] Judge Bégin conducted the appellant's trial once it was confirmed that Judge MacKinnon would not be returning. He heard the appellant's other sexual activity motion on November 18, 2021 and gave his decision immediately afterwards. He dismissed the appellant's s. 11(b) motion on December 16, 2022 when he also rendered his verdict.

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[1] This case involved proceedings before three Provincial Court judges. To avoid confusion I will refer to the judges by name throughout these reasons.

[5] I will be referring to all three decisions made by Judge Bégin: his November 18, 2021 decision on the s. 276 motion; his December 16, 2022 decision on delay; and his decision convicting the appellant.

[6] As these reasons explain, I am satisfied Judge Bégin was correct to have dismissed the appellant's s. 276 other sexual activity motion. I have also concluded the appellant's right to a trial within a reasonable time was not violated. I would dismiss the appeal.

A Summary of the Facts

[7] The appellant was a casual friend of the complainant, K.M. She had encountered him at music events where they knew people in common. On the night of November 10, 2017 there was musical entertainment at a local pub. K.M. spoke to the appellant briefly at the bar after the show. Subsequently, they both walked to the nearby home of mutual friends where the appellant was living temporarily. The after-party at the house stretched into the small hours of November 11.

[8] The house party included K.M.'s ex-boyfriend. He had broken off their relationship a few weeks earlier.

K.M.'s Evidence about the Events at the House-Party

[9] K.M. went to the basement where some of the party-goers were hanging out and jamming on various instruments. After approximately an hour and a half, she went back upstairs and saw the appellant in the living room sitting on the couch. He was leaning over a bucket and looked as though he was on the verge of vomiting. K.M. got him a glass of water and sat beside him. She testified he was intoxicated. She was not, having had only three drinks over a five hour period.

[10] K.M. planned to call a cab. After such a recent break-up, her ex-boyfriend being at the house was making her uncomfortable and she just wanted to go home. When she told the appellant this he said she could stay at the house. The hosts had young children who were out for the night and their bedroom was available. The offer suited K.M. She testified she knew and trusted everyone at the house, including the appellant, and staying the night would enable her to walk to her car the next morning and drive home.

[11] The appellant showed K.M. the children's room which had bunkbeds up against a wall. He sat on the lower, slightly bigger bed and patted the mattress

beside him. K.M. sat down intending to just go to sleep. She testified the appellant then kissed her. Knowing the appellant was drunk she thought little of the kiss and did not expect anything more would happen.

[12] K.M. told the appellant she wanted to go to bed and when he lay down, she lay down beside him. She thought they might cuddle a bit and fall asleep but the appellant started to kiss her again. K.M. testified she responded to the kissing by telling the appellant she did not want to go any further and was on her period. In her direct evidence she described what happened next, the penile-vaginal penetration:

> […] He got on top of me. He lifted up my skirt. He was kissing my neck, and I was saying stop, don't do this, like, I…I don't want to do this. I'm on my period. I don't want to have sex. My ex is in the house. This is not what I want to do. And he…he…he didn't listen to me, so he…he pulled up my skirt. I was wearing a jean skirt. He pulled it up to my…my torso. He pulled down my pantyhose, and he got on top of me. He pulled down my underwear, and he started having sex with me.
>
> […] I said I don't want to do this. I said no. I said stop. I went silent for probably 30 seconds while I was trying to come to terms with what was happening, and…and then I said hey, do you remember how I said no a minute ago, and do you notice what you're doing now, and he said I know, but it feels so good, and I…I just froze. I couldn't…I couldn't move. I just laid there looking at the top of the bunkbed and…I…eventually, he stopped.

[13] K.M. testified that once the appellant had stopped penetrating her, he asked her for fellatio. She told him: "Absolutely not" and went to the nearby bathroom. She said she felt "sick" and "disgusted" and "ashamed". She testified she was in the bathroom for five minutes, describing herself as "a mess" and "crying my eyes out". She went back to the bedroom and told the appellant she was leaving. She encountered a friend who called her a cab and accompanied her to her parents' home.

[14] In cross-examination K.M. acknowledged the kissing and lying on the bed with the appellant. She otherwise firmly denied the appellant's version of what happened in the bedroom.

The Appellant's Evidence About the Events at the House-Party

[15] The appellant testified to his belief that K.M. had consented to the penetrative sex.

[16] The appellant said he felt some attraction toward K.M. in what was a "flirtatious" atmosphere between them that night. He invited K.M. to lie down on the couch with him and she did. (In cross-examination the appellant acknowledged being drunk and experiencing the "spins" at the time K.M. got him the glass of water.)

[17] According to the appellant, K.M. called off her cab once he invited her to stay the night at the house. After lying down together on the couch for a few minutes he and K.M. went outside for a cigarette. (In cross-examination K.M. did not recall this.)

[18] The appellant testified that upon coming back into the house he asked K.M. if she wanted "to move things forward into the other room" and that she responded by saying okay. The appellant said K.M. was flirtatious and "kind of reciprocating" his behaviour. On cross-examination K.M. had denied being asked whether she wanted to "move things forward".

[19] The appellant showed K.M. into the children's bedroom with the bunkbeds. He closed the door. K.M. did not say anything when he did so. He testified that in his mind "we were moving forward like we had spoken about". He said their conversation at this point was about K.M. being on her period, which he said he "didn't mind", and that he proposed they could lie on a blanket. He said K.M. agreed. They lay down on a blanket he spread out and immediately started kissing and touching each other's bodies. The appellant testified that in his mind they were "going to have sex". K.M. assisted the appellant by raising her hips as he removed her pantyhose and underwear. She spread her legs and he proceeded to have penetrative sex with her.

[20] The appellant testified the vaginal sex quickly came to an end when he observed K.M.'s facial expression. He said he asked her if she wanted to stop and she said she did as she was still in love with her ex-boyfriend. They chatted and got dressed. K.M. went to the bathroom to clean up. When she returned they laid back down and started chatting again.

[21] The appellant testified that he "believed the whole time that I had obtained consent [to the penetrative sex] through our words, our conversation and our actions".

[22] The appellant was asked in direct examination if he had said anything to K.M. "at the time about having vaginal sex before it occurred". He responded by saying:

> Not specifically vaginal sex, no. I asked her if we wanted to move things forward…we knew that it was vaginal sex because of the talk about the period and agreeing to go forward with the blanket.

[23] The appellant testified that K.M. spread her legs to facilitate penetrative sex and did not say anything when she did so.

[24] In cross-examination the appellant acknowledged he never asked K.M. about having sex nor did he tell her explicitly that he wanted to have sex with her. He said K.M. did not tell him no and to stop. He denied saying, "I know, I'm sorry but it feels so good".

The Appellant's Facebook Messages

[25] Significant evidence led by the Crown came in the form of Facebook messages the appellant sent K.M. following the events at the house party. After getting to her parents' home, K.M. contacted her ex-boyfriend to tell him the appellant had forced penetrative sex on her. (She also told friends and her parents.) Advised by his hosts of this accusation when he woke up on November 11, the appellant sent K.M. a Facebook message and apologized emphatically. He testified the first message was at his own initiative. He said he was sorry for making her uncomfortable "last night", that it wasn't his intention and he "felt terrible about it".

[26] Some hours later the appellant received a message from K.M. saying she had told him she was on her period and said no "and you did it anyways". This message was admitted to place the appellant's follow-up message in context. He did not deny the allegation of forced sex. As noted by Judge Bégin the appellant said:

> I don't really know what to say, I feel sick about it. I'm truly sorry I know that doesn't change what happened that's not the kind of guy I am, if there's anything I can do to make up for it I will. I definitely understand if you just don't won't [*sic*] me to speak to you again…[2]

[2] The appellant quickly corrected the "won't" error in his message by sending a one word message—"Want"—to clarify he intended his message to read: "if you just don't want me to speak to you again…".

[27] The appellant testified that a lengthy Facebook message to K.M. on December 1, 2018 had been drafted, like his second message on November 11, under intense pressure from friends. In his decision on the merits, Judge Bégin highlighted statements made by the appellant on December 1:

- I've been haunted by that night while I try to go about my day-to-day life.
- I think about how I've hurt you.
- I was very drunk.
- I never realized I was doing anything to hurt you.
- I put you in a position you weren't comfortable in, and I didn't realize until it was too late.
- I don't know how to heal the wounds I have caused.
- I never imagined I could hurt someone the way I've hurt you.
- I am truly sorry. Sorry for hurting you in the moment.
- I've learned that although things seem to be pointing in one direction things aren't always as they seem. I'll never act upon my urges, only upon affirmative consent.
- I will never harm anyone again.
- I'm so very sorry.

[28] The last two excerpts emphasized by the judge were contained within a longer thread of the December 1 message that included the appellant stating:

> […] it may not mean anything to you but I make this oath to you that I will never harm anyone again. I have put a ton of thought into making sure it never happens again and this is something I will never forget. I'm not asking for forgiveness I am just asking you to realize I am so very sorry.

[29] The appellant testified he did not "really mean any of these messages" and had written them under duress exerted by his friends, the hosts of the house party. He testified he had been "force fed […] what to say and what to write". He said the

friends urged him to “acknowledge” and “empathize” with K.M. and not deny the accusation of forced intercourse. He said he was fearful his friends would evict him, rendering him homeless, if he defied their direction on how to respond.

[30] Judge Bégin was having none of this, and rejected the appellant’s explanation for the Facebook messages as “not believable, plausible or credible”. He said:

> […] I find the defence’s theory of Mr. Callahan-Tucker, a self-professed activist for sexual assault victims being under extreme pressure and duress from his friends, would lie and admit to an allegation of sexual assault to appease the victim and to avoid losing his house strains credulity.

[31] Judge Bégin found on an assessment of the whole of the evidence the Crown had proven beyond a reasonable doubt that K.M. did not consent to the penetrative sex. He held that:

> Lack of resistance does not equate to consent. Consent to engage in sexual activity requires some positive communication in the form of words or gestures from the complainant that she is consenting to the sexual activity in issue. It is never to assume that unless or until a person says no, she has implicitly given consent to any and all sexual activity. A belief that silence or passivity or ambiguous conduct constitutes consent is a mistake of law and provides no defence. The accused relied on passivity by [K.M.].
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> A person must be able to consent continually to the sexual activity. Consent must be contemporaneous, and one cannot unilaterally process from kissing to intercourse without obtaining further consent.
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> […]
>
> The burden lies on the accused to take reasonable steps to determine whether the victim in consenting. There is no burden on the victim to object. The accused, contrary to the evidence of [K.M.], testified that [K.M.] never said no, although she also never said yes, so she must have consented. This is not the legal standard. The accused took no steps to ensure consent but just assumed that [K.M.] was consenting.
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> […]
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> […] We have speculation by the accused that [K.M.] was consenting as she followed him into the bedroom, but there was no unambiguous affirmative consent. I accept the evidence of [K.M.] that she clearly and repeatedly told the accused she did not want to have sex”.

[32] Judge Bégin also rejected the appellant’s claim of an honest but mistaken belief in communicated consent:

> The evidence is clear the accused took no reasonable steps to confirm consent by [K.M.], but he just assumed or believed that [K.M.] was consenting and that the accused relies on silence, passivity, or ambiguous conduct by [K.M.] As a result, there's no air of reality or proper legal foundation to his claim of an honest but mistaken belief.

[33] None of these findings/conclusions have been appealed.

[34] I will refer to additional facts as they apply to each ground of appeal.

[35] As I noted earlier, the appellant's testimony at trial did not include evidence about the interactions he claimed to have had with K.M. outside the bedroom before the penetrative sex, and afterwards when she returned from the bathroom. These details were the subject of his earlier other sexual activity motions pursuant to s. 276 of the *Criminal Code.* The appellant sought unsuccessfully to have this evidence declared admissible by Judges Atwood and MacKinnon. He renewed his motion before Justice Bégin. I will discuss that next.

The Appellant's s. 276 Other Sexual Activity Motion

[36] The appellant's other sexual activity motion was brought pursuant to what the Supreme Court of Canada has called "a rigorous statutory regime" prohibiting the use of sexual activity evidence that is not the subject-matter of the charge unless,

> […] 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)).[3]

[37] Prohibited "twin-myth" reasoning relies 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".[4] The twin myths are "simply not relevant at trial", "can severely distort the trial process"[5], and "have no place in a rational and just system of law".[6]

[38] A s. 276 motion is assessed through a two-stage procedure established in the *Criminal Code*. Judge Bégin dismissed the appellant's motion at the first stage—Stage One—where he had to determine if the other sexual activity was capable of

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[3] *R. v. T.W.W.*, 2024 SCC 19 at para. 25 [*T.W.W.*].
[4] *T.W.W.* at para. 25.
[5] *R. v. Darrach*, 2000 SCC 46 at para. 33 [*Darrach*].
[6] *R. v. Seaboyer, R. v. Gayme*, [1991] 2 S.C.R 577 at p. 630 [*Seaboyer*].

being admitted into evidence.[7] Evidence that supports twin-myth inferences is not capable of being admitted and will fail at Stage One.[8]

[39] The appellant's motion before Judge Bégin was supported by his affidavit sworn February 3, 2021. That affidavit contained what the appellant alleged had occurred between K.M. and himself prior to entering the bedroom—the pre-bedroom sexual activity. According to the appellant:

- The appellant's "first series of sexual encounters" with K.M. occurred on the living room couch at the house party on November 11, 2017, 15–20 minutes before the penetrative sex.

- He and K.M. had been flirting with each other and speaking "in an affectionate way". The "flirting behaviour" intensified on the couch.

- He "asked" K.M. to spend the night with him and said he would drive her home in the morning. She agreed and cancelled her cab. She joined him on the couch, lying down beside him.

- He asked her if she would like to kiss him. He did not recall if she replied or not. K.M. rolled over and there was mutual kissing. "Her actions communicated to me that she was consenting by kissing me and allowing me to kiss her back".

- Mutual cuddling followed. The appellant touched K.M.'s breasts and body. No words were exchanged. The appellant "understood [K.M.'s] actions as a communication of consent to sexual touching".

- There was a discussion about oral sex. K.M. said she would fellate the appellant and began to do so. He "understood that she was consenting by her words and her actions". Fellatio ended as party-goers started to filter up from the basement. K.M. "stopped before I could ejaculate".

- The other sexual activity occurred over approximately 10 minutes, and about 5-10 minutes before the penetrative sex.

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[7] *R. v. Barton*, 2019 SCC 33 at para. 64 [*Barton*].
[8] *Criminal Code*, R.S.C. 1985, c. C-46, ss. 276(1)(a) and (b) [*Criminal Code*].

- The appellant and K.M. took a short smoke break on the front porch. On returning to the living room they resumed kissing which the appellant "understood […] to be consent to sexual touching".

- The appellant wanted to take the sexual activity "to the next level, meaning vaginal sex". He told K.M. he wanted to "move this forward" and she said "o.k.".

- They went to the children's bedroom. "It was clear from the friendly nature of our conversation that [K.M.] was comfortable being alone with me in this room". The appellant closed the door without objection by K.M.

- There was "further friendly conversation". They kissed and cuddled "for some minutes". The kissing and cuddling was reciprocated by K.M. The appellant "understood [K.M.'s] actions as a communication of consent to sexual touching".

[40] In his affidavit the appellant proceeded to describe the penetrative sex, stating he "honestly believed" by her actions that K.M. was communicating consent to it.

[41] The appellant's affidavit included his description of other sexual activity he said occurred after the penetrative sex when K.M. returned from the bathroom: cuddling on the bed, reciprocal kissing on the lips and face as before, and a goodnight kiss on the lips.

[42] The appellant said in his affidavit the other sexual activity evidence was essential to his full answer and defence:

> 32. I honestly believed that all of the sexual activity that occurred between [K.M.] and me on November 11, 2017 was consensual. [K.M.] repeatedly communicated her consent to me through her actions as outlined above. I believe the steps I took to ascertain her consent were reasonable given how we communicated throughout the evening.
>
> 33. If my lawyer is not allowed to ask [K.M.] about our sexual activity together on November 11, 2017, during this under-one-hour encounter, it will prevent me from properly explaining to the court why I honestly believed that [K.M.] had communicated her consent to intercourse and her manner of so consenting.

> 34. The previous trial court ruled that I could not relate to the court key evidence which contextualized how [K.M.] was communicating consent to sexual activity with me. I struggled in my testimony on February 21, 2021 with explaining why I felt I had received communicated consent given that I had to omit large gaps in my narrative to follow the court's ruling on excluding this evidence.[9]
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> […]
>
> 36. Specifically, I struggled to state why I believed that [K.M.] knew I was proposing to have sex with her when I asked her to spend the night with me. Excluding the evidence of the flirtation which occurred in the […] home and especially on the couch in this home robs this proposal of its context. This was the first communication of consent to sex made by [K.M.] to me.
>
> 37. I struggled to relay why I believed [K.M.'s] decision to waive [*sic*] away the taxi cab and stay at the party was communicated consent to the sexual activity. This can be seen at p. 312.[10] This is where I was attempting to respond to the Crown's question about the words I used to ask [K.M.] to stay the night. The exclusion of my evidence as to what happened mere minutes earlier in the home especially on the couch neuters the full sexual suggestion made in my invitation to her to spend the night with me.
>
> 38. Likewise, concerning the second communication of consent. Without revealing the prior sexual activity that occurred moments before in the living room near the couch area, I cannot fully reveal to the court why I believed [K.M.'s] entry into the bedroom after I suggested that "we move this forward" was a non-verbal communicated consent to the subsequent sexual activity which forms the subject-matter of the complaint.

[43] To support these statements, the appellant attached excerpts from his testimony on February 21, 2020 before Judge MacKinnon. This was the trial that was not completed due to Judge MacKinnon's illness and retirement.

[44] In his February 3, 2021 affidavit, the appellant said the following indicated K.M.'s "communication of consent to sex", that is, the penetrative sex that formed the subject-matter of the charge:

- The flirtation at the house party, especially on the couch, provided context for the appellant's proposal that K.M. spend the night with him, a proposal the appellant said he believed K.M. knew was a proposal to have sex.

[9] This was a reference to the trial proceedings before Judge MacKinnon in February 2020.
[10] The appellant was referring to the transcript of the trial before Judge MacKinnon.

- K.M.'s decision, in the context of the other sexual activity, to cancel her taxi and stay at the house party.

- K.M.'s entry into the bedroom after the appellant suggested "we move this forward".

- K.M. saying "yes" to the appellant asking did she want to move things forward. (The appellant was referring to his testimony under cross-examination at the trial before Judge MacKinnon. In his February 3, 2021 affidavit the appellant said K.M.'s response to him asking if she wanted to move things forward was "o.k.".)

- The post-incident sexual activity which, according to the appellant, "would help to confirm the way in which [K.M.] was communicating her consent to the complained-of sexual act".

Crown and Defence Submissions on the s. 276 Other Sexual Activity Motion

[45] For Stage One of the s. 276 procedure, in addition to the appellant's affidavit, Judge Bégin received written and oral submissions from Crown and defence counsel, Doug Lloy[11], on the issue he had to determine: was the other sexual activity the appellant had described in his February 3, 2021 affidavit capable of being admitted into evidence?

[46] The appellant submitted the other sexual activity that he claimed had occurred before and after the penetrative sex was not being advanced in support of twin-myth reasoning. He said s. 276 did not apply as the sexual activity was temporally connected to the penile-vaginal penetration and part of a "continuous transaction" between himself and K.M. In oral submissions, defence counsel characterized the other sexual activity as "inextricably intertwined with the vaginal sex". In the alternative, he said if it was caught by the s. 276 regime, it was compliant with the s. 276(2) statutory requirements for admissibility and relevant to communicated consent or an honest but mistaken belief in communicated consent. Defence counsel said a decision not to admit the evidence "would rob the court of valuable evidence surrounding the issue of how the parties were communicating and the vital issue of consent during this very discrete period of time".

[11] Mr. Lloy represented the appellant throughout all the Provincial Court proceedings.

[47] The Crown submitted that s. 276 applied to the proposed evidence as it constituted sexual activity between K.M. and the appellant that fell outside the subject-matter of the charge. Crown counsel said the sexual activity evidence served no purpose other than to support twin-myth reasoning. He described the two prongs of prohibited reasoning: (1) that the pre-bedroom sexual activity evidence was being advanced to support the inference that K.M.'s consent to that sexual activity with the appellant made it more likely she consented to the penetrative sex, and (2) the post-incident sexual activity described by the appellant supported the inference that K.M.'s assertion of non-consensual penetrative sex could not be believed. In other words, it was being advanced to support the inference that K.M. had consented to the penetrative sex.

[48] In oral submissions Crown counsel argued the sexual activity described by the appellant in his affidavit (which he said would not be conceded by the complainant) supported only consent to that activity, not consent to the penetrative sex that followed. In his submission it invited myth-based reasoning and none of it was relevant to either consent or an honest but mistaken belief in communicated consent.

Judge Bégin's Decision on the s. 276 Motion

[49] Judge Bégin rendered his decision on the s. 276 motion immediately following oral submissions. He dispensed with the motion on the basis that the other sexual activity evidence was not capable of being admitted under the *Criminal Code* provisions as it sought to engage twin-myth inferences and was not relevant to an issue at trial. This terminated the appellant's s. 276 motion at Stage One.

[50] Judge Bégin's oral reasons are best understood in the context of his exchanges with defence counsel during their submissions. Poised to hear their submissions, he indicated he had read both Crown and defence briefs and then immediately addressed the sexual activity the appellant claimed had occurred when K.M. returned from the bathroom. He said the cuddling, kissing and goodnight kiss was not capable of being admitted as it had no relevance to the issue of consent. The judge dismissed the appellant's suggestion of relevance because the "hundred different ways" complainants in sexual assault cases may react after a sexual encounter are not probative of consent.

[51] In comments to defence counsel during submissions on the "temporal connection" between the pre-bedroom sexual activity and the penetrative sex that

formed the basis for the charge, Judge Bégin expressed his view there had been "a hard change". The judge viewed the "hard change" as established by the different nature of the other sexual activity alleged by the appellant—cuddling, kissing, fellatio—and "all of a sudden" the penetrative sex. The judge said he did not see "a smooth or obvious transition escalation". He told defence counsel: "You have to be very specific as to why what happened before would have anything to do with the vaginal sex".

[52] Judge Bégin rejected the appellant's "temporal connection" argument as a basis for admitting the evidence. His reasons for dismissing the motion are encapsulated in the following passage from his decision:

> […] I know they started at a bar, they're together in the house, and at some point […] they end up in the bedroom. And that's the crux of the matter. No-one's denying anything happened earlier. And you're saying, "Well, it's important that we know everything that happened earlier and how it progressed." I don't think it's necessary. And the reason I don't think it's necessary, A, you got the problem with the twin myths, and B, […] I see a hard break in the activities from the initial stuff to the vaginal sex. And he also, in his affidavit, changes how the communication was between them. Initially it was a slow transition, more nonverbal, just sort of progressing to, "I asked her, 'Let's have sex'". I'm paraphrasing, obviously; he doesn't remember what he said, but, "Do you want to have sex," or whatever it is. But I don't -- I cannot see how any of that initial stuff would have anything to do with that. And obviously we all know there's a huge transition of -- huge difference in severity of the actions that led up to that, and then the vaginal intercourse […].[12]

[53] Judge Bégin used imprecise language and cannot have meant that the appellant explicitly asked K.M., prior to entering the bedroom, if she wanted to have penetrative sex. The appellant never suggested he did more than propose to K.M. they "move things forward".

[54] In agreeing with Crown counsel that the other sexual activity evidence invited twin-myth reasoning, Judge Bégin set out the nature of that prohibited reasoning:

> "[…] because we kissed, I think she wanted to have sex later […] I had consent because of her actions and we're just going," but then […] "I suggested we have

[12] Judge Bégin's statement "No-one's is denying anything happened earlier" was something of a mis-statement. At this first stage of the s. 276 procedure, the judge recognized he only had the appellant's affidavit before him. He noted: "I'm not so sure what the complainant's version of [the other sexual activity] is." And: "But I go by what your client says in his affidavit, because that's what's before me…".

> sex. I'm not sure what I said […]" […]he doesn't really say what she said, but there's a change, and for those reasons, I don't think it's admissible.

Position of the Parties on Appeal

[55] The appellant's position is summarized in his factum:

> 83. The Appellant was seeking to demonstrate that the vaginal intercourse did not occur spontaneously; but that the complainant went into the bedroom in anticipation of intercourse in the midst of an escalating consensual sexual interaction that had already included oral sex. None of the judges assessed the s. 276 question in this light. They failed to recognize that the events that punctuated the sexual activity—going together for a cigarette, uttering sexually charged words—strengthened the Appellant's narrative of a consensual encounter that progressed continuously from flirting to touching to intercourse.
>
> 84. The proximate sexual activity, before and after the intercourse, was integrally connected with the alleged assault and its admission at trial was necessary to explain the actions and perceptions of the Appellant. The exclusion of this evidence resulted in an unfair trial. Prevented from fully explaining how he came to be in bed with the complainant and why he was having sex with her, it was a foregone conclusion that the Appellant would be convicted.

[56] The appellant's counsel expanded on these submissions in oral argument. He said the main issue in the trial was K.M.'s subjective consent to the penile-vaginal penetration. The Crown had to prove K.M. did not consent. The appellant had been trying to show K.M.'s earlier consent was a window into her subjective state of mind in the bedroom. He argued before us the intimacy with K.M. in advance of them going into the bedroom was necessary to give meaning to what K.M. understood by him wanting to "move things forward". He said the evidence was so closely intertwined with the penetrative sex—the subject matter of the charge—it could not be disentangled. It fell outside the scope of s. 276 and should not have been screened. The appellant submitted the other sexual activity evidence could have raised a doubt about K.M.'s assertion of non-consent.

[57] The respondent said Judge Bégin was correct to conduct the s. 276 screening of the other sexual activity evidence and dismiss the motion. Whether the other sexual activity was integrally connected to the penetrative sex that formed the subject-matter of the charge was highly fact-dependent. The respondent submitted the judge's rejection of the proposed evidence as part of a "continuous transaction" was reasonable and logical. In the respondent's submission, the other sexual activity fell within the scope of s. 276 as it was not integrally connected to the penetrative sex that formed the subject-matter of the charge. The respondent said

the proposed evidence could only support the defences of consent and honest but mistaken belief in consent through inferences based on prohibited reasoning. Judge Bégin correctly determined at Stage One that the other sexual activity invited twin-myth reasoning and was not capable of being admitted.

Issue #1 - Did Judge Bégin Err by Dismissing the Appellant's s. 276 Motion?

[58] The appeal from Judge Bégin's s. 276 ruling engages two questions: (1) did he commit error in deciding that s. 276 applied, and (2) having found it applied, did he commit error by concluding the other sexual activity evidence was not capable of being admitted because it invoked the twin myths and was irrelevant to the issues at trial?

Standard of Review

[59] Section 276(2) provides that sexual activity that "forms the subject-matter of the charge" is not subject to screening for admissibility pursuant to the s. 276 regime. The issue of the scope of the phrase "sexual activity that forms the subject-matter of the charge" is an issue of statutory interpretation and subject to review for correctness.[13] The determination of admissibility at Stage One—whether the other sexual activity is capable of being admitted—is "a preliminary assessment of relevance such that the standard of correctness should apply".[14] It is a legal error to admit irrelevant evidence.

[60] In reviewing Judge Bégin's s. 276 ruling on appeal, we are to only consider the evidence he had before him.[15]

The Scope of s. 276

[61] The appellant says had Judge Bégin found s. 276 did not apply, he would have been able to testify to what he has characterized as the continuous sexual progression with K.M.

[62] Section 276 operates as a screening mechanism for evidence of sexual activity by the complainant "other than the sexual activity that forms the subject-matter of the charge". As the appellant notes in his factum, appellate courts in

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[13] *R. v. McKnight*, 2022 ABCA 251 at para. 120, leave to appeal to SCC denied 40375 (12 January 2023) [*McKnight*].
[14] *R. v. Crawford*, 2025 BCCA 17 at para. 42 [*Crawford*].
[15] *T.W.W.* at para. 23.

Alberta, Ontario and British Columbia have all held that s. 276 was not intended to apply to sexual activity evidence that is integrally connected to the alleged offence.[16]

[63] However, Parliament plainly did not intend a broad exclusion zone that placed all "proximate" sexual activity beyond the reach of s. 276 screening. I endorse the view of the Alberta Court of Appeal in *McKnight* that:

> [255] If the so-called "proximate" activity is not part of those events comprising the offence but is nonetheless allowed in evidence without review for admissibility or prejudice, then this concept of "proximate" activity is simply a lamentable revival of the concept of implied consent such as by the "come hither" stare or other alleged signals of sexual interest. Applying an amorphous notion of mere "proximity in time and place" as a justification for disapplying the screening provisions would not only undermine those screening provisions but would roll back Parliament's carefully chosen use of the word "activity" to put beyond question that a complainant is not deemed to mean "yes" to anything, even at the time and place.[17]

[64] I am in agreement with *McKnight* that "Parliament intended a more precise concept of 'sexual activity' than all the factual events pertinent to the interactions between the complainant and the accused on the occasion in question".[18]

[65] An overly broad "capture" of sexual activity between an accused and a complainant would defeat Parliament's purpose in protecting the integrity of sexual assault trials and the dignity, equality and privacy rights of complainants. As the Ontario Court of Appeal recently said: "The role that s. 276 plays in weeding out problematic evidence of sexual activity would be undermined if too broad an approach is taken".[19]

[66] Integral connection to the sexual activity that forms the subject-matter of the charge should be the focus for a trial judge's assessment of whether s. 276 applies. Temporal proximity alone is not dispositive.

[67] The Alberta, Ontario and British Columbia appellate courts have all recognized the assessment of whether the other sexual activity is integrally connected to the subject-matter of the charge is a fact-driven, contextual exercise.

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[16] See *McKnight* at para. 259; *R. v. Choudhary*, 2023 ONCA 467 at para. 29 [*Choudhary*]; and *R. v. Hoffman*, 2024 BCCA 98 at para. 117 [*Hoffman*].
[17] *McKnight* at para. 255.
[18] *McKnight* at para. 252.
[19] *R. v. Reimer*, 2024 ONCA 519 at para. 47.

[68] In *Choudhary*, the Ontario Court of Appeal offered helpful guidance to trial judges tasked with determining if other sexual activity should be screened pursuant to s. 276:

- Trial judges should use their common sense and "not artificially parse a sequence of events that may be integrally connected".
- An underlying purpose of the s. 276 regime, to immunize trials from prohibited reasoning grounded in pernicious myths and stereotypes about sexual assault complainants, should be kept in mind to "help guide the analysis of what this provision was meant to exclude and whether this other sexual activity should be screened".
- If a trial judge is uncertain about whether the other sexual activity is integrally connected to the subject-matter of the charge, screening of the proposed evidence pursuant to s. 276 should be undertaken.[20]

[69] It is important to emphasize that a trial judge's common sense must not draw on discriminatory beliefs or assumptions.[21]

[70] Although the focus of this appeal is on what Judge Bégin decided, both Judge Atwood and Judge MacKinnon found the other sexual activity evidence proffered by the appellant should be screened in accordance with s. 276.

The Other Sexual Activity Here was Not Integrally Connected

[71] The evidence before Judge Bégin in the form of the appellant's February 3, 2021 affidavit provided a factual basis for a determination that the kissing, touching and fellatio described by the appellant—the other sexual activity—was not integrally connected to the penile-vaginal penetration. Judge Bégin was correct in his determination that the pre-bedroom sexual activity—and the post-offence sexual activity—were not integrally connected to the "sexual activity that form[ed] the subject-matter of the charge" . It fell outside the sexual activity Parliament intended to exempt from s. 276 screening.

[72] The facts in this case are very similar to those in *Choudhary* where the other sexual activity—consensual kissing in the kitchen before sexual activity in the bedroom that led to the sexual assault charge—was screened in accordance with s.

[20] *Choudhary* at paras. 31-33.
[21] *R. v. Kruk*, 2024 SCC 7 at para. 99.

276. The Ontario Court of Appeal upheld the trial judge's conclusion that the kitchen activity was "not integrally connected, intertwined or directly linked to what occurred in the bedroom":

> [36] I agree with her conclusion. As will become clear from the review of the evidence below, the activity in the kitchen was not integrally connected, intertwined or directly linked to what occurred in the bedroom. As I read the record, unlike what transpired later, the sexual activity in the kitchen occurred in the presence of others, rather than alone and behind a closed door. It was at a far lower degree of physical intimacy. Nor did this activity immediately precede the sexual activity in question and because of its nature I cannot say that it formed part of an unbroken chain of events such that it was a precursor of what transpired later. This is especially so because there was evidence before the trial judge that the complainant thought she was being carried upstairs to go to sleep, not to continue what had occurred in the kitchen between the parties.
>
> [37] In contrast, the activities in the bedroom took place in private. I note that the consensual kissing that occurred on the bed and immediately before the sexual activity was admitted in this trial without any screening pursuant to s. 276. This only fortifies my conclusion that the trial judge was correct to view what occurred in the bedroom and the kitchen as two separate transactions. The kissing on the bed provided necessary context for understanding and assessing the competing evidence of what transpired immediately after. Events in the kitchen did not. Accordingly, I reject the submission that the trial judge erred by screening the kitchen incident under s. 276.

[73] The facts before Judge Bégin look very much the same:

- The purported "other sexual activity" occurred in the living room of the house, which, like the kitchen in *Choudhary*, was not a private or closed-off area.
- The "other sexual activity" was of a lower degree of physical intimacy. This was a finding of fact by Judge Bégin. He contrasted the penile-vaginal penetration calling it a "hard change".
- The appellant and K.M. went out to the porch for a smoke break. There was no "unbroken chain of events".
- The sexual activities in the bedroom took place in private behind a closed door.

- As in *Choudhary*, the appellant was able to testify, without s. 276 screening, about non-penetrative sexual activity in the bedroom that he claimed occurred immediately prior to the penetrative sex.

[74] Judge Bégin correctly did not treat temporal proximity as the controlling factor in his determination of the scope of s. 276. Had he done so, the pre-bedroom sexual activity might have "fallen outside of the s. 276 regime and been admitted even though it was not integrally connected to the sexual activity that formed the subject matter of the charge".[22]

[75] Judge Bégin was correct to have screened the other sexual activity evidence under s. 276. As I will explain, I am also satisfied he was correct to have found none of the purported sexual activity was capable of being admissible at Stage One.

The Other Sexual Activity Evidence was Not Capable of Being Admissible

[76] Section 276 of the *Criminal Code* establishes "substantive rules that prevent evidence of a complainant's sexual activities from being used for improper purposes, backed by procedural requirements to enforce these rules".[23]

[77] The screening of other sexual activity evidence is undertaken in accordance with a series of exacting steps:

> [36] Before evidence of a complainant's sexual history may be introduced under s. 276(2), the court must carefully scrutinize the potential evidence. First, the accused must set out in writing the "detailed particulars of the evidence that the accused seeks to adduce" and its relevance "to an issue at trial": s. 276.1(2). If the judge is persuaded that the evidence is "capable of being admissible under subsection 276(2)", a *voir dire* is held: s. 276.1(4). **Evidence adduced to support the twin myths is categorically barred**.[24]
>
> [*emphasis added*]

[78] In the words of Doherty, J.A. in *R. v. L.S.*:

> Section 276(1) does not create a new rule of evidence. Rather, it is an expression of the fundamental rule that to be admissible, evidence must be relevant to a fact

[22] *Hoffman* at para. 120.
[23] *Barton* at para. 58.
[24] *R. v. R.V.*, 2019 SCC 41 at para. 36.

> in issue. Section 276 identifies two illegitimate inferences from a complainant's sexual activity that have historically infected the criminal trial process. The section declares that neither inference provides a road to admissibility of evidence of other sexual activity: see *R. v. Darrach*, [2000] S.C.R. 443, at paras. 32-34.[25]

[79] As I noted earlier, a s. 276 application is assessed in two stages, with the accused having to satisfy the trial judge in Stage One that the evidence sought to be adduced is capable of being admissible under s. 276(2).[26] The evidence will not survive Stage One scrutiny if its purpose is to support inferences based on twin-myth reasoning. Section 276(1) prohibits the admission of other sexual activity evidence that seeks to advance such inferences. If the motion fails at the Stage One threshold that ends it. The appellant's motion fell at the hurdle of Stage One.

[80] Section 276(1) expressly prohibits the use of a complainant's sexual activity, whether with the accused or any other person, to support an inference that, by reason of that sexual activity, the complainant is more likely to have consented to the sexual activity that forms the subject-matter of the charge or is less worthy of belief. These are the prohibited "twin myths" which are anathema to our criminal justice system. As stated in *R. v. Goldfinch*:

> [1] Our system of justice strives to protect the ability of triers of fact to get at the truth. In cases of sexual assault, evidence of a complainant's prior sexual history—if relied upon to suggest that the complainant was more likely to have consented to the sexual activity in question or is generally less worthy of belief—undermines this truth-seeking function and threatens the equality, privacy and security rights of complainants.[27]

[81] Other sexual activity, that is, sexual activity that does not form the subject-matter of the charge, is potentially admissible where it is not being introduced to support the twin myths and meets the three-fold test that is applied in a Stage Two process. It (1) must be of specific instances of sexual activity, (2) relevant to an issue at trial, and (3) have significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.[28]

[82] In short, where s. 276 applies, other sexual activity evidence is first screened to address whether it is being advanced to support "twin-myth" reasoning—Stage One, and if not, then whether it satisfies the three-fold test—Stage Two.

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[25] 2017 ONCA 685 at para. 45.
[26] See s. 278.93(4).
[27] 2019 SCC 38 at para. 1 [*Goldfinch*].
[28] *Criminal Code*, s. 276(2).

[83] The Stage Two three-fold test requires a hearing.[29] In applying the test, a trial judge must consider a number of factors enumerated in the *Criminal Code*. They are not relevant to my assessment of this ground of appeal as Judge Bégin dismissed the appellant's s. 276 motion at Stage One. Consequently, no Stage Two hearing was held.

[84] The appellant bore the onus at Stage One of pointing to some legitimate use of the other sexual activity evidence that would have rendered it capable of being admitted.[30]

[85] The appellant had a "consent" purpose and, alternatively, a "mistaken belief in consent" purpose for the other sexual activity evidence he wanted Judge Bégin to admit. The appellant said the "proximate" sexual activity before he and K.M. entered the bedroom was needed to show what was in K.M.'s mind in order to rebut the Crown's evidence that K.M. did not consent to the penile-vaginal penetration. The appellant argues his February 3, 2021 affidavit showed a growing intimacy going to K.M.'s consent. He says the other sexual activity evidence would have enabled him to clarify his ambiguous "move things forward" statement to K.M.

[86] The appellant referred in his affidavit to the other sexual activity as necessary to provide context for the subsequent penile-vaginal penetration. He said: "I was referring to our sexual activity. I wanted to take it to the next level, meaning vaginal sex". According to the appellant, "o.k." in response to him suggesting they "move things forward" was communicated consent by K.M. to penile-vaginal penetration.

[87] As recognized by Justice Moldaver in *Goldfinch*, the bridge between context and consent, without more, is constructed of twin-myth reasoning:

> [119] Where sexual activity evidence is concerned, the failure to identify the explicit link between the evidence and specific facts or issues relating to the accused's defence can result in twin-myth reasoning slipping into the courtroom in the guise of "context". For example, there is a risk that sexual activity evidence may be used, whether consciously or not, to "contextualize" a complainant's testimony that she did not consent to the sexual activity in question through twin-myth reasoning: because the complainant consented in the past (the "context"), it is more likely that she consented this time as well. This is, of course, precisely the

[29] At a Stage Two hearing the accused can be cross-examined on their affidavit and the complainant is entitled to legal representation and standing to participate.
[30] *Goldfinch* at para. 5.

> sort of stereotypical reasoning s. 276(1) sought to banish from the courtroom. Yet without a clear and precise identification of the specific purpose for which sexual activity evidence is sought to be introduced, this sort of reasoning can all too easily infiltrate the courtroom through the Trojan horse of "context".[31]

[88] The suggestion that "because she consented in the past (the "context"), it is more likely she consented this time as well" is exactly the use the appellant wanted to make of the sexual activity he claimed K.M. had participated in before entering the bedroom. Judge Bégin understood this inferential reasoning was prohibited by s. 276(1).

[89] The other sexual evidence was not capable of "clarifying" that the appellant's statement about wanting to "move things forward" meant vaginal intercourse. In his February 3, 2021 affidavit the appellant claimed this was said just before he and K.M. went to the bedroom. According to his narrative, there had been kissing, touching and interrupted fellatio. "Move things forward" would have remained ambiguous even if that other sexual activity evidence had been admitted. "Move things forward" could suggest a number of possibilities. A continuation of fellatio? More intimate touching? It came back to this: the only purpose the evidence could have served relied on a prohibited inference, that it could be inferred from K.M.'s consent to the other sexual activity that she consented to penile-vaginal penetration. The proposed evidence was simply not probative of consent and therefore lacked the requisite relevance to get past Stage One.

[90] The other sexual activity evidence provided no window into what was in K.M.'s mind when she entered the bedroom with the appellant. Judge Bégin correctly saw the problem with the appellant's purpose for the evidence. He cited the statement in *Goldfinch* that "the details of previous sexual interactions are simply not relevant to the determination of whether the complainant consented to the act in question".[32]

[91] Judge Bégin found the other sexual activity evidence was not relevant to the issue of K.M.'s consent. He viewed the other sexual activity as harnessing the myth of implied or advance consent: "Every part of it seems to say 'Because of this, you know, because we kissed, I think she wanted to have sex later'". As stated by the Supreme Court of Canada in *Barton*:

> [118] […] a belief that […] the accused's own speculation about what was going through the complainant's mind could be substituted for communicated consent to

[31] *Goldfinch* at para. 119.
[32] *Goldfinch* at para. 74.

> the sexual activity in question at the time is a mistake of law. As a matter of law, consent must be specifically renewed—and communicated—for each sexual act.

[92] The other sexual activity evidence also could not support the appellant's alternative "defence" of an honest, albeit mistaken belief in K.M.'s consent to the penetrative sex.[33] Judge Bégin correctly concluded the evidence was irrelevant because it could not support the appellant's belief in K.M.'s consent to the penetrative sex without reliance on prohibited reasoning.

[93] To raise this defence, the appellant was required by law to have had an honest but mistaken belief that K.M. actually communicated consent, whether by words or conduct, to the impugned sexual activity. As explained in *Barton*:

> [93] Focusing on the accused's honest but mistaken belief in the *communication* of consent has practical consequences. Most significantly, in seeking to rely on the complainant's prior sexual activities in support of a defence of honest but mistaken belief in communicated consent, the accused must be able to explain how and why that evidence informed his honest but mistaken belief that she *communicated* consent to the sexual activity at the time it occurred […]
>
> [94] However, great care must be taken not to slip into impermissible propensity reasoning (see *Seaboyer*, at p. 615). The accused cannot rest his defence on the false logic that the complainant's prior sexual activities, by reason of their sexual nature, made her more likely to have consented to the sexual activity in question, and on this basis he believed she consented. This is the first of the "twin myths" which is prohibited under s. 276(1)(a) of the *Code*.[34]

[94] In *Barton*, the Supreme Court of Canada emphasized the importance of taking "greater care" in ascertaining consent to "more invasive" sexual activity where "the accused and the complainant are unfamiliar with one another, thereby raising the risk of miscommunications, misunderstandings, and mistakes".[35]

[95] There was no sexual history between the appellant and K.M. They were sexual strangers. Judge Bégin recognized this, referring to their interaction as "The one and only time between them". In such circumstances, there was a heightened risk of criminal liability if affirmative consent was not obtained.

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[33] As noted in *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 at para. 44, this is not actually a defence but "simply a denial of *mens rea*", a challenge to the requirement that the Crown prove beyond a reasonable doubt that the accused knew the complainant was not consenting.
[34] *Barton* at paras. 93-94.
[35] *Barton* at para. 108.

[96] The Supreme Court of Canada has emphasized that s. 273.2(b) of the *Criminal Code* "imposes a precondition to the defence of honest but mistaken belief in communicated consent—no reasonable steps, no defence".[36]

[97] The respondent provided us with the recent decision of *R. v. Al-Akhali* from the Ontario Court of Appeal which sets out an instructive discussion of the "reasonable steps" requirement. The following from *Al-Akhali* is particularly germane to the appellant's s. 276 ground of appeal:

> [29] […] while people can communicate consent through actions as well as words, non-verbal conduct often lacks the clarity of a simple, verbal "yes" or "no." It can be easy to misunderstand or make unfounded assumptions about what another person is trying to communicate through actions unaccompanied by words, especially if people are unfamiliar with each other. Thus, unless those actions unambiguously communicate consent, the reasonable person would take more steps.
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> [30] […] the reasonable person would take steps to ascertain consent to each sexual act, a requirement which may, depending on the circumstances, require taking additional steps where there are multiple acts. This precludes a blanket approach that equates consent to one sexual act with consent to any and all. Accordingly, confirming that another person has communicated consent to kissing and undressing is not, without more, reasonable steps to ascertain consent to sexual intercourse.
>
> [31] […] reasonable steps cannot be based on a mistake of law. Thus, steps to ascertain communicated consent that are met with silence, passivity, or ambiguous conduct are not reasonable. Neither is "test[ing] the waters" by engaging in non-consensual sexual touching.[37]
>
> [*citations omitted*]

[98] The "reasonable steps requirement" is relevant to an analysis of the appellant's complaints about Judge Bégin's s. 276 decision. In the absence of evidence he took "greater care" to ascertain K.M.'s consent, the appellant was relying on the other sexual activity to support his claim of an honest belief in consent. This was clear from his affidavit.

[99] In his reasons on the s. 276 motion Judge Bégin rejected the argument that K.M.'s consent to the kissing, cuddling and fellatio, as described by the appellant, could be used to support an honest but mistaken belief in communicated consent to the penetrative sex. He noted what the appellant described before he and K.M.

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[36] *Barton* at para. 104.
[37] 2025 ONCA 229 at paras. 29-31 [*Al-Akhali*].

were in the bedroom together was distinct from the more intrusive sexual activity—penile-vaginal penetration—that occurred in the bedroom. Although Judge Bégin's oral reasons could have been expressed more clearly—he characterized them himself as "not eloquent"—he arrived at two distinct and correct conclusions: that the other sexual activity was not part of an "unbroken chain of events"[38] and that the appellant was invoking the other sexual activity for a twin-myth purpose. K.M.'s consent to the pre-bedroom sexual activity was the basis for the appellant's belief she was consenting to the penetrative sex.

[100] Judge Bégin was also correct to have screened out the sexual activity the appellant claimed had followed K.M.'s return from the bathroom. He effectively found it had no probative value to the sexual assault charge. As held in *R. v. A.R.J.D.*:

> [39] […] what, if anything, can evidence of a lack of avoidant behaviour by a complainant tell a trier of fact about a sexual assault allegation? The answer is simple—nothing.[39]

[101] Judge Bégin was correct to conclude the pre-bedroom sexual activity did not provide admissible context for what happened in the bedroom. The judge understood the purpose the other sexual activity evidence was intended to serve. He was correct to conclude K.M.'s consent to that sexual activity was not relevant as it amounted to nothing more than this: K.M.'s consent to kissing, cuddling and fellatio with the appellant, supported the inference she was more likely to have consented to the penetrative sex. As Judge Bégin found, this constituted prohibited reasoning ending the s. 276 motion at Stage One.[40] The other sexual activity (both pre-bedroom and post-penetrative sex sexual activity) was not relevant to the issue of consent in the bedroom and could not have factored into the appellant's mistaken belief in consent without resort to twin-myth reasoning.

Conclusion on Issue #1

[102] Judge Bégin decided the motion on the basis of what he had before him—the appellant's February 3, 2021 affidavit (and submissions by counsel).

[103] On the basis of that evidence the judge concluded s. 276 applied to the proposed other sexual activity evidence as it did not form the subject-matter of the

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[38] *Choudhary* at para. 36.
[39] 2017 ABCA 237 at para. 39, aff'd in *R. v. A.R.J.D.*, 2018 SCC 6.
[40] See *Goldfinch* at para. 4.

charge of sexual assault. He went on to find the evidence was not capable of being admissible because its purpose promoted twin myth reasoning.

[104] Judge Bégin was correct to have concluded: (1) that the other sexual activity fell within the scope of s. 276, and (2) that at Stage One of the s. 276 motion the proposed evidence was not capable of being admissible as its intended use was reliant on prohibited reasoning. I would dismiss this ground of appeal.

[105] Before leaving this issue, it is important to emphasize the need for utilizing the framework of s. 276 in structuring decisions on these motions. Decisions should have a linear flow and a clear demarcation of issues. The first issue to be decided may be whether s. 276 applies. If found to apply the next issue is whether the other sexual activity is capable of being admissible – Stage One. The motion fails at Stage One if the purpose of the evidence invokes either of the prohibited twin-myth inferences. If the motion clears Stage One, the trial judge's decision must explain the Stage Two analysis.

[106] Demanding and crowded trial court dockets will continue to require busy trial judges to deliver oral decisions from the bench, however careful attention in a judge's reasons to the complexities of the s. 276 regime avoids the risk of conflating issues and a lack of coherency.

Issue #2 – Should Judge Bégin have stayed the proceedings for s. 11(b) delay?

[107] This issue requires some unpacking. My reasons will explain why I have concluded there is no traction to this ground of appeal. In short, Judge Bégin needed to be correct in his determination that the delays in the appellant's case did not violate his constitutional right to a trial within a reasonable time. I am satisfied he was, although as I will discuss, his analysis was not flawless. Fundamentally he was correct to have denied the stay motion on the basis that the combination of defence-caused delay and exceptional circumstances brought the delay within the constitutionally acceptable limits established by *R. v. Jordan*.[41]

[108] In reviewing Judge Bégin's decision, I will be adjusting his mathematical calculations although this has no impact on his attribution and allocation of delay and the ultimate result. While I reach a different number than the judge as a result of the re-calculations, the net delay in the appellant's case falls below the 18-month *Jordan* ceiling.

[41] 2016 SCC 27 [*Jordan*].

[109] I will deal first with Judge Bégin's summary dismissal of the appellant's s.11(b) application. I will then review his analysis of the application on its merits.

The Summary Dismissal Issue

[110] Judge Bégin dismissed the appellant's s. 11(b) application on December 16, 2022.[42] He agreed with Crown counsel that the application should be summarily dismissed for failure to comply with the *Nova Scotia Provincial Court Rules* but proceeded to consider the merits of the application in the event the matter underwent appellate review.[43]

[111] Judge Bégin based his reason for summarily dismissing the s.11(b) application on the requirement under the *Rules* that a pre-trial application must be heard at least 60 days prior to trial unless the judge permits an abridgement of the time.[44] The appellant's s. 11(b) application was heard on June 8, 2022. His trial was scheduled to proceed on June 15 and 16, 2022. However, the appellant's trial did not go ahead in June and was re-scheduled to September 13 and 14, 2022 for reasons unrelated to the s. 11(b) application.

[112] On appeal, both parties submit the summary dismissal was an error. I agree. That said, I am satisfied the error is of no consequence to this appeal.

[113] As the respondent notes, Judge Bégin could have summarily dismissed the s. 11(b) application on June 8, 2022 for non-compliance with the time requirements under the *Rules*. He did not do so. He heard the application on its merits and reserved his decision. The trial did not proceed until September. As it turned out, the application was heard, as the *Rules* required, "at least 60 days before trial".

[114] It was essentially meaningless for the judge to summarily dismiss the application on December 16, 2022 while proceeding to decide it on the merits. Nothing more needs to be said about this issue.

The Dismissal of the Application for a Stay Based on Unreasonable Delay

[115] Reviewing Judge Bégin's s. 11(b) decision requires a canvassing of relevant events between the dates with which he bookended the trial—May 17, 2018 when

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[42] *R. v. Callahan-Tucker*, 2022 NSPC 58 [the "s. 11(b) decision"].
[43] s. 11(b) decision at paras. 15 and 16.
[44] *Nova Scotia Provincial Court Rule* 2.4(1) [the "*Rules*"].

the charge was laid and June 16, 2022, the anticipated conclusion of the evidence and argument[45]—a total delay of 49 months.

[116] Although final submissions before Judge Bégin were concluded on September 14, 2022, he did not include the three months between June 16 and September 14 in his calculations. This has not been identified as an error. Judge Bégin noted the defence had not sought to have these additional three months added to the total delay. He did not consider them and held: "In any event, this delay would be wholly attributed to the Defence".[46]

[117] The appellant says Judge Bégin made errors that constituted reversible error. He focused his submissions on two periods of delay totalling nine months. However I have concluded it is more appropriate for these reasons to take account of the full 49 months.

[118] Before undertaking a review of Judge Bégin's decision, I will summarize the basic legal principles applicable to a s. 11(b) assessment.

Basic Legal Principles

[119] Judge Bégin and the parties were familiar with the *Jordan* framework which required:

- A determination of the total length of time between the charge and the anticipated or actual end of trial.
- An assessment of whether portions of the total delay were waived or caused solely by the defence. Any such portions are subtracted from the total delay. A waiver by the defence can be explicit or implicit but in either case, it must be informed, clear and unequivocal.[47]
- If the net delay exceeds the applicable presumptive ceiling—in this case, 18 months—the Crown can rebut the presumptive unreasonableness of the delay by showing there were exceptional circumstances. Exceptional

[45] See *R. v. K.G.K.*, 2020 SCC 7 at para. 31.
[46] s. 11(b) decision at para. 32. The trial was adjourned from June to September due to the appellant indicating he had tested positive for Covid.

[47] *Jordan* at para. 61; see also *R. v. Cody*, 2017 SCC 31 at para. 27 [*Cody*].

> circumstances include discrete, unforeseen events, or general case complexity.

[120] Delay will be counted against the defence where its conduct is the direct cause, and found not to be legitimate, or was employed deliberately to create delay through frivolous applications or requests.[48] Generally, delay caused by the defence not being available when the court and the Crown are ready to proceed will also go on to the defence-delay side of the ledger.[49] Allowance is made for defence preparation and actions "legitimately taken to respond to the charges" as this accords with an accused person's right to make full answer and defence.[50]

[121] The Supreme Court of Canada in *Cody* recognized there is a "potential tension between the right to make full answer and defence and the right to be tried within a reasonable time—and the need to balance both".[51] Actions taken by the defence in the course of the trial will be scrutinized to determine whether they were legitimately taken to respond to the charges or designed to delay. Furthermore, defence actions that exhibit "marked inefficiency or marked indifference toward delay" may well be counted against the defence in a s. 11(b) analysis.[52]

[122] Defence counsel have a responsibility to safeguard their client's s. 11(b) rights by "actively advancing their clients' right to a trial within a reasonable time, collaborating with Crown counsel when appropriate and, like Crown counsel, using court time efficiently".[53]

[123] *Jordan* directed all participants in the criminal justice system to coordinate efforts to achieve "reasonably prompt justice, with a view to fulfilling s. 11(b)'s important objectives".[54] Trial judges as well as counsel have an obligation to be efficient and proactive in their management of the proceedings to ensure unreasonable delay is avoided.

[124] Exceptional circumstances that the Crown could not reasonably foresee, avoid or mitigate come into play if the *Jordan* ceiling has been exceeded. Establishing exceptional circumstances is the only way the Crown can discharge its

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[48] See *Jordan* at para. 63.
[49] *R. v. Boulanger*, 2022 SCC 2 at para 8.
[50] *Jordan* at para. 65.
[51] *Cody* at para. 34.
[52] *Cody* at para. 32.
[53] *Jordan* at para. 138.
[54] *Jordan* at para. 5.

burden to justify a delay that exceeds the ceiling.[55] The trial judge is best suited to determine whether circumstances are "exceptional" and within which category they fall: discrete events or particularly complex cases.[56]

[125] No one suggested this case was particularly complex. As Judge Bégin said: "This was not a complex case, but it does have a complicated history".[57]

Standard of Review

[126] This Court set out the standard of review for s. 11(b) appeals in *R. v. Pearce*.[58] It is multi-faceted: deference in the absence of palpable and overriding error for findings of fact and the attribution of delay—who caused it and why, and correctness for the allocation or characterization of the delay and the ultimate determination of whether the delay was unreasonable and warranted a judicial stay.

[127] As stated in *Pearce*:

> [56] A trial judge's allocation of the delay under the *Jordan* framework, also referred to as the characterization of the delay, which includes calculating the total delay, subtracting the delay assessed against the defence, and then comparing the net delay to the applicable *Jordan* ceiling, is subject to a standard of correctness. Also subject to a standard of correctness is the judge's ultimate determination of whether the delay was unreasonable and violated s. 11(b).

[128] As these reasons explain, Judge Bégin made findings of fact to which deference is owed. His allocation of delay to the appellant was correct. Certain counting errors make no difference to the final result. Judge Bégin's ultimate determination that a stay was not warranted was correct.

The Errors Alleged by the Appellant

[129] The appellant's first trial date set in June 2018 was for November 28, 2018. The *Jordan* clock was running during this time. On November 21, 2018 both Crown and defence acknowledged the trial needed more time. The trial was adjourned to May 7 and 8, 2019. Judge Atwood was the trial judge.

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[55] See *Jordan* at para. 81.
[56] See *Jordan* at paras. 69 and 71.
[57] s. 11(b) decision at para. 21.
[58] *R. v. Pearce*; *R. v. Howe*, 2021 NSCA 37 [*Pearce*].

[130] The appellant expressly waived his s. 11(b) rights in relation to this delay. He does not take issue with Judge Bégin's deduction of 5 months and 16 days from the total delay as defence delay.[59]

[131] The appellant takes issue with the next 9 months of delay having been deducted from the total delay as defence delay: (1) May 7, 2019 to October 23, 2019, a period for which Judge Bégin held the appellant had expressly waived his s. 11(b) rights, and additionally, found was defence-caused delay; and (2) October 25, 2019 to February 21, 2020, a period of delay caused by Judge Atwood's recusal on October 25. Judge Bégin characterized this as an extraordinary event and one caused by defence.

[132] The appellant also says Judge Bégin should not have deducted from the total delay 67 days that fell between February 21, 2020 and April 28, 2020. As I will explain, I agree this was an error as the delay was in the nature of a routine adjournment. However, backing 67 days out of the deduction of defence-caused delay and exceptional circumstances delay from the total delay would not have changed the result reached by Judge Bégin, the dismissal of the stay application.

May 7, 2019 to October 25, 2019

[133] Judge Bégin allocated this delay to the appellant and deducted 5 months and 14 days from the total delay for this period. The appellant says this amounted to error. I disagree. I note however the delay was 5 months and 18 days as October 25 not October 23, 2019 was the anticipated final day of trial.

[134] As I discuss below in more detail, on May 7, 2019 the appellant's trial was adjourned again to October 23 and 25, 2019. The appellant argued before us that Judge Atwood should have worked harder in May 2019 to maintain trial momentum with as little delay as possible, especially he says, because the *Jordan* ceiling of 18 months would be reached in November 2019.

[135] Contrary to the appellant's submission, at the time his trial was adjourned on May 7, 2019, the 18-month *Jordan* ceiling was not November 2019. That was the ceiling when the *Jordan* clock started running at the time the charge was laid. On May 7, 2019 the trial was not approaching the *Jordan* ceiling because the appellant had expressly waived his s. 11(b) rights for a period of almost six months: November 21, 2018—when he acknowledged the trial time had been

[59] s. 11(b) decision at paras. 30 and 35.

underestimated—to May 8, 2019, the anticipated last day of the new trial dates he had agreed to. At the time of the May 2019 adjournment the *Jordan* ceiling was May 5, 2020, almost a full year away.

[136] In his s. 11(b) decision, Judge Bégin characterized the delay caused by Judge Atwood's adjournment of the trial from May 7, 2019 to October 23, 2019 as defence delay on the basis of (1) express defence waiver, and (2) defence delay-causing conduct. Although I agree with the parties' appeal submissions there was no express waiver, that error by Judge Bégin is of no consequence. As I explain, he was nevertheless correct to have allocated the delay to the appellant.

[137] On May 2, 2019 defence counsel filed a trial brief on the issue of honest but mistaken belief in consent that included a recital of proposed evidence, including purported sexual activity between the appellant and K.M.—kissing and fellatio on the couch—before the penile-vaginal penetration that was the subject of the charge. The brief did not reference s. 276.

[138] The filing of the brief led to Judge Atwood arranging for a pre-trial with counsel on May 3, 2019. In the course of the pre-trial discussion, Judge Atwood indicated the defence brief had triggered the potential for a s. 276 motion. He zeroed in on this development:

> […] it would seem to me that the prudent approach might have been to contact Mr. Young [Crown counsel] and ascertain what evidence is going to be led by the prosecution so that you would know…so that defence counsel would know of a certainty whether there is a section 276 issue…that might have to be addressed by the court. Mr. Young is telling me that some of this evidence is not going to be led, and defence counsel is now going to try to lead it.

[139] Defence counsel responded to Judge Atwood's inquiry about whether he intended to advance a s. 276 motion by saying: "Now that I hear that my friend [the Crown] is not going to be advancing this particular evidence, I guess I'll have to do so". Judge Atwood said he was not requiring a firm commitment from defence counsel "at this particular point" because the appellant was not present[60] and defence counsel had no instructions on the issue.

[140] On May 4, 2019 defence counsel filed motions to adduce the other sexual activity evidence and to abridge the time required for notice of the motion. The appellant's supporting affidavit was sworn on May 7, the day the trial was to

[60] Defence counsel had filed a designation of counsel pursuant to s. 650.01 of the *Criminal Code* which permitted him to appear at the pre-trial without his client present.

proceed. On May 7, 2019, Crown counsel objected to the late-filing of the s. 276 motion. He said the Crown being prepared to proceed with the trial on May 7, and the complainant's dismay "at the thought of the trial being adjourned", was a basis for requiring "some reason" why the motion was not made within "the proper seven-day time period".

[141] Crown counsel also raised an objection to the relevance of the proposed other sexual activity evidence. In brief, he said it was not relevant to whether the complainant consented to penile-vaginal penetration later. Defence counsel said the evidence "revolves around the concept of a continuous transaction".

[142] Judge Atwood viewed the issue before him as "primarily an application to abridge the seven-day notice time period required" for a s. 276 motion. He reviewed the recent history of the matter. He determined he was not prepared to hear the motion on short notice and pointed out he had only just received the appellant's affidavit. He concluded:

> I do intend to conduct a hearing in relation to section 276.1, but obviously that will have to be on a later date. I'm going to adjourn this trial. The delay is going to be charged to the defence.

[143] New trial dates were set for October 23 and 25, 2019. Judge Atwood advised the s. 276 motion would be heard on the first day of trial. Defence counsel accepted the October trial dates as did the Crown.

[144] The appellant says the adjournment of the trial to October 23 and 25 represented a failure by Judge Atwood to deal expeditiously with the s. 276 motion and avoid delaying the trial. In his factum he said defence counsel "consistently argued" that the "other sexual activity" did not need to be screened under s. 276. He emphasized the following points:

- The "other sexual activity" was outside the scope of s. 276 and the trial should have proceeded without interruption.

- It was not reasonable for Judge Atwood to adjourn the entire s. 276 motion even if his decision to screen the evidence was a reasonable exercise of his discretion. Judge Atwood could have undertaken the Stage One assessment on May 7.

- Judge Atwood should have granted the abridgement of time motion to allow the s. 276 motion to be heard on May 7. This would have

> occasioned no prejudice to the Crown or complainant and would have avoided the delay caused by adjourning the trial.

[145] These assertions by the appellant merit closer examination.

[146] When the appellant's trial was adjourned on May 7, 2019, defence counsel was only just starting to address the question of whether s. 276 applied to the evidence he wanted introduced. The appellant's argument that defence counsel had "consistently argued" the other sexual activity did not need to be screened under s. 276 was actually a very recent position. Although on May 3, 2019 defence counsel had described the other sexual activity as "one continuous transaction" and a component of "the escalating sexual nature of the relationship", he did not substantively address why s. 276 did not apply until his brief of September 10, 2019. It was Judge Atwood and Crown counsel who raised the applicability of s. 276. Defence counsel does not appear to have appreciated it might be an issue until the May 3 pre-trial.

[147] It is speculative to suggest that had Judge Atwood abridged the notice and proceeded with the s. 276 issue on May 7 the trial would have concluded on the two dates scheduled. When the trial proceeded before Judge MacKinnon who conducted both a Stage One and a Stage Two s. 276 analyses, the two days set aside—February 11, 2020 and February 21, 2020—were insufficient to complete the trial. Final submissions had to be set over to May 1, 2020 (when, as we know, they did not occur.)

[148] The appellant says he was ready to proceed with his trial on May 7 and 8, 2019 "and the matter would have been completed on those dates if it had not been diverted into an unnecessary s. 276 application".[61] This statement supposes that s. 276 could not be applicable on the facts of this case. As I have already discussed in addressing the appellant's first ground of appeal, s. 276 did apply on the facts of this case.

[149] All three trial judges who dealt with this matter independently found that s. 276 applied.

[150] The record does not support Judge Bégin's finding of express waiver by the appellant for the delay from May 7, 2019 to October 23, 2019. However, this error had no impact on Judge Bégin's analysis as his attribution and allocation of this

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[61] Appellant's factum at para. 112.

delay to the appellant was correct on the basis of it being defence-caused delay. The record also supports a finding of implicit waiver.

[151] The respondent says the appellant had a tactical choice to make once Judge Atwood refused to abridge the notice period. The appellant could have abandoned the other sexual activity evidence and proceeded to trial on May 7, 2019. Instead he accepted an adjournment so the admissibility of the other sexual activity evidence could be decided. Because he had an option that would have allowed him to avoid delay, the respondent, with reference to this Court's consideration of implicit waiver in *R. v. McNeil*,[62] says accepting the adjournment represented implicit waiver by the appellant.

[152] It is an accused's conduct that establishes whether there has been waiver.[63] Implicit waiver here can be inferred from the appellant's inaction in the face of further delay. He did not withdraw the s. 276 motion in order to proceed to trial on May 7 and 8, 2019. Although defence counsel's effort to abridge the notice requirement indicated an interest in keeping the trial on track, when that failed defence counsel did not press for trial dates earlier than October or seek dates that were not as close together. He did not ask Judge Atwood to hear Stage One of the s. 276 motion on an earlier date.

[153] It is also relevant that defence counsel did not react to Judge Atwood saying on May 7: "The delay is going to be charged to the defence". If nothing else, this would have planted the issue of delay firmly in defence counsel's mind. He said and did nothing in response.

[154] Waiver of delay cannot be inferred solely from defence silence or inaction.[64] However, silence or inaction "may be a relevant and important factor in the waiver inquiry".[65] The waiver inquiry will always be fact-based and contextual. Silence here was an aspect of defence conduct on May 7, 2019.

[155] The defence conduct on May 7 indicated a willingness to not have the May 7, 2019 to October 23, 2019 delay count against the state in order to have the s. 276 motion heard. The appellant's dogged pursuit before all three trial judges of a ruling that the other sexual activity evidence was not subject to s. 276 screening and admissible is a powerful indicator of its priority in his trial strategy.

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[62] 2024 NSCA 57 at paras. 78 and 87.
[63] *R. v. J.F.*, 2022 SCC 17 at para. 49 [*J.F.*].
[64] *J.F.* at para. 44.
[65] *J.F.* at para. 52.

[156] Furthermore, I agree with the respondent that Judge Atwood's adjournment of the appellant's trial was a legitimate response to defence counsel's late and unfocused treatment of the other sexual activity evidence. When adjourning the trial, Judge Atwood told defence counsel he could file fresh materials to support the s. 276 motion—"I'm not locking you into those materials at this point in time"—and encouraged him to review the Supreme Court of Canada's decision *R. v. Darrach* "to ensure that the affidavit, in particular, meets the requirements for a s. 276.1 application".

[157] The Supreme Court of Canada has held that the manner in which a Stage One inquiry is to be conducted should be left to the discretion of the trial judge "in accordance with their trial management powers".[66] Judge Atwood cannot be faulted for wanting well-informed submissions from both counsel—including written briefs which he directed were to be provided—on an issue that is not clear and uncomplicated. As held in *Choudhary*:[67]

> [24] The question of whether other sexual activity forms the subject-matter of the charge beyond the reach of a s. 276 application is often difficult to resolve.

[158] It was noted by Judge Atwood at the May 3, 2019 pre-trial that the "defence" the appellant was advancing—honest but mistaken belief in consent—had been raised at a telephone pre-trial in October 2018. Given what the record indicates about the appellant's statement to police in which he referred to other sexual activity, the defence was in a position to have identified the potential for a s. 276 issue in October 2018. On May 3, 2019, Judge Atwood said he faulted himself to some extent for not inquiring then whether s. 276 might be in play. However, it was the responsibility of defence counsel to proactively consider how evidence of other sexual activity might engage the s. 276 regime in the context of the defence being relied on.

[159] In *Boulanger*, the Supreme Court of Canada held that even a legitimate step undertaken by an accused to advance their defence will not immunize against delay being allocated to them where the "*manner* in which the defence conducted itself" has been illegitimate.[68] Inefficiency and a lack of timeliness can result in delay being laid at the feet of an accused.

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[66] *R. v. J.J.*, 2022 SCC 28 at para. 27.
[67] *Choudhary* at para. 24.
[68] *Boulanger* at para. 5.

[160] The s. 276 motion was a necessary step in this case if the appellant wanted the other sexual activity to be admitted, and one the defence should have approached more efficiently. There was further evidence of inefficiency by the defence when on October 24, 2019, defence counsel brought a s. 276 motion to adduce evidence of the sexual activity the appellant claimed had occurred following the penile-vaginal penetration. Judge Bégin noted that on October 25, 2019 Judge Atwood referenced "the myriad delays in bringing this matter to trial have arisen from what I feel compelled to describe as improvident defence strategy".[69]

[161] Returning to Judge Bégin's assessment of the delay from May 7, 2019 to October 23, 2019, I am of the view he was correct in finding the appellant could not benefit from his delay-causing "action or inaction".[70]

[162] I am satisfied the delay was correctly allocated to the appellant because (1) the appellant implicitly waived delay for this period; and (2) defence conduct also supported Judge Bégin's allocation of delay to the defence.

[163] In the result, Judge Bégin did not commit error in allocating the delay from May 7, 2019 to October 23, 2019 to the appellant. However, as noted earlier, the correct date was October 25, 2019, the anticipated end of the trial.

October 25 to February 21, 2020—The Recusal Delay

[164] This is another period of delay the appellant says should not have been allocated to him: a period of 3 months and 16 days as calculated by Judge Bégin, from October 25, 2019, when Judge Atwood recused himself, to February 21, 2020 when the appellant's trial was anticipated to conclude before Judge MacKinnon. (Re-doing the calculation, I find this was a period of 3 months and 26 days.)

[165] Judge Bégin accepted the Crown's submission that by his actions the appellant directly caused Judge Atwood to recuse himself, noting what Judge Atwood said about the s. 276 affidavit.

[166] As the respondent notes, Judge Bégin deducted the Atwood recusal period for another reason, separate and apart from attributing it to the appellant. He found

[69] s. 11(b) decision at para. 47.
[70] s. 11(b) decision at para. 37.

the recusal decision to be "tantamount to declaring a mistrial"[71] and characterized it as "a discrete event". He held:

> [67] This Court finds that the mistrial arising from Judge Atwood's recusal was a discrete event as neither party planned, caused, nor could they have reasonably anticipated that Judge Atwood would recuse himself after hearing the first defence s. 276 application on October 23, 2019.
>
> [68] Delay from a discrete exceptional event is to be subtracted from the total delay to determine whether the presumptive ceiling is exceeded.[72]

[167] A review of Judge Bégin's characterization of Judge Atwood's recusal as an exceptional event requires an examination of the surrounding circumstances.

[168] On October 23, 2019 the appellant's argument that s. 276 did not apply to the other sexual activity was rejected by Judge Atwood in an oral decision. He indicated he was "satisfied overwhelmingly that the provisions of section 276 are applicable in this case".

[169] In his reasons, Judge Atwood referred to the appellant's description in his May 7 affidavit of the other sexual activity and his statement that:

> At the time of the event in question, I believe that the complainant was consenting to vaginal sexual intercourse. She never said no or said or did anything else to suggest that she did not want to have sex.

[170] Judge Atwood, having earlier referred to passages from the Supreme Court of Canada's decisions in *Barton* and *Goldfinch*[73], held:

> In my view, this is the sort of evidence that would not support an air of reality regarding the existence of an honest but mistaken belief in consent. It is clearly fatal to a claim of honest but mistaken belief in consent because it demonstrates a failure to take reasonable steps to support a claim of mistaken belief in communicated consent. To repeat Justice Karakatsanis' clear direction:
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> > Today an accused may no longer argue that consent was implied by a relationship. Contemporaneous affirmative communicated consent must be given for each and every sexual act. Today not only does no mean no but only yes means yes. Nothing less than positive affirmation is required.
>
> […] The evidence that is being proposed to be put before the court, in my view, is being put before the court to support that myth that because of the fact that a

[71] s. 11(b) decision at para. 62.
[72] s. 11(b) decision at paras. 67-68.
[73] *Barton* at para. 111 and *Goldfinch* at para. 44.

> complainant might have consented earlier, even if only a brief time earlier, to sexual activity means that that person is more likely to have consented to the later activity. In my view, that supports a rape myth theory and it is inadmissible on that basis. And so, the application is not granted.[74]

[171] Judge Atwood followed his dismissal of the application with a direction that the trial would resume on October 25 "to hear from the prosecution witnesses at that time".

[172] On October 25, 2019 Judge Atwood made the bombshell announcement he was recusing himself. He said he had given "extensive consideration" to the matter and stated he was stepping aside after further reflection on the content of the appellant's affidavit:

> The affidavit, in my view, essentially sees Mr. Callahan-Tucker admitting in his own words essential elements of the offence. Furthermore, the affidavit has Mr. Callahan-Tucker presenting facts to the court that undermine significantly what would appear to be the main defence that Mr. Callahan-Tucker would intend to present to the court; that is, honest but mistaken belief in consent. I can't, as much as I have tried to do so, I do not believe that I would be able to embark upon a trial of this matter and disabuse myself of the knowledge that I have of the damaging contents of that affidavit. The damaging statements that appear to admit to essential elements of the offence and the damaging statements of fact that appear to undermine Mr. Callahan-Tucker's access to the defences of honest but mistaken belief in consent.

[173] Crown counsel asked Judge Atwood if he wanted to entertain submissions from counsel. Judge Atwood responded by saying he did not believe submissions would change his feeling that he would not be able to try the case impartially. He put the matter over to November 4, 2022 before Judge MacKinnon to set new trial dates.

[174] Judge Atwood's decision to recuse himself undoubtedly took Crown and defence completely by surprise. They would have had no inkling this was coming and had attended court on October 25 expecting the trial to proceed.

[175] Judge Atwood's recusal was likely especially surprising to counsel in light of the issue having been raised and dispensed with at the May 3 pre-trial. Crown counsel had expressed concern about content in the trial brief filed by defence counsel on May 2. Crown counsel said it provided the trial judge with prospective evidence before any evidence had been adduced, creating "arguably grounds for

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[74] The Justice Karakatsanis quote came from *Goldfinch* at para. 44.

[…] an application to have the matter heard by a different trial judge". Judge Atwood did not see any reason for recusing himself "at this stage". He recognized that trial judges may hear "vast volumes of controversial *voir dire* evidence" which they subsequently rule inadmissible,

> […] and yet the court feel [*sic*] confident that it may be able to embark or continue impartially with the hearing of a trial matter. So, I'm not […] of my own motion considering recusal but obviously, counsel are at liberty to apply for that if counsel see fit.

[176] Both counsel responded by indicating they had no present intention of applying for the judge's recusal.

[177] As the respondent noted before us, on May 3, 2019 Judge Atwood had not seen the appellant's affidavit sworn on May 7.

[178] The appellant faults Judge Bégin for his allocation of the delay caused by the recusal. He says in his factum that Judge Atwood's reasons for recusing himself are "difficult to understand". He makes the following arguments:

- The appellant was required by s. 278.93(2) of the *Criminal Code* to provide "detailed particulars of the evidence" he was seeking to have admitted.
- Trial judges are "presumed and expected"[75] to disabuse themselves of inadmissible evidence.
- The issue of recusal was addressed by Judge Atwood at the May 3, 2019 pre-trial.
- Judge Atwood failed to allow counsel the opportunity to "clarify his thinking about the affidavit and how it related to the Crown's burden to provide subjective consent and the defence of honest mistake".[76]

[179] The appellant says no deference should be accorded to the recusal decision, that it was an unacceptable derogation by the judge of his obligation to hear the trial through. He submits Judge Atwood's recusal should have been characterized as an unnecessary procedural delay caused by the court and not allocated to the appellant.

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[75] *R. v. Lilly*, 2023 NSCA 80 at para. 54; see also *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 at para. 35.
[76] Appellant's factum at para. 120.

[180] The respondent contends we should view the recusal decision as reasonable and appropriate, having been given due consideration by Judge Atwood.

[181] I do not understand the appellant to be saying that recusal can never constitute an "exceptional circumstance" in the context of a s. 11(b) application. As *Jordan* stated:

> [71] It is obviously impossible to identify in advance all circumstances that may qualify as "exceptional" for the purposes of adjudicating a s. 11(b) application. Ultimately, the determination of whether circumstances are "exceptional" will depend on the trial judge's good sense and experience. The list is not closed.

[182] Indeed, recusal has been widely accepted by counsel and the courts as an "exceptional circumstance".[77] The appellant takes issue with Judge Atwood recusing himself in the circumstances of this case and invites us to critique that decision. The invitation should be declined.

[183] It is not for this Court to conduct a post-mortem of Judge Atwood's decision to recuse himself. He informed the parties he had given the matter considerable thought. He concluded he could not adjudicate the case with impartiality. By recusing himself he ensured the appellant would have the fair trial to which he was entitled. Once he made the determination his impartiality had been compromised there was no turning back: submissions from counsel were of no relevance.

[184] On the facts in this case, Judge Atwood's recusal satisfied the "exceptional circumstances" features identified in *Jordan*. It was wholly outside the Crown's control. There was nothing the Crown could have done to remedy the unavoidable delay it caused.[78]

[185] *Jordan* held that the period of delay caused by an exceptional event "must be subtracted from the total period of delay for the purpose of determining whether the ceiling has been exceeded". Crown and the justice system are expected, within reason, to prioritize trials "that have faltered due to unforeseen events".[79] Once he announced his recusal, Judge Atwood docketed the matter for November 4, 2019, a little over a week later, so that Judge MacKinnon could schedule new trial dates.

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[77] See e.g.: *R. v. Avgeropoulos*, 2017 ONSC 4626 at paras. 31-34; *R. v. Salt*, 2018 ONSC 3452 at para. 10; *R. v. Thiyagarajan*, 2019 ONSC 7524 at para. 14; *R. c. Rice*, 2016 QCCS 4659 at para. 62 (aff'd 2018 QCCA 198 at paras. 175-178); *R. c. Seepersad*, 2024 QCCQ 1787 at para. 38.
[78] *Jordan* at para. 69.
[79] *Jordan* at para. 75.

The Crown sought dates "in the not too distant future" and both counsel accepted the February dates Judge MacKinnon found.

[186] Judge Bégin was correct, both in his characterization of Judge Atwood's recusal as an exceptional event and his statement about how an exceptional event is factored into the s. 11(b) analysis. It is unnecessary to address whether the defence bore responsibility for the recusal.

February 21, 2020 to April 28, 2021

[187] Judge Atwood's recusal led to the appellant's trial proceeding before Judge MacKinnon on February 11 and 21, 2020. All that remained at the end of the day on February 21 were final submissions which were derailed first by Covid-19 and then by Judge MacKinnon's illness. Judge Bégin found that Judge MacKinnon's illness was an exceptional event, a characterization the defence counsel conceded was correct. However the period of February 21, 2020 to April 28, 2020 was not part of that exceptional circumstance.

[188] The appellant correctly identified that Judge Bégin erred by including the 67 days between February 21, 2020 and April 28, 2020 as part of the exceptional circumstance of Judge MacKinnon's illness. It was, as the appellant points out, a routine adjournment by Judge MacKinnon for the scheduling of final submissions following the end of the trial evidence on February 21.

[189] After a back-and-forth with counsel on February 21, 2020 to find a date for final submissions, Judge MacKinnon confirmed the date of May 1, 2020. On April 29, 2020 the May 1 date fell victim to the initial wave of Covid-19. The 67 days that passed between February 21, 2020 and April 28, 2020 merely reflected the adjournment for final submissions and were not as a result of an exceptional event.

Judge MacKinnon's Illness and Covid-19 – Exceptional Circumstances

[190] The appellant accepts Judge Bégin's characterization of Judge MacKinnon's illness, and the delays caused by the Essential Services Model that governed the operation of the courts during Covid-19, as exceptional circumstances. He has not challenged Judge Bégin's determination that Covid-19 had a profound and enduring impact on the courts.[80] In particular, the pandemic frustrated a more

[80]See s. 11(b) decision at para. 80. Judge Bégin quoted Judge Atwood in *R. v. Graham*, 2022 NSPC 10 at para. 21: "The impact on court services has been profound and enduring".

timely scheduling of trials in the Pictou Provincial Court. As Judge Bégin said in his decision:

> [77] The final trial dates were set on April 29, 2021, but due to the Covid-19 global pandemic and the shutdown of courts across Nova Scotia, backlogs occurred in setting trail dates. The earliest available trial dates were for June 15 & 16, 2022, a delay of a further 15 months and 8 days.

Calculating the Net Delay

[191] The appellant says had Judge Bégin not incorrectly allocated delays to him and then erroneously included the routine adjournment from February 21, 2020 to April 28, 2020, the new delay would have been 25 months, exceeding the *Jordan* ceiling of 18 months. In the appellant's submission this should have resulted in a stay of the proceedings.

[192] As discussed, Judge Bégin did not make the errors alleged depriving the appellant of a stay. Although not perfectly executed, through his application of the *Jordan* framework Judge Bégin reached the correct determination: the appellant's s. 11(b) rights were not violated. There was no justification for a stay.

[193] Judge Bégin dismissed the appellant's stay application on the basis of calculations that brought the net delay below the 18-month *Jordan* ceiling. Adjustments made for errors in Judge Bégin's calculations do not change this result:

- May 17, 2018 to June 16, 2022 – total delay 49 months.
- May 17, 2018 to November 21, 2018 – 6 months and 4 days, the *Jordan* clock was running.
- November 21, 2018 to May 7, 2019 – as found by Judge Bégin, expressly waived by the appellant and therefore to be deducted from the total delay. (Judge Bégin calculated this as 5 months and 16 days; it should be 5 months and 17 days.)
- May 7, 2019 to October 25, 2019 – implicitly waived by the appellant, and as found by Judge Bégin, defence conduct and therefore to be deducted from the total delay. (Judge Bégin calculated this as 5 months and 16 days; it should be 5 months and 18 days.)

- October 25, 2019 to February 21, 2020 – Exceptional circumstance of Judge Atwood's recusal (3 months and 27 days to be deducted from the total delay.)

- April 29, 2020 to June 16, 2022 – Exceptional circumstances of Judge MacKinnon's illness and the impact of Covid-19 on the operation of the courts.

[194] The period of April 29, 2020 to June 16, 2022 has to be reviewed carefully to address Judge Bégin's non-consequential errors and afford deference to his findings of fact.

[195] On April 29, 2020 the anticipated final submissions before Judge MacKinnon were adjourned to August 21, 2020. Judge Bégin attributed 3 months and 24 days of delay to the exceptional circumstances of Covid.[81]

[196] Judge Bégin correctly characterized Judge MacKinnon's inability to finish the appellant's trial due to illness as an exceptional circumstance. However his calculation of the length of this delay was incorrect. He attributed 15 months and 8 days to Judge MacKinnon's illness and the earlier Covid-19 delay, calculated from February 21, 2020 to April 29, 2021.[82] As previously discussed, this incorrectly included delay caused by the routine adjournment of February 21, 2020 to April 28, 2020.

[197] Judge Bégin recognized he had already attributed the delay from April 29, 2020 to August 21, 2020 to Covid. Adjusting for the routine adjournment error, the delay caused by the exceptional circumstance of Judge MacKinnon's illness should have been from August 21, 2020 to April 29, 2021—8 months and 8 days.

[198] On April 29, 2021 the earliest trial dates available were June 15 and 16, 2022. Judge Bégin did not include all of this delay in his deduction from the total delay. He calculated the Covid delay as 15 months and 8 days but viewed only half of it as delay due to that exceptional circumstance. He took into account there would have been delay typical to trial-setting for multi-day trials without the exceptional impact of the pandemic.[83] His approach is entitled to deference.

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[81] s. 11(b) decision at para. 70.
[82] s. 11(b) decision at para. 75.
[83] s. 11(b) decision at para. 83.

[199] The calculations for the period of April 29, 2020 to June 16, 2022 is adjusted as follows:

- April 29, 2020 to August 21, 2020 - Exceptional circumstance of Covid-19 (3 months and 23 days to be deducted from the total delay).
- August 22, 2020 to April 29, 2021 – Exceptional circumstance of Judge MacKinnon's illness (8 months and 8 days to be deducted from the total delay).
- April 29, 2021 to June 16, 2022 – Exceptional circumstance of Covid for fifty percent of the 13 months and 18 days (6 months and 24 days to be deducted from the total delay).

[200] Judge Bégin was correct to dismiss the appellant's application for a s. 11(b) stay. The correct calculations for the analysis he undertook produce a slightly different final net delay below the 18-month ceiling, as follows:

- November 21, 2018 to May 7, 2019 5 months and 16 days (express waiver).
- May 7, 2019 to October 25, 2019 5 months and 18 days (implicit waiver/defence conduct).
- October 25, 2019 to February 21, 2020 3 months and 27 days (recusal).
- April 29, 2020 to August 21, 2020 3 months and 24 days (Covid).
- August 22, 2020 to April 29, 2021 8 months and 8 days (Judge MacKinnon's illness).
- April 29, 2021 to June 16, 2022 6 months and 23 days (Covid).

[201] Final net delay – 49 months less 33 months and 26 days of defence delay and exceptional circumstances equals 15 months and 4 days net delay.

Conclusion on Issue #2

[202] From the total delay of 49 months a deduction of 11 months and 4 days defence delay—November 21, 2018 to October 25, 2019—reduced the delay to 38

months. (This was Judge Bégin's conclusion at paragraph 35 of his decision.[84] These reasons previously addressed his reasons and the recalculation of his numbers.)

[203] Under the *Jordan* framework, 38 months was presumptively unreasonable. Where delay exceeds the ceiling the issue becomes whether there are exceptional delay-causing circumstances to be subtracted from the total delay.[85] Exceptional circumstances can rebut the presumption. Judge Bégin correctly deducted delay caused by the exceptional circumstances from the total delay in accordance with the Supreme Court of Canada's direction that "discrete events result in quantitative deductions of particular periods of time".[86]

[204] The exceptional circumstances of Judge Atwood's recusal, the initial wave of Covid-19 in 2020, Judge MacKinnon's illness, and the continued impact of Covid on the courts in 2021 and 2022, were all entirely outside the Crown's control and neither avoidable nor remediable. Together these discrete exceptional circumstances totaled 22 months and 22 days. With the initial deduction for the 11 months and 4 days allocated for express defence waiver, implicit defence waiver and defence-caused delay, the net delay—15 months and 4 days—was under the 18-month ceiling.

[205] The appellant's journey through the criminal justice system was fraught due to reasons for which he bore responsibility and unforeseen circumstances over which no one had control. The experience will have been difficult and stressful. However as a comprehensive analysis shows, Judge Bégin concluded correctly that the appellant was tried within a reasonable time as required by s. 11(b) of the *Charter* and the imperatives of *Jordan*.

[206] I would dismiss this ground of appeal.

Disposition

[207] I would dismiss the appeal and uphold the appellant's conviction.

Derrick, J.A.

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[84] s. 11(b) decision.
[85] See *Jordan* at para. 105.
[86] *Cody* at para. 48.

Concurred in:

Van den Eynden, J.A.

Gogan, J.A.