PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Hankey*, 2021 NSPC 60

Date: 20211115
Docket: 8507954
8507955
Registry: Halifax

Between:

Her Majesty the Queen

v.

Wayne John Hankey

Restriction on Publication:
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DECISION ON SEVERANCE APPLICATION

Judge:	The Honourable Judge Elizabeth Buckle
Heard:	October 27, 2021, in Halifax, Nova Scotia
Decision	November 9, 15, 2021
Charge:	156, 157 of the ***Criminal Code***
Counsel:	Stan MacDonald, for the Defence Carla Ball and Tim Leatch, for the Crown

By the Court:

Note: This judgment has been anonymized to comply with legislative requirements to protect the identities of the complainants. Random letters have been used in place of their names and certain identifying information has been removed.

Introduction

[1] Wayne Hankey is charged in a four count Information with gross indecency and indecent assault relating to two complainants, AB and CD.

[2] He now applies pursuant to s. 591(3) of the *Criminal Code* for severance to permit him to have separate trials for the charges relating to each complainant.

[3] The Crown and Defence generally agree on the applicable law but disagree on how the law should be applied in the circumstances of this case.

Law

[4] The Crown has broad discretion in deciding to include more than one count in an Information (s. 591(1); and, *R. v. Last*, 2009 SCC 45, at para. 1). However, s. 591(3) permits severance of counts where the court is satisfied it is "required in the interests of justice". The burden is on the Applicant. In *Last* the Supreme Court of Canada identified ten factors that might help a court determine how the interests of justice might be served or injustice avoided in a given case:

1. the general prejudice to the accused;
2. the legal and factual nexus between the counts;
3. the complexity of the evidence;
4. whether the accused intends to testify on one count but not another;
5. the possibility of inconsistent verdicts;
6. the desire to avoid a multiplicity of proceedings;
7. the use of similar act evidence at trial;
8. the length of the trial having regard to the evidence to be called;
9. the potential prejudice to the accused with respect to the right to be tried within a reasonable time; and
10. the existence of antagonistic defences as between co-accused persons

[5] This is not an exhaustive list but neither Crown nor Defence have suggested that any other factor is relevant in this case. They agree that this application essentially turns on three of these factors: whether there is a factual and legal nexus between the charges; whether there is an objective basis for the Defence submission that the accused may want to testify with respect to one complainant and not the other; and, whether the Crown has a viable similar act application.

Alleged Facts

[6] A summary of the allegations is necessary to assess these factors. On consent, the alleged facts were provided by counsel in their briefs and oral submissions.

[7] Mr. Hankey was an Anglican Priest, the founder of the King's College Foundation Year Program and the Director of that program. For much of the time period that is material to this application, he was also a professor, tutor, residence don and lived on the King's College campus.

[8] AB alleges sexual acts with Mr. Hankey beginning in the summer of 1977 when he was 18 years old and ending at the end of 1979 when he was 20 years old. During that time, Mr. Hankey was 32 to 34 years old. They had known each other since AB was about 12 years old. Mr. Hankey was a family friend [xxxxxxx]. AB and Mr. Hankey were close when AB was a teenager. The sexual activity is alleged to have begun when AB was preparing to attend his first year at the King's College Foundation Year Program. Mr. Hankey had access to the King's pool and invited AB to swim there after hours, where he was teaching him to swim. They would regularly shower together after swimming and would engage in "horseplay" which did not involve physical contact. While they were in the shower, Mr. Hankey would turn the lights off and on and, on one occasion, touched AB's genitals with his hand. The complainant describes this as "out of the blue" as there had been no sexual conversation or other touching prior to this. After this incident, they swam together on other occasions and engaged in sexual activity in the shower. During that summer, AB resided off campus. When the academic year began, AB became a student at King's and lived in residence. Mr. Hankey allowed him to study in his apartment which was on-campus. Sexual activity, which progressed beyond touching, continued approximately once or twice a week for the 1977-1978 academic year. In the fall of 1978, Mr. Hankey left Canada but returned and stayed with AB's family one summer during which he and AB engaged in sexual activity on several occasions.

[9] CD alleges that on one occasion between August 31 and October 1, 1982, when he was 18 years old, Mr. Hankey touched him sexually. Mr. Hankey was 37 years old at the time. CD was a student in the King's College Foundation Year Program and Mr. Hankey was assigned to be his tutor for the 1982/83 academic year. During the month of September, CD attended Mr. Hankey's residence office for a tutoring session. He was a basketball player and had come from practice so was wearing shorts. He alleges that during the session, Mr. Hankey edged his seat closer, placed his hand on CD's leg such that his hand or knuckles were up under his shorts. CD thought Mr. Hankey was going to touch his genitals but he did not actually touch them. CD jumped up and left. He subsequently left the university.

Factor 1 - The General Prejudice to the Accused

[10] The potential prejudice when counts are tried together includes moral prejudice (the risk that the fact finder will use the evidence for an improper purpose) and reasoning prejudice (the risk that the fact finder will place more weight on the evidence than it deserves, will be distracted or confused by it or that it will consume too much time in the trial). The Crown and Defence agree that in a judge-alone trial, the risk of either is significantly reduced but is not entirely eliminated. (*R. v. Abi-Samra*, 2018 ONSC 4228, at para. 44; and, *R. v. C.K.*, 2015 ONCA 747, at para. 41). The applicant argues that the risk is higher where, as in this case, the accused will admit to sexual acts with one complainant and deny that anything sexual occurred with the other. Further, in cases involving historical allegations, there is a higher risk of "credibility cross-pollination" (*R. v. L.M.*, 2017 ONSC 5159).

[11] I accept that even in a judge-alone trial there is some risk of prejudice so this factor would minimally favour severance.

Factor 2 - The Legal and Factual Nexus Between Counts

[12] Determining whether there is a factual nexus often involves consideration of factors such as proximity of time, location of the offences and commonality of witnesses.

[13] Determining whether there is a legal nexus requires consideration of factors such as whether the charges constitute overlapping transactions, have common essential elements and whether the defences will be different (*Last*, at paras. 31 – 44).

[14] The Applicant submits that there is virtually no factual nexus between the counts. He acknowledges that he was employed as an educator at the school during both offence periods and the offences are all alleged to have occurred in the same city. However, he submits that in all other respects they are distinct: they are separated by at least three years; involve different complainants; and will not involve any of the same factual witnesses. The Applicant argues that the only legal nexus is that the charges are the same, however, the defences will be very different so the legal issues to be resolved will also be very different. For the allegations involving AB, the defence will be consent. For the allegations involving CD, the primary defence will be that the incident did not occur. The Defence may argue, in the alternative, that if the touching did occur, it was not sexual.

[15] The Crown argues that there is substantial factual nexus and references seven commonalities. These can be grouped as follows: the accused was in a position of trust with respect to each of the complainants; the allegations occurred or were commenced on campus; the accused was employed on campus and the don of a residence; the allegations involve touching or attempted touching of the genitals with no preliminary physical contact or communication about physical contact; the complainants and the accused were alone when the contact occurred; and, there was a significant age difference between the complainant and the accused (15 years for AB and 20 years for CD).

[16] Many of these facts will be relevant to my consideration of the viability of a similar act application, but are not particularly relevant to the issue of whether there is a factual nexus between the counts. Nexus means connection, link or relationship. As such, determining whether there is a factual nexus is not a question of whether the facts supporting each count are similar to the other but rather whether the two sets of facts are connected in some way that make each narrative more complete if heard together (*R. v. J.C.L*, 2012 ONSC 6603).

[17] The Crown argues that there is a legal nexus, despite the possibility of different defences, because the charges are the same and in each case the issue will be whether the Crown has proven beyond a reasonable doubt that there was non-consensual application of force in a sexual context. In making that argument, the Crown relies primarily on the decision in *R. v. Carter-Teixeira*, 2018 ONCJ 968, paras. 13 - 16. In that case, in the context of two counts alleging sexual assault, the court found that despite the possibility of different defences, the legal issues to be decided were essentially the same – had the prosecution proven the elements of the offences beyond a reasonable doubt. On the basis of what was known at that

point, the court concluded this factor was neutral and did not favour severance (para. 16).

[18] The Supreme Court's consideration of factual and legal nexus in *Last* is helpful to my analysis. In that case, the accused had been charged with sexual assaults involving two complainants, occurring about a month apart in the same city. The defence to one was consent and the other was identification. On the question of factual nexus, the court said "the attacks on the two women were not closely connected in any meaningful way" (para. 32). On the question of legal nexus, the court said:

> . . . While the charges were similar, the theory of the defence was completely different: consent was at issue in one and identification in the other. The theory of the Crown that the two incidents were part of the same transaction was not supported by the facts. Rather, the attacks were separate incidents. The trier of fact would not need to know about one in order to understand the other.

[19] The Supreme Court concluded that the factual and legal nexus was "extremely thin".

[20] In the case before me there is no temporal connection between the cases. There is a geographic connection in that both complainants allege the assaults occurred on campus, and for some of the activity, in residence. However, geographic proximity is not particularly significant in this case where identification is not an issue and given that the accused lived and worked on campus. The allegations involve separate incidents which are not factually connected in any way that will be meaningful in the trial. Unlike in other cases where a factual nexus has been found, here the complainants are different and there is no relationship between them, the trial judge would not need to know about one set of facts to understand the other, the facts of one are not intertwined with the other, the facts of one would not provide necessary context to the other and the court would not be left with a "factual vacuum" if the cases were not tried jointly (eg. *R. v. G.W.*, 2016 ONSC 1018; *R. v. Darnley*, 2015 ONSC 3815; *R. v. Dunbar*, 2010 ONSC 5416; *R. v. Thomas*, [2008] O.J. No. 325 (Ont. S.C.J.); and, *Last*, para. 32).

[21] In terms of legal nexus, this case is, in my view, indistinguishable from *Last*. In both cases, there are common essential elements which the Crown must prove. However there is no transactional overlap and very different defences which will require consideration of different legal principles. To use the language of the court

in *Last*, the factual and legal nexus here is very thin and does not weigh in favour of a joint trial.

Factor 3 - The Complexity of the Evidence

[22] The Applicant argues that the evidence in the AB case is highly complex and multi-faceted, while the evidence in the CD case is straight-forward and relatively simple. In AB, there will be a third-party records application to obtain diocesan court records, admissibility hearings concerning a statement given in a diocesan proceeding, allegations that span months and include issues related to consent and honest but mistaken belief in communicated consent. In the CD case, there are no complicated evidentiary issues, the allegation is straightforward and spans a few minutes. The primary legal issue will be whether the Crown has proven beyond a reasonable doubt that the incident happened with a possible alternative argument that even if contact is proven, it was not sexual.

[23] The Crown argues that the evidence is not complicated in either. In AB, it is the procedural issues that make the matter more complex, not the evidence.

[24] I agree that much of the complexity in the AB case relates to the pre-trial motions. In a case involving severance of accused (as opposed to severance of counts) that might still support severance. However, I do not see how that complexity favours separate trials in this case. There remains some disparity in the complexity of the evidence between the two complainants and the defences. However, in the circumstances of this case and given that this is a judge-alone trial, I do not view this factor as favouring severance.

Factor 4 - Whether the Accused Intends to Testify on One Count But Not Another

[25] The Applicant advises that if Mr. Hankey had the ability to control his defence, he would likely testify in the AB trial and is much less likely to testify in the CD trial.

[26] It is clear from the cases that it is not enough for an accused to express an intent to testify on one charge but not the other. That intent must also be objectively justifiable (*Last*, para. 26). The judge must be satisfied that "the circumstances objectively establish a rationale for testifying on some counts but not others" (*Last* para. 26).

[27] The Applicant says that the potential admissibility of Mr. Hankey's statement in the Diocesan court proceedings is central to his intent to testify on one but not the other. In those proceedings, Mr. Hankey admitted to sexual acts with AB and so, if that statement were admitted in the trial, he would likely have to testify to explain. However, even if that evidence were not admitted, the Applicant argues that there is an objective basis to support Mr. Hankey's intention to testify in that case but not the other because of the different quality of the evidence and the different defences.

[28] The Crown does not dispute that there is an objectively justifiable basis to give this factor weight, however, argues that it is reduced if the diocesan record is not admitted, which is yet to be determined.

[29] I am satisfied that even without the admission of that record, there is an objectively justifiable basis for Mr. Hankey's expressed desire to defend the cases differently. Issues relating to consent often place a practical evidentiary burden on the accused and honest but mistaken belief in communicated consent almost always does. In contrast, depending on the reliability and credibility of CD's testimony, the Defence may very well decide the Crown has not met its burden without the need for the accused to testify.

[30] In *Last*, the court noted that this factor is concerned with giving the accused the ability to control his defence and the right to decide whether or not to testify (para. 25). As such, a subjective and objectively justifiable intention to testify on one count but not another will be given significant weight in the severance analysis.

[31] It is, however, "but one factor to be balanced with all the others" (*Last*, para. 27; and *R. v. Moore*, 2020 ONCA 827, at para. 15). Therefore, while I find that this factor strongly favours severance, it is not determinative of the Application.

Factor 5 - The Possibility of Inconsistent Verdicts

[32] The Crown and Defence agree that there is no danger of inconsistent verdicts in this case so this factor has no impact

Factor 6 - The Desire to Avoid a Multiplicity of Proceedings

[33] The Crown and Defence agree that, other than the possibility of a Crown expert (at the time of this application, the Crown was considering calling an expert

at trial but had not yet decided), there is virtually no overlapping evidence so little duplication of evidence if the trials were severed.

[34] The Crown argues that the legal elements in this historical case are complicated so it would be more efficient for a single judge to review and analyze those elements. The elements of these offences have been judicially considered and most issues that add complexity have now been resolved (eg. see: *R. v. Hawkes,* 2017 NSPC 4).

[35] As such, any benefit to the administration of justice in trying the counts together is minimal. This factor is essentially neutral.

Factor 7 – The Use of Similar Act Evidence at Trial

[36] The Crown intends to apply to admit the evidence of each of the two complainants as similar act evidence with respect to the other.

[37] A viable cross-count similar act application, while not determinative of severance, will weigh heavily against it (*Last,* para. 33-34; *R. v. Dorsey*, 2012 ONCA 185, paras. 47-48; and, *Carter-Teixeira*, at paras. 29 – 31). At this stage I am not deciding whether the proposed similar act evidence is admissible. In a similar act application, the burden would be on the Crown to establish on a balance of probabilities that the evidence is admissible. In this severance application, the ultimate burden is on the Defence. Within the severance application, I have to determine, based on the information available to me at this time, whether the cross-count similar act application is "viable" (*R. v. Blacklaws*, 2012 BCCA 217, 285 C.C.C. (3d) 132, paras. 43-44, *per* Finch C.J.B.C. (dissenting), aff'd at 2013 SCC 8, [2013] 1 S.C.R. 403). This is a considerably lower standard than the test for admitting similar act evidence (*Blacklaws*, at para. 42; *R. v. R.C.*, 2020 ONCA 159, paras. 38-39). This exercise of assessing the viability of a similar act application as a relevant factor in a severance application is tricky and requires great care to avoid putting an improper burden on the Crown (*R. v. Arp*, [1998] 3 S.C.R. 339, para. 52; *R. v. Sahdev*, 2017 ONCA 900, at para. 49; and, *R v. Waudby*, 2011 ONCA 707, at para. 4).

[38] Mr. Hankey is also charged in a separate Information with sexual assault relating to a third complainant, EF. That matter is scheduled for trial in another court but the Crown will also seek to admit that evidence as similar act evidence on the joint trial. The evidentiary foundation for that extrinsic similar act application is relevant to my consideration of the viability of the cross-count similar act

application because the Crown argues there is a pattern of conduct which includes all three allegations. Again, on consent, the alleged facts relating to EF were provided by counsel in their written briefs and oral submissions.

[39] EF alleges that between February 28 and April 1, 1988, when he was 23 years old, Mr. Hankey straddled him and grabbed his buttocks and genitals. At the time Mr. Hankey was 44 years old. EF was a student in the Foundation Year Program at King's College and in January of 1988 had moved into residence. Mr. Hankey was EF's teacher in a large class, was the don of his residence and they had at some point been on the board of directors of the institution at the same time. However, they did not know each other well. EF had [a medical procedure] and was laying on his bed in residence when Mr. Hankey came in. Mr. Hankey stood beside the bed and then jumped onto EF, straddling him. Mr. Hankey then pushed his hands down to fondle EF's buttocks and genitals which EF described as a grab. EF responded in obvious pain and Mr. Hankey left immediately.

[40] Similar act evidence is bad character evidence and is presumptively inadmissible (*Arp*, para. 40; and, *R. v. Handy*, 2002 SCC 56). It is inadmissible because of the risk that a person will be convicted based on prejudice rather than proof. That risk is significantly reduced in a judge-alone trial, but is not eliminated.

[41] As an exception to that general rule, the evidence is admissible where its probative value to an issue in the case outweighs its prejudicial effect (*Handy,* paras. 49 - 55; and, *Arp*, para. 41).

[42] The basis of this narrow exception is that in some cases the evidence of previous misconduct "may be so highly relevant and cogent that its probative value in the search for truth outweighs any potential for misuse" (*Handy*, at para. 41). Its "[p]robative value exceeds prejudice, because the force of similar circumstances defies coincidence or other innocent explanation" (*Handy*, at para. 47). Specific principles and factors are helpful in determining its probative value, however, the overarching principle is that its value is derived from the objective "improbability of coincidence" (*R. v. Shearing*, 2002 SCC 58, at para. 40; *Arp*, paras. 43 & 45; and, *R. v. Trochym*, 2007 SCC 6, para. 78).

[43] The degree of similarity required to justify admission of similar act evidence and/or the relative importance of specific similarities or dissimilarities will vary depending on the purpose for which the evidence is tendered (*Handy,* para. 78; and, *R. v. Carpenter,* (1982)1 C.C.C. (3d) 149 (ONCA).

[44] Therefore, the first step is to identify the issues in the case to which the evidence relates.

[45] The credibility and reliability of the complainants will be central at trial, for AB on the issue of non-consent and for CD on whether the incident occurred.

[46] The Crown argues that the similar act evidence in this case is relevant to assist in proving the *actus reus* of the charged offences by bolstering the credibility of each complainant. Further, that Mr. Hankey's behavior with the three complainants establishes a pattern which corroborates the testimony of each complainant, negates mere coincidence and ultimately demonstrates that Mr. Hankey had a situation-specific propensity. Properly admitted similar fact evidence can be used for these purposes (see: *R. v. B.(C.R.)*, [1990] 1 SCR 717; *R. v. H. (D.A.)*, 161 N.S.R. (2d) 204 (NSCA); and, *R. v. Thomas*, [2004] O.J. No. 4158 (ONCA)). The Crown argues that with respect to CD's allegation, the proposed similar act would also assist in proving the touching was an attempt to touch his genitals, an intentional sexual act.

[47] The next step is to identify the required degree of similarity (*Handy*, para. 76). In *Handy*, the court explained that the necessary degree of similarity in a case where the issue is proof of the *actus reus* is not necessarily higher or lower than where the issue is identity, but that the issue is different and the "drivers of cogency" will therefore not be the same (*Handy*, para. 78). There are general principles that arise from the cases: admissibility in a case where identity is not the issue does not require "striking similarity"; similarity can arise from similarity between the surrounding circumstances, including the relationship between the accused and the complainant, even where the specific acts are not similar; and, the presence of distinctive dissimilarities does not preclude admission.

[48] In *Handy*, the court proposed seven connecting factors that might be relevant in assessing the similarity of proposed similar act evidence (para. 82):

1. proximity in time of the similar acts;
2. extent to which the other acts are similar in detail to the charged conduct;
3. number of occurrences of the similar acts;
4. circumstances surrounding or relating to the similar acts;
5. any distinctive feature(s) unifying the incidents;
6. intervening events; and

7. any other factor which would tend to support or rebut the underlying unity of the similar acts.

[49] The court noted that not all factors would be useful in every case and cogency of individual factors would depend on the issues in the case.

[50] The Defence argues that the alleged events here bear virtually no resemblance to each other and there is no basis for a successful similar act application.

[51] The Crown argues that the similarities in this case relate to the distinctive nature of the acts and the circumstances in which the acts occurred. More specifically, that in each case, the accused, who was in a position of trust, power or authority, exploited a much younger man, over whom he exerted influence by touching or attempting to touch the complainant's genitals with no preliminary sexual contact or communication about physical contact.

[52] I have considered the alleged facts in light of the principles and applicable factors and have concluded that the evidence does not establish a pattern of conduct or similarity of circumstances that would render coincidence improbable.

[53] I say that for the following reasons.

[54] The acts in this case are not proximate in time. The first and second are separated by about three years and the second and third by about six years.

[55] The Crown argues that the acts are similar in detail and surrounding circumstances in the following areas: the year the acts occurred; the age of the complainant; the gender of the complainant; the age difference between the complainant and the accused; the status of the complainant; the position of the accused in relation to the complainant; the physical contact alleged; the absence of conversation preceding the act; the geographic location of the act; and, the fact that in each instance the accused was alone with the complainant.

[56] The Crown provided a number of cases involving admission of similar act evidence in the context of sexual assault prosecutions, including cases where similar act evidence was admitted at least in part due to the similarity of relationship or surrounding circumstances rather than the specific details of the incident: *R. v. Gilbert*, 2005 ONCA 927; *R. v. B. (L.)* (1997), 116 C.C.C. (3d) 481 (ONCA); *R. v. M. (J.)*, 2010 ONCA 117; *R. v. Moore* (1994) 92 CCC (3d) 281

(ONCA); *R. v. B(R)* 2005 77 O.R. (3d) 171 (ONCA); *R. v. S.C.* 2018 ONCA 454; *R. v. Lalo,* [2003] N.S.J. No. 271 (SC); and *R. v. Keats,* 2015 NSSC 128.

[57] These cases are instructive on how to apply the principles to the facts of a specific case and emphasize that in sexual assault cases, the similarities or dissimilarities between specific acts are often not as compelling as the circumstances around the acts (eg. *B. (L.),* at para. 37; *S.C.,* at para. 23; and *Gilbert,* para. 64). However, the determination in each case will rest on the unique features of the case.

[58] The Crown specifically referred to the facts in *B. (C.R.), Moore, B. (R.)* and *Keats.* In *B(CR),* the accused was charged with sexual offences against his daughter who was in his custody and similar act evidence was admitted from another witness who had also been in a father-daughter relationship with the accused. McLachlin, J., writing for the majority of the Supreme Court of Canada, said that the fact that in each case the accused established a father-daughter relationship with the girl before the sexual violations began would arguably show a pattern of similar behaviour which would support the complainant's credibility. She went on to say that she may have found this case to have been a borderline case of admissibility but would not interfere with the decision of the trial judge.

[59] In *Moore,* a retired priest was charged with sexual assault of a young boy. Similar act evidence from another boy was admitted. The details of the touch and the precise location were different but the court concluded the overall circumstances were the same. Specifically, the acts took place during the same time period, in both cases the accused used his position (in one case as a minister and the other as a family friend) to commit the sexual assaults, and the sexual assaults would occur despite adults being nearby. This last factor was seen as a distinctive unifying feature as it showed that lack of privacy was not an impediment and fear of detection not a deterrent. It was also viewed as particularly probative to rebut the suggestion that lack of privacy made it unlikely that the appellant would have engaged in the acts alleged which was a live issue in the trial.

[60] In *B(R),* the accused was charged with sexual offences relating to four complainants. The accused ran a foster home for adolescent boys. Each of the complainants were in his care and between 12 and 18 years old when the alleged abuse occurred. In each case, the alleged abuse began when a complainant was particularly vulnerable because of injury, illness or inebriation. The court of appeal ruled that the trial judge did not err in admitting the similar act evidence

across counts as it was relevant to the accused's specific propensity to engage in sexual misconduct with boys in his care who came to him in a vulnerable condition.

[61] In *Keats*, the accused, a paramedic, was charged with sexual assault of five women alleged to have occurred while they were under his care. In admitting the similar act evidence for four of the complainants, Justice Cacchione found there was proximity in time, similarity in detail (the incidents occurred in the ambulance when the accused was alone with each complainant, the acts included fondling of the breasts or vaginal area or both, all the incidents were brief), and the complainants were all women in a health crisis who had contact with the accused in his capacity as a health care worker.

[62] In each of these cases, the court found distinctive unifying features or a distinctive pattern.

[63] The Crown argued that the underlying unity here lies in the surrounding circumstances – the accused's position of authority *vis-a-vis* the complainants and touching or attempting to touch the genitals without any preliminary contact or conversation - and in the pattern of victimizing much younger men, who were alone with him and under his influence or power.

[64] Many of the similarities relied on by the Crown in this case are too generic to be probative. All complainants are male, all were between the ages of 18 and 21 when the alleged activity occurred, all were or were about to be students in the King's College foundation year program, Mr. Hankey was the founder and director of that program, and was also a professor, tutor, and residence don at King's College. However, I infer that he held similar roles for most of the 11 year period covered by these allegations. As a don, professor, or tutor he would have come into contact with hundreds if not thousands of male students in that age group. The complainant's age, status and the age and position of the accused in relation to each of them are similar but they are not distinct.

[65] The fact that the allegations occurred or were commenced on campus is of little significance given the issues in question and given that Mr. Hankey lived and worked on campus. Any potential significance to this similarity would be as part of the general power imbalance in that the allegations occurred in locations where Mr. Hankey was comfortable and had a position of power and authority.

[66] Courts have cautioned against relying on generic similarities to admit similar act evidence. For example, in In *R. v. R.B.*, [2003] O.J. No. 4589 (CA), Affirmed, 2004 SCC 69), the accused was charged with sexual assault and evidence was admitted from two similar act witnesses. The majority of the Court of Appeal (upheld by the Supreme Court of Canada) concluded that the trial judge had erred in relying primarily on generic similarities that would likely be present in most incidents of sexual touching involving children. Simmons, J.A., writing for the majority, said that the similarities noted by the trial judge were of "non-specific conduct" and lacked detail. They included: the children had been under 10 years old; the incidents involved genital touching; the incidents occurred in private; and the accused told two of the children that he was sorry and it would not happen again.

[67] The court in *R. B.* also cautioned that relying on generic similarities could mask important underlying dissimilarities.

[68] Of course, it is equally important not to make the focus too narrow. As was said in *Shearing*, at para. 60:

> [t]he judge's task is not to add up similarities and dissimilarities and then, like an accountant, derive a net balance. At microscopic levels of detail, dissimilarities can always be exaggerated and multiplied. This may result in distortion. At an excessively macroscopic level of generality, on the other hand, the drawing of similarities may be too facile. Where to draw the balance is a matter of judgment".

[69] The task was described by Laskin, J.A. in *Gilbert* as "qualitative not quantitative" (para. 70).

[70] In the case before me, there are some important dissimilarities in the relationships, the context and details of the alleged conduct.

[71] The differences in the relationships become more significant given the specific issues that will be important in this trial. For AB, at the time of the initial touching, a significant feature of his relationship with the accused was their long prior relationship which was the result of his family friendship. That is the context in which the accused initially had the opportunity to be alone with him and the context of the initial touching. They then continued sexual activity over a lengthy period. At trial, the Crown will no doubt argue that any apparent consent to the ongoing activity was coerced or otherwise invalid because the accused was in an emotional and professional position of authority and may have actually exerted

influence over him. In contrast, for CD and EF, at the time of the alleged touching, they barely knew each other, there was no emotional relationship and their only relationship was through school. For them, the alleged facts don't suggest coerced consent or, despite that he was in a position of influence, that he actually exerted any influence over them.

[72] There are also differences in the context and details of the alleged touching. In each case the alleged conduct occurred when the complainant was alone with the accused and involves touching or attempted touching of the genitals with no preliminary sexual contact or communication about physical contact. However the broader context and the details of the touching are very different. For AB, the touching was preceded by a long friendship which I infer would have included previous opportunities to be alone and was immediately preceded by swimming and horseplay. In contrast, the evidence suggests that for CD and EF, the touching occurred very near the first time, if not the first time, they were alone. For CD, the alleged touching was not a direct touching of the genitals but rather what could be described as exploratory, tentative touching or a sly attempt. Whereas, for EF, the alleged touching was preceded by Mr. Hankey jumping on his bed and straddling him, and then groping of the buttocks and genitals in a direct and assertive manner.

[73] Further, as I have said, with AB, the alleged sexual touching progressed over a period of months beyond mere touching and then resumed after a break while Mr. Hankey was out of the country. For CD and EF, the allegations involve a single incident of touching or attempted touching.

[74] This is not a situation where the alleged pattern of conduct gains strength in the sheer number of instances that compose it. AB will testify to numerous incidents that evolved over time to include other sexual activity. CD and EF will each allege one touch or attempt.

[75] In my view, there are generic similarities but I am not able to find any distinctive features unifying the incidents. In fact, in many respects, as discussed above, there are distinctive features that are dissimilar.

[76] As I said earlier, the premise of the admissibility of similar facts is the unlikelihood that the similar facts could be explained by a coincidence. There is no distinctive pattern here or distinctive similarity of circumstances that would allow me to find an "implausibility of coincidence" (*Arp*, at para. 45).

[77] The evidence may show a generic propensity but does not show a specific propensity. As such it would have little probative value.

[78] Assessing the viability of the Crown's similar fact application, requires consideration of the probative value of the proposed evidence against potential prejudice. As I previously noted, the potential for prejudice is significantly reduced in a cross-count similar fact application in a judge-alone trial (*R. B(RT,)* 2009 ONCA 177], at para 27; and, *R. v. J.H.* 2018 ONCA 245, paras. 23 – 24).

[79] However, even with that significantly reduced prejudice, given the low probative value of the similar act evidence in this case, I have concluded that, based on the information before me at this stage, the Crown's cross-count similar fact application is unlikely to succeed so is not viable.

[80] As such, this factor would not favour a joint trial.

Factors 8, 9 & 10 – the length of the trial having regard to the evidence to be called, the potential prejudice to the accused's right to be tried within a reasonable period of time, and the existence of antagonistic defences

[81] The Crown and Defence agree that these factors are either neutral or not applicable so have no bearing on the determination of the application.

Balancing

[82] I am satisfied that the interests of justice require that the counts involving CD be severed from those involving AB. In reaching that conclusion, I am particularly influenced by the objectively justified desire of the accused to testify on the counts involving AB and not on the counts involving CD. The right of the accused to control his defence is an important one. Given my conclusion that the Crown's similar fact application is not viable, there is no similarly important factor that would support a joint trial.

Elizabeth Buckle, JPC