SUPREME COURT OF NOVA SCOTIA
Citation: R v. K. P., 2010 NSSC 185

Date: 20100504
Docket: Syd 321250
Registry: Sydney

Between:

Her Majesty the Queen

v.

K. P.

Editorial Notice

Identifying information has been removed from this electronic version of the judgment. The four complainants have been replaced with A, B,C and D to protect their identities.

Restriction on publication:	Section 486.4 Identification of Complainants
Judge:	The Honourable Justice Frank Edwards
Heard:	April 7, 2010, in Sydney, Nova Scotia
Counsel:	Kathryn Pentz, Q.C, for the Crown Tony Mozvik, for the Accused

By the Court:

[1] ***Introduction:*** This is a motion for severance of counts in an indictment. The Accused, K. G. P., is charged with seven counts of sexually based offences contrary to the Criminal Code arranging in date from 1984 until July 9, 2005. There are four complainants. The four complainants; A; B; C; and D.

[2] All of the above are relatives of Mr. P. by marriage. Each alleges that, to various degrees, Mr. P. made sexual advances towards them over the course of their teenage years. All four are now adults.

[3] A seven count Information was sworn in this matter on October 3, 2008. A Preliminary Hearing was held on June 29, 2008 and the present matter is set for trial in Supreme Court from November 1 to November 12, 2010.

[4] The Accused makes application to have the seven count Indictment severed as follows:

1. Counts 1, 2 and 3 be tried together (A & B);
2. Counts 4, 5 and 6 be tried together (C); and
3. Count 7 to be tried separately (D).

[5] ***Facts: (as outlined in Defence Counsel's brief and as agreed by Crown Counsel)***

[6] ***D.:*** The oldest complainant is D. whose date of birth is August *, 1972. She alleges she was sexually assaulted by Mr. P. in or about 1985. The charge relating to her reads as follows:

> Count 7: AND FURTHER between August 27, 1984 and August 28, 1986, at or near Sydney, Nova Scotia, did commit a sexual assault on D, contrary to Section 246.1 of the Criminal Code.

[7] Mr. P. is married to V. P., the sister of D. It is anticipated, evidence will reveal V. P. and D were once close sisters, with D frequently visiting the home of her sister and Mr. P.. V. is a much older sister to D and often acted as a "mother figure" to her.

[8] The essence of D's allegations indicate that when she was approximately 12 to 13 years of age she stayed at Mr. P.' home while V. and her parents went to * on a trip. While she was at Mr. P.' residence, D alleges Mr. P. allowed her boyfriend,

W. D., to come over and visit with her alone. After the visit, Mr. P. returned home and both of them went to separate beds.

[9] The next thing D recalls is she woke up and found the Defendant kneeling or bending over the side of her bed. She will indicate Mr. P. put his hands near her vagina on the outside and inside of her pyjamas bottoms but not on the inside of her underwear. She further will state Mr. P. was indicating he saw her and Mr. D. earlier in the night and said he would not tell on them if he got "some".

[10] D indicates she told her parents about this event but they did not believe her and therefore she did not do anything about the matter.

[11] ***C.:*** C is the daughter of D. Her date of birth is July *, 1991. C alleges she was touched inappropriately by Mr. P. between September 1, 2003 and July 9, 2005. The relevant counts are as follows:

> Count 4: AND FURTHER did between July 9, 2003 and July 9, 2006, at or near *, Nova Scotia, did commit a sexual assault on C contrary to Section 271 of the Criminal Code;
>
> Count 5: AND FURTHER did between September 1, 2003, and July 9, 2005, at or near *, Nova Scotia, did for a sexual purpose touch C, a person under the age

of 14 years directly with a part of his body, to wit: his hand and indirectly with an object, to wit shaving cream contrary to Section 151 of the Criminal Code;

Count 6: AND FURTHER did between September 1, 2003, and July 9, 2005, at or near *, Nova Scotia, did being in a position of trust or authority towards A. M., did for a sexual purpose, touch directly the body of C, a young person, with an object, to wit: placed shaving cream on C's breasts and vagina and touch C's breasts with his hand contrary to Section 153(a) of the Criminal Code.

[12] Unlike all of the other complainants in this matter, C alleges a number of sexual assaults occurred during a two-year period. It is anticipated that C will allege the following:

1. Mr. P. brought liquor for her frequently.

2. Mr. P. on one occasion asked to see her vagina in exchange for alcohol. When he did so, he tugged on her pants and pulled her pants down but not her panties.

3. In Grade 8, C wished to purchase a tattoo. It is alleged Mr. P. touched her breast in exchange for money for the tattoo.

4. When C resided at the *, Mr. P. stopped by one day when she was home by herself and tried to touch her breasts. She estimates she was in either Grade 7 or 8.

5. One night she was at Mr. P.' home in * getting ready for a dance. C indicates Mr. P. touched her breast while she sat on his lap. She indicated she was 13 or 14 at the time.

6. C also indicates on another occasion when she stayed at Mr. P.' home she played caps with him and every time he would knock the cap off her bottle he would squirt shaving cream down her pyjamas. As well on the same night she alleges he jumped out of a room and exposed himself to her. She estimates that she was in Grade 7 when this occurred.

7. C also alleges she was driving with Mr. P. on a highway when she asked him for a pack of cigarettes. In response, he grabbed her breast at this time. She believes she was in Grade 8 or 9 at the time.

8. C alleges that on the * Highway, Mr. P. propositioned her for oral sex. In doing so, it is alleged Mr. P. grabbed her head and pushed it towards his crotch area.

[13] ***A.:*** A is the niece of K. P. by marriage. Mr. P. is married to her father's sister. Her date of birth is September *, 1982.

[14] The relevant charges relating to A are as follows:

Count 1: Between September 11, 1998 and September 12, 1999, at or near *, Nova Scotia, did being in a position of trust or authority towards A did for a sexual purpose, touch directly the body of A, a young person, with an object to wit: placed shaving cream on A's breasts and vagina contrary to Section 153(a) of the Criminal Code;

Count 2: AND FURTHER did between September 11, 2000 and September 12, 2001, at or near *, Nova Scotia, did commit a sexual assault on A contrary to Section 271 of the Criminal Code.

[15] A alleges on two occasions she was sexually assaulted by Mr. P.. She indicates she told her parents she was going to babysit Mr. P.' son, D., but D. was not present when she attended at Mr. P.' home. She admits she knew D. was away prior to going to Mr. P.' home.

[16] While at the residence of Mr. P., she drank rum and coke and played a caps game with the Accused. Basically, when Mr. P. flicked a cap off her bottle he would squirt shaving cream down her shirt. She describes herself as being extremely drunk and went into D.'s bed and went to sleep afterwards. This is alleged to have happened in 1998.

[17] The second incident involving A allegedly occurred when she was either 17 or 18. On this occasion she alleges she was looking to purchase a vehicle. She enlisted the help of Mr. P. and they went to Sydney to look at a variety of cars. As they returned to his home in the * area he asked her to go by his street and pull up on the next street in order for him to "piss". She describes the road as a dirt road and indicates he did get out to relieve himself. Upon returning to the car, she alleges he brought up the fact she owed him money for repairs to her car. She

indicates Mr. P. said she could pay him back in other ways and pulled her head toward his crotch area. Additionally, she will contend he reached into her shirt and grabbed her left breast under the bra. This is suggested to have happened in the year 2000.

[18] ***B:*** B is the final complainant. Her date of birth is March *, 1985. The charge relevant to her as follows:

> Count 3: AND FURTHER did between June 20, 2000, and September 22, 2000, near *, Nova Scotia, did being in a position of trust or authority towards B did, for a sexual purpose, touch directly the body of L. M., a young person, with an object to wit: placed whipped cream on B's breasts and vagina and placed B.'s head on his crotch contrary to Section 153(a) of the Criminal Code.

[19] B alleges when she was 15 she went to Mr. P.' home to drink rum and coke. She indicates she told her parents she would be babysitting D. but was lying about the incident as she knew both Mr. P.' wife and son were away at the time.

[20] B indicates she was very intoxicated and was drinking rum and coke and playing the game of caps with the Accused. She indicates every time Mr. P. would

knock a cap off her drink she would be squired with whipped cream. This whipped cream was squirted down her shirt and pants.

[21] Following the game of caps, she went to have a shower. She says she immediately got sick after the shower and then came out and laid on the lap of Mr. P.. Mr. P. asked her some sexual questions but there was no touching.

[22] B freely admits she consented to the activities involving Mr. P. on that occasion.

[23] ***The Law:*** As noted, the Accused asks the Court to consider severing the counts into three separate trials:

(1) D;

(2) A & B together; and

(3) C

[24] The relevant section of the Criminal Code is Section 591 and in particular, Section 591(3)(a). This Section reads as follows:

> (3) The court may, where it is satisfied that the interests of justice so require, order

> (a) That the Accused or defendant be tried separately on one or more of the counts;

[25] The most recent case dealing with this issue is ***R v. Last*** 2009 SCC 45, J.E. 2009-1893, 69 C.R. (6th) 1, 247 C.C.C (3d) 449, 311 D.L.R. (4th) 193, 394 N.R. 78, 2009 CarswellOnt 6137. In this case, the Appellant was charged in one indictment with counts relating to two separate incidents involving serious sexual assaults on two different victims. The appropriate legal test for severance of accounts was dealt with by Justice Deschamps of the Supreme Court of Canada at paragraphs 16-18:

> 16 ***The ultimate question faced by a trial judge in deciding whether to grant a severance application is whether severance is required in the interests of justice, as per s. 591(3) of the Code. The interests of justice encompass the accused's right to be tried on the evidence admissible against him, as well as society's interest in seeing that justice is done in a reasonably efficient and cost-effective manner. The obvious risk when counts are tried together is that the evidence admissible on one count will influence the verdict on an unrelated count.***
>
> 17 Courts have given shape to the broad criteria established in s. 591(3) and have identified factors that can be weighed when deciding whether to sever or not. The weighing exercise ensures ***that a reasonable balance is struck between the risk of prejudice to the accused and the public interest in a single trial***. It is important to recall that the interests of justice often call for a joint trial. *Litchfield*, where the Crown was prevented from arguing the case properly because of an unjudicial severance order, is but one such example. Severance can impair not only efficiency but the truth-seeking function of the trial.

> 18 The factors identified by the courts are not exhaustive. They simply help capture how the interests of justice may be served in a particular case, avoiding an injustice. ***Factors courts rightly use include: the general prejudice to the accused; the legal and factual nexus between the counts; the complexity of the evidence; whether the accused intends to testify on one count but not another; the possibility of inconsistent verdicts; the desire to avoid a multiplicity of proceedings; the use of similar fact evidence at trial; the length of the trial having regard to the evidence to be called; the potential prejudice to the accused with respect to the right to be tried within a reasonable time;*** and the existence of antagonistic defences as between co-accused persons: *R. v. E. (L.)* (1994), 94 C.C.C. (3d) 228 (Ont. C.A.), at p. 238; *R. v. Cross* (1996), 112 C.C.C. (3d) 410 (Que. C.A.), at p. 419; *R. v. Cuthbert* (1996), 106 C.C.C. (3d) 28 (B.C.C.A.), at para. 9, aff'd [1997] 1 S.C.R. 8 (sub nom. *R. v. C.* (D.A.)). (Emphasis added).

[26] ***Accused Testifying:*** The test as mentioned in ***Last*** is a threshold determination by the Court. In doing so, the Court considered the Accused's expression or intention to testify with both a subjective and objective review. Justice Dechamps explains at paragraph 25 and 26:

> 25 **In assessing the accused's testimonial intention on a severance application the underlying concern is for the accused's ability to control his defence, and, more specifically, his right to decide whether or not to testify with respect to each of the counts unimpaired by inappropriate constraints.**
>
> 26 Both the Crown and the defence submit that the accused's intention should be objectively justifiable. This requirement is, indeed, a threshold. The accused's expression should have both a subjective and an objective component. However, while a

> formulaic expression of a subjective intention is not sufficient in and of itself to discharge the accused's burden to have the counts severed, the trial judge should not substitute his or her own view for that of the accused and determine that the accused should testify or not. ***Rather, the trial judge must simply satisfy him- or herself that the circumstances objectively establish a rationale for testifying on some counts but not others. The burden on the accused is to provide the trial judge with sufficient information to convey that, objectively, there is substance to his testimonial intention. The information could consist of the type of potential defences open to the accused or the nature of his testimony: Cross, at p. 421. However, the accused is not bound by his stated intention; he remains free to control his defence, as the case unfolds, in a manner he deems appropriate.*** (Emphasis added)

[27] Defence Counsel in his brief submitted the following:

[28] Clearly, if all matters are tried together, the Accused would have to make a calculated decision as to whether he was going to testify on all matters since he would not be able to select which matter he would testify in. At this stage of the process it is difficult to completely determine whether the Accused will be testifying in all or any of the matters involving the complainants. That said, there are some strong likelihoods and reasoned approaches that one may consider at this juncture. Each complainant will be dealt with separately.

[29] At present, it is not likely the Accused will testify in the matters involving D. The charges involving D are by far the most dated with the alleged incident happening in or about 1985. As well, the manner in which the evidence came out both in her statement as well as during the preliminary inquiry leaves one to speculate that the memory of the event could be confused with a dream or some other event she may have experienced at the age of 12 or 13.

[30] In addition to the above, it is anticipated there will be third party evidence which will create significant questions on her credibility. At present, we are not certain if we should be revealing this matter and do not anticipate in doing so. That said, if the Court wishes specifics, we are prepared to provide the same.

[31] Finally, the manner in which D became a complainant in this matter is also of concern to the Defence and Mr. P.' decision to testify. D only came forward with these allegations of inappropriate touching after her boyfriend, S. P., was charged and convicted of assaulting Mr. P.. Prior to this occasion, D spent a great deal of time at the residence of V. and K. P. and allowed her daughter, C (one of the complainants) to stay frequently at the defendant's home on a regular basis both during the day and over night.

[32] Given all of the above, at present, it is very unlikely that the Accused would take the stand in this matter. That said, a final decision can only be made after the complainant has testified.

[33] ***A and B***: A and B are both sisters and nieces of the Accused by marriage. It is a strong likelihood the Accused will testify in these matters as the issue of "position of trust" is crucial to the charges involving both of them. In fact, it is particularly crucial for B as Mr. P. has not been charged with sexual assault on B, but only breaching a position of trust.

[34] B, in the preliminary inquiry, admitted she consented to the activities allegedly involving Mr. P. at his home. As such, given her age and her admission, the Crown has only proceeded with the charge of Mr. P. breaching his position of trust. It is anticipated the Defence will raise significant issues with respect to whether Mr. P. was in a position of trust with B.

[35] It is true the Accused is the uncle of the complainants by marriage. However, it is anticipated that he and others will give evidence their relationship

was remote or distant at best. In addition, there will be evidence he did not exercise any control or dominance over these girls and they freely went to his home misrepresenting to their parents why they were going and what they would be doing. In addition, they were free to leave at any time and willingly and fully participated in the events in question.

[36] Given the above, there is both a subjective and objective reality to the Defendant testifying in this matter.

[37] ***C:*** C is by far the most recent allegation involving Mr. P.. She is also the complainant who alleges significantly more occurrences than the other complainants.

[38] At present, the Accused is uncertain as to whether he will testify in this matter. This decision will likely not be made until C gives testimony during the trial.

[39] ***Nexus Between the Matters:*** The legal and/or factual nexus between the counts is also considered when deciding whether to exercise judicial discretion to

severe counts in an indictment. Some of the circumstances Courts typically look to within this part of the test are the timing of the events, the place where the events occurred as well as the nature of the allegations.

[40] In ***Last,*** the Supreme Court of Canada was faced with a situation in which two serious events occurred within one month of one another in London, Ontario. It involved different complainants in spite of the charges being very similar in nature.

[41] Dechamps, J. ruled that the nexus in this matter was “extremely thin”. He states at paragraph 32:

> 32 I agree with the dissenting judge that the factual and legal nexus between the two sets of counts is extremely thin. The fact that the two incidents occurred in London approximately one month apart is of very limited significance in this case. This was the city where Mr. Last resided and worked. The attacks on the women were not closely connected in any meaningful way. 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. The circumstances surrounding the charges were not sufficiently similar in character to have supported a similar fact evidence application.

> Accordingly, there was no truth-seeking interest in trying the counts together.

[42] Defence Counsel submits that the matters involving C are sufficiently distant from the others that severance is required. C's matter is alleged to have occurred in or about 1985 while the others range between 1998 and 2003. Likewise, C's allegation is significantly different than the matters involving B and A in that it did not involve alcohol and is alleged to have happened while she was sleeping as opposed to actively engaged in some type of activity with the Accused.

[43] As stated by Justice Deschamps above, the Trier of fact would obviously not need to know about the matters involving D in order to understand the issues involving B and A. Finally, there would be no reasonable prospect of similar fact evidence from her matter applying to the other three in question.

[44] ***Risk of Prejudice to the Accused:*** There are two issues of prejudice that Courts are often concerned with when dealing with multiple counts involving the same Accused. The first, cross pollination on credibility assessments, is simply when you have two complainants alleging similar events you risk the possibility one complainant would bolster the credibility of the other complainant. This is

clearly a problem Courts have to be concerned about when a jury is in place such as the present matter when there are multiple complainants.

[45] The second concern under this part of the test is what is commonly referred to as prohibited propensity reasoning. Generally speaking, Courts are concerned when the Crown proves beyond a reasonable doubt allegations by one complainant there is a tendency the jury might infer the Accused is the kind of person to commit similar acts and therefore convict him on other matters relating to separate complainants. More directly, the jury could ignore relevant evidence which creates reasonable doubt in favour of the Defendant in favour of simple "guilt by association".

[46] Courts in Nova Scotia have been sensitive to this issue. In ***R. v. Regan***, 174 N.S.R. (2d) 268, 532 A.P.R. 268, [1998] N.S.J. No. 322, 1998 Carswell NS 393 Associate Chief Justice MacDonald, as he then was, dealt with an application by the Defendant to severe a multi-count information against him. The charges in this matter involved serious sexual assaults and there were four complainants. The Defence conceded two of the matters should be tried together while the remaining matters involving the two complainants should be tried separately.

[47] The Court reviewed the legal tests at the time and determined one of the counts should be severed as a result of the potential risk of prejudice to the Accused. MacDonald, A.C.J. states at paragraphs 21, 22 and 23:

> 21 In reaching this conclusion, I accept the Crown's submission that evidence of the JLM\M(W)R allegations would serve to bolster Ms. JO's credibility in the circumstances and to that extent it would have some probative value. For example, these allegations all have common characteristics in that they involve assaults on young females by an individual in a position of relative power; all occurring suddenly, without warning, in the Accused's motor vehicle.
>
> 22 However, the prejudicial effect of this evidence would be enormous. It would greatly outweigh any probative value. I have reached this conclusion by applying the guidelines for assessing prejudice set out by Charron, J. in *B (F.F.)* supra. These (JLM\M(W)R) allegations are extremely discreditable and repugnant. Although all allegations of sexual assault are serious, they are much more serious than Ms. JO's allegations. They would go a long way to supporting an inference of guilt based solely on bad character. Furthermore, they go back over forty years, thereby making them difficult to respond to.
>
> 23 Secondly, this is not the kind of prejudice that can be cured by jury instructions, however carefully they may be worded. I say this because the JLM\M(W)R allegations are so much more serious and so much more repugnant. I realize that jurors take their oaths very seriously and will faithfully follow the judge's instructions. However, the inference of finding guilt based solely on bad character as a result of these earlier repugnant allegations, is just too much to ask of any jury. This is particularly so when one considers the potential list of admissible similar act evidence used to support the

> JLM/M(W)R charges. It is simply too risky to leave with a jury. In reaching this conclusion, I am aware that the interests of justice involve much more than the Accused's interests. There are compelling reasons to avoid a multiplicity of proceedings and to protect the interests of the alleged victims. These complainants should not have to wait more than is absolutely necessary and they should not have to testify any more than is absolutely necessary. However, for the reasons stated, I nonetheless feel compelled to sever this count.

[48] Defence Counsel argues that the allegations in question involving all four complainants have the prospect of creating a cross-pollination on credibility as well as the jury engaging in prohibited propensity reasoning. Under this indicia, however, the most concerning for the Defence is the matter involving C.

[49] C has alleged approximately seven matters which involve inappropriate touching of her body. While these matters are all similar in nature, the concern is they go far beyond the matters involving the other complainants.

[50] Of particular concern, however, for the Defence in this matter is her allegation of playing caps and having shaving cream placed down her pyjamas at the home of Mr. P., as well as the oral sex/car incident. The Defence is concerned the jury might believe this matter because the evidence is somewhat similar to what is anticipated from B and A and convict on all allegations.

[51] Moreover, Defence Counsel submits that C poses some significant challenges for the Crown. The Accused was provided with mental health records from the * involving C. She has been diagnosed with significant anxiety and depression which according to the physician notes provides loss of memory. This is obviously something the Defence will want to challenge without the burden of having the jury comparing her story to A and B.

[52] In addition, C also was a difficult witness at the Preliminary Hearing. Unlike A and B, she was withdrawn in her testimony and sometimes vague in recollection of events. Again, the Defence would be significantly prejudice in the event this anticipated testimony is allowed to be bolstered by the matters involving B and A.

[53] This case will be predominantly based on the credibility of Mr. P. and the four complainants. Since there is no expert evidence or physical evidence to rely upon, this is a classic "he said/she said" scenario. With this type of case the prospect of cross pollination on credibility assessments is high and obviously, the concern of a jury engaging in prohibited propensity reasoning is equally

problematic. What the Defence worries about is the jury might follow the old logic of "where there is smoke there is fire" and convict Mr. P. on the basis that four individuals cannot be making this up. Issues relating to her credibility may be ignored.

[54] Each matter is separate in time and there would not be a requirement of having one complainant testify in another complainant's trial. In short, there would be no necessity to have the complainants give evidence in the same matter other than to have each of them increase the credibility of the others in front of the jury.

[55] ***Administration of Justice:*** It is respectfully submitted, as stated previously, one case is not related to another and all have occurred at separate times and as separate events. One complainant would not have to be called in another complainant's case other than if the matters were tried jointly. In addition, there does not appear to be any requirement for other witnesses to testify at multiple trials as the allegations themselves are one on one situations.

[56] There are no expert witnesses, nor are there any key witnesses that would be central to all four matters. As such, there would be a minimal benefit to the Administration of Justice by having the matters tried jointly.

[57] A similar matter was dealt with in ***R. v. R.J.K.***, 1996 CanLII 7057 (SK Q.B.). In this case there were four complainants and 11 counts. The Court faced an Application by Defence asking for three counts to be severed from the information. While the details are not extensive in the Decision, the reasoning is very similar to what is presently being put before this Court.

[58] Dawson J. agrees with the Defence requests and states the following conclusion at page 2 and 3 of the Decision:

> The Crown alleges a series of sexual assaults on four complainants over a period of several years. The alleged assailant in each case is the accused. Most of the alleged incidents took place at the home of the accused's parents. However many took place at other locations. The modus operandi alleged by the Crown in some of the incidents is similar. However not all counts allege a similar modus operandi. But even with respect to the counts in which the modus operandi is similar, the particulars of the individual assaults attested to by the various complainants do not tend to demonstrate a similar pattern. The Crown is not intending or alleging that evidence on one count may constitute similar fact evidence admissible on other counts. There appears to be no real factual or legal nexus between the last three counts in the

indictment and the preceding counts. Further the Crown does not intend to call any complainant on one count as a witness against the accused on a count involving a different complainant. If the counts are severed as requested by the accused, none of the complainants will be required to testify more than once.

The accused has given an indication that he intends to testify on some of the counts and not on others. Credibility will undoubtedly be a major issue in this case. Where an accused indicates that he intends to testify in respect of some, but not all counts against him, severance may be granted. See R. v. McClory (1981), 60 C.C.C. (2d) 91 (Ont. Prov. Ct.).

In this case, the potential prejudice to the accused if severance is not granted, is that the evidence relating to some of the incidents charged in counts 1 to 8, might be improperly considered on the incidents charged in counts 9 to 11. In somewhat similar fashion, there is a risk that the cumulative effect of the evidence on several counts might be improperly relied on by the Court to indicate a propensity on the part of the accused to commit sexual offences. Indeed, if severance is granted, the accused will still be tried on two multi-count indictments.

I am satisfied that the accused's right to a fair trial will be infringed if the counts are not severed as requested. The accused has a right in law to separate trials only if the interests of justice require it. In other words, the potential threat to the fairness of the accused's trial if severance is not granted, must outweigh the other legal considerations involved in conducting multiple trials of the accused. I am satisfied on a balance of probabilities, that the interests of justice require a severance and a separate trial. The application is allowed.

[59] ***Crown's Position:*** In its brief, the Crown responded to Defence Counsel's submissions as follows:

[60] In ***R. v. McNamara*** (No 1) (1981), 56 C.C.C. (2d) 193 the Ontario Court of Appeal held that in an application for severance, the onus of proof is on the applicant on a balance of probabilities. Courts have also recognized the broad discretion conferred on the trial judge with respect to the decision to sever. In ***R. v. Last*** [2009] SCJ No 45 the court stated as follows at paragraph 14:

> It is noteworthy that, save for murder, s. 591(1) of the Code places no restrictions on the number of counts that can be tried together on a single indictment. Under s. 591(3)(a), however, a court may order that the accused be tried separately on one or more of the counts "where it is satisfied that the interests of justice so require". As noted by this Court in *R. v. Litchfield*, [1993] 4 S.C.R. 333, the absence of specific guidelines for granting severance requires that deference be afforded to a trial judge's ruling to the extent that he or she acts judicially and the ruling does not result in an injustice:
>
> > The criteria for when a count should be divided or a severance granted are contained in ss. 590(3) and 591(3) of the Code. These criteria are very broad: the court must be satisfied that the ends or interests of justice require the order in question. Therefore, in the absence of stricter guidelines, making an order for the division or severance of counts requires the exercise of a great deal of discretion on the part of the issuing judge. The decisions of provincial appellate courts have held, and I [page155] agree, that ***an appellate court should not interfere with the issuing judge's exercise of discretion unless it is***

> ***shown that the issuing judge acted unjudicially or that the ruling resulted in an injustice***. [Emphasis added; pp. 353-54.]

[61] The court in ***Last*** then reviewed the factors to be considered by a court in deciding whether to sever or not. The court noted the necessity to weigh the risk of prejudice to the accused and the public interest in a single trial concluding at the end of paragraph 18 that "Severance can impair not on efficiency but the truth-seeking function of the trial."

[62] The factors identified by the Supreme Court in Last were noted not to be exhaustive but included the following:

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 fact 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.

[63] The Crown submits that factors number 3 and 5 are not applicable to the severance application before the court. The evidence and issues in relation to the allegations are not complex; there is no issue with respect to inconsistent verdicts as between complainants; and as there are no co-accused the court need not to be concerned with antagonistic defences.

[64] ***Legal and Factual Nexus Between the Counts:*** In ***R. v. RWD*** [2004] O.J. 3091 the Ontario Superior Court of Justice denied an application for severance. In considering the factual and legal nexus between the counts the court held at paragraph 50, that the following factors demonstrated an indicia of an interrelationship:

> (1) victims who share similar qualities or who are of a readily identifiable group;
> (2) a relationship between the accused and the victims;
> (3) a temporal proximity with respect to the commission of the offences;
> (4) similarity in the manner by which the offences are committed;
> (5) the extent to which facts are shared between counts, and
> (6) the extent to which facts on one count corroborate facts in another count.

[65] The Crown submits that there is a strong nexus between the counts involving A, B and C. All three were nieces of the Accused, all three testified to the Accused supplying them with liquor; all three testified to an incident occurring at the

Accused's residence when he provided them with liquor and played "caps", all three were of similar age when the incidents occurred.

[66] In relation to A and C there are added similarities in the description of incidents where the Accused sought sexual favours in exchange for helping them out. In relation to A the sexual favours were suggested in response to money allegedly owed; in relation to C the incidents occurred when she requested money for various times. The incidents described by A and C involve a similar nature of contact in the Accused grabbing them by the breasts and attempting to put their heads in his crotch area.

[67] The Crown concedes that the nexus is somewhat more tenuous in relation to D however submits that the nature of the relationship and "*quid pro quo*" aspect to the sexual assault are similar. Just as the Accused was the uncle to whom A, B and C turned to provide them with illicit liquor, he was also the man who permitted D to engage in a relationship that had been prohibited by her parents. He was the adult who helped them break the rules. Then knowing her secret, the Accused allegedly used this information to secure sexual favours.

[68] ***Accused's Desire to Testify in Relation to Some Counts but Not Others:*** In ***R.v. Steele*** [2006] 206 CCC (3d) 327 (BCCA), the accused appealed on various grounds including the refusal of the trial judge to sever the counts against him, claiming that he wished to testify on some counts but not others. In the ***Steele*** decision, the issue upon which the accused potentially desired to testify was to explain how his fingerprint came to be found at the crime scene. The accused, along with others, were charged with offences from two separate dates, nine days apart. During the first incident, the accused's fingerprints were found at the scene however no fingerprints were found on the second occasion. Clearly an explanation for the presence of his fingerprint would be called for and likely could only be provided by the accused.

[69] The Court considered the various factors applicable to a severance application and concluded that the only criteria met was the accused's assertion that he desired to testify on the charge where his fingerprint was found at the scene but would not likely testify on the others. The court ruled that factor was not in and of itself sufficient to justify severance. At paragraph 15 of the decision Justice Huddart stated as follows:

> 15 On the record I can find no injustice in the trial judge's decision. While the expression by counsel of a defendant's

> desire to testify is a factor to be given substantial weight, as the trial judge recognized, that expression of desire in and of itself will not always outweigh all the other factors when a trial judge comes to decide what is in the interests of justice. Much will depend on the prejudice to the accused.

[70] What then is the prejudice to the Accused ? Defence has submitted that the Accused will not likely testify in relation to the allegations concerning D but will likely testify in relation to the issue of being in a position of trust in relation to A and B. The Defence further suggests that the Accused is uncertain as to whether he will testify in relation to C. Yet the Accused is alleged to be in a position of trust for all three and to have occupied a similar relationship to them. If the aspect of being in a position of trust is a live issue upon which the Accused desires to testify, then one questions why he would "likely" testify on two of them and not on the third.

[71] Further, as noted at page 18 of the Accused's brief, it is the Accused and "others" who will give evidence that his relationship with his nieces was remote or distant. If, indeed, there are "others" who can testify to this fact then the Accused is not put in a position of being forced to testify - the evidence in question can be adduced through other means.

[72] ***Use of Similar Fact Evidence at Trial:*** In assessing whether or not to grant severance the court must consider whether or not the severed counts will be adduced as similar fact evidence. Obviously, if the evidence will be tendered as similar fact then there is little merit in severing the counts. In the case at bar, it is the intention of the Crown to make a similar fact application.

[73] The first step in the analysis of whether similar facts evidence should be permitted in a determination as to whether or not there is a collusion on behalf of the complainants. The Crown submits that although the complainants readily admitted to discussing the proceedings, that there was no evidence of any collusion or contamination of the complainants evidence presented during the preliminary.

[74] Upon satisfying the court that there has been no collusion, the Crown must then identify the issue to which the issue has relevance. The onus is on the Crown to establish on the balance of probabilities that the probative value of the similar fact evidence outweighs the prejudicial effect.

[75] In ***R. v. B.(C.R.)*** [1990] 55 C.C.C. (3d) 1 (S.C.C.); the Supreme Court of Canada ruled that similar fact evidence may be admitted as corroboration where

the issue at trial is the credibility of the complainant. The Crown submits that the issue of credibility will the focus at trial and that the similar fact evidence sought to be adduced is relevant to corroborate the testimony of the complainants.

[76] In ***R. v. Handy*** [2002] 2 SCR 908, the Supreme Court of Canada commented on the need to establish the connecting factors between the similar acts alleged. At paragraph 81 of the decision the court held as follows:

> The decided cases suggest the need to pay close attention to similarities in character, proximity in time and frequency of occurrence. Wigmore put it this way:
>
> > Since it is the improbability of a like result being repeated by mere chance that carried probative weight, the essence of this probative effect is the likeness of the instance... .
> >
> > It is just this requirement of similarity which leaves so much room for difference of opinion, and accounts for the bewildering variances of rulings in the different jurisdictions and even in the same jurisdiction and in cases of the same offense.
> >
> > (Wigmore on Evidence, vol. 2 (Chadbourn rev. 1979), at pp. 245-46)
> >
> > See also: Arp, supra, at para. 44; R. v. Smith, [1992] 2 S.C.R. 915, at p. 941; and Cloutier v. The Queen, [1979] 2 S.C.R. 709, at pp. 730-31. Thus it was the required degree of similarity, or the lack of it, that divided the Court in B. (C.R.), supra, at pp. 739 and 753. Similarity in this respect does not necessarily require a strong

peculiarity or unusual distinctiveness underlying the events being compared, although similar facts manifesting a singular trait (such as necrophilia) would likely be a powerful tool in the hands of the prosecution.

The trial judge was called on to consider the cogency of the proffered similar fact evidence in relation to the inferences sought to be drawn, as well as the strength of the proof of the similar facts themselves. Factors connecting the similar facts to the circumstances set out in the charge include:

(1) proximity in time of the similar acts: D. (L.E.), supra, at p. 125; R. v. Simpson (1977), 35 C.C.C. (2d) 337 (Ont. C.A.), at p. 345; R. v. Huot (1993), 16 O.R. (3d) 214 (C.A.), at p. 220;

(2) extent to which the other acts are similar in detail to the charged conduct: Huot, supra, at p. 218; R. v. Rulli (1999), 134 C.C.C. (3d) 465 (Ont. C.A.), at p. 471; C. (M.H.), supra, at p. 772;

(3) number of occurrences of the similar acts: Batte, supra, at pp. 227-28;

(4) circumstances surrounding or relating to the similar acts (Litchfield, supra, at p. 358);

(5) any distinctive feature(s) unifying the incidents: Arp, supra, at paras. 43-45; R. v. Fleming (1999), 171 Nfld. & P.E.I.R. 183 (Nfld. C.A.), at paras. 104-5; Rulli, supra, at p. 472;

(6) intervening events: R. v. Dupras, [2000] B.C.J. No. 1513 (QL) (S.C.), at para. 12;

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

[77] The Crown submits that when assessing the allegations of the complainants, particularly between A, B and C are such that they are sufficiently linked so as to justify their inclusion as similar fact.

[78] In ***R. v. Shearling*** [2002] 3 SCR 33, the Supreme Court of Canada upheld the admission of similar fact evidence where the crown sought to introduce the same to establish a "double-inference"; firstly that the accused used his position as leader of the cult to groom young girls and to infer from that that the accused proceeded to use his position to sexually assault each of the complainants. Similarly in the case at bar, the Crown submits that the evidence of the complainants establishes a pattern on behalf of the Accused, in becoming a conspirator with the complainants in underage drinking and using his relationship with them to seek sexual favours in exchange for liquor or money.

[79] The Crown concedes that it is premature to assume that similar fact evidence will be admitted however the Crown submit that there is a valid argument to be made in favour of its admission and accordingly should mitigate against severance.

[80] ***Desire to Avoid Multiplicity of Proceedings:*** The Crown submits that even if severance were granted, that duplication of the evidence at the trials is inevitable requiring the complainants testify to the same facts in multiple hearings.

[81] As noted in the Accused's brief, all four complainants in this matter are related: sisters A and B, their cousin C and D, mother of C and aunt to A and B. During cross-examination of the complainants at preliminary the defence questioned the witnesses about their discussion with one another in relation to the allegations. As noted above, the position of the Crown is that no collusion existed between the complainants however it was apparent during the preliminary that the defence was pursuing that line of argument.

[82] The Crown submits that the questioning by defence went beyond an exploration of when and to whom the complainant spoke and raises the allegation of collusion. When questioning D, Defence was even more direct in suggesting that D's complainant was motivated by a desire to bolster her daughters charge.

[83] The Crown contends that in pursuing any allegation of collusion that it is inevitable that the evidence concerning the allegations will be brought forward. It

is difficult to envision how defence could argue collusion and contamination of the respective witnesses without adducing the evidence of the other complainants. The situation is similar to that described in ***R. v. RWD*** [2004] OJ 3091 (Ont Superior Court of Justice) wherein the court reached the following conclusion at paragraph 79:

> The practical effect is that even if there were separate trials of the counts relative to each sister, the defence would introduce the fact of the other sister's allegations in order to advance the proposition that the complainant sister's evidence was, a fabrication as a result of what she heard, was a function of a conspiracy between mother and daughters, or simply not reliable because of the contact between them. The Crown would then be entitled to adduce evidence that would rebut those suggestions.

[84] Thus, even if the counts are severed, the jury would be privy to the existence and details of the other allegations. The Crown submits that it is far more dangerous and potentially prejudicial to the Accused that the trier of fact hear the allegations but not be called upon to adjudicate upon them.

[85] ***Prejudice to the Accused:*** The Supreme Court of Canada stated as follows at paragraph 14 in ***Last***:

> The ultimate question faced by a trial judge in deciding whether to grant a severance application whether severance is required in the interests of justice, as per s. 591(3) of the Code. The

> interests of justice encompass the accused's right to be tried on the evidence admissible against him, as well as society's interest in seeing that justice is done in a reasonable efficient and cost-effective manner. The obvious risk when counts are tried together is that the evidence admissible on one count will influence the verdict on an unrelated count.

[86] The Crown submits that upon weighing the risk of prejudice to the Accused against the factors in favour of a single trial, that the Defence has failed to establish on a balance of probabilities that severance of the counts is required. The Crown submits that any potential prejudice is minimal and is fully capable of being addressed by the jury charge.

[87] ***Conclusion:*** Having considered both the written and oral submissions by Counsel, I am largely in agreement with the submissions of the Crown. The Crown has all but acknowledged that Count 7 regarding D should be tried separately. I so order. Counts 1 to 6 inclusive, involving the other three complainants, will be tried together.

[88] The Court is required to balance competing interests as set out in submissions of Counsel and case law. On a balance of probabilities, the Accused

Applicant failed to prove that severance is required to ensure a fair trial. Careful instructions to the jury will minimize any potential prejudice to the Accused and at the same time, ensure that the trial's truth seeking function is not impaired.

[89] I assume we will proceed first with the trial of Counts 1 - 6. The Crown should prepare a new indictment containing only those counts.

J.