Citation: R v Findlay, 2026 MBCA 88
Date: 20261105

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Diana M. Cameron
Madam Justice Janice L. leMaistre
Mr. Justice James G. Edmond

***B E T W E E N**:*

	)	***I. McKay, K.C.** and*
HIS MAJESTY THE KING	)	***H. Ferg***
	)	*for the Appellant*
Respondent	)	
	)	***M. Moorthy***
- and -	)	*for the Respondent*
	)	
CHASITY J. D. FINDLAY	)	*Appeal heard:*
	)	***April 20, 2026***
(Accused) Appellant	)	
	)	*Judgment delivered:*
	)	***November 5, 2026***

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On appeal from *R v Findlay* (4 December 2023), Winnipeg (MBPC) [*conviction decision*]

CAMERON AND LEMAISTRE JJA

Introduction and Issues

[1] The accused appeals her convictions after trial in Provincial Court for sexual interference and sexual assault. The sexual interference offence occurred when the victim was fifteen years of age and the accused was his

high school teacher. The sexual assault offence occurred when the victim was sixteen and attending the same high school where the accused taught.

[2] In convicting the accused, the trial judge rejected her testimony that the victim repeatedly violently and sexually assaulted her and her denial that she had ever voluntarily touched the victim.

[3] In support of her appeal, the accused maintains that the trial judge erred in (1) dismissing her motions pursuant to sections 8 and 24(2) of the *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [the *Charter*], to exclude evidence consisting of text messages exchanged between her and the victim (the messages) and photos of the accused and the victim that had been taken by the victim (the photos) that the accused claimed the police obtained in breach of her right to be free from unreasonable search and seizure; 2) committing legal and procedural errors in admitting evidence that the victim engaged in sexual activity other than the sexual activity that forms the subject matter of the charge (evidence of other sexual activity) (see *Criminal Code*, RSC 1985, c C-46, s 276 [the *Code*]); and (3) conducting her credibility analysis.

[4] We would dismiss the section 8 *Charter* argument. As we explain, we are of the view that the accused had no reasonable expectation of privacy in the messages or the photos. If we are wrong in this regard, we would dismiss the motions to exclude the evidence pursuant to section 24(2) of the *Charter*, as its admission would not bring the administration of justice into disrepute.

[5] We would also dismiss the argument that the trial judge improperly admitted the evidence of other sexual activity. Although the procedure followed did not comply with the requirements established in *R v Kinamore*, 2025 SCC 19 [*Kinamore*], the errors were harmless and the trial judge conducted the proper legal analysis before admitting the evidence.

[6] Finally, we would dismiss the argument regarding the trial judge's credibility analysis. The trial judge did not rely on myths or stereotypes, her assessments were not unreasonable, and the admission of the evidence of other sexual activity and the accused's cross-examination did not result in an unfair trial.

Trial Evidence

[7] The victim testified that, in February 2015, when he was fifteen years old, the accused was his grade ten English teacher. He stated that, in April 2015, they began to have sexual contact that they kept secret. This resulted in the victim lying to his family about his whereabouts when he was seeing the accused, mostly telling them that he was caring for his ill grandmother. According to the victim, the sexual contact involved kissing, touching and intercourse, and continued until his sixteenth birthday in September 2015.

[8] We pause to note that although the victim described his interactions with the accused as a "relationship", we decline to do so. As the Supreme Court of Canada explained in *R v Friesen*, 2020 SCC 9: "Adults, not children, are responsible for preventing sexual activity between children and adults" (at para 154), even when a child seeks out the sexual attention of an adult (see *ibid*). In our view, the term relationship does not accurately reflect that

principle or the inherent power imbalance between the accused and the victim "and risks normalizing the very conduct" that is being condemned (*ibid* at para 147).

[9] By November 2015, the victim had become anxious about his lying, feared getting in trouble and was feeling pressured to continue the sexual contact. He could no longer use caring for his grandmother as an excuse for his absences as she had passed away. He ended the sexual contact.

[10] The victim further testified that he and the accused resumed their sexual contact after his eighteenth birthday in September 2017 and continued until January 2018. During this period, he took the photos, which showed the two of them hugging and kissing. After the victim ended the sexual contact for a second time, the accused sent the messages expressing her love for and desire "to be with [him]" (*conviction decision* at para 30).

[11] The accused acknowledged that she first met the victim when he was a student in her class and said that he expressed romantic feelings toward her. However, she denied engaging in consensual sexual contact with him. Instead, she alleged that, beginning in May 2015, the victim repeatedly violently and sexually assaulted, threatened and stalked her. The accused explained that the messages were a way for her to keep the victim close while investigating whether he had distributed intimate images she had previously sent him. Those images were not in evidence and were not the subject of the motions to exclude evidence.

[12] The accused's parents testified concerning changes in her behaviour during the relevant period. The trial judge found that their evidence did not materially assist in resolving the central credibility issues.

[13] The trial judge dismissed the accused's motions to exclude evidence pursuant to section 8 of the *Charter* and section 276 of the *Code*. She rejected the accused's evidence and found that none of the defence evidence raised a reasonable doubt. The trial judge accepted the victim's evidence and convicted the accused of both offences.

The Section 8 *Charter* Motions

Decision of the Trial Judge

[14] The first *voir dire* dealt with the admissibility of the messages. It proceeded prior to the commencement of the trial by way of agreed facts.

[15] Briefly, the agreed facts included that the victim went to a police station to give a statement on April 27, 2021. He brought a journal, the photos and screenshots of the messages. When discussing the messages, the police officer who took the victim's statement indicated that he was "primarily looking for" any texts between the accused and the victim that had occurred while he was in school. The victim indicated that he did not have any messages from the time that he was under the age of eighteen. He then presented the messages to the police officer who said that he would keep them.

[16] The messages did not disclose an offence. They were tendered by the Crown to provide context to the contact between the accused and the victim. The Crown contended that this evidence contradicted the accused's position that the victim repeatedly violently and sexually assaulted, threatened and stalked her.

[17] The trial judge found that, despite the messages having been seized without a warrant, there was no breach of section 8 of the *Charter* (see *R v Findlay*, 2023 MBPC 17 at para 32 [*Findlay*]).

[18] After reviewing the jurisprudence and considering the factors outlined in *R v Marakah*, 2017 SCC 59 [*Marakah*], she determined that the subject matter of the search was the electronic conversation between the accused and the victim. She found that the accused had a subjective expectation of privacy in the messages.

[19] Next, the trial judge found that the accused's subjective expectation of privacy was objectively reasonable. In support of her conclusion, she stated that "[a] conversation between two adults involved in an intimate relationship does have the potential to reveal personal or biographical information" (*Findlay* at para 27) and that the accused's lack of control over further distribution of the messages did not eliminate her expectation of privacy from an objective point of view (see *ibid*).

[20] Jurisprudence that has evolved subsequent to the decision of the trial judge leads us to conclude that the trial judge erred in her section 8 *Charter* analysis in this regard. As we later explain, we are of the view that the accused did not have an objectively reasonable expectation of privacy in the messages.

[21] Despite finding that the accused had a reasonable expectation of privacy in the messages, the trial judge held there was no breach of section 8 of the *Charter* because the victim's consent in providing the messages meant that the search was authorized by law.

[22] In the alternative, she found that the act of the victim turning over the messages to the police did not amount to a seizure.

[23] A second *voir dire* was held regarding the photos. Like the messages, the photos did not disclose an offence but were proffered as evidence relevant to the accused's anticipated defence. The section 8 *Charter* argument was limited to a few sentences asserting the accused's expectation of privacy in the photos. The trial judge relied on her earlier ruling regarding the messages to find that there was no breach of section 8 of the *Charter*.

Positions of the Parties

The Accused

[24] While the accused's notice of appeal states that she is appealing the admission of both the messages and the photos, her factum focussed on the messages. In oral argument, the accused submitted that, while her expectation of privacy in the photos may be diminished as compared to the messages, her reasonable expectation of privacy was not eliminated.

[25] Relying on *R v Spencer*, 2014 SCC 43, the accused argues that the messages engaged her informational privacy (see para 38). In that case, Cromwell J stated that informational privacy includes "privacy as secrecy, privacy as control and privacy as anonymity" (*ibid*). Informational privacy seeks to protect the "biographical core of personal information", including "intimate details of the lifestyle and personal choices of the individual" (*ibid* at para 27, citing *R v Plant*, [1993] 3 SCR 281 at 293, 1993 CanLII 70 (SCC)).

[26] Given the high expectation of privacy attached to informational privacy, the accused argues that the trial judge did not err in finding that her expectation of privacy in the messages was reasonable. She argues that this is a situation comparable to *R v Reeves*, 2018 SCC 56 [*Reeves*]. That case dealt with a computer shared by spouses. Justice Karakatsanis, writing for the majority, held that the consent of Reeves' spouse to police seizing the shared computer did not nullify his reasonable expectation of privacy in it. She said that, while it is reasonable to ask citizens to bear the risk that a co-user of a shared computer will tell the police what they observed on it, it is not reasonable to ask them to bear the risk that the co-user could consent to the police taking it (see *ibid* at paras 41-44).

[27] The accused further relies on *Reeves* to the extent that Karakatsanis J affirmed the Court's decision in *R v Cole*, 2012 SCC 53 [*Cole*], in stating that the "[w]aiver by one rights holder does not constitute waiver for all rights holders" (*Reeves* at para 52) and does not constitute a seizure that is authorized by law (see *ibid* at para 58).

[28] Based on the above, the accused argues that, while the trial judge correctly concluded that the accused maintained a reasonable expectation of privacy in the messages, the trial judge erred in relying on the victim's consent to find that the search was authorized by law or, alternatively, did not constitute a seizure.

The Crown

[29] The Crown argues that *Cole* and *Reeves* are distinguishable on the basis that the police only received printed screenshots of the messages from the victim and did not access the messages from a device.

[30] The Crown further relies on *R v Mills*, 2019 SCC 22 at paras 3-4 [*Mills*], in asserting that the accused could not have had a reasonable expectation of privacy in the messages because when she sent them she was investigating her belief that the victim had distributed intimate photos of her that she had earlier sent to him and therefore was aware that he had a history of making private information between them public.

[31] Further, the Crown contends that the trial judge made no error in finding that the seizure was authorized by law because the information was voluntarily provided by the victim. It refers to Doherty JA's statement in *R v Orlandis-Habsburgo*, 2017 ONCA 649 at para 34 [*Orlandis-Habsburgo*], wherein Doherty JA expressed his difficulty accepting that section 8 of the *Charter* is engaged where information in which an accused has a privacy interest is brought to police by an independent third party on its own initiative.

[32] Finally, the Crown contends that the trial judge did not err in finding that there was no seizure, given that the victim voluntarily provided the messages to the police.

Standard of Review

[33] In our view, the determinative issue in the present case is whether the trial judge erred in her statement and application of the correct legal principles regarding the accused's reasonable expectation of privacy in the messages and the photos. These constitute questions of law to be determined on a standard of correctness (see *R v Farrah (D)*, 2011 MBCA 49 at para 7).

The Law

Section 8 of the *Charter*

[34] Section 8 of the *Charter* states that:

Search or seizure **8** Everyone has the right to be secure against unreasonable search or seizure.	**Fouilles, perquisitions ou saisies** **8** Chacun a droit à la protection contre les fouilles, les perquisitions ou les saisies abusives.

[35] The initial burden to demonstrate, on a balance of probabilities, that a *Charter* breach has occurred is on the claimant (see *R v Collins*, 1987 CanLII 84 at para 21 (SCC) [*Collins*]).

[36] As Paciocco JA neatly summarized in *R v Lambert*, 2023 ONCA 689 at para 48 [*Lambert*]:

> [T]here are three distinct components in determining whether a "search or seizure" occurred within the meaning of s. 8: (1) did the *Charter* claimant have a reasonable expectation of privacy in the subject of the alleged search or seizure; (2) was the impugned act a "search or seizure"; and (3) did the impugned act involve the state action required to constitute a search or seizure within the meaning of s. 8?

[37] Where a search or seizure is established, the issue then becomes whether the search was reasonable. There is a presumption that a warrantless search is prima facie unreasonable. In such a situation, the burden shifts to the Crown to demonstrate, on a balance of probabilities, that the search was reasonable. A search is reasonable if (1) it is authorized by law, (2) the law

itself is reasonable, and (3) the search was carried out in a reasonable manner (see *Collins* at para 23).

[38] Similar to the findings of the trial judge, in this case, some courts have found that the receipt of unsolicited information from a third party does not "engage" section 8 if it was not actively solicited by police or did not involve state action (*R v King*, 2021 ABCA 271 at para 12; see also *R v Bear-Knight*, 2021 SKQB 258 at para 53). We do not propose to review or decide the case law in that regard as, in our view, this case can be determined on the assessment of whether the accused had a reasonable expectation of privacy in the subject matter of the search.

Reasonable Expectation of Privacy

[39] Section 8 is engaged only where the claimant has demonstrated a "reasonable privacy interest in the object or subject matter of the state action and the information to which it gives access" (*Marakah* at para 10).

[40] The determination of whether a reasonable expectation of privacy exists involves the consideration of the totality of the circumstances in each case (see *R v Campbell*, 2024 SCC 42 at para 40 [*Campbell*]; *Marakah* at para 10).

[41] In *Marakah*, the Supreme Court held that Mr. Marakah had a reasonable expectation of privacy in text messages that he sent to his accomplice regarding illegal transactions in firearms, which were accessed on the accomplice's cellphone by the police in their investigation of Mr. Marakah without the consent of the accomplice and absent a search warrant.

[42] Writing for the majority (on this point), McLachlin CJC reiterated the four lines of inquiry as stated in *Cole* in the determination of whether a reasonable expectation of privacy exists: (1) what was the subject matter of the alleged search; (2) did the claimant have a direct interest in the subject matter; (3) did the claimant have a subjective expectation of privacy in the subject matter; and (4) if so, was the claimant's subjective expectation of privacy objectively reasonable (see *Marakah* at para 11). The claimant will only have standing to challenge the search pursuant to section 8 if all four are established.

[43] In *R v Suman*, 2026 ONCA 378 at paras 24-26 [*Suman*], Huscroft JA neatly summarized the oft-stated reminder that the inquiry into what constitutes an objectively reasonable expectation of privacy in a subject matter is normative. He explained that the expectation of privacy is one that ought to be respected because it deserves to be in certain circumstances when considering the interests and values of a free and democratic society (see *ibid* at para 24).

[44] In *Mills*, the Court considered Facebook chat and email messages sent by an adult in furtherance of sexual offences with someone they believed to be a child, but who was really the police. In finding that Mr. Mills did not have a reasonable expectation of privacy in the communications, Brown J, writing for a slim majority, applied the normative standard, stating that "adults cannot reasonably expect privacy online with children they do not know" in the sting context (*ibid* at para 23; see also *ibid* at paras 27-29). We pause to note that, in Ontario, it has been held that *Mills* created an exception to the reasonable expectation of privacy in electronic communications in situations where the electronic communications themselves constitute a crime against

the recipient (see *Suman* at paras 32, 37, 49-52; *R v PM*, 2025 ONCA 208 at para 39 [*PM*]; *R v Knelsen*, 2024 ONCA 501 at para 64 [*Knelsen*]). While the above cases raise an interesting issue, the communications, in this case, do not constitute part of the offences. Therefore, it is unnecessary, in this case, to determine whether such an exception exists in Manitoba.

[45] In addition, the section 8 analysis is content-neutral. That is, the reasonableness of an expectation of privacy is not to be determined by what the search reveals—including evidence of criminal activity (see *Suman* at para 25; *Campbell* at paras 50-52).

[46] In *Campbell* at para 53, Jamal J provided the following non-exhaustive list of factors to consider in the determination of whether a subjective expectation of privacy in the subject matter of a search is objectively reasonable:

> (i) whether the information would tend to reveal intimate or biographical details of the lifestyle and personal choices of the individual subject to the alleged search;
>
> (ii) the place where the alleged search took place;
>
> (iii) whether the subject matter of the alleged search was in public view;
>
> (iv) whether the subject matter had been abandoned;
>
> (v) whether the information was already in the hands of third parties, and if so, whether it was subject to an obligation of confidentiality;
>
> (vi) whether the police technique was intrusive in relation to the privacy interest;
>
> (vii) whether the individual was present at the time of the alleged search;

(viii) the possession, control, ownership, and historical use of the property or place said to have been searched; and

(ix) the ability to regulate access to the place of the search, including the right to admit or exclude others from the place (*Plant*, at p. 293; *Tessling*, at para. 32; *Edwards*, at para. 45).

[47] In the recent decision of *R v LT*, 2026 ONCA 449 [*LT*], Copeland JA applied the *Campbell* factors in determining that the accused, in that case, did not have a reasonable expectation of privacy in conversations between him and the complainant that were secretly recorded by the complainant and voluntarily turned over to police. In our view, the analysis in *LT* is persuasive and we would follow it. Accordingly, a more detailed examination of *LT* is appropriate.

The Decision in *LT*

Facts

[48] The relevant facts in *LT* are that the complainant secretly recorded private conversations between her and the accused (the appellant) on a voice memo app on her cellphone (the recordings) during which they discussed the incidents underlying her allegations that he sexually assaulted and choked her (the conversations). The recordings were made after the events constituting the offences had occurred but prior to the complainant having reported them to the police. When she made her police report, she told the police that the recordings contained statements by the appellant about the offences. However, it was not alleged by the Crown that the conversations themselves

constituted the offences[1]. The complainant voluntarily uploaded the recordings to an evidence preservation website provided by the police. The police received and listened to the recordings without having obtained a search warrant.

No Distinction Between Section 8 of the Charter Being Engaged and Whether a Claimant Has a Reasonable Expectation of Privacy

[49] Prior to determining whether the appellant had a reasonable expectation of privacy in the recordings, Copeland JA, writing for the Court, considered an argument that is similar to the argument made by the Crown in this case. The Crown in *LT* submitted that section 8 of the *Charter* was "not engaged" (at para 66) because the complainant voluntarily provided the recordings to police. This argument finds its roots in the case of *Orlandis-Habsburgo* at para 34, where Doherty JA stated:

> I have considerable difficulty with the submission that s. 8 [of the *Charter*] is *engaged* if the police look at information in which an accused has a legitimate privacy interest, even if that information is brought to the police by an independent third party acting on its own initiative. On that approach, s. 8 would be engaged if a "whistleblower" took confidential documents belonging to her employer to the police to demonstrate the employer's criminal activity. Must the police refuse to look at the documents to avoid violating the employer's s. 8 rights? As *Duarte* teaches, it is one thing to say that Canadian values dictate that the state's power to decide when and how it will intrude upon personal privacy must be carefully circumscribed, and quite another to say that an individual's private information is cloaked in the protection of s. 8 no matter how that information comes to the police.
>
> [emphasis added]

[1] Thus, distinguishing the facts in *LT* from those in *Knelsen*, *PM* and *Suman*.

[50] In response to the Crown's position, Copeland JA referred to Supreme Court and Ontario Court of Appeal jurisprudence in reinforcing that there is no distinction between section 8 being engaged and whether a *Charter* claimant has a reasonable expectation of privacy in the subject matter of the state action (see *LT* at para 67). To be precise, the threshold question is always and only whether the claimant has a reasonable expectation of privacy. In her view, *Orlandis-Habsburgo* did not suggest otherwise. Rather, the concern raised by Doherty JA constitutes a factor to be considered in determining whether a subjective expectation of privacy is objectively reasonable (see *LT* at paras 65-66, 69).

No Objectively Reasonable Expectation of Privacy in the Conversations or the Recordings

[51] Justice Copeland observed that the objective reasonableness of a subjective expectation of privacy where one party to a conversation voluntarily reports it to police was undecided and may be subject to different considerations than other situations where the police come into possession of electronically preserved conversations such as the recordings (see *ibid* at para 82[2]).

[52] In considering whether the warrantless receipt of the recordings by the police violated section 8 of the *Charter*, Copeland JA held that the subject matter of the search was the "electronic conversation" (*LT* at para 83) between the complainant and the appellant and that, as a participant in the

[2] In support of this statement, Copeland JA cited *Reeves* at para 46, *Marakah* at para 5, *Campbell* at para 40, *PM* at paras 49-57 and *R v Amdurski #4*, 2022 ONSC 1338 at paras 27-29.

conversations, the appellant had a direct interest and a subjective expectation of privacy in them.

[53] Nonetheless, she held that the appellant did not have an objectively reasonable expectation of privacy in the conversations. In reaching this conclusion, Copeland JA focussed on four of the seven factors set out in *Campbell* that she identified as being most relevant (*LT* at para 94):

> (i) whether the information would tend to reveal intimate details of lifestyle or personal choices;
>
> (ii) whether the information was already in the hands of third parties, and if so whether it was subject to an obligation of confidentiality;
>
> (iii) whether the police technique was intrusive in relation to the privacy interest; and,
>
> (iv) the appellant's level of control over the subject matter of the search.

[54] In considering whether the information would tend to reveal intimate details of lifestyle or personal choices, Copeland JA applied the content-neutral approach. She found that the conversations, having taken place in the home of both the appellant and the complainant when they were ex-domestic partners, had the potential to reveal private information about the accused and therefore supported the appellant's claim to a reasonable expectation of privacy (see *ibid* at paras 95-96).

[55] When discussing whether the information was already in the hands of third parties and, if so, whether it was subject to an obligation of privacy, Copeland JA found it to be significant that the complainant being the "third

party"[3] (*ibid* at para 97) in possession of the information who was under no obligation of confidentiality was a significant factor in the analysis distinguishing it from *Campbell* and *Marakah* (see *ibid*). In her view, the above circumstance weighed against the objective reasonableness of the appellant's subjective expectation of privacy in the conversations—including in their recorded form (see *LT* at para 99).

[56] In reaching this conclusion, she rejected the appellant's argument that the recordings raised the same concerns about warrantless participant surveillance as those considered in *R v Duarte*, [1990] 1 SCR 30, 1990 CanLII 150 (SCC) [*Duarte*]. In doing so, Copeland JA distinguished *Duarte*, noting that the complainant was not a state agent when she made the recordings and that, therefore, the concerns about unregulated state surveillance that arose in *Duarte* did not apply (see *LT* at para 100[4]). She stated (*ibid* at para 101):

> I do not intend to minimize the impact of a private individual who is a party to a conversation secretly recording the conversation. Many Canadians would view such conduct in the course of a relationship, and even after a relationship has ended, as a betrayal. But this type of individual recording does not raise the same privacy concerns as unfettered state intrusion into private conversations as in *Duarte*.

[57] Next, Copeland JA determined that there was a lack of intrusiveness in the search in the case before her, thereby distinguishing it from *Campbell*, *Marakah* and *Duarte*. She noted that police were not involved in the recordings, which the complainant, acting on her own, had lawfully recorded.

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[3] Although described by Copeland JA as a "third party" (as is common in the jurisprudence), it is helpful to note that the complainant could be considered to be the "second party" and not an outside third party with no involvement in the conversation.

[4] See *LT* at paras 70-78 for Copeland JA's discussion of *Duarte* in the context of this case.

The complainant voluntarily reported the offences to the police. After being interviewed, she provided the recordings, which she told police were evidence supportive of her allegations.

[58] In the circumstances of this case, Copeland JA held the police were entitled to receive the recordings to preserve the evidence pursuant to section 489(2) of the *Code* or at common law and that their listening to them was minimally intrusive to the appellant's subjective privacy interest. She concluded that this factor weighed against a finding that the appellant's subjective expectation of privacy in the recordings was reasonable (see *LT* at paras 105-11).

[59] Finally, Copeland JA considered the level of control the appellant had over the substance of the conversations with the complainant or the recordings themselves, finding that he had none. In this regard, she emphasized that the complainant could disclose the conversations to anyone she chose (see *ibid* at para 112).

[60] In her analysis, she was careful to remind herself that the issue of control is relevant but not determinative of whether the appellant had an objectively reasonable expectation of privacy.

[61] Importantly, Copeland JA examined the important differences between a shared expectation of privacy in a computer as compared to privacy in a conversation. She stated (*ibid* at para 115):

> When two or more individuals share a computer, typically, they each have their own private information on the computer. While one user may access another user's data on the computer, in general, any particular file belongs to one user. A conversation is

> different. By its nature, a conversation is an act engaged in by two or more people, each of whom has the right to disclose its contents.

[62] In explaining the differences, she quoted from Woolley J in *R v RDC*, 2022 ABKB 788 at paras 75-77, wherein she observed that in any conversation, whether electronic, hard copy or in person, both participants can make decisions about what to communicate and retain, and both accept the risk that the other party may disclose the content of the communication. That is, the communications belong to both parties (see *LT* at para 115).

[63] In concluding that the lack of control the appellant had over the recordings weighed against a finding of a reasonable expectation of privacy, Copeland JA distinguished *Campbell* and *Marakah* on the basis that, in those cases, access by police to the text conversations at issue resulted from invasive state action as opposed to the voluntary action of the other party to the conversation (see *LT* at paras 117-19).

[64] In addition, she distinguished cases where the Supreme Court has held that, despite there being a shared expectation of privacy in the subject matter of a search, disclosure by one party may not vitiate the other party's reasonable expectation of privacy. For example, in *Cole*, the subject matter of the search was a computer, which the Supreme Court has recognized as being different because of the vast amount of personal information computers contain. In *R v Bykovets*, 2024 SCC 6 [*Bykovets*], the majority of the Supreme Court found that internet subscriber information could identify a person's internet search history, which also constitutes a vast amount of personal information. Justice Copeland concluded that section 8 of the *Charter* may

protect such information from warrantless searches even if the claimant has a limited ability to control the information (see *LT* at para 122).

[65] She further distinguished *Cole*, *Reeves* and *Bykovets* on the basis that, while the computer may have been shared, the files at issue, in those cases, belonged to the claimant alone (see *LT* at para 123).

[66] In the result, applying "a normative assessment of the nature of privacy rights that Canadians expect in our free and democratic society" (*ibid* at para 130), Copeland JA held that the appellant did not have a reasonable expectation of privacy in the conversations or the recordings and therefore his section 8 *Charter* rights were not infringed.

Section 8 Charter Decision

[67] Acknowledging that the trial judge, in this case, did not have the benefit of *LT* when she rendered her decision, we are of the view that she erred in assessing whether the accused had a reasonable expectation of privacy in the messages and the photos. In particular, she failed to consider the factors identified in *Campbell* and, importantly, did not consider that the victim was free to disclose the messages and the photos, the minimal nature of the search and the accused's lack of control over the subject matter of the search in light of the fact that the victim voluntarily provided them to police.

[68] In this case, the fact that the messages were recorded was known to the accused. There was no surreptitiousness involved. Otherwise, the messages, in the present case, are indistinguishable from the recordings considered in *LT* (see *ibid* at para 83). For the purposes of these reasons, we would categorize the photos in the same manner. Each of these

communications constitute the subject matter of the section 8 *Charter* motions and involve private conversations and expressions of affection (as demonstrated in the photos). Contrary to the Crown's submission, it is the content of the messages that constitute the subject matter of the search and not the screenshots of the messages taken by the victim. We agree with the trial judge that the accused had a subjective expectation of privacy in the messages and the photos.

[69] Similarly, we are of the view that the four *Campbell* factors considered in *LT* are the most relevant in determining the issue of whether the accused's subjective expectation of privacy was objectively reasonable. Applying the analysis of those factors in *LT* to the facts in the present case, we conclude:

i. the information in the messages would tend to reveal intimate details of lifestyle or personal choices of the accused;

ii. the information was already in the hands of the victim who was not under an obligation of confidentiality and who could disclose the messages and the photos to whomever, whenever he chose;

iii. the police technique was not intrusive in relation to the privacy interest to the extent that the police merely viewed and received the information provided to them; and

iv. given the voluntary disclosure of the information by the victim, the accused lacked control over the messages and the photos.

> As well, the minimal nature of the shared information distinguishes this case from *Cole* or *Bykovets*.

[70] While the first of these four factors would favour a finding that the accused's subjective expectation of privacy was objectively reasonable, the remaining three weigh against it.

[71] Applying the normative analysis, we agree with the assessment in *LT* that, in the context of information disclosed in the circumstances of such a case, a finding that no reasonable expectation of privacy exists would not offend Canadian expectations in a free and democratic society.

[72] Before leaving our consideration of the normative analysis, we would note that, in *Knelsen*, *PM* and *Suman*, the Ontario Court of Appeal emphasized the normative approach in finding a lack of a reasonable expectation of privacy in cases involving the sexual abuse and exploitation of children. As summarized in *Suman* at para 36:

> The normative rationale for the approach in *Knelsen* and *P.M.* is strong: children are vulnerable to sexual abuse and text messaging affords perpetrators the opportunity to contact victims in secrecy. Adults have no strong claim to communicate with children in secrecy, while parents have every right to control their children's use of texting and social media in order to keep their children safe.

[73] Considering the way in which the accused fostered and developed her sexual involvement with the victim (much of it through text messaging and other electronic communications) and that the trial judge found her influence over the victim extended beyond his sixteenth birthday, the above normative rationale may have been relevant to the facts of this case. However,

we need not determine its application given our finding that the accused lacked a reasonable expectation of privacy in the subject matter in this case.

[74] In addition, as we have concluded that no reasonable expectation of privacy existed, it is not necessary to determine whether the trial judge erred in determining that the police viewing and retaining the messages was reasonable on the basis that it was authorized by law pursuant to *Collins*.

[75] Regarding the trial judge's alternate finding that the police reception of the messages and the photos did not constitute a seizure, it is similarly not necessary to decide the matter. However, we would note that, in *Lambert* at para 56, Paciocco JA argued that there are more doctrinally sound ways to address the issue, such as in circumstances where no reasonable expectation of privacy is found to exist (as in this case), where the warrantless seizure is lawful pursuant to section 489(2) or 487.11 of the *Code*, or where the seizure does contravene the *Charter* but does not bring the administration of justice into disrepute, an issue we next address.

Section 24(2) of the Charter

[76] In the event that we are wrong and a reasonable expectation of privacy did exist and the search was unreasonable (leaving aside the issues of whether the search constituted a seizure or was authorized by law), the application of the factors in *R v Grant*, 2009 SCC 32 at para 71 [*Grant*] leads to the conclusion that the admission of the messages and the photos would not bring the administration of justice into disrepute and therefore they should not be excluded from the evidence.

[77] In *R v Fox*, 2026 SCC 4 [*Fox*], Jamal J explained the two stages of the section 24(2) analysis. First, the court must consider the threshold requirement, which is "whether the evidence was 'obtained in a manner' that infringed or denied a *Charter* right or freedom" (*Fox* at para 90). This involves "examining the entire chain of events involving the *Charter* breach and the impugned evidence and asks whether they were part of the same transaction or course of conduct" (*ibid*). In this case, assuming the police receiving and examining the messages and the photos infringed section 8 of the *Charter*, a causal connection has been established between the breach and the impugned evidence.

[78] Justice Jamal further explained that the second stage of the section 24(2) analysis involves the evaluative component, which is whether the admission of the evidence would bring the administration of justice into disrepute. As noted in *Fox*, this involves consideration of "(1) the seriousness of the *Charter*-infringing state conduct; (2) the impact of the breach on the *Charter*-protected interests of the accused; and (3) society's interest in the adjudication of the case on its merits" (at para 91; see also *Grant* at para 71).

[79] Regarding the first factor, the seriousness of the breach, in this case, was nominal. As noted in *LT*, the law regarding police reception and examination of conversations in circumstances similar to the present case was unclear at the time of the investigation. Further, there is no indication that the police did not act in good faith when they received and looked at the messages and the photos.

[80] Regarding the second factor, if the accused had a reasonable expectation of privacy in the messages and the photos, the disclosure of them

to police would have an impact on her privacy interests considering that they revealed her stated intimate feelings for the victim and the nature of her contact with him.

[81] Finally, the messages and the photos constituted reliable evidence that provided context regarding the nature of the accused's contact with the victim and, as inferred by the trial judge, refuted her allegations that he was the aggressor and she the victim in their interactions.

[82] Qualitatively balancing these factors, we would admit the messages and the photos into evidence on the basis that their admission would not bring the administration of justice into disrepute.

[83] In the result, we would dismiss this ground of appeal.

Whether the Trial Judge Erred in Admitting the Evidence of Other Sexual Activity

Background

[84] During the victim's direct examination, the Crown sought to elicit evidence concerning events that occurred after the offences and after the victim turned eighteen. Counsel for the accused (trial counsel) (different than counsel on the appeal) objected on the basis of relevance. The Crown asserted that the evidence was relevant to anticipated defence evidence concerning the nature of the accused's contact with the victim and whether the victim was the aggressor.

[85] Trial counsel agreed that whether the accused was a willing participant in the sexual activity was a live issue at the trial.

[86] The trial judge determined that the evidence was relevant to that issue and permitted the victim to testify about events that occurred after the offences.

[87] Next, the Crown sought to tender the messages. The messages were exchanged between the accused and the victim after he ended the sexual contact and after the offences. The Crown's position was that the messages were inconsistent with the accused's assertion that she did not willingly engage in sexual contact with the victim.

[88] Trial counsel argued that the messages constituted evidence of other sexual activity and that, as a result, section 276 of the *Code*, together with the procedures set out in sections 278.93 and 278.94 (the section 276 regime) applied[5]. These sections are reproduced as they then read in an appendix to these reasons.

[89] After hearing brief submissions from the parties, the trial judge ruled that the messages "raise[d] the spectre of an intimate relationship" and that, based on the Supreme Court decision in *R v Goldfinch*, 2019 SCC 38 [*Goldfinch*], section 276 applied. She acknowledged that the procedures in sections 278.93 and 278.94 had not been followed and stated that it would have been preferable for the Crown to have filed a written application.

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5 On June 18, 2026, the *Protecting Victims Act*, SC 2026, c 19, s 34 [the *Act*], received royal assent. The amendments included in the *Act* repeal and replace sections 278.1-278.97 of the *Code*. In addition, the new section 276.06 now applies to applications by prosecutors. Joint applications are permitted under section 276.1. The amendments only apply to offences in respect of which a charge is laid after the commencement day (the thirtieth day after which the *Act* receives royal assent) (see section 100) and therefore, do not apply to these proceedings. Thus, all references to the provisions of the *Code* herein refer to the form in which they existed at the time.

[90] The trial judge determined that "the evidence [was] not being adduced to support either of the twin myths" set out in section 276(1). Regarding relevance, she found that the messages formed part of the narrative and were relevant to "whether or not [the accused] was a willing participant during the time period of the offences." She also found that the messages were limited in scope. Finally, she concluded that the messages had "significant probative value that . . . [was] not outweighed by the danger of prejudice to the proper administration of justice."

[91] In making these findings, the trial judge considered the purposes of the section 276 regime as explained by the Supreme Court in *R v Barton*, 2019 SCC 33 [*Barton*], "to protect the integrity of the trial by excluding irrelevant and misleading evidence, protect the accused's right to a fair trial, and encourage the reporting of sexual offences by protecting the security and privacy of complainants" (at para 58), and noted that the messages had been produced by the victim.

[92] Although the trial judge determined that the messages were relevant and admissible, she acknowledged her gatekeeping role and that it was open to her to reassess these findings as the trial unfolded.

[93] Subsequently, the Crown sought to tender the photos. Like the messages, the photos were taken after the offences.

[94] As we have explained, when the Crown sought to tender the photos, a *voir dire* was held regarding admissibility. In addition to the section 8 *Charter* argument, the accused argued that the photos engaged prohibited reasoning under section 276(1) of the *Code*. Her position was that she was the victim of sexual assault perpetrated by the victim. She contended that the

prohibition against twin-myth reasoning should apply to her and that the photos were tendered to support the inference that the sexual activity underlying the offences was consensual on her part (the victim's consent was not at issue).

[95] The trial judge admitted the photos for essentially the same reasons she admitted the messages. She found that the photos were relevant, as they corroborated the victim's evidence and rebutted a defence that the victim was the perpetrator of sexual offences. She also found that the photos had probative value that did not go to either of the twin myths.

Positions of the Parties

[96] On appeal, the accused argues that the trial judge committed legal and procedural errors in admitting evidence that the victim engaged in sexual activity other than the sexual activity that forms the subject matter of the charge by (1) failing to hold a *voir dire*, (2) failing to hear submissions, and (3) failing to conduct the required legal analysis. She says that the failure to follow the section 276 regime denied her the opportunity to call evidence at stage two and resulted in an unfair trial.

[97] The Crown concedes that a formal written application to admit the impugned evidence would have been preferable. However, it submits that the absence of a written application does not invalidate the trial judge's decision where trial counsel had notice of the issue and agreed to a more informal approach. Its position is that the trial judge did hear submissions and that she properly determined relevance and probative value, and considered whether there was any prejudicial effect. Thus, she properly admitted the evidence.

Standard of Review

[98] Pursuant to section 278.97 of the *Code*, a judge's determination that evidence is admissible under section 276(2) is a question of law reviewable on a correctness standard. However, decisions about whether otherwise relevant evidence should be admitted under section 276 involve a highly fact-specific balancing of probative value and prejudice and are generally owed deference (see *R v Desjarlais (DG)*, 2016 MBCA 69 at para 13). Appellate courts may only intervene if the judge applied the wrong legal principles, failed to consider required evidence, admitted irrelevant evidence or otherwise made an error of law.

[99] In *R v TWW*, 2024 SCC 19, O'Bonsawin J explained the applicable standard of review. She stated (*ibid* at paras 21-23):

> There is no dispute that the question of relevance is reviewable on a standard of correctness (*R. v. Schneider* 2022 SCC 34, at para. 39). However, in making a determination of whether to admit evidence of other sexual activity, the trial judge balances a number of considerations, both those enumerated in s. 276(3) and others that may arise in the specific circumstances of a case. The admissibility of prior sexual activity evidence is highly fact-specific and contextual, and the trial judge is best placed to assess probative value versus prejudice (*R. v. Araya* 2015 SCC 11, [2015] 1 S.C.R. 581, at para. 31; S. N. Lederman, M. K. Fuerst and H. C. Stewart, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada* (6th ed. 2022), at ¶2.93). The appellate court's approach on appeal must respect this reality while giving effect to Parliament's decision to deem s. 278.94 determinations questions of law. . . .
>
> An appellate court must ensure that the trial judge applied the correct legal principles, considered all the evidence they should have, did not admit irrelevant evidence, and did not otherwise err in law; no deference is owed in this regard. However, as to the trial judge's determination that the evidence's prejudicial effect

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

See also *R v AM*, 2026 SCC 33 at para 30 [*AM*].

The Law Governing Crown-Led Evidence of Other Sexual Activity

[100] At the time of the trial, the law governing Crown-led evidence of other sexual activity was governed by the principles and procedure outlined in *R v Seaboyer; R v Gayme*, [1991] 2 SCR 577, 1991 CanLII 76 (SCC) [*Seaboyer*] (see *Barton* at para 80).

[101] In *Seaboyer*, McLachlin J confirmed that (1) evidence of a complainant's other sexual activity is not admissible only to support twin-myth reasoning; (2) such evidence may be admissible where its probative value is not substantially outweighed by its prejudicial effect; (3) admissibility must be established on a *voir dire*; and (4) if evidence of other sexual activity is admitted in a jury trial, the jury should be warned against twin-myth reasoning (see 634-36; see also *Kinamore* at para 28).

[102] In *R v Diakite*, 2023 MBCA 42, this Court considered whether the principles in *Seaboyer* and section 276 applied to evidence that a complainant was sexually inactive. Justice Beard pointed out that the principles in *Seaboyer*, rather than the section 276 regime, applied to Crown-led evidence of other sexual activity.

[103] Although that was the law at the time of the trial, it is important to note that the law changed after the trial judge rendered her decision but before the *Act* came into force. In *Kinamore*, the Supreme Court held that the Crown, like the defence, must comply with the same substantive and procedural requirements under the section 276 regime when seeking to adduce evidence of a complainant's other sexual activity. In reaching that conclusion, the Court abolished the common law regime established in *Seaboyer* that permitted the Crown to introduce such evidence without complying with the statutory screening and admissibility requirements set out in section 276.

[104] As this Court explained in *R v Ackman*, 2017 MBCA 78, "an accused is entitled to any benefit of a change in the interpretation of the law provided that he or she is still in the system" (at para 68; see also *R v Wigman*, 1985 CanLII 1 at para 29 (SCC)).

[105] Consequently, pursuant to *Kinamore*, the Crown in the present case was bound to comply with the section 276 regime as it existed at the time of the offences. However, the common law standard for admitting evidence of other sexual activity led by the Crown, remained as stated in *Seaboyer* (see *Kinamore* at paras 38-39). That is, whether the prejudicial effect outweighs the probative value, rather than the statutory standard requiring that the probative value is not substantially outweighed by the prejudicial effect of the evidence.

[106] Chief Justice Wagner explained the procedural requirements for Crown-led evidence of other sexual activity in *Kinamore* (see paras 42-60; see also *AM* at paras 33-35). To summarize, the section 276 regime requires a written application, with notice to the accused, setting out detailed particulars

of the evidence being adduced and its relevance. The application should be brought prior to the trial, although mid-trial applications may be necessary.

[107] At stage one, "[t]he judge must assess whether the Crown has complied with its procedural obligations and whether the evidence sought to be adduced is capable of being admissible (see s. 278.93(4))" (*Kinamore* at para 49). Evidence that engages prohibited myth-based reasoning and is not otherwise relevant is incapable of being admissible.

[108] At stage two, guided by the factors in section 276(3), "the judge must decide whether the Crown has proven, on a balance of probabilities, that the evidence is relevant to an issue at trial and that its probative value is not outweighed by its prejudicial effect" (*ibid* at para 52). The judge must provide reasons for this decision (see the *Code*, s 278.94(4)) and "explain precisely how the evidence is relevant to an issue at trial and how they assessed the probative value and prejudicial effect of the evidence in light of the factors enumerated under s. 276(3)" (*Kinamore* at para 56).

Analysis

[109] The accused raises both procedural and substantive issues with the admission of the victim's testimony regarding events occurring after the offences, the messages and the photos. We begin our analysis with a review of the procedural issues.

Procedural Issues

[110] The accused argues that the procedural requirements of the section 276 regime were not met. She says that the Crown failed to bring an

application to admit the evidence of other sexual activity, the trial judge failed to hold a *voir dire* and the accused was deprived of the opportunity to make submissions and call evidence.

[111] Applying the law as established in *Kinamore*, we agree that the trial judge erred procedurally by not requiring a written application and failing to hold a *voir dire* to address the admissibility of the victim's testimony concerning sexual contact with the accused after the offence dates and the messages. She also erred by combining the stage one and stage two analyses. However, as we explain below, the errors are harmless.

[112] To begin our analysis, we note that the failure to comply with the procedural requirements of section 276 of the *Code* is being raised for the first time on appeal.

[113] In its brief for the accused's pre-trial application to exclude the messages pursuant to section 8 of the *Charter* filed six months prior to the commencement of the trial, the Crown stated that the messages were relevant to the accused's anticipated defence that the victim "was the aggressor, [and] that he extorted and threatened [the accused], who is the true victim of sexual assault."

[114] After the trial judge provided her decision regarding the section 8 *Charter voir dire* (almost three months before the trial began), trial counsel suggested that whether the messages offended section 276 was an issue that may have to be addressed at the trial.

[115] Thus, the accused had ample notice of both the evidence the Crown intended to lead and the purpose for which it sought to adduce that evidence.

[116] During the trial, when the Crown first asked the victim about his interactions with the accused after the offence dates and the messages, trial counsel objected based on relevance. The Crown's position was that the test in *Seaboyer*, rather than section 276, applied because the evidence was being led by the Crown and, in any event, it did not relate to other sexual activity. No one suggested that a *voir dire* was necessary to address admissibility. In keeping with the earlier discussions, the matter proceeded on an informal basis.

[117] Both parties made submissions, albeit brief, about the applicability of section 276. The Crown's submission focussed on relevance and probative value. Trial counsel referred to the trial judge's gatekeeper role and the purpose of the evidence. He expressed concern that the evidence engaged prohibited reasoning.

[118] There was no suggestion by the parties that the trial judge should restrict her initial determination to whether the evidence was capable of being admitted (see the *Code*, s 278.93(4)); both parties argued factors applicable at stages one and two (see *Kinamore* at paras 42-60, referred to above in paras 106-8). There was also no suggestion by trial counsel that the accused wished to make further submissions or intended to call any evidence in support of her position that the evidence was not admissible.

[119] Similarly, on appeal, the accused has merely asserted that she was not given the opportunity to call evidence; she has not suggested what that evidence might have been.

[120] Furthermore, there was a *voir dire* held to determine the admissibility of the photos.

[121] In the circumstances, we are not convinced that the failure to follow the procedures in the section 276 regime would have changed the outcome or resulted in an unfair trial.

[122] Finally, we would note that the accused's complaints regarding the procedural failures are not grounded in a concern regarding myth-based reasoning with respect to the victim. Rather, they are based on concerns regarding the use of the evidence with respect to the accused.

[123] Although section 276 of the *Code* is intended, among other purposes, to protect the integrity of the trial by excluding irrelevant and misleading evidence and protect the accused's right to a fair trial, the section 276 regime is not engaged when evidence of the accused's sexual activity is being led. In other words, the purpose of section 276 is to address the twin myths that historically served to cast doubt on credibility and imply consent in cases involving female sexual assault *complainants* (see *R v Kruk*, 2024 SCC 7 at para 31 [*Kruk*]; see also *AM* at para 59). In this case, the accused was entitled to the many protections that flow from the presumption of innocence and the reasonable doubt standard (see *ibid* at paras 58-62). However, she was not the complainant.

Substantive Issues

[124] In terms of substantive issues, the accused submits that the trial judge did not identify how the messages were relevant or link them to possible prejudice, and that she erred in admitting the photos by adopting her earlier ruling. We do not agree.

[125] As we have explained, after a recess, the trial judge provided reasons for her decision that the messages were admissible. The decision was made mid-trial while the victim was testifying in direct examination.

[126] In her reasons, the trial judge addressed the applicability of section 276, the purpose of the section 276 regime, the relevance of the evidence and the specific issues it was intended to address, as well as the probative value and prejudicial effect. She made clear that, although the evidence was being adduced to address whether the accused was a willing participant in the sexual activity, it was not being adduced to support myth-based reasoning. The accused did not point to any additional prejudice. The trial judge also referred to the factors in section 276(3) of the *Code*.

[127] Moreover, the trial judge correctly determined that the evidence was admissible.

[128] We agree with the trial judge that the evidence was relevant to the specific defence allegation that the accused did not willingly have contact with the victim outside of school and was forced by the victim to engage in sexual activity. This purpose does not rely on either of the twin myths: it does not seek to show that the victim was more likely to consent or less worthy of belief because of the evidence of other sexual activity. Rather, the evidence of other sexual activity was advanced as circumstantial evidence bearing on the accused's claim that she was coerced. It was relevant to her state of mind and to rebut her assertion that she was acting under compulsion.

[129] As the Supreme Court recently observed in *AM*, evidence of prior sexual activity is not categorically inadmissible merely because it involves sexual conduct. The critical question is whether the evidence is relied upon

for a legitimate inferential purpose rather than to support prohibited myth-based reasoning. Evidence may properly be admitted where it provides context regarding a person's state of mind, decision-making, autonomy or the nature of the relationship between the parties (see *ibid* at paras 88-91).

[130] In our view, the photos and the accused's expressions of love and statements of activities she loved doing with the victim in the messages are capable of supporting the trial judge's finding that the contact was voluntary from the accused's perspective and inconsistent with her defence that she was forced into it. The evidence was relevant because it provided a basis for assessing the credibility of her assertion that she acted under compulsion. As *AM* explains, courts must distinguish between inferences drawn from the sexual nature of conduct and those drawn from other relevant features of the evidence (see paras 59-61). In these circumstances, the probative value was substantial and outweighed the dangers that section 276 seeks to prevent.

[131] Finally, the trial judge conducted a contextual assessment of the admissibility of the photos and determined that the photos were being adduced for the same purpose as the messages, they had the same relevance, supported the same inference, had the same probative value and raised the same potential prejudice. In addition, the trial judge recognized that, having found the evidence was admissible, she would ultimately need "to assess whether it carrie[d] any weight at all."

[132] In our view, the trial judge's reasons, while brief, fulfill the requirements of section 278.94(4) of the *Code* and their purpose of explaining the decision and permitting effective appellate review (see *R v GF*, 2021 SCC

20 at paras 69-70, 74; *R v REM*, 2008 SCC 51 at paras 15-17; *R v Sheppard*, 2002 SCC 26 at para 55).

The Curative Proviso

[133] Applying the law as established in *Kinamore*, we have concluded that the trial judge erred by failing to require a written application, conduct a *voir dire* and proceed in two stages.

[134] Section 686(1)(b)(iii) of the *Code* allows an appellate court to dismiss an appeal where it is of the view that no substantial wrong or miscarriage of justice has occurred. In *Kinamore* at para 89, Wagner CJC explained:

> [T]his provision generally applies where there is no reasonable possibility that the verdict would have been different in the absence of the error. This occurs in two cases: first, where the error or irregularity in question is minor or harmless, such that it had no impact on the verdict, or second, where the error or irregularity, despite being serious enough to warrant a new trial, caused no substantial wrong or miscarriage of justice because the evidence against the accused is so overwhelming that a trier of fact would inevitably convict[.]

[135] In this case, while the admission of the evidence revealed inconsistencies and improbabilities in the accused's testimony that informed the trial judge's credibility assessment, it did not, in our view, have the effect of unfairly broadening the case the accused was required to meet, as alleged.

[136] Section 276 of the *Code* is designed to preserve the integrity of the trial process while respecting the accused's right to make full answer and defence. It operates to guard against the admission of evidence of prior sexual

activity where its probative value depends on impermissible assumptions about a complainant's credibility or consent. As the Supreme Court has observed, such reasoning "undermines [the] truth-seeking function and threatens the equality, privacy and security rights of complainants" (*Goldfinch* at para 1). The concern is not relevance alone, but the risk that seemingly relevant evidence may be used to support prejudicial inferences grounded in the twin myths or other stereotypes.

[137] In *Kinamore*, evidence of the complainant's sexual history was introduced without a *voir dire*. The trial judge relied heavily on this evidence in convicting the accused. The Supreme Court concluded that the trial judge erred in failing to hold a *voir dire* and that the error was not harmless because the evidence played a material role in the trial judge's reasons (see *ibid* at para 5).

[138] That case differs from the present case, where the trial judge determined that the evidence of other sexual activity did engage the section 276 regime and any errors were procedural.

[139] The accused had notice that the Crown intended to tender this evidence and the purpose for which it was being adduced. Trial counsel agreed to the process, that is, dealing with the admissibility of the evidence mid-trial without a formal application or *voir dire*. As we explain below, the trial judge did not use the evidence to make generalized assumptions about female sexual behaviour or invoke twin-myth reasoning, as alleged. Thus, there was no prejudice to the accused. Finally, despite not holding a *voir dire*, counsel made submissions and the trial judge considered the relevant factors in her determination that the evidence was admissible.

[140] A *voir dire* was held regarding the photos and the trial judge issued reasons that indicate she turned her mind to the relevant section 276 considerations.

[141] In our view, the evidence was properly admitted and, therefore, the error was harmless.

[142] As there is no reasonable possibility that the verdict would have been different in the absence of the error and the accused suffered no substantial wrong, we would apply the curative proviso and dismiss this ground of appeal.

Whether the Trial Judge Erred in Her Credibility Analysis

Background—The Trial Judge's Credibility Assessments

[143] Before convicting the accused of both offences, the trial judge conducted a careful analysis of the accused's testimony. The trial judge did not believe the accused's evidence. She found that it was implausible, not balanced, exaggerated and inconsistent with external evidence, including the text messages. She provided specific examples to support these findings.

[144] Importantly, the trial judge was alive to the risk of impermissible reasoning based on myths and stereotypes by "using [the accused's] consent post-offence, to find consent during the offence period" (*conviction decision* at para 21). However, she noted that "the same piece of evidence may support an impermissible line of reasoning and also have relevance to an issue at trial" (*ibid* at para 23) [emphasis in original]. She was clear that the messages were being relied on because they were consistent with the victim's evidence that

the accused engaged in ongoing voluntary sexual activity with him, "based on feelings of love and not consistent with [the accused's] description of a violent, non-consensual relationship" (*ibid* at para 27).

[145] The trial judge also considered the accused's explanation for sending the messages. The accused testified that, although she knew that once an image is "out there" it can circulate "in seconds", she wanted to keep the victim close so she could question him about how intimate images she had sent to him came to be circulating in the community so she could "stop any further distributions." The trial judge found that the explanation was inconsistent with the accused's stated desire to have "nothing to do with [the victim]" and that the messages "accurately reflect[ed] [the accused's] feelings for [the victim]" (*ibid* at para 32).

[146] After reviewing other external and internal inconsistencies in the accused's evidence, the trial judge determined that, although the messages were not dispositive, they were "important evidence in assessing [the accused's] credibility."

[147] Next, the trial judge considered whether the accused's evidence and the other defence evidence, in the context of all the evidence, raised a reasonable doubt. She found that it did not. In her view, the testimony of the accused's parents did not assist the defence; it was at times inconsistent with that of the accused, touched on collateral matters and they had no first-hand knowledge of the accused's contact with the victim.

[148] Finally, the trial judge carefully examined the victim's evidence, including the challenges and inconsistencies identified by the accused. She found that his evidence was compelling and made sense, that he made several

admissions that did not cast him in a favourable light, and that he provided credible and reasonable explanations for the inconsistencies and the delay in him contacting the police. She also found that the messages were consistent with the victim's evidence and inconsistent with the accused's evidence.

[149] The trial judge concluded that the Crown had proven beyond a reasonable doubt that the accused had engaged in sexual activity with the victim when he was fifteen years old and, as a result, had committed the offence of sexual interference. She further concluded that, on the victim's sixteenth birthday, the accused abused her position of authority as the victim's teacher to induce his participation in sexual activity. Accordingly, she also convicted the accused of sexual assault.

Positions of the Parties

[150] Regarding the third ground of appeal, the accused reiterates her argument that the messages and the photos were highly prejudicial and ought not to have been admitted into evidence. She submits that the Crown's cross-examination of her was also problematic because it relied on prohibited themes. She argues that the combined effect of the evidence of other sexual activity and the cross-examination tainted the trial judge's assessment of her credibility and resulted in an unfair trial. Finally, the accused asserts that the trial judge's credibility analysis improperly relied on myths and stereotypes, including assumptions about how a genuine victim would behave, and that it was unreasonable.

[151] The Crown argues that the trial judge did not engage in myth-based reasoning. It says that the trial judge's findings "were based on an assessment of the [accused's] evidence as to the believability of her claims about her

behaviour". The Crown asserts that the trial judge found that the accused's testimony was internally inconsistent, implausible and incredible, and that the record supported these findings.

Standard of Review

[152] Deference is owed to a judge's credibility findings. In *Kruk* at para 82, Martin J explained the standard of review in the following way:

> The governing standard of review applicable to findings of credibility and reliability is well established: absent a recognized error of law, such findings are entitled to deference unless a palpable and overriding error can be shown (*Gagnon*, at para. 10, citing *Schwartz v. Canada*, [1996] 1 S.C.R. 254, at paras. 32-33; *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401, at para. 74). Credibility and reliability findings typically do not engage errors of law, as at their core they relate to the extent to which a judge has relied upon a particular factor and how closely that factor is tied to the evidence. Although such findings may be overturned on correctness if errors of law are disclosed, in most cases it is preferable to review them using the nuanced and holistic standard of palpable and overriding error — which defers to the conclusions of trial judges who have had direct exposure to the witnesses themselves.

[153] Reliance on myths and stereotypes is a recognized error of law reviewable on a standard of correctness. However, the Supreme Court rejected the tendency to treat all factual assumptions about a witness' behaviour as impermissible reliance on myths and stereotypes. This was neatly summarized in *R v Oldfield*, 2025 BCCA 26 at para 85, where the Court stated:

> *Kruk* also grappled with the related trend in which appellate courts had "transformed" the recognized prohibition against "myths and stereotypes" historically invoked to marginalize sexual assault

> complainants into "a separate, parallel error of law relating to all factual assumptions about all witnesses, including the accused": *Kruk* at para. 23. The majority ultimately rejected this trend as an unjustifiable extension of evidentiary rules intended to eradicate pernicious and discriminatory myths as a means of discrediting sexual assault complainants with other "more benign generalizations" properly dealt with under existing rules of evidence and standards for appellate review of credibility findings: *Kruk* at paras. 45, 51, 91–98.

Analysis

[154] We are not convinced that the admission of the evidence of other sexual activity and the Crown's cross-examination of the accused "infect[ed] the fact-finding process with twin-myth reasoning" or "unconsciously impact[ed] the [trial judge's] credibility assessment" of the accused.

[155] Trial judges are entitled to draw inferences based on common sense and established facts about what the parties did or did not do (see *R v Pastro*, 2021 BCCA 149 at para 41, referred to with approval by the majority in *Kruk* at para 99). Evidence that happens to relate to sexual activity is not rendered inadmissible or incapable of supporting legitimate, non-prejudicial inferences. As the Supreme Court recently observed in *AM*, the critical question is whether the evidence was relied upon for a legitimate inferential purpose rather than to support prohibited myth-based reasoning (see *ibid* at paras 1, 88).

[156] In *R v Quartey*, 2018 SCC 59, the Supreme Court rejected the appellant's submission that the trial judge's credibility analysis rested on impermissible generalizations or stereotypes. Justice Brown stated (*ibid* at para 3):

> Nor did the trial judge err by applying generalizations and stereotypes in rejecting the appellant's evidence. We agree with the majority at the Court of Appeal that the trial judge's statements in this regard were directed to the appellant's *own* evidence and to the believability of *the appellant's* claims about how *he* responded to the specific circumstances of this case, and not to some stereotypical understanding of how *men* in those circumstances would conduct themselves.
>
> [emphasis in original]

[157] This is precisely what occurred in the present case. The Crown was aware of the prohibition against myth-based reasoning and stated that it would not be arguing that the accused's testimony should not be believed because she did not act in a way that accords with stereotypical views about how someone who alleges they were a victim should behave. It pointed out that a person's behaviour may nonetheless be relevant in assessing their credibility.

[158] The trial judge, who was also keenly aware of the prohibition on myth-based reasoning, did just that. She assessed the believability of the accused's testimony about what the accused said she did.

[159] In our view, the trial judge did not employ prohibited reasoning based on myths and/or stereotypes in her credibility assessment of the accused.

[160] The trial judge used the evidence of other sexual activity in two ways. She found that:

(1) it was inconsistent with the accused's testimony about the victim's behaviour and about her assertions that the victim was

violent toward her and that she did not consent to any sexual contact with him; and

(2) it was consistent with the victim's testimony that the accused engaged in ongoing voluntary sexual activity with him based on feelings of love.

[161] The accused testified that she sent the messages in an effort to keep the victim close so she could extract information from him about the intimate images that were circulating in the community. She said that she "used his own language" to try "to placate him".

[162] The trial judge found that the accused's explanation for sending the messages was "incredible" (*conviction decision* at para 28). She stated that the accused's testimony was unclear as to how "it would be at all helpful to [the accused] to find out how or to whom [the victim] might have sent [the intimate images]" (*ibid*) once they were already circulating.

[163] The trial judge also rejected the accused's testimony "that she was merely parroting back to [the victim] things he had said to her" (*ibid* at para 32). She found that there were things in the messages that would have had to come directly from the accused, such as her reference to freezing her embryos so that they could have children when the victim was old enough and her statement that the victim's mom would eventually "come around" (*ibid* at para 30).

[164] The trial judge also found that, if the accused was parroting back things the victim had said to her when she wrote the messages, what she wrote did not support her assertion that his behaviour was "of a violent, misogynistic

rapist" (*ibid* at para 33). The trial judge pointed to the victim's words in the messages quoted by the accused in which he said "that he wanted to let her go so she could find someone who could love her more and his desire to spare her pain" (*ibid*).

[165] Finally, the trial judge found that the messages were inconsistent with the accused's testimony. For instance, in the messages, the accused wrote: "I love going for a drive with you" (*ibid* at para 30). However, she testified that the only time she went for a drive with the victim that she enjoyed was when he told her that he believed he had contracted a sexually transmitted infection and may have given it to her. The trial judge found it "hard to believe such a drive would be something [the accused] would reference as a positive memory" (*ibid* at para 34).

[166] As for the photos, the trial judge found that the accused and the victim "look[ed] happy and loving in [them]" (*ibid* at para 36) and that they contradicted the accused's testimony that she was forced to pose for them because "[t]hey [did] not look forced" (*ibid*).

[167] The trial judge did not misuse the evidence of other sexual activity and there is no suggestion in her reasons that her credibility analysis of the accused was tainted by myth-based reasoning. The trial judge was keenly aware of the risks associated with the use of the evidence of other sexual activity—this concern was raised by trial counsel early on in the process—and she took care to ensure it did not form part of her reasoning.

[168] The trial judge assessed the accused's credibility based on the believability of her claims about her own behaviour. She disbelieved the

accused as a result of internal inconsistencies and the implausibility and incredibility of her evidence.

[169] Moreover, the trial judge's credibility findings were reasonably supported by the record.

[170] The accused raises four challenges to the reasonableness of those findings.

[171] First, the accused argues that the trial judge relied on speculation. During cross-examination, the accused was asked whether the victim believed they were dating based on his conduct and comments. The trial judge did not rely on speculation about the victim's state of mind. Rather, she relied on the accused's responses to those questions, finding that the accused resisted answering and was evasive. This was a proper consideration in assessing credibility.

[172] Second, the trial judge's finding that the accused exaggerated and was unable to substantiate her assertion that the victim's threats became increasingly violent was not unreasonable. Although the accused testified in direct examination that "[the victim's] assaults got more violent and his threats increased", she agreed on cross-examination that the threats would become more violent and then struggled to provide examples.

[173] The trial judge also identified other examples of exaggeration, including the accused's evidence concerning whether she was physically forced throughout her interactions with the victim and her description of the victim's physical stature.

[174] Third, the trial judge's finding that it was unclear how the accused's stated desire to keep the victim close would assist her was not unreasonable. As the trial judge explained, once the intimate images were already circulating, determining how or to whom the victim may initially have sent them would not prevent their continued dissemination.

[175] Finally, it was open to the trial judge to find that the contents of the messages were inconsistent with the accused's testimony that the victim was a violent, misogynistic rapist. The messages contained nothing that supported those allegations.

[176] As Pfuetzner JA recently explained in *R v Falk*, 2024 MBCA 51: "At the end of the day, it is not this Court's role to parse the language used by the trial judge in a search for error (see *Kruk* at paras 86-87). The trial judge weighed the evidence and drew factual inferences that were reasonably supported by the record" (at para 13).

[177] We see no basis to conclude that the trial judge erred in her credibility assessment or that the trial was unfair. We would dismiss this ground of appeal.

Conclusion

[178] In our view, the accused had no reasonable expectation of privacy in the messages and the photos. Accordingly, her rights under section 8 of the *Charter* were not infringed.

[179] We are also satisfied that the trial judge's admission of the evidence of other sexual activity discloses no reversible error. Although the procedure

followed did not comply with the requirements articulated in *Kinamore*, the procedural deficiencies were harmless and the trial judge conducted the requisite substantive analysis before admitting the evidence.

[180] Finally, we reject the challenge to the trial judge's credibility analysis. The trial judge did not rely on myths or stereotypes, her credibility findings were open to her on the record, and neither the admission of the evidence of other sexual activity nor the accused's cross-examination rendered the trial unfair.

[181] In the result, we would dismiss the appeal.

Cameron JA

leMaistre JA

I agree: Edmond JA

APPENDIX

The relevant provisions of the *Code*, as they then read, are reproduced below:

Evidence of complainant's sexual activity

276 (1) In proceedings in respect of an offence under section 151, 152, 153, 153.1 or 155, subsection 160(2) or (3) or section 170, 171, 172, 173, 271, 272 or 273, evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant

(a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or

(b) is less worthy of belief.

Conditions for admissibility

(2) In proceedings in respect of an offence referred to in subsection (1), evidence shall not be adduced by or on behalf of the accused that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge, whether with the accused or with any other person, unless the judge, provincial court judge or justice determines, in

Preuve concernant l'activité sexuelle du plaignant

276 (1) Dans les poursuites pour une infraction prévue aux articles 151, 152, 153, 153.1 ou 155, aux paragraphes 160(2) ou (3) ou aux articles 170, 171, 172, 173, 271, 272 ou 273, la preuve de ce que le plaignant a eu une activité sexuelle avec l'accusé ou un tiers est inadmissible pour permettre de déduire du caractère sexuel de cette activité qu'il est :

a) soit plus susceptible d'avoir consenti à l'activité à l'origine de l'accusation;

b) soit moins digne de foi.

Conditions de l'admissibilité

(2) Dans les poursuites visées au paragraphe (1), l'accusé ou son représentant ne peut présenter de preuve de ce que le plaignant a eu une activité sexuelle autre que celle à l'origine de l'accusation sauf si le juge, le juge de la cour provinciale ou le juge de paix décide, conformément aux articles 278.93 et 278.94, à la fois :

accordance with the procedures set out in sections 278.93 and 278.94, that the evidence

(a) is not being adduced for the purpose of supporting an inference described in subsection (1);

(b) is relevant to an issue at trial; and

(c) is of specific instances of sexual activity; and

(d) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

Factors that judge must consider

(3) In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account

(a) the interests of justice, including the right of the accused to make a full answer and defence;

(b) society's interest in encouraging the reporting of sexual assault offences;

a) que cette preuve n'est pas présentée afin de permettre les déductions visées au paragraphe (1);

b) que cette preuve est en rapport avec un élément de la cause;

c) que cette preuve porte sur des cas particuliers d'activité sexuelle;

d) que le risque d'effet préjudiciable à la bonne administration de la justice de cette preuve ne l'emporte pas sensiblement sur sa valeur probante.

Facteurs à considérer

(3) Pour décider si la preuve est admissible au titre du paragraphe (2), le juge, le juge de la cour provinciale ou le juge de paix prend en considération :

a) l'intérêt de la justice, y compris le droit de l'accusé à une défense pleine et entière;

b) l'intérêt de la société à encourager la dénonciation des agressions sexuelles;

c) la possibilité, dans de bonnes conditions, de

(c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;

(d) the need to remove from the fact-finding process any discriminatory belief or bias;

(e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;

(f) the potential prejudice to the complainant's personal dignity and right of privacy;

(g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and

(h) any other factor that the judge, provincial court judge or justice considers relevant.

parvenir, grâce à elle, à une décision juste;

d) le besoin d'écarter de la procédure de recherche des faits toute opinion ou préjugé discriminatoire;

e) le risque de susciter abusivement, chez le jury, des préjugés, de la sympathie ou de l'hostilité;

f) le risque d'atteinte à la dignité du plaignant et à son droit à la vie privée;

g) le droit du plaignant et de chacun à la sécurité de leur personne, ainsi qu'à la plénitude de la protection et du bénéfice de la loi;

h) tout autre facteur qu'il estime applicable en l'espèce.

Application for hearing — sections 276 and 278.92

278.93 (1) Application may be made to the judge, provincial court judge or justice by or on behalf of the accused for a hearing under section 278.94 to determine whether evidence is admissible

Demande d'audience : articles 276 et 278.92

278.93 (1) L'accusé ou son représentant peut demander au juge, au juge de la cour provinciale ou au juge de paix de tenir une audience conformément à l'article 278.94 en vue de décider si la

under subsection 276(2) or 278.92(2).

Form and content of application

(2) An application referred to in subsection (1) must be made in writing, setting out detailed particulars of the evidence that the accused seeks to adduce and the relevance of that evidence to an issue at trial, and a copy of the application must be given to the prosecutor and to the clerk of the court.

Jury and public excluded

(3) The judge, provincial court judge or justice shall consider the application with the jury and the public excluded.

Judge may decide to hold hearing

(4) If the judge, provincial court judge or justice is satisfied that the application was made in accordance with subsection (2), that a copy of the application was given to the prosecutor and to the clerk of the court at least seven days previously, or any shorter interval that the judge, provincial court judge or justice may allow in the interests of justice and that the

preuve est admissible au titre des paragraphes 276(2) ou 278.92(2).

Forme et contenu

(2) La demande d'audience est formulée par écrit et énonce toutes précisions utiles au sujet de la preuve en cause et le rapport de celle-ci avec un élément de la cause; une copie en est expédiée au poursuivant et au greffier du tribunal.

Exclusion du jury et du public

(3) Le jury et le public sont exclus de l'audition de la demande.

Audience

(4) Une fois convaincu que la demande a été établie conformément au paragraphe (2), qu'une copie en a été expédiée au poursuivant et au greffier du tribunal au moins sept jours auparavant, ou dans le délai inférieur autorisé par lui dans l'intérêt de la justice, et qu'il y a des possibilités que la preuve en cause soit admissible, le juge, le juge de la cour provinciale ou le juge de paix accorde la demande et

evidence sought to be adduced is capable of being admissible under subsection 276(2), the judge, provincial court judge or justice shall grant the application and hold a hearing under section 278.94 to determine whether the evidence is admissible under subsection 276(2) or 278.92(2).

tient une audience pour décider de l'admissibilité de la preuve au titre des paragraphes 276(2) ou 278.92(2).

Hearing — jury and public excluded

278.94 (1) The jury and the public shall be excluded from a hearing to determine whether evidence is admissible under subsection 276(2) or 278.92(2).

Audience — exclusion du jury et du public

278.94 (1) Le jury et le public sont exclus de l'audience tenue pour décider de l'admissibilité de la preuve au titre des paragraphes 276(2) ou 278.92(2).

Complainant not compellable

(2) The complainant is not a compellable witness at the hearing but may appear and make submissions.

Non-contraignabilité

(2) Le plaignant peut comparaître et présenter ses arguments à l'audience, mais ne peut être contraint à témoigner.

Right to counsel

(3) The judge shall, as soon as feasible, inform the complainant who participates in the hearing of their right to be represented by counsel.

Droit à un avocat

(3) Le juge est tenu d'aviser dans les meilleurs délais le plaignant qui participe à l'audience de son droit d'être représenté par un avocat.

Judge's determination and reasons

(4) At the conclusion of the hearing, the judge, provincial court judge or justice shall

Motifs

(4) Le juge, le juge de la cour provinciale ou le juge de paix rend une décision, qu'il est tenu de motiver, à la suite

determine whether the evidence, or any part of it, is admissible under subsection 276(2) or 278.92(2) and shall provide reasons for that determination, and

(a) if not all of the evidence is to be admitted, the reasons must state the part of the evidence that is to be admitted;

(b) the reasons must state the factors referred to in subsection 276(3) or 278.92(3) that affected the determination; and

(c) if all or any part of the evidence is to be admitted, the reasons must state the manner in which that evidence is expected to be relevant to an issue at trial.

de l'audience sur l'admissibilité de tout ou partie de la preuve au titre des paragraphes 276(2) ou 278.92(2), en précisant les points suivants :

a) les éléments de la preuve retenus;

b) ceux des facteurs mentionnés aux paragraphes 276(3) ou 278.92(3) ayant fondé sa décision;

c) la façon dont tout ou partie de la preuve à admettre est en rapport avec un élément de la cause.

Record of reasons

(5) The reasons provided under subsection (4) shall be entered in the record of the proceedings or, if the proceedings are not recorded, shall be provided in writing.

Forme

(5) Les motifs de la décision sont à porter dans le procès-verbal des débats ou, à défaut, donnés par écrit.