WARNING

The President of the panel hearing this appeal directs that the following should be attached to the file:

An order restricting publication in this proceeding under ss. 486.4(1), (2), (2.1), (2.2), (3) or (4) or 486.6(1) or (2) of the *Criminal Code* shall continue. These sections of *the Criminal Code* provide:

> 486.4(1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of
>
> (a) any of the following offences;
>
> (i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or
>
> (ii) any offence under this Act, as it read at any time before the day on which this subparagraph comes into force, if the conduct alleged involves a violation of the complainant's sexual integrity and that conduct would be an offence referred to in subparagraph (i) if it occurred on or after that day; or
>
> (iii) REPEALED: S.C. 2014, c. 25, s. 22(2), effective December 6, 2014 (Act, s. 49).
>
> (b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).
>
> (2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall
>
> (a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and
>
> (b) on application made by the victim, the prosecutor or any such witness, make the order.

(2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

(2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall

(a) as soon as feasible, inform the victim of their right to make an application for the order; and

(b) on application of the victim or the prosecutor, make the order.

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community. 2005, c. 32, s. 15; 2005, c. 43, s. 8(3)(b); 2010, c. 3, s. 5; 2012, c. 1, s. 29; 2014, c. 25, ss. 22,48; 2015, c. 13, s. 18.

486.6(1) Every person who fails to comply with an order made under subsection 486.4(1), (2) or (3) or 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

(2) For greater certainty, an order referred to in subsection (1) applies to prohibit, in relation to proceedings taken against any person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any way of information that could identify a victim, witness or justice system participant whose identity is protected by the order. 2005, c. 32, s. 15.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Lo, 2020 ONCA 622
DATE: 20201008
DOCKET: C65179

Watt, Hourigan and Harvison Young JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Vincent Lo

Appellant

Nathan Gorham & Breana Vandebeek, for the appellant

Nicole Rivers, for the respondent

Heard: June 24, 2020 by videoconference

On appeal from the conviction entered on July 5, 2017 by Justice Steve A. Coroza of the Superior Court of Justice, sitting with a jury.

Watt J.A.:

[1] Vincent Lo (the appellant) was a practicing psychologist. He treated many patients for anxiety. Sometimes, he used relaxation therapy, in particular, muscle relaxation therapy, as a method of treatment.

[2] Relaxation therapy includes touching the patient.

[3] Three patients claimed that the appellant's massages progressed from their shoulders to rubbing and caressing their genital areas.

[4] The College of Psychologists of Ontario (CPO) commenced disciplinary proceedings against the appellant in connection with the allegations of one complainant. Based on admissions contained in an Agreed Statement of Facts, the appellant pleaded guilty to one count of disgraceful conduct and no contest to a count of sexual abuse of a patient. He was found guilty of both counts and his licence to practice psychology was revoked.

[5] The appellant was charged with three counts of sexual assault. Each count alleged an offence against a different complainant. The counts were tried together before a court composed of a judge of the Superior Court of Justice and a jury. The jury found the appellant guilty on all three counts.

[6] The appellant appeals his conviction on the grounds that the trial judge erred in admitting certain evidence and also that his jury instructions contained inadequacies.

[7] As I will explain in the reasons that follow, I would not give effect to any of the grounds of appeal advanced. I would dismiss the appeal and affirm the convictions entered at trial.

The Background Facts

[8] The complainants were all a similar age when they became patients of the appellant. Each presented with anxiety or related conditions. They attended at different times and were unknown to one another. Each alleged unwanted touching in his genital area. Each was cross-examined at length about the circumstances and details of his initial complaint; his contact with CPO and police investigators, as well as counsel who acted for each in their separate civil suits; and the evolution of the details of their complaints described in their evidence at trial.

[9] The appellant testified at trial. He denied touching any of the complainants under their clothing or in their genital area. He acknowledged some touching as part of relaxation therapy but said that any touching was with the prior express and informed consent of the complainant.

[10] An overview of the allegations of each complainant and how they developed during the CPO and police investigations provides sufficient setting for an understanding of the claims of error being advanced.

The Complaint of A.M.

[11] A.M. had suffered from anxiety and obsessive-compulsive disorder before he was referred to the appellant for therapy in 2001. He participated in 12 or 13 therapy sessions. After several sessions involving discussions, the appellant

suggested that massages may help A.M. to relax and visualization would help A.M. respond to his anxiety. A.M. said “okay".

[12] At first, the appellant stood behind A.M. and massaged his shoulders, arms, and chest. A.M. found these massages relaxing. Later, however, the massages progressed to A.M.'s chest under his shirt, including squeezing and pinching A.M.'s nipples. A.M. was not asked for and did not give permission for these massages.

[13] In his final therapy session with the appellant, A.M. wore shorts and a short-sleeved shirt. The appellant, who appeared to notice his patient’s attire, began massaging immediately. This time, the appellant was seated beside A.M. The appellant asked A.M. to put his leg on his (the appellant's) lap. The appellant massaged A.M.'s leg. As he did so, the appellant's hand touched A.M.'s penis. The appellant pulled his hand away, then repeated what he had done, lightly rubbing with one of his fingers. A.M. said, “This is not helping" and got up. He did not return for further sessions with the appellant.

[14] A.M. acknowledged that he was aware of the names of the other complainants, B.G. and T.R., but said that he had not been provided by police with any details of their allegations.

[15] In cross-examination, A.M. admitted that he learned about the existence of the other complainants sometime after the CPO investigation of the appellant. However, he knew nothing about the use of relaxation therapy or any touching of

genital areas in their cases. He acknowledged having read the statement of claim filed on his behalf in civil proceedings. There it was alleged that the appellant's pattern of misconduct was substantially similar to the allegations of other male patients, including placing hands down or up the patient's underwear and, in some instances, massaging or rubbing their genitals.

[16] A.M. acknowledged that his account of what happened in his therapy sessions with the appellant changed over time. In his first complaint to his mother, A.M. did not allege that the appellant touched his penis. He told the CPO investigator that the appellant touched his penis once. He told the police the touching occurred twice. At trial, he said it happened three times, then between once and three times. Although he testified at trial that the appellant played with and pinched his nipples, he did not provide these details during the CPO investigation or at the preliminary inquiry.

[17] A.M. testified that before he gave his statement to the police, the investigating officer told him that there were other complainants who had experienced similar abuse. This confirmed for A.M. that he had not imagined what occurred with the appellant. He also affirmed that his mental illness distorted the manner in which he perceived reality, causing him to think that others were thinking about or laughing at him when they were not.

The Complaint of T.R.

[18] A crisis worker referred T.R. to hospital because of T.R.'s general anxiety, shyness, and inability to interact socially. Later, T.R. was diagnosed as suffering from paranoid schizophrenia.

[19] T.R. attended ten sessions with the appellant. The first eight sessions involved discussions about T.R.'s condition. The appellant suggested general relaxation techniques as a method of treatment.

[20] In the second last session, the appellant explained that he would touch T.R. as an extension of breathing exercises. The appellant rubbed T.R.'s shoulders for about 10 or 15 minutes. T.R. found this awkward. He could not recall whether they discussed the touching as it occurred, but he did remember that the appellant told him to relax and think of his breathing.

[21] One week later, in their final session, the appellant spoke about relaxation techniques, then moved behind T.R. to massage his neck and shoulders. T.R. found this relaxing. The appellant then worked his hands down T.R.'s back. He placed his hands in the back of T.R.'s pants, as far down as the seat. He kept his hands there for a few minutes massaging lightly. Then the appellant moved his hands around to T.R.'s stomach and down into his pants. The appellant massaged down to T.R.'s lower torso and penis where he left his hands for five or ten minutes.

[22] In cross-examination, T.R. acknowledged that the appellant asked whether he was comfortable with the touching. In his police statement, T.R. said that he did not recall the appellant touching his buttocks. He was also asked about inconsistencies in his accounts about whether he had removed his shirt during the relaxation therapy sessions.

[23] In examination in-chief, T.R. denied any interactions with the police or the justice system. Later, he conceded that he had been charged with uttering threats for which he received mental health diversion. No conviction was entered. He was also charged with posting nude photographs of his former teaching assistant at a local university on a publicly-accessible pornography website.

The Complaint of B.G.

[24] In 2008, when he was 19, B.G. was referred to the appellant by his family doctor. B.G. had difficulty concentrating. He attended about eight treatment sessions. At first, according to B.G., it seemed that he was being treated for anxiety and depression rather than his inability to concentrate that had been the reason for his referral. No touching occurred in the first session as they sat facing each other about two chair lengths apart.

[25] Some touching occurred in the second session, but it only involved both men standing facing each other with their palms facing out. The appellant told B.G. to breathe in and out in order to become more relaxed.

[26] In their third session, the appellant massaged B.G.'s shoulders, placing his hands on B.G.'s chest, both inside and outside B.G.'s shirt. The appellant moved his hands down to B.G.'s stomach. B.G. was very uncomfortable, as if he were in shock or frozen. When the appellant finished the massage, he sat down in his chair. B.G. noticed that the appellant had a visible erection in his pants that he tried to hide from B.G.'s view.

[27] In later sessions, the touchings continued for longer periods. Sometimes, the appellant would reach down to the waistband of B.G.'s boxer shorts, but not leave his hand there. In the final session, the appellant put his hand further down into B.G.'s shorts touching his pubic bone and hair, but not B.G.'s penis, for a few seconds of feeling and caressing. Each session ended with a conversation.

The Evidence of the Appellant

[28] The appellant, then 61 years old, testified on his own behalf. Until his position was eliminated by funding cuts, he had been the Director of Psychology at a local hospital. He entered private practice where he treated thousands of patients who suffered from anxiety. His professional interest was the interaction between mind and body.

[29] The appellant explained that one of the therapeutic techniques he used was progressive muscle relaxation. This technique, referred to as the Jacobson technique, requires a patient to tense an area of their body, then to consciously

relax that area. This increases the patient's awareness of tension in that area and helps them focus on relaxing. Which, in turn, assists in better communication.

[30] The appellant testified that, from time to time, he would touch a patient to help them in progressive muscle relaxation. A light touch on the part of the body the patient was trying to relax helped the appellant gauge tension and the patient focus on tightening and relaxing the particular muscle. He relied on a variety of academic literature to support the view that some physical contact between practitioner and patient is at once ethical and proper during cognitive behavioural therapy.

[31] According to the appellant, he obtained the consent of each complainant before any physical contact. Although he could not recall the specifics of each session, he testified that all physical contact was for the purpose of achieving therapeutic objectives. He denied ever having touched any of the complainants under their clothing or for a sexual purpose.

The Grounds of Appeal

[32] In this court, the appellant advances three grounds of appeal. Two are concerned with the admissibility and use of evidence, the third, with the trial judge's instructions to the jury. In particular, the appellant says that the trial judge erred:

i. in admitting evidence of disciplinary proceedings against the appellant at the CPO;

ii. in permitting across counts use of the evidence of each complainant; and

iii. in failing to properly instruct the jury on the appropriate use of evidence of collusion among the complainants in assessing whether the Crown had satisfied the burden of proof.

Ground #1: The Admissibility of Evidence of Disciplinary Proceedings

[33] Before his criminal trial began, the governing body of the appellant's profession, the CPO, commenced and concluded disciplinary proceedings against him based on the complaint of A.M. The appellant pleaded guilty to one count (dishonourable or disgraceful conduct), and no contest to another (sexual abuse). The prosecutor withdrew a third count, sexual harassment.

[34] The hearing panel entered findings of guilt on the counts of dishonourable conduct and sexual abuse. In a joint submission on penalty, the parties agreed that the appellant would:

i. be reprimanded and the reprimand reported on the College's register;

ii. undertake and agree to resign from the College, confirm that he was not registered and would not apply for registration as a psychologist anywhere in the world; and

iii. deposit $10,000 to be applied to the victims' therapy fund as needed.

The hearing panel gave effect to the joint submission and imposed the penalty counsel had proposed.

[35] The trial Crown sought to have evidence of the disciplinary proceedings admitted at trial as an admission against interest. Defence counsel opposed the application. Some further background is necessary to better understand the nature of this dispute.

The Disciplinary Proceedings

[36] In November 2010, an investigator from the CPO contacted A.M. who alleged that the appellant had touched his penis during a counselling session. Investigators then seized the appellant's file relating to A.M. Shortly thereafter, the CPO started disciplinary proceedings.

[37] The notice of hearing served on the appellant alleged that he massaged A.M.'s shoulder, back, chest, and penis. In a written response to the allegations, the appellant explained that he used progressive muscle relaxation therapy for patients with anxiety who had trouble relaxing. From time to time, this involved light physical touch. This type of treatment was not only ethical, but also supported by academic literature.

[38] The appellant denied that his hands were anywhere near A.M.'s groin or under his shirt, on his chest or his nipples. A.M. consented to the appellant's touching of his shoulders and knees.

[39] The College received a second complaint of similar allegations from B.G. Prosecutors agreed that they would not proceed on B.G.'s allegations if those relating to A.M. were resolved without a contested hearing.

The Allegations

[40] In late June 2012, the formal hearing into A.M.'s allegations began. The notice of hearing alleged that the appellant was guilty of professional misconduct. The particulars included:

i. abuse and sexual abuse of a patient;

ii. failure to maintain the standards of the profession, including sexual harassment of a patient; and

iii. engaging in disgraceful, dishonourable or unprofessional conduct.

The Appellant's Pleas

[41] The appellant, through counsel, entered pleas of guilty to engaging in disgraceful conduct and of no contest to abusing and sexually abusing a patient. The prosecutor withdrew the allegation of sexual harassment.

The Agreed Statement of Facts

[42] The Agreed Statement of Facts filed at the hearing recounted that the appellant massaged A.M.'s shoulders without maintaining appropriate boundaries. On one occasion, the appellant touched A.M.'s bare chest and nipple area with his

hand, and on another, massaged A.M.'s bare leg as it rested on his own leg. The appellant moved his hand up A.M.'s leg until it touched his patient's groin area. When A.M. reacted with discomfort, the appellant stopped the massage.

The Submissions of Counsel

[43] The prosecutor concluded her reading of the Agreed Statement of Facts in these words:

> These, Mr. Chair, are the uncontested facts as alleged by the College and agreed to by the Member and upon which, or at least not contested by the Member and upon which the College relies to make out the allegations of both sexual abuse and disgraceful, dishonourable or unprofessional conduct.

[44] Counsel for the appellant added:

> Just a couple of things that I would like to point out. And one is the effect of a no contest plea.
>
> So we have, as you've seen in the statement of agreed facts, we have got the formal admission of the facts, paragraphs that were numbered 14 through 19, but more properly are 1 through 6, and if you were to compare those admissions of fact to the allegations, it is our submission, our joint submission, that these facts combined give you a sufficient basis to support the guilty plea for allegation three in the notice of hearing, which is with regard to the disgraceful conduct allegations.
>
> Now, in terms of no contest, what the no contest -- the effect of no contest is that Dr. Lo is neither admitting nor denying the allegations of sexual abuse.

The prosecutor concluded:

> So we have a no contest plea to the allegations of sex abuse, but the joint submission is that -- the joint expectation is that you will, nonetheless, find that he is guilty of that allegation.

[45] At the request of the hearing panel, independent legal counsel provided the panel with a definition of sexual abuse. The prosecutor then concluded:

> The only submission that I would make in response to that is to reiterate my previous assertion that the facts, as they have been laid out before you, do make out the allegation of sexual abuse, particularly with respect to the touching of the finger, of the Member's finger, on the patient's groin area and the touching by the Member of the patient's bare chest and nipple area with the hand, and it would be my submission that that touching of that nature in the context in which it occurred does make out an allegation of sexual abuse and does make out a finding of sexual abuse.

Counsel for the appellant added:

> We have nothing to add. As you know, there is no contest to that allegation.

The Findings of the Committee

[46] The Committee found the appellant guilty of sexual abuse and engaging in disgraceful conduct. The prosecutor withdrew the count alleging harassment.

The Application at Trial

[47] At trial, the Crown applied to introduce admissions made on the appellant's behalf by his counsel in the disciplinary proceedings before the CPO. The Crown contended that this evidence was admissible as “admissions against interest".

[48] The appellant testified on the admissibility inquiry. He said that he did not authorize his lawyer to admit the fact that he touched A.M. in the manner described in the Agreed Statement of Facts.

[49] The Crown contended that evidence of the disciplinary proceedings was relevant, material, and admissible as an admission against interest by the appellant. That the admission was actually made by counsel for the appellant is of no moment. Counsel made the admission with full authority to do so. The admission fell well within the scope of that authority. The evidence is of significant probative value. Any incidental prejudice can be overcome by instructions to the jury about the available uses of this evidence.

[50] Defence counsel opposed the introduction of this evidence. The appellant made no admission himself. He said nothing. His pre-hearing conduct demonstrated unequivocally that he did not intend and would not admit sexual abuse. He testified that his lawyer had no authority to make the admissions she did at the hearing. And even if the evidence satisfies the requirements for an

admission, it should be excluded because its prejudicial effect exceeds its probative value.

The Ruling of the Trial Judge

[51] The trial judge admitted the evidence.

[52] The real question, the trial judge said, was whether the appellant formally admitted certain facts by proceeding with the Agreed Statement of Facts at the hearing. After reviewing the entirety of the disciplinary proceedings, the trial judge was satisfied that the appellant, through his counsel, formally admitted:

i. that he massaged A.M.'s shoulders;

ii. that he touched A.M.'s bare chest and nipple area; and

iii. that he placed A.M.’s bare leg on his own and began massaging A.M.’s leg up towards his groin.

[53] The trial judge concluded that counsel made these factual admissions on the appellant's behalf and was acting within the scope of her authority when she did so. She provided effective assistance. The trial judge rejected the appellant's evidence to the contrary. What counsel did not admit were the inferences that could be drawn from those admitted facts.

[54] Satisfied that the proposed evidence was relevant, material, and admissible, the trial judge conducted a cost-benefit analysis to determine where the balance

between probative value and prejudicial effect settled. The evidence was probative and reliable because it was an admission against the appellant's interest. Any reasoning prejudice was minimal and could be alleviated by instructions to the jury about the permitted and prohibited use of the evidence.

The Arguments on Appeal

[55] The appellant accepts that a party's admissions are admissible in evidence when tendered by the opposite party. The party tendering the admission must establish, on a balance of probabilities, that the party made the admission and that its probative value exceeds its prejudicial effect. A decision to admit an admission into evidence is a question of law reviewable on the standard of correctness. A substantial component of the inquiry into admissibility focuses on the weighing of various relevant factors. Provided the trial judge considers and makes a reasonable assessment of the relevant factors and does not materially misapprehend the evidence, the judge's assessment of those factors is subject to deference.

[56] The appellant says the trial judge made several errors in reaching his conclusion about admissibility. First, he failed to consider the overriding factor that the appellant did not instruct his lawyer to admit the facts as true. The appellant gave uncontradicted evidence to this effect on the admissibility inquiry. The appellant did not sign the statement of facts or say anything at the hearing. It

follows that the Crown did not establish, on a balance of probabilities, that the appellant admitted the facts alleged at the hearing.

[57] In addition, the appellant continues, the trial judge erred in using criminal law concepts of formal and informal admissions in interpreting what occurred at the disciplinary hearing. Different principles apply to administrative disciplinary proceedings where pleas of no contest may be entered. There was also some ambiguity in what occurred at the hearing as between an admission of fact and a failure to contest a fact contained in the Agreed Statement of Facts.

[58] The appellant argues that the trial judge considered irrelevant factors, such as the appellant's failure to object when the prosecutor read the Agreed Statement of Facts into the record, failed to take relevant factors into account when evaluating the probative value and prejudicial effect of the evidence, and engaged in impermissible speculation about the extent of counsel's admissions on the appellant's behalf.

[59] The respondent says that a party’s admissions against interest, whether formal or informal in nature, are admissible as an exception to the hearsay rule. Their admissibility is a product of the adversary system and does not depend on any showing of necessity and reliability. Formal admissions in prior proceedings, which could not be contradicted there, are admissible as informal admissions in

subsequent proceedings where they may be contradicted by the party against whom they are tendered.

[60] Considered in their entirety, the respondent contends, the statements contained in the Agreed Statement of Facts constituted formal admissions in the disciplinary proceedings. Their title says as much. They were unambiguous. Counsel described them as a “formal admission of facts" and they were worded as “admissions". The dispute was not about the underlying facts, which were admitted, but about whether the facts admitted could be characterized as “sexual abuse" for disciplinary proceedings purposes. That they did so was not admitted, but not contested.

[61] The respondent points out that the distinction between formal and informal admissions is not a “criminal law" concept, as the appellant contends, but rather is an evidentiary principle. The availability of a “no contest" plea does not eliminate the concept of formal admissions. Here, the appellant formally admitted facts before the disciplinary body. That formal admission is an informal admission in subsequent criminal proceedings and was properly admitted at the appellant's trial.

[62] In the respondent's submission, the trial judge correctly concluded that counsel for the appellant at the disciplinary proceeding was acting within the scope of her authority when she formally admitted the Agreed Statement of Facts. The trial judge rejected the appellant's testimony to the contrary. He was entitled to do

so. His reasons are free of error and his finding is entitled to deference, as is his conclusion that the probative value of the admissions exceeded their prejudicial effect. Any potential prejudice caused by the reception of this evidence was extinguished by the trial judge's careful instructions to the jury about their handling of this evidence.

The Governing Principles

[63] Evidence is receivable in a criminal trial if it is relevant, material, and admissible. Neither at trial nor in this court is there any controversy about the relevance or materiality of this evidence. The issue is one of admissibility, more specifically, whether the evidence in question satisfies the rule governing admissions.

What is an Admission?

[64] In traditional terms, an admission could be described as a statement of an opposing party offered in evidence against that party. A statement can include an express oral or written assertion or implied from nonverbal conduct intended by the party as an assertion. See, *Federal Rules of Evidence*, 28 U.S.C. rr. 801(a) & 801(2) (5th Supp 2011). See also, Robert P. Mosteller et al, *McCormick on* Evidence, 8th ed. vol 2 (Thomson Reuters, 2020), at pp. 273-74.

The “against interest" Requirement

[65] At trial and in this court, the parties referred to the admissibility rule as that which governs “admissions against interest". This qualified descriptive sometimes appears in decisions of courts of high authority. See, for example, *R. v. Terry*, [1996] 2 S.C.R. 207, at para. 28.

[66] The additional “without interest" qualifier confuses admissions with declarations against interest. Each is a discrete exception to the hearsay rule, if admissions are hearsay at all: see, *R. v. Evans*, [1993] 3 S.C.R. 653, at pp. 662-64. Admissions are often against their maker's interest. Were they otherwise, the opposing party would be unlikely to tender them as part of their case. But they need not be against interest. And they need not satisfy any of the requirements for declarations against interest, as for example, the unavailability of the declarant: *McCormick* at pp. 557-59.

Who can make admissions?

[67] For the most part, admissions are made by the party against whom they are offered in evidence. But they may also be made by an agent within the scope of their authority: *R. v. Strand Electric Ltd*., [1969] 2 C.C.C. 264 (Ont. C.A.), at p. 268; *Metro Conference Centre Inc. v. Hunter*, 2016 ABCA 83, at para. 42. Counsel acting for an accused may also make admissions on behalf of the accused: *English v. Richmond*, [1956] S.C.R. 383, at paras. 4-5. Section 655 of the *Criminal Code*

expressly authorizes counsel to “admit any fact alleged…for the purpose of dispensing with proof thereof".

The Types of Admissions

[68] Admissions may be formal or informal. In criminal proceedings, the *Criminal Code* recognizes two formal admissions:

- a plea of guilty; and
- an admission of fact under s. 655.

A plea of guilty is a formal in-court admission by an accused that they committed the offence to which the plea has been entered. It also constitutes a waiver of both an accused's right to require the Crown to prove its case beyond a reasonable doubt and related procedural safeguards, some of which are constitutionally protected: *R. v. Lopez-Restrepo*, 2018 ONCA 887, 369 C.C.C. (3d) 56, at para. 23, citing *R. v. T. (R.)* (1992), 10 O.R. (3d) 514 (C.A.), at p. 519.

[69] In the proceedings in which they are entered, formal admissions are conclusive of the facts admitted. They are not subject to contradictory proof. On the other hand, informal admissions are not conclusive: *Glover v. Leakey*, 2018 BCCA 56, 7 B.C.L.R. (6th) 1, at paras. 28-30.

Admissions Made in Other Proceedings

[70] Sometimes, formal admissions made in prior proceedings may be tendered and received in evidence in later proceedings. For example, a plea of guilty in a prosecution for a provincial or criminal offence may be received in evidence in subsequent civil or criminal proceedings.

[71] In *English*, English was charged with dangerous operation of a motor vehicle under the *Criminal Code*. Part way through English's trial before a magistrate, the Crown Attorney, who considered that the evidence did not support the charge, withdrew the count of dangerous operation. English pleaded guilty to a count of careless driving under the *Highway Traffic Act*, R.S.O. 1950, c. 167. At the joint trial of three civil actions for damages arising out of the motor vehicle accident, English was cross-examined on his plea of guilty to careless driving in the earlier proceeding. The evidence was held to have been properly admitted as showing conduct by English which, on its face, was inconsistent with his testimony at the civil trial where he denied negligence: at paras. 4, 5, and 24.

[72] In *R. v. Dietrich*, [1970] 3 O.R. 725, (C.A.), leave to appeal to S.C.C. refused [1970] S.C.R. xi, Dietrich pleaded guilty to non-capital murder when arraigned on an indictment charging him with capital murder. A conviction of non-capital murder was entered, and a life sentence was imposed. At the time of trial, no statutory provision, such as current s. 606(4), permitted entry of a plea of guilty to an

included or other offence arising out of the same transaction as the offence charged. Dietrich's appeal was allowed, and a new trial ordered: *R. v. Dietrich*, [1968] 2 O.R. 433 (C.A.).

[73] At Dietrich's second trial, Crown counsel closed his case by reading to the jury portions of the transcript of the first trial, including the plea of guilty to non-capital murder and some details about the reasons for its entry. On an appeal from the conviction entered at the conclusion of the second trial, this court held that this evidence had been properly received as an admission: *Dietrich*, at p. 56. See also, *R. v. W.B.C.* (2000), 142 C.C.C. (3d) 490 (Ont. C.A.), at paras. 59-60, aff'd 2001 SCC 17, [2001] 1 S.C.R. 530.

[74] Leaving to one side its availability in professional disciplinary proceedings, such as those before the CPO, a plea of "no contest" or, more fully, *nolo contendere*, is not available to an accused in criminal proceedings. As s. 606(1) of the *Criminal Code* makes clear, an accused called upon to plead in criminal proceedings may plead guilty, not guilty, or the special pleas authorized by Part XX and no others. See, *R. v. G. (D.M.)*, 2011 ONCA 343, 105 O.R. (3d) 481, at para. 39.

[75] *Nolo contendere*, translated from the Latin, "I do not wish to contend", is a formal plea available in some jurisdictions under specific enabling legislation. By entering this plea, a defendant neither contests nor admits guilt of the offence to

which the plea is entered: *G. (D.M.)*, at para. 44. A procedure with some affinity to what ensues after a *nolo contendere* plea has developed in this province. Its purpose is to preserve a right of appeal from a decision on a contested pre-trial motion that would be lost if a plea of guilty were entered. The procedure involves:

i. a plea of not guilty;

ii. an Agreed Statement of Facts establishing the essential elements of the offence(s) charged;

iii. no submissions on proof of guilt by the accused; and

iv. entry of a conviction.

See, *Lopez-Restrepo*, at para. 25 citing *R. v. Falkner*, 2018 ONCA 174, at para. 92.

The Rationale for Admissions

[76] Some controversy exists about the basis upon which admissions are received in evidence in criminal proceedings. Are they received as an exception to the hearsay rule? Or are they not hearsay at all?

[77] In Morgan's view, admissions are received as an exception to the hearsay rule. But this requires proof of necessity and reliability or a listed exception that meets those requirements. However, the admissions rule furnishes no objective guarantee of trustworthiness. The declarations may be self-serving when made.

The declarant need not have firsthand knowledge of the matters admitted. And the declarant is available, sitting in the courtroom: Edmund M. Morgan, “Basic Problems of Evidence” Joint Committee on Continuing Legal Education of the American Law Institute and the American Bar Association (1963), at pp. 265-66.

[78] Wigmore contended that a party's declaration had a special value when offered against the party. Admissions meet the requirement of the hearsay rule. The declaration is that of the opponent who does not need to cross-examine himself: John H. Wigmore, *Wigmore on Evidence*, volume 4 (Chadbourn Rev., 1972), at § 1048, p. 5.

[79] Strahorn classified all admissions offered against the party, whether words or acts, as conduct offered as circumstantial evidence, rather than for its assertive testimonial value. The circumstantial value lies in its inconsistency with the party’s claim at trial: John S. Strahorn Jr., “A Reconsideration of the Hearsay Rule and Admissions” (1937) 85 U. Pa. L. Rev. 484, at p. 576.

[80] In *Evans*, Sopinka J. said that the rationale for admitting evidence of admissions has a different basis than the other hearsay exceptions, if the evidence is hearsay at all. Admissions do not require independent circumstantial guarantees of trustworthiness. It is enough that the admissions are tendered against the party making them. Thus, admissibility is grounded on the theory of the adversary system; that what a party has previously said (or done) can be admitted against

that party in whose mouth it ill lies to complain of the unreliability of their own statements: *Evans*, at para. 24.

[81] In subsequent authorities, the Supreme Court appears to confirm that admissions are received as exceptions to the hearsay rule. Unless made to persons in authority, an accused's admissions are presumptively admissible: *R. v. T. (S.G.)*, 2010 SCC 20, [2010] 1 S.C.R. 688, at para. 20; *R. v. Mapara*, 2005 SCC 23, [2005] 1 S.C.R. 358, at para. 31; *R. v. Terry*, [1996] 2 S.C.R. 207, at para. 28; *R. v. Waite*, 2014 SCC 17, [2014] 1 S.C.R. 341, at paras. 3-4.

[82] An admission tendered by the opposite party that is relevant and material may be excluded where its prejudicial effect exceeds its probative value: *Terry*, at para. 28.

The Principles Applied

[83] As I will explain, I would reject this ground of appeal. I am satisfied that what occurred at the disciplinary hearing before the CPO was properly characterized as an admission when tendered at the appellant's criminal trial and was correctly received in evidence. My reasons involve a series of steps.

[84] First, I am satisfied that the Agreed Statement of Facts tendered in the disciplinary proceedings and the representations of counsel at the hearing are properly characterized as an admission for the purposes of the criminal prosecution about which we are concerned.

[85] In the Agreed Statement of Facts, the appellant admitted his conduct with A.M. What he admitted in those proceedings was relevant, material, and properly admissible as a formal admission in those proceedings to establish the allegations of unprofessional conduct and sexual abuse of a patient made against him. What he admitted there, when tendered by the opposing party – the Crown – at his subsequent criminal trial engaged the principles applicable to admissions.

[86] Second, the admission in the disciplinary proceedings was an admission made by counsel for the appellant and thus an admission of the appellant. She was authorized to act for him in those proceedings. Their email exchanges amply demonstrate the fact and scope of her authority. Making admissions of fact for the purposes of that hearing fell squarely within that authority. The decisions in *English*, *Dietrich*, and *W.B.C*. make it clear that the admissions of counsel are those of their client.

[87] The trial judge held an inquiry into the admissibility of this evidence. The appellant testified that his counsel had no authority to make the admissions the Crown sought to adduce in evidence. For reasons that are free of error, the trial judge rejected the appellant's evidence.

[88] Third, the formal admission of the facts contained in the Agreed Statement of Facts was conclusive of those facts at the hearing before the CPO. The plea of guilty to unprofessional conduct acknowledged the effect of the admissions on

proof of that count. The “no contest" plea to sexual abuse left at large, at least in a literal sense, whether the admissions constituted “sexual abuse”. But it did not alter the fundamental nature of the Agreed Statement of Facts as admissions. And as counsel observed, it preordained a finding of guilt of sexual abuse.

[89] Fourth, evidence of informal admissions, as with any item of evidence tendered by a party in a criminal case, must be relevant, material, and compliant with any governing rules of admissibility. The admissions were relevant. They tended to show conduct by the appellant that formed the *actus reus* of sexual assault. This also met the requirement of materiality. The evidence was tendered by the opposing party. This satisfied the rule of admissibility governing admissions, a rule that is either the product of the adversary system outside the framework of hearsay exceptions, or its own exception not requiring additional proof of necessity and reliability.

[90] As relevant and material evidence compliant with the controlling admissibility rule, the admissions tendered by the Crown were receivable at trial unless their probative value was outweighed by their prejudicial effect. The trial judge conducted a cost-benefit analysis and concluded that probative value predominated. His conclusion is entitled to deference. It is not cumbered by legal error, or misapprehension of evidence and is reasonable.

[91] In this case, the prospect of reasoning prejudice as a result of the admissions contained in the Agreed Statement of Facts was minimal. The subject-matter of the admissions was neither more nor less than the testimony of A.M. before the jury. The admissions were contained in an agreed statement of fact that made no mention of any extrinsic activity of a similar nature. The trial judge's instructions explained the permitted and prohibited use of this evidence. There was no risk that the introduction of this evidence would distract the jurors from their proper focus on the charges.

[92] Further, the risk of moral prejudice, that is to say, of an unfocused trial and wrongful conviction, was unlikely. This evidence did not show disreputable tendencies apt to induce a forbidden chain of reasoning. It was the subject of A.M.'s evidence at trial and of the jury instruction that enjoined propensity reasoning.

[93] I would not accede to this ground of appeal.

Ground #2: Evidence of Similar Acts

[94] This ground of appeal challenges a decision of the trial judge to permit across counts use of the evidence of each complainant. Some additional background is helpful to an understanding of the error asserted.

The Procedural Background

[95] At the outset of the trial, defence counsel sought an order of severance that would require a separate trial on each count. The Crown applied for a ruling permitting across counts use of the evidence of each complainant. The trial judge decided, in accordance with the submissions of defence counsel, that the Crown's application would proceed first since its result would likely be dispositive of the defence motion for severance.

The Positions of the Parties at Trial

[96] At trial, the Crown contended that the defence advanced was a denial of the conduct alleged to constitute the *actus reus* of the offences charged. The defence also involved an attack on the credibility of each complainant and the reliability of his testimony. The conduct alleged in each count was sufficiently similar to permit across counts use because it showed a specific propensity on the part of the appellant to commit the very offences charged. The evidence also tended to support the credibility of the complainants and the reliability of their accounts.

[97] Defence counsel responded that the evidence of the complainants was not sufficiently similar to warrant across counts use. Further, there was an air of reality to an allegation of collusion arising out of contact between and among the CPO investigator, A.M. and B.G., and the civil lawyer who acted for all three complainants in their individual actions against the appellant. The cogency of

evidence of similar acts arises because of the improbability of coincidence. Collusion negates this improbability, thus the probative value of the evidence. It follows that the evidence of each should not be admitted across counts and the counts should be tried separately.

The Ruling of the Trial Judge

[98] In his written reasons, the trial judge found that the evidence of each complainant was relevant and material on the counts involving the other complainants. The evidence assisted in proof of the *actus reus* of the other counts, rebutted and anticipated a defence of an innocent touching, and assisted in the assessment of the credibility of the complainants.

[99] Satisfied that, used across counts, the evidence was relevant and material, the trial judge then turned to the issue of admissibility which he acknowledged involved the assessment and balancing of probative value and prejudicial effect. He considered that the evidence had significant probative value since it disclosed a situation-specific propensity to commit the *actus reus* of the offences charged.

[100] The trial judge then examined the impact of evidence of collusion on the probative value of the evidence. He was satisfied that there was an air of reality to the claim of collusion. This required the Crown to negate collusion on a balance of probabilities. He was satisfied that there was no evidence of actual collusion, only evidence of a risk or opportunity, which the Crown had disproven on a balance of

probabilities. There was no evidence of actual disclosure of the contents of other complainants' statements to individual complainants and no evidence of a collusive taint to the account of any complainant.

[101] The trial judge then examined the prejudicial effect of admitting the evidence across counts. He considered the likelihood and extent of both reasoning and moral prejudice if the evidence were admitted across counts. He concluded that the prospects of either were not great and could be alleviated by specific jury instructions about the use of this evidence. The probative value of the evidence clearly outweighed its prejudicial effect, thus it would be admitted.

The Arguments on Appeal

[102] The appellant begins with a reminder about the presumptive inadmissibility of evidence of similar acts. The rule is only overcome when the probative value of the evidence outweighs its prejudicial effect. This requires a careful, case-specific analysis of probative value, prejudicial effect, and where the balance between them settles. It is well established that collusion destroys the basis of admissibility – the improbability of coincidence.

[103] In this case, the appellant continues, the trial judge found an air of reality to the claim of collusion. This shifted the onus to the Crown to negate collusion on a balance of probabilities. But the trial judge applied the wrong test. Instead of requiring the Crown to disprove collusion on a balance of probabilities, the trial

judge shifted the onus to the appellant, whom the judge required to prove actual collusion on a balance of probabilities.

[104] The appellant says that two additional errors further flawed the trial judge's conclusion to admit the evidence across counts. In assessing prejudicial effect, the trial judge improperly minimized the character of the sexual assaults and used this to find a minimal risk of prejudicial reasoning were the evidence to be admitted. The trial judge also erred in dealing with the application on a pre-trial motion when the evidence of each complainant continued to evolve as the trial progressed.

[105] The respondent accepts that evidence of similar acts is presumptively inadmissible unless the Crown establishes, on a balance of probabilities, that the probative value of the evidence exceeds its prejudicial effect. Further, the probative value of the evidence comes from the improbability that similar conduct is the product of coincidence. It necessarily follows, the respondent concedes, that potential collusion among similar act witnesses is an important factor in determining admissibility because of its tendency to negate the improbability of coincidence that is the touchstone of admissibility. However, where the evidence does not go beyond an opportunity for collusion, it is best left for the jury to decide in assessing weight. A trial judge's decision on this issue, as here, is entitled to deference.

[106] In this case, the respondent says, the trial judge recognized the role of collusion in the determination of probative value and in the admissibility analysis. The trial judge found an air of reality to the allegation of collusion, settled the burden and standard of disproof on the Crown, and found the standard met. Probative value was properly calibrated. The claim that the trial judge reversed the burden of proof is put to rest when the reasons are read as a whole.

[107] According to the respondent, the analysis of prejudicial effect is equally free of error. The gravity of the offences revealed by the evidence of similar acts is a relevant factor in an assessment of moral prejudice, the risk of conviction based on bad personhood. As the gravity of the allegedly similar acts increases, so does the likelihood of the prohibited form of reasoning.

[108] In the absence of error in evaluating the constituent elements of probative value and prejudicial effect, the trial judge's conclusion about where the balance between them falls is entitled to substantial deference in this court. The manner in which the application was heard did not cause any miscarriage of justice. After all, the request to have the admissibility issue determined on a pre-trial application was that of the appellant, as it would have a dispositive impact, or nearly so, on the appellant's pre-trial application for severance.

The Governing Principles

[109] The principal focus of the appellant's argument is on the impact of the potential for collusion on the admissibility decision and the trial judge's handling of that issue. The parties share much common ground on the controlling principles but diverge on the result of their application in this case.

[110] Evidence of similar acts is circumstantial evidence. Like other examples of circumstantial evidence, it gives rise to inferences. It is subject to a general rule of presumptive inadmissibility. The exclusionary rule sets its face against the use of character evidence as circumstantial proof of conduct on a specific occasion. The rule bars an inference from the similar acts that an accused has the propensity or disposition to do the type of acts charged and is thus guilty of the offence(s) charged: *R. v. Handy*, 2002 SCC 56, [2002] 2 S.C.R. 908, at. paras. 27, 31; *R. v. Perrier*, 2004 SCC 56, [2004] 3 S.C.R. 228, at para. 17.

[111] Evidence of similar acts engenders both reasoning and moral prejudice. Reasoning prejudice refers to the confusion that may result from a multiplicity of incidents and the tendency of a lay trier of fact to put more weight on the evidence than is logically justified. Moral prejudice has to do with the danger of conviction based on bad personhood, a chain of reasoning our law abjures: *Handy*, at para. 31.

[112] To overcome the rule of presumptive inadmissibility of similar acts, the onus is on the Crown to satisfy the trial judge, on a balance of probabilities, that the probative value of the evidence on a particular issue outweighs its prejudicial effect, thereby warranting its admission: *Handy*, at paras. 47, 55; *Perrier*, at para. 18.

[113] Since the admissibility of evidence of similar acts depends on the improbability of coincidence, any evidence that tends to negate this improbability is important in the admissibility analysis. Evidence of actual collusion or evidence that provides an air of reality to an allegation of collusion tends to do so. It then falls to the Crown to satisfy the trial judge, on a balance of probabilities, that the evidence of similar acts is not tainted with collusion. In these circumstances, the evidence of similar acts would be admitted with the ultimate determination of the persuasive force of the evidence left for the jury to decide: *Handy*, at para. 112; *R. v. Shearing*, 2002 SCC 58, [2002] 3 S.C.R. 33, at para. 41.

[114] When considering moral prejudice arising out of the reception of evidence of similar acts, the nature of the conduct evidenced by the similar acts is a factor to consider. The more inflammatory that conduct, the more likely a conclusion based on bad personhood: *Handy*, at paras. 83, 100, and 140.

[115] On the other hand, reasoning prejudice involves the distraction of jurors by the cumulative force of evidence about so many allegations from their task of

determining guilt of the offences charged. Arguably, the likelihood of reasoning prejudice may be diminished where the evidence of similar acts is not extrinsic to the offences charged, rather is co-extensive with them: *Shearing*, at paras. 69-70.

[116] A trial judge's decision about where the balance falls between probative value and prejudicial effect is accorded a high degree of deference in this court absent an error in law or principle, a misapprehension of material evidence, or a decision that is plainly unreasonable: *R. v. Araya*, 2015 SCC 11, [2015] 1 S.C.R. 581, at paras. 31, 38; *Shearing*, at para. 73.

[117] The final points concern the timing of the inquiry into the admissibility of evidence of similar acts.

[118] Where the similar acts are alleged as part of a multi-count indictment and the accused seeks severance of the counts, consideration of the admissibility of evidence of similar acts across counts is an important factor in the severance analysis. A ruling permitting across counts use of evidence of similar acts favours a joint trial since the evidence on all counts will be adduced in any event: *R. v. Last*, 2009 SCC 45, [2009] 3 S.C.R. 146 at para. 33. See also, *R. v. Arp*, [1998] 3 S.C.R. 339, at para. 52. The timing of the motion is left to the sound discretion of the trial judge: *Last*, at para. 34.

[119] A ruling made at one point in a criminal trial may be revisited later in the proceedings should circumstances change and warrant a reconsideration: *R. v. B.*

(H.), 2016 ONCA 953, 345 C.C.C (3d) 206 at para. 51, citing *R. v. Adams*, [1995] 4 S.C.R. 707, at para. 30; *R. v. Le*, 2011 MBCA 83, 270 Man. R. (2d) 82, at para. 123 leave to appeal refused, [2011] S.C.C.A. No. 526.

The Principles Applied

[120] In support of his submission that the trial judge erred in permitting use of the evidence of each complainant across counts, the appellant points to three specific errors. I would not give effect to any of them.

[121] The appellant says that the trial judge failed to properly evaluate the evidence of potential collusion between or among the complainants in determining whether to permit across counts use of their evidence. In my respectful view, the reasons of the trial judge, read as a whole as they must be, do not reveal the error alleged.

[122] The trial judge began his analysis with a correct statement of the rule that evidence of similar acts is presumptively inadmissible and the burden and standard of proof required to engage the inclusionary exception to that rule. He examined the relevance and materiality of the evidence. He concluded that it was relevant to assist in proof of the *actus reus* of the offences charged and to rebut the anticipated denial or assertion of incidental touching by the appellant. These were material issues at trial.

[123] In his admissibility analysis, the trial judge noted that the admissibility of evidence of similar acts is based on the improbability of coincidence. He recognized that evidence of collusion, whether potential or actual, could negate the improbability of coincidence and require exclusion of the evidence. He found no evidence of actual collusion but accepted that there was an air of reality to an allegation of potential collusion. On more than one occasion, he correctly described the burden and standard of proof imposed on the Crown to rebut collusion on a balance of probabilities.

[124] The trial judge was satisfied that the Crown had met its burden of rebutting the possibility that collusion was the genesis of the similar accounts of the complainants. Collusion did not render the evidence inadmissible across counts although it was left to the jury as a factor for them to consider in assessing the weight to be assigned to the evidence.

[125] The trial judge's conclusion about the admissibility of the evidence of the complainants across counts, in particular, the impact of the potential for collusion on admissibility, is largely fact-driven. It is not cumbered by legal error or any material misapprehension of the evidence. Nor can the decision to admit the evidence be characterized as plainly unreasonable. This claim of error fails.

[126] The second error the appellant alleges as a fatal blow to the admissibility analysis relates to the trial judge’s characterization of the conduct as “low level

sexual assaults". In doing so, he took into account an irrelevant factor in his assessment of prejudice.

[127] In my respectful view, this argument fails for at least two reasons.

[128] The assessment of the prejudicial effect of an item of evidence tendered for admission is a case-specific, fact-driven exercise. There are no bright line rules. There is no mathematical or scientific formula to gauge potential prejudice. In the result, the assessment of the ear and eyewitness to the proceedings in which the evidence is tendered is accorded substantial deference on appeal.

[129] It is beyond controversy that deference gives way in the face of an error in principle in the probative value-prejudicial effect analysis, such as consideration of an irrelevant factor. This brings me to the second reason for rejecting this ground of appeal – the absence of any error in principle.

[130] As *Handy* teaches, the seriousness of the conduct disclosed by the evidence of similar acts is a relevant consideration in assessing the moral prejudice associated with its reception: *Handy*, at paras. 40, 83, and 100. Moral prejudice refers to the prospect that a conviction will be based on bad character, not conduct. As the seriousness of the conduct increases, there seems more likely to be a proportionate enhancement in recourse to forbidden propensity reasoning. It would seem all the more so in cases, unlike this, of extrinsic similar acts the gravity of

which far exceeds those charged. In this case, all the conduct is of equivalent gravity.

[131] The final error alleged has to do with the procedure followed on the admissibility inquiry, in particular, it's timing. In my respectful view this claim is without merit.

[132] In a pre-trial application, the appellant sought severance of counts. An important consideration in determining whether the interests of justice required severance, a departure from the general rule of a joint trial of all counts, was whether the allegations of each complainant would be admissible as evidence of similar acts across counts. Crown counsel sought to have the evidence of each complainant admitted across counts as evidence of similar acts.

[133] The trial judge acceded to the request of defence counsel to have the Crown's application proceed first. The determination of the admissibility issue, defence counsel acknowledged, was, for practical purposes, dispositive of the severance motion. Having adopted this course at trial, it ill lies in the mouth of the appellant to complain of error. In addition, the determination of when, how, and in what sequence motions and applications will be heard and determined at trial is a matter for the sound discretion of the trial judge. That decision is subject to deference here.

[134] It is also worthy of note that the appellant did not ask the trial judge to revisit his admissibility ruling later in the trial as a result of a change in circumstances. That he did not do so is not dispositive of a lack of prejudice from the procedure followed at his own insistence, but it affords cogent evidence that very experienced counsel did not consider it so.

Ground #3: Inadequate Jury Instructions on Collusion

[135] The final ground of appeal alleges inadequacies in the trial judge's charge on how jurors were to evaluate evidence of potential collusion between and among the complainants. The issues raised may be adequately framed by a brief reference to the trial proceedings and the ruling of the trial judge on the issues reargued here.

The Essential Background

[136] The evidence at trial revealed that A.M. and B.G. were interviewed by the same CPO investigator. Each was interviewed separately at a different time.

[137] In spring of 2010, a CPO investigator began her investigation into the allegations of A.M. They met at least once before A.M. made a formal statement recounting his allegations. They also spoke on the telephone on several occasions, but A.M. could not recall the details of those discussions. The defence at trial alleged that A.M. said nothing about the appellant touching his penis until after he had spoken to the CPO investigator.

[138] In 2011, B.G. told others that the appellant had not sexually assaulted him. He spoke to the CPO investigator later in 2011 and in 2012 but could not recall what the investigator had said to him. Later, he told police that the investigator had “heavily, heavily implied" that there were other complainants. B.G. alleged that the appellant pinched his nipples and put his hands down B.G.’s boxer shorts.

[139] Both A.M. and B.G. denied that the investigator provided them with the details of any other complainants' allegations. Defence counsel argued that the details of the alleged assaults had been shared by the CPO investigator, police, and civil counsel who represented each complainant in his individual civil suit against the appellant.

[140] Neither the CPO investigator nor civil counsel were called as a witness at trial.

The Request for Instructions

[141] In their closing addresses, both counsel commented on the failure of opposing counsel to call the CPO investigator as a witness at trial.

[142] Defence counsel asked the trial judge to include two instructions in his charge to the jury:

i. that jurors were entitled to draw an adverse inference from the failure of the Crown to call the CPO investigator as a witness; and

ii. that civil counsel owed a duty of candour to share information with each complainant about what the other complainants had said.

The Ruling of the Trial Judge

[143] The trial judge declined to include either requested instruction in his charge.

[144] The trial judge found Crown counsel's closing address “problematic” because counsel had suggested that defence counsel could have called the CPO investigator as a defence witness. Such a comment had the potential to reverse the burden of proof. However, the trial judge declined to include an adverse inference instruction in his charge because:

i. the investigator was not under the exclusive control of the Crown;

ii. it could not be assumed that the investigator would be favourably disposed towards the Crown; and

iii. the Crown had discretion as to which witnesses it would call to unfold the narrative of relevant events.

[145] The trial judge also declined to instruct the jury about the duty of disclosure imposed on civil counsel. The judge reasoned:

i. that there was no evidence about the scope of counsel's duty in the circumstances;

ii. that he was not convinced that the duty of candour was as broad as counsel alleged;

iii. that there was no evidence of an ethical duty to share confidential information among clients; and

iv. that the trial judge proposed to instruct the jury about the effect of the complainants' assertion of solicitor-client privilege on the ability of the defence to challenge their evidence.

The Arguments on Appeal

[146] In this court, the appellant reiterated the argument he advanced at trial in respect of each instruction.

[147] The appellant says that the combined effect of several factors required an instruction that the jury could draw an adverse inference from the Crown's failure to call the CPO investigator. It was a reasonable assumption that the investigator would be favourably disposed towards the Crown. She investigated the complaints of A.M. and B.G. The Crown had access to her because the information she obtained was shared with the police and Crown. She was uniquely situated to corroborate the accounts of A.M. and B.G. and the Crown provided no explanation for failing to call her as a witness.

[148] As for the second instruction, the appellant says that civil counsel had a professional obligation to share information received from each complainant with

the others because it was critical to her ability to provide effective representation to each client. This was a joint retainer. The duty of candour required disclosure. And that was an important factor for the jury to consider in assessing the credibility of each complainant and the reliability of his evidence.

[149] The respondent begins with a reminder that a trial judge has broad discretion about what to include in a charge to the jury and how to express what is said. The parties are entitled to a proper charge, not a perfect charge that meets every party's ideal. Looked at functionally, this charge satisfied those requirements.

[150] In this case, the respondent says, the trial judge fully equipped the jury to consider the possible influence of collusion on the credibility of the complainants and the reliability of their evidence. The charge specifically invited the jury to consider the change in the complainants' accounts after A.M. and B.G. had contact with the CPO investigator. The trial judge made specific reference to the fact that the same lawyer represented all three complainants in their individual civil actions against the appellant. The judge rehearsed the evidence of B.G. that police had shown him the statements of others.

[151] The respondent argues that the circumstances of this case did not warrant an instruction that jurors could draw an adverse inference from the Crown's failure to call the CPO investigator as a witness. A.M. and B.G. were unshaken in their

denials that the investigator had provided them with details of the other's account. T.R. had no contact with the investigator.

[152] In addition, the respondent continues, an instruction inviting an adverse inference from failing to call a witness is a rare exception, not the general rule. It is only to be given with great caution in cases in which a party fails to produce a witness who is reasonably assumed to be favourably disposed towards the party or within the exclusive control of that party. The Crown had no special access to or exclusive control over the witness. Nor could it reasonably be assumed that the witness was favourably disposed to the Crown. There was no promise by the Crown to call this witness and no need to do so in order to properly to unfold the narrative of relevant events.

[153] The respondent also rejects any suggestion of error from the failure to give an instruction advising the jury about the duty of civil counsel in the circumstances. The representation presented a conflict between the duty of confidentiality and that of candour. The instruction given was adequate. To say more risked an invitation to the jury to speculate.

The Governing Principles

[154] The parties' entitlement in a charge to the jury is uncontroversial. It is not perfection. Neither party is entitled to more, nor less, than a properly instructed

jury: *R. v. Jacquard*, [1997] 1 S.C.R. 314, at paras. 2, 62; *R. v. Flores*, 2011 ONCA 155, 269 C.C.C. (3d) 194, at para. 92.

[155] Equally uncontroversial is the proposition that the Crown is generally free to exercise her discretion to determine who are material witnesses essential to the unfolding of the narrative. This discretion will not be interfered with unless the Crown has exercised it for some oblique or improper motive. The Crown need not call all witnesses who may have relevant testimony if such testimony is not essential to the narrative: *R. v. Yebes*, [1987] 2 S.C.R. 168, at pp. 190-91. See also, *R. v. Cook*, [1997] 1 S.C.R. 1113, at paras. 30-31; *R. v. Jolivet*, 2000 SCC 29, [2000] 1 S.C.R. 751, at para. 14.

[156] Sometimes, a judge may instruct the jury about its authority to draw an adverse inference from the failure of the party to call a witness or produce other evidence. This principle derives from ordinary logic and experience. Although an adverse inference may be drawn against a party for failure to call a witness reasonably assumed to be favourably disposed to that party, or one who has exclusive control over the witness, an adverse inference should only be drawn with the greatest of caution: R. v. *Ellis*, 2013 ONCA 9, 113 O.R. (3d) 641 at paras. 45-49; *Jolivet*, at paras. 37, 39; *R. v. Zehr* (1980), 54 C.C.C. (2d) 65 (Ont. C.A.), at p. 68.

[157] In connection with the allegation that the trial judge erred in failing to instruct the jury that the civil lawyer had an obligation to share any relevant information she obtained from any client with the others, it is helpful to consider the scope of the duties of candour and confidentiality.

[158] A lawyer has a duty of candour with the client on matters relevant to the retainer. This requires the lawyer to inform the client of information known to the lawyer that may affect the interests of the client in the matter. Put in another way, this requires the lawyer to disclose any factors relevant to the lawyer's ability to provide effective representation: *Canadian National Railway Co. v. McKercher LLP*, 2013 SCC 39, [2013] 2 S.C.R. 649, at para. 45. This duty is frequently engaged in situations in which acceptance of a retainer will require a lawyer to act against an existing client: *McKercher*, at para. 46; *R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631, at para. 19.

[159] A lawyer also has a duty of confidentiality towards the client. This requires the lawyer to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of their professional relationship and not to divulge that information unless expressly or impliedly authorized to do so by the client. The lawyer’s duty of candour towards one client must be reconciled with the obligation of confidentiality towards another: *McKercher*, at para. 47. See also, *Strother v. 3464920 Canada Inc.,* 2007 SCC 24, [2007] 2 S.C.R. 177.

The Principles Applied

[160] As I will explain, I would not give effect to either complaint. I agree with the conclusion of the trial judge on each issue and, in large measure, with his reasons.

The Adverse Inference: The Failure to Call the CPO Investigator

[161] As a matter of first principle, Crown counsel is under no obligation to call a witness they consider unnecessary to the unfolding of the narrative of the case for the Crown. To the extent that the failure to call a particular witness leaves a gap in the Crown's proof of some essential element, the Crown bears the risk of an adverse finding of which the accused is the beneficiary. The trial judge made this consequence clear to the jury in his charge.

[162] No bright line rule requires inclusion of an adverse inference instruction anytime a witness defence counsel considers should have been called by the Crown is not called. The basic principle is to the contrary: the adverse inference instruction is the exception, not the rule. It is an exception that is only invoked with great caution because it may have a serious and unwarranted impact on the jury's assessment of the credibility of the witnesses who testify and may distract from an informed analysis of the evidence as a whole.

[163] Whether to include an adverse instruction is a determination that falls within the discretion of the presiding judge. In the absence of an error of law or principle, a material misapprehension of any relevant evidence, or a decision that is plainly

unreasonable, the exercise of that discretion is entitled to deference in this court. No such error, misapprehension, or unreasonableness has been established here.

[164] Finally, the absence of a specific adverse inference instruction did not leave the jury unschooled about the impact of the interaction of the complainants with investigators and the prospect of contamination of their evidence.

[165] The trial judge instructed the jury that although Crown counsel was not required to call the CPO investigator, the Crown was required to prove its case beyond a reasonable doubt on the evidence it chose to introduce at trial. When considered together with the instructions on reasonable doubt, in particular, that a reasonable doubt may be based on the absence of evidence, the jury would understand that the failure to call evidence may mean that the evidence did not prove the offences alleged to the standard of proof required.

[166] The final instructions also pointed out that the accounts of two complainants, A.M. and B.G., changed after they met with investigators. This was a factor left to the jury to consider in assessing whether the appellant's guilt had been proven beyond a reasonable doubt.

[167] To counteract Crown counsel's submission in his closing address that the appellant could have called the CPO investigator as a witness, the trial judge made it clear that the defence was under no obligation to do so.

[168] This claim of error fails.

The Disclosure Obligations of Civil Counsel

[169] At trial, defence counsel sought an instruction that civil counsel, who acted for each complainant in his individual civil action against the appellant, had an obligation to share any relevant information she received from each client with the others. The trial judge refused to include such an instruction for several reasons he included in a post-verdict endorsement.

[170] As I will briefly explain, I would not give effect to this claim of error. In my view the trial judge was correct in not including such an instruction in his charge.

[171] First, the principle of law upon which the appellant sought to have the trial judge instruct the jury is of doubtful validity.

[172] The duty of candour was not the only obligation at work here. The lawyer's concurrent representation of the three complainants in related but separate lawsuits against the appellant implicated two competing professional obligations on the lawyer's part. The duty of candour and the duty of confidentiality.

[173] The lawyer’s duty of candour towards each client precluded her from withholding information relative to the retainer with her client. But where the lawyer represents different clients on separate but related lawsuits, her duty of candour is put in conflict with her duty of confidentiality to each individual client. The duty of confidentiality allows for disclosure with the express or implied authorization of the

client. Without that authorization, the duties remain at odds with one another, barring disclosure.

[174] In addition to the questionable accuracy of the broadly stated principle trial counsel sought to have the trial judge put to the jury, such an instruction would inevitably lead to impermissible speculation by the jury. Whether counsel understood her professional obligations. Whether she complied with them. Whether she obtained a waiver. The nature of any information she provided.

[175] The complainants did not waive their solicitor-client privilege at trial. The jury would hear no evidence about what had actually happened between lawyer and client. Not from the lawyer. And not from the client. The instruction sought would engender idle speculation and deflect the jury's attention from the real issues in the trial.

[176] Further, the instruction sought was unnecessary in light of the trial judge's charge on the relevance of the common representation on the issue of collusion. The trial judge told the jury that the common representation of the complainants in the civil actions was a factor for them to consider in assessing the possibility of collusion as a reason underlying their similar allegations against the appellant. The trial judge also told the jury that the complainants' refusal to waive solicitor-client privilege prevented defence counsel from testing their denials of discussing the accounts of their fellow complainants with civil counsel.

[177] In the result, I am satisfied that the non-direction of which the appellant complains did not amount to misdirection or otherwise compromise the jury's ability to fairly evaluate the complainants' testimony and the appellant's assertion of its collusive origins.

DISPOSITION

[178] For these reasons, I would dismiss the appeal.

Released: "DW" October 8, 2020

"David Watt J.A."
"I agree. C.W. Hourigan J.A."
"I agree. Harvison Young J.A."