Date: 2021 03 22
File: T-2-CR-2020-000520

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

MATTHEW LAKUSTA

REASONS FOR DECISION
of the
HONOURABLE JUDGE GARTH MALAKOE

Restriction on Publication

Identification Ban – See the *Criminal Code*, section 486.4.

By Court Order, information that may identify the victim must not be published, broadcast, or transmitted in any way.

NOTE: This judgment is intended to comply with the identification ban.

Heard at:	Yellowknife, Northwest Territories
Date of Decision:	March 22, 2021
Date of Hearing:	February 24, 2021
Counsel for the Crown:	Levi Karpa
Counsel for the Accused:	Jessi Casebeer
Counsel for the Complainant:	Michael Hansen

[Section 278.93 *Criminal Code* Application]
[Section 278.94 *Criminal Code* Hearing]

Date: 2021 03 22
File: T-2-CR-2020-000520

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

MATTHEW LAKUSTA

WARNING

This application and hearing are governed by s. 278.95 of the *Criminal Code*:

Publication prohibited

278.95 (1) A person shall not publish in any document, or broadcast or transmit in any way, any of the following:

(a) the contents of an application made under subsection 278.93;

(b) any evidence taken, the information given and the representations made at an application under section 278.93 or at a hearing under section 278.94;

(c) the decision of a judge or justice under subsection 278.93(4), unless the judge or justice, after taking into account the complainant's right of privacy and the interests of justice, orders that the decision may be published, broadcast or transmitted; and

(d) the determination made and the reasons provided under subsection 278.94(4), unless

(i) that determination is that evidence is admissible, or

(ii) the judge or justice, after taking into account the complainant's right of privacy and the interests of justice, orders that the determination and reasons may be published, broadcast or transmitted.

Offence

(2) Every person who contravenes subsection (1) is guilty of an offence punishable on summary conviction.

An order has been made under subss. 278.95(1)(c) and (d) allowing the decision and reasons to be published, broadcast, or transmitted, subject to the s. 486.4 order referred to above.

A. INTRODUCTION AND OVERVIEW

[1] Matthew Lakusta is charged with committing a sexual assault on A.B. contrary to s. 271 of the *Criminal Code*.

[2] The sexual assault is alleged to have taken place in the early morning hours of April 19, 2020. The accused is alleged to have penetrated the complainant's anus with his fingers. The trial of this matter is scheduled to take place in Hay River, NT commencing on March 30, 2021.

[3] The issue before the Court is whether or not the defence can cross-examine the complainant with respect to certain documents that the accused has in his possession or control. These are documents in which the complainant has a reasonable expectation of privacy. In particular, the documents contain entries in the complainant's journal, text messages between the complainant and accused before and after the alleged offence and text messages between the complainant and her friend, C.D. after the alleged offence.

[4] Since these are documents relating to the complainant in the possession or control of the accused, the documents cannot be used for cross-examination without approval by the Court. To seek this approval, the defence has to follow a process set out in amendments to the *Criminal Code* which came into force in December, 2018.

[5] The *Criminal Code* contemplates a two stage process consisting of an application and a hearing. At the first stage which was held on February 24, 2021, the Court ruled that the defence application was properly made; that certain of the documents sought to be adduced were capable of being admissible under subs. 276(2); and that a hearing should be held under s. 278.94. In lieu of an oral hearing under s. 278.94, Crown, defence and counsel for the complainant then made written submissions with respect to these documents.

[6] This decision provides the reasons for both the first stage (governed by s. 278.93) and the second stage (governed by s. 278.94).

[7] This decision is organized as follows. First, the allegations against the accused are set out. Then, the documents in the possession of the accused are described. The text messages and diary entries are divided into three categories: non-charge specific sexual activity documents, charge specific sexual activity documents and relationship documents. There is a discussion about why the application is before the Court and whether these are "records" as described in the *Criminal Code*. The appropriate provisions of the *Criminal Code* are reviewed followed by an identification of all material filed with the Court. Then the decision with respect to the s. 278.93 application is given. Finally, the decision following the s. 278.94 hearing is given for each of the three categories of documents. This includes an identification of all documents which are admitted for the purposes of cross-examination and the reasons for their admission.

[8] In this decision, a reference to a section number in the absence of the name of a statute is a reference to the *Criminal Code*, R.S., c.C-34, s.1 as amended.

B. ALLEGATIONS AND DESCRIPTION OF THE DOCUMENTS

B.1 Introduction

[9] Let me briefly review the allegations of the complainant as disclosed by the complainant's statement to the police and then the specifics of the evidence which the defence seeks to use to cross-examine the complainant.

B.2 Allegations

[10] The complainant and accused had been co-workers for eight months. They were friends but they had never had any sort of physical relationship. On the evening of April 18, 2020, they had gone out to the Hay River Museum. The accused invited the complainant and two other males back to a home where he was house-sitting to watch movies.

[11] All four were watching a movie. The accused and the complainant were at opposite ends of a couch. She was under a blanket. They were kicking each other. She started giggling. He pulled down her pants and started fingering her anally. She tried to push his hand away. He anally penetrated her with another finger and eventually stopped. The complainant was at this house until two or three in the morning of April 19, 2020. The complainant asked the accused to come home with her and he declined.

[12] The complainant and the accused had a text conversation later in the morning of April 19, 2020 about the events earlier that morning. The complainant and the accused continued communicating with one another until July, 2020, at which time the complainant cut off contact with the accused.

[13] On August 21, 2020, the complainant reported the incident to the Royal Canadian Mounted Police (RCMP).

B.3 Description of Documents

[14] The following is a description of the documents which form the subject-matter of this application and which the defence wish to have this Court decide as being admissible for the purpose of cross-examining the complainant:

(a) Complainant's journal entries. Two pages dated April 19, 2020 5:38 a.m. including an entry: "Matt crossed the line of no return by pulling my pants down in a room of people, underneath a blanket and coping more than a feel. I was so taken aback by it, and I thought it was a signal of moving forward." . . . "But I get home, and it escalates anyways into a cam/facetime session and I thought it was incredibly hot & vulnerable and intimate";

(b) Text messages between complainant and accused. Two pages with date Sunday, April 19 5:37 a.m. including "Let's talk about that video chat. Because that was wild … But I think we can go wilder …";

(c) Text messages between complainant and accused from January 2020 to April 19, 2020;

(d) Text messages between complainant and accused after April 19, 2020;

(e) WhatsApp messages from the complainant to the accused;

(f) Text messages between the complainant and her friend, C.D. in April 2020;

(g) Text messages between the complainant and C.D. in May and June 2020 including, "She asked when I left baileys and I said 10 minutes after Matt left and then I said we hadn't seen each other in a month, basically fought for most of that time, didn't speak for about 2 weeks….because HE made a move towards me, a willing participant, then he, 5 hours later, said that made me really uncomfortable."

[15] For the purposes of the analysis in this decision, the documents have been divided into three categories:

(a) **Non-charge specific sexual activity documents.** Documentary evidence (text messages exchanged between the complainant and accused and complainant's diary entries) referring to a specific instance of sexual activity, i.e., the FaceTime/cam session which does not form the subject-matter of the charge;

(b) **Charge specific sexual activity documents.** Documentary evidence (text messages exchanged between the complainant and accused and between the complainant and C.D. and complainant's diary entries) referring to the sexual activity that forms the subject-matter of the charge; and

(c) **Relationship documents.** Documentary evidence (text messages exchanged between the complainant and accused and between the complainant and C.D. and complainant's diary entries) regarding the relationship between the complainant and the accused before and after April 19, 2020.

[16] The two pages of the complainant's journal or diary were provided by the complainant to the RCMP and disclosed to the defence as part of the disclosure package. The text messages (including the WhatsApp messages) between the accused and the complainant come from the accused. The text messages between the complainant and her friend, C.D. were provided to the accused by C.D.

C. WHY IS THIS APPLICATION BEFORE THE COURT?

C.1 Cross-examination of the Complainant

[17] The defence is seeking to use these documents to cross-examine the complainant. As disclosed in its written submissions, the position of the defence is that the complainant subjectively consented to the sexual activity that forms the subject-matter of the charge. It was only after the passage of four months and after the accused refused to engage in a romantic relationship with her that the complainant changed her mind that she had consented. She then fabricated the sexual assault.

[18] As I understand the defence position, the cross-examination questions based on the documents will be to

(a) attack the credibility and reliability of the complainant's testimony by raising inconsistencies and omissions between what the complainant said in her statement to the police and in these documents;

(b) question the complainant about her own description of her state of mind during the sexual activity that forms the subject-matter of the charge; and

(c) question the complainant about the relationship between the refusal of the accused to enter into a physical relationship with her and her decision to report a sexual assault to the police.

[19] Pursuant to the legislative scheme in ss. 278.1 to 278.97, the accused, who is facing one of the enumerated offences dealing with sexual misconduct, must apply to the Court when seeking production of certain records in the hands of third parties or when seeking to use at trial certain records in the possession or control of the accused. In the case at bar, the records are in the accused's possession (recognizing that he received the journal entries from the Crown as part of the disclosure process) and he seeks to use them at trial.

C.2 Are the Journal Entries and Text Messages "Records"?

[20] In determining whether the provisions of the *Criminal Code* apply to these documents, two questions must be answered. First, are these documents, i.e., diary entries and text messages, targeted by these provisions? Second, does the defence have to make this application even if the sole use of the documents is to cross-examine the complainant? The answer to both questions is "yes".

[21] Section 278.92 provides that no "record" relating to a complainant that is in the possession or control of the accused, and which the accused intends to adduce, shall be admitted in evidence in any proceeding in respect of an offence under s. 271 unless a judge determines that it is admissible in accordance with the two-step application and hearing procedure set out in ss. 278.93 and 278.94. This operates to render any "record" related to the complainant presumptively inadmissible at trial for any purpose. Further, it is accepted that if an accused seeks to use the record to cross-examine the complainant, then the accused is seeking to "adduce the record" as contemplated by s. 278.92 (*R. v. Boyle*, [2019] O.J. No. 1922).

[22] The definition of a "record" is as follows:

> 278.1 For the purposes of sections 278.2 to 278.92, "record" means any form of record that contains personal information for which there is a reasonable expectation of privacy and includes medical, psychiatric, therapeutic, counselling, education, employment, child welfare, adoption and social services records, personal journals and diaries, and records containing personal information the production or disclosure of which is protected by any other Act of Parliament or a provincial legislature, but does not include records made by persons responsible for the investigation or prosecution of the offence.

[23] For the purposes of this hearing, Crown and defence conceded that the documents with which defence wished to cross-examine the complainant were "records" as defined in s. 278.1. I asked that the parties address in their written submissions why they had made that concession. Clearly, at least some of the documents contained "personal information for which there is a reasonable expectation of privacy" and I have accepted the concession for the purpose of this application.

[24] Having accepted the concession, this decision should not be considered as authority for the proposition that all text messages exchanged between a complainant and accused are "records" as defined in s. 278.1. There are divergent conclusions in this regard across various jurisdictions: *R. v. Nirlungayuk*, [2021] Nu.J. No. 8; *R. v. R.M.R.*, [2019] B.C.J. No. 1442, *R. v. McKnight*, 2019 ABQB 755; and *R. v. A.M.*, [2020] O.J. No. 1345. To my knowledge, the question has not been decided in the Northwest Territories.

C.3 The Right to Cross-examine in a Sexual Assault Case

[25] The importance of cross-examination has been judicially stated many times. For example, in *R, v Lyttle*, 2004 SCC 5, the Supreme Court of Canada wrote:

> [1] Cross-examination may often be futile and sometimes prove fatal, but it remains nonetheless a faithful friend in the pursuit of justice and an indispensable ally in the search for truth. At times, there will be no other way to expose falsehood, to rectify error, to correct distortion or to elicit vital information that would otherwise remain forever concealed.
>
> [2] That is why the right of an accused to cross-examine witnesses for the prosecution -- without significant and unwarranted constraint -- is an essential component of the right to make full answer and Defence.

[26] In *Lyttle*, the Supreme Court also stated that the "right of cross-examination must therefore be jealously protected and broadly construed."

[27] The right to cross-examine is not unlimited. Cross-examination must be relevant and its prejudicial effect must not outweigh its probative value. In a sexual assault case, there is legislation which limits the introduction into evidence of records and hence, the ability of the accused to cross-examine based on these records. The importance of cross-examination and its limits in a sexual assault case are summarized by Karakatsanis J. in *R. v. R.V.*, 2019 SCC 41:

> 38 Individuals charged with criminal offences are presumed innocent until proven guilty. As a result, an accused has the right to call the evidence necessary to establish a defence and to challenge the prosecution's evidence: *R. v. Osolin*, [1993] 4 S.C.R. 595, at p. 663. "Full answer and defence" is a principle of fundamental justice, protected by s. 7 of th*e Canadian Charter of Rights and Freedoms*. In *Seaboyer*, McLachlin J. explained, at p. 608:
>
> > The right of the innocent not to be convicted is dependent on the right to present full answer and defence. This, in turn, depends on being able to call the evidence necessary to establish a defence and to challenge the evidence called by the prosecution.
> > ...
> > In short, the denial of the right to call and challenge evidence is tantamount to the denial of the right to rely on a defence to which the law says one is entitled.
>
> 39 Generally, a key element of the right to make full answer and defence is the right to cross-examine the Crown's witnesses without significant and unwarranted restraint: *R. v. Lyttle*, 2004 SCC 5, [2004] 1 S.C.R. 193, at paras. 1 and 41; *Osolin*, at pp. 664-65; *Seaboyer*, at p. 608. The right to cross-examine is protected by both ss. 7 and 11(d) of the *Charter*. In certain circumstances, cross-examination may be the only way to get at the truth. The fundamental importance of cross-examination is reflected in the general rule that counsel is permitted to ask any question for which they have a good faith basis -- an independent evidentiary foundation is not required: *Lyttle*, at paras. 46-48.
>
> 40 However, the right to cross-examine is not unlimited. As a general rule, cross-examination questions must be relevant and their prejudicial effect must not outweigh their probative value: *Lyttle*, at paras. 44-45. In sexual assault cases, s. 276 specifically restricts the defence's ability to ask questions about the complainant's sexual history. By virtue of s. 276(3), full answer and defence is only one of the factors to be considered by the trial judge; it must be balanced against the danger to the other interests protected by s. 276(3). These additional limits are necessary to protect the complainant's dignity, privacy and equality interests: *Osolin*, at p. 669; see also *R. v. Mills*, [1999] 3 S.C.R. 668, at paras. 61-68. They also aim to achieve important societal objectives, including encouraging the reporting of sexual assault offences: s. 276(3)(b).
>
> 41 Thus, the fact that the accused's ability to make full answer and defence requires that the complainant be cross-examined is not the end of the analysis. The scope of the permissible questioning must also be balanced with the danger to the other interests protected by s. 276(3), including the dignity and privacy interests of the complainant.

[28] This quote, in general, describes the balancing of interests that the Court must consider in determining the admissibility of the documents which are to be used to

cross-examine a complainant in a sexual assault case. The following describes the provisions of the *Criminal Code* which are the legislative direction for this balancing process.

D. THE LEGISLATION

[29] The admissibility of "records" (as the term is defined in s. 278.1) in the hands of the accused is dealt with in s. 278.92. Presumptively, the records are inadmissible. However, there are two gateways through which the Court can admit them. They are stated in s. 278.92(2):

> (a) if the evidence deals with the complainant's sexual activity other than the sexual activity that is the subject-matter of the offence, then the evidence must meet the conditions set out in subs. 276(2) while taking into account the factors set out in subs. (3); and
>
> (b) otherwise, if the evidence is relevant to an issue at trial and has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

[30] In general terms, the non-charge specific sexual activity documents will be subject to the first stream; and the relationship documents and the charge specific sexual activity documents will be subject to the second.

[31] Section 278.92 states as follows:

> 278.92 (1) Except in accordance with this section, no record relating to a complainant that is in the possession or control of the accused – and which the accused intends to adduce – shall be admitted in evidence in any proceedings in respect of any of the following offences or in any proceedings in respect of two or more offences at least one of which is any of the following offences:
>
> (a) an offence under section 151, 152, 153, 153.1, 155, 160, 170, 171, 172, 173, 210, 211, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 286.1, 286.2 or 286.l3; or
>
> (b) any offence under this Act, as it read from time to time before the day on which this paragraph comes into force, fi the conduct alleged would be an offence referred to in paragraph (a) if it occurred on or after that day.
>
> (2) The evidence is inadmissible unless the judge, provincial court judge or justice determines, in accordance with the procedures set out in sections 278.93 and 278.94,

(a) if the admissibility of the evidence is subject to section 276, that the evidence meets the conditions set out in subsection 276(2) while taking into account the factors set out in subsection (3); or

(b) in any other case, that the evidence is relevant to an issue at trial and has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

(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;

(c) society's interest in encouraging the obtaining of treatment by complainants of sexual offences;

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

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

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

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

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

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

[32] Section 278.93 describes the procedure for getting the application before the Court:

278.93 (1) Application may be made to a 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 under subsection 276(2) or 278.92(2).

(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.

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

(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 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).

[33] Section 276 states:

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.

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

(a) is not being adduced for the purposes 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.

(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;

(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.
>
> (4) For the purpose of this section, "sexual activity" includes any communication made for a sexual purpose or whose content is of a sexual nature.

[34] Section 278.94 describes the hearing process to determine if the evidence contained in the records in the possession of the accused is admissible:

> 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).
>
> (2) The complainant is not a compellable witness at the hearing but may appear and make submissions.
>
> (3) The judge shall, as soon as feasible, inform the complainant who participates in the hearing of their right to be represented by counsel.
>
> (4) At the conclusion of the hearing, the judge, provincial court judge or justice shall 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.
>
> (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.

[35] Before going through the two stage process as described in ss. 278.93 and 278.94, it is necessary to review the material that was filed with the Court in support of the accused's application.

E. MATERIAL FILED WITH THE COURT

[36] Counsel for the accused filed the following material with regard to this application:

(a) Notice of Application for Hearing on Admissibility of Evidence filed on January 11, 2021 regarding diary entries of the complainant dated April 19, 2020 and two text messages received by the accused from the complainant on April 19, 2020;

(b) Affidavit of Hilary Sigurdson, legal assistant, filed on January 11, 2021, with copies of above-noted diary entries and text messages;

(c) Transcript of complainant's statement to the RCMP dated August 21, 2020 (38 pages);

(d) Supplementary Application for Hearing on Admissibility of Evidence filed on February 5, 2021 regarding text messages between the accused and the complainant between January and July 2020, two WhatsApp messages from July 2020 and a screenshot of a google doc referred to in the WhatsApp messages, and text messages between the complainant and C.D. between April and June 2020; and

(e) Affidavit of Hilary Sigurdson, legal assistant, filed on February 5, 2021 with copies of the following documents.

Exhibit "A" - Text messages between complainant and accused – January 26, 2020 (2 pages);

Exhibit "B" - Text messages between complainant and accused – February 11, 2020 to February 24, 2020 (12 pages);

Exhibit "C" - Text messages between complainant and accused – March 8, 2020 to March 15, 2020 (15 pages);

Exhibit "D" - Text messages between complainant and accused – April 13, 2020 to May 1, 2020 (38 pages);

Exhibit "E" - Text messages between complainant and accused – May 4, 2020 to May 14, 2020 (59 pages);

Exhibit "F" - Text messages between complainant and accused – June 8, 2020 to July 6, 2020 (42 pages);

Exhibit "G" - Text messages between complainant and accused – July 6, 2020 to July 9, 2020 (4 pages);

Exhibit "H" - WhatsApp messages between complainant and C.D. – April 13, 2020 to May 1, 2020 (12 pages);

Exhibit "I" - WhatsApp messages between complainant and C.D. – April 13, 2020 to May 1, 2020 (34 pages);

Exhibit "J" - WhatsApp messages between complainant and C.D. – June 5, 2020 to June 29, 2020 (34 pages).

[37] For the purpose of this application, I will occasionally use the term "text messages" to include both the SMS text messages and the WhatsApp messages. In addition, although the pages of each exhibit were not numbered, I will refer to the page number for ease of reference.

F. SECTION 278.93 APPLICATION

F.1 Introduction

[38] As stated earlier, the s. 278.93 application was heard on February 24, 2021. During the application, both Crown and defence conceded that the following portions of the documents should be removed from the application:

(a) D-11: "I had an ex who was super into it… but he was also super rough… and wouldn't listen to me.. so I couldn't trust him with that.";

(b) G-4: "I wasn't even ten years old the first time I experienced sexual assault by an older male.";

(c) J-19: "reported my old director for sexual harassment"

[39] At the conclusion of the s. 278.93 application, the Court permitted all of the documents to be considered at the s. 278.94 hearing *except for* the above-noted excerpts. The following describes the reasons for this decision.

F.2 The Nature of s. 278.93 Application

[40] The type of inquiry that the Court must conduct pursuant to s. 278.93(2) is described in *R. v. G.E.*, [2020] O.J. No. 4339, 2020 ONCJ 452:

> 15 The questions before me are whether the evidence in issue--whether of records in which the complainant has a reasonable expectation of privacy or of other sexual activity of the complainant--is "capable of being admissible" under s. 276(2) (for other sexual activity) or s. 278.92(2) (for private records relating to the complainant) (s. 278.93(4)).
>
> 16 I am required to engage in only a facial consideration of the issue, and make a tentative decision about the capability of the evidence to be admissible. Courts should be cautious in limiting the defendant's rights to cross-examine and adduce evidence. Unless the evidence clearly appears to be incapable of admissibility the court should proceed to the second stage and hold a hearing under s. 278.94. Any doubts about admissibility under s. 278.93(4) are better left for the evidentiary hearing under s. 278.94 (*R. v. Ecker*, 96 C.C.C. (3d) 161 (Sask. C.A.); *R. v. B.B.*, [2009] O.J. No. 862 (S.C.J.), *R. v. A.M.*, 2020 ONSC 1846 at para. 28; *R. v. Barakat*, [2019] O.J. No. 705 at para. 18 (C.J.); *R. v. J.S*, 2011 ONSC 5367)

[41] This filed material appears to satisfy the requirements of s. 278.93(2), i.e., "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." Copies of the applications had been given to the prosecutor and the clerk of the court within the requisite time frames.

[42] In order for me to grant the application to hold a hearing under s. 278.94, I must be satisfied that "the evidence sought to be adduced is capable of being admissible under subs. 276(2)."

[43] The type of inquiry that the Court must conduct in s. 278.93(4) is described in *R. v. Kapustinsky*, 2020 ABQB 611 in the context of an application to adduce evidence of sexual activity:

> [21] The first stage does not determine ultimate admissibility under 276(3). This preliminary step is mean to screen out those requests to raise other sexual activity which, on their face, are clearly brought for an impermissible purpose: *R. v. J.E.*, 2019 NLSC 13 paras 47-51. At this point in the process, the Court must be satisfied that the evidence tendered with the application "is <u>capable of being admissible</u> under section 276(2)". (s. 278.93(4)) [emphasis added]
>
> [23] The guiding jurisprudence identifies two key questions the Court must ask at the first stage: (i) is the proposed evidence sufficiently well-defined and circumscribed to serve a proper purpose; and (ii) can the accused articulate the mechanism of relevance to which those specific facts relate. A detailed examination of the relevance mechanism, and the overall balancing of interests the probative and prejudicial value of the evidence, are reserved for the full hearing.

[44] As indicated earlier, for the purpose of the analysis, the evidence sought to be admitted can be divided into three categories:

(a) **Non-charge specific sexual activity documents.** Documentary evidence (text messages exchanged between the complainant and accused and complainant's diary entries) referring to a specific instance of sexual activity, i.e., the FaceTime/cam session which does not form the subject-matter of the charge;

(b) **Charge specific sexual activity documents.** Documentary evidence (text messages exchanged between the complainant and accused and between the complainant and the third party and complainant's diary entries) referring to the sexual activity that forms the subject-matter of the charge; and

(c) **Relationship documents.** Documentary evidence (text messages exchanged between the complainant and accused and between the complainant and the third party and complainant's diary entries) regarding the relationship between the complainant and the accused.

[45] Before dealing with the admissibility of these documents, let me consider an issue raised by the Crown, the authenticity of the text messages.

F.3 Authentication

[46] Section 278.93(2) requires that the application be "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." On the face of it, there is no requirement that an affidavit be filed or that the 'evidence' be authenticated.

[47] The Ontario Court of Appeal dealt with the authentication of text messages in *R. v. C.B.*, 2019 ONCA 380 and defined authentication as follows:

> 64 The requirement of authentication applies to various kinds of real evidence. Authentication involves a showing by the proponent of the evidence that the thing or item proffered really is what its proponent claims it to be: Kenneth S. Broun, ed., *McCormick on Evidence*, 7th ed., vol. 2 (Thomson Reuters, 2013), at $S 212, pp. 4-5.
>
> 65 Authentication is the process of convincing a court that a thing matches the claim made about it. In other words, it is what its proponent claims it to be. Authentication is intertwined with relevance: in the absence of authentication, the thing lacks relevance unless it is tendered as bogus. Thus, authentication becomes necessary where the item is tendered as real or documentary evidence.

[48] In this case, the documents provided to the Court were exhibits to an affidavit filed by the legal assistant of the accused's counsel. With respect to the two pages of the personal diary of the complainant, these were received as part of Crown

disclosure. With respect to the text messages (including the WhatsApp messages), the legal assistant deposed that the lawyer had received the documents from Mr. Lakusta and the third party.

[49] The purpose of s. 278.93 is to determine if the application should go to a hearing. Section 278.94 deals with the hearing itself. At the conclusion of the hearing, the Court determines if the evidence is admissible under subs. 276(2) or 278.92(2). This admissible evidence still has to be admitted into evidence at trial. The authentication of this evidence is part of the admission process at trial.

[50] Since the records are being used to cross-examine the complainant, they will have to be put to the complainant to identify. If she says that she does not recognize them, or did not write what appears to have been written by her, the defence will have to prove the authenticity of the records.

[51] The Crown submits that the "text message record is incomplete and portions of the April 19, 2020 texts have been removed." I recognize that this submission is also made in the context of the comments by the complainant in her text to her friend, C.D., in which the complainant said that she deleted all of the texts between her and the accused. This seems to indicate that only the accused would still have copies of the texts and there is no indication whether or not he has been selective in which texts have been provided to the Court.

[52] During cross-examination, if the complainant feels that there are texts that are missing that might support something that she is saying, it is open to her to state that. At that point, the defence will have to make a decision as to how to respond.

[53] It should also be recognized, that not all texts will be put to her in cross-examination as a result of the outcome of the s. 278.94 hearing. In addition, the cross-examination will depend on what the complainant says in her examination-in-chief. At this stage of the proceedings, there is an assumption that the description of the events in her testimony will resemble the description contained in her statement to the police.

[54] The Crown submitted that in *R. v. Darrach*, [2000] 2 S.C.R. 443, the Supreme Court required that, in respect of s. 276.1, the Court required affidavit evidence as the "detailed particulars of the evidence" and held that part of the purpose of the *voir dire* was to cross-examine the accused on the affidavit. This approach makes sense where the accused is intending to introduce evidence of sexual activity. The Court needs to know the specifics of the activity and it is usually only through the accused's testimony that this evidence will arise. In the situation which is before the Court,

where the issue is the admissibility of documents in the hands of the accused, the documents themselves provide the detailed particulars. In my view, an affidavit of the accused is not required.

[55] This view would be different if the accused was alleging an honest but mistaken belief in communicated consent.

[56] Even if I am wrong in the finding that an affidavit of the accused is not required, there is judicial support for the position that the Court has the discretion to proceed to the s. 278.94 hearing in the absence of an affidavit of the accused (see *R. v. T.A.H.*, [2019] B.C.J. No. 1802 at para. 37).

[57] The Court always has the discretion to inquire as to the basis for the authenticity of the evidence if it has concerns at either of the stages contemplated by s. 278.93 or s. 278.94. In exercising this discretion, the Court has to focus on the admissibility of the evidence and recognize that the authentication of the evidence may require the accused to provide evidence at trial.

F.4 The Decision with respect to s. 278.93

(a) Is the proposed evidence sufficiently well-defined and circumscribed to serve a proper purpose?

[58] With respect to the three categories of documents, there is no controversy that the proposed evidence is well-defined. The texts are before the Court by way of photographs taken of a cell phone displaying the texts (screenshots). When the texts are put to the complainant in cross-examination, it will be clear what is being referred to. She will be able to see the individual texts and the context in which they were sent.

(b) Can the accused articulate the mechanism of relevance to which those specific facts relate?

[59] The relevance of the charge specific sexual activity documents is apparent. With respect to the non-charge specific sexual activity documents, the defence submits that the FaceTime session was not referenced by the complainant in her statement to the police and therefore this omission goes to her credibility. Further, it is submitted that comments made by the complainant in other texts would not be understood without the context of this FaceTime session.

[60] Finally, with respect to the relationship documents, the defence submits that certain comments of the complainant in her statement are contradicted by these texts

and more importantly, they establish a change in her thinking about the sexual activity that forms the subject-matter of the charge.

(c) Is the evidence capable of being admissible under subsection 276(2)?

[61] Section 276(2) refers to sexual activity other than the sexual activity that forms the subject-matter of the charge. Therefore, this does not refer to the charge specific sexual activity documents or the relationship documents.

[62] As indicated above, certain excerpts in the documents have been excluded since they refer to sexual activity which has no relevance to this charge.

[63] This leaves the non-charge specific sexual activity documents. For the purposes of determining whether they are "capable of being admissible under subs. 276(2)", the accused has established that they are not being adduced to support a prohibited inference and that there is some relevance to an issue at trial. For this reason, and recognizing that the threshold is not high at this stage, I decided that they could be considered in the s. 278.94 hearing.

[64] In doing so, I recognize that simply seeking admission of this type of evidence on the basis that it is relevant to context is not sufficient. As stated in *R. v. Goldfinch*, [2019] S.C.J. No. 38:

> [5] A s. 276 application requires the accused to positively identify a use of the proposed evidence that does not invoke twin-myth reasoning. In other words, relevance is the key which unlocks the evidentiary bar, allowing a judge to consider the s. 276(3) factors and to decide whether to admit the evidence. Bare assertions that such evidence will be relevant to context, narrative or credibility cannot satisfy s. 276.

[65] There is one other comment about the documents that are to be considered in the s. 278.94 hearing. Subsection 276(4) states that "[f]or the purpose of this section, "sexual activity" includes any communication made for a sexual purpose or whose content is of a sexual nature." Some of the texts which are being considered in the s. 278.94 hearing which describe the relationship between the complainant and the accused refer to physical and emotional attraction. I have not included these as "sexual activity" for the purposes of the s. 278.94 analysis. In my view, they do not lead to any s. 276 prohibited interferences and the s. 278.94 hearing protects their intimate nature without the requirement that they be subject to a s. 276 analysis.

G. SECTION 278.94 HEARING

G.1 Procedure

[66] As stated earlier, the s. 278.94 hearing was conducted by way of written submissions. Although it was not required under s. 278.93, the complainant was given a copy of the s. 278.93 application and her counsel was present by telephone for the s. 278.93 application. Counsel for the complainant provided written submissions. The complainant adopted the position of the Crown with respect to the admissibility of the documents.

G.2 Crown's Position

[67] The Crown agreed that the following were admissible:

(a) Texts – Exhibit "D" – Affidavit filed January 11, 2021 (2 pages)

Beginning at D-7: "Saturday, Apr 18 • 6:28 PM to D-13: "It was fine…rome just wasn't built in a day yknow?"

(b) Diary entry – Exhibit "A" – Affidavit filed January 11, 2021

"Matt crossed the line of no return by pulling my pants down … for another night"

[68] The Crown agreed that the following was potentially a reference to the incident and therefore possibly admissible:

(a) Texts – Exhibit "F" – Affidavit filed January 11, 2021 (42 pages)

Beginning at F-23: "Jun 17, 10:53 PM • SMS" to "Jun 17, 11:06 PM • SMS"

G.3 Analysis

[69] In the analysis that follows, I will deal with each of the three categories of documents and follow the analysis set out in s. 278.94. Following this analysis, I will list the admissible documents. A summary of the admissible documents is contained in Appendix "A".

[70] Before doing so, let me deal with the factors in s. 278.92(3). The factors in s. 278.92(2) will be dealt with below when referring to each of the three categories of documents.

[71] With respect to subss. 278.92 (3)(a) and (d), the texts and diary entries which are admissible are required for the accused to make full answer and defence and will assist in arriving at a just determination in this case.

[72] With respect to subs. (h), the diary entries were provided by the complainant to the RCMP. Presumably, they were to support the complaint of sexual assault. There is a diminished privacy interest of the complainant in these personal entries given the circumstances in which they were shared with the police.

[73] The text messages and WhatsApp messages were one-to-one closed communications between the complainant and the accused and between the complainant and her friend, C.D. As such, there would initially be strong expectations of privacy in them by its participants. In her statement to the police, the complainant refers to texts between her and the accused. This is in the context of general comments about communicating by text, stopping communication and deleting texts. There are also specific references to specific texts. For example, a text from the accused about "I didn't really know if two fingers would fit or something like that."

[74] In referring to the contents of text messages with the accused in her statement to the RCMP, the complainant has lowered the expectation that those text messages are to be kept private.

[75] With respect to the text messages between the complainant and C.D., there is a higher expectation of privacy; however, the messages do not contain extraneous or overly personal information that is not related to relevant issues at trial. On the issue of "reasonable expectation of privacy", it is significant that at one point, the complainant includes a copy of one of the accused's texts in a text to C.D.

[76] As will be indicated below, certain texts and diary entries will not be admissible because of the potential to engage a "discriminatory belief or bias." With respect to the admissible texts and diary entries, I am satisfied that their use in the cross-examination of the complainant will have significant probative value and will not prejudice the proper administration of justice.

[77] In particular, the use of these texts and diary entries will not catch the complainant by surprise, given her participation in this process. The areas of cross-examination will not go outside the boundaries that were established by the complainant in her statement to the police. I am satisfied therefore that their admissibility will not discourage the reporting of sexual assault offences or affect

the complainant's right to personal security and full protection and benefit of the law.

H. NON-CHARGE SPECIFIC SEXUAL ACTIVITY DOCUMENTS

[78] In the diary entry (Exhibit "A" of the January 11, 2021 affidavit), there is reference to a FaceTime session which, by its description, involved sexual activity:

> "But I get home, and it escalates anyways. Into a cam/facetime session and I thought it was incredibly hot + vulnerable and intimate."

[79] This same session was described in Exhibit "B" of the January 11, 2021 affidavit:

> "Let's talk about that video chat. Because that was wild … but I think we can go wilder … winking emoji."

[80] The defence submits that the description of the FaceTime session is relevant for two reasons:

(a) It is linked with the previous entry describing the sexual activity that forms the subject-matter of the charge. In particular, the phrase "and it escalates anyways" is linked to the accused not wanting to come over "because he wants to save it for another night." The ability to cross-examine the complainant on the totality of the events would give the Court a more clear understanding of what happened that night.

(b) In her statement to the RCMP, the complainant said that there was no further physical contact with the accused after the alleged incident. She describes messaging the accused the next morning. There is no reference to the FaceTime session.

[81] In my view, the entries have little probative value on the issue of whether or not the complainant consented to the sexual activity in question or to her credibility. To the contrary, the fact that she engaged in a consensual sexual activity a short time after the sexual activity in question has the real potential to be used, inappropriately, to support the inference that she had consented to the sexual activity in question. In short, the evidence cannot be introduced pursuant to s. 276(2).

[82] In refusing to allow these portions of the documents to be admitted, I recognize that there may be an issue with respect to a later text which states:

> J-10 "because HE made a move towards me, a willing participant, then he, 5 hours later, said that made me really uncomfortable"

[83] The defence submits that the complainant was referring to the sexual activity which forms the subject-matter of the offence when she refers to herself as "a willing participant." The Crown submits that she was referring to the FaceTime session. If I refuse to allow any reference to the FaceTime session, it will not be possible for the complainant to be cross-examined as to the meaning of her being "a willing participant."

[84] In this regard, I will allow the Crown and defence to refer to the fact of a contact between the complainant and the accused by FaceTime after the sexual activity that forms the subject-matter of the offence. There can be no reference to the nature of the contact; other than the fact that a FaceTime session occurred. There can be questions which establish when and for how long the FaceTime session took place.

I. CHARGE SPECIFIC SEXUAL ACTIVITY DOCUMENTS

I.1 Analysis

[85] Documents which describe or refer to the sexual activity which forms the subject-matter of the charge are not evidence of sexual activity that is prohibited by s. 276(2). Nonetheless, these documents must contain evidence that is "relevant to an issue at trial" and have "significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice" while taking into account the factors in s. 278.92(3).

[86] With respect to the diary entries and the texts between the accused and the complainant, the defence submits the follow reasons for the relevance of the identified entries and texts regarding charge specific sexual activity:

(a) The complainant describes her reaction to the accused using his fingers to penetrate her anus. This relates to whether she was consenting;

(b) Her description of her reaction to the accused is inconsistent with her descriptions of the allegations to the RCMP.

[87] With respect to the texts between the complainant and her friend, C.D., the defence submits the follow reasons for the relevance of the identified texts regarding charge specific sexual activity:

(a) The complainant's description of her reaction to the accused during the incident is inconsistent with her descriptions of the allegations to the RCMP, where she said she was fearful.

(b) The complainant's description of herself as a "willing participant", if she is referring to the sexual activity which forms the subject-matter of this offence is relevant to the issue of consent.

[88] In general, the texts and diary entries which refer to the specific sexual activity which forms the subject-matter of the offence are admissible. The potential relevance for the purposes of cross-examination is clear, given that lack of consent is an essential element of the offence.

[89] The importance of "ambiguous or contradictory conduct" relating to the issue of consent is explained in *R. v. Ewanchuk,* [1999] 1 S.C.R. 330

> 61. In sexual assault cases which centre on differing interpretations of essentially similar events, trial judges should first consider whether the complainant, in her mind, wanted the sexual touching in question to occur. Once the complainant has asserted that she did not consent, the question is then one of credibility. In making this assessment the trier of fact must take into account the totality of the evidence, including any ambiguous or contradictory conduct by the complainant. If the trier of fact is satisfied beyond a reasonable doubt that the complainant did not in fact consent, the *actus reus* of sexual assault is established and the inquiry must shift to the accused's state of mind.

I.2 Admissible Documents Related to Charge Specific Sexual Activity

Diary Entries – Exhibit "A" – Affidavit filed January 11, 2021

[90] Both pages are admissible *except for*, "But I get home, and it escalates anyways into a cam/facetime session, and I thought it was incredibly hot & vulnerable and intimate." See direction above with respect to fact of a FaceTime communication occurring.

Texts – Exhibit "D" – Affidavit filed February 5, 2021 (37 pages)

[91] The following are admissible:

(a) D-8 "Sunday, Apr 19 • 3:56 AM" to D-12 "I didn't say I didn't";

(b) D-17 "I just can't see this turning out good for either of us…Do you see it different?" to D-17 "Apr 19, 12:05 PM •SMS";

(c) D-20 “The only thing unhealthy here is that you keep pulling away ..” to D-25 “Congrats on taking it too far again and ruining whatever potential was here. Which clearly to you was never anything.”

(d) D-33 “Umm soo I don’t think this is fully resolved for me yet … as well”

Texts – Exhibit “F” – Affidavit filed February 5, 2021 (59 pages)

[92] The following are admissible:

(a) F-13 “I know I cant give you what you want either” to F-13 “the fallout of a third time will be worse”.

(b) F-25 “You ran straight for third base while I’m trying to slowly guide you to first” to “Jun 17, 11:06 PM • SMS”

(c) F-32 “”All I expected from you before was friendship until you were ready and I was so so happy to think that you were that night.” to “Tuesday, June 23 • 10:43 PM”

Texts – Exhibit “H” – Affidavit filed February 5, 2021 (12 pages)

[93] The following are admissible:

(a) H-3 “Sun, Apr 19, 1:02 PM” to H-6 “I know. I’m just disappointed to say the least. Because I was fine with.how things were. And he had to go and do this and now it’s in a state of disrepair.”

WhatsApp Messages – Exhibit “I” – Affidavit filed February 5, 2021 (33 pages)

[94] The following are admissible:

(a) I-29 “Wed, May 20, 9:27 PM” to I-33 “except keep moving forward.”

WhatsApp Messages – Exhibit "J" – Affidavit filed February 5, 2021 (34 pages)

[95] The following are admissible:

(a) J-8 "Fri, Jun 5, 10:45 PM" to J-10 "because HE made a move towards me, a willing participant, then he, 5 hours later, said that made me really uncomfortable"

J. RELATIONSHIP DOCUMENTS

J.1 Relevance of Relationship Documents

[96] The defence submits that these documents are relevant for cross-examination of the complainant to:

(a) Establish inconsistencies with her statement to the RCMP; and

(b) Demonstrate potential motivation to fabricate the allegation of sexual assault.

[97] A key element to the defence submission that the complainant subjectively consented to the sexual activity that formed the subject-matter of the charge but then changed her mind about her consent is contained in the complainant's statement to the RCMP. At page 32, the following exchange occurs:

> Q: Now, had you guys ended up staying or stuff like that, would you consider that more of just an advance? Or … How would that work out? If he ended up coming over that night? To your house?
>
> A: [sighs] Yeah, I think about that a lot too. Uhm … if, if he had … I think things would have played out the same way. Like, I think he would have … woke up the next morning and been like well that, that didn't work for me. I can't do this.
>
> Q: Mhm.
>
> A: Like I think … I think that's how that would have played out. And I think we still would have just like … been in this really weird place. Of like both of us being really uncomfortable. And … Not being able to move forward and I … [signs] And then there's another part of me that wonders well, maybe, maybe that wouldn't have happened and maybe things would have like … progressed and, you know, would you have ever called, call this what it was? Would you ever been able to call a spade a spade, kind of thing? <u>And … I think if I … if things had worked out in like the way that I wanted them to, I don't think I would have ever been able to say that was actually sexual assault.</u>

[emphasis added]

[98] It is important to consider the evidence that is before the Court at this point in this hearing and how it relates to the evidence that will be introduced at trial. First, unless something unexpected occurs, the statement of the complainant will not be entered as an exhibit during the trial. Second, the texts and diary entries which are the subject-matter of this application will only be used to cross-examine the complainant. They will not stand by themselves as evidence of the truth of their contents.

[99] At trial, the complainant will testify during the Crown's case. After her examination-in-chief, the complainant will be cross-examined by the accused's counsel. The nature and content of the cross-examination will depend on what the complainant testified in her examination-in-chief. If her testimony is inconsistent or contradictory to something she said to the RCMP, then the defence can cross-examine on that inconsistency. Similarly, if her testimony is inconsistent with respect to what she wrote in a diary entry or text, then the defence can cross-examine on that inconsistency. Finally, the complainant may omit to say something that is contained in the statement, diary entries or text. The defence will be able to cross-examine on those omissions.

[100] In determining whether the diary entries or texts are admissible for the purpose of cross-examination, the Court must recognize that the relevance of this evidence is related to what the complainant says in examination-in-chief. For the purposes of predicting what she might say in examination-in-chief, we are using the statement to the RCMP.

[101] With respect to the relationship diary entries or texts, they may be relevant to what the complainant said in her statement to the police, but this may change after the complainant has testified. Depending on what the complainant testifies, the diary entries or text may no longer be relevant. For example, if she testifies during examination-in-chief that after June 19, 2020, she continued to want a relationship with the accused and this affected how she perceived the events of April 19, 2020, these diary entries or texts would have limited relevance.

[102] At this point, the Court is balancing the privacy interests of the complainant and the other factors set out in s. 278.92(3) with the relevancy. Even if the diary entries or texts are determined to be admissible at this stage, the Court may prohibit cross-examination based on the diary entries or texts at trial if they lose their relevancy or probative value.

[103] Where I have not determined texts to be admissible and not provided a specific explanation, it is because they do not appear to have significant probative value.

J.2 Delay and Fabrication

[104] The Court cannot make an assumption that the delay in reporting the sexual assault was related to whether or not the complainant consented. There is no inference to be drawn from the fact that a sexual assault complainant does not complain immediately after the assault.

[105] As the Ontario Court of Appeal said in *R. v. Lacombe*, 2019 ONCA 938, [2019] O.J. No. 6023, at para. 45, "[d]elayed reporting, standing alone, does not assist in evaluating whether an account alleging a consensual encounter is true or raises a reasonable doubt."

[106] There is, however, a distinction between relying on an invalid inference and trying to establish that the inference is true. Therefore, it is open to the defence to try and establish that during this period of delay, the complainant changed her mind as to whether or not she consented and then fabricated the charge. This is not unlike the situation in *R v Shearing*, [2002] 3 SCR 33, 2002 SCC 58 where the defence was trying to establish the significance of an absence of entries about sexual assault in a complainant's diary. The Supreme Court of Canada stated at para. 146:

> [T]he probative value to the Defence depended on establishing the premise that if the physical and sexual abuse occurred, it would have been recorded. The Defence was rightly precluded from assuming the truth of that premise, but it did not follow that the Defence should also be precluded from attempting to demonstrate it with this particular diary on the particular facts of a case.

[107] As I understand the defence submission, a major thrust of the cross-examination based on the relationship documents will be to establish this change of mind and fabrication. In this regard, the evidence identified below is relevant and has significant probative value.

J.3 Admissible Documents related to Relationship

Texts – Exhibit "E" – Affidavit filed February 5, 2021 (59 pages)

[108] The following are admissible:

(a) E-16 "I feel so incredibly hurt by all of this …" to E-59.

Texts – Exhibit "F" – Affidavit filed February 5, 2021 (42 pages)

[109] The following are admissible:

(a) F-1 to F-42.

Texts – Exhibit "G" – Affidavit filed February 5, 2021 (4 pages)

[110] The following are admissible:

(a) G-1 to G-4

K. SUMMARY

[111] This decision is provided pursuant to s. 278.94. Appendix "A" summarizes which of the texts and diary entries can be used for the purpose of cross-examining the complainant.

[112] As indicated in the first paragraph, I make an order under subss. 278.95(1)(c) and (d) allowing this decision and reasons to be published, broadcast, or transmitted, subject to the s. 486.4 order protecting the identity of the complainant. In making this order, I have tried to remove any information which may identify the complainant so that her right of privacy would not be infringed.

Garth Malakoe
T.C.J.

Dated at Yellowknife, Northwest Territories, this 22nd day of March, 2021.

APPENDIX "A"

A. EVIDENCE ADMITTED PURSUANT TO s. 278.94(4)

A.1 Portions of text ruled inadmissible at s. 278.93 application

[113] At the conclusion of the s. 278.93 application, the Court permitted all of the documents to be considered at the s. 278.94 hearing ***except for*** the following excerpts:

(a) D-11: "I had an ex who was super into it… but he was also super rough… and wouldn't listen to me.. so I couldn't trust him with that.";

(b) G-4: "I wasn't even ten years old the first time I experienced sexual assault by an older male.";

(c) J-19: "reported my old director for sexual harassment"

A.2 Diary Entries – Exhibit "A" – Affidavit filed January 11, 2021

[114] Both pages are admissible ***except for***, "But I get home, and it escalates anyways into a cam/facetime session, and I thought it was incredibly hot & vulnerable and intimate." See direction above with respect to questions about the fact of FaceTime communication occurring, the time and the duration.

A.3 Texts – Exhibit "B" – Affidavit filed January 11, 2021 (2 pages)

[115] Neither of the two pages are admissible.

A.4 Texts – Exhibit "A" – Affidavit filed February 5, 2021 (2 pages)

[116] Neither of the two pages are admissible.

A.5 Texts – Exhibit "B" – Affidavit filed February 5, 2021 (12 pages)

[117] None of the pages are admissible.

A.6 Texts – Exhibit "C" – Affidavit filed February 5, 2021 (15 pages)

[118] None of the pages are admissible.

A.7 Texts – Exhibit "D" – Affidavit filed February 5, 2021 (37 pages)

[119] The following are admissible:

(a) D-8 "Sunday, Apr 19 • 3:56 AM" to D-12 "I didn't say I didn't";

(b) D-17 "I just can't see this turning out good for either of us…Do you see it different?" to D-17 "Apr 19, 12:05 PM •SMS";

(c) D-20 "The only thing unhealthy here is that you keep pulling away .." to D-25 "Congrats on taking it too far again and ruining whatever potential was here. Which clearly to you was never anything."

(d) D-33 "Umm soo I don't think this is fully resolved for me yet … as well"

A.8 Texts – Exhibit "E" – Affidavit filed February 5, 2021 (59 pages)

[120] The following are admissible:

(a) E-16 "I feel so incredibly hurt by all of this …" to E-59.

A.9 Texts – Exhibit "F" – Affidavit filed February 5, 2021 (42 pages)

[121] The following are admissible:

(a) F-1 to F-42.

A.10 Texts – Exhibit "G" – Affidavit filed February 5, 2021 (4 pages)

[122] The following are admissible:

(a) G-1 to G-4

A.11 Texts – Exhibit "H" – Affidavit filed February 5, 2021 (12 pages)

[123] The following are admissible:

(a) H-3 "Sun, Apr 19, 1:02 PM" to H-6 "I know. I'm just disappointed to say the least. Because I was fine with.how things were. And he had to go and do this and now it's in a state of disrepair."

A.12 WhatsApp Messages – Exhibit "I" – Affidavit filed February 5, 2021 (33 pages)

[124] The following are admissible:

(a) I-29 "Wed, May 20, 9:27 PM" to I-33 "except keep moving forward."

A.13 WhatsApp Messages – Exhibit "J" – Affidavit filed February 5, 2021 (34 pages)

[125] The following are admissible:

(a) J-8 "Fri, Jun 5, 10:45 PM" to J-10 "because HE made a move towards me, a willing participant, then he, 5 hours later, said that made me really uncomfortable"

Date: 2021 03 22
File: T-2-CR-2020-000520

IN THE TERRITORIAL COURT
OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

MATTHEW LAKUSTA

REASONS FOR DECISION
of the
HONOURABLE JUDGE GARTH MALAKOE

Restriction on Publication

Identification Ban – See the *Criminal Code*, section 486.4.

By Court Order, information that may identify the victims must not be published, broadcast, or transmitted in any way.

NOTE: This judgment is intended to comply with the identification ban.

[Section 278.93 *Criminal Code* Application]
[Section 278.94 *Criminal Code* Hearing]