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IN THE SUPREME COURT OF CANADA
(ON APPLICATION FOR LEAVE TO APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

HIS MAJESTY THE KING

APPLICANT
(Respondent in the Court of Appeal)

AND:

EDWIN TSANG

RESPONDENT
(Appellant in the Court of Appeal)

MEMORANDUM OF ARGUMENT
HIS MAJESTY THE KING - APPLICANT

(Pursuant to s. 693(1) of the *Criminal Code*)

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PART I – OVERVIEW AND FACTS

A. Introduction

1. In *R. v. Tsang,* 2022 BCCA 345, the Court of Appeal for British Columbia ("BCCA") overturned the respondent's conviction for sexual assault because it took issue with the trial judge's reasons for disbelieving his evidence that *the complainant* instigated the rough sex that injured her, in circumstances where the trial judge found she was dominated and controlled by him. The BCCA held that the trial judge's acceptance of the complainant's testimony that she did not consent to the violent sexual activity, and corresponding rejection of the respondent's contradictory account that she asked for it, could "only have been founded upon an assumption about what activity [the complainant] might have willingly engaged in after she willingly engaged in some sexual foreplay". Accordingly, the judge's credibility assessment was affected by implicit, unsupported assumptions about "normal behaviour" which engaged speculative reasoning.

2. On a functional and contextual review of the reasons for judgment, however, the trial judge found the complainant to be a credible witness and accepted her evidence that, while she agreed to go into the back seat of the car to engage in some form of sexual activity, she did not consent to the respondent's subsequent application of force to compel fellatio or his vigorous penetration of her vagina causing significant injuries. Consequently, the trial judge rejected the respondent's account that the reluctant complainant freely encouraged and enjoyed objectifying and violent sexual practices – telling him she liked it "rough", asking him to "spank" her, calling him "daddy", and urging him to "finger her harder". His story, said the trial judge, was "an attempt to explain the presence of the injuries", and "at odds with the evidence I accept".

3. This Court has already granted leave in *R. v. Kruk,* 2022 BCCA 18, on the basis that the BCCA's approach to speculative reasoning raised issues of public importance, including that it unduly fetters a trial judge's ability to make credibility findings and can operate unfairly against sexual assault complainants. The BCCA in this case, broadly speaking, committed the same errors alleged in *Kruk* by: (1) finely parsing the trial judge's language, rather than assessing the overall meaning of the reasons; (2) misapplying the prohibition on speculative reasoning to oust permissible use of common sense by a trial judge; and (3) substituting its own inferences about the believability of evidence when the trial judge's analysis was logical and reasonable.

4. This application is therefore accompanied by a request that consideration of whether to grant leave be expedited so, if leave is granted, this appeal could be heard with the *Kruk* case (SCC No. 40095). Alternatively, it is requested that this application be considered in the normal course or after the release of the Court's decision in *Kruk* if appropriate.

5. The overlap between this case and *Kruk* makes it efficient to have the appeals heard together. Further, while there are factual differences between the two cases, these differences would permit this Court to assess how impermissible reasoning is being misidentified by appellate courts in a variety of contexts to the detriment of sexual assault complainants, and to justify appellate intervention contrary to this Court's pronouncements on the deference and latitude that must be provided to trial judges when explaining credibility assessments.

6. The BCCA in *Tsang* dissected the judge's manner of expression and concluded the judge relied on generalizations which the BCCA either deemed permissible or impermissible. However, the inferences impugned by the BCCA were available to the trial judge on the evidence. Further, in distinguishing what was permissible and what was not, the BCCA failed to apply a principled framework that would enable trial judges to determine what inferences can legitimately be relied upon to resolve credibility disputes. This Court's intervention is required to provide guidance which affirms that trial judges may rely on their common sense even when assessing sexual interactions, and to ensure that the prohibition on impermissible reasoning does not become a means of circumventing appellate deference when the reviewing court merely disagrees with the trial judge's factual findings or inferences drawn from the evidence.

7. The BCCA in *Tsang* principally disagreed with the trial judge that what had previously transpired between the complainant and the respondent to shape their dynamic had practical relevance once the complainant agreed to some "sexual foreplay". According to the BCCA, no rational inferences could be drawn about the believability of the respondent's evidence that the complainant desired objectifying and violent sexual activity. In effect, having consented to some sexual contact, it could not be implausible that the complainant could then have instigated other sexual activity including violent force. This Court's intervention is also required to disavow victim-blaming by using the complainant's limited consent to undermine her credibility and by reconstructing harm as the outcome of rough sex, which effectively breathes new life into misogynist stereotypes about women "asking for it".

B. Facts

8. The complainant, a then 20-year-old university student, attended a two-day music festival with her close friend L.F. in December of 2018. They met the respondent, who was working as a photographer, for the first time at the event. The complainant and the respondent were acquainted with one another through the complainant's sister and social media.[1]

9. The respondent met up with the complainant's group twice at the event. The first time he barely interacted with the complainant, as she was flirting with a friend named Josh. The respondent directed his attention to Ms. F. and gave the impression that he was trying to hit on her. Neither woman was interested in the respondent. The second time he met up with the group he invited the complainant and Ms. F. to an afterparty at a club where a DJ called Galantis, the complainant's favourite artist, was slated to perform.[2]

10. The appellant drove the two women to the afterparty, parking close to the venue. He snorted cocaine, and then pressured the complainant and her friend to leave their belongings (fanny packs) in his car when they were leaving to go to the club.[3] Once inside the club, the respondent pressured the women to consume alcohol.[4] Ms. F. refused and left the club around 1:30 a.m. The complainant decided to stay on the respondent's reassurance that Galantis would be on "soon" and he would drive her home.[5] She drank tequila bought by the respondent, although she had requested water, because she did not want to deal with the anger and annoyance he earlier exhibited when they did not want to leave their fanny packs in his car.[6]

11. The respondent made unwanted advances towards the complainant on the dance floor, including by touching her breasts and kissing her. She did not reciprocate but did not react in an aggressive way, trying not to make him mad. He forced her to sit on his lap in the upstairs gallery, which she did, explaining, "you pick your fights". While she was on his lap, the respondent asked her, "Have you ever had sex with a stranger?" She said no. He immediately said, "Let's go" (it

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[1] Applicant's Record (AR) TAB C, Reasons for Judgment (RFJ), ¶¶2, 3, 13, 68-69
[2] AR, TAB C (RFJ, ¶¶5-6, 16-18, 118, 133)
[3] AR, TAB C (RFJ, ¶¶7, 19, 119, 134, 136)
[4] AR, TAB C (RFJ, ¶¶20-21, 23, 120, 122, 137, 138)
[5] AR, TAB C (RFJ, ¶¶9, 22); AR, PART D, pp.121-122 (T.46(35)-47(17))
[6] AR, TAB C (RFJ, ¶23); AR, PART D, pp.123-124 (T.47(18)-48(5))

was only 15 minutes after her friend had left). The complainant was confused but left the club with the respondent in an inebriated state because she was worried about getting home.[7]

12. The complainant sobered up a bit during the drive when she became concerned by the respondent's impairment. The appellant said he wanted to go into a parking lot, so she told him to take a right turn into the Britannia parking lot, which she knew was about three minutes away from her residence, whereas the next turnoff was for a park.[8]

13. The complainant felt vulnerable because she was scantily attired in an unsafe neighbourhood, but she did not think the respondent posed any immediate danger.[9] She assumed the respondent wanted to "hook up" with her. She did not really want to – she was drunk and wanted to go home. When the respondent suggested they get into the back seat, she thought "I'm not going to protest too much" and "I'm not going to make his life more difficult" because of what they had already done in the club and because he had been nice to her, planning to just make out. Only when she got into the back seat did she see that the zipper of his pants was slightly undone, and the tip of his penis was showing. They kissed, while he touched her breasts over her clothing.[10]

14. The complainant testified that the respondent, without her consent, then pulled on her hair, forcing her head toward his penis, which he had exposed. He told her to "lick it" and she said, "I'm drunk. I want to go home." She tried to push back against his hand with her head. He told her, "Just suck it". He moved her head up and down on his penis, called her a "dirty slut", told her she "loved that dick" and was enjoying it. He also grabbed her by her throat to raise her head, choking her. Several times, he forced his entire penis into her mouth, causing her to gag and start crying.[11]

15. The respondent told the complainant to "just ride his dick". She repeatedly said no. She told him she was drunk, tired, and wanted to go home. He suggested "anal". She said she no. As he was holding her head to his penis, the respondent moved her clothing aside and "fingered" her, putting one and then multiple fingers inside of her vagina, as well as a finger in her anus. The complainant testified that it hurt a lot and it hurt for days. He kept telling her she was enjoying it ("you like this"),

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[7] AR, TAB C (RFJ, ¶¶24-26, 121, 140-142); AR, PART D, pp.125-128 (T.48(7)-51(21))
[8] AR, TAB C (RFJ, ¶¶27, 52, 143); AR, PART D, pp.129-131 (T.51(39)-53(18))
[9] AR, TAB C (RFJ, ¶¶53-55, 143); AR, PART D, pp.164-166 (T.106(6)-107(31); 109(22-39))
[10] AR, TAB C (RFJ, ¶¶28-29, 144); AR, PART D, pp.132-136 (T.53(22)-56(10), 106(14-21))
[11] AR, TAB C (RFJ, ¶¶30-31, 145); AR, PART D, pp. 137-141 (T.56(13)-58(21), 69(44)-70(22))

but she was not able to respond because she had his penis in her mouth. Whenever she was able to breathe, she told him she wanted to go home. She denied ever asking him to spank her or saying, "I like it rough. Go harder".[12]

16. The respondent said, "Why don't you just ride this cock". She said no. He said, "Just for 10 seconds". He released her head, and she was able to get his hand out of her vagina. He pulled her onto his lap and moved her body until he penetrated her vagina with his penis. The intercourse was painful because of the injuries she had sustained from the fingering. She counted down 10 seconds in her head and told him, "It's been 10 seconds", but he continued for about a minute more until she was able to push herself off him. He looked annoyed, said "fine", and pulled her head back to his crotch. He masturbated and then ejaculated onto his stomach, telling her to "lick it up".[13]

17. The complainant agreed that, in response to his earlier question about whether she spit or swallowed, she said "swallow" because she did not want a "spit" response to incite him to ejaculate inside of her.[14] She testified that she tried to make small talk afterwards, asking questions like, "Have you done this with other girls?" and "If [she] did a good blow job?" He drove her to Ms. F.'s house and before she even made it to the sidewalk, he was gone. The complainant testified she started criticizing herself and felt disgusted that the respondent had ignored her "asks". She then messaged him asking "if what had happened had happened" and when he responded "no" she knew it was not just a misunderstanding but that he felt ashamed about his actions.[15]

18. The next morning the complainant was in a lot of pain, her vagina hurt, and she saw blood when she urinated. She went to the hospital because she was concerned about diseases.[16] Dr. Hirowatari examined her. She was qualified, without objection, as a medical doctor with expertise as a sexual assault physician examiner, able to proffer an opinion as to whether the observed physical injuries were consistent with the reported sexual assault. Dr. Hirowatari documented unprecedent injuries to the complainant's genital area in terms of number and depth, including a

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[12] AR, TAB C (RFJ, ¶¶32-34, 57, 146); AR, PART D, pp.142-148 (T.58(20)-62(16), 120(30-60), 124(5-17))
[13] AR, TAB C (RFJ, ¶¶35-37, 147); AR, PART D, pp.149-155 (T.62(17)-68(4))
[14] AR, TAB C (RFJ, ¶37); AR, PART D, p.156 (T.65(15-45))
[15] AR, TAB C (RFJ, ¶¶39-41); AR, PART D, pp.157-160 (T.68(4)-69(11), 71(35)-72(34))
[16] AR, TAB C (RFJ, ¶¶42-44); AR, TAB D, pp.161-163 (T.73(12)-75(23))

rift in her genital opening only commonly seen after childbirth. That rift would not only be painful to sustain but would cause secondary pain on exposure to air, urine, or touch.[17]

19. The respondent gave a diametrically opposed description of the sexual encounter. He testified the complainant propositioned him after they left the club. She asked him, "Hey, do you want to have some fun?" He said, "What kind of fun?" She said, "I won't fuck you, but I will give you a blow job." He was "a little bit surprised" but asked her if she was good at giving blow jobs. She said, "That's for you to find out." The complainant suggested that they go to a parking lot near her home. They parked and, at her suggestion, he got into the back seat.[18]

20. The respondent said the complainant straddled him and began grinding against him while they made out. She tugged on his hair and said, "Spank me, daddy." He asked her, "Do you like rough sex?" The complainant said she did. The complainant spat on his penis, began giving him a hand job, and then started performing oral sex. She was "deep throating it". According to the respondent, the complainant was "quite turned on as well just from like, the light moaning and the way she's going at it. She was quite aggressive". He said, "Wow, you're actually pretty good at giving blow jobs" and told her she was probably top five.[19]

21. The respondent said the complainant consented to being "fingered" by him. She repositioned herself and returned to giving him oral sex. He reached over her, pushed her underwear aside, and put one finger in her vagina. The complainant was moaning in pleasure and urging him to "finger me hard, daddy" and "harder, harder, harder". As a result, he fingered her "a little harder". She continued moaning and encouraging him, so he tried fingering her harder, but their positions made it difficult. He asked her if she wanted to get on his lap so he could finger her from the front. She agreed and got on his lap. He put two fingers inside of her, "hitting her G-spot". She continued moaning and telling him, "harder". He put three fingers inside her vagina. The complainant moaned in pleasure: "[s]he was in sort of like euphoria".[20]

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[17] AR, TAB C (RFJ, ¶¶59-64); AR, PART D, pp.167-187 (T.131(28)-151(37))
[18] AR, TAB C (RFJ, ¶¶80-83); AR, PART D, pp.188-190 (T.195(8)-197(46))
[19] AR, TAB C (RFJ, ¶¶84-87); AR, PART D, pp.191-195 (T.198(26)-201(26), 205(27-35))
[20] AR, TAB C (RFJ, ¶¶88-89, 100); AR, PART D, pp.196-201 (T.201(32)-204(29), 226(37)-227(5))

22. When "she stopped for a second", the respondent asked the complainant "Do you want me to fuck you?" She asked if he had a condom. He briefly rummaged through his centre console, couldn't find a condom, and told her he didn't have one. She went back to performing oral sex, "deep throating" him. He grabbed her hair to "reinforce that type of rough action". He said he was going to come soon and asked her, "Do you spit or swallow?" She replied, "I swallow. Spitting is for losers." He ejaculated into her mouth, and she swallowed. They cuddled and made small talk.[21]

23. The respondent said he drove the complainant to Ms. F.'s place, where she kissed him on the lips and said she would like to see him tomorrow (he had said he would try). She asked him to pop the trunk to retrieve her fanny pack, they waved goodbye, and he drove off "pretty quickly". He was still driving home when he received her message, and he was confused because she had been "giving [him] all these cues". He assumed she was asking about intercourse and kept denying that he "didn't go in". Later, upon learning that she was going to the hospital, he wrote, "[a]ll we did was have a tequila shot".[22]

C. Reasons for Judgment

24. The trial judge instructed herself in accordance with the framework articulated by this Court in *W.(D.)*[23] that her task was not "to simply compare stories about the event or shift the onus to the accused". Rather, she was required to scrutinize the credibility and reliability of the Crown evidence before it could be acted upon as proving the offence beyond a reasonable doubt.[24]

25. After conducting an extensive examination of the evidence, the judge accepted the complainant's evidence that: while she agreed to get into the back seat with the respondent and was aware that they might do more than just kiss, the respondent then applied unwanted force to her head and hair, forcing his penis in her mouth, causing her to cry and gag; and he pushed her clothing aside and digitally penetrated her with increasing ferocity before forcing painful sexual

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[21] AR, TAB C (RFJ, ¶¶90, 100); AR, PART D, pp.202-206 (T.204(31)-206(11); 227(9)-228(16))
[22] AR, TAB C (RFJ, ¶¶92, 102); AR, TAB D, pp.207-210 (T.208(9)-209(36), 232(8)-233(72))
[23] *R. v. W.(D.),* 1991 CanLII 93 (SCC), [1991] 1 S.C.R. 742
[24] AR, TAB C (RFJ, ¶117)

intercourse.[25] The judge accepted that the widespread nature of the trauma to the complainant's genital area, including the rift tear, was supportive of the complainant's account.[26]

26. The judge expressly rejected the respondent's "narrative about the encounter which was at odds with the evidence I accept".[27]

27. The trial judge also identified issues with the substance of the respondent's evidence having regard to the dynamics of the relationship cultivated by the respondent and the significant injuries sustained by the complainant. The judge found the respondent's testimony to be "a very contrived and unbelievable story": "[h]e offered a narrative of a lucky encounter with a stranger who wanted to have [sex] with him when the facts instead show he attempted to orchestrate the event and then used force to see it through."[28] She found that his story about the complainant's interest in rough sex and demands for him to apply "harder" force was an attempt to explain the presence of injuries.[29]

28. The judge made a series of relevant factual findings to conclude that the respondent made concerted efforts to be involved with one of the women that night; he actively tried to control their movements by forcing them to return to his car to retrieve their belongings; he contributed to the complainant's intoxication by buying her more alcohol when she requested water; he made unwanted sexual advances towards her at the club; and he orchestrated a situation whereby the complainant felt vulnerable and under his control, such that she reluctantly agreed to some sexual activity to appease him.[30] The trial judge did not find the respondent's account that the complainant instigated and enjoyed the rough sex as he described believable in these circumstances. The trial judge also held that the trauma to the complainant's genital area was consistent with her account and inconsistent with the expressions of pleasure described by the respondent.[31]

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[25] AR, TAB C (RFJ, ¶¶146-148, 150-151, 159)
[26] AR, TAB C (RFJ, ¶150)
[27] AR, TAB C (RFJ, ¶158)
[28] AR, TAB C (RFJ, ¶156)
[29] AR, TAB C (RFJ, ¶158)
[30] AR, TAB C (RFJ, ¶¶119-121, 128, 136-138, 140, 144, 146, 151, 157)
[31] AR, TAB C (RFJ, ¶¶128, 150)

29. Ultimately, the judge concluded: "Taking into account the totality of the evidence, *including the complainant's decision to get in the back seat of the accused's car*, I am satisfied beyond a reasonable doubt that [the complainant] did not consent to the sexual touching starting at the forced oral sex."[32]

D. BCCA Decision

30. The respondent argued on appeal that the judge erred by: (1) basing an adverse assessment of his credibility on speculative reasoning that was not founded upon evidence and subjecting the Crown and defence evidence to uneven scrutiny; (2) admitting and relying on the expert medical evidence; and (3) reversing the burden of proof.[33] The respondent characterized his challenge to the trial judge's conclusions on credibility as an assertion that the verdict was unreasonable.[34]

31. The BCCA canvassed the many recent cases, mostly involving sexual assaults, addressing inappropriate reliance on stereotypes or generalizations in the assessment of credibility. It characterized such cases as "a minefield for judges, who necessarily bring to the task of assessing the evidence their own limited range of experience".[35]

32. The BCCA isolated 41 paragraphs of the reasons to evaluate the respondent's claim that "the trial judge rejected his evidence in large part because of core assumptions about how the complainant would have behaved that are not tethered to the evidence".[36] Having identified those specific paragraphs as the trial judge's credibility assessment, the BCCA observed, "appellate review … is necessarily circumscribed by the reasons actually provided in support of a particular result".[37] The BCCA then engaged in a line-by-line review of the four examples of inappropriate reliance on a generalization cited by the respondent:[38]

- The trial judge's rejection of the respondent's testimony that the complainant started grinding against his groin on the dance floor was <u>permissible</u> because it found support in

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[32] AR, TAB C (RFJ, ¶159, emphasis added)
[33] AR, TAB F (BCCA Decision, ¶4)
[34] AR, TAB F (BCCA Decision, ¶5)
[35] AR, TAB F (BCCA Decision, ¶13)
[36] AR, TAB F (BCCA Decision, ¶28)
[37] AR, TAB F (BCCA Decision, ¶29)
[38] AR, TAB F (BCCA Decision, ¶¶31-72)

the complainant's own evidence, and that of her friend, that she had been flirting with another man and was not interested in the respondent.[39]

- The judge's conclusion that the respondent's evidence about French kissing on the dance floor was "even more fanciful" was permissible because she did not expressly refer to any generalized assumption about human behaviour.[40]

- The judge's conclusion that the respondent's evidence that he shared a gin and tonic with the complainant "seems unlikely, given that they were mostly strangers" was permissible as a legitimate exercise of common-sense reasoning because it fell within "the class of inferences that may fairly be drawn".[41]

- The trial judge's rejection of the respondent's evidence that the complainant encouraged and enjoyed "rough sex", however, was impermissible.[42]

33. In respect of the latter example of impermissible reasoning, the BCCA characterized the trial judge's conclusion that it was not believable that the complainant would have asked the respondent to spank her as an apparent "bald assertion untethered to any evidence" and held that the impugned paragraph did not provide factual support for the conclusion that the respondent's version of events was unbelievable.[43]

34. According to the BCCA, the complainant's conduct earlier in the evening "cannot be said to provide a reliable basis for conclusions with respect to consensual behaviour in the parked car". When she got into the back seat and engaged in "sexual foreplay", her resistance to the respondent's advances had "clearly diminished" and her conduct was "a marked departure from her previous behaviour".[44] For this reason, "little turns on the events that preceded those that took place in the parking lot".[45] As such, the judge's conclusion that it was unbelievable that she asked

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[39] AR, TAB F (BCCA Decision, ¶¶31-34)
[40] AR, TAB F (BCCA Decision, ¶¶36-39)
[41] AR, TAB F (BCCA Decision, ¶40)
[42] AR, TAB F (BCCA Decision, ¶¶41-65)
[43] AR, TAB F (BCCA Decision, ¶¶49-50)
[44] AR, TAB F (BCCA Decision, ¶52)
[45] AR, TAB F (BCCA Decision, ¶42)

to be spanked "*can only* have been founded upon an assumption about what activity she might have willingly engaged in *after she willingly engaged in some sexual foreplay – the assumption that she consented to some sexual activity but not to that described by [the respondent]*."[46]

35. The BCCA also took issue with the judge's description of the respondent's account as one that "seemed lifted from a pornographic script completely at odds with the encounter to that point" because that statement was founded on assumptions, "not only about what was consistent behaviour to that point but also about 'normal' speech".[47] The BCCA then juxtaposed the respondent's testimony about how he said the sexual encounter unfolded at the complainant's direction, against selected parts of the complainant's testimony about how the respondent forced unwanted rough sex on her.[48] It concluded, "it is difficult to see what in his evidence about what was said is 'completely at odds with their encounter up to that point', *if the 'encounter' is taken to include consensual sexual foreplay*".[49]

36. The BCCA declined to consider the trial judge's privileged position and the "complex intermingling of impressions" that inform a trial judge's credibility assessment, because "to do so would be to disregard the judge's express reasoning". The judge had "'placed high prominence' on her assessment of the implausibility of the *dialogue* described by the [respondent] and *her view* that rough sex was 'at odds with' the complainant's earlier behaviour".[50]

37. The BCCA then identified faulty assumptions, not raised by the respondent in his factum, pertaining to the trial judge's appreciation of whether vaginal penetration occurred and after-the-fact conduct. The BCCA summarized the three assumptions made by the trial judge that played "some role" in her rejection of the respondent's evidence, including that "*a person* would not ask to be spanked *while engaging in sexual foreplay* 'out of the blue'".[51]

38. The judge's reliance on these assumptions, according to the BCCA, engaged speculative reasoning. The BCCA emphasized that "approaching the fact-finding process [in the way the trial

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[46] AR, TAB F (BCCA Decision, ¶53, emphasis added)
[47] AR, TAB F (BCCA Decision, ¶55, referencing RFJ, ¶148)
[48] AR, TAB F (BCCA Decision, ¶¶56-60)
[49] AR, TAB F (BCCA Decision, ¶61, emphasis added)
[50] AR, TAB F (BCCA Decision, ¶62, emphasis added)
[51] AR, TAB F (BCCA Decision, ¶73, emphasis added)

judge did] does not account for the unpredictable, surprising, and out-of-character ways in which human beings sometimes do behave".[52]

39. On the question of materiality, the BCCA focussed on the conflict in the evidence with respect to whether vaginal intercourse occurred.[53] The BCCA held, "[t]he complainant's own evidence was unequivocal at trial but not as supportive of her version of events as suggested by the trial judge".[54] Ultimately, the BCCA determined that: "[t]he conclusion that [the respondent] engaged in vaginal sex with the complainant was founded solely upon the complete rejection of [the respondent's] testimony, and the acceptance of the complainant's evidence in its entirety".[55] For this reason, the BCCA held that "it cannot be said that the judge would have reached the same conclusion *with respect to whether there had been vaginal intercourse* had she not placed some reliance on generalizations about human behaviour untethered to the evidence".[56]

40. The BCCA then proceeded to separately consider whether the rejection of the respondent's evidence could be founded upon the evidence of injury alone.[57] It noted that the trial judge's acceptance of the medical evidence played a significant role. However, the BCCA was of the view that the doctor's opinion about the cause and impact of the numerous, deep, and uncommon injuries she observed on the complainant was of limited value.[58] The BCCA thus held that "an adverse conclusion with respect to [the respondent's] evidence would not necessarily have resulted from consideration of the nature and extent of the complainant's injuries alone". Accordingly, the BCCA held that the trial judge's reliance on unfounded generalizations constituted reversible error.

41. Given the Court's conclusion "with respect to the reliance on *unsupported inferences*", the BCCA did not find it necessary to deal with the uneven scrutiny claim. Still, the BCCA identified an essential problem in the trial judge's reasons, namely, her failure to "factor into her assessment of the complainant's credibility her finding that the complainant was significantly impaired …"

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[52] AR, TAB F (BCCA Decision, ¶74, citing *R. v. Pastro,* 2021 BCCA 149, emphasis added)
[53] AR, TAB F (BCCA Decision, ¶¶84-91)
[54] AR, TAB F (BCCA Decision, ¶86)
[55] AR, TAB F (BCCA Decision, ¶91)
[56] AR, TAB F (BCCA Decision, ¶91)
[57] AR, TAB F (BCCA Decision, ¶¶92-112)
[58] AR, TAB F (BCCA Decision, ¶111)

and her failure to "expressly address" the complainant's after-the-fact conduct that the BCCA regarded as inconsistent with her account of the sexual encounter.[59]

PART II – ISSUES

42. The BCCA erred in concluding the trial judge relied on impermissible speculative reasoning in assessing credibility by: (1) failing to review the reasons functionally and contextually; (2) misapplying the prohibition on speculative reasoning to oust permissible use of common sense by a trial judge; and (3) substituting its own inferences about the believability of evidence when the trial judge's analysis was logical and reasonable.

43. The errors committed by the BCCA in this case raise equivalent issues of public importance identified in *Kruk*, namely: (1) what principles govern in distinguishing between legitimate inferences and speculation; and (2) whether sexual assault complainants face additional barriers to having their evidence accepted as credible.

PART III – ARGUMENT

A. The Identified Question of Law has Merit

44. To provide context for how this case raises the issues of public importance identified in *Kruk*, the applicant will first address the errors in the BCCA's decision to overturn the trial judge's factual findings based on "impermissible speculative reasoning".

(i) ***The BCCA did not read the reasons functionally and contextually***

45. The BCCA's finding that the judge's acceptance of the complainant's evidence, and corresponding rejection of the respondent's version of events, was based on impermissible reasoning is not supported by a functional and contextual review of the reasons. Notwithstanding the BCCA's acknowledgement of the Crown's submission that "it is not the role of appellate courts to parse the reasons for judgment looking for error" and that "the appellate courts' role is to determine whether the reasons, taken as a whole, reflect reversible error",[60] the Court proceeded to conduct a review of the judge's manner of expression divorced from the big picture.

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[59] AR, TAB F (BCCA Decision, ¶115, emphasis added to identify further overlap with *Kruk*)
[60] AR, TAB F (BCCA Decision, ¶8)

46. The trial judge manifestly found the complainant to be a credible and reliable witness. The judge accepted her evidence.[61] The judge expressly rejected the respondent's "narrative about the encounter which was at odds with the evidence I accept".[62] This was the essential basis for the conviction. A considered and reasoned acceptance beyond a reasonable doubt of the truth of conflicting credible evidence is a valid basis for the rejection of an accused's evidence.[63]

47. The BCCA did not approach the reasons with this crucial context at the forefront of its review. It confined its analysis to one quarter of the reasons, and then dissected the judge's language in particular paragraphs.[64] For example, the BCCA deemed a single paragraph problematic because "it [did] not provide support for the conclusion that [the respondent's] version of events was unbelievable".[65] This resulted in the BCCA's anomalous conclusion that the judge's rejection of the respondent's evidence that the complainant asked to be spanked "could only have been founded upon an assumption about what activity she might have willingly engaged in"[66] when the judge's analysis was grounded in the complainant's evidence about what activity she did and did not willingly engage in, including that she *did not* ask to be spanked.

48. The BCCA's finding that assumptions about what "a person" would do played a role in the judge's rejection of the respondent's evidence was a product of conducting a "word-by-word analysis" rather than an "examination to determine whether the reasons, taken as a whole, reflect reversible error". The BCCA's approach was not in keeping with this Court's direction to review reasons with care, to not undermine the trial judge's responsibility for weighing all the evidence.[67]

(ii) ***The BCCA misapplied the prohibition on speculative reasoning***

49. The BCCA misapplied the prohibition on speculative reasoning to oust permissible use of common sense by a trial judge to assess credibility. There is a distinction between prejudicial

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[61] AR, TAB C (RFJ, ¶156)
[62] AR, TAB C (RFJ, ¶158)
[63] *R. v. J.J.R.D.,* 2006 CanLII 40088 (ONCA), ¶53
[64] AR, TAB F (BCCA Decision, ¶¶29, 31, 36, 46-47, 55, 63, 66-67, 86, 90, 93-94, 101, 108)
[65] AR, TAB F (BCCA Decision, ¶50)
[66] AR, TAB F (BCCA Decision, ¶53)
[67] *R. v. Gagnon,* 2006 SCC 17, ¶19; *R. v. Laboucan,* 2010 SCC 12, ¶¶16-17; *R. v. G.F.,* 2021 SCC 20, ¶69

generalizations about human behavior that do not rest on the evidence and legitimate inference-drawing based on the evidence. As the Court of Appeal for Ontario recently stated:[68]

> [61] Properly understood, the rule against ungrounded common-sense assumptions does not bar using human experience about human behaviour to interpret evidence. It prohibits judges from using "common-sense" or human experience to introduce new considerations, not arising from evidence, into the decision-making process, including considerations about human behaviour.

50. The Court of Appeal for Ontario also addressed the related prohibition on stereotypical reasoning:[69]

> [63] The second relevant, overlapping rule is that factual findings, including determinations of credibility, cannot be based on stereotypical inferences about human behaviour. I will call this "the rule against stereotypical inferences". Pursuant to this rule, it is an error of law to rely on stereotypes or erroneous common-sense assumptions about how a sexual offence complainant is expected to act, to either bolster or compromise their credibility: [citations omitted] It is equally wrong to draw inferences from stereotypes about the way accused persons are expected to act: [citations omitted] …
>
> [65] First, like the rule against ungrounded common-sense assumptions, the rule against stereotypical inferences does not bar all inferences relating to behaviour that are based on human experience. It only prohibits inferences that are based on stereotype or "prejudicial generalizations": [citations omitted] …
>
> [70] By the same token, it is not an error to arrive at a factual conclusion that may logically reflect a stereotype where that factual conclusion is not drawn from a stereotypical inference but is, instead, based on the evidence. …

51. Overall, as noted above, the reasons do not support the BCCA's finding that the judge's disbelief of the respondent's evidence was affected by speculative reasoning. The judge did not introduce new considerations, not arising from the evidence, into the decision-making process. She did not draw inferences based on stereotypes or "prejudicial generalizations". Rather, the trial judge accepted the complainant's evidence, while also examining its consistency, and the respondent's conflicting account, with the probabilities that surrounded the event.[70] Courts are

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[68] *R. v. J.C.*, 2021 ONCA 131, ¶61
[69] *J.C.,* ¶¶63-70
[70] *Faryna v. Chorny*, 1951 CanLII 252 (BCCA), p.357; *R. v. R.H.A.,* 2000 CanLII 3027 (ONCA), ¶4

entitled to evaluate the inherent improbability of certain evidence and are expected to bring their experience and common sense to that task, even when assessing sexual interactions.[71]

52. It is difficult to discern the principled basis on which the BCCA differentiated between instances of permissible and impermissible reasoning in this case. It would appear as though the trial judge's disbelief of the respondent's account of earlier events at the club accorded with the BCCA's own appreciation of the evidence, so those aspects of the judge's reasoning were acceptable, but the judge's dismissal of the cogency of his version about what occurred later in the parking lot did not conform to the BCCA's assessment of the evidence, so the BCCA labelled it speculative. However, in both instances the judge was entitled to use human experience about human behaviour to interpret the evidence, and her reasoning was logical, reasonable, and tied to the specific dynamics she found to be at play leading up to and during the sexual encounter in the parking lot. The judge's use of common sense to assess the conflicting testimony about what occurred in the parking lot was, on a correct interpretation of the law, permissible.

(iii) ***The judge's assessment of the objective implausibility of the complainant asking for and being pleasured by rough sex was reasonable***

53. The BCCA's real point of contention with the judge's reasoning was that, in its view, "the *complainant's conduct* earlier in the evening cannot be said to provide a reliable basis for conclusions with respect to consensual behaviour in the parked car".[72] But the judge's focus was on the *dynamic* between the complainant and the respondent, and what motivated her to engage with him, not simply her *conduct*.

54. Based on the specific dynamic that she found to exist between two virtual strangers, whereby the respondent exerted control over the complainant to orchestrate a situation where she was vulnerable to his persistent sexual advances, it was open to the trial judge to regard the parking lot events as a continuation of what started at the concert. It was reasonable for the judge to view the complainant's reluctant consent to limited sexual activity as an extension of her earlier disinterest in but tolerance of the respondent's advances at the club. It was also reasonable for the

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[71] *R. v. R.R.*, 2018 ABCA 287, ¶8; *R. v. A.J.R.D.,* 2017 ABCA 237, ¶100 (in dissent), aff'd 2018 SCC 6; *R. v. G.H.,* 2018 ONCA 349, ¶¶3-5

[72] AR, TAB F (BCCA Decision, ¶52, emphasis added; *see also* ¶42)

judge to infer from this dynamic that it made no sense for the complainant, concerned about her safety and not wanting to protest too much, to then instigate and escalate rough sex, and moan with pleasure as the respondent inflicted significant injuries on her.

55. The BCCA discounted the judge's logical reasoning because it regarded the complainant's consent to some sexual foreplay as a break in the chain, rendering earlier events "*inconsequential and not determinative*" of an evaluation of the conflicting accounts of what occurred in the parking lot.[73] For reasons set out below, the BCCA's assessment in this regard is highly problematic, but at a minimum it did not establish that the trial judge's implausibility finding was unsupported and unreasonable such that, on the deferential standard of review, it justified appellate intervention.

B. The Basis to Grant Leave

56. Pursuant to s.693(1) of the *Criminal Code*, the applicant seeks leave to appeal on the basis that the identified question of law raises issues of public importance. While the applicant acknowledges that there are differences between the nature of the "speculative reasoning" identified by the BCCA in *Tsang* and *Kruk,* corresponding public interest principles are engaged.

(i) ***The need to ensure consistency in distinguishing between legitimate inferences and speculation is a matter of public importance***

57. Trial judges must rely on their common sense and life experiences in their decision-making.[74] If trial judges are not permitted latitude to apply common sense in sexual assault cases, they cannot effectively perform their role as the trier of fact. A trial judge will be hamstrung in their ability to resolve credibility conflicts or overturned on appeal because they relied on an "unfounded" common-sense assumption or otherwise failed to "grapple" with the evidence. The prohibition on impermissible reasoning cannot be applied by appellate courts to merely substitute different views of what inferences should be drawn from the evidence for those of the trial judge, otherwise appellate deference is rendered illusory.[75]

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[73] AR, TAB F (BCCA Decision, ¶77, emphasis added)
[74] *R. v. S.(R.D.),* 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484, ¶39
[75] *Gagnon,* ¶10; *R. v. Dinardo*, 2008 SCC 24, ¶30

58. Canadian courts have yet to find a consistent approach to deciding how much to read into reasons for judgment in determining whether impermissible reasoning has occurred.[76] As Professor Lisa Dufraimont observed:

> The distinction between legitimate inferences and prohibited stereotyping can be elusive and context-dependent. The difficulty of this distinction may account for the significant number of cases in which appellate courts have divided over whether a lower court judgment was based on impermissible stereotypes."[77]

59. The BCCA's decision is *Tsang* does not aid in distinguishing between legitimate inferences and prohibited stereotyping and speculative reasoning. As noted above, it is difficult to discern any principled framework underpinning the BCCA's identification of legitimate versus speculative reasoning – the decision does not provide guidance to trial courts on how they can resolve credibility disputes without being impugned for relying on unsupported inferences. This case, like *Kruk,* presents an opportunity for this Court to give direction as to what constitutes a reasoning error, and in what circumstances it gives rise to reversible error.

(ii) ***Whether sexual assault complainants face additional barriers to having their evidence accepted as credible is a matter of public importance***

60. By disagreeing with the trial judge that what had previously transpired between the complainant and the respondent had practical relevance to how later events unfolded, and by contrasting the complainant's reaction to the respondent's advances at the club with her evidence about what occurred in the parking lot because of the intervening event of *consensual sexual foreplay*, the BCCA implicitly endorsed a form of reasoning which, itself, has been deemed problematic by this Court for several reasons.

61. First, the BCCA's reasoning propagates the myth that the complainant, having consented to some form of sexual activity, was more likely to consent to *any* sexual activity than if she had refused entirely to engage with the respondent and had resisted all his advances. In this way, the

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[76] Lisa Dufraimont, *Current Complications in the Law on Myths and Stereotypes* (2021) 99:3 Can Bar Rev 536, 2021 CanLIIDocs 13421, p.556

[77] *Ibid,* p.554, emphasis added, citing the divided appellate courts in: *R. v. Quartey,* 2018 ABCA 12 aff'd 2018 SCC 59; *R. v. Delmas,* 2020 ABCA 152 aff'd 2020 SCC 39; and *A.R.J.D*

BCCA improperly considered "victim-precipitating" conduct to penalize the complainant.[78] It also approached consent in a one-dimensional fashion (i.e., it was not the quality of her consent to sexual foreplay but the mere fact of consent that caused the BCCA to conclude that her conduct was "a marked departure from her previous behaviour").[79]

62. The second problem is that the BCCA's reasoning tends to reinforce the "mythical assumptions that when a woman says 'no' she is really saying 'yes', 'try again', or 'persuade me'".[80] By considering the complainant's consent to some sexual foreplay as evidencing a marked departure from her earlier behaviour, the BCCA is practically encouraging an offender to persist in the face of resistance because if he wears the complainant down it is a proverbial "game-changer" and her consent to some sexual activity becomes logically probative of her credibility when she says she did not consent to the activity constituting the sexual assault.

63. The third problem stems from the BCCA's assumption that human sexuality is so variable that few if any valid inferences can be drawn about the plausibility of an accused's conflicting account that a woman desired to be penetrated so forcefully to cause harm. By relying on the "unpredictable, surprising, and out-of-character ways in which human beings sometimes do behave", the BCCA effectively insulated the respondent's account from an assessment of its implausibility on the basis that any woman (or, at a minimum, one who consents to some sexual activity) could instigate rough sex with a stranger, at any time, and in any circumstances. This, in turn, implies that women are "walking around this country in a state of constant consent to sexual activity", contrary to this Court's recognition of a woman's sexual autonomy.[81]

64. Further, the respondent's account *did* resemble what researchers have labelled as "pornographic sexual scripts" depicted in mainstream pornography.[82] The accused's attempt to reconstruct harm as the outcome of rough sex ought to have been scrutinized (as the trial judge

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[78] *R. v. Seaboyer; R. v. Gayme,* 1991 CanLII 76 (SCC), [1991] 2 S.C.R. 577, p.605 (per McLachlin J.) and pp.651-653 (per L'Heureux-Dube J. dissenting in part, but not on this point)
[79] AR, TAB F (BCCA Decision, ¶52)
[80] *Ewanchuk,* ¶87
[81] *R. v. Ewanchuk,* 1999 CanLII 711 (SCC), [1991] 1 S.C.R. 330, ¶87
[82] Elizabeth Sheehy, Isabel Grant & Lise Gotell, "Resurrecting 'She Asked for It': The Rough Sex Defence in Canadian Courts" Alta L Rev [forthcoming in 2023] available online SSRN: https://ssrn.com/abstract=4130532, p.32, fn149

did) and not normalized as a natural consequence of violent sexual practices instigated by unpredictable women.

65. On the BCCA's analysis, it is unclear on what basis this trial judge, or a future trial judge, could legitimately reject the respondent's story. A considered and reasoned acceptance of the truth of the complainant's evidence was not sufficient. The plausibility of the respondent's account was not amenable to any interpretation based on human experience because of her limited consent and the vagaries of human sexuality. Effectively, the complainant's testimony was incapable of proving the offence absent a confession or corroboration (which does not include medical evidence explainable by rough sex). This runs counter to Parliament's recognition "that all witnesses who claim they have been victims of crime should enjoy the same baseline standard for credibility assessments: certain categories of complainants should not start from a deficit position or face the additional barriers of being discredited based on myths and stereotypes."[83]

PART IV – SUBMISSIONS ON COSTS

66. The applicant does not seek costs.

PART V – ORDERS SOUGHT

67. The applicant seeks an order granting leave to appeal from the judgment of the Court of Appeal for British Columbia, Docket CA47290, 2022 BCCA 345, dated October 14, 2022. The applicant also seeks an order that the application for leave to appeal be expedited.

ALL OF WHICH IS RESPECTFULY SUBMITTED.

Dated at Vancouver, British Columbia this 9th day of November, 2022.

Susanne Elliott
Counsel for the Applicant

[83] *R. v. C.M.G.,* 2016 ABQB 368, ¶¶56, emphasis added

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23	Elizabeth Sheehy, Isabel Grant & Lise Gotell, "Resurrecting 'She Asked for It': The Rough Sex Defence in Canadian Courts" Alta L Rev [forthcoming in 2023] available online SSRN: https://ssrn.com/abstract=4130532, p.32, fn149	64
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