WARNING

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

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

486.4(1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences;

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read at any time before the day on which this subparagraph comes into force, if the conduct alleged involves a violation of the complainant's sexual integrity and that conduct would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(iii) REPEALED: S.C. 2014, c. 25, s. 22(2), effective December 6, 2014 (Act, s. 49).

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and

(b) on application made by the victim, the prosecutor or any such witness, make the order.

(2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information

that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

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

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

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

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

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

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

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

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. S.S.S., 2021 ONCA 552

DATE: 20210803

DOCKET: C67462

Feldman, Lauwers and Trotter JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

S.S.S.

Appellant

Anil K. Kapoor and Victoria M. Cichalewska, for the appellant

Vallery Bayly, for the respondent

Heard: February 17, 2021 by video conference

On appeal from the convictions entered by Justice Sandra Caponecchia of the Ontario Court of Justice on May 13, 2019, and from the sentence imposed on October 8, 2019.

Feldman J.A.:

A. INTRODUCTION

[1] The appellant appeals his convictions for sexual assault and sexual interference, and seeks leave to appeal his sentence of six months' imprisonment plus two years' probation, along with various ancillary orders, including one under s. 161 of the *Criminal Code*, R.S.C. 1985, c. C-46.

[2] The complainant was a young girl, eight or nine at the time of the alleged offences and eleven at trial. The appellant was a 20-year-old university student at the time of the alleged offence. The families of the complainant and the appellant

were close. Sometime between February 1 and March 31, 2017, the complainant had a sleepover at her friend P.'s home. P. is the appellant's younger sister. The complainant said that sometime during the sleepover, when P. was in the shower and she was in a chair in the kitchen, the appellant came in, kissed her, and touched her breasts and vagina over her clothes. She said she screamed as the appellant's parents returned home from a shopping trip.

[3] The appellant testified, denying the complainant's claim. He stated that he remembered the weekend the complainant slept over and that he was never alone with her.

[4] The appellant raises a number of grounds for the conviction appeal, most of which allege errors by the trial judge in her assessment of the credibility and reliability of the complainant and the appellant. In my view, the trial judge erred in fact and law by finding that the complainant and her mother had a motive not to fabricate the allegations, and by using that finding to enhance the credibility of the complainant. I would accordingly order a new trial.

B. BACKGROUND

(1) Evidence of the complainant

[5] The complainant's evidence was given in two forms. She gave a videotaped statement to the police, several months after the incident, once her mother made the decision to report it. In addition, she testified at the trial. Her mother, her father, and her upstairs neighbour, whom she referred to as her aunt, also testified, essentially about how they learned of the incident, how the incident was reported to the police, and what subsequent interactions the complainant and her mother had with the appellant's family.

[6] The complainant said that the incident took place while she was staying at the appellant's house. The appellant's father had picked her up on a Friday and taken her to their house for a sleepover with P. According to the complainant, the people at the house were P, the appellant, the appellant's parents, and H., who she referred to as P.'s brother. The complainant testified in cross-examination that she did not see the appellant before she went to bed that night. She ultimately could not pinpoint the timing of the incident, but she said it occurred while she was in the kitchen on a "wheelie-chair." At the time, P. was taking a bath, H. was at work, although she was not sure if he was at home, and the appellant's parents were out at a shop.

[7] The complainant testified that the appellant "came downstairs." She said the appellant kissed her on the lips, tickled her on her breasts, and patted her private

part over her underwear after he moved her pants partway down. She said she screamed as the appellant's parents returned home from their shopping trip. She told them what happened, they asked her a bunch of questions, and then they sent her upstairs and asked the appellant questions.

[8] In cross-examination, defence counsel asked the complainant about what occurred the next morning. She agreed that after she woke up, she played in the kitchen with P.'s mother and ate oranges. This accorded with the testimony of the appellant. The complainant also agreed that at some point, her mother arrived, and that the appellant came downstairs, said hello to her mother, and then went back upstairs. She similarly saw H. come down for lunch and go back to his room. She acknowledged that she had been guessing when she testified to H.'s whereabouts during the incident.

[9] The complainant described how she felt close to P. and how P. had helped her when she was bullied. When the complainant's mother picked her up from the sleepover, she told her she had had a great time and wanted to visit P. again.

[10] In both the police statement and cross-examination, the complainant stated that she liked to scare her mother by telling her things that were not true. However, in cross-examination, she denied that she had made up the allegations against the appellant. The complainant also admitted that she was not sure whether the appellant's parents went to the store the day she arrived or the next day. She acknowledged that she did not see the appellant before she went to bed, which was on the day she arrived.

(2) The evidence of the complainant's mother

[11] The evidence of the complainant's mother focused on the relationship she and her daughter had with the appellant's family before and after the incident. She explained that she had known the appellant's father since the age of two, and that she was close to both him and the appellant's mother. She permitted her daughter to sleep over at their house because the complainant enjoyed spending time with the appellant's sister, P. She recounted that the sleepover took place sometime in February or March of 2017. Her daughter told her about the incident two to four days later, after which point she did not let the complainant have another sleepover at P.'s house, and sent the complainant to stay with her aunt whenever the appellant's family visited.

[12] In cross-examination, the complainant's mother was asked why she had not cut ties with the appellant's family after her daughter's disclosure to her. She responded that she had tried to reduce contact and that she trusted the appellant's parents who had been good to her in the past, having taken her in when she

immigrated to Canada and was pregnant with the complainant. She repeatedly denied the suggestion that she continued to associate with the appellant's family because she did not believe her daughter.

(3) The evidence of the appellant

[13] The appellant testified. He recalled the weekend that he came home from his university for reading week and the complainant was sleeping over at his house. He stated that he got home late on the Friday night, after the complainant had gone to bed, and that he did not see her until the next morning. He denied that he was ever alone with the complainant. He was only in the kitchen with the complainant when other adults were there as well. He also denied all of her allegations that he touched her and kissed her.

[14] The appellant stated that after the sleepover, he saw the complainant and her family members on more than one occasion. He did not believe that anyone acted differently towards him.

[15] None of the appellant's family members testified.

(4) The trial judge's findings

[16] The trial judge believed the complainant. She rejected the appellant's evidence because she accepted the complainant's evidence beyond a reasonable doubt, applying *R. v. J.J.R.D*. (2006), 215 C.C.C. (3d) 252 (Ont. C.A.), leave to appeal refused, [2007] S.C.C.A. No. 69, and *R. v. R.D.*, 2016 ONCA 574, 342 C.C.C. (3d) 236. In addition, the trial judge did not find the appellant's evidence to be compelling in form or content, for two reasons: (1) the appellant's demeanor had changed under cross-examination; and (2) she found it incredible that he remembered exactly which weekend his sister's friend slept over, when he came home from university regularly on the weekends at different hours, and since two years had passed between the incident and his trial. The trial judge acknowledged, however, that aside from those frailties, the appellant's blanket denial did not have any flaws. Nevertheless, for the trial judge, it did not raise a reasonable doubt.

C. ISSUES

[17] The appellant raises five issues on the conviction appeal. Three focus on alleged errors in the credibility assessments, including the trial judge's finding that the complainant had no motive to fabricate, one submits that the trial judge misapplied the standard of proof, and one challenges the trial judge's ruling on the admission of third-party records.

[18] As I would order a new trial based on the error in the trial judge's finding of no motive to fabricate, it is only necessary to address that issue and the third-party records issue.

D. ANALYSIS

(1) Motive to Fabricate

(a) Overview

[19] The trial judge found that she was satisfied beyond a reasonable doubt of the credibility and reliability of the complainant. One of the factors the trial judge considered in the portion of her analysis where she reached this conclusion was the complainant's lack of motive to fabricate. She found that not only was there no evidence of motive to fabricate or animus, but that it was contrary to the interests of the complainant and her mother to come forward, and the fact that they did demonstrated how the complainant had no motive to fabricate. The trial judge used that finding as a make-weight to enhance the complainant's credibility.

[20] The trial judge addressed the issue of motive to fabricate in the following two paragraphs of her reasons:

> [164] I have taken into consideration that there is no evidence of a motive to fabricate or animus in this case. To the contrary, by coming forward the complainant stood to jeopardize her friendship with the defendant's sister. The complainant's mother risked the close relationship and support of the defendant's parents, both of whom she considered family.
>
> [165] The existence or absence of a motive to fabricate is a relevant factor to be considered. I acknowledge that when dealing with the issue of a complainant's motive to fabricate, it is important to recognize that the absence of any evidence of motive to fabricate is not the same as absence of motive to fabricate. It is dangerous and impermissible for me to move from an apparent lack of motive to the conclusion that the complainant must be telling the truth. People may accuse others of committing a crime for reasons that may never be known, or for no reason at all. The burden of production and persuasion is upon the prosecution and an accused need not prove a motive to fabricate on the part of a principal Crown witness. [Footnotes omitted.]

[21] There are three errors in the trial judge's approach. The first is a factual error, while the other two are legal errors. The errors are as follows: (1) there was no evidence from the complainant that she believed coming forward would jeopardize her friendship with P.; (2) the fact that the complainant's mother did not want to undermine her relationship with the appellant's parents in no way supports the credibility of the complainant – it is irrelevant to her credibility; and (3) even if the trial judge only found no evidence of motive to fabricate, treating the lack of evidence of motive to fabricate as a factor in assessing the credibility of the complainant in this case amounts to an error of law, because it had the effect of putting an onus on the appellant to disprove that the complainant had no motive to fabricate.

(b) How the issue was raised at trial

[22] The issue of motive to fabricate was raised in closing argument by defence counsel at trial (not appeal counsel). Defence counsel first submitted that there was evidence of motive to fabricate because the complainant had mentioned in her police statement and cross-examination that she would tell her mother stories that were not true. After a discussion between counsel and the trial judge regarding that evidence, the trial judge asked defence counsel, "So, what are you saying is the motive to fabricate here?" Defence counsel responded that the appellant did not have to prove motive to fabricate, but then clarified his initial submission by saying: "Where I meant – I guess the – the better word of saying, there's evidence here from the complainant that she's made up this story. I – I guess it['s] better to say it that way as opposed to motive." The clarification served to withdraw his initial submission on the motive to fabricate.

[23] Despite that clarification, Crown counsel at trial (not appeal counsel) made her own submission that there was no motive to fabricate and no animus, and that to the contrary, on the totality of the evidence, there was a motive to tell the truth, i.e., not to fabricate. There was no plan of revenge, the complainant's mother continued to see the appellant's family, she initially did not report the incident to police, she still respected the appellant's parents, and she did not want to destroy her close relationship with them.

[24] The effect of these submissions was that while the defence was not taking the position that the complainant had a motive to fabricate, the Crown asserted that the complainant was credible, in part, because she had no motive to fabricate. The trial judge accepted the Crown's submission.

(c) Errors in the trial judge's reasoning

[25] Paragraphs 164 and 165, quoted above, are the trial judge's response to counsels' submissions. I interpret paragraph 164 as a finding by the trial judge that there was evidence of no motive to fabricate, i.e., there was motive on the part of the complainant and her mother not to come forward. The trial judge took this finding into consideration in concluding that the complainant must be telling the truth, and determining that she believed the complainant beyond a reasonable doubt.

[26] However, the trial judge erred by so doing. First, there was no evidence to support the trial judge's finding regarding the complainant herself. The complainant was not asked any questions about whether she was concerned that her disclosure would jeopardize her relationship with her friend, P. There was no basis for the trial judge to infer such a concern from her evidence. The inference amounted to transferring the concerns of the complainant's mother onto the complainant, a young child.

[27] Second, the trial judge relied on the mother's desire to maintain a good relationship with the appellant's family to bolster the credibility of the complainant's account. That was an error of law. The mother's motive cannot and does not speak to the credibility of the complainant's story.

[28] In the second paragraph, i.e., 165, the trial judge discussed the law on motive to fabricate. She began by stating that the existence or absence of a motive to fabricate is a relevant factor to be considered. That is an accurate statement where there is a proved presence or absence of motive to fabricate: *R. v. Bartholomew*, 2019 ONCA 377, 375 C.C.C. (3d) 534, at para. 21.

[29] The trial judge then recognized the distinction between no motive to fabricate and no evidence of motive to fabricate, and that it is impermissible to move from an apparent lack of motive to fabricate to the conclusion that the complainant is telling the truth. She also confirmed that an accused need not prove that a Crown witness had a motive to fabricate. While these statements of the law are true, it is unclear how they were applied by the trial judge.

[30] First, the trial judge did not find a lack of evidence of motive to fabricate. Rather, she found that there was no motive to fabricate, which she used as a make-weight for the complainant's credibility. Finding no motive to fabricate amounted to a factual error that was not available on the evidence. As explained above, the complainant was never asked about motive to fabricate or any concern that coming forward could jeopardize her friendship with P. In cross-examination she said she did not disclose her allegation to P., but she was not asked about her reason(s) for that decision. The question appeared to be part of a series of questions intended to suggest that the incident did not actually occur, as opposed to suggesting that

the incident did occur, but that the complainant did not want to tell P. about it because she was afraid of ruining their friendship. The trial judge also based her finding that the complainant had no motive to fabricate on her perception that the complainant's mother believed that she could jeopardize her relationship with the appellant's family if the complainant came forward. This was a significant error because the mother's motive or lack thereof cannot be attributed to the daughter.

[31] Second, there was no issue of onus because the appellant did not rely on motive to fabricate. Although defence counsel initially labelled his argument about the complainant's tendency to tell her mother untrue stories as motive to fabricate, he withdrew that label. He was not arguing motive to fabricate. His argument was simply that the complainant had a history of telling untruths rather than a motive to tell untruths. Therefore, the question of whether or not the accused had proven motive to fabricate was not an issue before the trial judge.

(d) The impact of *Ignacio*

[32] At the oral hearing of the appeal, counsel were asked to provide written submissions on the effect of this court's recent decision in *R. v. Ignacio*, 2021 ONCA 69, 70 C.R. (7th) 134, leave to appeal refused, [2021] S.C.C.A. No. 127, on the motive to fabricate issue here. In *Ignacio*, the defence took the position at trial that the complainant had a motive to fabricate because she feared that she had become pregnant from her sexual encounter with the accused and needed a way to explain the pregnancy to her parents in order to absolve herself of any responsibility. The trial judge rejected this submission, found that the complainant did not fear becoming pregnant and had a good relationship with the appellant, and concluded that she had no motive to fabricate.

[33] On appeal, the accused argued that the trial judge had erred in finding that the complainant had no motive to fabricate, and that this erroneous finding influenced his decision to accept the evidence of the complainant and reject the evidence of the accused.

[34] The court found that in responding to the defence submission that the complainant had a motive to fabricate, the trial judge had not made a finding of no motive to fabricate, but had simply determined that there was no evidence of a motive to fabricate. The court then found, as a matter of law, that the trial judge was entitled to consider the absence of evidence of motive to fabricate as a factor in assessing the credibility of the complainant.

[35] *Ignacio* is distinguishable from this case on the factual finding. Because *Ignacio* deals with the use that a court can make of a finding of no

evidence of a motive to fabricate, rather than a finding of no motive to fabricate, its result is not applicable to this case.

[36] However, *Ignacio* is also distinguishable because there, the issue of motive to fabricate was raised by the defence and therefore had to be addressed by the trial judge, whereas in this case, the issue was not raised by the defence. Consequently, in *Ignacio*, the court did not have to consider the risk of the onus being reversed in situations where the issue is not raised by the defence.

[37] Here, the issue was raised only by the Crown, who argued no motive to fabricate rather than no evidence of motive to fabricate. The Crown did not submit that if the court failed to find no motive to fabricate, but only found no evidence of a motive to fabricate, that it could and should use the absence of evidence of motive to fabricate to add weight to the complainant's testimony.

[38] Not only is there no burden on an accused to prove a motive to fabricate, there is equally no burden on an accused to disprove that the complainant had no motive to fabricate.[1] If the accused does not raise the issue, it is not open to the trial judge to find that there was no evidence of motive to fabricate and to use that finding, not disproved by the accused, as a make-weight in support of the complainant's credibility.

[39] The trial judge's error in finding no motive to fabricate and using that to bolster the credibility of the complainant was a significant one in the context of this case. Her acceptance of the complainant's credibility was the main reason she rejected the appellant's evidence and found that it did not raise a reasonable doubt. As any aspect of the credibility analysis could have been critical to the finding of proof beyond a reasonable doubt, the trial judge's error requires a new trial.

(2) Third-Party Records

[40] After the appellant was charged with the offences before the court, the Children's Aid Society ("CAS") sent a letter informing him that an investigation had been conducted into whether the complainant was in need of protection, and that the file had been subsequently closed. At trial, the appellant sought production of the CAS record as it related to the appellant and the complainant.

[41] The trial judge fully considered the defence request in the legal context prescribed by the *Criminal Code* and explained by the case law, beginning with *R. v. Mills*, [1999] 3 S.C.R. 668. *Mills* sets out the two-stage process governing the release of s. 278.1 records. At the first stage, the court decides whether the accused has established that the record is likely relevant to an issue at trial or to the competence of a witness to testify. If so, then the record is produced to the trial

judge, who looks at the record in the absence of the parties, and if necessary, holds a hearing to determine its likely relevance and whether its production is necessary in the interests of justice.

[42] Here, the trial judge concluded that the appellant had not satisfied the first stage, i.e., that the record was likely relevant. She therefore did not need to proceed with the next steps of the process.

[43] At trial, the appellant relied on the reasons enumerated in ss. 278.3(4)(a), (c), (d), (e) and (k) of the *Criminal Code* to establish likely relevance, based on the following three statements in the CAS letter:

> 1. CAS investigated a report that the defendant engaged in sexual activity with a child while in a care giving role.
>
> 2. The concern that the defendant was engaged in abusive sexual activity with a child while in a care giving role has not been verified.
>
> 3. The society was unable to verify the concerns as it was found that you were not in a caregiver role of the child at the time of the alleged incident.

[44] Based on these statements, the appellant argued that the record was necessary to make full answer and defence because it established that (1) witnesses were interviewed by the CAS, and their statements could be used to impeach their credibility; (2) the complainant's allegation was not verified by the CAS; and (3) material representations were made to the CAS by the complainant or a witness.

[45] The trial judge found that the defence had not met its onus for three reasons. First, the letter did not say that the CAS had found no merit in the complainant's allegation, but only that it could not verify that the appellant was in a caregiving role at the time of the incident. Second, there was no basis to conclude that the CAS had interviewed the complainant or other Crown witnesses. Third, even if the CAS record contained statements from the complainant or other Crown witnesses, the defence had the ability to obtain the same evidence from other sources. In particular, the appellant had access to members of his family who were at home with him during the alleged incident, and to the statements provided by the complainant and the other Crown witnesses.

[46] On appeal, the appellant argues that the trial judge erred in the "likely relevance" analysis by treating the CAS record as having the same degree of privacy protection as counselling records.

[47] In *Mills*, at paras. 136-137, the Supreme Court held that the nature of the records provides trial judges with the informational foundation to assess the privacy interest at issue. Counselling records have been recognized as extremely private because of the trust involved in the counselling relationship and the subjective nature of the disclosures.

[48] In contrast, the record at issue here was the result of a targeted CAS investigation. If the complainant was interviewed, it was with respect to the very incident that is the subject of the charges against the appellant. The trial judge considered this same argument by the defence, regarding the lower level of privacy in CAS records than in counselling records, in the context of whether production was necessary in the interests of justice. The trial judge appeared to reject the submission, observing that CAS records regarding an alleged sexual assault can contain very private information about a complainant and their family. Nevertheless, the trial judge concluded that had she found likely relevance, then in the interests of justice, she would have been inclined to order the production of the CAS record for inspection by the court "given the narrow scope of the request for records only involving the defendant."

[49] I would accept the submission of the appellant. Given that any statement by the complainant to the CAS, if she made one, would have related to the allegations in this case and would not have been of a therapeutic nature, the privacy interest in the record is not as high as in counselling records. If there was any such statement, it was reasonably possible that it would be logically probative of an issue at trial. In those circumstances, the trial judge stated that had she found likely relevance, she would have ordered production for review by the court in the interests of justice. In my view, that is the correct approach for the new trial.

E. CONCLUSION

[50] For the above reasons, I would allow the appeal, set aside the convictions, and order a new trial.

Released: August 3, 2021 "K.F."

"K. Feldman J.A."

"I agree. P. Lauwers JJ.A."

"I agree. Gary Trotter J.A."

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[1] In *R. v. Bartholomew*, 2019 ONCA 377, 375 C.C.C. (3d) 534, at para. 25, Trotter J.A. observed that the lack of evidence of a motive to fabricate should be used as a "neutral" factor for assessing the credibility of the complainant. Paciocco J.A. reiterated the same point in *R. v. S.H.*, 2020 ONCA 34, at para. 11:

> [11] Moreover, it is inadmissible for a trial Crown, without proving affirmatively that a complainant did not have motive to mislead, to argue in substance that the absence of a known motive to mislead adds to the weight of her testimony: *R. v. Bartholomew*, 2019 ONCA 377, 375 C.C.C. (3d) 534, at paras. 22-23. Where this occurs, the trial judge must direct the jury that this reasoning is not permissible: *R. v. M.B.,* 2011 ONCA 76, 267 C.C.C. (3d) 72, at paras. 30-32. Reasoning in this way undermines the presumption of innocence by reversing the burden of proof and fails to recognize that motives to mislead can be hidden: *R. v. L.L.*, 2009 ONCA 413, 96 O.R. (3d) 312, at paras. 16, 44.

The court clarified the reasoning for this principle of law in *R. v. A.S.,* 2020 ONCA 229, at paras. 58-60:

> [58] Where, as here, a suggested motive to mislead is disproved, the testimony is preserved from being impugned by such motive. When that suggested motive is disproved, it is as though the suggested motive is knocked off of the scales.
>
> [59] However, affirmative weight cannot properly be added to the scales in favour of the testimony of a witness unless there is a proved absence of motive on the part of that witness: see, generally, *R. v. Bartholomew*, 2019 ONCA 377, 375 C.C.C. (3d) 534, at paras. 22-23; *R. v. M.B.*, 2011 ONCA 76, 267 C.C.C. (3d) 72, at paras. 30-32; *R. v. L.L.*, 2009 ONCA 413, 96 O.R. (3d) 412, at paras. 16, 44. Disproving a single suggested motive to mislead – such as a desire to win custody and access – does not prove the absence of any and all motives to mislead.
>
> [60] Accordingly, the trial judge's rejection of the sole motive considered for the complainant's testimony cannot add affirmative weight supporting the complainant's claim that she was not consenting. It is not capable in law of being a makeweight affirmatively supporting her testimony. [Emphasis in original.]