Translated from the original French

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| R. c. Salvail | | | | 2020 QCCQ 8704 |
| COURT OF QUEBEC | | | | | |
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| CANADA | | | | | |
| PROVINCE OF QUEBEC | | | | | |
| DISTRICT OF | | | MONTREAL | | |
| “Criminal and Penal Division” | | | | | |
| No.: | | 500-01-183327-193 | | | |
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| DATE: | December 18, 2020 | | | | |
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| PRESIDING: THE HONOURABLE ALEXANDRE DALMAU, J.C.Q. | | | | | |
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| THE QUEEN | | | | | |
| Prosecutrix | | | | | |
| v. | | | | | |
| ÉRIC SALVAIL | | | | | |
| Accused | | | | | |
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| **JUDGMENT** | | | | | |
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| THIS JUDGMENT IS SUBJECT TO AN ORDER DIRECTING THAT ANY INFORMATION THAT COULD IDENTIFY A WITNESS OTHER THAN DONALD DUGUAY SHALL NOT BE PUBLISHED OR BROADCAST OR TRANSMITTED IN ANY WAY (s. 486.4(1) *Cr. C.*) | | | | | |

1. The accused is being tried on three counts: criminal harassment, forcible confinement, and sexual assault.
2. The Crown’s case rests essentially on the testimony of the complainant, Donald Duguay, who described events that occurred while he was the accused’s work colleague at Société Radio-Canada (Radio-Canada) in 1993.
3. The complainant testified that in the spring, summer, and fall of 1993, the accused repeatedly made sexual advances to him. He quickly communicated his lack of interest and the fact that this behaviour was unacceptable in the workplace. The accused ignored his objections and increased his sexual propositions and comments on his physical appearance.
4. The accused touched his buttocks on several occasions (count of sexual assault)
5. During one incident, the two of them were in a cubicle in the mailroom and the accused fondled his penis through his pants while making sexual propositions.
6. Another time, the accused exposed his penis to the complainant while making the same kind of propositions.
7. Due to the increasing number of such incidents and the accused’s persistence, the complainant began to fear for his safety during this period (count of criminal harassment).
8. According to the complainant, it all culminated in 1993 just before Halloween. The accused followed him into a washroom in the Radio-Canada building. They were alone. The accused again made sexual advances. He physically restrained the complainant and prevented him from leaving the washroom (count of forcible confinement). The accused exposed his penis and tried to force intercourse (count of sexual assault). The complainant managed to free himself from the accused’s grasp and left the washroom.
9. The accused presented a defence.
10. He began by filing into evidence his Radio-Canada employee record to establish that his assignments during the period described contradict the complainant such that it was impossible for the offences he described to have been committed.
11. His own testimony followed, which also sought to convince the Court that the incidents described by the complainant could not have occurred, even though he had no memory of them.
12. Essentially, the accused invokes three reasons in support of this argument.
13. First, it was physically and temporally impossible:

* during part of the period described by the complainant, he was not working in the mailroom with him, as he claims, and therefore could not have committed the acts that the complainant alleges occurred while they were working there together;
* during another part of the period described, he was no longer working at Radio-Canada and therefore could not have committed the acts described, because he almost never went to the Radio-Canada building.

1. Second, it would have been impossible for him to commit the acts described, since he is not, at least at that time, a person who acts that way ([translation] “I wouldn’t have done it” and “I don’t assault people in life”). He supports that argument by invoking his reputation, among other things. No matter what his counsel say, that argument is indeed part of the accused’s testimony. He clearly and knowingly used it to convince the Court of his innocence. Believing him could lead to his acquittal.
2. Last, with respect to the washroom incident, it is also impossible because he would remember an event of such importance had it happened.

**ISSUES**

1. The outcome of this case rests essentially on the credibility of the accused and of the complainant.
2. In its analysis of the evidence, the Court must first ask whether it believes the accused. If so, he must be acquitted.
3. If not, the Court must ask whether, in light of all of the evidence, his defence nonetheless raises a reasonable doubt as to his guilt. If so, he must be acquitted.
4. If the Court does not believe the accused and his defence does not raise a reasonable doubt, it must analyze all of the evidence and determine whether it is convinced beyond a reasonable doubt that the accused is guilty on each count. The Crown bears the burden of proof, which in a case such as this one involves an analysis of the complainant’s credibility and of the reliability of his testimony.

**BACKGROUND**

**The evidence adduced in support of the charges**

1. The charges laid by the Crown are based on the facts described by the complainant in his testimony.
2. His account of the incidents can be divided into two periods:

* the first period covers the incidents that occurred prior to his departure on a trip to France on June 4, 1993, and
* another one covers the period after he returned from his trip in mid-June 1993 up to the days leading up to Halloween that same year.

1. Facts that occurred after the incident on Halloween 1993 are also relevant to the analysis of his credibility and the reliability of his testimony.

**The events prior to the complainant’s departure on a trip on June 4, 1993**

1. The complainant began working at Radio-Canada in July 1992 as a temporary employee. He had contracts in various departments. First, he worked in the music library for a few weeks, then in the radio dispatch department, then in documentation, and finally, in the mailroom around November 1992, where he worked for one year, that is, until November 1993.
2. Nothing in his testimony confirms that when he worked in the radio dispatch department, for example, he might have performed tasks similar to those performed when he was in the mailroom, such as sorting the mail and distributing it on the floors. It is understood from his testimony that when he describes his transfer, or that of the accused, from one department to another, there is both a change in the duties to be performed and a physical change in location to which the position is attached. It is also understood from all of the evidence that temporary employees of Radio-Canada, which the complainant and the accused were at the time, go from contract to contract in positions and departments located in different places inside the Radio-Canada building.
3. He mentioned that he met the accused for the first time in the radio dispatch department and that no specific incident occurred.
4. He saw him again in April 1993,[[1]](#footnote-1) when the accused started working with him as a clerk in the mailroom.
5. The complainant explained in detail the context in which the accused arrived in the mailroom in 1993. The complainant had been temporarily promoted and the accused came to replace him to sort and distribute mail to floors 15 through 18 (module 15-18).
6. Indeed, according to the complainant, he was replacing A, who was leaving on a six-month maternity leave, to deliver unaddressed mail. That work was done in a cubicle located within the larger mailroom in basement C of the Radio-Canada building.
7. Since the accused was replacing him to distribute the mail to floors 15 through 18, the complainant had to train him for one week on the tasks to perform. The objective was for the accused to distribute the mail on those floors independently by the end of the week.
8. The first relevant incidents occurred in this context.
9. The complainant stated that the accused made sexual remarks to him on the first day of training. The accused told him that he [translation] “has a cute little ass” and that that is how he [translation] “likes them”.
10. The complainant was very uncomfortable. It was the first time anyone had ever treated him this way at work. He told the accused in [translation] “a very affirmative way” that he did not care for this type of comment and that it made him uncomfortable.
11. The next day, that is, on the second day of training, the accused made the same type of comment, but this time he also grabbed the complainant’s buttocks with both hands.
12. The complainant turned around and said [translation] “I can’t stop you from talking, but don’t touch me, don’t ever touch me again”.
13. The accused’s reaction was to say it was a joke and that the complainant should lighten up. The complainant replied that it was unacceptable and that he did not accept it.
14. The complainant felt very bad. The accused had invaded his bubble. It was no longer just words; the accused had violated his physical integrity. He was no longer comfortable in his presence.
15. The next day, that is, the third day of training, he told the accused that he could now distribute the mail by himself and that if he needed help, he could ask a colleague. As a last resort, he could come and find him with A, who was training him to replace her.[[2]](#footnote-2)
16. The complainant then described how, once he started using A’s office, the accused regularly came to see him when he was alone in the cubicle. He used vulgar language and made numerous sexual propositions to him.
17. The complainant explained that he received this type of comment [translation] “all the time”, at least two or three times a week.
18. On each occasion, the complainant told the accused emphatically that he was not interested and that this behaviour was unacceptable in the workplace.
19. During one of the incidents in the cubicle, the accused fondled his penis through his white trousers while making sexual propositions. The complainant thinks that the accused’s penis was semi-erect at the time.
20. The complainant once again rejected his advances and repeated that this behaviour was unacceptable in the workplace.
21. Crown counsel asked the complainant when the incident where the accused touched his own penis through his trousers had occurred. He answered: [translation] “probably in May ‘93”.
22. She also asked him, again with respect to that incident, to describe the accused’s duties. The complainant answered: [translation] “He was working, he replaced me on module 15-18, which happens to be the module right behind the screen.” It is understood that this is a work module where the clerk sorts the mail and prepares it for distribution before going to the floors, in this case, floors 15-18.
23. The complainant described a similar incident when the accused went even further and exposed his penis.
24. The complainant was at his own workstation in the cubicle. The accused asked him to turn around. He did. He saw the accused, with his trousers open and his penis exposed. He had an erection and was masturbating, all while making sexual propositions to him. The complainant once again rejected his advances. He went behind the desk to protect himself. The complainant was beside himself and ordered the accused to stop or he would report him.
25. The complainant situated the incident in time with great precision: June 3, 1993. He said it happened on that date because he clearly remembers that the incident occurred the day before he left for a two-week trip to France. He provided investigators with travel documents to support his claims (exhibits D-1 and D-2).
26. Crown counsel asked the complainant about this first series of incidents that allegedly took place before he left on his trip to France on June 4, 1993. The complainant replied as follows:

[translation]

Q. … Can you describe Mr. Salvail’s duties as of April ninety-three (’93)? To your knowledge.

A. Module 15-18.

Q. Yes. For how long?

A. Well he did it until at least the month of... end of May, beginning of June, when my boss gave me permission to take two (2) weeks of vacation to go to Paris. And, unfortunately, Mr. Salvail was again designated to replace me for those two (2) weeks. Therefore, Mr. Salvail replaced me for two (2) weeks, which, I think, I started training him during the last week of May, or the first week of June ninety-three (’93). I left on the fourth (4th), if I remember correctly, on June fourth (4th), for Paris, and he replaced me for two (2) weeks.[[3]](#footnote-3)

1. Later, she asked him to describe what happened with the accused between the incident where he fondled his own penis through his trousers and the incident where he exposed his penis on June 3, 1993.

[translation]

Q. Between these two (2) incidents, did anything in particular happen involving Mr. Salvail? What happened?

A. I kept my distance, I tried to speak to him as little as possible, I did not eat with him. Things became quite cold, I was training someone, but it was very cold because I never knew what he would do to me, what he would say to me and his remarks were always inappropriate.

Q. When you say he was always inappropriate, I am going to ask you to explain what you mean to His Honour (inaudible).

A. It was always sexual propositions, very openly made, very direct, things that might happen at three (3) o’clock in the morning, in a disreputable bar, not in a workplace, certainly not at Radio-Canada. It just wasn’t done.

Q. Between that time, from May until your departure in June, can you estimate how often these comments were made?

A. Two (2) to three (3) times a week.

Q. Can you describe the context in which they occurred?

A. Yes, always when...he always waited until nobody was around and he’d make his comment to me directly. It was as if… I had invited him out for coffee, but I hadn’t.

Q. How did you feel about it?

A. Assaulted and I was starting to feel a kind of harassment weighing me down, making me doubt myself, because I wondered how far it would go, because it kept escalating. It went from words to grabbing my behind, or taking out his penis, masturbating in front of someone, like an exhibitionist, I was really wondering how far it would go, and I tried to avoid all contact with him, as much as possible.[[4]](#footnote-4)

1. As stated above, at times the complainant situates the accused’s training, and therefore the time the inappropriate gestures and words began, in April 1993. At other times, he situates it in late May or early June 1993. He even went so far as to state without hesitation that the training took place one week before he left for France, that is, during the last week of May.
2. This last claim would mean that between late May and the complainant’s departure on vacation on June 4 (that is, over a period of several days), the accused began making inappropriate remarks and grabbed the complainant’s buttocks while he was in training, he then *regularly* (the complainant mentioned two or three times a week) searched him out to make sexual propositions when he was alone in the cubicle, and on one of these occasions he did so while fondling his own penis through his trousers, to finally expose himself the day before he left on vacation. The complainant mentioned an escalation in the seriousness of the acts committed.
3. He initially claimed that this series of incidents took place between April and June 4, 1993.
4. In spite of this discrepancy, the complainant’s testimony includes two assertions about this first series of incidents that culminates with him exposing his penis. The first assertion is that it took place in the days or weeks prior to his trip to France, which he situates on June 4, 1993. The second assertion is that the accused was replacing him as a clerk in the mailroom (module 15-18) when the incidents occurred, whereas he was replacing A, who had left on maternity leave. The complainant was training the accused for this position.
5. The complainant was questioned on these assertions on cross-examination. It was even suggested that he was mistaken. He provided some nuance on the continuity, but remained adamant that the accused was working in the mailroom at specific times in April, May, and June 1993.

[translation]

Q. Okay. Now, I suggest to you that from April to May, even from April to June, Mr. Salvail was not even working in the mailroom, do you agree with my suggestion?

A. It’s possible.

Q. Wait a minute...

A. If you can prove it.

Q. ...you said “It’s possible”?

A. Maybe he came and went, I don’t know, I wasn’t necessarily keeping track of his comings and goings, I wasn’t his manager.

Q. Okay. So, now, Mr. Duguay, what you are telling us, today, I am suggesting to you, for the first time, that it is possible that he was not working in the mailroom, whereas before, you consistently maintained that Mr. Salvail was working in the mailroom, during April, May, and June.

A. Yes.

Q. Do we agree?

A. Yes.

Q. So today, you are no longer sure?

A. That he was working in the mailroom?

Q. Yes.

A. I am convinced that he was working in the mailroom. Did he work in the mailroom continuously, or did he spend a week in another department and come back? I can’t say.

Q.  Okay. So, let’s figure this out, according to you, Mr. Salvail worked in the mailroom in May?

A. In May? Probably, because I trained him on account of replacing A.

Q. Alright. So, when you say you trained him on account of replacing A. in May, you are sure that he worked in May.

A. Yes.

Q. And you are sure he worked in May because you have a reference, that is, that you trained him, is that correct?

A. Yes, that’s correct.

Q. Alright. Did he work in the mailroom in April?

A. In April? Logically, unless he was moved...transferred to another department for one (1) week, two (2) weeks, I don’t know.

Q. So, did he work in the mailroom at any time during April?

A. Yes.

Q. Yes. Are you sure?

A. Yes.

Q. Maybe not the entire month of April, but part of April.

A. Yes.

Q. That is what you are telling us today.

A. Yes.

Q. In June...

A. Yes.

Q. ...did he, in your opinion, work in the mailroom?

A. Yes.

Q. Yes. For how long?

A. I was on vacation, and he was still there when I came back then, as far as I know, like my boss told me, he left the department about one (1) week later.

Q. Okay. What I want to know is what you, what you remember.

A. Yes.

Q. So, again, in June, according to your own recollection, did Mr. Salvail work in the mailroom?

A. Yes.

Q. Alright.

THE COURT:

Q. How long was your trip?

A. My trip? Two (2) weeks.

Q. Two (2) weeks.

MTRE MICHEL MASSICOTTE:

Q. And Mr. Duguay, if I suggested to you that Mr. Salvail never worked in the mailroom, be it in April, May, or June, would you agree with that suggestion?

A. No.

Q. No, alright. So it is very clear that there is no mistake, he worked in April, although not necessarily all of April, he worked in May, although not necessarily all of May, and he worked in June, although not necessarily all of June, is that correct?

A. Correct.[[5]](#footnote-5)

1. The complainant categorically stated that the accused was working in the mailroom when the incidents of this period occurred. He refers to his own replacement within the same department. He added that he had to train the accused because of that replacement. He referred to “module 15-18), which designates both a work space within the mailroom on level C and the distribution of mail on those floors. He considers it possible that the accused did [translation] “one week in another department” and returned to the mailroom. His testimony never considers that the accused might have worked as a clerk in other departments throughout the period at issue and that those positions had him handling the mail or going to the mailroom. That is absolutely not the essence of his testimony.
2. The accused’s employee record at Radio-Canada (exhibit D-6) establishes, however, that he did not work in the mailroom in April, May, or June 1993.
3. The first time the accused worked in the mailroom was from August 20 to October 14, 1991.[[6]](#footnote-6) The complainant was not yet working at Radio-Canada during that period. Therefore, the incidents he described could not have occurred at that time.
4. Thereafter the accused worked in various positions in other departments.
5. He returned to the mailroom for a period of three weeks from January 15 to February 5, 1993.[[7]](#footnote-7) At that time, the complainant had been working in the mailroom since November 1992, according to his testimony. The accused’s employee record therefore confirms the complainant’s testimony that they worked in the mailroom together at one point. The document contradicts him, however, on the period when that happened. The record indicates that the accused was given the position [translation] “to replace” one [translation] “B, temporarily promoted”. For the period described by the complainant, he indicates that the accused replaced him because he himself had been temporarily promoted.
6. From February 8 to July 11, 1993, the accused worked as a clerk in various departments, but not in the mailroom.[[8]](#footnote-8)
7. He was reassigned to the mailroom from July 12 to August 13, 1993, the date on which his temporary employment with Radio-Canada ended. He then worked part time. From July 12 to 16, 1993, however, he was away.[[9]](#footnote-9)
8. At no time, in April, May, or June 1993, was the accused assigned to the mailroom, as the complainant claims. Since the accused did not replace the complainant in a position in the mailroom during this period, the complainant cannot have trained him on mail distribution to floors 15 to 18 during that same period, as he claims.
9. The evidence provided by the employee record is contradicted only by the complainant’s testimony. The document, established in the normal course of business, was admitted with the Crown’s consent as proof of its contents. There is no reason to doubt the truth and accuracy of its contents.
10. As a result, there is every indication that it is impossible that the incidents described by the complainant took place during the period he identified and in the context he detailed, that is, the accused’s arrival in the mailroom, his replacement in the complainant’s job, and his training, all of which took place in the days or weeks before the complainant left for France on June 4, 1993.
11. With respect to the incidents that occurred before this date, the complainant explained that the previously described escalation made him [translation] “start to feel a kind of harassment weighing me down”. He wondered how far it would go.
12. He was very uncomfortable with what had happened, and, according to him, the day before he left on his trip, he asked his supervisor, C, not to pair him with the accused, although he did not provide any reason. He mentioned misunderstandings and altercations and that he was no longer comfortable working with the accused. She informed him that in a week or two the accused was leaving their “department”, which is understood to be the mailroom.
13. C did not testify.
14. D’s testimony, however, had certain similarities with that of the complainant.
15. She explained that in 1992 and 1993, she was a head clerk, coordinator in the mailroom. She was also responsible for the multiservice counter.
16. The mailroom workspace was on level C and the multiservice counter was on level A.
17. She remembers that during those years, the complainant worked in both places.
18. She also remembers that at one point the complainant and the accused worked in the mailroom at the same time.
19. At some point in 1993, the complainant confided in her about the accused.
20. In this regard, she remembers going down to the mailroom with her team leader, whose name she does not remember.
21. She cannot remember whether the complainant and the accused were both working in the mailroom that day, but she is certain that both of them were present.
22. In that place, that day, she saw the complainant exit his workspace, which was “semi-isolated”. He was walking fast. He was nervous and worried. He told her that there had been an incident involving the accused. He had allegedly [translation] “shown him his private parts”.[[10]](#footnote-10) She told the investigators, and she repeated her remarks at the hearing, that the complainant was [translation] “pretty emotional about the situation...”.
23. D cannot remember whether any steps were taken in response to these revelations.

**The events after the complainant returned from a trip in mid-June 1993.**

1. The complainant situates his return to work in the third week of June 1993. Exhibit D-1 appears indeed to indicate a return from Paris on June 20, 1993.
2. He added that when he returned, the accused was still working in the mailroom, but that he left in the following weeks to work somewhere else. He first indicated that he thought it was in the costume department, and then he mentioned the possibility that the accused started working as a warm-up announcer. He is not sure. That is not information that he [translation] “necessarily recorded”.
3. What the complainant refers to as the [translation] “summer of harassment” began when he returned from his trip. He explained that the accused harassed him continuously, followed him onto the escalator and into the elevator, grabbed his buttocks whenever he could, and repeatedly made sexual remarks and propositions. He estimates that these episodes of harassment occurred two or three times a week. He estimates that in July and August 1993, the accused grabbed his buttocks 20 times and made rude or sexual remarks 40 times.
4. He thinks the accused was no longer working with him in the mailroom by then because the events occurred outside the workspace of that department.
5. According to him, the harassment took place primarily in the afternoon.
6. As mentioned, the accused’s employee record (exhibit D-6) indicates that he was working part time in the mailroom from July 19 to August 13, 1993.[[11]](#footnote-11) This appears to contradict the complainant, who first claimed that the accused left the mailroom shortly after he returned from his trip. He corrected himself on cross-examination when he stated that it was possible that the accused was working in the mailroom during this period. He stated categorically, however, that the events described took place outside the mailroom.
7. The complainant also described two specific events that, according to him, occurred in the summer of 1993.
8. One of them he situates in early July, right before the accused left the mailroom.
9. The complainant explained that he told his supervisor he would come in on a Saturday to clean the sorting modules. She accepted and told the other employees to remove their personal effects from the sorting modules so that the complainant could clean them the following weekend.
10. The accused was present and heard the supervisor. He went up to the complainant and told him that he would join him on the following Saturday, saying: [translation] “We’ll have some fun together”.
11. The complainant felt trapped and in danger. The idea of being alone with the accused in the basement of the Radio-Canada building on the weekend made him [translation] “extremely scared”. He feared a sexual assault because of the previously described escalation.
12. He therefore decided to bring his 12-year-old sister with him that day. He told himself that the accused would not dare to do anything in front of a child.
13. According to the complainant, the accused did indeed show up at Radio-Canada that Saturday. He knocked very loudly at the mailroom door and asked the complainant to open it. The complainant’s sister was scared. He himself was very worried about what would happen if they left the room.
14. Two hours later, after he had finished cleaning, they left the room and bumped into the accused in a corridor. The complainant introduced him to his sister. The accused said: [translation] “Well, we couldn’t have done much, since you brought your sister”. The complainant replied that this was [translation] “exactly the point”. The complainant described what happened next as follows: [translation] “And then, we decided to leave immediately and we started running really fast, to escape that situation, because we were in the basement, there was no place to hide, and nobody to ask for help if anything happened.”
15. The complainant described another specific example of harassment that he thinks took place in late July or early August 1993.
16. One morning he arrived at work on his bicycle. He was wearing a tight-fitting cyclist’s outfit.
17. He bumped into the accused on level A of the Radio-Canada building, that is, on the ground floor.
18. The accused came over to the complainant and told him he was wearing that outfit on purpose to excite him.
19. The complainant walked towards the elevator to go down to level C. The accused followed him, saying he was going to get into the elevator with him. He described the look in the accused’s eyes as [translation] “lascivious” or [translation] “like a satyr”. It was the same look he had in his eyes when he exposed his penis earlier that year.
20. The complainant again told the accused that he was absolutely not interested and asked him to leave him alone. He was afraid that if he got into the elevator, the accused would touch and grope him.
21. He rushed ahead and managed to get into the elevator ahead of the accused, using his arms to prevent him from entering. The doors closed, leaving the accused outside.

**The event of October 29, 1993 in the washroom**

1. The complainant recounted that on October 29, 1993, that is, the Friday before Halloween, Radio-Canada employees can go to work in a costume.
2. He wore a disco costume that he had made himself for the occasion.
3. He first saw the accused in the Radio-Canada building. The accused made the same kind of inappropriate comment as usual: [translation] “Your costume makes your ass look nice, I know you are doing it on purpose”.
4. The complainant ignored him and kept walking.
5. In the middle of the afternoon, when he returned after distributing the mail, the complainant went to the washroom on the same floor as the mailroom, that is, level C.
6. He described the place as a [translation] “half-open stall” with a toilet inside. When standing at the entrance, there is a sink with a mirror on the right and a urinal at the back on the left.
7. The complainant used the urinal. During his examination-in-chief, here is how he described what happened next:

[translation]

A. It was about ten (10) to twenty (20) seconds later, once I was inside, that I heard someone come in, so up until then, everything was fine and a few seconds later, I noticed someone standing, even though there was just one urinal, there was someone standing to my right. I turned around and it was Mr. Salvail. He repeated the (inaudible) comment he had made earlier: you know that costume makes your ass look nice, you are doing it on purpose, but I noticed, as I turned around, that he had already taken his penis out of his pants.

Q. What do you mean? Explain to us, to the best of your recollection, what you saw when you turned around.

A. I saw Mr. Salvail standing as if he had ... well, he had already unbuttoned and unzipped his pants, with his penis outside his underwear, as if there were a urinal in front of him to urinate, but there was just one that I was using.[[12]](#footnote-12)

1. On cross-examination, on the same subject of the accused’s arrival to his right while he was urinating, he said: [translation] “Up until I noticed that someone was to my right, which wasn’t normal, because there was no urinal to my right, there was just one (1) urinal, and until I heard the much-talked-about comment...”.[[13]](#footnote-13)
2. When he noticed that and heard the accused, the complainant told him: [translation] “You aren’t going to start your damned nonsense again?”
3. He stopped urinating, pulled up his pants, and turned around. His costume included platform shoes and, as he turned around, he twisted his ankle and had to support himself by placing one hand on the urinal. That disgusted him. He decided to wash his hands.
4. While he was washing his hands at the sink described earlier, he realized that the accused was now standing to his right, still holding his penis, and was starting to get an erection. He was playing with his penis and appeared aroused.
5. He was not interested and made it clear by trying to leave the washroom. The accused prevented him and they were shoving each other.
6. Every time the complainant tried to leave, the accused tried to place his penis on his thighs.
7. The accused asked him to have intercourse. He also asked him to touch his penis.
8. The complainant was absolutely not interested. A hand game followed in which the accused tried to take the complainant’s hand and place it on his penis.
9. The complainant realized that the situation aroused the accused, who was getting becoming increasingly erect.
10. He was more and more afraid.
11. He told the accused: [translation] “if I touch it, I will yank it off”.
12. According to him, the altercation was becoming increasingly violent.
13. The accused pinned him against the wall. He indicated in a sketch (exhibit D-3a) that the accused pinned him against the wall across from the urinal. The same wall as the sink.
14. The accused then grasped the complainant’s arms over his head with one hand and kissed his neck. The complainant turned away. It disgusted him that the accused was kissing and touching him everywhere. He spat in his face and repeated several times that he was not interested. He ordered him to release him.
15. The accused’s pants were down around his knees.
16. He then started working on the complainant’s belt, which he succeeded in removing. The complainant turned around because he was afraid his pants would fall down.
17. The complainant was pinned with his face to the wall. The accused’s pants were on the floor and he was masturbating against the complainant’s buttocks. The accused was still trying to remove the complainant’s pants.
18. At one point, the pant button gave way and the only thing preventing them from falling down was a clasp.
19. When he realized this, the complainant told the accused to stop or he would scream and the accused would have to explain what he was doing with his pants on the ground.
20. The accused released his grip slightly and the complainant managed to escape. He mustered all of his strength and pushed or [translation] “propelled” the accused against the back wall. The accused then slumped to the ground and begged him not to report him.
21. The complainant left the scene, distraught. The assault really scared him.
22. He returned to the sorting module in the mailroom and confided in one or two colleagues. He said that the accused had just assaulted him and asked for advice. Should he report the situation to his superiors, or to the police? He weighed the advantages and disadvantages with them.
23. He went home, still distraught. He felt sick and vomited. He took several showers. He experienced several feelings at once: anger, disbelief, shame, and disgust.
24. Later, that evening, he confided in his friend E that someone he had already mentioned who was causing him trouble at work had assaulted him in the washroom.[[14]](#footnote-14)
25. E testified. At the time of the events, he and the complainant were friends. They had common interests and went out together.
26. In 1993, the complainant confided that he was having a tough time at work, especially with one colleague.
27. He remembers one confidence in particular concerning an event that occurred in October 1993. Crown counsel asked him to describe the complainant’s state when he confided in E. He answered that he remembered that the complainant was [translation] “out of solutions”. He himself was not sure how to help him.
28. The story the complainant told the Court in 2020 about the washroom incident is slightly different from the one he told investigators in 2017.
29. Among other things, he contradicted himself on the number of urinals in that washroom. This contradiction, however, is not merely a contradiction on the number of urinals, which is a trivial detail. The impact of this contradiction is that it changes part of the complainant’s story.
30. In a first written statement, taken by investigator Côté, which she used as an aide-mémoire, the complainant stated that when the accused entered the washroom he moved to the urinal to his left, while the complainant was also at a urinal.[[15]](#footnote-15)
31. In a video-recorded oral statement, the complainant essentially said the same thing. He stated:

[translation]

Someone came in, I’d say 10 seconds after me, it was Salvail. He came and stood at the urinal beside me. He made the same comment to me … . When he came to urinate, he was showing off. He was displaying it. He was fully displaying it. It wasn’t like when you go to urinate and you’re somewhat discreet.[[16]](#footnote-16)

1. It is true that the complainant stated [translation] “if I remember correctly” about the number of urinals. That doubt does not reveal whether there might have been more than or less than two urinals. However, his story at that time was that there were at least two urinals since the accused came to stand at the urinal next to his and prepared to urinate.
2. During this same taped interview, the complainant made a sketch (exhibit D-3) in which he drew two urinals and two lines from them to the sink. One line showed his own path, the other, the accused’s path.
3. After the taped interview, again in 2017, the complainant sent an email to the investigator in which he wrote:

[translation]

Also, during our meeting, I told you that I was not sure about the placement of the urinals. In fact, they were located on the wall he pinned me to, it was an embedded urinal that goes from the waist to the floor, where the drain is located, I remember, because I always have that damn creepy image haunting me: My back is pinned between the two urinals and my left foot in the platform shoe is constantly rolling inward and in danger of falling into the bottom of the urinal.

(Emphasis added.)

1. Between his statements to the police in 2017 and his testimony at the preliminary inquiry, the complainant appeared on *Tout le monde en parle*, which is recorded in the Radio-Canada building. He explained that he took that opportunity to visit the washroom in question, which is located on level C, for therapeutic reasons. He noticed that there is only one urinal.
2. At the preliminary inquiry, his story included just one urinal.
3. He denied that he became aware of the contradiction when he appeared on *Tout le monde en parle*. He testified that he realized it a few weeks or months after he appeared on the show, while working on his post-traumatic memory with his psychiatrist.
4. He claims that when he realized the mistake, he sent investigator Côté an email:

[translation]

Q. Okay. But, the same way you sent an email to say that there were two (2), you surely must have taken... an email, or taken the trouble to send your investigator, to say: [translation] hey, by the way, there aren’t two (2) urinals, there was one (1).

A. Absolutely.

Q. You did that?

A. Yes.

Q. Okay. You sent an email?

A. To my knowledge, yes.

Q. To your knowledge, when did you send this email?

A. Ah, good question.

Q. Who did you send it to?

A. I probably sent it to Sergeant Isabelle whatever.

Q. Ms. Côté.

A. Ms. Côté.

Q. Okay. So therefore you sent Ms. Côté an email to explain that, contrary to what you stated in your previous email, there was only one (1), not two (2), urinals in the washroom? Are you absolutely sure of that?

A. Yes.

Q. There is no doubt in your mind?

A. No doubt.

Q. Okay. Do you keep the emails you send?

A. Rarely.

Q. Oh, rarely. Okay. So, there is a way of finding out, either with your copy which you rarely keep, or with Ms. Côté’s copy, which she obviously must have kept.

A. Obviously.[[17]](#footnote-17)

1. Later, the parties filed the following admission in this regard:

[translation]

After checking with Sergeant-Detective Isabelle Côté, no message from Donald Duguay was found indicating that the washroom related to the incident on October 29, 1993, was equipped with a single urinal.

1. The fact that in reality this washroom contains just one urinal alters the complainant’s story on more than one point.
2. The [translation] “creepy image” that haunts him described in a 2017 email , was wrong, with the complainant now claiming that the accused pinned him against the opposite wall.
3. It also changes his story about his left foot in the platform shoe, which was [translation] “constantly rolling inward and in danger of falling into the bottom of the urinal.” The same “creepy image” being wrong, now when he turned around his foot twisted and he touched the urinal, which made him want to wash his hands. His shoe was no longer rolling and in danger of falling into the urinal as the accused pinned him against the wall because this part of the story now occurred on the opposite wall.
4. Furthermore, in the complainant’s initial account to investigators, the accused stood at the urinal next to his and appeared to want to urinate. At least, his presence in the washroom, the fact that he stood in front of an empty urinal and took out his penis, appears legitimate at first glance. In this version, this situation gave the accused the opportunity to make comments and sexual propositions. The complainant stated: [translation] “When he came to urinate, he was showing off. He was displaying it. He was fully displaying it.”
5. In the version at trial, the accused acted much more like a predator. His goal was now unequivocal when he went to stand beside the complainant who was using the only urinal. The complainant took pains to add that it was abnormal for him to came stand beside him like that.
6. The complainant’s account of the washroom incident was also very detailed. On cross-examination, the defence established that several of these details did not appear in the account given to investigators in 2017.
7. Thus, the complainant testified at trial that he noted pre-cum on the accused’s penis when he was trying to force him to touch him there. That disgusted him. This detail is not mentioned in any of the statements provided to the investigators, or at the preliminary inquiry.
8. While the complainant explained that at a given point, before he was pinned to the wall, he and the accused were shoving each other and it was becoming increasingly violent, at trial he added that the accused used his fists. This detail is also not mentioned in his statements to investigators or at the preliminary inquiry.
9. He stated that he spit in the accused’s face when he tried to kiss him on the neck. That fact does not appear in the statements to investigators.
10. When the complainant explained that he struggled to escape the accused’s hold while pinned to the wall, he testified that he tried to knee the accused in the genitals, that he elbowed him and tried to twist one of his fingers. These specific defensive moves are not described in the various statements provided to investigators.
11. The complainant testified that when he freed himself from the accused’s hold, he pushed or propelled him towards the back wall of the washroom and that the accused then slumped to the ground. The complainant did not mention these facts in any statement provided to the police.

**The relevant facts after Halloween 1993**

1. After the washroom incident, the complainant was promoted and started working at the multiservice counter in the building’s main entrance (level A). He believes he was reassigned in November or December 1993.
2. He saw the accused again while working in this position. The accused made the same comments and sexual propositions to him as usual [translation] “as if nothing had happened in the washroom”.
3. After that, he informed his supervisor D that he no longer wanted to serve the accused as part of his duties at the multiservice counter.
4. The complainant testified that he then described to D what happened when the accused exposed his penis to him in the cubicle, not the washroom incident. The complainant situates that event with great accuracy: June 3, 1993. B granted his request.
5. It must be noted that, as previously mentioned, D testified that the complainant told him about the incident when the genitals were exposed immediately after it happened. She was questioned to confirm that the complainant indeed confided in her the same day the incident occurred. Some questions made her have doubts, but she is fairly certain. She said that the complainant walked out of the cubicle quickly, that he was nervous and worried. She appears to remember it being the same day that he confided in her.
6. Next, the complainant explained that he saw the accused again during the filming of an episode of *La petite vie*. The complainant had tickets to see it, and his friend F went with him. He situates the incident in October or November 1994.
7. The accused was now a warm-up announcer. He welcomed the public that came to the filming.
8. Here is how the complainant described that meeting:

[translation]

We entered the television studio, everything was going well and at one point I saw Éric Salvail on a platform in the middle, I hadn’t known that he was the warm-up announce. When he saw me, he came over to me, but in a very...in a very assertive way, very...he was angry and he grabbed my arm and said: [translation] “I hope you didn’t come here to stir shit up”. I didn’t really understand, he wanted to take me behind the curtains to talk, but I said: [translation] “Look, if you have something to say to me, say it here, in front of F, I’m not going behind the curtains with you”, and I remember, I was holding onto my friend F, because he was still pulling on my other arm to take me behind the curtains. So I really held tight onto F, I was very scared and when he moved towards me, very aggressively, I said to F: [translation] “That’s him, that’s him, he’s the one causing me problems at Radio-Canada”, because she also knew that someone at Radio-Canada was causing me problems, so I was identifying who was (inaudible). At that point, I was holding onto her so tightly, I was so afraid that he would take me behind the curtains, the fear was really uncontrolled and uncontrollable.[[18]](#footnote-18)

1. On cross-examination, he used or agreed that he had used the following expressions in the past to describe how the accused approached him and F: he moved with determination, he was charging ahead, he was fuming, and he was flinging himself forward.
2. He confirmed that the accused tried to pull him aside by the arm. Again, in front of F, the accused asked to speak to him alone.
3. It is important to note that when the complainant did not remember this incident when he initially reported the accused to the police. F reminded him of it.
4. Here is the exchange on this subject between counsel for the accused and the complainant:

[translation]

Q. So when you caught up with her, what did you discuss?

A. Oh, this and that, we hadn’t spoken in years so, [translation] “What have you been doing?” things like that, that’s about it. I asked her if...since she told me she remembered that stuff, I asked her if she would be willing to meet with the investigators if necessary, and that’s all.

Q. Alright. So, among other things, you talked about the Salvail affair, is that correct?

A. That matter, yes, which had exploded in the media, yes.

Q. Alright. And she reminded you of an incident, correct?

A. Correct.

Q. She reminded you actually of the *La petite vie* incident we just talked about...

A. Yes.

Q. ...is that right? And when she reminded you of that, you, your reaction was to say, [translation] “Oh my god, I didn’t even remember myself.” »

A. Correct.

Q. Is that correct?

A. Correct.[[19]](#footnote-19)

1. Now, here is F’s testimony on the same incident:

[translation]

And we were...as soon as we entered, we were right in front of the television studio and there was Mr. Salvail, coming towards us, and he came...in fact, he came to assign us some seats, but he had a very, very, very strange look, very...it wasn’t a look that was...

I can tell you this, it was a hard look, it was... it was disturbing, it was... it wasn’t friendly, I mean as soon as Donald saw him, he took me by the arm, or by the hand, I don’t remember, he really hugged me tight to him.

Actually, he was glued to me and we were assigned some seats, I don’t think I spoke to Mr. Salvail. There was probably...I don’t know if he spoke with Donald, it’s too long ago for me, I don’t remember at all.

Q. Perfect. Can you describe for us how Mr. Salvail came toward you at that moment?

A. It was fast and he didn’t speak to me, he didn’t look at me, he really headed straight for Donald with that infamous look I told you about. It happened really, really, fast, it was a few seconds, it...

Q. You still remember that incident today?

A. Yes.

Q. What made an impression on you?

A. The look, the look and Donald’s panicked gesture, he grabbed onto my arm, really glued himself to me, he had never done that before, I really didn’t understand what was happening. Well yes and no because he had told me about various things that had happened, but right then, it really, really surprised me.

So, that’s why it really stuck in my mind even if it was a really, really long time ago.

1. On cross-examination, F claimed that she remembered that there was an exchange between the complainant and the accused. When asked if the exchange was aggressive, she answered instead [translation] “very cold”. It was the accused’s look that was aggressive.
2. She testified that the complainant was grabbing onto her arm or her hand. There was no contact between the accused and the complainant, [translation] “as far as she knows”.
3. When she was asked outright whether the accused attempted to pull or drag the complainant, she answered: [translation] “Oh my gosh, well, I don’t know, not when I was there, I don’t know, I have no idea.” Later, she added [translation] “it happened over 20 years ago.”
4. Last, the complainant was cross-examined on a series of emails sent to the investigators and the prosecutor responsible for his case, as well as to the Director of the DCPP.
5. He said that he was unhappy with the delay in filing charges against the accused.
6. He expressed his impatience by threatening to [translation] “unleash the media”. He complained of having [translation] “to shut up and wait”. According to him, by not acting diligently, Crown counsel was giving the accused [translation] “a nice Christmas break”. Again, according to him, it is [translation] “a rather probative example” of a [translation] “two-tier justice system”. He accused counsel of [translation] “being more concerned with her Christmas preparations than with her cases”. The complainant admitted that this was just a “random” statement. He had absolutely no idea whether she was actually getting ready for Christmas. To him, it was possible. He is not at all embarrassed he wrote it. He takes full responsibility for what he wrote.
7. In his emails, he also complained that the prosecutor had not prepared him before the preliminary inquiry.
8. He refused to [translation] “be prepared less than 72 hours before the preliminary inquiry began after months of radio silence from a prosecutor who appeared to care less about her witnesses.” He said that [translation] “he was going to meet with the journalists before the hearing, and the prosecutor would have rearrange her schedule accordingly”, not him.
9. He also indicated in his emails that he had no confidence in the prosecutor in charge of his case. He claims she was [translation] “shamelessly lax” and “lacking combativeness”. He had [translation] “had more than enough of her Outremont attitude”. He added: [translation] “I had no confidence in her ability to successfully handle a case as big as this one. A prosecutor from the minor leagues should never be assigned to a case that exceeds her level of competence.” He threatened to [translation] “file an ethics complaint against her. So she would take her fingers out of her nose and get to work”.
10. At one point, defence counsel asked the complainant about an email in which he claimed to have no confidence in Crown counsel: [translation] “...what did she do to earn the wrath expressed in that email?”
11. The complainant answered, [translation] “Technically today, I realize nothing”. He justified the wording of his email by explaining that when he wrote it, he was unfamiliar with the justice system. He felt a lot of pressure as the preliminary inquiry approached.

**The accused’s testimony**

1. The accused stated that he has no memory of the complainant. He does not remember working with him at Radio-Canada. At most, his face looks familiar.
2. His employee record (exhibit D-6) confirms, however, that they worked together in the mailroom during two periods in 1993.
3. Since he has no memory of any interaction with the complainant, he did not testify directly on the alleged incidents.
4. In fact, the accused’s explanation was more of an argument than testimony.
5. He tried to convince the Court.
6. One of his arguments was that the incidents described could not have occurred because he was not working in the same department as the complainant during one of the periods identified and was no longer working at Radio-Canada during the other.
7. He used his employee record (exhibit D-6) as evidence of the period he was a temporary employee at Radio-Canada. Since he has few independent memories, he relied largely on that document. Therefore, his testimony in this respect is almost useless.
8. Furthermore, the employee record (exhibit D-6) filed as evidence of its contents does not establish his innocence. It was used to attack the complainant’s credibility.
9. That said, it may be useful to recall that the accused does not have to prove his innocence. He can even remain silent. The Crown must establish the accused’s guilt beyond a reasonable doubt.
10. The accused used his agendas to refresh his memory about the period he was employed part time and started to work on *L’enfer c’est nous autres* in the summer of 1993, and the period starting August 13, 1993, when he was no longer a temporary Radio-Canada employee.
11. He stated that the incidents described as occurring during this period could not have happened since he hardly ever went to the Radio-Canada building anymore.
12. More specifically with respect to the period he held a part-time position, he added that he was there in the mornings only because he was away on location in the afternoons, not at the Radio-Canada building.
13. This was probably the most relevant portion of the accused’s testimony, as his version contradicts the complainant’s version on a subject that is not necessarily part of the employee record.
14. Indeed, for the period the complainant calls [translation] “the summer of harassment”, he claimed that there were episodes of harassment two to three times a week, primarily in the afternoon. In July and August, he estimated that the accused touched his buttocks 20 times and made sexual remarks to him 40 times.
15. For the other period beginning on August 13, 1993, the accused argues that he could not have committed the alleged acts because he was no longer working at Radio-Canada and he no longer, or almost never, went to the building.
16. The strength of that statement was greatly eroded on cross-examination. A significant nuance was added. He was no longer a temporary Radio-Canada employee, but he sometimes worked there on specific contracts related to a production. He also sometimes went there for administrative reasons, such as to be paid a salary or compensation. In fact, throughout this period he was working on *L’Enfer c’est nous autres*, a Radio-Canada production.
17. The period when he was no longer a temporary employee began on August 13, 1993. The complainant mentioned general harassment in July and August 1993. The specific incidents (in front of his sister and wearing the cycling outfit) happened in July, according to him, therefore before the accused stopped working as a temporary employee.
18. The complainant did not report anything in September or early October 1993.
19. According to him, the next incident happened on October 29, 1993.
20. There is nothing in the evidence to establish that the accused was not present on that date inside the Radio-Canada building. In fact, *L’enfer c’est nous autres* started up again on November 2, 1993. Although filming was done elsewhere, a production meeting could well have been held on October 29. 1993.
21. The accused’s testimony for the period after August 13, 1993, is therefore not very useful.
22. To establish that the incidents described could not have happened, the accused also added with respect to the washroom incident that, if something of that magnitude had happened, he would remember it.
23. As mentioned, the accused’s testimony also tried to establish that the complainant’s allegations are impossible because he, Éric Salvail, would never do such a thing. He clearly tried to portray himself as someone who does not engage in the behaviour described by the complainant. The Court will not repeat what he said. Instead, it refers to the relevant excerpt of its decision on the admissibility of rebuttal evidence.[[20]](#footnote-20)
24. It is merely necessary to recall that for almost every one of the complainant’s allegations, he stated that [translation] “he would not have done it”. The only thing he admits is that he sometimes comments on people’s buttocks, as a joke.
25. He is not in the habit of assaulting people.
26. He referred to his reputation and stated that [translation] “anyone who knows him a little” knows that he would not jeopardize a budding career in the industry he loves by doing what the complainant described.
27. He also referred to his professionalism, which makes it impossible for him to have committed some of the acts described by the complainant.
28. The Court will not repeat in detail the rebuttal evidence, that is, the testimony of G, H, and I.
29. It must be noted, however, that this evidence is uncontradicted. Its truth and reliability has not been challenged. The Court accepts it as is.
30. Furthermore, it must be recalled that the rebuttal evidence’s limited objective was to attack the accused’s credibility. He is not charged for the acts described by the witnesses G, H, and I. Therefore, the Court will not rule on the accused’s guilt in relation to these acts.
31. Their testimony presented facts to put the accused’s testimony into perspective and test his claims.
32. The three witnesses described events that occurred in the 1990s and early 2000s, when the accused was not yet as famous he would be later.
33. The incidents occurred in the workplace.
34. They described the accused’s seduction methods, which the Court characterizes as [translation] “aggressive”.
35. The accused was persistent, despite the person’s refusal to play along with the seduction. At times, that refusal had to be physical, by pushing the accused away, for example. The accused did not appear to understand these refusals, or ignored them.
36. G described persistence over several years, despite the firm boundaries established at the start of their professional relationship.
37. H described a short-lived persistence, which is nonetheless revealing. The accused caught him off guard by putting his hand down his pants from behind, along his buttocks to his testicles. H pushed him away and said [translation] “What are you doing?” H told the accused that he was not interested, adding that he had a boyfriend. He walked towards the elevators to leave the scene. Despite this, the accused still thought he had a chance. He exposed his penis and asked H to go into a researcher’s office.
38. The three witnesses described acts by the accused that meet the definition of sexual assault in Canadian criminal law. They occurred in the workplace.
39. They describe incidents where the accused violated their bodily and sexual integrity without their consent.
40. The accused took no steps to obtain consent. Nothing in the circumstances the witnesses described could have lead the accused to conclude that they consented to being touched in that way.
41. These situations are not akin to slapping the buttocks of a friend or a teammate, which are the examples the accused used in his testimony.
42. G explained that the accused grabbed one of his buttocks. It was his first contact with the accused, who was working on the same set as he was. At the time, the accused was a warm-up person. He was also cornered or [translation] “backed into” a corner by the accused, who wanted to kiss him. It was an attempted seduction, even though G did not express interest, quite the contrary.
43. I described an incident in which the accused surprised him by grabbing him from behind while he was on the phone. He rubbed against him and caressed his torso with his hands. I violently shoved him away. This happened in a context where the accused had been making sexual comments to him for some time.
44. The incident involving H was described above.
45. Based on this evidence, the Court can infer that, contrary to what the accused claims, he is likely to commit acts such as those described by the complainant in this case.
46. The rebuttal evidence establishes that he committed this kind of act in the workplace.
47. That he was not worried about jeopardizing his career in the industry he loves by behaving this way.
48. That his professionalism did not stop him.
49. That he persisted, despite clearly expressed refusals.
50. That his attempts at seduction could go as far as committing acts that meet the definition of sexual assault.
51. Therefore, the rebuttal testimony contradicts the accused’s general claims *that he would not have* committed the acts the complainant described and that he is not *someone who assaults people in life*.

**ANALYSIS**

**The alleged offences**

1. First, the alleged offences should first be briefly discussed.
2. If the defence is rejected and the complainant’s testimony accepted at face value, the commission of the offences of sexual assault and forcible confinement will be proven. This is uncontested.
3. Non-consensual sexual touching of the buttocks, as described by the complainant, in a context where the accused expresses his sexual desire, meet the definition of sexual assault.
4. Attempting to force sexual intercourse by touching another person with your penis, by restraining, shoving, and trying to undress him while the victim is struggling and clearly expressing his lack of consent is sexual assault.
5. Pinning him to the wall and physically preventing him from leaving the washroom for a certain period of time although he wanted to leave, is forcible confinement.
6. Criminal harassment is different and requires deeper analysis in a case such as this one.
7. The *Criminal Code* describes this offence as follows:

* **264. (1)** No person shall, without lawful authority and knowing that another person is harassed or recklessly as to whether the other person is harassed, engage in conduct referred to in subsection (2) that causes that other person reasonably, in all the circumstances, to fear for their safety or the safety of anyone known to them.
* **Prohibited conduct**
* **(2)** The conduct mentioned in subsection (1) consists of
* **(a)** repeatedly following from place to place the other person or anyone known to them;
* **(b)** repeatedly communicating with, either directly or indirectly, the other person or anyone known to them;
* **(c)** besetting or watching the dwelling-house, or place where the other person, or anyone known to them, resides, works, carries on business or happens to be; or
* **(d)** engaging in threatening conduct directed at the other person or any member of their family.

1. The fact that the offence was created and introduced into the *Criminal Code* on August 1, 1993, is also a factor. Only the acts the accused committed after that date that have been established beyond a reasonable doubt can constitute harassment.
2. Therefore, the first question is whether the evidence establishes beyond a reasonable doubt that the accused committed any of the prohibited acts described in s. 464(2) *Cr. C.* between August 1 and November 30, 1993.
3. The second question is whether the evidence establishes beyond a reasonable doubt that the act at issue that occurred after August 1, 1993, caused the complainant to reasonably fear for his safety. In this analysis, the incidents that occurred before August 1, 1993, can be taken into consideration.
4. Last, the accused’s state of mind must be examined to determine whether the evidence establishes beyond a reasonable doubt that the accused knew when he committed the prohibited act that the complainant felt harassed or was reckless as to whether the complainant felt harassed.
5. The evidence in this trial reveals a wide range of acts that certainly constitute inappropriate conduct in the workplace. Taken individually, not all of these acts are criminal offences.
6. However, as stated above, they are relevant in establishing whether there was criminal harassment.
7. Furthermore, it must be noted that psychological or sexual harassment in the workplace does not necessarily constitute criminal harassment. Each type of harassment has its own definition, be it in labour law or in criminal law. For harassment to be a criminal offence, it must meet the definition set out above. The fear felt by the victim is often the determinative issue in establishing the offence.

**The presumption of innocence and the burden of proof**

1. The presumption of innocence is one of the cornerstones of our criminal justice system. This fundamental principle is enshrined in the *Canadian Charter of Rights and Freedoms.*
2. A corollary to this principle is the applicable burden of proof to find someone guilty of a criminal offence.
3. In order to find the accused guilty, the evidence must establish his or her guilt beyond a reasonable doubt. The accused benefits from the presumption of innocence until a court of competent jurisdiction renders a guilty verdict.
4. This means, among other things, that the presumption of innocence is not rebutted even if the Court does not believe an accused and totally rejects his or her testimony. The court must still be convinced beyond a reasonable doubt of the accused’s guilt to convict him.
5. The burden of proving the accused’s guilt beyond a reasonable doubt rests entirely on the Crown, which in this case is represented by the State. The accused has no obligation to prove anything. He need not establish his innocence. He can even remain passive and silent.
6. The burden of proving an accused’s guilt in a case like this one rests on the State, not the victim.
7. It may sometimes appear difficult to separate these roles when the Crown’s case rests almost entirely on the testimony of one victim. However, that should not be the case. In our criminal justice system, at the stage of determining guilt, the victim is a witness whose role is to describe his or her experience to the court to the best of his or her ability. The victim does not have the burden of persuading the court. This role falls to the Crown’s representatives who authorize the laying of charges.
8. In order to respect the presumption of innocence, an alleged victim is usually designated as a “complainant” until the verdict is rendered. Once a guilty verdict is rendered, the alleged victim is referred to as a “victim” and his or her role then changes at the sentencing stage.
9. These observations should not be interpreted as an assertion that the victim is merely an ordinary witness in a criminal trial. The victim is entitled to be accompanied, supported, informed, and protected in order to ensure that an appearance in court is as painless as possible, to encourage denunciation and the search for the truth, while respecting the presumption of innocence and the accused’s right to make full answer and defence.
10. The search for truth must guide a court responsible for determining the accused’s guilt. The search for truth, however, is not an end in itself. A verdict can be rendered without the truth having been established with absolute certainty. A guilty verdict can be rendered even if there are still doubts on some aspects. There are also cases where doubt on what actually happened overshadows everything else, taints the whole and, naturally, in such a case the doubt benefits the accused, who must be acquitted.
11. The principle always remains the same: for the accused to be convicted, the evidence must establish each of the essential elements of the offence beyond a reasonable doubt.
12. It is also useful to recall that a “reasonable doubt is not an imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it must be based upon reason and common sense. It must be logically connected to the evidence or absence of evidence.”[[21]](#footnote-21)

**The analysis of the contradictory versions**

1. This matter is not a classic case of contradictory versions where the complainant and the accused testify on the same incidents, but do not describe the same facts.
2. In this case, the accused did not testify on the incidents. He claims that they never happened. He has no memory of them. His testimony seeks to establish that the complainant’s allegations are impossible.
3. However, in situations where there are contradictory versions, the method of analysis suggested by the Supreme Court of Canada in *W.(D).*[[22]](#footnote-22) may be adapted to the circumstances.
4. Thus, in order to respect the principle of the presumption of innocence and its corollary, the burden of proving the accused’s guilt beyond a reasonable doubt, the Court must first establish whether it believes the accused’s claim that the complainant’s account is impossible. If so, it must acquit.
5. If it does not believe the accused, the Court must still determine whether his defence, in light of all of the evidence, nonetheless leaves it in reasonable doubt as to his guilt. If so, it must acquit.
6. If the Court does not believe the accused and his defence does not leave it in reasonable doubt, it analyzes all of the evidence and determines whether it is convinced beyond a reasonable doubt of the accused’s guilt on each count. The burden is on the Crown and this is where the analysis of the complainant’s credibility comes into play in a case like this.
7. Even if this appears contrary to the way we analyze situations in everyday life, the issue is not to determine which version is more probable. It is not a credibility contest between the accused and the complainant.

**General comments on the assessment of the credibility of witnesses and the reliability of their testimony.**

1. The assessment of the credibility of witnesses and the reliability of their testimony can be a complex task. Unfortunately, there is no foolproof analytical tool to determine whether a witness is telling the truth.
2. A number of factors must be taken into account. It is important not to give too much weight to any one aspect.
3. Although it is useful in assessing credibility, care must be taken when analyzing the manner in which testimony is given.
4. Sometimes people full of good faith have difficulty testifying, while others testify with assurance and confidence despite the fact that they are lying.
5. Two general factors affect the probative value of a testimony: the credibility of the witness and the reliability of his or her testimony. The Court of Appeal of Quebec wrote the following on this subject:

[translation]

[49] As the appellant submits, the concepts of reliability and credibility are distinct. Reliability refers to the value of a witness’s statement, while credibility refers to the person. My colleague the Honourable Judge François Doyon clearly explains the difference between these concepts:

[translation]

Credibility refers to the person and his or her characteristics, such as honesty, that manifest themselves in his or her behaviour. We therefore speak of the credibility of the witness.

Reliability, on the other hand, refers to the value of the witness’s account. We therefore speak of the reliability of a witness’s testimony, or in other words, trustworthy testimony.

Thus, it is recognized that credible witnesses can honestly believe that their version of events is the truth when it is not, simply because they are in error; therefore, the witness’s credibility does not necessarily render his or her account reliable.

[50]           A credible person can therefore provide an unreliable statement.[[23]](#footnote-23)

1. A recognized tool for assessing testimony is the verification of its consistency. This can be done through intrinsic (does the witness contradict him or herself?) and extrinsic (is the testimony confirmed or contradicted by evidence which is independent of the witness?) elements.
2. Contradictions on aspects that are far from the crux of the matter (peripheral issues) have less of an impact than contradictions on key questions (for example, the essential elements of the offence). A significant number of contradictions, even on peripheral issues, can also raise doubts about testimony.
3. Another tool is the verification of its likelihood. Is the account plausible? Alternatively, is it rather implausible?
4. In this case, an additional challenge must be faced: the alleged incidents took place 27 years ago. The evidence rests in large part on the memory of the protagonists. The passing of time necessarily affects the reliability of the testimony. This observation is not a criticism. It is completely normal not to remember all of the details of events that occurred 27 years ago.
5. Nor is the point that criminal proceedings are impossible for old events. Reliable and credible evidence adduced with respect to very old events can support a conviction despite imperfect memories. Every trial is different and it is the analysis of all of the evidence in each case that will determine the verdict.
6. Therefore, it is not impossible, but it is undeniable that the passing of time is sometimes an obstacle to the determination of the facts, especially when the evidence is based solely on the testimony of those who experienced the events at the time.
7. Human memory is complex. It is not like the memory of an electronic device that records the information as it actually is.
8. Human factors, such as perception, prejudices, or emotions, influence the way we remember an event.
9. In this case, the Court is dealing with two people with very different types of memory.
10. On the one hand, the accused presents himself as a person with a poor memory. He could not relate facts without relying on his employee record and his agenda.
11. On the other hand, the complainant presents himself as a person with an excellent memory. The account he provided was rich in detail and very precise. Above all, he had an almost unfailing confidence in the quality of his memory, as it is, when he testified in February 2020, nearly 27 years after the events.
12. The testimony on this matter by the other witnesses was more nuanced. They were aware of the limits of their memory and readily admitted it.
13. Quality of memory can affect the reliability of testimony to varying degrees. As with contradictions, omissions on less important details have less impact on overall reliability. They affect the testimony’s value in a more substantial way if they concern essential elements. A significant number of omissions, even on less important details, can also reduce the testimony’s overall reliability.
14. In addition, the way witnesses treat their memory can affect credibility.
15. We can be sympathetic to the difficulties persons may have with their memory, but they must be honest about it. Several factors can undermine the credibility of a witness.
16. For example, where witnesses hide weaknesses in the story behind false memory gaps.
17. The contrary can also have the same effect, that is, where witnesses fill in the gaps in their story with details invented to make up for their faulty memory.
18. A refusal to admit obvious memory gaps could also undermine credibility.
19. A total lack of memory that cannot be explained by a physical or mental condition may give rise to suspicion, as can a memory that is too perfect that yields a testimony full of details about events that happened a very long time ago.
20. A memory that evolves can have the same effect.
21. The human experience teaches us that memory deteriorates over time, so the opposite surprises us.
22. Witnesses too eager to convince can also affect credibility.
23. The remarks of witnesses who are motivated by the desire to convince may lapse into exaggeration or amplification. They may also seek to render the incident more dramatic than it actually was. This can affect credibility, but can also muddy the waters, making it more difficult to ascertain the facts.
24. Witnesses who are too eager to convince can also refuse to admit their own mistakes or weaknesses. They give strategic testimony, seeking to avoid pitfalls. They then lose their candour.
25. These are common human reactions when one’s word is under scrutiny. It sometimes conceals a desire to obtain a conviction at all costs, a desire for revenge, or other personal motive unrelated to the concern for telling the truth. Sometimes they may simply be based on a misunderstanding of the role of witness. In any case, these reactions are likely to affect the credibility of witnesses and the overall reliability of their testimony.

**Can the accused’s testimony lead to an acquittal?**

1. As stated above, the accused used his testimony as an argument to demonstrate that the complainant’s allegations are false because he has no memory of any interaction with the complainant.
2. The information supplied by his employee record (exhibit D-6) is not in itself a defence. It attacks only the complainant’s claims concerning the period during which the incidents took place. It is useful only for testing the complainant’s credibility.
3. It is silent with respect to the possibility that the accused committed the acts described by the complainant, upon which the charges are based. The employee record confirms that they did indeed work together in the mailroom during two periods in 1993, making it possible that some of the acts were committed that year, in the circumstances described by the complainant.
4. This is probably why the accused felt compelled to go further in his testimony and claim that he is not the type of person to commit such acts. He took pains to mention it for almost every one of the complainant’s allegations against him.
5. He even called the complainant’s allegations with respect to the washroom incident [translation] “outlandish”. The complainant’s allegations, however, are not outlandish in themselves. What he describes is plausible, not unlikely. To characterize the allegations as “outlandish”, the accused must base his claim on something tangible. He did so by stating that he would remember such an incident if it had happened. He added that [translation] *he would not have done it*, he is not someone who [translation] “assaults people in life”.
6. This is the true defence against the charges.
7. It combines the physical and temporal impossibility with the fact that Éric Salvail is not the type of person to commit such acts. This is the image he wants to project. Nobody forced him to do so.
8. Believing it leads directly to an acquittal.
9. The media reported the fact that he chose to project such an image in Court. Some people were shocked because according to them it did not correspond to reality. It was in this context that the rebuttal testimony was given.
10. Indeed, this testimony destroyed the image the accused wished to project. His credibility was greatly affected.
11. Contrary to what he claims, this evidence establishes that he is someone likely to commit acts such as those described by the complainant.
12. This part of his defence must be rejected. The Court does not believe the accused.
13. Once this finding has been made, nothing truly probative remains of the accused’s defence. There is nothing to maintain a reasonable doubt as to his guilt.
14. As the Court has already stated: the accused’s employee record is useful in assessing the complainant’s credibility. It does not mean that the offences could not have been committed on dates other than those given by the complainant.
15. A similar finding can be made with respect to the portion of the accused’s testimony where he states that the harassment in the summer of 1993 and the washroom incident on October 29, 1993, are impossible because he hardly ever went to Radio-Canada during those periods.
16. In the examination-in-chief, the accused testified with confidence on this issue. This certainty eroded on cross-examination and in light of all the evidence, to the point where nothing remains of this argument. The Court accepts from the evidence that the accused worked at Radio-Canada on a temporary basis until August 13, 1993, which in itself does not prevent him from committing the alleged acts. Thereafter, he still had reason to go to the Radio-Canada building, either for administrative reasons or for production meetings. At the time of the alleged washroom incident, he was working on *L’Enfer c’est nous autres,* a Radio-Canada production.
17. There remains the accused’s statement that he would remember the washroom incident had it happened. The accused’s credibility was sufficiently affected by the rebuttal evidence to remove all weight from this somewhat easy statement that is difficult to verify.
18. The only part of the accused’s testimony that the Court finds has some probative value is where he explains that he was absent from work at the Radio-Canada building from July 12 to 16, 1993, and from July 19 to August 13, 1993, he worked there only in the mornings because he was on location elsewhere filming *L’enfer c’est nous autres* in the afternoons.
19. This part of his testimony is partially corroborated by his employee record . He also used his agenda to refresh his memory. Crown counsel had a copy of his agenda at hand. She did not attempt to contradict him. There is no reason to set aside his testimony in this regard.
20. This part of the accused’s testimony does not raise a reasonable doubt as to guilt. It is useful in assessing the complainant’s credibility.
21. In short, the accused’s testimony cannot lead to an acquittal. The Court does not believe the accused and his defence does not raise a reasonable doubt.

**Does the complainant’s testimony support a guilty verdict?**

1. The complainant testified confidently, with conviction, and assurance. At first glance, he has an excellent memory. His testimony is rich in detail concerning events that occurred 27 years ago. He authoritatively asserted his certainty about certain facts.

**Elements that do not affect the complainant’s credibility**

1. It must be added that some aspects do not affect the complainant’s credibility.
2. First, the Court finds nothing implausible in the complainant’s story itself. The accused’s only way to argue that the story is implausible was to state that he is not the type of person to commit such acts. As previously stated, the Court rejects this argument.
3. Everything related to the complainant’s reactions during the washroom incident must be carefully analyzed. His reactions must not be compared to those of an [translation] “ideal” or [translation] “normal” victim because this notion does not exist.
4. There are a myriad of possible reactions to an assault. Each person reacts differently. A victim is not expected to behave in any given way. Reactions can be unpredictable because the victim is in that situation for the first time. In moments of intense stress or fear, reactions are often less thought out and more instinctive. Feelings and emotions can complicate the situation, for example, in cases different from this one, when the victim knows or even loves the assailant.
5. In addition to perpetuating myths and stereotypes about sexual assault victims, this type of comparison has the perverse effect of making them feel guilty, of giving them the impression that they are partly responsible for what happened to them. This type of inference has absolutely no place in a criminal trial.
6. Thus, any challenge to the plausibility of the complainant’s account based on his reactions, including his decision to wash his hands despite the threat posed by the accused and his inability to defend himself and [translation] “shove” the accused aside to leave the washroom and end the assault, must be rejected.
7. That said, an analysis of the complainant’s reactions may be relevant, not to determine whether the story is plausible, but rather to determine if his fears were reasonable in a context where the accused is on trial on a charge of criminal harassment.
8. It can also be useful when the time comes to verify the consistency of the complainant’s story compared to his previous statements.
9. Discussing the plausibility of the complainant’s story leads the Court to examine the rebuttal testimony from this perspective.
10. The reflex is to say [translation] “the complainant must be telling the truth, his account is plausible, because the accused acted in a similar way with other people during the same period”. This reflex is natural because it is logical. However, it is very dangerous because it could end in accused being convicted based not on the quality of the evidence in support of the charges alleged against them, but on the quality of the evidence with respect to other incidents for which they have not been charged. In addition, there is a risk that they will be convicted for who they are, not for what they do. Evidence as to disposition or propensity is generally inadmissible for this reason.
11. The presentation of similar facts to enhance the credibility of a complainant or to establish the accused’s guilt is possible, but remains exceptional. This is usually part of the Crown’s evidence in chief. An application must be submitted beforehand. Due to the dangers already discussed, the analysis is different from the Court’s analysis in this case. The possible prejudicial effects for the accused are greater.
12. Here, the rebuttal testimony was given after the defence was presented. The Crown did not have it when the trial began. The similar facts that the testimony described had the limited effect of attacking the accused’s credibility. Their purpose was not to enhance the complainant’s credibility. This is the Crown’s expressed objective and this is the effect of the Court’s decision on the admissibility of the rebuttal evidence.
13. The Court must therefore disregard the reflex described above and use the rebuttal testimony solely to assess the accused’s credibility and not that of the complainant.
14. It is also important to mention that in its analysis, the Court did not address several of the contradictions raised by the defence because it did not consider them significant. Nor were some of the factual details added by the complainant at trial missing from his statements to investigators. It is partly normal for new details to emerge during a trial. Statements to police officers are shorter. At trail, the complainant spent two days on the witness stand and his story was meticulously analyzed.
15. Some additions of detail can be more significant, however, especially in a context where memory is expected to fade over time or where the issue of whether the witness is exaggerating arises.
16. Moreover, in the Court’s view, there are four salient aspects that affect the complainant’s credibility and the reliability of his testimony: the contradiction with the accused’s employee record, the contradictions with his prior statements about the washroom incident, his tendency to exaggerate and dramatize the facts, and his inability to admit to weaknesses in his testimony.

**The contradiction with the accused’s employee record**

1. As previously described, the complainant’s story is firmly anchored in time by his departure for France on June 4, 1993. He stated that the accused’s harassment began in the days or weeks preceding his trip, culminating, with respect to this first period, with the accused’s act of exhibitionism the day before his departure.
2. The accused’s employee record, however, indicates that the incidents described by the complainant could not have happened during the period identified and in the context he specified, that is, the accused’s arrival in the mailroom, the replacement in his own job, and his training; all in the days or weeks leading up to his departure for France on June 4, 1993.
3. There are only two possible explanations for this contradiction.
4. Either the complainant made up part of his story, which would greatly affect his credibility.
5. Or the incidents and the context he described are accurate, but he is mistaken about the time period.
6. This second possibility could be of little consequence. Dates are not necessarily essential elements that must be proved beyond a reasonable doubt. The Court can be convinced beyond a reasonable doubt that the accused committed the offences without being sure of the date and still find the accused guilty. Witnesses are not necessarily expected to remember exact dates 27 years after the facts. Witnesses can get dates wrong in good faith without it being fatal.
7. That is what Crown counsel is asking the Court to do. During her oral arguments, she raised the possibility that the complainant was mistaken about the dates.
8. The problem is that in his testimony the complainant rejected the lifebuoy thrown by Crown counsel.
9. The complainant was given several opportunities, on cross-examination, to revise his testimony, or at least to admit that he was not sure of the dates or of the period during which the first series of incidents occurred. The only possibility he considered was that the accused did not work continuously in the mailroom during the period described. He was adamant, however, that the accused worked in the mailroom at certain times in April, May, and June 1993. He refused to admit the possibility that the accused never worked in the mailroom in April, May, or June 1993, which is the case. He maintains that the incidents described happened during this period.
10. This obstinacy affects the reliability of his testimony. If he is indeed mistaken, then the complainant is relying too heavily on his faulty memory. This undermines the trust that can be placed in his testimony.
11. The Court is not faced with a person telling it [translation] “I am unsure of the dates, but I am sure that the accused committed the acts I am describing.” The complainant stated that he was sure of the dates and refused to entertain any doubts in this regard.
12. The greatest issue for the complainant’s credibility is that this obstinacy also prevents the Court from ruling out the first possible explanation for this contradiction, which is that he fabricated part of his story.
13. The contradiction with the accused’s employee record affects either the complainant’s credibility or the reliability of his testimony.

**The contradiction with respect to the washroom incident**

1. As discussed, the contradiction on the number of urinals in the washroom does not concern a trivial detail. It alters the complainant’s account of the washroom incident in more than one aspect: the context of the accused’s arrival in the washroom, the way in which the complainant twisted his ankle, and where he was pinned to the wall.
2. At trial, the complainant gave an account of the washroom incident in great detail and, above all, with much certainty and little hesitation.
3. He claims this incident occurred in 1993. He described the substance of that incident in some of his statements to investigators in 2017. At the time, he thought there were two urinals. Several details of his account revolve around the fact that there were two urinals.
4. Somewhere between the time he made his statements to investigators and the preliminary inquiry, he realized that there was just one urinal in that washroom. What made him realize it is not important. He assured the Court that he informed the investigators of this change to his version by email. The investigators can find no trace of it.
5. At the preliminary inquiry and at trial, several details of his account of the washroom incident were changed to reflect the fact that there was just one urinal.
6. Once again, only two conclusions may be drawn from these findings.
7. Either the complainant is fabricating part of his account of the washroom incident.
8. Or his memory is imperfect. When he testified, the complainant, however, had unwavering confidence in his memory as it was in 2020.
9. In fact, the [translation] “creepy image” that haunts him, which he described to investigators in 2017 and in which he sees himself pinned to the wall between two urinals, is necessarily false.
10. Either the complainant is fabricating this image voluntarily, or his memory is playing tricks on him and has unconsciously created a false image in his mind.
11. In the first case, his credibility is greatly affected because it establishes that he has little regard for the truth.
12. In the second case, the reliability of his testimony is affected because his memory has the capacity to produce false images. In this case, it may be difficult to distinguish what is real from what is not.
13. The complainant claims that in 2020 his memory of the 1993 incidents is better than it was in 2017.
14. He supports his position by explaining that he has been working on reconstructing his memory in therapy.
15. Once again, his testimony is not [translation] “I do not remember all of the details, due to the passing of time or because of the stress experienced during the incident, but I am convinced that I was assaulted in the washroom”. The complainant instead delivered testimony that was rich in detail, with some additions or changes over time, with no room for doubt about the quality of his memory in 2020.
16. Human experience teaches us that memory deteriorates over time, and not the opposite. There are many reasons, including defence mechanisms, why therapy might cause buried memories to resurface. Are these memories more reliable than those about the same incident expressed a few years earlier? Does the brain then produce images that are necessarily true when it produced false images in the past? The Court does not know. Such a finding requires an opinion on a subject that is outside the scope of judicial notice. No expert testimony was presented that could have enlightened the Court on this subject.
17. Therefore, the Court cannot rely on the complainant’s opinion to reach such a conclusion.
18. Even if the Court believes that he did not voluntarily fabricate parts of his story, it is clear that at a minimum his brain is capable of producing false memories or false images with respect to part of his story.
19. The effect of this finding is that the complainant’s memory is not entirely reliable. This would not have much effect if the memory gaps or faulty memory concerned insignificant details and the witness was candid about them.
20. That is not the case here because the false image alters a relatively important part of the story. Moreover, there is nothing in the evidence to support a finding that the complainant’s memory in 2020 is more reliable, despite gaps in the past. The Court cannot rely on the complainant’s word to reach such a conclusion.
21. The Court also finds it strange that the work the complainant is doing on his memory in therapy aligns the details of the story perfectly so that it is consistent with the fact that there was just one urinal. All of these changes suggest not a reconstruction of memory, but a reconstruction of the narrative when the complainant confirmed during his appearance on *Tout le monde en parle* that there was only one urinal.
22. The fact that there is no trace of the email he claims to have sent the investigators in this regard also affects his credibility.
23. The evidence does not justify overlooking the possibility that he voluntarily fabricated part of his story.
24. The contradictions on the washroom incident significantly affect either the complainant’s credibility or the reliability of his testimony.

**The complainant’s tendency to exaggerate and dramatize the facts**

1. At the outset, the emails in which the complainant complains about how the authorities were handling his case must be addressed.
2. He certainly has the right to complain about the work of the police officers, of the DCPP in general, or of the prosecutor in particular. It is not up to the Court to determine if the complaints against them are well founded.
3. The waiting period before a decision is rendered, the uncertainty concerning the outcome of the case, and the pressure felt on the eve of testimony certainly contribute their share of stress and anxiety, this is quite understandable
4. The Court finds it troubling, however, that the complainant made a series of serious allegations about the competence of counsel. He even threatened to file an ethical complaint, and then admitted that he actually had no grounds for doing so. In retrospect, she had done nothing to “warrant his disdain”. Furthermore, he said he must be “responsible for” his remarks. These facts establish that he has the ability to make alarming statements and serious allegations that have no real basis. This leads to the finding that he has little regard for the truth in his quest to obtain what he wants and to express how he feels. That, to him, the ends justify the means. He can even go so far as to say disparaging things about someone.
5. In his emails, the tone used, the words chosen and the allegations made, that he admits today were unfounded, establish at least that the complainant, when he expresses himself, has a tendency to use overblown rhetoric.
6. The Court also observed this tendency to exaggerate when the complainant described the incident that occurred on the set of *La petite vie*.
7. The complainant’s account of this incident is much more dramatic than that provided by F. In the complainant’s account, the accused is much more aggressive in the way he acts. Among other things, he physically tries to pull the complainant, who is holding onto F.
8. The complainant’s account has many more details than F’s. These are not neutral details. They amplify the accused’s aggressive behaviour.
9. Yet, in 2017, at the time it was disclosed to the authorities, the complainant did not remember this incident. It was F who reminded him of it.
10. In a context where this tendency to exaggerate is observed, it should also be noted that the washroom incident was more dramatic at trial than in the versions previously provided to investigators.
11. Details were added, making the altercation more violent than in the complainant’s previous description. At trial, this violence was described as arousing the accused who was, [translation] “more and more erect”, the complainant now remembered seeing pre-cum on the accused’s penis. He stated for the first time that the accused pushed him using his fists. The complainant appears to defend himself more vigorously than in previous versions: now he spits in the accused’s face when he tries to kiss him, he tries to knee him, twist one of his fingers and elbows him. He also adds that he [translation] “propelled” the accused against a wall where he slumped to the ground.
12. As previously stated, in the version delivered at the trial, the accused’s initial approach in the washroom is far more predatory. The complainant explained to investigators that the accused came up to the urinal next to his and got ready to urinate. This gave him the opportunity to show his penis and to make sexual propositions. At trial, since there was only one urinal, the accused was standing right next to him with his penis exposed. His intentions were therefore unequivocal.
13. It is also difficult to conclude that the complainant is not exaggerating when he claims that in the summer of 1993 the accused grabbed his buttocks about 20 times and made sexual propositions 40 times, mainly in the afternoon, whereas the accused was not in the Radio-Canada building for an entire week in July that year and thereafter he only worked there part-time, in the mornings, until August 13. In the afternoon, he was on location away from the building. After August 13, he went to the Radio-Canada building but less often, since his direct employment had terminated.
14. In some cases, an exaggeration can be overlooked because other evidence convinces the court that the offences were committed. It is possible to entertain doubts that the incidents occurred *exactly* as the witness describes, but remain convinced beyond a reasonable doubt of the accused’s guilt.
15. Here, the situation is different. With respect to most of the facts reported by the complainant, there is little to distinguish what is true from what is not. When added to the other factors that affect the complainant’s credibility, his tendency to exaggerate and to dramatize seriously muddies the waters.

**The complainant’s inability to admit to weaknesses in his testimony**

1. When the evidence of the commission of an offence rests solely on the testimony of one victim, that victim may feel an enormous weight on his or her shoulders. The pressure can be even greater when the accused is a public persona and for that reason, the media pay a lot of attention to the case.
2. Most of the time, victims simply want to be believed. They are generally motivated by the noble desire for justice. Since the evidence rests on the victim’s testimony, they can feel pressure to convince.
3. However, it must be recalled that the Crown decides when to file charges and it is responsible for proving the accused’s guilt beyond a reasonable doubt. The victim does not bear that burden.
4. Victims undertake to tell the truth in an affidavit or solemn affirmation. Therefore, testimony is not expected to be perfect. Victims are simply expected to tell the truth.
5. Victims who tell the truth testify to the best of their ability, to the best of their recollection. In this context, it is normal to find uncertainty, hesitation, and imprecision in their testimony.
6. Sometimes the weight of myths and prejudices about sexual assault, unfortunately still present in society, makes victims feel ashamed, regretful or guilty about their own actions during the incident. These feelings can make victims reluctant to discuss the aspects of their account that they wrongly perceive as weaknesses. The courts have a duty to set aside the myths and prejudices, which should never be used to support a negative finding about credibility.
7. Sometimes, the fear of not being believed is so strong that it leads witnesses to stray from the truth to cover up what they perceive as weaknesses or to support their remarks more solidly.
8. Some of these misdemeanors are of little consequence and can be overlooked. Other departures from the truth are significant enough to interfere with the determination of the facts necessary to support a conviction.
9. In many cases, the victim’s testimony alone is sufficient to support a conviction, even when there are contradictory versions. Sometimes, despite the victim’s good faith, a reasonable doubt subsists and the accused is acquitted.
10. It is understandable that victims may feel a sense of injustice if the incidents actually occurred and there is an acquittal because of a reasonable doubt. Victims may view this as a sign that they are not believed, when this is not necessarily the case. Respect for the presumption of innocence can lead to this type of consequence, which is sometimes difficult to accept.
11. There are also situations where people provide false testimony. The right to make full answer and defence must provide the accused with the tools necessary to flush out those situations and avoid an innocent person being convicted based on this testimony.
12. As previously stated, witnesses who are too eager to convince risk affecting their credibility. This includes when witnesses stray from the truth in order to give a perfect testimony, when that is not what they are being asked to do.
13. The analysis of the complainant’s testimony in this case allows the Court to infer that it was his mission to convince the Court, which in itself is not problematic. However, he sometimes did so to the detriment of the truth. This inference is based in particular on the observation of his inability to admit to what he perceived as weaknesses in his testimony.
14. Indeed, the complainant delivered testimony that was rich in detail and specific about incidents that took place nearly 27 years ago, which is surprising. Some people, however, have exceptional memories.
15. The difficulty in this case, is that more than one example demonstrates that the complainant’s memory is not as good as he suggests. Then again, to err is human and he could honestly be wrong.
16. However, he refused to entertain any uncertainty in his testimony. Sometimes when confronted he let slip a [translation] “if you say so”, “possibly” or [translation] “probably”. Surprisingly, the next minute, he became very assertive on the same subject. He then stated that he is [translation] “certain” or even that there is [translation] “no doubt” on what he alleges, in spite of the fact that there is contradictory independent evidence.
17. This establishes that he made a strategic choice not to make concessions even though the situation required that he at least convey his uncertainty.
18. His refusal to admit to any flaws in his memory or to any other weaknesses in his testimony, which is normal and expected, allows the Court to infer that he abandoned his duty to tell the truth in favour of his desire to convince at any cost.
19. When combined with his tendency to exaggerate and dramatize the facts, which can also signal a desire to convince at any cost, the complainant’s testimony is thereby affected.
20. It then becomes difficult, even impossible, to distinguish between what is true and what is not.

**Conclusion**

1. All of the factors analyzed lead to the inference that the complainant took serious liberties with the truth and perhaps even fabricated portions of his testimony. The evidence as a whole does not rule out this possibility.
2. Even if that is not the case, the reliability of his testimony and his credibility are nonetheless greatly affect by the evolution of his memory, which is sometimes faulty, the complainant’s refusal to admit to apparent weaknesses in this regard and his overreliance on his memory.
3. The fact that significant portions of his story were intentionally invented or were the result of errors made in good faith leads the Court to the same inevitable questions: what to believe in the complainant’s testimony, how to distinguish what is true from what is not?
4. The same questions arise when we note his tendency to exaggerate and dramatize the facts.
5. In this case, the Court is unable to answer these questions with respect to many of the facts presented by the complainant. The issues of credibility and reliability are sufficiently troubling to taint the entire testimony. They muddy the waters. It is impossible to trust his testimony.
6. The testimony of D, E, and F and the accused’s employee record, are such that the Court is convinced that the complainant and the accused worked together at Radio-Canada in 1993.
7. The Court is also convinced that at that time the accused engaged in behaviour that made the complainant feel so uncomfortable, troubled or disturbed that he confided in his supervisor D and in his friends E and F.
8. It is likely that the accused’s behaviour constituted a form of harassment.
9. Criminal harassment has its own definition in the *Criminal Code*. This definition includes very specific elements. Due to the Court’s lack of confidence in the complainant’s testimony, the Court is not convinced beyond a reasonable doubt that the accused committed one of the acts set out in the definition, either before or after August 1, 1993, and that these acts made the complainant reasonably fear for his safety.
10. Due to that same lack of confidence in the complainant’s testimony, a reasonable doubt also subsists with respect to the allegations of sexual assault and forcible confinement.
11. A conviction must be based on reliable and credible evidence. A witness whose credibility is undermined or testimony that is unreliable can create reasonable doubt.
12. Even if we do not believe the accused, the Court finds itself in a situation where the presumption of innocence must be upheld, since guilt has not been established beyond a reasonable doubt.

**FOR THESE REASONS, THE COURT:**

**ACQUITS** the accused on all counts.

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| Mtre Amélie Rivard  Crown prosecutor | | |
|  | | |
| Mtre Michel Massicotte, Ad. E.  Mtre Nicholas St-Jacques  Counsel for the defence | | |
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| Hearing dates: | February 17, 18, 19, 20 and November 9, 10, 11, 13, 2020 | |

1. The complainant first indicated that the accused replaced him in the mailroom and that he trained him in April 1993 (transcript of February 17, 2020, at 10). Later on, however, he appears to say that the replacement and training took place in late May or early June 1993 (transcript of February 17, 2020, at 19). On cross-examination, he repeated that he trained the accused in late May or early June (transcript of February 17, 2020, at 127), to later state that it was in April (transcript of February 17, 2020, at 131). Ultimately, he stated that the training took place the week before he left for France (on June 4, 1993), that is, in the last week of May (transcript of February 17, 2020, at 169). [↑](#footnote-ref-1)
2. Transcript of February 17, 2020, at 16. It must be noted that the complainant appears to be indicating here that he was being trained by A at the same time he was training the accused. On cross-examination, however, he indicated that his training to replace A was in April 1993 and that he trained the accused in late May or early June 1993 (transcript of February 17, 2020, at 127). [↑](#footnote-ref-2)
3. Transcript of February 17, 2020, at.19–20. [↑](#footnote-ref-3)
4. Transcript of February 17, 2020, at 26–28. [↑](#footnote-ref-4)
5. Transcript of February 17, 2020, at 173–177. [↑](#footnote-ref-5)
6. Exhibit D-6 at 136–141. [↑](#footnote-ref-6)
7. Exhibit D-6 at 173 and 178. [↑](#footnote-ref-7)
8. In the production coordination department from February 8 to March 7, 1993. In the radio coordination department from March 8 to May 2, 1993. In the “ress. de production” department from May 3 to July 11, 1993. During this last period, the accused worked part-time from June 14 to July 11, 1993 (Exhibit D‑6 at 179–192). [↑](#footnote-ref-8)
9. Exhibit D-6 at 21, 27, and 53. [↑](#footnote-ref-9)
10. This part of L.H.’s testimony was not adduced to prove that the incident where the penis was exposed actually occurred, but to explain the context in which the confidence was shared. This is the purpose stated by Crown counsel (transcript of February 19, 2020, at 18). [↑](#footnote-ref-10)
11. Exhibit D-6 at 21, 27, and 53. [↑](#footnote-ref-11)
12. Transcript of February 17, 2020, at 40–41. [↑](#footnote-ref-12)
13. Transcript of February 17, 2020, at198. [↑](#footnote-ref-13)
14. An objection was taken under reserve when this matter was discussed. Of course, the fact that the complainant said he himself revealed the assault in the washroom in the past does not in itself enhance his credibility. That is self-serving evidence. Furthermore, Crown counsel elected not to adduce into evidence the content of the confidences shared by the complainant with E. The Court therefore need not rule on the admissibility of the content of these confidences. [↑](#footnote-ref-14)
15. Transcript of February 17, 2020, at 203–204. [↑](#footnote-ref-15)
16. Transcript of February 17, 2020, at 205–206. It should be noted that the excerpt of the oral statement played in the courtroom was not transcribed. It can be heard on the replay. [↑](#footnote-ref-16)
17. Transcript of February 17, 2020, at 212–213. [↑](#footnote-ref-17)
18. Transcript of February 17, 2020, at 63–64. [↑](#footnote-ref-18)
19. Transcript of February 18, 2020, at 169–170. [↑](#footnote-ref-19)
20. *R.* *c.* *Salvail*, 2020 QCCQ 3220. [↑](#footnote-ref-20)
21. *R. v. Lifchus*, [1997] 3 S.C.R. 320. [↑](#footnote-ref-21)
22. [1991] 1 S.C.R. 742. [↑](#footnote-ref-22)
23. *J.R. c. R.*, 2006 QCCA 719. [↑](#footnote-ref-23)