# English translation of the judgment of the Court by SOQUIJ

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| Nadeau c. R. | 2024 QCCA 852 |
| COURT OF APPEAL |
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| CANADA |
| PROVINCE OF QUEBEC |
| QUEBEC |  |
| No.: | 200-10-003826-216 |
| (600-01-015899-177) |
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| DATE: | June 27, 2024 |
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| CORAM: | THE HONOURABLE | MARIE-FRANCE BICH, J.A.MICHEL BEAUPRÉ, J.A.GUY COURNOYER, J.A. |
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| MAURICE NADEAU |
| APPELLANT – Accused |
| v. |
|  |
| HIS MAJESTY THE KING |
| RESPONDENT – Prosecutor |
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|  |
| JUDGMENT |
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**WARNING: An order restricting publication was made pursuant to s. 486.4 *Cr*.*C.* directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way.**

1. On December 18, 2020, in a judgment rendered orally, the Honourable Marie-Claude Bélanger J. of the Court of Québec, Criminal and Penal Division, District of Rouyn-Noranda, convicted the appellant of various sexual offences against two complainants, during the period from 2003 to 2016 (counts 1 to 6, 8, 9, 14 and 16—sexual interference, invitation to sexual touching, exposure). A conditional stay of proceedings was ordered on two counts of sexual assault with which the appellant was also charged (counts 7 and 12). An acquittal was entered on counts 10, 11, 13 and 15 (invitation to sexual touching, exposure).
2. On August 27, 2021, in another judgment rendered orally, Bélanger J.C.Q, sentenced the appellant to nine years’ imprisonment, that is, five years for counts 1 to 6 (sexual interference and invitation to sexual touching), four years, to be served consecutively, for counts 8 and 9 (sexual interference) and two years, to be served concurrently, for counts 14 and 16 (exposure), subject to various orders.
3. The appellant is appealing these two judgments.
4. With regard to the convictions, on January 18, 2021, he filed (1) a notice of appeal setting out questions of law only (s. 675(1)(a)(i) *Cr.C.*) and (2) an application for leave to appeal on questions of fact (s. 675(1)(a)(ii) *Cr.C.*). On June 8, 2021, he withdrew this application.[[1]](#footnote-1) In the fall of 2021, he filed an application with the Court office to extend the time limit for an appeal, an application for leave to appeal, this time alleging ineffective assistance of counsel who represented him in first instance (s. 675(1)(a)(iii) *Cr.C.*), and a motion for authorization to adduce fresh evidence related to this ground of appeal (s. 61 of the [past] *Rules of the Court of Appeal of Quebec in Criminal Matters*[[2]](#footnote-2)). On March 14, 2022, this Court ruled on these three proceedings.[[3]](#footnote-3) It granted the first two. As for the third, the Court allowed fresh evidence to be adduced (sworn statements by the appellant, medical reports, statement by one of the complainants to the police), and the remainder of the motion was referred to this panel. In addition, since the lawyer facing the allegation himself filed a sworn statement contesting the appellant’s allegations against him, this Court, in the same decision, allowed his cross-examination and the cross-examination of the appellant on his own sworn statements. These two cross-examinations took place on July 8, 2022, and the transcripts were subsequently filed in the appeal record.
5. Last, shortly before the appeal hearing, the appellant filed an application for authorization to amend his brief by adding some of the arguments from the cross‑examination of his former counsel to the ground of ineffective assistance of counsel.
6. With regard to the sentence, on September 20, 2021, the appellant filed an application for leave to appeal, which was also referred to this panel in the decision dated March 14, 2022.[[4]](#footnote-4) In it, he argues that the trial judge erred in considering the lack of remorse an aggravating factor (an error made all the more serious by the fact that he had appealed the conviction at the time). In addition, she allegedly violated the principle of totality in sentencing by imposing a penalty that greatly exceeded the moral blameworthiness of the appellant. According to the appellant, a sentence of six- or seven-years’ imprisonment would have been appropriate, but not a sentence of nine years.
7. For the following reasons, this Court will allow the appeal against conviction and order a new trial, which will set aside the sentence without the need to rule on the application for leave to appeal or examine the appellant’s arguments on this issue.

**I. Background**

1. The appellant and the mother of the complainants, S. S., were in a common-law relationship for a dozen years. It is alleged that during that time the appellant frequently sexually abused his spouse’s two daughters, X and Y. More specifically, recurring sexual interference allegedly occurred until 2010 but then ceased (more or less concurrently with the first disclosure—see below), as the complainants refused to allow themselves to be touched from then on. However, the appellant allegedly continued exposing himself in their presence. The older daughter, X, left the family home a few months after reaching the age of majority (in late 2012 or early 2013), although she returned for a six-month period in 2014 for health reasons. Y was still living there in 2017.
2. The appellant and his spouse separated in 2017, after the complainants made a second disclosure. They also filed a complaint with the police against the appellant, hence the charges.
3. According to the complainants, who both testified at the trial, the actions that the appellant committed against them evolved over time from superficial touching to much more invasive actions. In the case of the older daughter, X, fellatio, masturbation, digital and penile penetration occurred three times a week, not counting other touching of all kinds, at a rate, according to X, of one to three times a day, five days a week. The younger daughter, Y, reported touching one to three times a day as well. The complainants’ mother, who also testified, knew nothing about it until her daughters first disclosed it to her in 2010. However, she did not really believe X or Y at the time and did not act on the information. It was after her daughters brought it up a second time in 2017 that she decided to leave the appellant. The two complainants filed a complaint with the police on their own initiative after consulting with a former police officer (X had also consulted one or more therapists and Y had consulted a social worker at the CEGEP she was attending at the time).
4. The appellant, who also testified at the trial, denies that he ever committed any acts of a sexual nature against the complainants. He explained in his testimony that the complaints were the result of a vendetta orchestrated by his former spouse, the complainants’ mother, due to a financial conflict resulting from the couple’s break-up. She would have liked to obtain a portion of the proceeds from the sale of the family residence, of which the appellant was the sole owner, which he refused, and which also resulted in him being sued by his former spouse for unjust enrichment.
5. Last, (and this, as we will see, is at the heart of this appeal), during his testimony the appellant stated the following in support his denials:

[TRANSLATION]

Q. What are your comments on all these... these actions that are attributed to you?

A. I...

Q. Both [Y] and [X].

A. Okay. If I remember [X]’s testimony correctly, she, she said she... it was thousands of times. She talked about my circumcision during her testimony, but I had a birthmark on my penis.

Strange, she remembers that, and she has seen my penis thousands of times, but she didn’t remember that I had a birthmark. Maybe because she never saw it.[[5]](#footnote-5)

1. It should be noted at the outset that no one asked the complainants or their mother any questions regarding this characteristic of the appellant’s penis. The appellant’s counsel did not continue with this line of questioning or otherwise react to his client’s comments. As for the judge, she did not make any comment or raise the matter in any way, and she did not address this element in her judgment in any way.

**II. Appeal from the conviction**

**A. Grounds of appeal regarding the conviction and arguments of the parties**

**1. The appellant’s grounds and arguments**

1. The appellant raises essentially two grounds of appeal: first, he believes the judge did not correctly assess the credibility and reliability of the witnesses, making various errors of law in this regard; second, and this is his main argument, he alleges ineffective assistance of counsel who represented him at trial and, incidentally, that the trial judge was overly passive in this regard.
2. Regarding the first ground of appeal, the appellant essentially argues that the judge:

• completely ignored the fact that the central elements of the appellant’s testimony had not been contradicted;

• used gender stereotypes when examining the appellant’s testimony, ruling on the basis of prejudices about the manner in which men generally behave;

• conducted a differentiated analysis of the testimony by taking peripheral elements into account in the assessment of the appellant’s testimony that should not have been considered, just as they were not considered in the complainants’ testimony;

• generally, did not comply with the teachings in *W.(D.).*[[6]](#footnote-6)

1. As for the second ground of appeal, based on both what took place during the trial and what is revealed by the fresh evidence that he is seeking authorization to adduce, the appellant raises various grievances against counsel who represented him at trial and who allegedly provided ineffective assistance, thus leading to a miscarriage of justice.
2. First, the appellant criticizes his former counsel for a lack of preparation, apathy, and general confusion in his conduct of the case and trial.[[7]](#footnote-7)
3. He then criticizes his former counsel for not following his instructions regarding the real reason behind the complaints, a vendetta by the complainants’ mother. However, counsel dismissed this reasoning and instead stating in his arguments that he did not support this theory, even though it was invoked by the appellant in his testimony.[[8]](#footnote-8) In doing so, he undermined his client’s very credibility, which necessarily influenced the judge’s assessment of the client’s testimony, leading to a miscarriage of justice.
4. Even more importantly, counsel neglected to take into account the fact that the appellant’s penis had a distinctive characteristic until August 2011 (which corresponds, generally speaking, to the first part of the offence period), a distinctive characteristic that had disappeared by August 2011 following surgery. It is in this respect that the appellant seeks authorization to adduce fresh evidence that he considers admissible and decisive based on the criteria established in *Palmer*[[9]](#footnote-9) and *Lévesque*[[10]](#footnote-10) and which appears to him to allow this Court to set aside the conviction rendered against him.[[11]](#footnote-11)
5. Until August 2011, the appellant’s penis had [translation] “tight phimosis with chronic balanitis and lichen sclerosus” (a condition that makes it difficult to retract the foreskin).[[12]](#footnote-12) The organ also had what the appellant describes as a [translation] “birthmark” and a medical document describes as a [translation] “wart approximately 2.0 cm long with a wide base, on the ventral side of the penis”.[[13]](#footnote-13) In September 2011, the appellant was circumcised to resolve the first issue and, at the same time, had the wart referred to above excised. The appellant says that he disclosed all these facts to his counsel at the time, well before the trial. However, counsel did not take any action as a result of this disclosure, nor did he seek to obtain any evidence to confirm this state of affairs. Nor did he cross-examine the complainants or their mother at the trial about the [translation] “mark”, which none of them mentioned. X’s statement to the police included a detailed description of the appellant’s genitals but did not mention the wart. All of this should have prompted counsel, at a minimum, to obtain the relevant medical evidence and address the matter with the witnesses. Instead, he simply asked the complainants and their mother whether the appellant was circumcised.
6. Last, during his examination-in-chief, as explained above,[[14]](#footnote-14) the appellant very clearly indicated the presence of the [translation] “mark” in question, even casting doubt on the credibility of the complainants in this regard. But rather than continuing the examination along this line of questioning and pushing the issue further, appellant’s counsel simply moved on to something else. Nor did he, as he could have done, ask to re-examine the complainants and their mother on this crucial point[[15]](#footnote-15) (even though they were recalled, at the prosecution’s request, to be questioned on another subject raised by the appellant during his testimony, namely the financial conflict between him and his former spouse). If the complainants had admitted, either during cross-examination or under re-examination, that they had never seen this very noticeable mark, the appellant argues that this would have given weight to his denials or undermined the credibility of the complainants, to the point of justifying an acquittal, at least in the case of complainant X.[[16]](#footnote-16)
7. The appellant also alleges that the judge failed in her duty to ensure a fair trial when she did not respond to the appellant’s testimony about the [translation] “birthmark” or question counsel (or the appellant himself) about what she had just heard. Her conduct in this regard contrasted with her attitude about the issue of circumcision, where she actively intervened with the complainants to help clarify their responses. Lastly, the appellant argues that the judge completely ignored this aspect of his testimony in her judgment.
8. According to the appellant, his counsel’s conduct as well as the judge’s inaction again led to a miscarriage of justice. In his opinion, [translation] “When the description of the accused’s genitals is unique or identifiable by uncommon characteristics, this fact may raise reasonable doubt of guilt”,[[17]](#footnote-17) since it is likely to damage the credibility or reliability of the complainant who may not have noticed them or cannot adequately describe them. This is precisely the case here, when the proper approach would have been to verify the complainants’ knowledge in this respect, which could have raised a reasonable doubt.

**2. Respondent’s response and arguments**

1. The respondent considers that the appellant’s arguments with regard to the first ground of appeal do not hold. First of all, the appellant is in fact attacking the judge’s assessment of the evidence, particularly with regard to the credibility of the witnesses. This would only be a question of fact, and no error of law could be attributed to the judge. Moreover, she complied in all respects with *W.(D.),* and her assessment of the credibility and reliability of the appellant and the other witnesses is beyond reproach: she examined the appellant’s testimony in detail; she did not use any stereotypes, adhering strictly to the evidence; and she explained her reasoning in a thorough, reasonable and logical manner. Referring to *R. v. Gagnon*,[[18]](#footnote-18) the respondent points out that “[a]ssessing credibility is not a science”[[19]](#footnote-19) and that “[i]t is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events”.[[20]](#footnote-20) A court of appeal can therefore intervene only if there is an error of law or a palpable or overriding error, which the appellant has failed to establish.
2. With regard to ineffective assistance, the respondent is of the opinion that the appellant’s grievances against his former counsel do not meet the criteria established in the case law, in particular in *G.D.B.*[[21]](#footnote-21) Counsel is not held to a professional standard of perfection. Counsel also enjoys a presumption of competence, which the appellant has not refuted. He also has some strategic leeway. Perhaps in this case counsel could have done better or done more, but this does not mean his services can be described as ineffective.
3. In any case, according to the respondent, even if the question of the [translation] “mark” had been addressed, it would have made no difference. There is nothing to reasonably suggest that this would have influenced the judge’s assessment of the credibility and reliability of the complainants, whose testimony was largely corroborated by their mother’s testimony. It must also be taken into account that even if the complainants had not noticed this mark, it would not necessarily undermine their credibility, because X and Y were children at the time of the events. We know that [translation] “the credibility of adults who testify about events that occurred when they were children is assessed differently and that the age of the witness at the time of the alleged offences must be taken into account”.[[22]](#footnote-22) Moreover, given the nature of the sexual interference they experienced, it would have been difficult for them to notice the [translation] “birthmark” on the appellant’s penis, such that, even if they were genuinely unaware of this characteristic, it would not have been decisive.
4. Last, the respondent submits that counsel cannot be blamed for failing to argue that the complaints against his client were the result of a plot hatched by the complainants’ mother in response to the financial conflict between her and the appellant. In any event, even though counsel did not follow his client’s instructions on this point, it is inconsequential, because [translation] “the judge discussed this at length in her decision and explained very clearly why she did not accept the appellant’s version of this portion of his testimony”.[[23]](#footnote-23) In addition, the respondent argues that [translation] “counsel is not required to obtain their client’s agreement about every decision they make in the client’s interest unless it is a matter of procedural fairness”.[[24]](#footnote-24) Procedural fairness was not at stake here and [translation] “the appellant’s argument that he suffered a miscarriage of justice because his counsel did not comply with his requests about the financial conflict is doomed to fail”.[[25]](#footnote-25)

**B. Analysis**

1. The second ground of appeal being sufficient to justify overturning the trial judgment, we will limit ourselves to this ground, without any need to examine the first ground (relating to the assessment of the credibility of the witnesses, in particular the credibility of the appellant, and the application of *W.(D.)*). The appellant has discharged his burden of establishing both the ineffective assistance of counsel in his treatment of the issue of the unique characteristics of the appellant’s genitals and the importance that this information could have had in dealing with and assessing the credibility and reliability of the testimony, which is a potentially decisive factor.
2. Let us now consider this.

**1. Motion to adduce new evidence, application for leave to appeal based on s. 675(1)(a)(iii) *Cr.C.* and motion to amend the appellant’s brief**

1. This Court, as is clear from the above, considers that the new evidence put together by the appellant meets the requirements of *Palmer*,[[26]](#footnote-26) *Lévesque*,[[27]](#footnote-27) *Warsing*[[28]](#footnote-28) and *G.D.B.*[[29]](#footnote-29) It will therefore grant the motion to adduce new evidence, which includes the following four items: (1) sworn statements by the appellant, dated September 20 and October 7, 2021; (2) the surgical report dated August 30-31 2011, by urologist Hares El Rami; (3) the pathology report dated September 23, 2011, by pathologist Robert Nicholson; and (4) plaintiff X’s written statement to the police, dated November 27, 2017. In addition to these items, there is also the transcript of the appellant’s cross-examination on his sworn statements, the sworn statement of the appellant’s former counsel, and the transcript of his cross-examination.
2. The [translation] “motion for authorization to amend the appellant’s brief and its conclusions” will also be granted.

**2. Ineffective assistance of counsel**

**a. Reminder of general rules**

1. In *R. v. G.D.B.,*[[30]](#footnote-30) the landmark decision on the matter, Major J., writing for the Court, set out the rules that apply to allegations of ineffective assistance of counsel:

23 While the early history of the common law shows that society had little interest in permitting anyone charged with a felony the assistance of counsel, times have changed.

24 Today the right to effective assistance of counsel extends to all accused persons. In Canada that right is seen as a principle of fundamental justice. It is derived from the evolution of the common law, s. 650(3) of the *Criminal Code* of Canada and ss. 7 and 11(*d*) of the *Canadian Charter of Rights and Freedoms*.

25 The value of effective assistance of counsel is apparent, but was fully explained by Doherty J.A. in *R. v. Joanisse* (1995), 102 C.C.C. (3d) 35 (Ont. C.A.), at 57:

…

Where counsel fails to provide effective representation, the fairness of the trial, measured both by reference to the reliability of the verdict and the adjudicative fairness of the process used to arrive at the verdict, suffers.  In some cases, the result will be a miscarriage of justice.

26 The approach to an ineffectiveness claim is explained in *Strickland v. Washington*, 466 U.S. 668 (1984), *per* O’Connor J. The reasons contain a performance component and a prejudice component. For an appeal to succeed, it must be established, first, that counsel’s acts or omissions constituted incompetence and second, that a miscarriage of justice resulted.

27 Incompetence is determined by a reasonableness standard. The analysis proceeds upon a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance. The onus is on the appellant to establish the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The wisdom of hindsight has no place in this assessment.

28 Miscarriages of justice may take many forms in this context. In some instances, counsel’s performance may have resulted in procedural unfairness. In others, the reliability of the trial’s result may have been compromised.

29 In those cases where it is apparent that no prejudice has occurred, it will usually be undesirable for appellate courts to consider the performance component of the analysis. The object of an ineffectiveness claim is not to grade counsel’s performance or professional conduct. The latter is left to the profession’s self-governing body. If it is appropriate to have an ineffectiveness claim on the ground of no prejudice having occurred, that is the course to follow (*Strickland*, *supra*, at p. 697).

1. It should also be noted that “[t]he standard for establishing a miscarriage of justice on this basis is high; the defect must be “so serious that it shakes public confidence in the administration of justice” (*R. v. Davey*, 2012 SCC 75, [2012] 3 SCR 828 at para 51, quoting *R. v. Wolkins*, 2005 NSCA 2, 229 N.S.R. (2d) 222 at para 89)”.[[31]](#footnote-31)
2. Recently, in *Ratt c. R.*[[32]](#footnote-32), the Court, per Vauclair J., recalled the law on matters of ineffective assistance of counsel:

[translation]

[22] There is no doubt that successfully establishing ineffective assistance is not easy. As Doyon J.A. noted on behalf of the Court, in addition to establishing ineffective assistance or incompetence on a balance of probabilities, it is necessary to establish prejudice in the nature of a miscarriage of justice: *R. c. Helpin*, 2012 QCCA 1523 at para 68; *R. c. Paiement*, 2024 QCCA 304.

[23] *R. c. Lajoie*, 2021 QCCA 1631, provides a good illustration of the fact that not all mistakes open the door to a conclusion of ineffective assistance. It is common ground that it is necessary to establish that the conduct of counsel falls outside the “wide range of reasonable professional assistance”: *R. v. G.D.B.,* [2000] 1 S.C.R. 520 at para 27.

[24] In addition, there is a point at which the prosecution’s evidence is so overwhelming that ineffective assistance becomes inconsequential. The Court has noted that it is possible that in the face of such overwhelming evidence, the ineffective assistance invoked will not affect the reliability of the verdict: *R. c. Vdovin*, 2021 QCCA 1969 at para 24; *R. c. Vallières*, 2020 QCCA 372 at paras 141–142.

[25] However, both the fairness of the proceedings and the reliability of the verdict underlie the assessment of the quality of counsel’s assistance at trial. I reproduce here the remarks of the Court in *Agnant*:

[TRANSLATION]

[9] If our adversarial justice system functions well, it is because it can rely on a competent bar association to confront the facts, assert a party’s thesis, and promote the law, values, and constitutional guarantees, in short, to properly represent litigants before the courts.

[10] In *R. v. G.B.D*., [2000] 1 S.C.R. 520, the Supreme Court confirmed the rather unanimous Canadian case law, according to which the right to the [translation] “useful” or “effective assistance” of counsel is the best way to determine the merits of the charges.

[11] Major J. explained that the incompetence of counsel can compromise procedural fairness or the reliability of the verdict, two forms of miscarriage of justice that then occur, both of which are equally unacceptable: *R. v. G.D.B.*, cited above, at paras. 26–28.

See *R. c. Agnant*, 2015 QCCA 465 [references omitted] and case law cited.

1. It is also worth citing the following excerpt from *Paiement c. R.*:[[33]](#footnote-33)

[translation]

[4] A convicted person who believes that their counsel has not effectively represented them may file an appeal alleging a miscarriage of justice within the meaning of s. 686(1)(a)(iii) *Cr.C.* [reference omitted]. In order to succeed, the convicted person must establish—on a balance of probabilities [reference omitted]—the existence of two components [reference omitted]:

* That counsel who represented the convicted person at trial demonstrated incompetence, i.e. that the lawyer did not behave as a [translation] “normally provident and diligent lawyer, possessing ordinary knowledge” [reference omitted]. There is a heavy burden on the appellant at this stage of the analysis because there is a strong presumption that counsel provided reasonable professional assistance [reference omitted]. In addition, it is well established that appellate courts must avoid falling into the trap of retrospective wisdom—[translation] “the hindsight trap” [reference omitted]—in assessing the conduct of counsel [reference omitted].
* The appellant must also demonstrate that this incompetence resulted in a miscarriage of justice [reference omitted], by compromising the fairness of the trial or the reliability of the verdict [reference omitted]. When the reliability of the verdict is called into question, as in this case [reference omitted], the standard to apply is that of the *reasonable probability* that the verdict would have been different—a standard that falls between a mere possibility (“some conceivable effect on the outcome of the proceedings”) and a balance of probabilities [reference omitted].

[5] Furthermore, and as the Court pointed out in *Delisle*, per Proulx J.A., [translation] “it is logical… to first analyze the harm or effect of the conduct of counsel on the fairness of the proceedings” [reference omitted]. The Supreme Court expressed the same view in *G.D.B.* [reference omitted], relying on a U.S. Supreme Court ruling, whose majority reasons were drafted by O’Connor J. [reference omitted]:

Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, it is not necessary to determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel’s performance. If it is easier to have an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims do not become so burdensome to defence counsel that the entire criminal justice system suffers as a result.

[Emphasis added]

1. These are the rules that will apply to this case.

**b. Application to this case**

1. As discussed above, the appellant levelled two criticisms against his former counsel on the issue of ineffective assistance:

- counsel was ill-prepared and defended the case in an unclear and confusing manner, undermining the appellant’s credibility by refusing to argue, contrary to his express will, that the complaints were the result of a financial conflict between him and his former spouse;

- counsel erred by not acting on and ignoring the information the appellant provided to him about the particular characteristics of his penis without ever cross-examining or re-examining the complainants and their mother on the topic.

1. Let us consider each of these criticisms.

**i. First criticism: unclear and confusing representation, refusal to follow the appellant’s instructions, and undermining the appellant’s credibility**

1. According to the appellant, his former counsel was ill-prepared and therefore sloppy. The appellant’s brief provides the following examples:

[translation]

34. On October 2, 2020, the trial judge criticized Mtre Bédard for not being specific. For example, during the accused’s examination Mtre Bédard began by saying, [translation] “I will try to be more specific”. A short time later, the judge said, [translation] “[Y]ou’re not being more specific, you’re going to lose me”. At another point, the judge again asked him to be more specific, saying, [translation] “Are you talking about the morning? … Because be specific”.

35. On November 12, 2020, during the re-examinations, Mtre Bédard asked for the accused to be heard again on two questions. This request was denied because the questions had already been asked during the accused’s main testimony. Mtre Bédard said:

 [translation]

“I wasn’t... I wasn’t sure anymore, I hadn’t reviewed the accused’s testimony, but... . I don’t remember exactly, because I didn’t re-read his testimony, but if it’s...”.

36. From a reading of the transcripts Mtre Bédard appeared unprepared during arguments on November 12, 2020, Mtre Bédard seemed unprepared, when he did not necessarily cite the pages of the transcripts he was referring to:

 MTRE CLAUDE BÉDARD FOR THE ACCUSED: … Because the young girl,... the young lady said, [translation] “he sat down, waited for the meals, had his plate cleared, watched TV, everyone had to be quiet”. That is what X told us, page… yes…

THE COURT: Page?

MTRE CLAUDE BÉDARD FOR THE ACCUSED: No, no page.

 [References omitted]

1. With respect, there is nothing in these examples, either taken together or individually, that establishes the ineffectiveness of the assistance provided by the appellant’s former counsel. These are irrelevant details taken out of context, and it is hard to see how they would have been decisive or even relevant, or how they could have influenced the way in which the judge assessed the evidence or, more generally, how they could have changed the outcome of the dispute.
2. As noted in *G.D.B.*, for an ineffective assistance of counsel claim to succeed, it must be established, “first, that counsel’s acts or omissions constituted incompetence and second, that a miscarriage of justice resulted”.[[34]](#footnote-34) However, the appellant failed on both points. Counsel’s performance is not assessed based on a standard of perfection, and it is not uncommon for even the most competent defence lawyer to occasionally falter or not be able to immediately indicate the page number where a piece of information is found. This is not an indicator of incompetence. In addition, the appellant did not establish the resulting prejudice. The same applies, in the circumstances, to counsel’s admission that he did not read the appellant’s testimony before asking to re-examine him, a request that was refused since the questions he would have asked had already been addressed during the examination-in-chief. It is not possible to conclude from counsel’s statement that he was incompetent or to infer that the appellant suffered any prejudice amounting to a miscarriage of justice. In fact, if counsel had reread his client’s testimony, in all likelihood he would not have asked for permission to re-examine him, and no such re-examination would have taken place, which was ultimately the case here.
3. Although the first criticism is unfounded, what about the second, which concerns the financial conflict between the appellant and his former spouse, a conflict that is related to their break-up? Did counsel follow his client’s instructions in this regard and, if not, did he significantly undermine his client’s credibility by stating the following during his arguments, in reply, on November 12, 2020:

[translation]

Mtre Claude Bédard

for the accused:

Listen, Your Honour, I’m not going to argue for ten minutes (0:10), I will just add that there has been... there will not be and there has not been any allusion, and we do not want it to be perceived that way, that Ms. S. testified out of vengeance.

 She was summoned in the course of the proceeding, and even the testimony of Ms. S., several times and on several facts, contradicts her daughters’ testimony and substantiates the accused’s testimony. Never...

 The accused said, and that was where everything started to go off course, [translation] “she kicked me... she swore to me that she would kick me out” or I don’t know what, those are not the exact words, but he was referring, and I told you, but the discussion was reopened anyway, it was because of the civil cases.

 Because in a criminal case, never would I... would we accuse her of testifying out of vengeance and conspiring with her daughters. So, I want to settle this part, immediately, we’re not making any allegations to this effect.

THE COURT:

Well, that means you’re not arguing that...

Mtre Claude Bédard

for the accused:

Yes, but the accused, in his...

THE COURT:

…I understand, you told me last time…

Mtre Claude Bédard

for the accused:

Yes.

THE COURT:

…and you…

Mtre Claude Bédard

for the accused:

But I’m repeating it because my colleague is talking about it.

THE COURT:

...are consistent in this, in your position...

Mtre Claude Bédard

for the accused:

Yes.

THE COURT:

…about this…

Mtre Claude Bédard

for the accused:

Yes.

THE COURT:

...but the fact remains that the accused said that the only reason Ms. S. is participating in the criminal judicial process is that he refused to share... he said that. You can tell me that you don’t agree with that, but in the end you don’t agree with your client’s position, is what I understand.

Mtre Claude Bédard

for the accused:

Well...

THE COURT:

When you say that, that’s what I understand.

Mtre Claude Bédard

for the accused:

Well, it’s because I, when I didn’t put... I didn’t have the accused testify on this point again, but he...

THE COURT:

No, but he already testified on this point.

Mtre Claude Bédard

for the accused:

 No, no, I understand, but the accused is not familiar with the entire judicial process, whether criminal or civil, or how proceedings are instituted. In the sense that in a civil case, she’s the one who decided to take the initiative and institute proceedings, whereas in a criminal case, we invited her to be involved by asking her questions, and... and that’s all.

 In that sense, that’s what I want to explain to you, and it was probably... and it certainly wasn’t clear... it wasn’t clear in the accused’s mind, and that’s why I’m telling you that there’s no conspiracy theory, and if it’s...

THE COURT:

But I...

Mtre Claude Bédard

for the accused:

…that’s what appeared in the accused’s testimony, but…

THE COURT:

At two nineteen p.m. (2:19 p.m.) ... because I did... before hearing, I listened to it again.

Mtre Claude Bédard

for the accused:

Yes?

THE COURT:

And here’s what it says, [translation] “Are you claiming that Ms. S. was influenced in her decision to participate in the proceedings by the fact that you did not want to give her the money?” “Yes.” And I noted, [translation] “She’s participating only because I refused to give her money.” Then all that is talked about is the criminal case..

Mtre Claude Bédard

for the accused:

We’re talking about the judicial process.

THE COURT:

That’s what you said, but I...

Mtre Claude Bédard

for the accused:

Well, that’s what I understood.

THE COURT:

...will go back and listen again, Mtre Bédard, because maybe you’re right.

Mtre Claude Bédard

for the accused:

No, no, that’s not what I’m saying, I’m just saying that you just said, [translation] “the judicial process” to me...

THE COURT:

Well, I understand... I understood in my... in my notes that we were talking about the criminal judicial process, but I may be wrong. I’ll listen again to this...

Mtre Claude Bédard

for the accused:

But I’m not sure, but in any case, that isn’t being argued before you, so... it’s not before you and second, we’re talking about the accused’s insistence that the doors are open, and this and that. My colleague says that the accused keeps insisting that the doors are open, and he wasn’t there. Listen...[[35]](#footnote-35)

1. The judge—and understandably so—was unsure about the convoluted position of the appellant’s counsel or, at the very least, was surprised by it. However, to fully understand the situation in which counsel found himself when he expressed himself this way, we must read specific excerpts of the appellant’s testimony, as well as the fresh evidence presented to the Court.
2. At the trial, as part of the accused’s examination-in-chief, counsel addressed the issue of the conflict between the appellant and his former spouse, S. S., and he asked him some general questions. The appellant replied that by then the couple had lived for several years in a house of which the appellant was the sole owner, and which he sold in the spring of 2017. Why? Because at that time the appellant and S. S. were planning to move to the Laurentians, buy a new property there together, and each pay 50% of the purchase price. According to the appellant, however, she insisted that he transfer to her half of the sale price of the house, which he refused to do. That is when, according to him, the situation deteriorated and [translation] “[e]verything got messed up. Everything got messed up. I even… with everything I have going on today, I even lost my job because of it…”.[[36]](#footnote-36)
3. Crown counsel intervened to ask her colleague to explain why he was asking questions on this subject, since he had not cross-examined the former spouse or the complainants on this subject. The judge noted that the questions seemed relevant to her because [translation] “that would be the reason the accused finds himself here today”.[[37]](#footnote-37) The appellant’s counsel explained himself in a few words, and an exchange followed during which the judge indicated that she understood that [translation] “it is to... adduce evidence that there is a possibility… that the reason the accused is before me today… may be related to that dispute”.[[38]](#footnote-38) Counsel for the appellant agreed three times. Later on, in light of counsel for the respondent’s reaction, the judge added: [translation] “I do not see how I can prevent the questions, because the defence’s theory seems to be… that it’s like revenge”.[[39]](#footnote-39) Appellant’s counsel then noted:

[translation]

But not... I’m not saying it’s the mother’s revenge. It’s a larger context in which the girls are aware. We will discuss it in the arguments. I never said it was revenge by the mother. It’s not the mother who...[[40]](#footnote-40)

1. The judge brought it up again, and the appellant’s counsel responded as follows:

[translation]

THE COURT:

But it could be a context that resulted in the complaints being filed, that’s what I understand.

MTRE CLAUDE BÉDARD

FOR THE ACCUSED:

Yes, but I never said it was revenge by the mother, and I won’t even say it because the mother didn’t file the complaints.[[41]](#footnote-41)

1. The examination of the appellant ended a few minutes later, and the respondent began its cross-examination on the same subject. Counsel for the appellant once again insisted that neither he nor his client were claiming that the former spouse had incited the complaints or that she was behind the complaints in any way. After a further three-way discussion (counsel and the judge), the following was said:

[translation]

 THE COURT:

Well, what I understand from your colleague and, Mtre Bédard, please correct me if... if my interpretation is inaccurate, correct me, but I, what I’ve understood is that there’s an inference drawn from the fact that there’s a conflict between Ms. S. and the accused, and the accused is nodding his head.

MTRE CLAUDE BÉDARD

FOR THE ACCUSED:

Yes.

THE COURT:

You want the Court to draw the inference that the sexual assault complaints *originate* from this conflict between the mother, Ms. S., and your client.

MTRE CLAUDE BÉDARD

FOR THE ACCUSED:

Maybe not just from that, but yes, it’s one of many elements.[[42]](#footnote-42)

1. After this exchange, Crown counsel continued her cross-examination:

[translation]

Q. So, I will repeat my questions, sir, after this long break. I’m not talking about the girls, I’m not talking about Y or X, I’m really talking about Ms. S., okay, who is also a witness in the judicial process that we’re currently involved in. Are you claiming, further to your earlier answer, that Ms. S. was influenced in her desire to testify or to be involved in the judicial process, this judicial process, not the other proceedings, by the fact that you did not want to give her money? Is that what you’re claiming today?

A. Yes.

Q. Okay. So, you believe that the only reason she has come to testify at the trial—by that I mean the trial for touching and sexual assault, I’m not talking about the civil proceedings—is because you refused to give her money?

A. Yes.

Q. Okay. The girls, they... because it was not clear in your answer, it was a general answer, the girls—I’m talking about Y and X—do you think that’s also the same reason they filed a complaint? Is that what you’re claiming?

A. I would have the... the... yes.

Q. Is that the only reason you believe they filed a complaint?

A. Yes.[[43]](#footnote-43)

1. The appellant and his counsel were not in agreement, and this is what the judge noted later on:

[translation]

MTRE CLAUDE BÉDARD

FOR THE ACCUSED:

Your Honour, first, concerning Ms. S., the accused may think... I’ve heard him say certain things, but I am not at all suggesting that Ms. S plotted with the girls...

THE COURT:

Well, you may not say it, but the accused, he...

MTRE CLAUDE BÉDARD

FOR THE ACCUSED:

Well, even if he said it, I’m telling you I’m not going to argue that before you.

THE COURT:

I understand, but it remains that...

MTRE CLAUDE BÉDARD

FOR THE ACCUSED:

But if we want to present rebuttal evidence...

THE COURT:

...that’s part of the analysis... Mtre Bédard...

MTRE CLAUDE BÉDARD

FOR THE ACCUSED:

Right.

THE COURT:

...your client is clearly claiming...

MTRE CLAUDE BÉDARD

FOR THE ACCUSED:

Yes.

THE COURT:

...is clearly claiming, okay, that in the context of the break-up, there was a financial problem that caused the break up and that’s the reason, and he said so, just like that...

MTRE CLAUDE BÉDARD

FOR THE ACCUSED:

Yes, yes.

THE COURT:

...this is why Ms. S. is involved in these criminal proceedings and one of the reasons, or part of the reason, the girls, Y and X, filed a complaint against him.

 So even if you aren’t arguing that before me, it’s going to be part of the analysis of the credibility of your client and the witnesses. Because there is clearly a... a... an obvious contradiction between these testimonies.

 In any case, one might think that, although they were not specifically questioned about the financial conflict, which I learned about from your client’s testimony.

MTRE CLAUDE BÉDARD

FOR THE ACCUSED:

Right.[[44]](#footnote-44)

1. On October 16, when the trial resumed and began with a discussion of the respondent’s request to re-examine the complainants and their mother about the dispute between the mother and the appellant, the discussion resumed between the judge and counsel, who continued to maintain that he would not argue that the complaints resulted from the conflict between his client and S. S., that he had confirmed this direction with his client, and that his client may have reacted emotionally when he answered the questions put to him previously.[[45]](#footnote-45)
2. The complainants and their mother were re-examined on November 12, 2020, and denied that they had been motivated by the conflict in question.
3. As discussed above, the appellant’s counsel did not argue the conspiracy theory in his arguments on the merits. This is what the appellant is now criticizing him for.
4. In the sworn statement that he filed in response to the appellant’s allegations of ineffective assistance, the appellant’s former counsel, who is no longer bound by solicitor-client privilege, explains that he had initially persuaded his client [translation] “not to claim at the trial that the complainants’ complaint and their mother’s testimony stemmed from the appellant’s unwillingness to share the proceeds of the sale of the family residence and from the resulting civil dispute”.[[46]](#footnote-46) During his cross-examination on July 8, 2022, however, he acknowledged that the appellant was [translation] “livid”[[47]](#footnote-47) about this, and this was understood to mean that his client remained convinced that he was the victim of revenge by the complainants’ mother.[[48]](#footnote-48) However, even though the appellant did not accept willingly, he and his counsel had agreed not to raise this issue at the trial and not to make it part of the defence’s case. This is what the appellant confirmed during his cross-examination on July 8, 2022.[[49]](#footnote-49)
5. This is why counsel was surprised that the appellant, during his examination-in-chief at the trial, addressed the dispute with his former spouse from this angle, since the questions he asked him on the subject were not heading in that direction. He wrote the following in his sworn statement:

[translation]

71. In doing so, I did not expect the appellant to make a connection between the financial conflict and the charges filed against him when, at the end of his examination-in-chief, I questioned him about his relationship with the complainants after 2010;

72. At that point in the examination-in-chief, my questions were aimed at establishing the context of the relationships between the appellant, the complainants and their mother, up until the charges were filed;

1. As discussed above, the appellant’s answers led to a cross-examination (on October 2, 2020) during which he clearly stated the connection he felt existed between the dispute between him and his former spouse and the complaints filed by her daughters.
2. When counsel noted that the appellant had deviated from the strategy they had originally agreed on and was at risk of damaging his case by asserting a thesis that he, for his part, considered ill-advised, he discussed the issue again to confirm the original strategy. With his client’s approval, counsel tried, on October 16, 2020, and again thereafter, to undo the damage, as it were, by avoiding [translation] “adopting a position that was radically different from the appellant’s position during his testimony while also trying to mitigate his comments”.[[50]](#footnote-50) Counsel added (again in his sworn statement dated May 11, 2022):

[translation]

81. In doing so, it was wrong of the appellant in paragraph 42 of his brief, to criticize me for not following, [translation] “his client’s position and line of defence” to use his words,. As stated earlier, the appellant had agreed not to say that the charges were filed as a result of the financial conflict, and that’s why I did not cross-examine the complainants or their mother on this point.

82. By adopting a position during his testimony contrary to what had been discussed without informing me beforehand, the appellant put himself, all on his own, in a position that greatly affected his credibility.

1. Counsel essentially maintained this narrative when cross-examined on this point, quite briefly, it should be noted, by the appellant’s new counsel.
2. What can be concluded from all this?
3. First, it is clear based on the fresh evidence that counsel and his client had agreed not to raise the dispute between the client and the complainants’ mother and, certainly, not to make it the reason for the criminal complaints. We also know that the appellant remained convinced that this was in fact the case. In this context, the questions that his former counsel asked during his examination-in-chief may be found to be clumsy. On the other hand, it is true that it was not counsel who brought it up, but rather the appellant who, in response to a general question about his previous interactions with the complainants ([translation] “But how was it going with the girls?”[[51]](#footnote-51)), first stated that everything was fine, but added, “[w]hen I refused to give the money to her mother…” (the implication being that things then went wrong). These words triggered a series of rather vague questions about his financial dispute with his former spouse and answers that made it clear that this was, in fact, the underlying reason for the complaints against him.
4. It is difficult to understand why counsel, who was aware of the appellant’s thoughts on this subject and knew he was [translation] “livid” about it, took the risk of asking him such questions, and thereby giving him the opportunity to vent. Counsel was surprised by the response but failed to stop the spiral his client had set in motion by mentioning his refusal to give his former spouse the money, and instead, his questions made his strategic problem worse. This allowed for a cross-examination during which the appellant firmly reiterated this argument, to the dismay of his counsel, who, it is understood, would have preferred that his client not go down this path for all the reasons he had explained to him. It must also be acknowledged that the vague explanations he subsequently gave the judge to try and set things right (particularly during his arguments) did not accomplish their goal, which was to tone down the appellant’s comments.
5. That said, is this a refusal to follow the client’s instructions as the appellant claims? Can it be said that counsel undermined the appellant’s credibility by contradicting him on the conspiracy theory, which he is also accused of doing? Are we talking about incompetence or ineffective assistance?
6. The Court finds it must answer these questions in the negative.
7. Because, it bears repeating, the fresh evidence establishes that the appellant and his counsel had agreed that they would *not* allege in defence that the complaints filed against the appellant were retaliation related to the financial conflict between him and his former spouse. The appellant, however, brought it up during his testimony (when cross-examined on July 8, 2022,[[52]](#footnote-52) he explained that he had been in a panic), leading to the barrage of questions that followed at the trial, both during the examination-in-chief and the cross-examination. Although we may think that the appellant’s counsel should have reacted differently, he cannot be blamed for ignoring his client’s instructions. He was caught off guard by his client’s reversal and tried to counter. He then again confirmed the strategy initially agreed to with his client and, when he returned before the court, he tried to rectify the situation, perhaps a little clumsily (it is easy to say this in hindsight), but nevertheless with the goal of protecting the appellant and asserting his rights. His attempt was unsuccessful, but it must be acknowledged that counsel’s scope of action was singularly restricted by the solicitor-client privilege by which he was bound at the time, since he obviously could not reveal to the judge the discussions he had had with his client.
8. There was therefore no easy remedy for the appellant’s reversal (who himself did not follow the instructions he had agreed to with his counsel). Counsel did the best he could, in good faith, by acting in what he considered to be his client’s interest, and it cannot be called incompetence or ineffective assistance, even though in the circumstances his attempt did not have the desired effect. To paraphrase the Supreme Court, citing the Court of Appeal for Ontario, while counsel’s performance may not have been exceptional, “it did not fall outside the realm of reasonable professional assistance”,[[53]](#footnote-53) given the difficulty of the situation the appellant had gotten himself into, regardless of his motives. In short, it was not counsel who deviated from the appellant’s instructions, as the appellant alleges, but rather the appellant who failed to follow the strategy he had agreed on with counsel, who was then required to try and fix the situation.
9. In any event, and even though it could be said that counsel’s actions were in vain, it is not reasonably possible, barring speculation, to conclude that his conduct *probably* caused harm to the appellant by influencing the outcome of the trial or by affecting its fairness. Even though counsel did not argue the existence of the conspiracy alleged by the appellant and tried to mitigate the impact of his client’s comments, as described above, the client had the opportunity to lay out his theory during his testimony, which led to the re-examination of the complainants and their mother, so that the subject was covered. The judge carefully examined the appellant’s testimony in this regard, which she did not believe, explaining her point of view in detail. Among other things, she noted that the appellant’s theory was incompatible with the actions that the complainants had taken when they spoke to their mother in 2010, years before the conflict, and that it was also incompatible with the former spouse’s behaviour in the summer of 2017, after the complainants had once again reported the appellant to her in the spring. Given the reasoning contained in her judgment (and even her remarks during trial, as listed above), we cannot conclude that the appellant’s credibility was undermined by counsel’s refusal to [translation] “argue the conspiracy” or by his attempts to shift the meaning of his client’s testimony. Either way, the appellant’s argument did not cross the threshold of a *reasonable probability* that the verdict would have been different, to use the language of *Paiement.*[[54]](#footnote-54)

**ii. Second allegation: counsel’s omission regarding the particular characteristic of the appellant’s penis**

1. Although the first allegation against the appellant’s former counsel cannot be accepted, the same cannot be said of the second allegation, which relates to an admittedly delicate subject, but one that is potentially decisive in the guilt or innocence of the person concerned. It is therefore necessary to accept the appellant’s arguments here.
2. As we saw above, during the appellant’s examination-in-chief, he reported an anomaly on his penis that he referred to as a [translation] “birthmark”. He questioned the credibility of the complainants (particularly X), who had never mentioned it in their respective testimony. For convenience, we will reproduce the relevant excerpt of the appellant’s examination-in-chief (cited above at para [12]):

[translation]

 Q. What are your comments on all these... these actions that are attributed to you?

A. I...

Q. Both [Y] and [X].

A. Okay. I, if I remember [X]’s testimony correctly, she, she said she... it was thousands of times. She talked about my circumcision during her testimony, but I had a birthmark on my penis.

 Strange, she remembers that, and she has seen my penis thousands of times, but she didn’t remember that I had a birthmark. Maybe because she never saw it.[[55]](#footnote-55)

1. As revealed by the medical reports included in the fresh evidence, the anomaly was not actually a birthmark but rather a fairly large wart (approximately 2 cm wide). This was indicated in the surgical report by the doctor who excised the wart on August 30, 2011, while performing a circumcision on the appellant, whose foreskin also suffered from an abnormality. The surgical report states the following:

[translation]

Preoperative diagnosis: tight phimosis with chronic balanitis and sclerotic lichen.

Wart measuring approximately 2.0 cm wide on the skin of the ventral side of the penis.

Planned operation: *circumcision with excision of the* wart

Operation performed: idem

Postoperative diagnosis: idem

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

...

We started with the circumcision, I made a circular incision in the skin at the collum glandis, another incision at the mucosa 5.0 mm from the corona. We excised the affected prepuce. I performed the hemostasis with an electrosurgical knife, then closed the skin at the mucosa using 4-0 Chromic with interrupted sutures. There were no complications.

As a second step, we excised the wart. We used surgical ink to mark the wart. We made a transverse incision on both sides of the wart, which was very big, with a wide root, which was probably a bowenoid wart. The wart was excised completely and sent for anatomopathological examination. Hemostasis was performed with an electrosurgical knife, and I closed the skin with Chromic 4-0. No complications.[[56]](#footnote-56)

1. The pathology report, dated September 23, 2011, confirms the existence of this wart:

[translation]

 “Wart on the penis, tight phimosis with clinical balanitis, bowenoid wart penis.[[57]](#footnote-57)

1. During his cross-examination on July 8, 2022, the appellant had an opportunity to specify that what he was still referring to as a birthmark was in fact a wart, elevated from the surface of the organ[[58]](#footnote-58) and especially visible when it was erect (it was less visible without an erection, since the wart was located on the underside of the penis, approximately in the centre[[59]](#footnote-59)).
2. Neither the complainants (and, in particular, X) nor their mother mentioned this wart, which no one, it must be said, questioned them about, although it was both visible and unique, at least until it was excised in August 2011.
3. However, appellant’s counsel questioned X and S. S. (but not Y, presumably because of the nature of the sexual touching she reported) about the appellant’s circumcision. After a laborious exchange, during which the judge intervened, X said that the appellant’s penis was not circumcised.[[60]](#footnote-60) S. S. had no recollection of it, she said, although she had been in a relationship with the appellant for 14 years.[[61]](#footnote-61)
4. We can immediately observe that counsel, in the questions he addressed to X and S. S., made no distinction between the period prior to August 2011 (when the appellant was not circumcised) and the period after August 2011 (when he was). This distinction, however, is not without significance, since it should be recalled that in 2010, the sexual interference stopped after the complainants reported it to their mother, but they explained that the appellant continued exposing himself to them for several years. However, X apparently did not notice the circumcision that occurred in August 2011 (when she was 17 years old). It is possible, of course, that she had not been physically close enough to the appellant to see it, or that the trauma of the events she has reported prevented her from noticing it or from remembering, but we cannot really know, as she was not questioned, it bears repeating, on this point (nor were her mother or sister).
5. Coming back to the wart, and as indicated above (at para 13), counsel did not ask his client any questions after he had testified about the presence of this [translation] “birthmark”: he simply changed the subject and continued his examination as if nothing had happened. For her part, the judge did not note down the new information that had been disclosed, nor did she make any comments to counsel or speak to him (in contrast to her specific comments when X and her mother were cross-examined about the appellant’s circumcision[[62]](#footnote-62)). Counsel also did not ask to re-examine the complainants or their mother on this point and did not mention the [translation] “birthmark” during his arguments (nor did Crown counsel). Moreover, he did not even discuss it with his client after his testimony. The judgment contains no mention of it, either.
6. How can the conduct of the appellant’s counsel be explained?
7. To try to understand, we must examine the fresh evidence, in particular the sworn statements of the appellant and of his former counsel, as well as their respective cross‑examinations, which differ on whether counsel was aware of the existence of the wart on the appellant’s penis.
8. According to the appellant’s sworn statement and his cross-examination on July 8, 2022, the appellant informed his counsel, even before the preliminary investigation, about the presence of this wart (or [translation] “birthmark”, as he called it at the time), just as he had informed him about the circumcision. He even explained to him that he had had surgery to be circumcised and to remove the wart at the same time, though he no longer remembered the date.
9. In his sworn statement, Counsel stated the following:

[translation]

21. I consider this allegation unfounded. The appellant never told me, either before the preliminary investigation or before testifying at the trial, that he had a birthmark on his genitals;

...

23. If the appellant had told me that he had a birthmark on his genitals prior to testifying at trial, I obviously would have assessed the appropriateness of using this information in the cross-examination of the complainants and their mother;

...

26. The only thing the appellant told me about his genitals before testifying was that his penis had been circumcised when he was an adult;

...

39. Besides what I just mentioned, the appellant never told me that his genitals had any other distinctive characteristics;

40. That said, I must point out that during his examination-in-chief, the appellant said, in response to a question asking him to comment on the actions alleged by the complainants, that X had testified about his circumcision, but that he also had a birthmark on his penis and that she had not mentioned it;

41. I was surprised to hear the appellant mention this birthmark, as he had never mentioned it to me before. He had never asked me to cross-examine the complainants on this subject;

1. In other words, the appellant disclosed his circumcision to his counsel but did not tell him about his wart. This claim is not convincing. First of all, it does not seem logical: would the appellant have made the effort to tell his counsel about his circumcision in 2011 but not about the excision of the wart, which occurred at the same time? In the circumstances, we are skeptical. Similarly, given his behaviour at the trial and the remarks he spontaneously made during his testimony, it is difficult to imagine that the appellant only told his counsel about his circumcision *without ever* mentioning the excision of his wart (thus revealing its existence), as the two events occurred simultaneously. When cross-examined counsel acknowledged that the appellant told him about the circumcision (but only the circumcision), while the appellant, in his own cross-examination, maintained that he had told him about both at the same time (even though he called it a birthmark instead of a wart). In light of all the fresh evidence, the latter version seems entirely plausible and preponderant.
2. Let us now turn to what the evidence reveals about counsel’s conduct during the trial, when the appellant testified about his [translation] “birthmark” and sought to cast doubt on the testimony of X, who had not said a word about it. As we saw above, in his sworn statement, counsel stated that he was [translation] “surprised” to hear his client refer to this birthmark during his testimony.[[63]](#footnote-63) However, here is what he said during his cross-examination on July 8, 2022, in response to questions from the appellant’s new counsel:

[translation]

Q. I’m going to ask questions related to the... when Mr. Nadeau revealed during his testimony on October 2, 2020, that he had a birthmark. Do you confirm that this was the first time that Mr. Nadeau had talked about it?

A. Yes.

Q. So, your reaction was that you were surprised... that’s what you said in your sworn statement, that you were surprised to have that information?

A. In which paragraph?

Q. Paragraph 41.

A. From what I remember, yes. Yes.

Q. When you were surprised about that, do you... In fact, from what I understand from reading the transcripts—you’ve surely read them yourself—you nevertheless continued questioning Mr. Nadeau before the judge, the proceedings continued normally?

A. Yes. Yes.

Q. You never asked the judge for an adjournment as a result of this new information?

A. No.

Q. Thereafter, did you speak to Mr. Nadeau about this birthmark immediately after his testimony?

A. No.

Q. You never asked any questions about it later?

A. No.

Q. You never asked him for more details about what this birthmark was?

A. No.

Q. So, it was October 2, 2020, and we heard that the next court date was November 12, 2020. which is when there was a discussion about the... the... re‑examination of specific witnesses?[[64]](#footnote-64)

A. Yes.

Q. Okay. So, what I understand is that after you got the information about the birthmark, when Mr. Nadeau said it in the courtroom, afterward, you never took any steps to find out more about it?

A. No. No.

Q. And you also didn’t take any steps to obtain medical records from the Centre hospitalier de Rouyn-Noranda either, is that correct?

A. There are several aspects to your question. With regard to the birthmark, I reviewed the notes and transcript of when he started talking about the birthmark, and I do not clearly remember hearing it when he said it.

 I’m not saying he didn’t say it, because there’s a transcript, and yes, it says “birthmark,” but when I read the transcripts, I said I didn’t hear it. Did I... It was at the beginning of COVID, with the plexiglass, and we were sitting several metres apart. I don’t remember hearing it.

 I’m not saying he didn’t say it, if it’s in the transcript, he said it, but I don’t remember hearing it, so I didn’t question him about it, and then I didn’t ask Mr. Nadeau about it later.[[65]](#footnote-65)

1. This long excerpt is perplexing: counsel, as he confirmed in his sworn statement and reiterated at the beginning of the above excerpt, was [translation] “surprised to hear the appellant mention this birthmark” during his testimony,[[66]](#footnote-66) but he also stated that in fact he did not hear it, noting it only when he was reading the transcript. And why didn’t he hear it? Because of the plexiglass and the distance between him and his client during the trial.
2. This blatant contradiction seriously undermines counsel’s credibility and reliability: was he surprised to hear his client mention the birthmark during his testimony or did he not hear him say it? Only one of these scenarios is true, as both cannot be true at the same time. Moreover, this element is directly related to the core of the appellant’s allegation. Counsel has undermined his own testimony by providing two contradictory explanations.
3. It must also be said that it seems quite unlikely that counsel did not hear the appellant, despite the plexiglass and the distance. We are not talking about missing a word or two, but the entire answer, which was articulated in more than a second or two. Incidentally, if counsel had not heard it, it is unclear why he did not ask the appellant to repeat what he had just said, which would have been the normal reaction of someone who had asked an important question (which it was) and had not heard the answer. Even if counsel’s claim turns out to be true, it should be seen as an unfortunate example of ineffectiveness (unintentional, no doubt, but nonetheless real).
4. But all things considered, in light of all the statements made by the appellant and counsel both in writing and during their respective cross-examinations, this Court considers that the appellant has sufficiently established that he informed his former counsel, in sufficient time, of the existence of his birthmark/wart, that is, at the same time that he informed him of his circumcision, well before the trial.
5. And what did counsel do with this information? Nothing. He did not conduct any research before the trial nor, apparently, did he ask for any explanation. When his client testified about the existence of this anomaly during the trial, he did not react to the information (or was not paying attention), did not ask any additional questions on the subject, and moved on to something else. He did not attempt to verify the information and did not discuss it with the appellant. It was as if he had never said anything: he was not questioned on this point, he was not re-examined, nor was there any re-examination of the complainants or their mother (who must be given the opportunity to testify on this subject), and no request was made in this regard.
6. This was not a trivial matter, however, and, considering the nature of the charges filed against the appellant and of his defence (complete denial), it could have been a decisive factor. It must be said that counsel, who had received the evidence from Crown counsel, had the plaintiffs’ statements to the police in his possession, including X’s statement (moreover, counsel had submitted these statements to the appellant[[67]](#footnote-67)). This statement is particularly interesting in that it contains a precise description of the appellant’s genitals (size from various angles, hairiness, colour, the fact that he was uncircumcised, and other details) but makes no mention of the wart, which he had until 2010 (after which date the alleged sexual assault and physical touching stopped, according to the complainants, but the appellant continued exposing himself to them[[68]](#footnote-68)), nor does it mention the post-2011 circumcision. Here is the text of this statement:

[translation]

 When I met with her at the police station, Ms. S. S. made a statement to me about the sexual assault that you were subjected to by Maurice Nadeau, are you able to describe to us any distinctive features, marks or scars on his body?

Nothing significant on his body. There was a big contrast between his neck, which was much more tanned than his torso. It was even more noticeable in the summer. It was most probably because of his work outside in the sun in a grader cabin.

\_\_\_\_\_\_\_\_\_\_

Can you describe Maurice Nadeau’s pelvic area to me?

 His bum is white, not really hairy, like an old man, not muscular but not a “flat bom” either. His hips are average width. He was always hairy above his penis, but his body is not very hairy in general. He never shaved anywhere except his face over the years. His penis is not circumcised, and it’s average in size. When he has an erection, his penis must measure about 5 to 6 inches. When I masturbated him, his penis was a few inches wider than the width of my hand. The head was slightly wider than the base of his penis. When he asked me to eat his anus, I noticed that he was moderately hairy around his anus. There was not much hair on his testicles, which were more pink/brown than his penis.

\_\_\_\_\_\_\_\_\_\_

Do you have anything else to add or change?

No![[69]](#footnote-69)

1. The absence of any mention of the wart (or the appellant’s circumcision, during the second half of the period of offence) then became an issue that counsel should have at the very least, assessed and examined, which he did not do.
2. As a result, it can be considered ineffective assistance, strengthened by counsel’s inaction during the trial. On this last point, it may be noted that even if counsel had not been aware of the existence of this birthmark/wart, his inaction in the face of the appellant’s testimony remains inexplicable. As discussed above, when he was caught off guard by his client’s claims that he was the target of a conspiracy counsel had tried to manage the situation. This was not the case here, where he did not respond to the appellant’s statement, which was literally and completely ignored, whereas, in the context, he could not remain apathetic. It is true, we note in passing, that the judge could have intervened, if only to ask for clarification about what she had just heard the appellant say and of which there was no indication up to that point. This would have given counsel the opportunity to react, drawing his attention to a potential weakness or element of interest, without affecting his strategic freedom. No such thing happened, but in any case, this does not release counsel from his failure.
3. In short, this Court concludes that, on this point, the appellant received ineffective assistance from his counsel. And pointing out that the appellant himself never suggested anything on this subject, after the testimony of the complainants and their mother, does not constitute an excuse or justification for counsel. The appellant is a manual worker with no prior convictions who is not wealthy, does not know the law and is charged with serious crimes; he is clearly stressed, and counsel cannot blame him for not advising him on this matter. That would be to reverse the burden of effective assistance.
4. There is also another incident that adds to the ineffectiveness of assistance of counsel, this time concerning the issue of circumcision. As we saw earlier, the appellant’s former counsel does not deny that he was informed about this circumcision. The preponderance of evidence establishes that he was also informed about the existence and excision of the wart.[[70]](#footnote-70) We already know he did not follow up on this information and attended the trial without doing any particular preparation on this point. During the trial, he interviewed X and S. S. about the circumcision, in a fairly basic manner. During his examination on July 8, 2022, he claimed that he did not focus on it due to a lack of sufficient information because he did not know exactly when the appellant had been circumcised: he did not push the cross-examination, fearing a damaging response.[[71]](#footnote-71) Clearly, if he had prepared properly, he would not have found himself in this difficult situation.
5. Furthermore, after X’s testimony in June 2020, as the appellant acknowledges,[[72]](#footnote-72) counsel instructed the appellant to obtain the medical records confirming the circumcision or, at least, provide him with the date of the surgery. However, the appellant (who also explained this in his cross-examination on July 8, 2022[[73]](#footnote-73)) was unable to do so due to the restrictive measures put in place by the hospitals at the time due to COVID-19. The request had to be sent by fax, a device that he did not have. Once informed,[[74]](#footnote-74) counsel allegedly insisted that the appellant obtain this evidence, but he stated that [translation] “he never got back to me on this subject”.[[75]](#footnote-75)
6. *A priori*, this is surprising: it is true that clients must work with their counsel and provide them with close cooperation, but it is regrettable that counsel did not act in this situation. He did not ask his assistant to help the appellant, nor did he call the hospital’s archives department or send a fax himself.[[76]](#footnote-76) As was noted, he explained this by saying that his client [translation] “did not get back to him”, but also by stating that he would have had to proceed with a power of attorney to obtain the information himself. “I did not obtain a power of attorney,” he said, “because I’ve done it before on other cases, and I thought it would be faster if Mr. Nadeau found someone in the archives to at least get a date”.[[77]](#footnote-77) This explanation is not convincing when we note, that counsel finally admits , a little later that his client did indeed tell him that he was unable to obtain the documents sought and that he did not take over [translation] “for the same reason”—he refers here to the power of attorney.[[78]](#footnote-78) This circular excuse does not in any way diminish the ineffectiveness of the assistance of counsel on this point.
7. Of course, this explains (without justifying it) why counsel did not distinguish between the period prior to August 2011 and the period after August 2011 when he questioned X and S. S. about the appellant’s circumcision, which could have been another important element (as he himself implies). And, once again, if he had bothered to obtain the medical documents himself, he would have found much more. This is another example of ineffective assistance.
8. In short, the appellant has overwhelmingly established that he did not receive effective assistance from his former counsel with regard to the characteristics of his genital organ and with regard to the defence that could have consequently been made or attempted to be made to the charges laid against him. This Court is of the opinion that counsel’s conduct in this regard falls outside of the “wide range of reasonable professional assistance”[[79]](#footnote-79) and does not reflect the conduct of [translation] “a normally forward-looking and diligent lawyer, possessing ordinary knowledge”.[[80]](#footnote-80)
9. That said, it is necessary to move on to the second stage and ask whether the appellant has demonstrated, according to the reasonable probability standard, that this ineffective assistance caused a miscarriage of justice, [translation] “by compromising the fairness of the trial or the reliability of the verdict”.[[81]](#footnote-81)
10. This Court has concluded that this is the case.
11. It is true, as the respondent noted, that the fact that a person did not notice a characteristic on the genital organ or body of the person accused of sexually assaulting them, does not automatically lead to an acquittal. The respondent gave the example of *R. c. J.S.*[[82]](#footnote-82) However, in that case, the complainants *had* been asked about the characteristics of the accused’s penis (which was not comparable to this case, as the characteristic was a scar from a cut, under the head, at the junction of the prepuce). The judgment also notes that the accused had [translation] “always made a point of hiding it”.[[83]](#footnote-83) Above all, it stresses that some of the complainants were young girls around ten years old, attacked in [translation] “very specific” circumstances,[[84]](#footnote-84) and so cannot be blamed for not noticing this scar.[[85]](#footnote-85) The other complainants had not had [translation] “direct access to the accused’s penis”[[86]](#footnote-86) and were therefore unable to observe its characteristics. It is understandable why, in this context, the Court found that not noticing the scar on the accused’s penis did not, in and of itself, affect the complainants’ credibility or reliability. This situation is quite different, especially in the case of X (given the nature, frequency and persistence of the actions that she alleges the appellant committed) and of S. S. (who was in a relationship with him for nearly 14 years), who were not interviewed or cross-examined.
12. In short, although it is true that the presence of a distinctive or unusual physical characteristic on an individual’s genitals that the complainant had not noticed is not necessarily decisive, it can be decisive and constitute a key element. This is what emerges from the case law and, for example, from the following cases, in which a distinctive characteristic on the penis was considered and examined: *R. c. Tremblay,*[[87]](#footnote-87) *R. c. N.H.,*[[88]](#footnote-88) *R. v. DPO,*[[89]](#footnote-89) *R. v. Strojny,*[[90]](#footnote-90) *W.A. c. R.,*[[91]](#footnote-91) *R. c. C.L.*[[92]](#footnote-92). In the first three cases, an acquittal was entered; in the last three (as in *J.S.*, discussed above), a conviction was entered, the Court having in all cases had the opportunity to hear the complainant’s version regarding the characteristic in question and to rule in this regard. In other words, in all these cases, the Court ruled on the basis of evidence whose reliability had been validly tested.
13. In this case, the situation is different, although it may appear, *prima facie,* difficult for anyone who has seen the appellant’s penis not to notice the presence of a wart of the size described in the medical evidence and, perhaps to a lesser extent (since there was no more touching by then), not to notice the circumcision that occurred in August 2011, given the previous condition of the appellant’s foreskin. Neither X, who testified to fellating and masturbating the appellant on numerous occasions, nor S. S., the appellant’s former spouse, make any mention of the wart (or of the distinctive condition of the foreskin), a subject that should have been discussed with them (just as the circumcision should been further discussed), especially since the appellant’s counsel was aware of the contents of X’s statement to the police. The fact that they were not cross-examined on this point is an indefensible shortcoming. It is less clear, perhaps, in the case of complainant Y, given the nature of the alleged touching and that it ended in 2010, but the fact that this complainant was not cross-examined on this point was not because of a strategic decision by counsel, he merely avoided the subject.
14. The whole case is based on the credibility of the witnesses (as is often the case with sexual offences): the complainants, the former spouse and the appellant. A factor such as the one in question could therefore be decisive in the assessment of the evidence and, in the circumstances, it was not a minor or peripheral factor. The appellant, because of his counsel’s lack of action both before and during the trial, was unable to assert what could have been a defence or an argument in support of his defence of general denial. At the very least, this would have been an important fact for the purpose of testing the witnesses, but also for the assessment of the credibility of the witnesses, including the appellant. Given the ineffective assistance provided by his counsel, who neglected this evidence, the appellant was deprived of the opportunity to challenge the veracity of the witness statements attacking him or to establish his credibility and, as a result, he was deprived of the opportunity to raise reasonable doubt about his guilt, which directly affected the fairness of the trial.
15. Moreover, the evidence in this case is not [translation] “so overwhelming that ineffective assistance becomes anecdotal”.[[93]](#footnote-93) The prosecution’s evidence is solid on first glance, admittedly, but, in the context, the issue of the distinctive characteristics of the appellant’s genital organ and how they changed over time would likely have affected the trial judge’s assessment of each testimony and of the evidence as a whole, and she could not have ignored the subject. There is a *reasonable probability* here ([translation] “a standard that falls between a mere possibility (“some conceivable effect on the outcome of the proceeding”) [translation] and a balance of probabilities”[[94]](#footnote-94)) that the outcome of the debate would have been different if the fresh evidence (primarily the medical evidence) that is now available to this Court had been made available to the Court and if the prosecution witnesses had been cross-examined on this element. It is not *certain* that this would have been the case, but that is not the burden that the appellant had to meet.
16. Ultimately, as the fairness of the trial and the appellant’s right to a full and complete defence have been compromised by the ineffective assistance he received from his former counsel, this Court must reverse the trial judgment and order a new trial on counts 1 to 9, 12, 14 and 16.[[95]](#footnote-95) The Court is, of course, fully aware of the impact of such an order, but in this case no other solution can be considered.

**III. Appealing the sentence**

1. For these reasons, it is neither necessary nor useful to consider the application for leave to appeal the sentence or the sentence itself. As the conviction has been quashed, it follows that the sentencing judgment is now null and void, as is the sentence itself, which must be dropped.

**FOR THESE REASONS, THE COURT:**

1. **GRANTS** the [translation] “motion for authorization to fresh evidence”;
2. **DECLARES** the fresh evidence admissible;
3. **GRANTS** the [translation] “motion for authorization to amend the appellant’s brief and its conclusions”;
4. **ALLOWS** the appeal of the conviction on the ground of ineffective assistance of counsel who represented the appellant at trial;
5. **REVERSES** in part the trial judgment of December 18, 2020, and **QUASHES** the conviction issued therein on each of counts 1 to 6, 8, 9, 14 and 16, as well as the stay of proceedings for counts 7 and 12;
6. **ORDERS** a new trial on counts 1 to 9, 12, 14 and 16;
7. **DECLARES** the sentencing judgment of August 27, 2021, null and void, given the quashing of the conviction;
8. **DECLARES** as a result the [translation] “application for leave to appeal the sentence” to be moot.

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|  | MARIE-FRANCE BICH, J.A. |
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|  | MICHEL BEAUPRÉ, J.A. |
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|  | GUY COURNOYER, J.A. |
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| Mtre Justine Levasseur |
| For the appellant |
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| Mtre Julien Pelletier |
| DIRECTOR OF CRIMINAL AND PENAL PROSECUTIONS |
| For the respondent |
|  |
| Date of hearing: | March 14, 2023 |

1. The notice of discontinuance, signed by the appellant’s counsel, was filed with the Court office on June 18, 2021, and took effect the same day. [↑](#footnote-ref-1)
2. SI/2018-96. [↑](#footnote-ref-2)
3. *Nadeau c.* *R.*, 2022 QCCA 359. [↑](#footnote-ref-3)
4. *Id.,* at para. 6. [↑](#footnote-ref-4)
5. Appellant’s testimony, transcript from October 2, 2020, at 77 (appellant’s brief [“A.B.”] at 955). [↑](#footnote-ref-5)
6. *R. v. W.(D.)*, [1991] 1 SCR 742, or *W.(D.)*. [↑](#footnote-ref-6)
7. A.B., Arguments at paras. 34–36. [↑](#footnote-ref-7)
8. *Id.,* at paras. 37–41. [↑](#footnote-ref-8)
9. *Palmer v. The Queen*, [1980] 1 SCR 759. [↑](#footnote-ref-9)
10. *R. v. Lévesque*, [2002] 2 SCR 487. [↑](#footnote-ref-10)
11. Appellant’s additional arguments at paras. 61–68. [↑](#footnote-ref-11)
12. Operation record of urologist Hares El Rami, Centre hospitalier Rouyn-Noranda, August 30–31, 2011. [↑](#footnote-ref-12)
13. *Ibid.* [↑](#footnote-ref-13)
14. *Supra* at para. [11]. [↑](#footnote-ref-14)
15. A.B., Arguments at paras. 51–54. [↑](#footnote-ref-15)
16. Additional arguments of the appellant at para. 67. [↑](#footnote-ref-16)
17. A.B., Arguments at para. 49. See also para. 51. [↑](#footnote-ref-17)
18. 2006 SCC 17 at para. 20. [↑](#footnote-ref-18)
19. A.B., Arguments at para. 26. [↑](#footnote-ref-19)
20. *Ibid.* [↑](#footnote-ref-20)
21. *R. v. G.D.B.*, 2000 SCC 22. [↑](#footnote-ref-21)
22. Respondent’s brief, Arguments at para. 46. [↑](#footnote-ref-22)
23. *Id.,* at para. 39. [↑](#footnote-ref-23)
24. *Id.,* at para. 42. [↑](#footnote-ref-24)
25. *Ibid.* [↑](#footnote-ref-25)
26. *Supra* note 9. [↑](#footnote-ref-26)
27. *Supra* note 10. [↑](#footnote-ref-27)
28. *R. v. Warsing* [1998] 3 SCR 57 at para. 50. [↑](#footnote-ref-28)
29. *R. v. G.D.B.*, *supra* note 21 at para. 16. [↑](#footnote-ref-29)
30. *Ibid.* [↑](#footnote-ref-30)
31. *R. v. White*, 2022 SCC 7 at para. 9. [↑](#footnote-ref-31)
32. 2024 QCCA 463. [↑](#footnote-ref-32)
33. 2024 QCCA 304. [↑](#footnote-ref-33)
34. *R. v. G.D.B.*, *supra* note 21 at para. 26 (cited in *R. v. Meer*, 2016 SCC 5 at para. 2). See also: *R. v. White*, *supra* note 31 at para. 6. [↑](#footnote-ref-34)
35. Reply by appellant’s former counsel, transcript dated November 12, 2020, at 246 *in fine* at 252 (A.B., at 1468–1474). [↑](#footnote-ref-35)
36. Appellant’s testimony, transcript dated October 2, 2020, at 137 (A.B. at 1015). [↑](#footnote-ref-36)
37. Appellant’s testimony, transcript dated October 2, 2020, at 139 (A.B. at 1017). [↑](#footnote-ref-37)
38. Transcript dated October 2, 2020, at 140 (A.B. at 1018). [↑](#footnote-ref-38)
39. *Id.,* at 142 (A.B., at 1020). [↑](#footnote-ref-39)
40. *Id.,* at 143 (A.B., at 1021). [↑](#footnote-ref-40)
41. *Ibid.* [↑](#footnote-ref-41)
42. Transcript dated October 2, 2020, at 1, 166–167 (A.B. at 1044–1045). [↑](#footnote-ref-42)
43. Appellant’s testimony, transcript dated October 2, 2020, at 167–168 (A.B. at 1045–1046). [↑](#footnote-ref-43)
44. Transcript dated October 2, 2020, at 308–310 (A.B. at 1186–1188). [↑](#footnote-ref-44)
45. Transcript dated October 16, 2020, at 4–10 (A.B. at 1203–1209). [↑](#footnote-ref-45)
46. Sworn statement by the appellant’s former counsel, May 11, 2022, at para. 67. [↑](#footnote-ref-46)
47. Cross-examination of the appellant’s former counsel, transcript dated July 8, 2022, at 101. [↑](#footnote-ref-47)
48. The cross-examination of the appellant on July 8, 2022, as part of the fresh evidence, shows that he is still convinced of this. See: cross-examination of the appellant, transcript dated July 8, 2022, at 48 and 66–67. [↑](#footnote-ref-48)
49. *Id.,* at 49. [↑](#footnote-ref-49)
50. Sworn statement by the appellant’s former counsel, May 11, 2022, at para. 80. [↑](#footnote-ref-50)
51. Appellant’s testimony, transcript dated October 2, 2020, at 131 (A.B. at 1009). [↑](#footnote-ref-51)
52. Cross-examination of the appellant, transcript dated July 8, 2022, at 49 and 66–67. [↑](#footnote-ref-52)
53. *R. v. W.E.B.,* 2014 SCC 2 at para. 3. [↑](#footnote-ref-53)
54. *Paiement c. R.*, *supra* note 33 at para. 4. [↑](#footnote-ref-54)
55. Appellant’s testimony, transcript dated October 2, 2020, at 77 (A.B. at 955). [↑](#footnote-ref-55)
56. Surgical report of urologist Hares El Rami, Centre hospitalier Rouyn-Noranda, August 30–31, 2011. [↑](#footnote-ref-56)
57. Report of pathologist Robert Nicholson, Centre de santé et de services sociaux de Rouyn-Noranda, September 23, 2011. [↑](#footnote-ref-57)
58. Cross-examination of the appellant, transcript dated July 8, 2022, at 20. [↑](#footnote-ref-58)
59. *Id.,* at 18 and 62–63. [↑](#footnote-ref-59)
60. Cross-examination of X, transcript dated June 3, 2020, at 298–300 (A.B. at 553–555). [↑](#footnote-ref-60)
61. Cross-examination of S. S., transcript dated June 4, 2020, at 264–67 (A.B. at 864–867). [↑](#footnote-ref-61)
62. X, transcript dated June 3, 2020, at 298–300 (A.B. at 553–555); S. S., transcript dated June 4, 2020, at 264–66 (A.B. at 864–866). [↑](#footnote-ref-62)
63. Sworn statement by the appellant’s former counsel, May 11, 2022, at para. 41 (reproduced above at para. 78). [↑](#footnote-ref-63)
64. In fact, the next date was October 16, 2020. [↑](#footnote-ref-64)
65. Cross-examination of the appellant’s former counsel, transcript dated July 8, 2022, at 101. [↑](#footnote-ref-65)
66. Sworn statement by the appellant’s former counsel, May 11, 2022, at para. 41 (reproduced above at para. [78]). [↑](#footnote-ref-66)
67. Cross-examination of the appellant, transcript dated July 8, 2020, at 23. [↑](#footnote-ref-67)
68. In this regard, it should be noted that, according to the judgment, plaintiff Y saw the appellant only once, after 2010, on an unknown date (when she was between 13 and 19 years old), but not up close (while he was masturbating). [↑](#footnote-ref-68)
69. X’s written statement to Officer Martin Désilets, November 27, 2017. [↑](#footnote-ref-69)
70. Cross-examination of the appellant, transcript dated July 8, 2022, at 25, 32, 37, 38 and 52–53. [↑](#footnote-ref-70)
71. Sworn statement from the appellant’s former counsel, May 11, 2022, at paras 32–38. See also the cross-examination of the appellant’s former counsel, transcript dated July 8, 2022, at 102–104. [↑](#footnote-ref-71)
72. Cross-examination of the appellant, transcript dated July 8, 20[2]2, at 32. [↑](#footnote-ref-72)
73. *Id.,* at 33–37. [↑](#footnote-ref-73)
74. Cross-examination of the appellant’s former counsel, transcript dated July 8, 2022, at 86. [↑](#footnote-ref-74)
75. Sworn statement by the appellant’s former counsel, May 11, 2022, at para. 35. [↑](#footnote-ref-75)
76. Cross-examination of the appellant’s former counsel, transcript dated July 8, 2022, at 84–85. [↑](#footnote-ref-76)
77. *Id.,* at 85. [↑](#footnote-ref-77)
78. *Id.,* at 86. [↑](#footnote-ref-78)
79. *R. v. G.D.B.*, *supra* note 29 at para. 27. [↑](#footnote-ref-79)
80. *Carignan c. R.*, [2003] R.J.Q. 1022 (C.A.) at para. 29, cited in *Paiement c. R.*, *supra* note 33 at para. 4. [↑](#footnote-ref-80)
81. *Paiement c. R.*, *supra* note 33 at para. 4. [↑](#footnote-ref-81)
82. 2008 QCCQ 7615. [↑](#footnote-ref-82)
83. *Id.,* at para. 292. [↑](#footnote-ref-83)
84. *Id.,* at para. 293. [↑](#footnote-ref-84)
85. *Id.,* at paras. 293–294. [↑](#footnote-ref-85)
86. *Id.,* at para. 296. [↑](#footnote-ref-86)
87. 2017 QCCQ 19881. [↑](#footnote-ref-87)
88. 2018 QCCQ 3409. [↑](#footnote-ref-88)
89. 2002 BCPC 0230. [↑](#footnote-ref-89)
90. 2019 ONCA 329. [↑](#footnote-ref-90)
91. 2016 QCCA 835. [↑](#footnote-ref-91)
92. SOQUIJ AZ-50259293, 2005 CanLII 56780 (C.Q.; aff’d on appeal, without the Court expressly ruling on this point: 2006 QCCA 695). [↑](#footnote-ref-92)
93. *Ratt c. R.*, *supra* note 32 at para. 24. [↑](#footnote-ref-93)
94. *Paiement c. R.*, *supra* note 33 at para. 4. [↑](#footnote-ref-94)
95. See: *Deramchi c. R.*, 2021 QCCA 203 at paras. 21–22; *M.D. c. R.*, 2022 QCCA 915 at para. 109; *Vachon v. R.*, 2011 QCCA 2103 at paras. 66–67 and 73. [↑](#footnote-ref-95)