

BETWEEN:



RICHARD MCPHILLAMY

Appellant

and

THE QUEEN

Respondent

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RESPONDENT'S OUTLINE OF ORAL ARGUMENT

**Part I:**

1. This outline is in a form suitable for publication on the internet.

**Part II:**

20 **Ground 1: Section 97**

**The evidence had significant probative value**

1. The tendency evidence demonstrated that:
  - (a) As a mature male, the appellant had a sexual interest in young, adolescent boys who were under his supervision and authority; and
  - (b) The appellant was prepared to act on that interest by sexually abusing such boys: Respondent's written submissions ("RWS") at [28].
- 30 2. This tendency evidence was not expressed at a high level of generality. The tendency evidence demonstrated that the appellant had a sexual interest in a narrow class of person, namely, young adolescent boys aged between 11 and 13 years who were under his supervision and authority: RWS at [38]. In summary, there was particularity in gender, age and the nature of the relationship.
- 40 3. The tendency evidence had significant probative value. The tendency evidence was not limited to evidence of a state of mind (sexual interest), but demonstrated that the appellant had acted on that interest. Further, he had acted on that interest on more than one occasion and in respect of more than one child.

4. The tendency evidence strongly supported proof of the facts in issue in the trial: RWS at [29] – [30]. The issue in the present case was not the identity of the person who sexually assaulted the complainant. The issue was whether the acts alleged occurred at all. The complainant gave evidence that the appellant had committed each of the acts alleged. It was the appellant’s case that the complainant had fabricated his account.
- 10 5. The tendency evidence was strongly probative of whether the complainant’s account should be accepted beyond reasonable doubt. In particular,
- (a) The particularised tendency was capable of demonstrating that the appellant had a motive to commit the alleged acts (that is, that the fact that the appellant had a sexual interest in young adolescent boys was capable of demonstrating that the appellant had a sexual interest in this young adolescent boy);
- (b) The particularised tendency demonstrated that the appellant had previously overcome any inhibitions and had acted on his sexual interest in the past; and
- 20 (c) As in *Hughes v The Queen* (2017) 92 ALJR 52, the tendency evidence was capable of assisting the jury in resolving doubts that they may have had about NC’s credibility.
- (RWS at [29] - [30])
6. The fact that the tendency acts occurred ten years before the charged acts is relevant to the assessment of the probative value of the evidence. However, as the majority of the CCA concluded “*it was not particularly controversial for a jury to be asked to infer that a sexual interest in young teenage boys would be unlikely to become attenuated in the space of ten years*”: CCA judgment at [129]. The appellant was a mature adult at the time of the commission of each of the tendency acts and was a mature adult at the time of the charged acts. There was no evidence that the appellant had received any treatment or counselling in the intervening period. In these circumstances, the elapse of ten years is not such as to deprive the evidence of its significant probative value: RWS at [41] and [44].
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## **Ground 2 - Section 101**

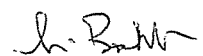
### **Assessment of the prejudicial effect of the tendency evidence**

- 40 7. Section 101, like s. 97, was intended to make substantial changes to the common law: *Hughes* at [13], [31], [32] and [42]. Sections 97 and 101 have clearly abrogated the common law “*no rational explanation*” test: *IMM v The Queen* [2016] HCA 14; (2016) 257 CLR 300 at [59].
8. Any assessment of the prejudicial effect of tendency evidence does not include the “*legitimate capacity [of the evidence] to inculcate*” an accused: *HML v The Queen* [2008] HCA 16; (2008) 82 ALR 204 at [12]; RWS at [59]. As s. 97 expressly permits tendency reasoning, the prejudicial effect of such evidence does not relate to the legitimate capacity of the evidence to inculcate by way of tendency (as opposed to coincidence) reasoning. The “*more than a century of case-law*” relied on by the

appellant (ARS at [12]) must be viewed with caution. For much of its history, the common law did not permit the admission of propensity evidence.

9. Nonetheless, the admission of tendency evidence may give rise to a risk of prejudice. In particular, the jury may fail to allow that a person who has a tendency to have a particular state of mind or to act in a particular way did not have that state of mind or act in that way on the occasion in question; or the jury may underestimate the number of persons who share the tendency to have that state of mind or act in that way. There is also a risk that the jury's assessment will be clouded by the jury's emotional response to the tendency evidence: *Hughes* at [17].
10. Again, to the extent that common law authorities described these risks as giving rise to a "high" risk of prejudice, the common law authorities must be treated with caution. Many of those authorities relied on judicial assumptions, or drew support from studies which suggested that juries tended to assume too readily that past behaviour is an accurate guide to contemporary conduct, or that the evidence may cause a jury to become biased against an accused: see, for example, *Pfennig v The Queen* (1990) 182 CLR 422 at 512, per McHugh J.
11. More recent research conducted by the Royal Commission into Institutional Responses to Child Sexual Abuse ("Royal Commission") indicated that the risk of juries engaging in such prejudicial forms of reasoning is not unduly high. In particular, the empirical research commissioned by the Royal Commission found that mock juries were capable of distinguishing between counts and of basing their verdicts on the evidence that pertained to each count. The study also studied jury reasoning and found no evidence that decisions to convict were the result of impermissible reasoning: RWS at [58] – [61].
12. Moreover, in the present trial, the risk of unfair prejudice was mitigated by the directions that were given: RWS at [63]. In particular, the trial judge directed the jury that it would be "*completely wrong*" to reason that because the appellant may have committed one crime or been guilty of one piece of misconduct; that they had to find each count, "*individually considered*", to be proved beyond reasonable doubt, and that they could not let "*sympathy, emotion, bias or prejudice*" sway their judgement: AFM 189 – 191 and CAB 27 – 30; RWS at [63].
13. In summary, for the reasons outlined above, the tendency evidence was strongly probative of the facts in issue, and the prejudicial effect of the tendency evidence was limited. Accordingly, no error has been demonstrated in the finding of the majority of the Court of Criminal Appeal that the probative value of the evidence substantially outweighed its prejudicial effect. The appeal should be dismissed.

Dated: 9 August 2018



L Babb