1 (Unrevised)

2 (Her Honour Judge Gaynor)

3 R U L I N G

4 HER HONOUR: Charge 9, indecent assault in 1989 or 1990
5 involved "G", a Year 10 day student, at the college whose
6 father fell ill with cancer when "G" was in Year 7. "G"
7 became friendly with the accused who was then Vice-
8 Principal when he supervised the school yard at recess
9 and thereafter enjoyed his company on a regular basis.
10 The accused allegedly became aware of "G's"
11 father's cancer when "G" was in Year 8 and regularly
12 called him into his office to talk about any problems "G"
13 may be having.
14 Allegedly on two occasions in his office in 1989
15 when "G" was in Year 9 aged 14 or 15 the accused gave
16 "G", who was sitting in a chair, a glass of Scotch and
17 then sat on "G's" knees facing him with his forearms
18 resting on "G's" shoulders saying "G" could talk to him
19 about anything.
20 In the 1989-90 Christmas holidays "G" allegedly
21 went to school upset about a fight over his father's
22 drinking to speak to the accused who took him to his
23 bedroom and gave him two glasses of Scotch. As "G" sat
24 on a single couch drinking the second Scotch the accused
25 allegedly came over and squatted beside him, ran his hand
26 up "G's" leg and sat it over his penis and scrotum over
27 his jeans.
28 In his first statement dated 5/9/2012 "G" said he
29 jumped up and said he had to go. In a second statement
30 dated the 3/10/2012, "G" said that after reaching his
31 groin the accused allegedly then took off his jeans and

1 underpants, told him to slide down the chair, took him by
2 the hips and turned him round so he was kneeling in front
3 of the chair. "G" then felt something pushed into his
4 anus. He did not know what but thought because the
5 accused did not take off his clothes it may have been his
6 finger or fingers. He said he was too embarrassed and
7 disgusted to tell police about this in his first
8 statement. As "G" cannot identify what penetrated his
9 anus this latter incident is being led as an uncharged
10 act.
11 Charges 10, 11, 12 and 13 are charges of rape and
12 Charge 14 a charge of indecent assault said to have
13 occurred in 1990 and the complainant is "H", who came to
14 the college as a 16 year old border in Year 10, turning
15 17 in July that year.
16 He had learned difficulties and dyslexia. He
17 thought the accused may have taught him religious
18 education but was not sure. He alleged one evening the
19 accused told him to come to his office, the accused
20 allegedly offered H a cigarette immediately he came in
21 and then a drink which H thought was whiskey. The
22 accused alleged talked about H's learning difficulty in
23 school work "then suddenly told me to come and stand in
24 front of a high backed chair." He then allegedly pushed
25 H's head down in the chair, took off his pants and
26 inserted his penis into H's anus. H began crying from
27 the paid and the accused allegedly told him to shut up
28 and hit him on the back of the head saying no one could
29 hear him. Then after some time withdrew his penis and
30 walked H back to his dormitory. H then found blood in
31 his jocks. These actions underlie Charge 10, rape.

1 H alleges the accused came into his dormitory one
2 night soon after the Easter holidays that year and
3 ordered him back to his office: H crying as he knew what
4 would happen. There he immediately told H to go to the
5 chair, pulled down his pants and put his penis into H's
6 anus: Charge 11, rape. H alleges the exact same
7 incident occurred again about a week later. H crying on
8 each occasion and the accused slapping him on the head
9 and telling him to shut up. Thereafter H said he hid
10 from the accused when he saw him coming. He alleges that
11 in July, the third of the alleged rapes comprises Charge
12 12. He alleges that in July or August 1990, the accused
13 came into his dormitory late at night and ordered H to
14 his office where he pushed H over the desk, then as he
15 lay there tied his hands with a cord. The accused
16 allegedly pulled down H's pants and inserted his penis
17 into H's anus and was "really rough and hard": this is
18 Charge 13, rape.
19 While his penis was in H's anus the accused
20 allegedly leaned over and grabbed H's testicles with his
21 hand squeezing and yanking them, causing H to cry out in
22 agony. The accused then put a hanky in H's mouth. H
23 said he believed the accused then ejaculated withdrew his
24 penis and came to the side of the desk with his pants
25 still down, slapping his penis against H's still tied
26 hands. He then alleged pulled the hanky from H's mouth
27 and tried to insert his penis but H kept his teeth
28 clenched and the accused could get only his penis between
29 his lips: these later actions comprising Charge 14,
30 indecent assault.
31 He then stopped and untied H's hands and had to

1 physically help H back to a walkway area where he left
2 him. H was allegedly unable to walk the next day due to
3 pain in his testicles and was told to stay in bed in the
4 dormitory but ran out in the afternoon when the accused
5 came in, crossing fields and swimming a river to the next
6 property where he was found and brought back that night
7 and the doctor called. According to doctor's reports, on
8 August 31, 1990 H underwent surgery for torsion of the
9 right testicle and was treated for enuresis, a repeated
10 inability to control urination.

11 The witness X was a boarder who in 1975 was aged 14
12 in Year 9 at the College when the accused was allegedly
13 his dormitory co-ordinator and slept at night in a small
14 room off X's dormitory. In his statement dated July 10,
15 2012, X said he began smoking the accused cigarettes with
16 him in his bedroom which progressed to him also drinking
17 scotch and coke supplied by the accused. He said the
18 accused allegedly first sexually assaulted him one night
19 as X went to leave his room after drinking and smoking
20 with the accused, coming up behind him, running his hand
21 over X's body and pushing from behind so X could feel his
22 erect penis through his pyjama pants. X said it was his
23 first sexual experience, he became aroused and got an
24 erection and "next minute" the accused allegedly took X's
25 penis in his mouth giving him oral sex until X ejaculated
26 in his mouth.

27 He said the accused then gave him another scotch
28 and cigarette. X alleges that from that night the
29 accused sexually abused him every second or third night
30 until he left the school the next year. He alleged that
31 the accused either performed oral sex on him or would put

1 Vaseline on X's penis and his own and lie on top of him,
2 rubbing up and down until either of them ejaculated. He
3 alleged on one occasion the accused tried to insert his
4 penis into X's anus.
5 A made a statement to police in 2000, the other
6 complainants made police statements in 2011, 2012 and
7 2013. In a record of interview dated 20 July 2012, the
8 accused denied knowing the complainants A and C and said
9 he vaguely remember F and vehemently denied the
10 allegations put to him in relation to them. He declined
11 to be interviewed in relation to any other charges.
12 Before turning to a discussion of the law relating
13 to the applications before me, it is important to note
14 that defence counsel specifically indicated that the
15 issues of collusion and contamination were not raised as
16 part of his argument for severance or against the
17 admission of evidence of tendency and coincidence.
18 Tendency. It is accepted that tendency evidence
19 does not need to demonstrate a striking pattern or
20 similarity between incidents or even closely similar
21 behaviour. However, the degree of similarity is relevant
22 when assessing the probative value of tendency evidence.
23 In *RHB v. R* [2011] VSCA 295, His Honour Mr Justice
24 Nettle, at Paragraph 17, described tendency evidence as
25 "evidence which establishes that the appellant had the
26 tendency to commit a particular type of act or to commit
27 an act in a particular way and that the question is
28 whether the degree of peculiarity, for want of a better
29 term, either in the acts themselves or in the
30 circumstances in which they were committed or in the
31 nature or identity of the persons against whom they were

1 committed or by reason of combination of those and
2 possibly other considerations are such that it has
3 significant value."
4 Tendency evidence therefore can comprise a
5 combination of circumstances such as the nature of the
6 alleged victims, the circumstances surrounding the
7 offences, the way the offences were alleged committed,
8 the nature of the acts themselves and so on. In RHB it
9 was alleged the accused had indecently assaulted his
10 granddaughter and evidence was sought to be led of
11 indecent assaults against his daughters that he had
12 pleaded guilty to many years before the alleged current
13 offending.
14 The court their held that that evidence should be
15 admitted as tendency evidence. His Honour Mr Justice
16 Nettle stated, at p.18, "As the (trial) judge held it is
17 a remarkable thing for a man to commit sexual acts
18 against his female lineal descendants.
19 It is still more remarkable when in each case the
20 nature of the acts, similar in respect not identical,
21 even if they are commonplace sexual acts. It is even
22 more remarkable that in each case the acts were committed
23 in the home while the victim was in the applicant's care,
24 while other adults were close by and the risk of
25 detection were significant. It follows that if accepted,
26 the evidence of the applicant's prior offending against
27 his daughters would demonstrate that he had a tendency to
28 be attracted to his young female descendants and to act
29 upon that attraction in similar ways at different times
30 when the victims were in his home under his care, and
31 thus vulnerable to his advances.

1 As such, as the held, it would be capable of
2 rationally affecting the assessment of the probability
3 the applicant, having had a sexual interest in his
4 granddaughter and giving effect to it by committing the
5 offence alleged. That paragraph, in my view, well
6 demonstrates what His Honour said in paragraph 17 when he
7 talked about the circumstance - the combination of
8 factors that can be applied in determining whether or not
9 sufficiently probative tendency evidence has been
10 established.
11 In the same paragraph, in words proceeding above,
12 Nettle J also approved the observation of Hanson JA in
13 *KRI v. R* [2011] VSCA at par 57, that the test for
14 admissibility of tendency evidence is one of fact and
15 degree to be assessed in light of the fact and
16 circumstances of the particular case.
17 It is my view that what their Honours had to say in
18 both cases has direct application to the matter before
19 me. Before proceeding, however, I am aware that caution
20 must be exercised in this regard by a trial judge as per
21 *CEG v. R* [2012] VSC 55, where a trial judge ruling based
22 on *RHV* was felt by Nettle and Harper JJA and Hollingworth
23 AJA to have taken the analogy with RHV too far, although
24 ultimately the court was not satisfied the judge's
25 conclusion was not one which on the evidence available,
26 no reasonable judge could properly reach.
27 In my view, there are many similarities between the
28 allegations. Faced with the fact that in each of the
29 charges, bar the first, the accused was either in
30 training to be, or was a priest in a teaching order of
31 the Catholic Church. That role involves taking a vow of

1 celibacy in what might be termed professional commitment
2 to a religious code of behaviour as a way of life such
3 that the alleged offending, in my view, may be seen by
4 analogy, to be almost as remarkable a departure from such
5 a commitment and expected behaviour as a father's abusive
6 of his lineal descendants, but such offending by members
7 of religious orders against children is now known not to
8 be uncommon is not to the point. So neither is sexual
9 offending by fathers against their children. Each
10 complainant was a Catholic schoolboy, aged between 12 and
11 possibly 17, and significantly younger than the accused.
12 Each was, by virtue of their religion, particularly
13 vulnerable to the authority of a priest (I note this
14 factor does not have application to Charge 1). In all
15 cases bar those involving complainants B and C, the
16 complainants were allegedly isolated by the accused in
17 his bedroom or his office at the institution where he was
18 residing. The indecent assaults allegedly involving
19 complainants A, B, C, D, E and G, involved ouching of the
20 genitalia either above or below clothing. The accused
21 allegedly used enticements in the charges involving: A
22 (take him to the movies); D (computer games and items in
23 a drawer); E (cigarettes and alcohol; F (computer games);
24 G (alcohol) and; H (a cigarette and alcohol).
25 He allegedly used counselling as a precursor to the
26 sexual offending perpetrated on A and G. The cases
27 involving B, E and F infer the use of drugs to render the
28 victim more vulnerable to sexual assault, noting that the
29 charge where E was complainant, involved a frank use of
30 alcohol rather than an unknown soporific. He allegedly
31 used his authority in order to sexually assault B

1 (ordered into a room for a medical examine), and C
2 (ordered boys to drink Milo. He allegedly assaulted in
3 the presence of others who may have been complicit (the
4 "medical" examine of B involving the accused and other
5 priests, the alleged assault on C in the school
6 infirmary). There is alleged anal penetration of
7 complainants F, G and H.
8 In terms of cross-admissibility there is also, in
9 my view, what might be termed a meshing or crisscrossing
10 of singular features running through the charges so that
11 there is a singular feature of the offending as well as a
12 dissimilar one, as between the charges. For example, the
13 accused allegedly used a soporific in the alleged
14 offending against C, the glass of lemonade, and F, the
15 mug of Milo, which I regard as a most singular feature,
16 yet the act on F was a penetration and the act on C an
17 indecent assault.
18 Following the counselling alleged as a precursor to
19 the assaults on A and G, he committed an assault on G and
20 he allegedly committed an indecent assault on A and an
21 indecent assault and penetration on G, and so on. This
22 is not an unknown situation. See, for example, the case
23 in *WEA v. R*, a decision of the Court of Appeal delivered
24 on 22 February 2013, where the accused faced 37 charge
25 relating to sexual assaults of various kinds committed on
26 five female complainants, some of which were common
27 amongst some of the complainants and others which were
28 not, and included offending against one complainant which
29 was far more serious and protracted than that inflicted
30 on the other complainants. There the court ruled that
31 the charges should be heard together and that there was

1 sufficient singularity for the evidence to be used as
2 evidence of tendency.
3 In my view, Charge 1 should be severed from the
4 indictment. The accused was not then a priest or
5 training to be one. The setting of the alleged assault
6 at the movies was distinctly different from those in the
7 remainder of the charges and the act, although not
8 dissimilar to others alleged, also lacked singularity so
9 that the combination of features and circumstances is
10 insufficient to form a basis for admission as tendency
11 evidence, but the remainder of the charges, in my view,
12 form a singular pattern of regular exploitation in
13 various ways by the accused of his authority as a
14 religious and a teacher to regularly sexually assault in
15 various ways adolescent boys who were subject to his
16 authority.
17 It is my view this evidence amounts to tendency
18 evidence, which is significantly probative, substantially
19 outweighs any prejudicial effect and is capable of
20 rationally affecting the assessment of the probability of
21 the accused having had a sexual interest in the
22 complainants and giving effect to it by committing the
23 offences alleged.
24 It is my view this evidence amounts to tendency
25 evidence which is significantly probative, substantially
26 outweighs any prejudicial effect and is capable of
27 rationally affecting the assessment of the probability of
28 the accused having had a sexual interest in the
29 complainant and giving effect to it by committing the
30 offences alleged. Sorry - I will leave that.
31 It is also my view that the evidence of "X" should

1 be admitted. Whilst the nature of the offending may be
2 different to other acts it still fits within the pattern
3 of sexual exploitation alleged against the accused and
4 bears the same surrounding characteristics and isolation,
5 inducement and use of authority albeit in a beguiling way
6 founding many of the other alleged instances of
7 offending.
8 As to the defence admission that sheer weight of
9 numbers would overwhelm the jury and render defence of
10 the charges almost impossible that is essentially a
11 submission that the prejudicial effect outweighs the
12 probative value of the evidence. This is an argument
13 also raised in *WEA*.
14 However, as it has been stated by senior courts on
15 many occasions the fact that a case is strongly probative
16 also means that prejudice to the accused is higher. It
17 is impermissible or unfair prejudice which is the problem
18 and as I have already ruled the probative value of the
19 evidence is, in my view, of sufficient strength to
20 outweigh such impermissible or unfair prejudice.
21 Tendency evidence is, of course, limited evidence.
22 It can never be relied upon by the prosecution as the
23 sole means of proving its case beyond reasonable doubt.
24 It has been described as "No more than a building block
25 or stepping stone", providing the basis for an inference
26 that on a relevant occasion the accused behaved in a
27 particular way or had a particular state of mind. See
28 *DAO* VR (2011) NSWCA, 63 at para. 80 per Simpson J. That
29 is - "It may only be used by a jury to infer it is more
30 likely the accused committed the offences charged. The
31 jury will be directed it may only use evidence of

1 tendency if it is satisfied beyond reasonable doubt that
2 some or all of the acts are said to reveal if such
3 tendency occurred and it is satisfied beyond reasonable
4 doubt the only reasonable inference to draw from that
5 evidence is that the accused had the tendency alleged by
6 the prosecution. It will be further instructed that it
7 must not substitute evidence of tendency to evidence of
8 the offences charged. Finally, the jury will, of course,
9 be directed not to reason that the accused is a type of
10 person who would commit the offences charged. It will be
11 directed, in the strongest terms, that it must be
12 satisfied beyond reasonable doubt by the evidence of the
13 particular complainant, in relation to the particular
14 charge before it may bring back a verdict of guilty."
15 Coincidence evidence requires evidence of two or
16 more similar incidents, essentially, so that a jury is
17 invited to infer that they had well occurred in a
18 coincidental way and may be used as supporting the truth
19 of the evidence led.
20 The case of *Papamitrou*, the decision of His Honour
21 The President, Mr Justice Winneke, spoke at length of a
22 modus operandi said to have attached to the accused in
23 that case, he being a manager at a Tandy electronics
24 store then sexually assaulting - allegedly - a number of
25 young women by virtue of exploitation of his position.
26 To some extent this case has similar
27 characteristics and features as the facts and
28 circumstance outlined in *Papamitrou.* Ultimately,
29 however, I am concerned that there is a difference in the
30 way the accused man allegedly went about obtaining access
31 to the complainants in this matter for me to rule that

1 evidence may be led as coincidence evidence in this
2 trial.
3 Basically, I am not satisfied that the evidence of
4 the various acts contain the required sufficient
5 similarity overall beyond certain aspects which has the
6 probative value required by s.98(1) or 101(2). I rule
7 that the evidence should not be led on this basis.
8 Finally, whilst I have ruled evidence that tendency
9 should be led I do not agree with the evidence extracts
10 provided by the prosecution in its notice of tendency as
11 being appropriate for that purpose. Some of it clearly
12 being hearsay, such as evidence, apparently some of the
13 complainants heard rumours about sexual abuse abounding
14 in the school and so forth, but is a discussion which may
15 be had before the commencement of the trial.
16 Finally, in such matter it is now required that a
17 trial judge make some assessment of the reliability of
18 the witnesses. See *Dupas*. However, this is not a case
19 where either that has been raised as an issue before me
20 in this application or where, in any event, I should make
21 that finding there being no indication from the
22 depositional material of unreliability.
23 - - -