PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. L.. P.*, 2022 NSPC 6

Date: 20220117
Docket: 8406207
Registry: Dartmouth

Between:

Her Majesty the Queen

v.

L. P.

Restriction on Publication: Section 486.4 and Section 486.35

Judge:	The Honourable Judge Theodore Tax,
Heard:	April 6, 2021; April 7, 2021 & Oct 4, 2021, in Dartmouth, Nova Scotia
Decision	January 17, 2022
Charge:	Section 271 of the Criminal Code of Canada
Counsel:	Stephanie Morton, for the Nova Scotia Public Prosecution Service Drew Rogers, for the Counsel for Defence

A Ban on Publication of the contents of this file has been placed subject to the following conditions:

Section 486.4 & 486.5: Bans ordered under these Sections direct that any information that will identify the complainant, victim or witness shall not be published in any document or broadcast or transmitted in any way. No end date for the Ban stipulated in these Sections

By the Court:

[1] Mr. L.P. was charged with unlawfully committing a sexual assault on Ms. C.M. contrary to section 271 of the **Criminal Code**. The offence is alleged to have occurred in Lower Sackville, Nova Scotia on or about March 20, 2019.

[2] The Crown proceeded by way of summary conviction and L.P. entered not guilty pleas. Trial evidence was heard on April 6 and 7, 2021. The parties made their closing submissions on October 4, 2021 and the Court reserved its decision until today's date.

Positions of the Parties:

[3] The parties have agreed that the issues around the date, time, jurisdiction in which the offence is alleged to have occurred and the identification of L.P. as the accused person are not in dispute.

[4] The Crown Attorney submits, in referring to **R. v. Barton**, 2019 SCC 33 and **R. v. GF**, 2021 SCC 20 that the evidence established the *actus reus* of the offence which involves three essential elements: [1] the direct or indirect touching or application of force to another person regardless of the degree of strength or power applied; [2] that the contact was of a sexual nature ; and [3] the complainant had not subjectively consented to that contact of a sexual nature at the time when it occurred.

[5] With respect to the *mens rea* of a sexual assault offence, the Crown Attorney submits that it may be established by two essential elements: [1] the accused intended to touch the complainant and the contact was of a sexual nature and [2] the Crown must prove beyond reasonable doubt that the accused either knew the complainant was not consenting or was wilfully blind or reckless as to her lack of consent. In other words, the onus is on the Crown to prove beyond a reasonable doubt that the accused did not apply force to the complainant operating under an "honest but mistaken belief in communicated consent."

[6] It is the position of the Crown that the complainant, who was 18 years old, at the time when she visited a relative during Spring Break in the Halifax Regional Municipality ["HRM"], specifically described an evening where she consumed alcohol and shared cannabis with the accused, who was her cousin and then passed

out from those substances. While she was generally unconscious at the material times in question, during “glimpses” and being aware of what was occurring, C.M. stated that the accused touched her breast and inserted his fingers into her vagina under her clothes. The Crown Attorney submits that the evidence of the complainant was straightforward and unshaken on cross-examination that she never consented to the touching of her body in those locations by the accused.

[7] In addition, the Crown Attorney submits that when the complainant confronted her cousin on the drive back home the next day about the “glimpse” that she had during the previous evening which was a “gross nightmare,” she says that he admitted that her “nightmare” was real and had happened. The Crown Attorney also points to the opinion evidence of the SANE nurse, as well as the unexplained presence of the accused’s DNA being found on the complainant’s underwear as well as text messages which support the complainant’s version of the events.

[8] The Crown also introduced two voluntary statements made by the accused to a police officer, from which it would be reasonable to conclude that parts of his statement were inculpatory, while other parts were exculpatory in stating that she had initiated the contact, thereby communicating her consent to him. However, the Crown Attorney submits that the complainant’s evidence established that she did not nor could she legally consent to the contact of a sexual nature based upon section 273.1(2)(a.1) **Code**. She submits that, at all material times, the complainant had ”passed out” and was either unconscious or briefly semiconscious during “glimpses” before passing out again due to consumption of alcohol and cannabis. In those circumstances, the complainant could not legally consent to the accused’s actions, nor is there any factual basis for a claim of an honest but mistaken belief in communicated consent.

[9] It is the position of the defence that there are issues with the credibility and reliability of the complainant’s evidence as she has acknowledged that the combination of taking alcohol and cannabis for the first time together had an impact on her and that she could only recall and relate “glimpses” of what had occurred. Defence Counsel submits that the accused, himself, was under the influence of cannabis and alcohol and as mentioned in his statement to the police officer, the complainant woke up and unzipped her top and then she put his hand on her breast. Then, after that, the complainant moaned and rubbed her legs together, which he interpreted as her consent to touch her vagina, but then he suddenly realized it was his cousin and he immediately stopped.

[10] Defence Counsel submits that the accused's touch of the complainant's breast was either based on her consent because she had put his hand there or, in the alternative, he had an honest but mistaken belief that her action did communicate her consent to do so, based upon the moaning and then rubbing her legs together just before that occurred. He submits that the accused's honest but mistaken belief that the complainant had consented is based upon the possibility that the complainant was, at that moment, thinking that she was in the bed with her boyfriend who had gone away for the Spring Break and then, she herself, realized that it was her cousin in the bed.

[11] Defence Counsel acknowledges that during his client's second voluntary interview with the police officer, the accused did express regret for touching the vagina of the complainant. However, Defence Counsel submits that, given the fact that the accused provided different and contradictory versions of what had occurred during the two statements, those statements cannot be regarded as a clear admission of the offence. In fact, in the final description of what occurred, the accused refuted the complainant's version of events. Given those different and contradictory versions of events related to the police officer, the Crown cannot point to those statements as proof beyond a reasonable doubt that there was a sexual assault.

[12] It is the position of the defence that, even if the Court finds that the *actus reus* of this offence had been established beyond a reasonable doubt, the Court ought to be left in reasonable doubt with respect to the accused's intention or *mens rea* to commit a sexual assault. Defence Counsel submits that the accused's actions were not based upon an intention to commit a sexual assault, but rather, it was a misunderstanding, and he was not reckless to the any lack of consent. He has maintained, in his police statement, that she had given him "cues" to her consent to his acts before he realized who was laying next to him on the couch.

[13] In the final analysis, Defence Counsel submits that the complainant and the accused agree there was a sexual touch while the two of them were on a couch, but the Crown has not established the *mens rea* of a sexual assault beyond reasonable doubt in all the circumstances of this case. The complainant was a tired, half-asleep, intoxicated female and the accused was, at the time, an intoxicated male, who simply reacted to the "cues" of his female cousin. In those circumstances, this is not a case of reckless disregard by the accused, but rather, an honest but mistaken belief in communicated consent.

[14] In a brief reply to the submissions of the Defence Counsel, the Crown Attorney submits that the evidence established that it was not possible for an accidental transfer of the accused's semen from the bed sheets to the inside of the underwear of the complainant, as she stated that she standing and not sitting on the bed when she changed to go to sleep. Although there was the presence of L.P.'s DNA evidence on the underwear, it was not conclusively established whether it was on the inside or outside part of the complainant's thong. However, the Crown Attorney submits that Defence Counsel's suggestion that the semen may have transferred from the bed sheets, through the clothes to the underwear, is highly unlikely.

[15] Finally, with respect to the submission of Defence Counsel to analyze the situation from the accused's perception, the Crown Attorney submits that his perception is not relevant, only whether he had the intent to touch the complainant in a sexual manner. As an act of general intent, she submits that the accused's state of mind is not relevant, the case law has made it clear that it is the complainant who must communicate subjective and contemporaneous consent with the specific sexual activity that took place. Furthermore, it is the position of the Crown that the complainant did not consent to the actions of the accused and pursuant to section 273.1 **Code,** since she was unconscious at material times to this case, she could not legally consent to his digital penetration of her vagina.

Overview of Trial Evidence:

[16] The complainant, Ms. C.M. and the accused, Mr. L.P. are well-known to each other as he is related to her as a second cousin, through her mother's side of the family. At the time of this incident in March 2019, C.M. recently had her birthday and was 18 years old while L.P. was about 19½ years old.

[17] C.M. moved to Nova Scotia with her parents in 2014. In 2017, she first learned that L.P. was a second cousin on her mother's side of the family, who lived about two hours away and that he was relatively close to her age. When she finally met him, C.M., as an only child, was pleased to be able to connect with extended members of her family and she felt like L.P. was the older brother who she never had.

[18] After the initial meeting, they communicated with each other daily and saw each other approximately once a week. At times, he would come to her place and stay for a weekend, or she would go to his community where he lived with his

grandparents. During the summer of 2018, L.P. got a job in C.M.'s town, and she and her parents invited him to stay in their home. He stayed in the bedroom across the hall from C.M.'s bedroom. During this time, C.M. referred to L.P. as her "best friend" or her "older brother figure" that she never had.

[19] L.P. stayed and worked in C.M.'s town for about six months, but in January 2019, he moved back into his grandparent's house as they were getting older and often needed his assistance. After he moved back to his town, C.M. and L.P. still talked daily and continued to see each other once a week or once every second week.

[20] During the March school break in 2019, C.M. and L.P. decided to spend a couple of days in HRM, at his aunt's house in Lower Sackville, Nova Scotia, which would save them the cost of a hotel. C.M. said that it was during the March break and her boyfriend had gone out of the country with his family for the week. Their plan was to spend two nights and three days in the HRM, before returning to Antigonish on March 20, 2019. C.M. drove the two of them to Halifax in her car.

[21] C.M. and L.P. arrived in the city at his aunt's place on March 18, 2019. After putting their things in the basement where they would be staying, L.P. remained at the house while C.M. went shopping with a friend of hers. Later, that evening, she and L.P. went out to buy some candy for a movie which they planned to watch that night and he bought some alcohol and cannabis at the NSLC for them as he was 20 years old and she was only 18 years old. He purchased a six pack of Smirnov ice coolers in cans as well as a package of pre-rolled joints of cannabis.

[22] C.M. stated that, during the evening, while she and L.P. were watching the movie, she had two cans of the alcohol cooler and L.P. gave her one of the pre-rolled joints of marijuana. On the first night, C.M. slept on the couch in the living room area of the lower level, while L.P. slept in the bedroom located on that level. C.M. said that, on both nights in the HRM, she wore the same pyjamas, which was a zip up sweater and long pants.

[23] On the second day, L.P. met with a cousin and the three of them walked in the Sackville area. Later that afternoon, they went back to the liquor store and L.P. bought some more pre-rolled joints because were only three left in the package of six from the first night. She confirmed that L.P. had used two of them and she had one. For supper on the second day in the HRM, C.M. and L.P. went to East Side Mario's, which is her favourite restaurant. She felt that they were having a great time together in town.

[24] After supper, they went back to his aunt's place and the plan was to watch movies and just "hang out" until they went to sleep. Initially, she sat on the couch in the living room area of the lower level with L.P., but then C.M. went into the bedroom to Facetime with her boyfriend.

[25] C.M. stated that she sat on the bed while she was speaking with her boyfriend on Facetime and during that conversation, she stood up, put on a new pair of underwear, and changed into the same pair of pyjamas that she had worn the previous night. She confirmed that she did not sit on the bed at any time without her pants being on. After the conversation with her boyfriend, C.M. went back into the living room area of the lower level, sat on the couch, and picked a movie to watch.

[26] C.M. stated that she talked to her boyfriend for about an hour, likely between 8 and 9 PM, then came out of the bedroom and watched the movie with L.P.. She recalled having consumed three cans of Smirnov ice during the evening. She stated that she had one can of Smirnov ice while talking to her boyfriend and the other two while she was watching the movie with L.P.. At some point during the movie, they went outside and smoked a joint of cannabis together, came back in the house and continued watching the movie. They were both watching the movie, seated on the couch and that is where she fell asleep.

[27] C.M. stated that she had never previously smoked marijuana and this was the first time that she smoked marijuana and consumed alcohol at the same time. She stated that she felt "okay" but it made her "really tired" because she could not stay awake on the couch and just "passed out."

[28] C.M. stated that, when she fell asleep on the couch, she was wearing pyjama bottoms which had a drawstring to tie at the waist, but there was no zipper. She was wearing her underwear under those pyjama pants. The sweater that she was wearing had a zipper and confirmed that she was not wearing anything under her sweater.

[29] C.M. said that L.P. sat on her right on the L-shaped couch as they watched the movie. Their bodies were not touching but he had his arm on the top of the couch behind her shoulders. She fell asleep on the couch after midnight and when she woke up in the morning, she recalled "just feeling very weird." C.M. stated that she remembered "a glimpse of something that went on after I fell asleep that I could not tell if it was real or not."

[30] In terms of the specifics of that "glimpse," she recalled that L.P. moved the hand of his arm which was around her back, down under her sweater and placed it on her breast. At the same time, she recalled that he placed his other hand down under her pants and underneath her underwear. He touched the outside of her vagina and it felt like he also put his fingers inside her. C.M. stated that she did not ask L.P. to touch her breast, she did not unzip her sweater, she did not guide his hand onto her breast and that she did not, in any way, consent to L.P. placing his hand on her breast.

[31] With respect to her statement that L.P. had touched her vagina and inserted his fingers inside her vagina, she had not asked him to do that, she had not guided his hands under her pyjamas and underwear to do that and she did not consent in any way to L.P. touching her vagina. She added that she did not consent to L.P. putting his fingers inside her vagina.

[32] C.M. was asked whether L.P. had ejaculated when he did those things and she stated that she did not know. She added that she "was not conscious at that time to be aware of that." C.M. stated that she had been asleep and did not really recall anything except that "glimpse" when she briefly woke up. In the morning, when she woke up, C.M. said that she was on the couch where she had fallen asleep and that all her clothes were still on. She added that her sweater was "zipped down a bit, but not much," and she thought that it may have come undone a bit while she was asleep. She did not recall whether the drawstring on her pyjama pants was undone or still tied.

[33] About 20 minutes after she woke up, L.P. came out of the bedroom on the lower level. She spoke to him, but did not mention anything about the previous evening, however, she considered how she would confront him about her "nightmare." They did not really speak during the first 45 minutes as she drove home, but then she asked if she could talk to him about a "nightmare." She told him about the "nightmare," that what he had done was "gross" and that he had touched her during this "gross and messed up nightmare." She said that L.P. looked at her and agreed with her that it was and that was the end of their conversation at that time.

[34] About a half-hour later, during the trip back to Antigonish, C.M. saw L.P. start fidgeting and she asked him if he was okay. According to her, L.P. looked at her and said: "that nightmare you had was not a nightmare, it was real." She looked

at him and asked him what he meant by that, and he replied: “it happened.” C.M. told him not to talk to her and she continued driving to her hometown.

[35] A little later, C.M. again looked over at L.P. and he seemed to be fidgeting as he looked out the window. She asked him what had happened and if she had done anything that may have brought it on. She also asked if he had done anything and whether she had done anything back to bring it on, because she did not know what had happened. He replied that she did not do anything back. She recalled that he said that he instigated it, he did it and she did not do anything back to him. C.M. felt that L.P. looked “distraught” when he said that and because she did not wish to talk to him any further, she turned on music and just kept driving.

[36] C.M. said that their original plan was for him to stay the night at her house before he went home. However, when they got to her driveway, she told him that he was not to come into the house. C.M. believed that L.P.’s grandfather was at her house when they arrived, and shortly thereafter, he left with his grandfather.

[37] After L.P. left, C.M. was “pretty distraught” and sent a text message to a girlfriend. She told her friend that “stuff happened” but did not fully explain what had happened. She also sent a text message to her boyfriend, who was still out of the country, telling him that “stuff happened” and asked him to call her. He immediately called her, and she told him what happened. C.M. stated that her boyfriend advised her to go to the hospital, not to have a shower, to take clothes that she had worn to the hospital and tell the nurse what had happened.

[38] However, C.M. added that before going to the hospital, she had a short text message exchange with L.P. and then blocked his number. After that, L.P. tried reaching out to her on Instagram because she had blocked his number as well as his “Snapchat.” She said that the messages sent by L.P. were “counteracting” and that he was going against what he had originally told her.

[39] C.M. stated that L.P. was saying that it was all a “messed up joke and a prank” because they had made a bet to see if he could make her believe “a lie” for 24 hours and if she did, then she owed him $50. He also said that, if she caught on that it was a lie and called him out, then he owed her $50. When asked whether she recalled making such a bet, C.M. categorically stated: “I would never make a bet like that.” She confirmed that she had not made that bet while she was smoking cannabis or drinking alcohol and was “100% sure” that she had not made a bet like that.

[40] Then, C.M. added that, in one of L.P.'s text messages, he started to blame her and said that she had instigated it, it was all her fault and that she had asked for it. She responded that she would never do that, that it grosses her out and that she would never ask a family member to do any sort of physical contact like that to her. She repeated that she would "never make a bet like that."

[41] After she sent that response, C.M. said that L.P. started changing his story and said that it was not a bet, it was just a "messed up joke," but added that it was her fault. As far she was concerned his story "just kept changing." After that and before going to the hospital, she told her mother and best friend what had happened. C.M. and her best friend arrived at the hospital between 11:30 PM and midnight on March 20, 2019.

[42] At the hospital, C.M. described some of the tests conducted by the nurse. She did not necessarily have any injuries from the incident, but there were some bruises on her arm and leg. After the hospital, she went to the police station and gave a statement. After her initial statement to the police around midnight, she went home. The next day, she came back to the police station and provided a second statement. She said that after having some rest, the next day she was able to recall "more stuff."

[43] At this point in her testimony, C.M. read into the record the text messages that she exchanged with L.P. which started at about 6:52 PM on Wednesday, March 20, 2019. C.M. recognized the texts and indicated that they were this series of texts exchanged between her with L.P. at that time and the 14-page exchange was filed as Exhibit 3.

[44] In essence, in her text messages to L.P., she asked him what he did to her and to be honest with her. L.P. replied that after she smoked the joint, between 12:30 and 1 AM, she started cuddling him and then it was just a "messed up prank/lie" and that he went too far with it. L.P. said that he was surprised that she had a memory loss from smoking the weed, but reiterated that they had made the $50 bet. L.P. added, in his message, that he knew that she probably would not pay up either way since she was "drunk and stoned when we made the bet." He told her that he could not believe that she would think that he would do something like that to her and reminded her that they had previously slept in a bed together without any problems.

[45] In the messages, when she kept saying that she did not believe him, L.P. then said that after they had smoked a joint, he fell asleep cuddling her. He woke

up to her "humping" his leg and when he tried to get up, she grabbed him and asked him to stay. Then, he said that she then pulled him back down, she unzipped her top and she put his hand on her chest. In his text message, L.P. said that "for 15 minutes, I just sat there in shock" and when she pushed him off the couch, he went to bed and cried for an hour wondering what had just happened. In his text, L.P. said that when he thought about what had occurred, he "did not want to lose her", so he made up "that BS story." He added that he made up the "lie" because he did not want her to know that she was the one "who did it."

[46] A few hours later, C.M. sent a text back to L.P. to say that she did not do anything back to him because he was her cousin and she repeated that she had not done anything and that "my gut tells me I did not do anything." Once again, L.P. said that he did not do anything and that he was now telling her the truth. He added that she was "sexting" her boyfriend while she "Snapchatted" with him. In his text messages, L.P. said that he had not taken advantage of C.M. and repeated that what she had done was "messed up." He added that "I understand that you were drunk and high and probably do not even know WTF you were doing, but I am not lying."

[47] In concluding her direct examination, C.M. categorically stated that what L.P. had said in those text messages was not true. Specifically, she said that she did not unzip her top, she did not put his hand on her chest at all or let him leave it there for 15 minutes, she did not push him off the couch, nor did she grab him to stay on the couch.

[48] On cross-examination, C.M. agreed that, after they arrived at his aunt's place, she went and met with a friend of hers and L.P. stayed at the house. When she returned, she confirmed that he did ask her to drive him to the liquor store to buy some pre-rolled cannabis and that she asked him to get her for some Smirnov coolers. She also agreed that, on the first night, she had one or two coolers and shared a joint with L.P.. She confirmed that it was the first time that she had ever combined alcohol and the cannabis and after that, she was feeling "giddy and laughing at everything." She confirmed that nothing bad had occurred during their first evening in the HRM.

[49] C.M. disagreed that there had been any issue with L.P. because she was spending a lot of time on her phone with her friends and her boyfriend but agreed that she did talk to her boyfriend for about an hour. Prior to calling her boyfriend, she agreed that she had shared some cannabis with L.P. and that the impact of the

cannabis probably led to a romantic conversation with her boyfriend. After the Facetime call with her boyfriend, C.M. recalled that L.P. sent her a text message to see if she wanted to watch a movie.

[50] On the second night in the HRM, C.M. agreed that she had more cannabis than the first night and agreed that after the conversation with her boyfriend, she drank a cooler and had some marijuana. After mixing the cannabis with the Smirnov coolers on the second night, she fell asleep in the middle of the movie. In the morning, she recalled having a "glimpse" of something happening during the evening and agreed that she was fully dressed when she woke up.

[51] She agreed with Defence Counsel that after they got ready, in the morning, the two of them left HRM. On the drive home, C.M. agreed that was when she mentioned what she called "the nightmare" to get some clarity from L.P. because she was unsure of what did or did not happen. She agreed that when she spoke with the police, she "was unclear of the actions that happened, but I was able to see a glimpse of what did happen."

[52] However, C.M. did acknowledge that, in her first statement to the police officer when she was asked to describe the touching, she agreed that she had responded: "no, because I do not remember it. Like I do not remember the situation happening." She agreed that she made the same statement with respect to whether there was any penetration with his hands or that he was just touching her genital area.

[53] C.M. stated that she could recall how the contact started, and that she simply had a "glimpse" of something that was already occurring. She stated that she was conscious for a moment but could not move and then just passed out again. C.M. believed that L.P. was high from the marijuana but agreed with Defence Counsel that he had not consumed any of the coolers. She agreed that she did not know how much weed L.P. would have consume before he became high and agreed that his conversations were coherent.

[54] With respect to the text message exchange where L.P. had suggested that he woke up to C.M. humping his leg, she agreed that she could not say that there was not some unintentional contact of a rubbing kind while in her sleep, as she has rubbed her legs together when she is asleep, since she was a child. She interpreted his remark in the text about "humping" as a reference to her simply falling asleep and rubbing her legs together.

[55] With respect to the comment that she started to breathe heavier as well, she agreed and said that she is aware that she snores and that there is a noticeable noise. She agreed that it was possible that a snore could sound like a moan and that sometimes she does mumble in her sleep or make some noises.

[56] C.M. disagreed with Defence Counsel's suggestion that she had unzipped her sweater because she was hot and added that if she was hot, she would have instantly woken up. She agreed that it might have been possible for the zipper on the sweater to come down through some movement of her own while sleeping. However, she disagreed with the suggestion that while she was asleep, she may have thought that L.P. was her boyfriend lying beside her and that she had put his hand on her breast. She also disagreed with the statement made by L.P. in a text message that she had asked him to stay with her.

[57] C.M. agreed that L.P. had never expressed any kind of romantic or sexual interest in her on any prior occasion. However, she added that one evening when she came home drunk, he was at her house and he saw her go into a room and take off her clothes. C.M. agreed with Defence Counsel that L.P. had seen her naked that time, but nothing bad happened that evening or on any other night when they slept in the same bed. She reiterated that he was like an older brother to her.

[58] C.M. disagreed with Defence Counsel's suggestion that nothing bad ever happened on this trip. She also disagreed with the suggestion that this was simply a horrible mistake on everyone's part. Based upon her sexual relationship with her boyfriend, she stated if something had occurred the previous evening, she could feel it the next morning and, on this occasion, she had "that weird feeling."

[59] Kari-Lee Chisholm-MacDonald, who is a registered nurse working at the local hospital stated that she was trained as a SANE nurse and that she did a sexual assault examination for forensic evidence on C.M. on March 20, 2019, starting at 10:11 PM. She filled out a "Forensic Evidence Record," which is an RCMP form, which indicated the areas searched when she did the sexual assault examination for forensic evidence. She also completed a "Traumagram" with notations on diagrams was marked as Exhibit 2.

[60] Ms. Chisholm-MacDonald stated that when C.M. arrived at the hospital, she agreed to have a full examination conducted by her. The SANE nurse collected her underwear and did a fluorescence test on it as well as on her right and left thighs, she also took swabs of the vaginal and anal/rectal area. Ms. Chisholm- MacDonald pointed out that on page 2 of the "Traumagram" the fluorescence indicated

"pattern" which she marked as "PA" on the diagram. It was a reddened area which she thought might be fingerprints and confirmed that she could only speculate on what had caused that reddened area.

[61] With respect to those reddened areas, Ms. Chisholm-MacDonald stated that she asked C.M. if she recalled any force or any digital penetration or any foreign objects being involved. C.M. could not recall if anything like that had occurred.

[62] Ms. Chisholm-MacDonald also confirmed that she had noted at the top of the first page of Exhibit 2 that C.M. had provided her with the thong underwear that she was wearing at the time of the incident. She indicated that the underwear was the most likely place to collect DNA if that underwear was worn by the person after the incident.

[63] Ms. Christine Downs, who works as a forensic DNA specialist at the RCMP National Forensic Laboratory in Ottawa was qualified to provide expert opinion evidence in the forensic application of DNA typing, the interpretation of body fluid identification test results, the interpretation of DNA typing profiles and the forensic application of statistical significance to the comparison of DNA profiles. Her curriculum vitae and three (3) Expert Reports were filed as Exhibit 1.

[64] Ms. Downs explained where DNA comes from and that there is a very small percentage that differs between people, which can be analysed to determine a unique DNA profile by looking at 15 specific genetic locations as well as a sex determining region. She spoke of how DNA can be transferred from one person to another by direct or indirect transfer and how it is analysed by her in the laboratory.

[65] In her first expert report, dated October 3, 2019, at tab 2 of Exhibit 1, she commented on the exhibits received from the swabs of C.M.'s body which were obtained by the SANE nurse. She pointed out that at page 1 of that report all the DNA samples had come from a known source, C.M., and then Ms. Downs could check to see if there were any comparisons to any other profiles obtained in this case.

[66] With respect to the DNA conclusions of the swabs taken from the external genitalia area and the vaginal swab, Ms. Downs confirmed that no male DNA typing profile was able to be obtained, however male DNA was detected. She indicated that she could not tell if that was from semen or skin cells and added that she could only say that the DNA came from the cells of a male's body, but she

could not determine the biological origin/source of that DNA. She confirmed that there was some male DNA on a body swab, but it did not meet the minimum requirements for further processing.

[67] In Ms. Downs second expert report which was dated May 4, 2020, at tab 3 of Exhibit 1, Ms. Downs confirmed that she had received the underwear worn by C.M. for analysis as well as a vaginal swab. She confirmed that the underwear received was a thong and then she provided the information with respect to her analysis of the underwear. In area "AA" which was the interior front of the crotch, she conducted two different tests and confirmed that neither one of them indicated the presence of semen.

[68] Ms. Downs also conducted a DNA analysis of the area marked as "AB" on the underwear, which is the lower back panel of the thong. In that area, human semen was identified. The area analysed was on the back of the thong near its crotch or gusset area. She added that there was no way to determine which side of the fabric had the semen. However, Ms. Downs stated that the DNA profile of the underwear at area "AB" was a mixed origin, coming from two individuals. One of the DNA profile was from an unknown male, which she marked as "male 1," the female component matched the known sample from C.M..

[69] Ms. Downs noted that the vaginal swab confirmed that it had come from a known sample, that is, C.M. and although no male DNA typing profile could be obtained for analysis from that swab, some male DNA was detected.

[70] The final expert report dated December 16, 2020, which was provided by Ms. Downs was located at tab 4 of Exhibit 1. The report stated that report was that the lab had received an exhibit marked as "P-1," which had come from a known sample attributed to the person identified as "LEP." Defence Counsel confirmed that they agree that the known sample was obtained from L.P..

[71] For this analysis, Ms. Downs indicated that she compared the known sample from LEP to the DNA typing profile that had been obtained from the underwear of C.M. at area "AB" which was confirmed to be of mixed origin, consistent with having originated from two individuals. The female component matched the known sample from C.M..

[72] Then, Ms. Downs compared the known sample from LEP to the sample previously designated as "male 1." Ms. Downs stated, as noted in her report filed as Exhibit 1, that the DNA profile of the "male 1" matches the known sample

obtained from LEP and that the estimated probability of selecting an unrelated individual at random from the Canadian Caucasian population with the same profile is 1 in 1.7 quintillion. She added that the number represents a fraction and shows the rarity of that DNA profile, which is essentially close to zero.

[73] On cross-examination, Ms. Downs confirmed that no male DNA sample was found in or on the external or internal genitalia of C.M., just on her thong underwear. She confirmed that it was only area "AB" of the underwear where male DNA could be analysed, however, she said that male DNA was detected on other internal swabs but could not be further analysed. She agreed that there was no way of determining whether the male DNA was on the inside or the outside of the fabric of the underwear. Ms. Downs agreed with Defence Counsel that the DNA matching L.P. could have possibly come from a different substance other than semen, but she added that human semen was identified in that area.

[74] Ms. Downs was also asked about the transmissibility of DNA in semen from one surface to another, for example, possibly from a bed sheet to C.M.'s underwear. She said that she could not answer that question but stated generally that wet biological stains do transfer more easily than dry stains. In addition, she could not say how the DNA got to that location on C.M.'s underwear or whether the semen was wet or dry when it was deposited at area "AB" of the thong. She added that there was no way to determine whether the DNA substance was actual ejaculated semen or pre-ejaculate, since spermatozoa can be found in pre-ejaculate.

[75] The final evidence tendered by the Crown during the trial were the two cautioned audio/video recorded statements of L.P. conducted initially by Cpl. Mike Wilson on March 29, 2019 [the transcript of which was marked as an aide memoire to the audio/video recording as Exhibit 4A]. The second cautioned audio/video recorded statement of L.P. conducted by Sgt. Fraser Firth on May 16, 2019 [the transcript of which was marked as an aide memoire to the audio/video recording marked as Exhibit 4B]. Defence Counsel confirmed that there was no issue with respect to the voluntariness of the statements made by L.P. and therefore no need to conduct a *voir dire*. The audio/video recordings of both interviews of L.P. were played in their entirety into the court record.

[76] During the first interview conducted on March 29, 2019, L.P. confirmed that he was 19 years old at the time of the interview. He confirmed that he had lived at C.M.'s house for about six months the previous year, while he worked in that community before returning to live with his grandparents. He first met C.M. when

she contacted him in October 2017 and since that time they had talked daily and seen each other quite often and the relationship was like a “brother and sister.” He confirmed that C.M. was an only child and that she did not have any brothers or sisters of her own.

[77] With respect to their March break visit to Lower Sackville, L.P. advised the officer that C.M.’s boyfriend went on vacation, and the two of them had arranged to go to Halifax and stay at his aunt’s place in Lower Sackville. On the first day in Halifax which was Monday, March 18, 2019, L.P. said that C.M. went out with a friend and later came back and during the evening, she had her first joint ever and was drinking alcohol as well. C.M. spent a lot of time during the evening “snapchatting” with a friend and her boyfriend, which bothered him because it was just the two of them there and he wanted to talk to her. He added that she had said that the “weed makes her horny.”

[78] On that first evening, L.P. said that he got “mad” at C.M. because she was spending so much time on her phone and talking in the other room. Around 12:15 AM, she came out of the bedroom joined him on the couch and they talked for a moment then went outside and split a joint. He said that she had previously had a whole joint herself, so during the evening, she had in total, four drinks and two joints. Then, she came out of the bedroom, cuddled up to him and laid down beside him, which “was not unusual” and then about five minutes later he fell asleep.

[79] L.P. then told the police officer that he later woke up “to something rubbing up against my leg.” He realized what it was and then she grabbed his wrist and said L.P. “stay” but he really couldn’t make out all the words as pulled him back down to the couch. Then, he said that she unzipped her top and put his left hand on her chest and about 10 minutes later, C.M. pushed me off the couch and he went into the bedroom. L.P. told the officer that the next morning when they were going home, she brought up “that she had a nightmare from the night before about us doing something together.” L.P. said that she must have thought he did something to her, “because I didn’t ask her what the nightmare was about. I just said it wasn’t a nightmare.”

[80] L.P. confirmed that this conversation occurred as they were on their way home, around the Truro area and then about 15 minutes later, he repeated that it was not a nightmare, but he “didn’t want to tell her what she did because who wants to tell their cousin that?” He then added that he should have told her because he would not be at the police station talking to the officer if he did.

[81] The police officer asked L.P. to tell him all of the conversation between him and C.M. as she drove back to her hometown. L.P. repeated that he had "just said it was not a nightmare" and she asked, "what do you mean?" He answered: "I don't think it was a nightmare because stuff did happen last night." But once again, L.P. added that he did not tell her what had happened because he did not want her to feel embarrassed.

[82] L.P. told the officer that he did lie at first because he wanted to protect C.M. from being too embarrassed and did not want to tell her what happened. However, she did not believe him, so he told her what really happened, adding that she still did not believe him. He told the officer that after smoking all the joints together, they made a $50 bet about him being able to pull off a "lie" for 24 hours that she could not see through.

[83] The officer asked what the "lie" was and L.P. said that he was lying about her nightmare, and that it was all a joke, but she saw through it so he "gave up and just told her the truth." He also said that he had sent her text messages or by Snapchat. Then L.P. added that she probably was not going to pay him the $50 anyway so he then said the main part of his lie was that he told her that "nothing happened, he made it up and that he was going to give her $50 because she had seen through his "lie." She kept responding "bullshit" to him. L.P. told the officer that when he said that to C.M. "she did not know at this point what she did."

[84] After L.P. explained that, he added that C.M. thinks that he did something to her while she was asleep, and the officer asked him if he did. L.P. replied that he had not done anything to her because he cared that much for her, and he just would not do that. He acknowledged that they were sitting close to each other on the couch, but "not really cuddling" and that they had slept in the same bed 15 to 20 times where nothing had happened before. L.P. added that they regarded each other as brother and sister, but this was the first time that she smoked "dope and drinks and something happened." He confirmed that there never been any prior sexual interaction with her.

[85] After those general questions, the officer asked L.P. to describe what occurred during the evening in question, and he said that they had been watching a movie after they both had changed into their pyjamas. C.M. was wearing a zipper up jacket-like sweater and pyjama pants, and he had pyjama pants and a T-shirt on. At a certain point, they went outside and shared the first joint of the night, then they came back in the house and C.M. drank a Smirnoff Ice from a can and he put

the movie on. She asked him to get her another cooler, so he went upstairs to get one and when he came back downstairs, she was in the bedroom and on the phone with her boyfriend for a long time.

[86] L.P. said that he was "set off" by the fact that she was on the phone all night, so he was planning to smoke another joint. Before doing so, she came out of the bedroom and he was laying on the couch, pretending to be asleep for about 15 minutes, so she went outside and smoked a joint by herself. She came back in the house and went in the bedroom, so he sent a text message and asked her if she wanted to come out to the living room area and watch a movie. She came out and he gave her a hug and said he was sorry for getting mad at her about "dumb stuff." However, L.P. said that C.M. then went back into the bedroom because her boyfriend was sending text messages to her, and she was "sexting" him. At the same time, he was carrying on a Snapchat conversation with C.M. about joining him in the living room to watch a movie.

[87] After C.M. finished exchanging text messages with her boyfriend, she came out to the living room area and shortly thereafter they went outside and shared another joint. When they got back inside, he sat next to her on the couch and that is when she started "cuddling up to me and stuff like that." L.P. said that he "passed out like five minutes after that" because he had not been sleeping well for several nights and then he woke up to "her humping my leg and all that stuff." L.P. said that he was in shock and tried to get himself off the couch but she grabbed his wrist and either said "no stay" or "L. stay." He felt that she knew it was him seated beside her, so he just looked away and "let it happen for about 10 minutes" and then she pushed him off the couch.

[88] L.P. said he did not know what to do and he did not know if she knew it was him sitting beside her. However, because she said his name "or at least I thought she did", he got up. He reiterated what he had said earlier - C.M. had taken his left wrist and unzipped her top with her other hand and put his hand on her left breast. He confirmed that she had nothing on underneath her sweater top. L.P. said that he did not become aroused, have an erection, or ever touch her anywhere else. After she pushed him off the couch, he went to the bedroom and cried for about an hour and then fell asleep.

[89] Then, the officer again asked about their conversation in the car on the way back to her hometown and some other general questions before the interview

ended. This first interview of L.P. had commenced at 4:14 PM on March 29, 2019 and concluded at 5:25 PM.

[90] The second cautioned audiovisual interview with L.P. was conducted on May 16, 2019, by Sgt. Fraser Firth. After some discussion about the possibility of a polygraph test, Sgt. Firth basically told L.P. what C.M. had said to the police, namely, that L.P. had grabbed her breast and that he had put his hand down her pants and digitally penetrated her. L.P. said that he was asleep, and he woke up to C.M. grinding on his leg and then she grabbed his left wrist, yanked him down and said: "no stay or L. stay."

[91] After that, Sgt. Firth asked questions of whether there was some misinterpretation of what the officer referred to as "signals" that C.M. may have sent to L.P. that evening or on prior occasions. L.P. stated that the way she was acting with him was "kind of" sending signals through the cuddling. He said that cuddling had occurred in the past but was "just not as intense" as it was on this occasion. He said that C.M. was "cuddling up to him and stuff" and that it really started after they had gone outside and smoked a joint. When they came back in, she put her arms around his shoulders which she did not usually do when they cuddled in the past. Then, L.P. fell asleep on the couch for about 20 minutes and woke up to "her humping my leg."

[92] L.P. added that during the whole evening C.M. had been "acting weird" and the night before, she had been "sexting" her boyfriend and talking about it with her friends. He added that she had told him that she was "sexting" her boyfriend while she was talking to him. L.P. said that she was "acting weird", and in his opinion, it was because that was her first time trying weed and alcohol. He then stated: "I screwed up and I let her drink at the same time." On the evening in question, L.P. said that C.M. smoked two joints.

[93] The officer asked whether L.P. thought that C.M. believed it was her boyfriend seated beside her based upon his statement that she had said "no stay or L. stay" when she pulled on his wrist. L.P. stated that he was not really sure what she said had, but he thought that he heard her say "L." and that is why he was in shock about what was going on.

[94] L.P. was asked when C.M. had started sending him "signals" during their visit to Halifax and he said that had occurred on both nights after she smoked the weed. He confirmed that she had some weed and alcohol the first night but added that she drank more alcohol and smoked more weed the second night. At this point,

Sgt. Firth then asked L.P. to provide a detailed summary of what occurred on the first evening in the HRM. He repeated what he had earlier said during the interview.

[95] Moving on to the events of the second night, Sgt. Firth asked L.P. to explain what he meant by the statement that things were more "intense" the second evening. L.P. said that normally they would sit next to each other, but this time she laid down, she put her arm around him and put her head on his shoulder which was more intense than just sitting beside each other. Then, Sgt. Firth asked L.P. whether he may have "misinterpreted signals" and that L.P. had put his hand in her pants on that second evening. After the officer suggested that it might have been something quick that happened, L.P. said "no it did not happen at all."

[96] Notwithstanding L.P.'s answer, Sgt. Firth said that there was no doubt in his mind that something had happened, and he added that L.P. may have "misread some signals that she was giving off that whole weekend." At that point, the following exchange occurred at pages 51-52 of the transcript:

> "Q. No. Okay. Well, that is, so it is a whole lot different if it, you know, if your finger was in there for a long time or if it was just for a moment, you know?
>
> A. Yeah
>
> Q. Was it just for a moment? Is that all…
>
> A. Yeah.
>
> Q. Okay. I am glad you told me that. I am glad you told me that. Because you know what? You and I both knew the truth.
>
> A. Yeah. I can… What happened, take both them stories and put it together.
>
> Q. All right. So… So…
>
> A. That's pretty much…
>
> Q. So, put… Put… Tell me the truth like now, did you… Is this something that…
>
> A. The truth is, she started playing with herself, she then started humping my leg. Because I woke up to her playing with herself…
>
> Q. Okay.
>
> A. And then she started humping my leg and then it went from that to… No, then she unzipped her top, that was also true, and took my hand, put it on her breast, that was true, and then I put my hand down her pants for a second, and then that… That was it. I yanked it out and went into the room because I didn't… Because I just… I kind of (inaudible) two at once because… Yeah

> Q. Okay. And I am sorry, why did you stop?
>
> A. Just because it clicked to me who was sitting next… Like, right beside me.
>
> Q. Okay.
>
> A. Like who like… Because I was… I had fell asleep and woke up to, like, little moans and stuff like that, then she started, like, a couple of minutes later started rubbing against my leg and then I thought it was someone else."

[97] Following that exchange, Sgt. Firth asked if C.M. reacted to him putting his finger down her pants, and he said that there wasn't anything that he could really remember. He stated that he was just lying on his back, looked over and realized that it was C.M. beside him with her head resting on his shoulder. Then, he immediately slid his hand out, got up and went into the bedroom. He estimated that his finger went in and out in may be two seconds.

[98] When asked whether C.M. was asleep the whole time, L.P. stated that she was not asleep because she was moving and grinding, and she also got up and undid her top with her eyes open. He said, again, that she had taken his right hand and put it on her breast and since he was stoned, he was not really thinking of what was going on. He then added at page 55 of the transcript: "I just woke up and like, okay, I am ready, then I put my hand down her pants and then from there, then that is when I realized, oh shit, this is my cousin, I need to stop. At I got up and got the hell out of there."

[99] Sgt. Firth asked L.P. why he had not told the police the truth before, and he stated that "who wants to admit to something like that." When questioned by Sgt. Firth at page 56 of the transcript what he was referring to, L.P. responded: "who wants to say that they put their fingers inside of their cousin, even accidentally, who wants to say that." A few moments later, L.P. added that when C.M. put his hand on her breast and about a minute later, "that is when I put my hand down her pants."

[100] At the end of the statement, Sgt. Firth told L.P. that C.M. had gone for a sexual assault examination and swabs were taken and he was asked whether there was any chance that his semen would be found there. L.P. stated that there would be no chance of his semen being located there because he did not ejaculate, although he had done "my business" the first night, He added that there may be a possibility of that because there was some semen in the bedroom and the next day she went into that bedroom to "sext" with her boyfriend.

Analysis:

[101] In a criminal trial, there is a presumption of innocence and an onus on the Crown to prove the charge(s) against any accused beyond a reasonable doubt. The burden of proof rests on the Crown and never shifts to the accused person. The presumption of innocence and the requisite standard of proof beyond a reasonable doubt are fundamental principles in our criminal law. The Supreme Court of Canada has established in cases such as **R. v. Lifchus,** [1997] 1 SCR 320 and **R. v. Starr,** [2000] 2 SCR 144 that "reasonable doubt" does not require the Crown to prove the allegations to an absolute certainty. Those cases have determined that a "reasonable doubt" does not involve proof to an absolute certainty, but more is required than proof that the accused is probably guilty.

[102] The Supreme Court of Canada has also pointed out that a reasonable doubt is not based upon sympathy or prejudice, nor is it an imaginary or frivolous doubt. It is a doubt based upon reason and common sense which is logically connected to the evidence or the lack of evidence. Reasonable doubt may arise if the Court determines that the evidence called by the Crown was vague, inconsistent, improbable, or lacking in cogency. Of course, reasonable doubt can also arise from testimony of an accused or any other defence evidence.

[103] In order to conclude that all of the essential elements of a sexual assault offence contrary to section 271 of the **Criminal Code** have been established, the Court must be satisfied that the Crown has proven, beyond a reasonable doubt, in addition to those essential elements which were not contested, (i.e. the date, time, jurisdiction and identification of the accused person) that:

1. L.P. applied some force to C.M.;
2. the force applied by L.P. took place in circumstances of a sexual nature.
3. C.M. did not consent to the force that L.P. applied;
4. L.P. intentionally applied that force; and that
5. L.P. knew or ought to have known that Ms. C.M. did not consent to the force that he applied or in other words, has the Crown disproved that L.P. was not acting under an honest but mistaken belief in communicated consent or was he wilfully blind or reckless as to her lack of consent; and

Has the Crown Established the Essential Elements of the *Actus Reus* of the Offence – (1) Touching; (2) the sexual nature of the contact and (3) the absence of consent?

[104] In terms of the first factual issue to resolve, I find that C.M. testified in a straightforward manner and was able to recall and recount the background events around her trip to the HRM with L.P. in detail. However, in relation to the key events, she acknowledged that her recollection was based only on a "glimpse" of a "nightmare" of what occurred. She candidly stated that she could not recall everything that had occurred after she "passed out" on a couch while watching a movie with L.P..

[105] With respect to the background circumstances leading up to C.M. and L.P. spending a couple of days in the HRM during March break, 2019, I find that there were very few, if any discrepancies between her account in court and the comments made by L.P. during his two interviews by police officers. L.P.'s voluntary interviews with the two police officers were filed as Exhibits in the trial, as part of the evidence presented by the Crown.

[106] By way of background to the events leading up to the incident in question, C.M. and L.P. both highlighted the fact that she had recently found out he was her first cousin and that he lived in a nearby community. After meeting, their relationship became quite close, with both describing it as being more like a brother and sister. The closeness of that brother and sister relationship was also highlighted by both stating that they regularly spoke to each other and that they had often slept overnight at each other's house and, on occasion, having slept in the same bed without there being any issues.

[107] On their second evening in the HRM, I find that both C.M. in her testimony and L.P. in his statements to the police officers described her consumption of three or four Smirnov ice coolers as well as a couple of joints of pre-rolled cannabis which had been purchased by L.P. at the NSLC. I find that C.M. and L.P., confirmed that this was the first time that she had consumed cannabis and alcohol at the same time. She stated that the combination of the cannabis and the alcohol made her "really tired" and shortly thereafter, she "passed out" sitting beside L.P. on a couch while they were watching a movie. L.P. stated that he fell asleep before C.M. because he had not slept well in the previous days but was awakened by her grabbing his arm and then her placing his hand on her breast.

[108] For her part, C.M. stated that, after she "passed out", she was only awake for a few moments that evening, but during that time, she had a "glimpse" of L.P. touching her breast with one hand and with his other hand inserting his fingers in her vagina.

[109] L.P. stated in both police statements that C.M. had taken his arm, she unzipped her sweater top a little bit and then she placed his hand under the sweater on top of her bare breast. In the first interview with a police officer, L.P. said that nothing else had occurred that evening and that he was pushed off the couch by her and then went to sleep in the bedroom in the lower level of the house. However, during the second interview, L.P. reiterated what he had said in the earlier interview with respect to C.M. placing his hand on her breast but, towards the end of the second interview, L.P. added that after she put his hand on her breast and about a minute later, he placed his other hand down under her pants for short time and inserted his finger into her vagina. He told the police officer that his finger only went in and out of her vagina for a couple of seconds before he "realized" it was his cousin and he went to the bedroom.

[110] When I consider that C.M. stated that, during her momentary "glimpse" of consciousness, she "sensed" something had happened after she fell asleep but was not certain whether it really did occur, I find that the totality of the evidence did establish that what she had "sensed" during the "glimpse" was certainly a reality and not a dream. First, there is L.P.'s acknowledgement, in both interviews, that his hand had been on her breast, although during both interviews he maintained that C.M. had taken his left hand and that she placed it on her bare breast. As mentioned, during the second interview with the police officer, I find that L.P. admitted that moments after touching C.M.'s breast, he then slid his right hand under her sleepwear and underwear after she fell asleep on a couch while watching a movie with him on the evening in question. L.P. also admitted that he then inserted a finger or fingers into her vagina for a few moments before pulling his hand out and going to sleep in the bedroom in the lower level of the house. In those circumstances, I find that the evidence established that L.P. did apply force in the manner described to C.M.'s left breast and to her vagina.

[111] With respect to the issue of whether L.P. intentionally applied force to C.M.'s breast and her vagina, based upon his admissions towards the end of the second interview, where he admitted that he put his hand "down her pants" and his fingers into her vagina even for only a brief period, I find that there is no doubt that those were certainly intentional actions by him to apply that force to her vagina.

Unlike the touch of her breast, which L.P. maintained, during both interviews, to have occurred by C.M. grabbing his hand and placing it on her breast, there was no similar claim that she grabbed or manoeuvred his hand to the area of her vagina. Moreover, L.P. never claimed in his statement to the police that she had any role in him inserting a fingers or fingers into her vagina.

[112] Furthermore, I find that the DNA evidence which confirmed that L.P.'s DNA was located on the thong underwear worn by C.M. on the evening in question is certainly consistent with the evidence which I have accepted that he intentionally inserted his finger or fingers into her vagina. I find that, for L.P. to have placed his hand directly on C.M.'s genitalia while she was wearing thong underwear and pyjama bottoms, his hand would have had to touch the thong underwear to lift it away from her body, in order to insert his finger or fingers directly into her vagina.

[113] While the expert, Ms. Downs could not conclude whether L.P.'s DNA was on the inside or outside of the thong underwear, worn by C.M., I find that the Ms. Downs' evidence established that it is highly unlikely there was an indirect transfer of his dry DNA that may have been the semen that he claimed to have left on the bed from doing his "business" the night before.

[114] In addition, with respect to the expert's opinion that an indirect transfer of dry DNA on the bed sheets to C.M.'s underwear, was highly unlikely, I accept C.M.'s evidence that she never sat on the bed in the bedroom on the lower level without wearing her clothes or pyjamas and that she had kept the thong underwear on and stood beside the bed, when she changed into her pyjama bottoms. After changing into her sleepwear and speaking with her boyfriend who was out of the country, I accept her evidence that she left the bedroom, went into the living room area, sat on the couch beside L.P. and they watched a movie for awhile before she fell asleep in that location. L.P.'s statements to the police officer were consistent with C.M.'s account to the extent that when she returned to the living room area and that she "cuddled up" beside him on the couch to watch the movie.

[115] While L.P. stated in both interviews that C.M. had placed his hand on her breast, L.P. had maintained that he had fallen asleep before C.M., but added that he was awakened by her making noises of some sort, which C.M. had acknowledged was possible, by saying that she does snore in her sleep. During his interviews, L.P. also said that, together with the noises, he was also awakened by her "humping his leg." On that point, during C.M.'s direct and cross-examination, she

did not agree with the suggestion that she had been "humping his leg" but did acknowledge that in her sleep she does often rub her legs together and that there could have been some unintentional contact with him, after she fell asleep.

[116] When I consider those comments by L.P. and C.M.'s evidence, I find that they are completely consistent with her evidence that she had "passed out" and was sound asleep and unconscious. In fact, during her cross-examination, C.M. agreed with Defence Counsel that, when she first reported the incident to the police, she was "unclear of the actions that happened" and was only able to recall a "glimpse" in a moment of consciousness but could not move and then passed out again.

[117] In those circumstances, I find that C.M. had "passed out" and was unconscious during the touching of her breast and her vagina by L.P.. During her testimony, C.M. categorically stated and was unshaken on cross-examination that she did not unzip her top, she did not grab and then place L.P.'s hand on her breast, nor did she let his hand stay on her breast for several minutes. Since C.M. had stated that she had fallen asleep and was essentially unconscious but for a brief "glimpse" of what she could recall having occurred, I find that the evidence established that she did not consciously initiate or agree to any of the subsequent actions taken by L.P.

[118] For his part, during his interviews, L.P. had stated that he was awakened by her and reacted to her "signals." In terms of those "signals" which L.P. mentioned during his police interviews, I find that there was no conscious exchange of any words prior to his actions and neither he nor C.M. mentioned any conversation that she wished to be intimate with him then or at any prior time. L.P.'s position was that he was awakened by C.M.'s "signals" and simply reacted to them when she initiated the intimacy by grabbing his hand and placing it on breast.

[119] In those circumstances, even if I was to consider his alternative explanation for the touching of C.M.'s bare breast, I find that his version is based upon a claim of misinterpreting and reacting to his unconscious cousin's "signals" after he was awakened by her actions. When I consider the events leading up to L.P.'s claim that his cousin had given him those "signals," I find that, if there were any "signals" given by C.M., which she denies and based upon her evidence which I accept, they could only have been made while she was "passed out," asleep and essentially unconscious. In terms of the possibility of L.P. misinterpreting any "signals," it also bears repeating that neither he nor C.M. had ever expressed any prior intention to be intimate with each other and although they both felt a close

attachment to each other as cousins, they described their relationship as being more like a brother and sister.

[120] As a result, I find that it is highly unlikely that L.P. misinterpreted any "signals" on the evening in question and I find that the implausibility of that statement was highlighted by L.P. himself, during his interview with the police officers. During the second interview, L.P. was asked if he thought that C.M.'s "signals" were due to her believing that it was her boyfriend seated beside her on the couch. L.P. initially stated that he believed that C.M. knew it was him seated beside her on the couch, because he thought that she said: "no stay or L. stay" when she pulled on his wrist to have him stay with her and then he "let it happen for 10 minutes." However, a few moments later in the interview, I find that L.P. contradicted his previous comment and attempted to rationalize his actions stating that he thought that she knew it was him, but he may have "misread some signals," when he woke up to her rubbing his leg and "then I thought it was someone else."

[121] Given the fact that I find that he must have known that she had never expressed any indication of wanting to be intimate with him on any prior occasion and realizing that he told the officer that he may have misinterpreted her "signals," the rationalization for his actions cannot be based on his belief, as proffered by Defence Counsel during the closing submissions, that C.M.'s actions were probably based upon her dreaming that she was actually with her boyfriend on the couch. During the interview with the officer, I find that L.P. was also trying to find a way to rationalize his actions by saying that he initially thought he was with someone else. Once again, I find that these comments by L.P. highlight the fact that when he touched C.M.'s breast and her vagina, she was asleep and unconscious, and that she had not "subjectively consented" to engaging in that sexual activity, let alone consenting to engage in that activity with her cousin.

[122] In the final analysis, with respect to the touching of C.M.'s breast, I find that L.P. made a conscious decision to either place his hand on her bare breast or in the unlikely event that C.M. actually dreamt that she was with her boyfriend and she placed L.P.'s hand on her breast while she was unconscious, he was conscious at that moment and knew or ought to have known that she had no interest in being intimate with him. Based upon her evidence which I accept and L.P.'s comments during the police interviews, I find that he then, knowingly, did not pull his hand away, but rather, left his hand on her bare breast and in his words, "let it happen for about 10 minutes" while his cousin was asleep and in an unconscious state.

[123] In terms of what I have found, at the very least, to be L.P.'s continued touching of C.M.'s bare breast, I find that, he then sought to further rationalize his actions, by telling the police officer that he was "stoned" and he initially "thought" that it was someone else lying beside him, when he put his hand down her pants and inserted his finger or fingers in C.M.'s vagina before he "realized" that it was his cousin and stopped. Certainly, C.M.'s evidence was consistent with L.P.'s comments regarding the consumption and effect of the cannabis on both of them, during their second evening in the HRM.

[124] Based upon L.P.'s comments that he was "stoned" and that he possibly "misinterpreted" C.M.'s "signals" prior him inserting his finger or fingers into her vagina, it would appear that L.P. was then trying to rationalize his actions because he was "stoned" and it took him some additional time before he "realized" that he just put his fingers in his cousin's vagina before stopping. In terms of what appears to be L.P.'s claim that he was "stoned" and that caused his "misreading" or "misinterpretation" of C.M.'s "signals," I find that L.P.'s claim is based upon self-induced intoxication which I find does not provide a defence to the charge before the Court or that, due to his intoxication, he believed that the complainant had consented to the activity which forms the subject matter of the charge.

[125] In particular, I find that Section 273.2(a)(i) and (ii) **Criminal Code** removes the availability of so-called "apprehended consent" where the accused's belief arose either from (i) the accused's self-induced intoxication, or (ii) the accused's recklessness or wilful blindness to the fact that the complainant had not "subjectively consented" to the activity that forms the subject matter of the charge and to engage in that activity with L.P.

Has the Crown established the sexual nature of the contact?

[126] This element of the offence, like the application of force in any direct or indirect manner by the accused to the complainant, is determined objectively and based upon the Supreme Court of Canada's comments in **R. v. Ewanchuk**, [1999] 1 SCR 330 at para. 25, "the Crown need not prove that the accused had any *mens rea* with respect to the sexual nature of his or her behaviour."

[127] In **R. v. Chase**, [1987] 2 SCR 293 at 302, the Supreme Court of Canada stated that the test to be applied in determining whether the impugned conduct has the requisite sexual nature is an objective one: "viewed in light of all of the

circumstances, is the sexual or carnal context of the assault visible to a reasonable observer."

[128] In order to determine the "sexual nature" of the contact, several cases have concluded that the objective determination may be made by considering the part of the body touched, the nature of the contact, the situation in which the contact occurred, the words or gestures accompanying the act, and all other circumstances surrounding the conduct.

[129] I find that the Crown has established, beyond a reasonable doubt, based upon an objective assessment of a reasonable observer that the contact was of a sexual nature. Clearly, L.P. claimed, in his statement, that C.M. had placed his hand on her breast, which she categorically denied. Putting aside for a moment the issue of whether the force was intentionally applied, based upon C.M.'s "glimpse" and L.P.'s admissions during the interviews with police officers, I find that there is no dispute between the parties that he had his hand on her bare breast under her sweater top for a few minutes prior to him then inserting a finger or fingers into her vagina for, at least, a few moments.

[130] While there are certainly conflicting accounts with respect to how L.P.'s hand came to be placed on C.M.'s breast, it appears from his own admissions during the interviews with the police officers that, even if she placed his hand on her breast, I find that L.P. then made a conscious decision to leave his hand on her bare breast for several minutes. He also admitted during the second interview that, after touching of C.M.'s breast for an unspecified period, then, on his own initiative, he put his hand under her pyjama pants and thong underwear to insert his finger or fingers "inside his cousin" for a few moments before stopping and pulling his hand away.

[131] I find that L.P.'s admission of touching and then leaving his hand on C.M.'s bare breast and then inserting his fingers into her vagina were certainly consistent with C.M.'s evidence in relation to what she momentarily sensed during what she described as a "glimpse" of what had occurred, while she was momentarily awake after "passing out" and falling asleep. I find that her evidence and L.P.'s admissions are also consistent with what C.M. described as a "weird feeling" that she had the next morning when she woke up.

[132] In those circumstances, I find that the Crown has established beyond a reasonable doubt that L.P. touched and then left his hand touching C.M.'s bare breast for several minutes and shortly thereafter, he put his hand down her pyjama

pants and thong underwear to insert his finger or fingers in her vagina for a few moments. I find that, regardless of how his hand came to be placed on her breast, after the initial touching her breast, L.P. was awake and aware of what he was doing and then made a conscious decisions to leave his hand on C.M.'s bare breast for several minutes and to insert his finger or fingers into her vagina for a few moments.

[133] When I consider the parts of the body touched, the fact that L.P. admits to inserting his fingers in her vagina and his contact and the force being applied to her body while she was asleep, "passed out" and essentially unconscious, I find that there can be no doubt in relation to the sexual nature of L.P.'s actions. In addition, I find that the Crown has established beyond a reasonable doubt that there was a violation of C.M.'s sexual integrity and that the sexual context of that physical contact would be readily apparent to any reasonable observer familiar with all of the circumstances.

Has the Crown established the absence of consent to that touching?

[134] With respect to the issue of whether the Crown has established that C.M. did not consent to the force which was applied to her breast and her vagina under her clothing by L.P., I find that the applicable case law has established that this element of the offence is determined subjectively, by reference to the complainant's state of mind toward the touching at the time when it occurred: see **R v. Barton** 2019, SCC 33 at para. 88 and **R. v. Ewanchuk**, [1999] 1 SCR 330 at para. 26.

[135] In those cases, the Supreme Court of Canada has made it clear that this key element of the offence may also be addressed by posing and answering the question of whether "the complainant in her mind wanted the sexual touching to take place"- See **Ewanchuk** at para. 48 and **Barton** at para. 89. The focus is squarely on the complainant's state of mind, and it is important to note that the Supreme Court of Canada has clearly stated that the accused's perception of that state of mind is irrelevant at this stage of the analysis.

[136] For the purposes of sexual assault charges pursuant to section 271, 272 or 273 of the **Criminal Code**, "subjective consent" is defined as "the voluntary agreement of the complainant to engage in the sexual activity in question": See section 273.1(1) of the **Code.** Moreover, section 273.1 (1.1) of the **Code** states that

the "consent must be present at the time the sexual activity in question takes place."

[137] The issue of whether the complainant "subjectively consented" in her mind to the sexual activity in question at the relevant time is, of course, a question of fact. Here, C.M. clearly stated that, in relation to her state of mind with respect to L.P. touching her breast and inserting his finger or fingers into her vagina, she had not consented to any of the touching of her body by L.P.. Despite a vigorous cross-examination, C.M. steadfastly reiterated clearly and categorically that she had not consented in any way to the sexual activity in question. I accept her evidence that she did not express any words which conveyed her "subjective consent" nor did she ask him to engage in the sexual activity in question with her.

[138] In addition, I also find that C.M.'s testimony was credible and reliable, in relation to the impact on her from the consumption of several Smirnov ice coolers and for the first time in combination with cannabis which made her, in her words, "really tired" and she could not stay awake. I find that her evidence with respect to the impact on her from the combination of the cannabis and alcohol being consumed at the same time, for the first time, was consistent with the comments made by L.P. to the police officers. I accept her evidence that, while she was seated on the couch next to L.P. as they watched a movie and that she, in her words, "just passed out." I find that the sexual activity, which involved, at a minimum, L.P.'s continued touching of her breast and inserting his finger or fingers into her vagina, occurred after she had "passed out" and was unconscious, lying next to him on the couch in her pyjamas.

[139] With respect to the issue of whether she had "subjectively consented" to the force and touching that was applied to her body by L.P., I find that C.M. did not embellish her testimony. Quite to the contrary, I find that she affirmed that she did not recall all the details of what occurred after she "passed out." In addition, she candidly stated that she only had a brief "glimpse" while she was temporarily awake and aware of what was going on, before falling asleep again until the next morning. She also acknowledged during her cross-examination that, shortly after the incident, in her initial statement to the police, she had told the police the same thing, that is, that she did not remember the entire situation, but only had a "glimpse" of what had occurred.

[140] Notwithstanding the fact that C.M. had limited a recollection of what had occurred, I accept her evidence that, based upon that "glimpse" and what she

described as a “weird” feeling in her vagina the next morning, she confronted L.P. during the drive home about a “nightmare” that she had the previous evening. I accept C.M.’s evidence in relation to the confrontation of L.P. about the “nightmare”, which was consistent with the information provided by L.P. during his interviews, that she had confronted him about the “nightmare” that what he had done was “gross” and that he had touched her during that “nightmare.” C.M. stated that L.P.’s response was “that it was not a nightmare, it was real, and it happened.”

[141] Based upon his reply, C.M. believed that his answer confirmed that what she had sensed and described as a “gross nightmare” had actually occurred during her “glimpse” of consciousness the previous night and was not something that she had imagined or dreamt. C.M. also testified that, after she confronted L.P. about the “nightmare” on the drive back to her home, he came up with an explanation which she called a “BS story” about a wager that he claimed they had made that he could fool her into believing something for 24 hours that “she could not see through.” C.M. understood from that discussion that L.P. was claiming that nothing had happened the previous evening, which is what L.P. initially said to the police officers. However, C.M. stated that she did not believe L.P. and continued to confront him, based upon her “glimpse” that he had done something quite “gross” to her.

[142] While it was suggested during cross-examination that C.M. was not sure as to what had happened because she had “passed out” and only had a “glimpse” of what she may have thought occurred, she was steadfast in her recollection that something “gross” had happened after she passed out. When I consider L.P.’s subsequent acknowledgement to the police officer during the second interview that he had lied to C.M. about the bet and he admitted to having put his fingers inside C.M.’s vagina, I find that L.P.’s initial responses when confronted about the “gross nightmare” on the drive home, that “it” referring to her “gross nightmare” was “real” and had “happened” were, in fact, truthful responses and that, among other things, he had inserted his finger or fingers into her vagina.

[143] I accept her evidence that <u>prior</u> to “passing out” on the couch while watching a movie with L.P., she was conscious and would have had an “operating mind.” At that time, I accept C.M.’s evidence that she did not express any voluntary agreement to engage in the sexual activity in question, she did not ask or guide L.P.’s hand to touch her breast and she did not in any way “subjectively consent” to L.P. putting his fingers inside her vagina. I accept C.M.’s evidence that no force

or touching of a sexual nature occurred prior to her "passing out" while she was wearing her pyjamas, sitting beside L.P. on a couch watching a movie.

[144] Furthermore, I accept C.M.'s evidence which I found to be credible and reliable that, as result of the consumption of alcohol and cannabis at the same time and possibly being tired as it was late in the day, while she was seated on a couch beside L.P. watching a movie, she "passed out" and was sound asleep, was for all intents and purposes, unconscious.

[145] However, after C.M. "passed out" on the couch seated beside L.P., I find that she recalled what she regarded as a "gross nightmare" which involved her being momentarily awake before "passing out" again and that L.P. had placed his hand on her bare breast under her sweater top and then put his hand under her pyjamas and underwear and inserted a finger or fingers into her vagina for a few moments. In those circumstances, I find that, both before and after the brief "glimpse" of L.P.'s actions, C.M. was in an unconscious state, and I find that she did not "subjectively consent" to the sexual activity in question. As a result, I find that, at all material times to the incident before the court, C.M. did not have an "operating mind" to be able to "subjectively consent" to exercise a choice to engage in any sexual activity or to specifically engage in that activity with L.P..

[146] In those circumstances and having accepted C.M.'s evidence that she had "passed out" and was unconscious when L.P. applied force and touched her breast and inserted his fingers into her vagina, I find that the facts and circumstances of this case bring the provisions of section 273.1 (1) and 273.1(2)(a.1) of the **Criminal Code** into play. I find that section 273.1(2)(a.1) of the **Code** establishes that C.M. could not legally consent to the contact of a sexual nature as I have found that she had "passed out" and was unconscious when L.P. applied force and touching of a sexual nature to her body.

[147] The relevant provisions of s 273.1 of the **Code** provide as follows:

> "Section 273.1(1) – Meaning of "consent" subject to subsection (2) and subsection 265(3), "consent" means for the purposes of section 271, 272 and 273, the voluntary agreement of the complainant to engage on the sexual activity in question.
>
> 273.1(2) – No consent obtained – For the purpose of subsection (1), no consent is obtained if (a.1) the complainant is unconscious."

[148] I find that, even in L.P.'s statements to the police officers and in his subsequent text messages in which he claimed that C.M. had "initiated" the touching of her bare breast, there were no references to any words, which were consciously expressed by her that might indicate that she had "subjectively consented" to the insertion of his finger or fingers in her vagina. However, during his police interviews, L.P. had initially claimed that the sexual activity was instigated by C.M.'s conduct or "signals" by "humping his leg," making moaning noises and then grabbing his hand and guiding it onto her bare breast.

[149] During her cross examination with respect to those two points, I find that C.M. acknowledged that she could not state whether there may have been some unintentional contact with L.P. based upon her possibly rubbing her legs together while she is asleep. In addition, she also acknowledged that she often snores when she is asleep and that it is possible that her snoring, could sound like a moan. However, C.M. was steadfast in stating, on both direct and cross-examination, that she had not unzipped her top, she had not taken L.P.'s hand and put it on her breast or let him leave it there for up to 15 minutes. She stated the same thing in denying that there were any words or actions that might indicate her "subjective consent" to him inserting his fingers into her vagina.

[150] When I consider L.P.'s statements to the police officers and C.M.'s evidence in relation to his claimed "misinterpretation of signals", I find that the her rubbing of her legs together and possibly making unintentional contact with L.P. and her snoring, are, in reality, only consistent with the possibility that they may have occurred, while she was asleep and essentially unconscious on the evening in question.

[151] As a result, even considering L.P.'s claims made during the police interviews that he reacted to her "signals," I find that his comments and C.M.'s evidence established that there were never any words expressed by her which indicated her "subjective consent" to the physical acts of a sexual nature with him. Given C.M.'s evidence, which I accept, regardless of how his hand came to be on her breast, as mentioned previously, I find that L.P. then made two conscious decisions, which he acknowledged during his second police interview, that while she was asleep and unconscious, he decided to leave his hand on her bare breast for several minutes and then to place his other hand under his cousin's pyjamas and thong underwear to insert his finger or fingers into her vagina. I find that, when L.P. made those conscious decisions, the evidence established that C.M. did not

have an “operating mind” to consider his actions, let alone to “subjectively consent” to them.

[152] As a result, I find that C.M. had not “subjectively consented” to any of the acts of a sexual nature with L.P. while she had an “operating mind.” Therefore, I find that L.P.’s conscious decisions to apply force and after touching C.M.’s breast to then leave his hand there for several minutes and shortly after doing that, inserting his finger or fingers into her vagina, occurred while she was “unconscious”. In those circumstances, I find that C.M. would not have been legally able to consent to the sexual activity in question.

[153] Finally, dealing with the issue of “subjective consent,” I find that the comments of the Supreme Court of Canada in **R. v. GF**, 2021 SCC 20, also address an issue raised by the defence that L.P.’s misinterpretation of C.M.’s “signals” may have led to him operating under an honest but mistaken belief as to her communicated consent. Defence Counsel had submitted, based upon L.P.’s police statements prior to his admission of inserting his finger or fingers in C.M.’s vagina that she had initiated the sexual contact by unzipping her sweater top, grabbing L.P.’s hand, and placing it on her breast, while asleep and under the combined influence of alcohol and cannabis, based upon a possibility that she may have believed that the person beside her on the couch was her boyfriend. Of course, the evidence had established that her boyfriend was out of the country with his family during the 2019 school March break.

[154] I find that this submission that L.P. believed that C.M. had communicated her consent to the sexual activity in question, obviously not by words, but rather by what he maintained were leg movements and sounds, has no foundation in law. First, as I have indicated in the preceding paragraphs, I find that the hypothetical scenario is premised on the fact that C.M. may have unconsciously expressed her “subjective consent” through conduct while she was asleep and unaware of who was actually beside her on the couch. Clearly, the provisions of section 273.1(2)(a.1) of the **Code** stipulate that she could not legally consent in circumstances where she was unconscious to the sexual activity in question.

[155] In addition, with respect to the issue of “subjective consent” and a complainant’s capacity to consent, the Supreme Court of Canada clearly stated in **R. v. GF**, *supra*, at para. 24 that: “…. Where the complainant is incapable of consenting, there can be no finding of fact that the complainant voluntarily agreed to the sexual activity in question. In other words, the capacity to consent is a

necessary – but not sufficient – precondition to the complainant's subjective consent."

[156] In **GF**, *supra*, at paras. 55-58, the Supreme Court of Canada clarified the issue of capacity to consent as a precondition to "subjective consent" in the following manner:

> "[55] As capacity is a precondition to subjective consent, the requirements for capacity are tied to the requirements for subjective consent itself. Since subjective consent must be linked to the sexual activity in question, the capacity to consent requires that the complainant have an operating mind capable of understanding each element of the sexual activity in question, the physical act, its sexual nature, and the specific identity of their partner.
>
> [56] There is one further requirement. Because subjective consent requires a "voluntary agreement", the complainant must be capable of understanding that they have a choice of whether or not to engage in the sexual activity in question: **Criminal Code** section 273.1 (1). At the very least, a voluntary agreement would require that the complainant exercise a choice to engage in the sexual activity in question… In **JA**, this Court held that consent requires that the complainant have "an operating mind" at the time of the touching, capable of evaluating each sexual act and choosing whether or not to consent to it… Thus, and unconscious complainant could not provide contemporaneous consent."
>
> [57] In sum, for a complainant to be capable of providing subjective consent to sexual activity, they must be capable of understanding four things:
>
> 1. the physical act;
>
> 2, that the act is sexual in nature;
>
> 3. the specific identity of the complainant's partner or partners; and
>
> 4. that they have the choice to refuse to participate in the sexual activity.
>
> [58] The complainant will only be capable of providing subjective consent if they are capable of understanding all four factors. If the Crown proves the absence of any single factor beyond a reasonable doubt, then the complainant is incapable of subjective consent, and the absence of consent is established at the *actus reus* stage. There would be no need to consider whether any consent was effective in law because there would be no subjective consent to vitiate."

[157] When I consider the foregoing comments of the Supreme Court of Canada in **GF** and the submissions of Defence Counsel that L.P.'s actions were based on an honest but mistaken belief as to her consent, I find that the evidence established, beyond a reasonable doubt, that C.M., at material times, did not have an "operating

mind" capable of understanding each sexual act and then choosing whether or not to consent to it or them.

[158] L.P. had not claimed during his police interviews that C.M. had ever expressed any words that might indicate her "subjective consent" to the sexual activity in question. However, he had claimed during those interviews that her conduct, which he maintained were "signals" which woke him up were what he interpreted as an intention to initiate sexual contact. As he stated during the second police interview, when he received those "signals," he said to himself: "I am ready" and then, put his hand down her pants.

[159] With respect to the submission that C.M. had somehow "subjectively consented" to the sexual activity in question by "signals", I find that the evidence established, beyond a reasonable doubt, that when L.P. claimed to receive those "signals" from C.M., based upon the totality of the evidence, they could only have occurred after she had "passed out" and was essentially "unconscious." In those circumstances, I find that C.M. could not legally consent to the sexual activity in question, nor could she have understood that she had a choice to refuse to participate in the sexual activity or that she understood, that she had, in any way, "subjectively consented" to the sexual activity with her cousin, L.P., who she was like a brother to her.

[160] In the final analysis, I find that the Crown has established beyond a reasonable doubt, that while C.M. was conscious and had an "operating mind" which would have been capable of understanding the four factors outlined above by the Supreme Court of Canada which must be satisfied to establish "subjective consent," she did not formulate any conscious and voluntary agreement in her own mind to engage in the sexual activity in question: see **Barton**, *supra,* at para. 88.

[161] Having come to those conclusions and having concluded that the sexual activity in question by L.P. occurred after C.M. had "passed out" and was unconscious, I find that section 273.1 of the **Criminal Code** is determinative of the issue of whether C.M. could consent to that sexual activity while she was unconscious. This section clearly defines "consent" for the purposes of sexual assault offences, and requires that consent must be present at the time when the sexual activity in question takes place. Subparagraph 273.1(2)(a.1) of the **Code** clearly states that "no consent is obtained if the complainant is unconscious."

[162] As a result, I find that C.M. did not voluntarily indicate her "subjective consent, nor could she have voluntarily and legally consented to engage in the

sexual activity in question with L.P., while she was unconscious. I therefore find that C.M. did not consent to any of the four key aspects or factors of determining "subjective consent to sexual activity" as highlighted by the Supreme Court of Canada in **GF**, *supra*, at para. 57.

[163] In terms of this essential element, I find that the Crown established, beyond a reasonable doubt, that the complainant, being unconscious at all material times to this incident, did not and could not legally provide her "subjective consent" by way of a voluntary and contemporaneous agreement to engage in the sexual activity in question with L.P.. As a result, I find that the Crown has also established, beyond reasonable doubt, the absence of her consent as part of the *actus reus* of this offence.

Has the Crown Established the Essential Elements of the *Mens Rea* of the Offence – (1) intention to touch and (2) knowledge of, or wilful blindness or recklessness as to a lack of consent on the part of the person touched?

[164] With respect to the *mens rea* of the sexual assault charge, I find that the case law has established that the Crown is required to prove, beyond a reasonable doubt, two elements: (1) intention to touch; and (2) knowledge of, or wilful blindness or recklessness as to a lack of consent on the part of the person touched: see **Barton**, *supra* at para. 87, **GF**, *supra*, at para. 25 and **Ewanchuk**, *supra* at para. 42.

[165] While I have essentially canvassed the intentional aspect of touching as part of the consideration of the essential elements involved in the *actus reus* of this offence, it is important to note that sexual assault is considered to be a crime of general intent. In those circumstances, in accordance with the comments of the Supreme Court of Canada in **Ewanchuk**, supra, at para. 41, "the Crown need only prove that the accused intended to touch the complainant in order to satisfy the basic *mens rea* requirement" of intention to touch.

[166] With respect to the whether the Crown has established, beyond a reasonable doubt, L.P.'s intention to touch, in particular, C.M.'s vagina, I accept C.M.'s evidence, which is consistent with L.P.'s admission during his second police interview that he inserted his finger or fingers into her vagina for a few moments. In addition, based upon C.M.'s evidence and L.P.'s admission, I find that the location where his hand went and then him taking the further action of inserting his finger or fingers into her vagina, are, in my opinion, indicative of and certainly consistent with a clear intention to do so.

[167] In addition, I find that L.P.'s intention to touch and then insert his finger or fingers into her vagina is also supported by the expert evidence that his DNA was present on her underwear, which she was wearing under her pyjamas on the evening in question.

[168] During his second police interview, L.P. was asked whether it was possible any of his semen would show up in a sexual assault examination. He initially said that there was "no chance" of that occurring, because he had not ejaculated on the second night but then mentioned that he had done "his business" during the first night in the HRM and there might have been some semen in the bedroom. Based upon that statement, Ms. Christine Downs, who was qualified as a Forensic DNA Specialist, provided an opinion that it was unlikely for there to be an indirect transfer of DNA of dry semen from the bed sheets to C.M.. Moreover, I have accepted C.M.'s evidence that she stood when she changed into her pyjamas and kept her thong underwear on the entire time and, in those circumstances, I find that the unlikelihood of an accidental transfer of L.P.'s DNA is amplified by virtue of the fact that her thong underwear itself did not come directly into contact with the bed or bed sheets.

[169] Regardless of the source of L.P.'s DNA or the fact that the expert could not conclude whether his DNA was on the inside or the outside of the back gusset or crotch [referred to as area "AB"] of C.M.'s thong underwear, I find that the expert's opinion with respect to the DNA in the area marked as "AB" of her report, conclusively established that the DNA located there was of mixed origin, from two individuals, with the female component being from C.M. and the male DNA component being from L.P. As mentioned, the presence of L.P.'s DNA on C.M.'s thong underwear, which was worn under her pajama pants, is certainly consistent with an intention to touch her vagina.

[170] However, while L.P. admitted during his second interview with the police officer that he had inserted his finger or fingers into C.M.'s vagina for a few moments, at the end of the interview, he was asked why he had not told the police the truth previously. In response, L.P. stated "who wants to say that they put their fingers inside of their cousin, even accidentally, who wants to say that." Based upon that comment by L.P. to the police officer, he appears to have claimed that the insertion of his fingers into her vagina was "accidental." As a result, it will be important to consider his statement that the insertion of the fingers into the vagina was "accidental" and not intentional.

[171] In the Supreme Court of Canada decision in **Barton**, *supra*, at paras. 186-192, the Court canvassed the definition of an "accident" in a criminal law context. Justice Moldaver noted, at para. 186, in referring to excerpts from the authors of two criminal law sources that, in a legal context, "an accident is, in the popular and ordinary sense, a mishap or untoward event not expected or designed." The Court also cited with approval that "the term 'accident' has a more specialized meaning in a criminal law context and is used to signal one or both of the following: (1) that the act in question was involuntary (i.e. non-volitional), thereby negating the *actus reus* of the offence; or (2) that the accused did not have the requisite *mens rea*."

[172] When I consider the totality of the evidence with respect to the touching of C.M.'s vagina, L.P.'s admissions, and the DNA evidence, I find that the Crown has established, beyond a reasonable doubt, that L.P. intended to touch her vagina. I find that it was not something done by mishap or something that occurred unexpectedly. In fact, quite to the contrary, I specifically find that L.P.'s touching of her vagina was not unintentional or unexpected, or put another way, was by "accident". I find that the Crown has established, beyond a reasonable doubt, that after L.P.'s hand was on C.M.'s bare breast for a period of time, on his own initiative and as he told the officer, he thought "I am ready" and then he intentionally reached down put his hand under her pyjamas and her thong underwear, and inserted to insert his finger or fingers into her vagina.

[173] For all of the foregoing reasons, I have concluded that the Crown has established, beyond a reasonable doubt that L.P.'s touching of C.M.'s vagina was not an involuntary or "accidental" act, but rather, it was a volitional, intentional action. Notwithstanding the claim made by L.P., I find that what he described and what C.M. "sensed" during her "glimpse" of what occurred and what the DNA confirmed, was that immediately after leaving his hand on her bare breast, L.P. made a conscious decision to intentionally put his hand down under her pyjamas and underwear and then to insert his finger or fingers into her vagina.

[174] With respect to the force and touching applied to C.M.'s breast, L.P. maintained during his police interviews that she had placed his hand on her breast, which C.M. categorically denies. In those circumstances, there is certainly a factual dispute about how L.P.'s hand came to be placed on C.M.'s breast. However, as I previously indicated, I find that even if I was to accept his claim as to how his hand came to be on her breast or that conflicting version left me in reasonable doubt, I find that C.M.'s evidence and L.P.'s statement establish that, once his hand was on

her breast, he then made a separate and conscious decision while he was awake and aware of the circumstances, to leave his hand on her breast for several minutes.

[175] In those circumstances, regardless of how L.P.'s hand came to be on C.M.'s breast, I find that the Crown has established, beyond a reasonable doubt, an intention on the part of L.P. to, at the very least, continue to touch her bare breast for several more minutes before he removed his hand when he said that he "realized" that he was lying on a couch beside his cousin.

[176] Put another way, looking at the comments of the Supreme Court of Canada in **Barton**, *supra*, with respect to what might be considered to be an "accident," I find that, based upon L.P.'s claim, the initial placement of his hand on her breast may have been involuntary and non-volitional at the outset. However, when I consider his comments that his hand stayed on her bare breast for several more minutes, possibly up to 15 minutes according to him, I find that L.P., being awake and aware at that time, made a volitional and intentional decision to leave his hand on the bare breast of his cousin who had "passed out" and was lying unconscious beside him on the couch.

[177] Given the circumstances in which the touching occurred with respect to whether the Crown had established the *mens rea* of the offence, I find that the Crown has established, beyond a reasonable doubt, L.P.'s intention to touch the complainant. In addition, as I have previously stated, I find that the physical force or touches applied by L.P. to C.M.'s breast and her vagina, took place in circumstances of a sexual nature and were of a sexual nature.

[178] With respect to the second aspect of the *mens rea,* the Crown must prove beyond a reasonable doubt that the accused either knew that the complainant was not consenting or was wilfully blind or reckless as to C.M.'s lack of consent. In this case, there is no evidence that C.M. ever conveyed any words to L.P. upon which he could claim to have had an honest but mistaken belief in a communicated consent by her to his touching of her breast or her vagina.

[179] However, based upon Defence Counsel's submissions and L.P.'s statements to the police when he admitted to the touching of C.M.'s breast and vagina, he claims that C.M. initiated the sexual touching and that her non-verbal "signals" through her moans, her taking his hand and placing it on her breast and by "humping his leg" prior to him touching her vagina signified her "subjective consent" to the physical contact in question. Defence Counsel submits that the "misinterpretation" of C.M.'s "signals" or "cues" led to L.P.'s actions based upon

an honest but mistaken belief in communicated consent, in this case, through her conduct or actions.

[180] For several reasons, I reject the proposition of an honest but mistaken belief in communicated consent. First of all, I have found that C.M. did not express any words that she had, or was in any way, voluntarily exercising a choice to engage in acts of a sexual nature with L.P.. As I have previously found that C.M. was, at all material times, "passed out," and for all intents and purposes unconscious, I find that she could not legally consent to the sexual activity in question: see subsections 273.1(1) and (2)(a.1) of the **Criminal Code**. In those circumstances, I find that, if the law has established that she could not legally consent to the sexual activity in question, it stands to reason that, by the same token, L.P. could not have been operating under an honest but mistaken belief in communicated consent which she could not legally provide.

[181] In addition, as mentioned previously, a critical aspect of the issue of "subjective consent" to the sexual activity is that the complainant intended to have the sexual activity in question with the specific person accused of the offence. In his submissions, Defence Counsel proffered the possibility that C.M., while intoxicated from the combination of alcohol and cannabis and then having fallen asleep on a couch while watching a movie, may have done some acts or conveyed a few words of consent to L.P., in a belief that he was actually her boyfriend who was out of the country at the time.

[182] Clearly, even if L.P. believed that her conduct or "signals" were based on her belief that it was her boyfriend beside her, it would only, once again, highlight the fact that L.P. was aware of the fact that he knew or ought to have known that C.M. was not "subjectively consenting" through her conduct to engage in the physical acts of a sexual nature with him. Moreover, even by his own account, C.M. had not taken his hand and placed it by her vagina so that he could insert his finger or fingers into her vagina. Once again, I reject the claim that he could have had an honest but mistaken belief as to her consent to the touching of her vagina by him.

[183] Even if C.M. had made a moaning noise while she was sleeping or inadvertently touched L.P. by rubbing her legs together when she was sleeping, I find that L.P. would have had to be wilfully blind to the fact that there was a need to make inquiries as to whether she had, in fact, "communicated her subjective consent" to the physical acts of a sexual nature in question with her cousin, who

she and, for that matter, he regarded as being in more like a brother and sister relationship. I find that L.P. did not take any steps to determine whether his cousin had "subjectively consented" to the physical acts with him. As he said to the police officer: "I am ready" and then he put his finger or fingers in C.M.'s vagina.

[184] Given the totality of the circumstances, I find that L.P. deliberately chose not to take reasonable steps to ascertain whether his unconscious cousin had communicated contemporaneous consent to engage in the physical acts in question with him, through what he claimed to be her "signals" while she was asleep and unconscious. As a result, I find that he could not have honestly held a mistaken belief that she had communicated consent while unconscious to the sexual activity in question and most importantly to that activity with him, especially in circumstances where there is no evidence that L.P. took any reasonable steps to ascertain whether C.M. had "subjectively consented" to the physical acts of a sexual nature with him.

[185] Furthermore, based upon the evidence of C.M. and the comments of L.P. that he may have been "stoned" or "high" from the consumption of cannabis at the time of the sexual touching, Defence Counsel submitted that L.P. may have also been intoxicated when he "reacted" to the actions of his intoxicated cousin, causing him to "misinterpret signals". Therefore, it was submitted that this incident was just a "misunderstanding" and that L.P. had an honest but mistaken belief that C.M. had consented to the physical contact in question.

[186] With respect to that submission, I find that the case law has not supported that proposition and in addition, there can be no doubt and I find that section 273.2 (a)(i) of the **Criminal Code** has clearly restricted the availability of so-called "apprehended consent" that the accused believed that the complainant consented to the activity that forms the subject matter of the charge where "(a) the accused's belief arose from (i) the accused's self-induced intoxication." Thus, while an accused person may assert that they had an "honest" belief that the complainant had consented to the sexual activity in question, it is clear from this section and the case law, that the "belief" must not arise from the accused's self-induced intoxication or by the accused recklessness or wilful blindness due to the accused's consumption of alcohol and/or other substances.

[187] As the Supreme Court of Canada stated in **Barton**, *supra*, at para. 95: "an honest but mistaken belief in communicated consent is a claim that the accused committed the *actus reus* of the offence while "mistakenly perceiving facts that

negate, or raise reasonable doubt about, the fault element." I find that the Crown has established, beyond a reasonable doubt, that L.P. took no reasonable steps to ascertain whether C.M. had actually and contemporaneously communicated her "subjective consent" to engage in the physical acts of a sexual nature with him.

[188] Having come to the foregoing conclusions with respect to the *mens rea* of this offence and having concluded that there was an intention to touch, I also find that the Crown has established, beyond a reasonable doubt, that L.P. had knowledge of or was wilfully blind or reckless to C.M.'s lack of consent to the physical acts of a sexual nature with him.

[189] For all of the reasons outlined above, I find that the Crown has established, beyond a reasonable doubt, all of the essential elements of the *actus reus* as well as the *mens rea* of the offence of sexual assault contrary to section 271 of the **Criminal Code.**

[190] In the final analysis, I find that the Crown has established all of the essential elements of this offence, beyond a reasonable doubt and I therefore find L.P. guilty of the offence of committing a sexual assault on Ms. C.M. contrary to section 271 of the **Criminal Code**.

Theodore Tax, JPC