

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. BB*, 2022 NSPC 54

Date: 20221116

Docket: 8486407, 8486408, 8486409, 8486410

Registry: Dartmouth

Between:

His Majesty the King

v.

BB

Restriction on Publication: Section 486.4 and Section 486.35

Judge:	The Honourable Judge Theodore Tax,
Heard:	June 27, 2022, July 5, 2022, and July 21, 2022, in Dartmouth, Nova Scotia
Decision	November 16, 2022
Charge:	Section of the Criminal Code of Canada
Counsel:	Nicole Campbell, for the for the Nova Scotia Public Prosecution Service Patrick Eagan, for the Counsel for Defence

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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ordered under these Sections direct that any information that will identify the complainant, victim or witness shall not be published in any document or broadcast or transmitted in any way.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] BB is charged with four offences involving LP, a person under the age of 16 years. He faces a charge of sexually assaulting LP contrary to section 271 of the **Criminal Code**, as well as a sexual exploitation charge that he did, while being position of trust or authority towards LP, for a sexual purpose invite LP, a young person, to touch directly or indirectly a part of his body, to wit, his penis, contrary to section 153(1)(b) of the **Criminal Code**. In addition, he is also charged with a sexual interference offence that he did, for sexual purpose, touch LP, a person under the age of 16 years, directly with the part of his body, to wit, his hands, contrary to section 151 of the **Criminal Code**. Finally, he also faces a invitation to sexual touching charge that he, for sexual purpose, invited, counselled or incited LP, a person under the age of 16 years to touch directly a part of his body, to wit, his penis, contrary to section 152 of the **Criminal Code**.

[2] The Information alleges that those four offences occurred at or near Eastern Passage, Nova Scotia on or about August 23, 2020. The Crown proceeded by indictment on all charges. On September 9, 2021, BB elected Provincial Court for the trial of those offences. The one-day trial was scheduled for June 27, 2022.

[3] Trial evidence was heard on June 27, July 5 and on July 21, 2022. The trial evidence concluded on July 21, 2022, but since there was insufficient time to hear the closing submissions at that time, the parties agreed to file written closing submissions. The Crown Attorney's closing submissions were dated August 15, 2022, and the closing submissions of Defence Counsel were dated September 15, 2022. Based upon those dates for the filing of closing submissions, the Court reserved its decision until today's date.

Positions of the Parties:

[4] It is the position of the Crown that there is no dispute between the parties with respect to the identification of the accused, jurisdiction in which the alleged offences occurred, the date or time of the alleged offences and that LP was under the age of 16 years, which is a required element for the section 151, 152 and 153 **Criminal Code** offences. She submits that the evidence established that BB should be found guilty of all charges before the court, and on sentencing, submissions may be made with respect to the **Kienapple** principle.

[5] The Crown Attorney submits that the evidence heard during the trial established that the incident which brings BB before the court occurred on or about August 23, 2020. In addition, LP had provided a detailed video statement to the police on September 1, 2020, which was admitted as part of the evidence during the trial, pursuant to a section 715.1 **Criminal Code** application, which the Court was satisfied had met the required criteria for doing so.

[6] Furthermore, it is the position of the Crown that LP, who was about 12 ½ years old at the time of the alleged offences and 14 years old at the time of her testimony in the court, provided a very detailed description of the events in a straightforward manner. LP's evidence was very detailed with respect to the key events in question and was presented in a clear, consistent, and reliable manner, which was unshaken on cross-examination. While LP made no attempt to downplay her ill feelings towards BB, she reiterated, on several occasions during her cross-examination, in a straightforward manner how BB pulled her wrist towards his exposed penis, which was outside his shorts, after he lifted the blanket while he was laying on a mattress, and she was seated beside him, on a mattress which was on the floor.

[7] The Crown Attorney submits that the evidence of MS and JM, supported the evidence of LP with respect to her being visibly upset as she returned home and disclosed what had occurred a few moments earlier at the house where BB was living. In addition, JM's evidence established that she had been in a romantic relationship with BB and, while they were living together, he had been acting in a parental role towards her children. In addition, her evidence supported LP's evidence that her 12-year-old had gone to BB's residence to clean that house and that LP had been cleaning there for the goal of getting a phone from the accused.

[8] Finally, it is the position of the Crown that the evidence of CT, who is a cousin of the accused, supports LP's testimony with respect to who was present in the house at the time of the allegations before the court, where BB was located being on a mattress, which was on the floor of the dining room, and that LP had done some cleaning at that residence the evening before the incident which brings this matter to the court. He also confirmed that LP returned to the residence the next day to continue cleaning for BB, as both LP and her mother had testified. CT was present for a short time at the house that next day while LP did some additional cleaning, and when he left the house, only LP and BB were there.

[9] The Crown Attorney also submits that, pursuant to the principle established in **R. v. Evans**, [1993] 3 SCR 653, BB's comments to CT are relevant and admissible, without a *voir dire*, as they were not made to a person in authority. It is the position of the Crown that CT's evidence established that, during the evening before the alleged incident, he and BB were drinking alcohol and using recreational drugs, and at a certain point, BB made some comments of a sexual nature in relation to LP. She submits that the Court may assess the weight of CT's evidence with respect to the remarks of a sexual nature made by BB in reference to LP the evening before the alleged incident. The Crown Attorney submits that this evidence does not reflect any propensity or bad character evidence as claimed by Defence Counsel, but rather, should be considered with the totality of the evidence before the court.

[10] For his part, Defence Counsel submits that, while LP may have an honest belief that inappropriate touching occurred, the evidence is not as clear, detailed, or descriptive as was submitted by the Crown Attorney. He points out that LP's evidence was uncertain with respect to certain key details, possibly based upon the impact of a 12-year-old girl having consumed a beer, for example, her uncertainty as to which hand was utilized by BB to grab her arm. In addition, Defence Counsel pointed out that there were some key differences between her trial testimony and what she had said during the audiovisual statement on September 1, 2020. Furthermore, he noted that LP acknowledged that she had an animus towards BB based upon her dislike of the nature of his relationship with her mother [JM]. He notes that her dislike of BB was stated in several different ways, which, in his opinion, undermined the credibility and reliability of her testimony.

[11] In addition, it is the position of the defence that even if the Court was to accept that BB grabbed or pulled LP's arm or hand towards him, it does not necessarily follow that there was any sexual intention to that touching or any invitation to sexual touching. Defence Counsel points out that LP acknowledged on cross examination, that she immediately "yanked" her hand away from BB once he touched her, based upon an aversion to him touching her, because LP had previously, but inadvertently, seen pictures of him frequently touching his own penis, when she was using her mother's cell phone. In those circumstances, he submits that, even if BB grabbed LP's arm, the fact that she pulled her arm away, almost immediately, ought to leave the Court in reasonable doubt as to whether any of the alleged sexual offences occurred.

[12] Moreover, with respect to the evidence of CT, Defence Counsel submits that his evidence in relation to parts of a conversation between himself and BB the night before the alleged incident is not relevant to his “mindset” the next day or at the time of the alleged incident. In those circumstances, he submits that CT’s evidence relating to parts of the conversation between himself and BB the evening before the alleged incident, should be inadmissible as bad character evidence. Furthermore, Defence Counsel also submits that, although CT is related to BB, his evidence may not be totally objective, forthright and reliable, as very shortly after the allegations before the court, CT started a dating relationship with LP’s mother [JM] and actually moved in with her, LP and her other children.

[13] Finally, Defence Counsel submits that BB was not in a “position of trust” with respect to LP at the time of the allegations before the court. In fact, LP had stated that BB had very little to do with her and she did not see him as a father figure. In addition to LP’s stated animus towards him, she had also said that, while he lived in the house with her, her mother, and the other children, BB had very little to do with her or the other children because he spent most of his time in the basement consuming recreational drugs and alcohol. Moreover, by late August 2020, Defence Counsel submitted that BB had not been living with JM or LP for several months and therefore, it is the position of the defence that BB was not in a “position of trust or authority” with respect to LP at the time of the allegations before the court.

[14] In conclusion, Defence Counsel submits that BB may have only shown bad judgement in lying on a mattress thrown on the floor of the living room or dining room, drinking alcohol, and only wearing shorts while LP was cleaning his house, in order to get money for a phone. However, in the final analysis, looking at the totality of the evidence, the Crown has not established all of the essential elements of any of the charges beyond a reasonable doubt.

Overview of Trial Evidence

[15] At the outset of the trial evidence, the parties had agreed that it would not be necessary to call Det/Const. Anthony McGrath or Sonya Juneja, a social worker, who had conducted the video interview of LP on September 1, 2020. Following that agreement, the Crown Attorney made a section 715.1 **Code** application to have LP’s interview introduced as evidence in the trial. Following the playing of that video interview of LP, the Court concluded that LP was under the age of 18 years at the time of the alleged offence, the video recording was made within a

reasonable time after the alleged offence and that LP had described the acts complained of, during the interview.

[16] In addition, after some preliminary questions by the Crown Attorney, the Court also concluded that LP had adopted her statements made during the recorded interview, and that the September 1, 2020, video recording of the interview could be admitted as Exhibit 1 in the trial. The Crown Attorney also provided the Court and Defence Counsel with a transcript of that video statement prepared by a certified court transcriber as an aide to follow the interview or to pose questions in court.

[17] At the outset of the video interview, LP confirmed that she was born on February 26, 2008. During her trial testimony, she confirmed that she was now 14 years old and in grade 9 at school. LP confirmed that her mother and at “Bernie” referring to BB had been in an on-again off-again relationship, but they had broken up at the time of the interview. She stated that they were living at someone else’s place at that time, and that she had wanted to move to her father’s place.

[18] In response to the question when she last saw Bernie, LP stated that it was “last Monday when I was cleaning out his house.” She confirmed that they were no longer living at his house, but she had walked over there to clean his house. When she got there, LP stated that BB and his cousin CT were there. A little later, CT left the house and then, only she and BB remained in the residence.

[19] For the record, I simply note here that, if there is an issue with respect to the date of the alleged offences, at the outset of the video interview of LP by Det/Const. McGrath and Ms. Juneja, he states that they are conducting this video interview on “Tuesday, September 1, 2020.” Given the remark by LP that the last time she saw BB was “last Monday when she was cleaning the house” as opposed to “yesterday,” I am prepared to take judicial notice, in referring to the 2020 calendar, that LP’s reference to “last Monday” was, in fact, a reference to Monday, August 24, 2020. While the Court may make amendments to the Information to conform with the evidence during the trial, the parties did indicate that there was no issue with respect to the date of the alleged offences, and I note that the Information alleges that four offences were committed “on or about the 23rd day of August 2020.”

[20] LP stated that she started cleaning and while she was doing so, BB was either laying on a bed or “something” and then moved over to sit on a couch and was drinking alcohol. She took a break and was using a phone to talk to a friend

and while CT was still at the house, BB gave her a beer and told her “Don’t let CT see this.” LP drank the beer and kept using the phone to talk to her friends while she was sitting in a corner. Then, she went over and sat on a couch to charge her phone while she continued to use it. BB came over and sat beside her on the couch and offered her another beer, but she said no, and she continued using the phone. BB drank that beer and then he went over and laid back down.

[21] As LP continued to use the phone, BB asked her if she wanted it and, in her mind, she was doing the work to get a phone from him, and he kept asking her “what are you going to do for the phone?” LP replied: “I don’t know” and asked BB “what do you want me to do for the phone?” They asked each other those questions a couple of times. LP stated that she was looking for some direction from him as to what she needed to do to obtain the phone.

[22] At that point, LP stated that BB said: “we’re both messed up in the head and shit” and then he did a fist pump with her. Immediately after that, LP said that he put his hand on her thigh for a minute and rubbed it and then he said sit right here. She moved and sat “there.” He was beside her while she was still using the phone. Then, LP stated that BB said: “don’t tell your mom about this” and then he grabbed her wrist and lifted the blanket and slowly directed her hand to his penis. At that point, she said that she “just yanked my hand away, threw the phone on the couch, walked out and then started running to my house.”

[23] When asked what BB was wearing at the time, she said that he was wearing shorts and a shirt and then immediately clarified that he was not wearing a shirt, only his shorts. He was under a blanket and “he lifted the blanket up, and it was, like, right there.” She confirmed that his shorts were still on, but “it was just coming out.” LP stated that this occurred in the living room of the house where she was cleaning for BB.

[24] After that occurred, LP immediately left the house and told her next-door neighbour “Mel” what had happened, the two of them had a short discussion and “Mel” said that she should let her mother know what had happened. From there, LP and “Mel” went to see her mother and told her what had happened. Her mother asked LP whether she saw “it” and LP replied: “I saw it and stuff.”

[25] In answer to questions whether something like that had ever occurred before with “Bernie,” LP said no. She also confirmed that BB had not communicated with her after this incident. However, on one occasion after the incident, while she was using her mother’s phone for her Instagram messages, she saw a message from BB

to her mother where he was trying to convince her that nothing had happened. She recalled that his message that was something like “that bitch got mad because I didn’t give her a fucking phone and shit and then I told her to leave.” LP stated to the police officer and the social worker, during the interview, “but that’s not what happened.”

[26] After some other discussion, Det/Const. McGrath then asked LP to come back to the date of the incident and state what it was that BB had tried to make her do. LP’s answer was “he tried to make me touch his penis and, like... For the phone... But I refused.”

[27] When asked to provide further detail as to what happened after LP sat down beside BB, she said that he was laying on his side, on a mattress on the floor, not on a sofa. This occurred sometime in the afternoon, after she had sat down on the mattress, LP said that then “he slowly grabbed my wrist and then pulled it towards his penis after he lifted up the blanket.” She saw his penis and she immediately yanked her arm away and put the phone down, and then thought about signing out of her Instagram account, because she was concerned that he might hack into her account. At that point, BB was covering his face with his arm and then LP walked out and ran home to tell Mel and then, her mother.

[28] Finally, towards the end of the video statement, the social worker asked LP to be a little more specific about what BB was wearing when he pulled her hand towards his penis. LP stated that he was wearing grey shorts with two orange stripes on each side. Then, after he lifted the blanket up, she saw that he was pulling and “aiming” her hand towards his penis. LP said, once again, that “it” referring to his penis, was pulled out of the shorts and “it was just laying there,” and in response to a further question, added “it was like laying and curved onto his stomach.”

[29] During additional questioning on direct examination, LP confirmed that she is the oldest of four children, her mother is JM, and that BB is not her father. BB had been her mother’s ex-partner and he had lived with them for a period of time in the Shearwater area. LP said that if her mother was out of the house, BB took care of the kids and, for example, if she wanted to go out with friends, she had to ask him if it was okay to do so. She added that if he said no, she would not go out of the house.

[30] On cross-examination, LP agreed with Defence Counsel that she never liked BB and referred to him as a “complete asshole” because he always fought with her

mother and drank too much. LP said that she generally got along well with her mother, but at times she was mad at her mother because her mother told her that she was spending too much time on the Internet in her room. She denied having told her mother that she wanted to move to Calgary with her father prior to the incident but stated that after the incident, she did want to go and live with her father.

[31] When questioned whether LP was under a specific direction from anyone to not be around BB, she stated that she did not recall anyone saying that to her. She was not afraid of BB when she went to the house to clean, but he was drinking when she got there and she thought he was drunk, because she was aware that he usually drinks a lot.

[32] Defence Counsel also posed questions about LP's comments during the video interview about BB trying to "blackmail" her and saying in text messages: "who's daddy's girl?" and offering to give her prepaid cards. During the video interview, LP had said that she told BB to stop doing that, had sent some screenshots of his messages to her mother and then blocked his number in January 2020. She agreed that this was one of the reasons why she and BB did not get along.

[33] LP also agreed with Defence Counsel that, at some point prior to the incident, she was on Instagram on her mother's cellphone and had seen some "inappropriate" text messages between her mother and BB. Some of the things that he had mentioned to her mother in the messages were "weird" and she did not like the way he spoke to her mother. This was another reason, before the incident, why she had told her mother: "to get rid of him." LP also agreed that she felt BB was using her mother to get money to buy "weed" for him. Once again, LP stated that she did not think very much of BB, thought he was an "asshole" and was "very disappointed" with his character.

[34] LP confirmed that in August 2020, she, her mother and her siblings had moved out of BB's house and were living down the street, about a five-minute walk away, at Tyleesha and Rob's house. The incident occurred in the afternoon, but she could not recall the exact time. She recalled that when she arrived at BB's house to clean his house, she saw BB and his cousin, CT seated on the couch. She understood that if she helped clean the house, BB would give her one of his old phones. However, she added that he had told her that it was full of "stuff" that would have to be deleted before he gave her the phone.

[35] LP said that, on the day of the incident, she did not start cleaning right after she arrived at BB's house. However, she had cleaned "a bit" before the incident where he touched her. While she was taking a break from cleaning, LP said that BB gave her a beer while CT was still there, seated on a couch. LP was sitting on the stairs next to the basement and living room, near a wall when she drank the beer, so CT could not see her doing that. The beer had no effect on her.

[36] On further cross-examination, LP said that a short time later, after CT left the house, she moved from sitting on the stairs and to sit on a couch in the living room. BB offered to give her a second beer, but she told him that she did not want it and he drank that bottle. Then, he invited her to sit beside him on a mattress on the floor. He was laying on the mattress on the floor and while she was still on the phone with her friends, he was asking her "what are you going to do for the phone?"

[37] After being asked a couple of times without answering his question, she continued to use the phone, but then he asked her to move a little closer to him. Although LP said she felt "uncomfortable" in doing so but continued to use the phone. At that point, LP stated that BB said: "don't tell your mother" and grabbed her right wrist, while he was laying on the mattress, to the right of her, with his head on a pillow and a blanket over him. She is not sure which hand he used to pull her wrist towards him, but as he did so, with his other hand, he lifted the blanket which was covering him from the waist down on the mattress. At that moment, she saw his penis sticking out of his shorts and realized that he was directing her wrist and hand towards his penis. She immediately pulled her hand away as he was pulling it towards his penis.

[38] On further cross-examination, LP recalled that BB had grabbed her right hand and pulled it towards his penis, because she remembered having the cell phone in her left hand. She agreed with Defence Counsel that what she had said during the video statement on page 21 at line 22 of the transcript of Exhibit 1, when she asked him whether she could first sign out of her Instagram account, was probably a "stupid question". However, she was worried that he might hack into her Instagram account. LP was pretty sure that he had said no to her request, so she got up, threw the phone on the sofa, and left his house.

[39] LP said that, after leaving BB's house, she went over to Mel's house to relate what had happened. She was pretty sure that she had told Melanie that she was sitting on the bed beside BB when he directed her hand towards his penis.

After that, LP went with Melanie to tell her mother what had occurred. Finally, in response to cross-examination whether LP had told other people that BB was naked, under the blanket, she reiterated that he was wearing shorts and his penis was sticking out of the shorts, but she could not recall whether his penis was erect or not.

[40] MS testified that she has lived in the same neighbourhood as LP and her family for about five years. She was aware that LP had lived for a period of time with “Bernie” as she did not know his last name but referred to him as LP’s “stepdad.” She recalled being outside her house one day when LP came to her and “looked very upset” and said that she wanted to talk to her. LP told her that she was cleaning at Bernie’s house and that he had asked her if she wanted a cell phone and how bad she wanted it. Then, LP told her that Bernie had asked her to sit beside him and took her hand and tried to put it between his legs. When he did that, LP told Melanie that she got up and left his house

[41] MS testified that, as LP was telling her what had occurred, she also demonstrated how BB had moved her hand to what she described as his “personal area” which was between his legs. She recalled that this conversation with LP occurred sometime in the afternoon, but she could not recall the specific day. She confirmed that LP had come from the direction of BB’s house which was further up the same street. MS confirmed that, at that time, LP, her mother, and her siblings were living with her neighbours, Tyleesha and Rob.

[42] MS confirmed that LP was “very upset” as she disclosed what had just occurred. After hearing what LP had said, she suggested that they should immediately let her mother know what had occurred. They went next door, met with JM and LP told her mother what had just occurred.

[43] On cross-examination, MS recalled that LP had told her that BB had patted a chair and then asked her to sit on it beside him. LP had told her that BB then grabbed her hand while she was seated on a chair and then put it in his “private area” between his legs. LP had not told her that she drank a beer at BB’s house but added that she did not recall detecting any odor of liquor on LP’s breath when she was speaking to her.

[44] CT testified that he is the cousin of BB. He confirmed that JM, LP’s mother, was Bernie’s “ex-girlfriend” and she is now his girlfriend. He has known LP for about 3 to 4 years, mainly seeing her and JM while they were camping at BB’s trailer. He recalled that, on the date of the incident in August 2020, he and BB

drank alcohol the evening before LP came over to the house in the morning to clean the house. At that time, BB was the only one living at that house.

[45] After work one day, CT recalled going over to BB's house and having a few puffs of "pot" with him, but they were not intoxicated. LP was there cleaning, and BB was the only other person in the house when he got there. He said that JM had moved out with the kids a few weeks before the incident, but they relocated to a house about a five-minute walk away from BB's place.

[46] CT described the split entry duplex house and stated that on the main level where he stayed that evening was a mattress in the dining room, which is next to the living room and that there was a couch in the living room. There was a mattress on the floor in the dining room area. During the late afternoon or evening, when CT went to BB's house after work, he recalled that LP was there cleaning the house and a little later that evening, he drove LP home.

[47] CT stated that, after driving LP home, he returned to BB's house and then the two of them had several more drinks, before he passed out between 1 AM and 2 AM. During the evening, he recalled a couple of specific conversations that he had with BB. He was not sure how the first one started, but he recalled that it was earlier in the evening while LP was still in the house. CT said that he had told BB that, before he drove her home that evening, LP had hugged him and wrapped her arms and legs around him. After saying that, CT recalled that BB told him that LP had also been "grinding" on him.

[48] CT did not think much about BB's comment at that time, but later that evening, BB made another comment about LP. He asked CT if he would have sex with LP and he asked him whether he would like to "Fuck her in the ass." CT felt that BB was trying to pressure him into saying yes. CT told his cousin, a couple of times, "no" and that he could not do that, but then BB said a couple of times: "Come on, you know you'd do it." CT did not answer and then they talked about other things during the rest of the evening. CT confirmed that LP was 12 years old when BB made those comments about her to him.

[49] During their continued conversation, CT recalled that BB had also made a remark about LP when he told him that he had "caught her" looking at him with "affectionate eyes" and that "LP was attracted to him." CT added that BB never said what he would do about that with LP.

[50] The next day, CT was at the house when LP came over to clean the house for BB. When he left the house, only LP and BB remained in the residence. He confirmed that the couple of conversations that BB had with him in relation to LP, had occurred during the evening before LP came back the next day to clean the house.

[51] On cross-examination, CT could not recall the time of day or date when he was at BB's house after work. He stated that while LP was in the house cleaning upstairs and downstairs, he and BB went outside and had a couple of puffs of marijuana. That evening, he only recalled saying "hi" to her. While he was in the living room the next morning, he was not aware that LP was sitting on the stairs or that she had been drinking a beer. He only learned about that later.

[52] In terms of his alcohol consumption, after CT drove LP home in the late afternoon, between 6 PM and midnight, he estimated that he and BB probably each drank about 12 beers of the 24 pack that he had purchased. CT added that the two of them split about 1 g of cocaine and shared two or three joints of "pot." CT stated that he is a big guy and that he does not smoke as much pot when he is drinking alcohol and that amount of alcohol has no real impact on him or his memory of events.

[53] The final witness in the trial was JM, LP's mother. She confirmed that LP was her daughter and is presently 14 years old. She confirmed that she met BB about four years ago on the Internet. At the time of the alleged incident before the court, they were "lovers" who had lived together for about 1½ years. While they cohabited, they lived at BB's mother's house on the "B" side of the duplex. She confirmed that LP was about 11 and 12 years old when she and the other children lived with BB.

[54] JM stated that while she and her children lived there with him, he was always a "parental figure" with her kids, but he is not their biological father. When JM was not at home, BB would be "in charge" at home and things seemed to be okay. He provided "necessities" and helped with many things around the house like meals, laundry, and gardening outside the house. However, she was responsible for the discipline of the children. BB would offer ideas for her consideration, but he did not discipline the children unless JM was out of the house or discipline was immediately needed, for example, if the kids were fighting.

[55] JM confirmed that, in the summer of 2020, she left BB's house and moved into her friends, Tyleesha and Rob's house, which was only a short five-minute

walk away from her former residence with him. MS is a friend and neighbour of hers on that street and JM also confirmed that CT is her current partner, and she has been living with him for just over 1.5 years.

[56] In terms of the allegations before the Court, JM was aware that LP had gone to BB's house to do some cleaning as well as to bring some things back to where she was now residing. JM confirmed that LP had also done some cleaning at BB's house the day before the incident. JM confirmed that she had previously spoken with BB and LP about her daughter doing some work at the former residence to obtain some extra money to buy a cell phone.

[57] JM stated that, on the date in question, she believed that CT and BB were at her previous residence, which was owned by BB's grandparents. The grandparents lived on one side of the duplex while BB lived in the adjoining duplex. The duplex where BB lived was essentially empty, but there was still a sofa and a bed in it, so he did not have to stay with his grandparents.

[58] JM confirmed that she provided a statement to the police on September 1, 2020. She recalled that LP came running back to the house where she was living and said that something bad had happened. LP was with Melanie when she said what had happened at BB's house. JM stated that LP looked "very distraught and afraid."

[59] In terms of what LP related to her, JM recalled that LP said she was using her cell phone and BB grabbed her hand and asked her if she wanted to keep the phone. JM recalled that LP told her that she would have to do what he wanted. However, LP told her that she threw the phone on the floor and ran home. Initially, JM did not plan to call the "authorities" but after talking to some friends, she called the police. JM confirmed that LP was 12 years old at that time.

[60] On cross-examination, JM stated that she and LP generally got along well, but there were times, during puberty, that they did not always get along well. She agreed that she may have said to BB that there were "moments" when she did not get along well with LP, but added that LP is her oldest child, and this was her first experience with puberty. She agreed with Defence Counsel that LP did not do much of what JM had asked her to do at that time.

[61] JM stated that BB felt that a stricter approach with the children was a better route and at times, she did apply that approach "with consideration." She agreed with Defence Counsel that LP had told her that she resented BB's interventions

with respect to discipline of the children. In fact, LP also expressed a “distaste” for anyone other than JM telling her to do something.

[62] On further cross-examination, JM confirmed that when she spoke with LP about doing work at BB’s house, it was for the purpose of her daughter getting a used phone from him or possibly for cash. She confirmed that LP spoke to her about what had happened at BB’s house but did not say that she had a drink of alcohol there. JM did not detect any odour of alcohol when she spoke to her, and LP was not under the influence of alcohol at that time. She agreed that LP later told her that she had accepted a beer at BB’s house, and JM believed that was the first time LP had ever consumed some alcohol.

[63] In terms of what LP had disclosed to her mother, JM recalled that LP had said that she was sitting on the sofa and BB grabbed her hand and tried to move it over to somewhere private on him. LP told her that she immediately pulled her hand away and threw the phone down on the couch and ran home.

[64] Finally, there were a series of questions with respect to comments made by LP during the video interview that BB was “blackmailing” her, in relation to text messages about “keeping secrets,” “who’s daddy’s girl?” and offers of prepaid cards. JM agreed that she had seen some of those text messages from BB to LP. She confronted BB about those messages and his response was that he was teaching LP about the dangers from strangers on the Internet. JM confirmed that she had no idea what the reference to “keeping secrets” meant. JM also agreed that when LP had used her phone, her daughter had seen some of the sexual conversations between herself and BB. She also agreed with Defence Counsel that LP had told her that she did not want her mother to be with BB.

[65] On re-examination, JM confirmed that when she confronted BB about the text messages referring to “daddy’s girl” and “keeping secrets,” he did acknowledge sending those messages to LP.

ANALYSIS

[66] 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.

[67] 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,

[68] In determining whether the evidence presented in court has met the high threshold of proof beyond a reasonable doubt, it is important to remember that the evidence of witnesses may raise issues with respect to the credibility or the reliability of their testimony. Credibility relates to the sincerity and their willingness to speak the truth or veracity of their testimony. The reliability or accuracy of a witness’s testimony relates to his or her ability to accurately observe, recall and recount the events in issue. Any witness whose evidence on an issue is not credible cannot give reliable evidence on that point, but on the other hand, a credible witness may give unreliable evidence: see **R. V. H.C.** 2009 ONCA 56.

[69] At this point, since the Crown’s case is largely based on the evidence of LP, who was 12 years old at the time of the alleged offences, it is important to keep in mind the comments of the Supreme Court of Canada by Justice McLachlan [as she then was] in **R. v. W.R.**, [1992] 2 SCR 122, which confirmed that the law affecting the evidence of children had undergone major changes, especially, in removing the notion, previously in legislation, that the evidence of children was inherently unreliable and therefore to be treated with special caution. In addition, in 1998, Parliament amended the **Criminal Code** and removed the requirement that a child’s evidence be corroborated.

[70] Justice McLachlan also referenced a second major change in the attitude of the law towards the evidence of children, which was a new appreciation that it was wrong to apply adult tests for credibility to the evidence of children. McLachlin J noted that every person giving testimony in court, of whatever age, is an individual, whose credibility of evidence must be assessed by reference to criteria

appropriate to their mental development, understanding and ability to communicate.

[71] Young witnesses do not always have the same ability as adults to recall precise details or describe the events fully and accurately. Having said that, in terms of assessing the evidence of a young witness who promised or affirmed to tell the truth, it is important to determine the difference between significant or important details and other aspects of their evidence which may be considered as more minor or peripheral details in considering the credibility and reliability of the young person's evidence.

[72] Finally, as a preliminary point before conducting a detailed analysis of the four offences before the court, it should also be noted that, with respect to the sexual assault charge contrary to section 271 of the **Criminal Code** and the offences of sexual interference or invitation to sexual touching offences contrary to sections 151 or 152 of the **Criminal Code** and the sexual exploitation offence contrary to subsection 153(1) of the **Criminal Code**, Parliament has stipulated, in section 150.1(1) of the **Criminal Code**, that where the complainant is under the age of 16 years, it is **not** a defence that the complainant consented to the activity that formed the subject matter of the charge.

[73] As a result, since LP was only 12 years old at the time of the alleged offences, she could not have legally consented to any of acts in question. Of course, as mentioned above, it is the position of the defence that the none of alleged offences ever occurred and although the touching of LP may not have been fabricated by her, Defence Counsel submits that LP misinterpreted the purpose of the touching it is the position of the defence that, when all of the facts and circumstances are considered, the Crown has not established the charges beyond a reasonable doubt.

[74] Therefore, the key issue in this case is whether the Crown has established, beyond a reasonable doubt, all of the essential elements of the four alleged offences before the court.

[75] At the outset of the analysis of the evidence in this trial, I find that there is, in reality, no dispute between the parties with respect to the date, time or location of the allegations before the court, nor the identification of BB as the accused person. However, based upon my earlier analysis of LP's comment during the video interview, I find that the evidence established that the incident in question occurred on or about Monday, August 24, 2020. Having made that determination, I

find that, pursuant to section 601(4.1) of the **Code**, the variance by a day in the allegation of the date of the offence is not material and I am prepared to amend the Information accordingly to conform with the evidence that is before the court.

Analysis relating to S.153(1)(b) Sexual Exploitation Offence:

[76] With respect to the section 153(1)(b) **Criminal Code** sexual exploitation offence, Justice David Watt notes, in his commentary in relation to this offence in his **2022 Annotated Tremear's Criminal Code**, that it combines elements of sexual interference and invitation to sexual touching with other circumstances to constitute the crime of sexual exploitation specifically in relation to a person that Parliament has defined as a “young person.”

[77] In this case, BB was charged that “he, at the same time and place aforesaid, did being in a position of trust or authority towards LP, a young person, did for a sexual purpose invite LP, a young person to touch directly or indirectly with the part of his body to wit, his penis, the body of BB, contrary to section 153(1)(b) of the **Criminal Code**.”

[78] At the outset of this analysis, it is important to consider a key difference in the Information relating to the complainant in the section 151 and 152 **Code** charges as opposed to the section 153(1)(b) **Code** charge. It should be noted that in the Information with respect to the section 151 and 152 **Criminal Code** charges specifically referred to LP as “a person under the age of 16 years,” which is consistent with the specific wording of those charges in the **Criminal Code**. However, the Information with respect to the sexual exploitation charge contrary to section 153(1)(b) of the **Criminal Code**, uses a different manner of identifying the complainant in relation to that charge, as being a “young person” rather than “a person under the age of 16 years.” In those circumstances, I find that Parliament has legislated a different essential element for the sexual exploitation charge, which requires the Crown to prove, beyond a reasonable doubt, that the complainant was a “young person” at the time of the alleged offence.

[79] Parliament has defined the term “**young person**” in section 153(2) of the **Criminal Code** for the purposes of section 153 of the **Criminal Code** as follows:

“(2) **Definition of “young person**” - In this section, “young person” means a person 16 years of age or more but under the age of 18 years.”

[80] In this case, I find that the evidence of LP, JM and CT established, beyond a reasonable doubt, that LP was about 12 years old at the date and time of the alleged sexual exploitation offence. As a result, I find that the Crown has not established, beyond a reasonable doubt, that LP was a “young person” as defined by section 153(2) of the **Criminal Code** who had celebrated her 16th birthday but had not reached her 18th birthday. In those circumstances, I find that the Crown has not established one of the essential elements of the offence contrary to section 153(1)(b) of the **Code**, and therefore, I find BB not guilty of this offence.

[81] Having concluded that the Crown was not able to establish the essential element of LP being a “young person” as required by section 153(1)(b) of the **Code**, I have found BB not guilty of the sexual exploitation offence. In those circumstances, I find that it is not necessary to determine whether the Crown had established, beyond a reasonable doubt, whether any of the accused words, gestures or actions had occurred while he was in a “position of trust or authority” towards the complainant or that the complainant was in a relationship of dependency with the accused.

Analysis relating to the S.151 Code Sexual Interference Offence:

[82] As mentioned, one of the essential elements of the offences contrary to section 151 [sexual interference] and section 152 [invitation to sexual touching] of the **Criminal Code**, requires the Crown to establish, beyond a reasonable doubt, that the complainant [LP] was “under the age of 16 years old” at the time of the alleged offences. I find that the evidence before the court established, beyond a reasonable doubt, that LP was about 12 years old at the time of those alleged offences and only about 14 years old when she testified in court.

[83] In terms of the other essential elements of the section 151 **Code** Sexual Interference offence, I find that the Crown must establish, beyond a reasonable doubt, that BB intentionally touched LP either directly or indirectly and that the touching was for a sexual purpose. If the accused’s direct or indirect contact with any part of the young complainant’s body was found to be accidental or unintentional, then this essential element of the charge would not be satisfied, and the accused person should be found not guilty of sexual interference.

[84] Finally, I find that there is no requirement that the Crown establish that a certain degree of force was applied to the complainant to satisfy the essential element of an intentional “touching” of the victim. In addition, pursuant to section

150.1(1) of the **Code**, Parliament has legislated that the consent by the complainant, who is under the age of 16 years, to the activity that formed the subject matter of the charge is not a defence to this offence.

[85] The sexual interference offence is a specific intent offence and therefore, I find that the Crown must establish, beyond a reasonable doubt, that the touching was intentional and was also sexually motivated. To assess the *mens rea* in this case, the court must consider whether the sexual purpose of any touching would have been apparent to a reasonable observer. Of course, a sexual purpose could also be inferred from the circumstantial evidence or the nature of the touching itself.

[86] In **R. v. Morrissey**, 2011 ABCA 150, the Court held that touching is done for a “sexual purpose” if it is done for sexual gratification or violates a person’s sexual integrity. The *actus reus* is touching, direct or indirect, performed with any part of the accused’s body: **R. v. GDO**. 2013 ABPC 306 at para. 63. Unlike sexual assault, touching for a sexual purpose is a specific intent offence and this means that it is not sufficient to simply establish contact. The Crown must also prove that the accused intended to touch the complainant for a sexual purpose: **R. v. G.B.** 2009 BCCA 88 and **R. v. R.V.**, 2020 ABPC 188 (CanLii) at para. 98.

[87] With respect to the essential elements of whether BB intentionally touched LP directly or indirectly, one can determine that the act of “touching” involves some physical contact with any part of another person’s body. In my opinion, the contact or “touching” by an accused person may be direct in the sense that the accused touched the other person with a hand or some other part of his or her body, or the accused may have intentionally initiated the “touching” through indirect contact, for example, by touching the person with some object which was being manoeuvred by the accused person.

[88] Finally, I find that it is an essential element of this sexual interference charge that the Crown must establish, beyond a reasonable doubt, that the touching was for a sexual purpose. With respect to this essential element, courts have concluded that the touching had a sexual purpose if it was done for the accused person’s sexual gratification or for the purpose of violating the complainant’s sexual integrity, including any act which was meant to degrade or demean the complainant in a sexual way.

[89] In terms of the overall assessment of LP’s evidence, I found that she testified with little hesitation in her words and then recalled and described the events which

occurred, in straightforward manner, which included a significant level of detail. In doing so, I found that LP was able to recall and relate details of conversations with BB, which included her verbatim account of the brief conversation before he grabbed her arm and hand and began moving it towards his penis. Moreover, she also described in detail how and where BB made his comments and grabbed her arm while he was laying on a mattress which was on the floor of the house where LP, her mother and her siblings had recently lived with BB before they moved out of that house.

[90] During her direct examination, the Crown relied in large measure on the video statement which was taken within seven days of the alleged incident, the details of which LP adopted during the trial, having stated that they had occurred “last Monday.” As mentioned previously, pursuant to section 715.1 of the **Criminal Code**, the Court concluded that the criteria had been met for the video recorded evidence of LP, who was under 18 at the time, to be admitted as evidence during the trial.

[91] During the video interview as well as in court, I found that LP provided spontaneous and detailed responses to questions, which were certainly appropriate for a child of her age. During her cross-examination, she acknowledged having consumed a bottle of beer provided to her by BB and candidly agreed that she really did not like BB and had even told her mother at one point to “get rid of him.” During his submissions, Defence Counsel suggested that this *animus* towards BB may have caused LP to embellish her evidence. With respect to that possibility, first, I found that LP’s evidence was highly credible and reliable, as demonstrated by her strong ability to recall and relate key details to the court in a logical manner. In addition, I find that LP had no reason to embellish any of her evidence for that reason, either during the video interview or especially during the trial, as it was clear from the evidence of LP, JM and MS that JM had stopped living with BB and that she and her children had moved out of his house, on some unspecified date, prior to August 23 or 24, 2020.

[92] During the video interview of LP and her direct evidence, she described BB having a short conversation with her and asking some questions while she was seated beside him on the mattress on the floor. The evidence of JM and CT supported LP’s evidence that she had been at BB’s house for the purpose of doing some cleaning of the house the evening prior to the incident and then returning to continue to clean the house the next day to earn some money or to obtain an old phone from BB.

[93] In terms of the description of the incident, LP provided significant details which clearly demonstrated, both during the video interview as well as during the trial evidence, her ability to observe the events, recall the events and then relate them to the court in a very credible and reliable manner. LP provided very specific details of BB lifting the blanket that was over him while he was on a mattress that was on the floor in the dining room, and then how he pulled at her hand or arm toward his exposed penis which was sticking outside his shorts.

[94] I find that a further indication of the credibility and reliability of LP's evidence was that she initially recalled that BB was wearing a shirt, but then correcting herself and stating that he was not wearing shirt, and that he was only wearing grey shorts with orange stripes on the side when she saw his penis sticking out of the shorts. She stated clearly, both during the video interview and in court that as soon as she saw him pulling her hand towards "it" referring to "it," both during the interview as well as in court as being BB's exposed penis outside of his shorts, she "yanked" her hand away. After pulling her hand away from BB's grasp, she threw the phone down that she had been using in her other hand, left the house and ran home to disclose what had just occurred first to her neighbour and her mother.

[95] With respect to the fact that LP disclosed and repeated, on a few occasions, what had occurred to MS, then her mother and about a week later to the police, I simply note here that the repetition of that information does not necessarily enhance the credibility or reliability of her testimony during the trial, simply because she said the same thing or similar thing on one or more earlier occasions.

[96] However, the evidence of JM and MS certainly provides a narrative as to the events which occurred and how the matter came to the attention of the police. In addition, the description of Ms. Shattuck and JM that LP "looked very upset" and that she looked "very distraught and afraid" when she related the details of what transpired shortly before speaking with them, is consistent with an incident of a serious nature having occurred, moments before.

[97] Despite a vigorous and extensive cross examination by Defence Counsel, I find that LP's evidence was highly credible and equally reliable in answering questions spontaneously which demonstrated, once again, a significant ability to recall what had occurred and relate those events in significant detail. She was not shaken on cross examination and LP's evidence was internally consistent and

externally consistent with the supportive peripheral evidence provided by other witnesses in the trial.

[98] As a result, I accept LP's evidence and I find that BB intentionally touched and more accurately grabbed her arm or wrist, for a sexual purpose, that is, to pull the hand of a 12-year-old girl, over to and then potentially to touch his exposed penis. I accept LP's evidence, that as BB pulled her wrist or hand towards his penis, she immediately realized what he was doing and was able to yank her arm away from his grasp and leave the house. Immediately thereafter, she disclosed what had occurred to her mother's friend and then her mother.

[99] In addition, I find that the evidence of CT in relation to comments made to him by BB while the two of them were drinking alcohol and taking a few "puffs" the evening before the incident in question, are relevant to Mr. BB's mindset and specific intent as he pulled LP's arm and hand towards his exposed penis. CT had testified that BB had made remarks directly to him which objectified LP, as a 12-year-old girl, in a sexual manner. I agreed with the Crown Attorney that, based upon the Supreme Court of Canada's comments in **R. v. Evans**, [1993] 3 SCR 653, BB's remarks made directly to his cousin, were admissible and could be relevant to the issue of BB's state of mind the next day when LP stated that he pulled her hand towards his exposed penis.

[100] While I find that CT's recollection of the circumstances and evidence as to what his cousin had said to him were quite specific and detailed, which speak to its credibility and reliability, I agree with the Crown Attorney that those comments should not be given undue weight, but rather, should simply be considered with the totality of the other circumstances and evidence which I have accepted.

[101] Finally, when I consider the totality of the facts and circumstances surrounding this incident, what LP stated that BB had said to her just prior to grabbing her arm and hand pulling it towards his penis, the part of the body that he was moving her hand toward when she "yanked" her hand away, I find that the evidence established that BB had intentionally touched LP's wrist or arm for the purpose of directing her hand towards his exposed penis. In those circumstances, I find that it is reasonable to infer BB had taken those steps to pull LP's hand towards his exposed penis in order to have her hand touch his exposed penis for his own sexual gratification. I find that the fact that LP actually "yanked" her hand away from BB before it touched his exposed penis, does not alter my conclusion

that the grabbing and pulling LP's arm and hand towards his exposed penis, which was outside of his shorts, was done for his own sexual gratification.

[102] Having made those findings of fact and considering the totality of the facts and circumstances with respect to the sexual interference charge, I find that the Crown has established, beyond a reasonable doubt, all of the essential elements that BB intentionally touched LP with his hands for a sexual purpose. Having come to that conclusion, I therefore find him guilty of the offence of sexual interference of LP contrary to section 151 of the **Criminal Code**.

Analysis relating to the S.152 Code Invitation to Sexual Touching Offence:

[103] With respect to the essential elements of the section 152 **Criminal Code** offence of invitation to sexual touching, I find that they are quite similar to the section 151 **Code** sexual interference offence. Based upon the wording of the offence in the **Criminal Code** as stated in the Information, I find that the Crown must prove, beyond a reasonable doubt, the following essential elements:

1. that the complainant [LP] was less than 16 years old at the time;
2. that BB invited, counselled, or incited LP to touch, either directly or indirectly, BB's body, to wit, his penis and
3. that the invitation, counselling, or incitement to touch was for a sexual purpose.

[104] As indicated previously, at the time of the events which bring this matter before the Court, I find that the evidence clearly established that LP was less than 16 years old, on or about August 24, 2020. Furthermore, I find that the Crown does not have to prove that BB knew or ought to have known how old LP was on or about August 24, 2020. On the other hand, even if that were the case, having lived with JM, LP, and her siblings, I have no doubt that BB would have known that LP was less than 16 years old.

[105] In terms of the second essential element of this offence, the Crown must establish, beyond a reasonable doubt, that BB either invited, counselled, or incited LP to touch herself or him. Moreover, for the purposes of this essential element, I find that it is irrelevant whether LP actually agreed to touch or did touch herself or him. The invitation must be to touch the body of a person and the proposed touching must involve some physical contact with any part of a person's body. Like the sexual interference offence, the contact could be direct, for example

touching a person with a hand or some other part of the body or indirect, for example, by touching the other person with an object.

[106] Finally, like the sexual interference offence, I find that the third essential element of the section 152 **Code** invitation to sexual touching offence requires the Crown to establish that the accused's invitation, counselling, or incitement to touch her or himself was for a sexual purpose.

[107] With respect to the three aspects of "invitation" mentioned in section 152 of the **Code**, that is, "invites, counsels or incites" a person under the age of 16 years to directly or indirectly touch, for a sexual purpose, I find that the dictionary definitions of those words provide guidance as to the nature of the intentional act of the accused, which is required to be established, beyond a reasonable doubt, by the Crown.

[108] Where the incident in question involves an invitation to perform a certain act, I find that a dictionary definition of "invite" means to request, ask or suggest, by words or gestures or both, that something be done by the complainant. Where the facts and circumstances may allege that the accused was "counselling" someone to do something, I find that a definition of "counsel" or "counselling" would require the Crown to establish that the accused person suggested that the complainant do something or advised or recommended that the complainant do something. Finally, where the facts and circumstances of the case may involve "inciting" or to "incite" someone to do something, a definition of that action would require evidence that the accused encouraged or urged the complainant, by words or gestures or both to do something.

[109] Based upon my analysis in relation to the section 151 **Code** sexual interference offence, and my findings of fact with respect to the credibility and reliability of LP's testimony, I accept LP's evidence which was supported by other witnesses on peripheral matters, that BB's actions of grabbing LP's hand or wrist and pulling it towards his exposed penis was, in fact, an "invitation" to a sexual touching. I find that the "invitation" was primarily expressed through his gestures, but also through what he had said to LP just prior to pulling her arm and hand towards his exposed penis. Having found those facts and circumstances in relation to the "invitation," I find that the only reasonable inference from those facts and circumstances, is that BB did so, presumably, and logically, for the sole purpose of his own sexual gratification by bringing LP's hand, which was the hand of a 12-year-old girl, into contact with and touch his adult male's exposed penis.

[110] As indicated in my earlier analysis of the sexual interference offence, I find that the Crown has established, beyond a reasonable doubt, that BB had made that “invitation” through his words, gestures and actions directed towards LP, which involved his intentional acts of making direct physical contact with his hand on her wrist or arm and then pulling her hand towards his exposed penis.

[111] In those circumstances, I find that the Crown has established, beyond a reasonable doubt, that essential element of this “invitation to sexual touching” charge. Having come to that conclusion, from my review of the essential elements of this offence, I also find that the Crown is not required to also establish that LP actually touched BB’s exposed penis.

[112] With respect to the third essential element of this invitation to sexual touching charge, I find that the Crown must establish that BB’s invitation, counselling or incitement of LP to touch him was for a sexual purpose.

[113] Like the sexual interference charge, I accept LP’s evidence which I found to be highly credible and equally reliable in relating her specific recall of the words spoken to her by BB, just prior to his direct and intentional physical contact by grabbing her arm or wrist and pulling her hand towards his exposed penis. When I consider LP’s evidence of the words spoken by BB and his intentional physical contact with LP, I find that his words and actions clearly and legally constituted an “invitation” for her to touch him for a sexual purpose.

[114] Furthermore, given LP’s evidence, which I have accepted that BB was pulling her hand directly towards his exposed penis outside of his shorts, I also find that his words and gestures and intentionally pulling her hand towards his exposed penis outside his shorts, was intended for his own sexual gratification. In those circumstances, I find that the Crown has established, beyond a reasonable doubt, that BB had a sexual purpose in mind when he “invited” and in fact, “incited” LP, who was a 12-year-old girl, through his words and gestures, to touch his exposed penis.

[115] Having come to those conclusions, I find that the Crown has established, beyond a reasonable doubt, that BB invited and incited LP to touch him, in particular, his exposed penis, and that in doing so, that invitation or incitement of LP to touch his penis, was for a sexual purpose. In those circumstances, I find BB guilty of the offence of invitation to sexual touching contrary to section 152 of the **Criminal Code**.

Analysis relating to the S.271 Code Sexual Assault Offence:

[116] With respect to the essential elements of a sexual assault charge, section 271 of the **Criminal Code** simply states – “Everyone who commits a sexual assault is guilty of” (a) of an indictable offence or (b) an offence punishable on summary conviction. A person convicted of a sexual assault of a complainant who is “under the age of 16 years” would be liable, if prosecuted by indictment, to a minimum term of imprisonment of one year or if prosecuted on summary conviction, to a minimum term of imprisonment of six months.

[117] The offence of sexual assault incorporates, by virtue of section 265(2) of the **Criminal Code** all forms of assault that may be committed by the definitions as outlined in section 265 (1) of the **Code**. In addition, sexual assault has been defined in **R. v. Ewanchuk**, 1999 SCC 711. The *actus reus* of sexual assault is unwanted sexual touching, which is established by the proof, beyond reasonable doubt, of three essential elements:

1. the voluntary or intentional touching of or force being applied to the other person, directly or indirectly;
2. the touching or force applied to the other person took place in circumstances of a sexual nature; and
3. the absence of consent.

[118] In this case, as mentioned previously, section 150.1(1) of the **Criminal Code** stipulates that where an accused is charged with an offence under section 271 in respect of a complainant “under the age of 16 years,” it is **not** a defence that the complainant consented to the activity which forms the subject matter of the complaint.

[119] As a result, given the fact that LP was a child who was only 12 years old at the time of the activity the forms of subject matter of the charge, even if she had “consented” to the activity in question, it would not constitute a defence to a sexual assault charge.

[120] With respect to the first aspect of the *actus reus* of a sexual assault charge, I find that LP stated that there were three brief acts of voluntary or intentional touching of her body by BB on the date in question. The first was described as a “fist pump” following a short discussion about what she was prepared to do to obtain a phone from BB. Moments later, LP stated that he rubbed her thigh for a

moment, apparently while she was standing next to him lying on a mattress on the floor, after which he patted the mattress and asked her to sit beside him. After LP sat down beside BB, she stated that the third act of voluntary or intentional touching of her body by him was when he grabbed her arm or wrist and then slowly began directing her hand towards his exposed penis. When she saw that BB was pulling her hand towards his exposed penis, she yanked her arm out of his grasp, left his house one and ran home.

[121] In determining the second aspect of the *actus reus*, that is, whether the contact, touching or force applied to LP was of a sexual nature, according to **R. v. Chase**, [1987] 2 SCR 293, that issue is determined on an objective standard. In assessing whether the contact was sexual in nature, courts have noted that the trial Judge should consider several factors including:

- (a) *the part of the body touched* - here, as mentioned, the only parts of LP's body that were touched by BB were her fist during a "fist pump," his brief rubbing of her thigh and after she sat beside him, and then him grabbing her wrist or arm and slowly pulling it and her hand towards his exposed penis.
- (b) *the nature of the force used* - BB used one hand with minimal force to do a "fist pump" and to rub her thigh, but LP also described that he grabbed her with a grip firm on her arm or wrist and then some force was applied to move her arm and hand towards his exposed penis.
- (c) *the duration of the touching* - according to LP, the duration of the rubbing of her thigh was less than a minute and shortly thereafter, the pulling of her arm and hand towards his exposed penis was also brief and ended when she realized where BB was pulling her hand.
- (d) *the location of the touching* - the touching occurred on a mattress placed on the floor of the dining or living room of the house where BB was living. LP, her mother and her siblings had been living in that house while her mother and BB were in a romantic relationship for about 18 months, but her mother and BB had recently separated. This occurred while no one else was present at that house.
- (e) *any words accompanying the contact* - LP stated that BB had asked her a couple of times before she sat down beside him on the mattress what she was willing to do to obtain a phone from him. She never gave him an answer and he did not give her any further direction, but

then rubbed her thigh and patted the mattress which was on the floor and asked her to sit on it beside him. LP added that shortly thereafter, he lifted the blanket which had been covering him with one hand and with the other hand, he grabbed her arm or wrist and started pulling her hand towards his exposed penis.

- (f) *actions immediately following the touching* – LP’s evidence was that she “yanked” her hand out of BB’s grasp and ran home where she immediately disclosed what had occurred to her neighbour and her mother. Once at home, LP had stated that she accidentally saw a message on her mother’s phone from BB which claimed that nothing had happened, referred to LP as “that bitch” and that she got mad because he did not give her the phone, so he told her to leave. With respect to that message, LP had stated that during the video interview, which became part of the trial evidence, “but, that’s not what happened.”
- (g) *intent of the accused* – In this case, if BB had testified, the Court could have considered his direct evidence with respect to the issue of his intent. In determining this factor in the matrix of factors to be considered, the Court may still consider all of the other direct and circumstantial evidence in the case.

[122] An additional factor which is often mentioned for consideration by courts, relates to the intention of the accused with respect to the act or acts in question. If an accused person has testified, his or her intent or motive is only one factor in the matrix of considerations in determining whether, on the basis of an objective assessment, the contact or touching was sexual in nature. However, it should also be noted that the absence of a sexual motive does not preclude the offender from a sexual assault conviction: see **R. v. PLS**, [1991] 1 SCR 909.

[123] In terms of the *mens rea* for this offence, the Crown must establish, beyond a reasonable doubt, that the accused intended to touch the complainant and that the touching was sexual in nature. The sexual purpose of the touching or contact may be determined on the direct evidence of witnesses or may also be inferred from the circumstantial evidence and the nature of the touching. The Court should consider whether the sexual purpose of the touching or contact would have been apparent to a reasonable observer.

[124] In this case, the parts of LP's body which she said were touched, rubbed, or held, very briefly, were her fist, her thigh and her arm or wrist. There was no evidence that BB ever touched, grabbed, or rubbed any other parts of LP's body, in the area of her breasts, her buttocks or her vagina, which a reasonable observer would immediately consider as being sexual in nature. Clearly, the rubbing of her thigh for a brief moment or holding her wrist would not, on an objective basis, indicate to a reasonable observer that those touches or rubs were for a sexual purpose.

[125] As the Supreme Court of Canada noted in **R. v. Chase**, *supra*, sexual assault is an assault committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated. The test to be applied in determining whether the impugned conduct has the requisite sexual nature is objective. The intent or purpose of the assault as well as the motive, if the motive was one of sexual gratification, may also be a factor in considering whether the conduct was sexual in nature.

[126] When I consider all of the factors outlined above as noted in **R. v. Chase**, *supra*, I cannot conclude beyond a reasonable doubt that BB's brief "fist pump," brief rubbing of LP's thigh and then simply grabbing her wrist or arm and pulling it towards him, violated the sexual integrity of LP. Looking at those actions, on an objective basis and considering the part of the body touched, the nature of the force, the duration of the touching and the totality of the circumstances, I cannot conclude that the Crown has established that those actions, would be considered by a reasonable observer to have been done for a sexual purpose and that they had violated LP's sexual integrity.

[127] In those circumstances, I cannot conclude that the Crown has established, beyond a reasonable doubt, that those contacts with LP's body by BB constituted a sexual assault of LP and I find him not guilty of that charge.

[128] In the final analysis, as I have earlier concluded, I have found that the Crown has established, beyond a reasonable doubt, that BB's intentional actions in relation to LP constituted a sexual interference offence contrary to section 151 of the **Criminal Code** as well as the offence of invitation to sexual touching contrary to section 152 of the **Criminal Code**. In those circumstances, I have found him guilty of those two offences.

[129] In relation to the other two charges which were before the court, namely, the sexual exploitation charge contrary to section 153(1)(b) of the **Code** and the sexual

assault charge contrary to section 271 of the **Code**, for the reasons outlined above, BB has been found not guilty of those two offences.

Theodore K. Tax, JPC