SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. A.L.*, 2014 NSSC 402

Date: 20141112
Docket: CRH 413742
Registry: Halifax

Between:

Her Majesty the Queen

v.

A.L.

Restriction on Publication: Pursuant to CC s. 486.4

Editorial Notice:	Identifying information has been removed from this electronic version of the judgment.
Judge:	The Honourable Justice Joshua M. Arnold
Heard:	March 17, 18, 19, 20, 21, 24, 2014; April 11 and 17, 2014, September 17, 2014 and November 12, 2014, in Halifax, Nova Scotia
Final Written Submissions:	July 25, 2014
Written Release of Decision:	December 18, 2014
Counsel:	Roland Levesque, for Her Majesty the Queen Thomas Singleton, for the Accused

By the Court:

Overview

[1] C.S. alleges that in 2002, when she was 10 years old, her mother, B.S., started a relationship with a new boyfriend, A.L. A.L. was in his late 40's when he first met B.S. and was involved in a successful […] business. B.S., C.S. and J.S (son of B.S. and brother of C.S.) began to spend time overnight at A.L.'s home. Eventually the trio moved in with A.L. as a family unit. C.S. testified that shortly after she began spending time at A.L.'s home, her life changed significantly. C.S. alleges that she was subjected to years of constant sexual and physical abuse at the hands of A.L. A.L. denies all of the allegations made by C.S.

[2] The testimony in this judge alone trial included evidence on behalf of the Crown from C.S., J.L. (A.L.'s estranged biological son), J.P. (C.S.'s high school same-sex partner), J.H. (mother of J.P.) and Constable McGowan (the police investigator). On behalf of the defence the Court heard from B.S., J.S. and A.L.

[3] The testimony and submissions took place over seven days in March and April 2014, and counsel's final legal submissions arrived at the end of July 2014.

The Charges

[4] A.L. stands charged:

1) that he between the 31st day of December, 2001 and the 1st day of January, 2009 at, or near […] , in the County of Halifax in the Province of Nova Scotia, did unlawfully commit a sexual assault on C.S., contrary to Section 271(1)(a) of the Criminal Code.

2) AND FURTHER THAT HE AT THE SAME TIME AND PLACE AFORESAID, did unlawfully assault C.S., contrary to Section 266 of the Criminal Code.

3) AND FURTHER THAT HE AT THE SAME TIME AND PLACE AFORESAID, did unlawfully utter a threat to C.S. to cause bodily harm or death to the said C.S., contrary to Section 264.1(1)(a) of the Criminal Code.

4) AND FURTHER THAT HE AT THE SAME PLACE AFORESAID between the 31st day of December, 2001 to the 3rd day of June, 2005, did for a sexual purpose touch C.S., a person under the age of fourteen years, directly or indirectly with a part of his body, to wit: his penis, contrary to Section 151 of the Criminal Code.

5) AND FURTHER THAT HE AT THE SAME PLACE AFORESAID between the 31st day of December, 2001 to the 3rd day of June, 2005, did for a sexual purpose invite C.S., a person under the age of fourteen years, to touch directly or indirectly with a part of his body, to wit: his penis, the body of A.L. contrary to Section 152 of the Criminal Code.

6) AND FURTHER THAT HE AT THE SAME PLACE AFORESAID between the 2nd day of June, 2005 to the 1st day of January, 2009, being in a position of trust or authority towards C.S., a young person, did for a sexual purpose touch directly or indirectly the body of C.S., a young person, with a part of his body, to wit: his penis, contrary to Section 153(1)(a) of the Criminal Code.

Facts

[5] C.S. was born June […], 1991. She was 22 years old at the time she testified during this trial. She alleges that A.L. committed various assaults upon her, sexual and otherwise, between December 2001 and October 2008, while she was living in his home. C.S. alleges countless instances of sexual activity with A.L., as well as assaults and threats by him. At all material times, A.L. was the common-law husband of B.S., C.S.'s mother.

[6] C.S. has faced many challenges in her life. Her parents separated when she was eight years old. C.S. and J.S. lived with their mother, B.S. Following the marital breakup, money was tight and C.S., J.S. and B.S. lived in a duplex in Cole Harbour for a little over a year, paid for by B.S.'s parents.

[7] C.S. testified that B.S. worked long hours for […] and prior to meeting A.L. when not working, whether during the week or on weekends, B.S. would spend her time away from the home playing video gambling machines. C.S. testified that B.S. spent little time looking after her and J.S. during that time period, leaving the young children to either look after themselves or rely on their maternal grandmother to look after them.

[8] C.S. was attending elementary school (grade six) near their home when B.S. introduced A.L. to C.S. as "her boyfriend". After that first introduction to her mother's new boyfriend, C.S. testified that she, J.S. and B.S. spent weekends at A.L.'s home. This progressed to the family spending weekdays there as well. Eventually, she, J.S. and B.S. moved into A.L.'s home sometime during her grade six year.

[9] J.L. is A.L.'s biological son. He is a few years older than C.S. During much of the relevant time period J.L. spent every third weekend at A.L.'s house. J.L. eventually had a falling out with A.L. and never returned to the home.

[10] A.L.'s house is described by C.S. as being a two story building. When C.S. first moved into A.L.'s home she was given her own bedroom upstairs. J.S. was also given his own bedroom upstairs and B.S. and A.L. shared the master bedroom upstairs. During the first few years C.S. was living there A.L. had an office downstairs in the home. If J.L. came for a weekend visit he would either sleep on a couch downstairs or use J.S.'s bed if J.S. was out for the night staying with friends. After a period of time A.L. built an outbuilding that housed his office and C.S. created a bedroom downstairs where A.L.'s office had been located. C.S. moved out of A.L.'s home in October 2008 and has had little or no contact with B.S., J.S., J.L. or A.L. since moving out.

Moving Date

[11] Defence counsel pointed out that C.S.'s recollection of the date her family moved in with A.L. in 2002 differed slightly from the recollection of the defence witnesses.

[12] C.S. testified that she was in grade six when she was introduced to A.L. as her mother's new boyfriend. She testified that the family stayed at A.L.'s home off and on that winter at her mother's convenience. C.S. was not certain when the family's official move to A.L.'s home took place but thought was during the winter of her grade six year, possibly sometime after Christmas. Defence counsel pointed out that during the Preliminary Inquiry C.S. stated she thought that the move took place in April.

[13] B.S. testified that C.S. was born in 1991. She confirmed that she met A.L. in May 2002 and started a relationship with him in July 2002. She stated that the family starting traveling to A.L.'s place in September 2002 and by January 2003 B.S. decided to switch their schools and move in with him permanently.

[14] J.S. also testified that he and C.S. switched schools in January or February 2003.

Reading

[15] C.S. testified that shortly after she moved into A.L.'s house, A.L. started to come into her room at bedtime to read. During those first "reading" sessions C.S. describes A.L. as kissing her on the lips when he finished reading. Not long after the kissing started, C.S described A.L. started fondling her above her clothes. She says that this quickly progressed to A.L. fondling her under her clothes. Shortly thereafter she stated A.L. asked her to touch his penis, then to rub his penis and eventually A.L. exposed his penis and asked her to rub it.

[16] C.S. testified that when the touching progressed under her clothing A.L. would instruct her to take off her shirt or take off her pants but to remain under the covers. He would then touch her chest, vagina and bottom. During the course of touching C.S., A.L. would tell her, "I love you", "you're doing good things" and provided her with specific direction as to how to reciprocate by touching his penis.

[17] C.S. said she wore either pajamas or t-shirt and pajama pants when she first began living at A.L.'s house. She testified that A.L. eventually bought her a nightgown to make it easier for him to access her during these evening sessions of molestation. C.S. testified that eventually A.L. would come into her room to molest her almost every week night under the pretext of reading.

[18] C.S. described A.L. wearing a cellphone attached to his pants. She stated that on at least three occasions a call came in while A.L. was touching her and he either: continued; kissed her on the lips and then left to take the call; or, resumed touching her when the call was finished.

[19] According to C.S., A.L. would pretend he was reading to her to cover up what was really going on. C.S said that he most often feigned reading Stephen King's *Dreamcatcher*. She stated that during these "reading" sessions the lights in her room would be turned off but her door would always be partly opened with the hallway light turned on.

[20] C.S. said that B.S. was often downstairs while this was going on. The house was old and had squeaky stairs so A.L. and C.S. could hear if B.S. was coming upstairs.

[21] C.S. said that on one occasion while the nightly "reading" was going on, she could hear squeaking as B.S. started to come up the stairs. Shortly thereafter, she said B.S. took her aside and told her that she was too old to have someone read to her. C.S. told A.L. about her mother's comments and A.L. instructed her to tell her mother that she was just happy to have a father figure involved in her life. She said this seemed to mollify B.S.

[22] C.S. described this nighttime "reading" as going on from shortly after she moved in in 2002 until sometime in 2003. She stated that when she started school again in September 2003, A.L. was still "reading" to her. C.S. cannot be precise as to when it stopped.

[23] C.S. was adamant that A.L. never read to her brother, J.S.

[24] B.S. testified that C.S.'s bedtime was between 9:00-9:30 p.m. The family had pet dogs. According to B.S., at night A.L. would go up to read to both of the kids, typically C.S. first because she was younger. B.S. would take the dogs outside at that time. B.S. testified that on her way to bed she would observe A.L. reading to C.S. Once at the top of the stairs B.S. could see into C.S.'s room where her bed was located. B.S. testified that during these reading sessions she observed C.S.'s door open and A.L. sitting on floor reading while C.S. was lying in bed.

[25] According to B.S., A.L. would read to C.S. for 15-20 minutes and then read to J.S. for 15-20 minutes. B.S. said that she had no idea what A.L. may have been reading to her kids. She also acknowledged that most of the time when she was heading upstairs to bed, A.L. would be finished reading to C.S. Additionally, B.S. agreed that the stairs were old and squeaky. Therefore, anyone upstairs would be alerted to someone coming up the stairs.

[26] B.S. testified that the nighttime reading only went on for a couple of months, from September 2002 (before the family "officially" moved in) to sometime in January 2003.

[27] In her testimony, B.S. stated that she definitely observed A.L. reading to J.S. and that usually when she was heading upstairs to bed, A.L. would be finishing reading to J.S. This raises the question: if A.L. read to C.S. before J.S., and if B.S. was usually going to bed when A.L. was finishing reading to J.S., how could she see what may have been happening in C.S.'s room?

[28] According to J.S. he usually went to bed around 10:00 p.m. once the family was essentially living at A.L.'s home. C.S. went to bed a little earlier than he did. According to J.S., A.L. only read to them for the first little while after they moved in.

[29] J.S. described the bedtime routine as starting with A.L. reading to C.S. in her room. He said that he could hear A.L. reading to C.S. at night. Once finished reading to C.S., A.L. would then go into J.S.'s room to read to him. When the family initially moved in with A.L., J.S. said he always kept his door opened. J.S. testified that C.S. also always kept her door opened at night because she was scared of the dark and as a result made sure her room was well lit. Generally, according to J.S., while A.L. was upstairs reading to the kids, B.S. would be downstairs.

[30] J.S. also testified that he would overhear A.L. reading Stephen King novels to C.S. A.L. would read shark stories to J.S. According to J.S., the routine of bedtime reading was of such a short duration that they never actually made it all the way through the shark book. J.S. stated that A.L. stopped reading to him and C.S. at same time because his work got in the way. According to J.S., if the family moved in permanently in January 2003, by June or July that same year A.L.'s work load increased such that he was gone many evenings and had stopped reading to the kids. Between 2003 and 2005, J.S. said that while A.L. was out most nights working he would occasionally be home by the time the kids got to bed. In 2005, A.L. hired more employees and was home more evenings, but he did not resume the reading routine.

[31] A.L. also testified about the bedtime reading routine. His initial testimony during direct examination was that between September and December 2002 he would go into C.S.'s room and read to her while sitting on her bed. He said that the door to her room was always open and the lights were always on. A.L. stated that this usually occurred between 8:00-8:30 p.m. while B.S. was downstairs. Once finished reading to C.S., he read to J.S. between 9:00-9:30 p.m. According to A.L. he stopped reading to the kids permanently around January 2003. A.L. stated that during the brief time period he was reading to the kids, he did so only sporadically, no more than two or three times per week.

[32] Later in his direct examination, A.L. testified that C.S. would lie in bed while he read to her but he would only sit on the floor of the room right by her bedroom door while reading. He reiterated his testimony in this regard on cross-

examination and denied testifying on direct examination that he sat on C.S.'s bed while reading to her. It was only after the recording of his earlier testimony was played back in Court that A.L. reluctantly agreed that he probably sat on her bed at some point. A.L. may have legitimately been mistaken or he may have let the fact that he sat on C.S.'s bed "slip" and was attempting to cover up that admission.

Routines

[33] C.S. testified that A.L. was able to molest her on a regular basis because her mother, B.S., was rarely home, and when she was home, was disinterested in her children. C.S. also testified that her older brother, J.S. was rarely home and that when he was home he was also so disinterested in C.S. that he did not notice what A.L. was doing with her.

A.L.'s Work Routine

[34] J.S. testified that once he and C.S. had switched schools, by January or February 2003, they usually got home from school around the same time in the afternoon. J.S. explained that A.L. became very busy with work in 2003 and was not often home when the kids were awake until 2005. If A.L was not home then he would not be "reading" to C.S. or molesting her at bedtime.

[35] B.S. testified that once the family moved into A.L.'s home, a normal weekday consisted of A.L. leaving for work by 7:30 a.m., B.S. leaving by 7:50 a.m., with the kids either getting to school by bus or getting a drive. They would arrive home from school by 3:30 or 4:00 p.m. A.L. returned home between 5:30 and 9:00 p.m. depending on his job site location.

[36] A.L. testified that in 2002 he started his own business and had lots of morning and evening work calls. He said that from 2002 onward he left home anytime between 6:00 a.m. and 7:30 a.m. and as a result he was generally gone before the kids left for school. He worked until 6:30 p.m. or later and was generally not home when they arrived home from school. He said that he never ate supper with the family. In addition, A.L. testified that he was on call every second or third night. By January 2003, his business had new contracts requiring him to do service calls as far away as Bridgewater.

[37] A.L. testified during direct examination that he was frequently away working and as a result had no opportunity to molest C.S. However, on cross-

examination A.L. agreed that during the six years C.S. lived in his home, he certainly was alone with her on occasion.

B.S.'s Work Routine

[38] A.L.'s son, J.L., testified that according to a custody arrangement, every two weeks he would stay at A.L.'s home for a weekend during the first few years that C.S., B.S. and J.S. were living with A.L. J.L. testified that when he was staying at the house, B.S. was usually at the home on weekends unless she was working.

[39] According to B.S., she worked for […] at various locations on all weekdays all day (8:00 a.m.-5:00 p.m.) and one weekday evening per week, usually either Wednesday or Thursday evening. On those evening shift dates she would leave home at noon and not return home until 9:00-10:00 p.m.

[40] B.S. said she had one Saturday off per month. She testified that on weekends, the kids would usually be up by the time she left for work. According to B.S.'s testimony, A.L. would either be up or gone to work by the time she left for work on the weekends. B.S. agreed that on many weekends she was not home during daytime hours due to work.

[41] B.S. testified that in September 2007 she entered Dalhousie University as a part-time student. She was on short-term disability with a medical issue between September 13, 2008 and October 23, 2008 when she returned to work. She stayed at home the month she was on disability. The defence raises this as significant because C.S. testified that there were no long periods that A.L. did not molest her while she was living in the home. The implication is that if B.S. was home on disability she would have noticed A.L. molesting C.S.

[42] There was additional evidence concerning B.S.'s hours of work. According to J.S., B.S. worked all weekdays, one night per week and had one weekend off per month. Prior to Sunday shopping, B.S. worked Saturday nights. Once Sunday shopping came into effect, she worked either Saturday or Sunday nights.

[43] According to A.L., from 2002-2007, B.S. worked 8:00 a.m.-5:00 p.m., and once per week had an evening shift of either noon-9:00 p.m. or 1:00 p.m.-10:00 p.m. B.S. also worked Saturdays or Sundays off and on, depending on when Sunday shopping became available. He would therefore be home with the kids on many weekends when B.S. was at work.

J.S.' Routine

[44] According to C.S., although he was just a couple of years older than her, J.S. was often not home due to an active social life, work and skateboarding.

[45] J.L. corroborated C.S.'s testimony in this regard and stated that J.S. was rarely home during his weekend visits, as he was often out skateboarding with friends. J.L. also stated then when J.S. was home, he was often in his room playing video games.

[46] B.S. presented what appeared to be a toned down version of J.S.'s schedule. According to B.S., J.S. spent some evenings out with friends skateboarding and some evenings he would be home. During the school year, J.S. would be home on most weekends, but during the summer there were some weekends he was away at friends' homes. When J.S. turned 16 he obtained a part-time job and had to stay home a little more because of that responsibility.

[47] A.L. testified that "in later years" J.S. was out skateboarding frequently.

[48] J.S. testified that C.S. did her homework right after school, while he did his own after supper. J.S. acknowledged that he was a skateboarder but said that weeknights were school nights so it was difficult for him to get out of the house. Therefore, he says his skateboarding mainly occurred on the weekends.

Intercourse

[49] C.S. was born June […], 1991. She testified that about two weeks after her eleventh birthday in June 2002, a friend of hers had stayed over for the weekend. Sometime soon after this sleepover, on a rainy Saturday or Sunday, midmorning sometime between 9:00 a.m. and 10:00 a.m., while B.S. was at work and J.S. was out skateboarding with friends, C.S. was in her room playing with her Barbie dolls. She said that A.L. came into her room and began to play Barbies with her. After a short time playing Barbies, he asked her to come into his bedroom. A.L. told her that they were going to play together. He instructed C.S. to take off her clothes. She recalled that A L. was wearing a purple sweater. A.L. then took off his pants. She described him as wearing black underwear with a white waistband. A.L. instructed her to take off her own underwear, then took his underwear off.

[50] C.S. said that at A.L.'s direction, she lay down on his bed on her back with her legs spread. A.L. told her that he was too nervous to achieve an erection.

Eventually A.L. did achieve an erection. A.L. began to have intercourse with C.S. C.S. describes the event as hurting a little bit and not lasting very long. Eventually she says that A.L. withdrew his penis from her vagina and ejaculated into his own hand. She said that A.L. then told her that he was proud of her because she had done so well. C.S. then went downstairs to the washroom to clean up. C.S. advised the Court that after this event she found blood in her underwear.

[51] Following that first incident of intercourse, C.S. said A.L. took her out to lunch at the Irving Big Stop in Enfield. On the way home from the Irving Big Stop he told her variously: " I love you", "keep this a secret", "this is a good thing", "it will feel better next time" and "if you keep doing this I will make sure that your family is well taken care of". On their way home from the Big Stop, A.L. received a work service call and dropped C.S. off at their house.

[52] C.S. testified that the promise by A.L. to take care of her family if she continued to have sex with him was very significant to her. She described the difference in lifestyle prior to living with A.L. as "huge". Prior to living with A.L., she said was a period of time when her family did not always have enough money for food or home heating.

[53] A.L. agreed that he had taken C.S. to the Irving Big Stop for lunch while she was living with him. He denies having intercourse with C.S., denied taking C.S. to the Big Stop after intercourse and denied telling her not to talk about intercourse.

[54] C.S. said that after that first incident of intercourse when she was eleven years old, A.L. had regular intercourse with her until she moved out at age sixteen. Generally, she said A.L. would have sex with her on either Wednesday or Thursday evenings or Saturday mornings when B.S. was at work. C.S. also claimed that she had intercourse with A.L. many times while accompanying him on work service calls. C.S stated that as time went on she tried on several occasions to discourage A.L. from his sexual advances, but this caused him to react in an intensely abusive fashion and she was unable to stop him.

[55] C.S. explained to the Court that A.L. expected her to come to his room and get in bed with him after B.S. left for work as long as they could avoid J.S. If J.S. was home, C.S. explained that he usually had the television on and they would often have intercourse anyway. C.S. said she would make sure she always had a blanket close at hand and would cover up immediately if she felt in danger of being discovered. She said that J.S. came into A.L.'s bedroom on a couple of occasions

when C.S. was in bed with A.L., but never asked why she was there or what she was doing.

[56] J.S. testified that he never saw C.S. in bed with A.L. and did not recall ever seeing C.S. in the master bedroom with A.L.

[57] C.S. said that after the first instance of intercourse, there were no protracted periods of time when she did not have intercourse with A.L., except on a couple of occasions when she and J.S. were away on vacation. B.S. said that she was home for a month on disability between September 13, 2008 and October 23, 2008, so there would have been little opportunity for C.S. and A.L. to have been alone together having sex.

[58] A.L. denied any intercourse with C.S. He initially testified that he worked so often that he had little opportunity to be alone with her. In cross-examination, A.L. agreed that he could have been home alone with C.S.

[59] J.P. testified that prior to dating C.S. she was not at her home very often. However, during the ten months that they dated prior to C.S. moving out, J.P. said that she was at A.L.'s home early in the morning on school days and almost every weekend. Therefore, during those final ten months there would have been less opportunity for A.L. to molest C.S.

[60] After she started dating J.P., C.S. said she had intercourse with A.L. on a couple of final occasions. C.S. could not remember the last time she had sexual intercourse with A.L.

The Doors

[61] C.S.'s bedroom was on the upper floor of A.L.'s home for the first few years they lived there. Her room was located immediately adjacent to J.S.'s room, on the same level as the master bedroom where B.S. and A.L. slept. The condition of J.S.'s door and the lock on C.S.'s bedroom door became an issue at trial.

The Door to J.S.'s Room

[62] C.S. advised that when she first moved into A.L.'s home she and J.S. each had their own rooms, immediately adjacent to each other. C.S. described J.S.'s door as being old and squeaky. Anyone on the upper floor could hear when J.S.

was opening his door. According to C.S., J.S. asked to have his door fixed but A.L. said no to that request.

[63] J.S. described the door to his own room as having no door handle. As a result it would not stay shut. He said he jammed a box or step stool against the door to keep it closed. There were such large cracks on the door frame that his bedroom door barely stayed on.

[64] B.S. also testified that J.S.' door was old and had no doorknob or handle. As a result J.S. used a footstool to prop it closed.

[65] A.L. testified that J.S.'s room had an unfinished door frame, no door knob and was barely on its hinges. He agreed that the door to J.S.' room was never repaired.

[66] Having this dilapidated door could have assisted A.L. in molesting C.S. undetected, since J.S. had to prop his door closed and if opened the door would make enough noise to alert A.L. and C.S. On the other hand, J.S. said his bedroom door was open at bedtime.

The Door to C.S.'s Room

[67] A.L. testified that C.S. and J.S. did not get along. At one stage, he said C.S. was slamming her door so often he removed it for one week.

[68] A.L. also testified that the door to C.S.'s room did not always have a lock on it. He said C.S. complained that J.S. would come in to her room, "poke and pick at her" and take things from her. Therefore, sometime during 2003, A.L. stated he put a hasp on the inside of C.S.'s door so that she could swing it shut and lock it when she was in her own room without being bothered by J.S. A.L. denied that he placed a hasp on the inside of J.S.' door so that he could molest her without someone walking in on him.

[69] C.S. testified that A.L. accused her of trying to have intercourse with J.L. because he had seen them in her room playing video games one evening. C.S. said that A.L. then temporarily removed her door from the hinges so that she could not shut her door when J.L. was visiting. C.S. expanded on this and stated that A.L. later threatened to take her bedroom door off again when J.L. and a friend of his were staying at the home as A.L. felt C.S. was being too friendly to them. She denied that A.L. removed her door because she was slamming it.

[70] C.S. testified that J.S. did not go into her room to steal things or bother her. She says she was a large girl and could handle her brother. C.S. said she never asked A.L. for a hasp or lock on her door. The hasp was locked with a small luggage-style padlock. According to C.S., one key hung in her closet and A.L. kept the other key.

[71] C.S. said that toward the end of her grade seven year, A.L started telling the family that he was going into C.S.'s room to help her with her homework. Once announced, A.L. would enter her room, lock the hasp, help her with her homework and then have intercourse with her.

[72] C.S. testified that if J.S. was really bothering her, if given an option she would have asked for an exterior lock on her bedroom door, not an interior one. She said the hasp was put on the interior of her door for one reason only, to allow her and A.L. to have intercourse in her room without risk of discovery.

The Bed

[73] C.S. testified that she was initially given a single mattress on an older metal bed frame when she arrived at A.L.'s house. According to C.S., the bed frame proved too noisy during A.L.'s molestation of her, particularly during intercourse. C.S. therefore told B.S. that she did not like the metal bed and slept with her mattresses on the floor of her room, not in the bed frame. She said A.L. eventually removed the metal bed frame from her room.

[74] C.S. told the Court that when she moved to the downstairs' bedroom she set the metal bed frame up in that room. She said that she went to the mattress store with A.L. when A.L. purchased J.S. a new bed and frame and at that time he also bought her a new mattress. C.S. testified that she did not receive a new box spring as she did not need one. She could not recall if B.S. also came to the mattress store when the purchases were made.

[75] During cross-examination, C.S. was shown a receipt purportedly for the new mattress or bed. She denied ever having seen the receipt previously and was confused as to whether her new mattress was a twin size or single size.

[76] According to B.S.'s testimony C.S. always had a metal frame on her bed and never slept upstairs on the floor on a mattress. B.S. stated that when C.S. moved downstairs they bought her a new twin size box spring and mattress.

[77] When C.S. moved out of A.L.'s home and into J.H.'s home, B.S. said the same twin size metal frame bed, box spring and mattress were delivered to her there.

[78] J.S. testified that when she was living upstairs, C.S. had a single bed with an old wooden frame. When C.S. moved downstairs she had a bed about the same size, twin or double, with a box spring and mattress.

[79] A.L. said that C.S.'s first bed, when in the upstairs bedroom, was an old fashioned spring frame, tubular steel bed with a headboard. A.L. says that C.S. slept in the same bed, not on a mattress on the floor, until she moved downstairs in 2007. A.L. claimed that C.S.'s bed was not taken out of her room upstairs until she moved downstairs.

[80] A.L. stated that in 2007, they bought C.S. a twin box spring and mattress. He said B.S. was with him when he made the purchase. That new bed was used by C.S. when she stayed in the downstairs bedroom and was eventually delivered to J.H.'s house when C.S. moved out.

The Tent

[81] C.S. told the Court on direct examination that during the summer following grade six, just after her eleventh birthday, A.L. told her that he owned a tent and proposed the idea of setting it up in their yard near the driveway. According to C.S., A.L. told her that they could have sex in the tent and spend the entire night together. The small tent was set up in the yard and C.S. said she spent the night in the tent with A.L. During the night A.L. slept closer to the tent entrance. According to C.S., the first night in the tent A.L. touched her breasts but did not attempt further sexual activity.

[82] After spending a couple more nights in that small tent, C.S. said A.L. bought a larger tent and an air mattress. A.L. told her that sleeping on the ground hurt his back. He spent several nights with her in the larger tent over the course of the summer. C.S. described to the Court that A.L. had intercourse with her at night while they were alone together in the tent. C.S. alleged that intercourse in the tent with A.L. occurred between two and four times over the course of that summer.

[83] C.S. testified that on one occasion when she tried to leave the tent to use the washroom after having intercourse, she noticed that the zipper was locked by a small master lock. C.S. was unable to unzip the tent as a result of the lock.

[84] C.S. said that at one point during the summer, B.S. mentioned that she did not feel comfortable with C.S. sleeping in the tent with A.L. C.S. claimed that, in response, A.L. told B.S. that he enjoyed sleeping out in the tent with C.S. if that made C.S. feel like she had a father.

[85] On cross-examination, C.S. testified that the tent could have been set up in the yard as early as May. She then went on to state that the tent was set up prior to the first incident of intercourse. She confirmed that a friend of hers also stayed in the tent with her on separate occasions.

[86] B.S. testified that she only remembered one tent being used in the yard and that it was fairly large. The tent was placed in two different spots over the course of the season, that being the side of the house and the back of the house. B.S. advised that contrary to C.S.'s claims, there was never an air mattress in their household. Additionally, B.S. denied that A.L. ever spent the night in the tent. B.S. said that A.L. had a bad back and could not sleep outside.

[87] J.S. recalled A.L. setting up a small, two or three man tent in their backyard one summer but could not recall the year. J.S. could not recall a second tent ever being purchased. He told the Court that C.S. stayed in the tent with a friend overnight but that no one else ever stayed in the tent with C.S.

[88] A.L. testified that they only ever had one tent, not two. He stated that he had this tent for years, long before B.S. and her family moved into his home. A.L. denied having an air mattress. He denied ever staying in the tent with C.S. He denied having intercourse with C.S. in the tent.

The ATV

[89] C.S. testified that A.L. owned an all-terrain vehicle (ATV). She told the Court that there was a trail not too far from their home. She described several occasions where A.L. put the ATV on a utility trailer, drove her to a remote location and took her for a drive on the ATV. C.S. claimed that A.L. twice drove them to a secluded clearing and they had intercourse on that trail. On one occasion, she said they also drove to another trail near […] and again had intercourse on the back of the ATV.

[90] B.S. agreed that A.L. owned an ATV that could seat two. She testified that she was not aware of any occasions when A.L. took C.S. away from their yard on

the ATV. J.S. also agreed that A.L. had an ATV and a utility trailer. He testified that he never saw A.L. use the utility trailer to transport the ATV.

[91] A.L. confirmed that he owned an ATV. He said it was used for plowing and yard work. He went on to agree that C.S. went for rides with him around their property but he denied ever taking her four wheeling. A.L. agreed that he had a utility trailer but said that it was used for business only and was never used to transport the ATV. A.L. testified on direction examination that he had never taken the ATV off the property.

[92] On cross-examination, A.L. admitted that he and his business partner had purchased ATV's at the same time, since his partner was an avid four wheeler. A.L. agreed that he went four wheeling with his business partner and others […] and elsewhere.

[93] A.L. denied owning a utility trailer at the time he went four wheeling with his business partner and claimed that he just loaded the ATV on someone's truck. Oddly, A.L. could not remember whose truck was used to transport the ATV or when he purchased his own utility trailer.

[94] A.L.'s business partner lived in […]. A.L. stated on cross- examination that he could not recall ever taking C.S. on his ATV off his own property.

Taking Kids on Work Calls Routine

[95] C.S. stated that A.L. told her that it would be exciting for him to have sex with her where he worked. She said he took her on work calls to various […] in and around the Halifax Region. C.S. claimed that A.L. also took her on work calls outside of Metro. C.S. alleged that A.L. had intercourse with her while working […].

[96] She testified that […] . According to C.S., those rooms often had locks.

[97] C.S. described A.L. taking her on other work service calls. During some of those service calls, she said he took the opportunity to sexually assault her. C.S. described being touched on her breasts and vagina while A.L. was doing a service call in Musquodoboit. She also stated that A.L. had intercourse with her at a […] in Bridgewater.

[98] According to C.S., while she frequently went on service calls with A.L., her brother, J.S., only went to work with A.L. a couple of times.

[99] C.S. described going on service calls with A.L. in the evenings, on weeknights/school nights, as well as any time, day or night, on the weekends. C.S. described arriving back home many nights later than 9:30 p.m. B.S. would know if C.S. was out on work calls because B.S. only worked one night per week. C.S. recalled A.L. waking her up at 10:00 p.m. to take her to a service call at a […] in Dartmouth. That resulted in her not arriving back home until 2:30 a.m. C.S. stated that they did not have intercourse on that occasion, as A.L. became worried that there might be video surveillance in […].

[100] According to J.L.'s testimony, prior to the arrival of B.S. and her family, A.L. used to take him along on service calls. Once C.S. became part of the household, J.L. observed A.L. take her on service calls instead of him. J.L. was left behind to do yard work or watch television. This hurt J.L.'s feelings significantly, since he only spent three days with his father every two weeks.

[101] J.L. advised that when on service calls with A.L. […].

[102] According to B.S., who worked in some of the […] A.L. serviced, when a contractor like A.L. came into their […], the procedure was for the contractor to see the store manager and the […] manager would unlock […] for the contractor.

[103] B.S. testified that she observed C.S. come into […] with A.L. on service calls.

[104] According to B.S., C.S., J.S. and J.L. (when he was at their home) all wanted to go with A.L. on service calls. Therefore, the general unwritten rule in the home was that if A.L. was going on a service call, the first child out the door went on the call.

[105] B.S. also stated that the general rule was that if a service call was something quick A.L. would take one of the kids with him, but if he was going on a longer service call he would not bring any of the kids.

[106] J.S. testified that he occasionally went on work calls with A.L. until 2005, when he obtained his own employment. He also stated that C.S. also went on work calls with A.L. According to J.S., A.L. would not take either C.S. or himself on

any out-of-town service calls and they were never away from home for more than a couple of hours while on service calls.

[107] J.S. said that from his experience on service calls with A.L., the locks on the […] were always on the outside, not the inside. J.S. also said that he never went into […] on work calls with A.L.

[108] A.L. testified that J.L., C.S. and J.S. were all occasionally taken on simple one-hour service calls. He said he did not take them on complicated calls. A.L. agreed that he started taking C.S. and J.S. on service calls as soon the kids stated staying overnight at his home, but he denied taking them frequently. A.L. stated that he would never take the kids on service calls on school nights and generally only took them on weekends. In the summer time, he said he might take them any time. A.L. testified that he would not take the kids on service calls outside of the Metro area, since those calls could be very long, as out-of-town customers stockpiled work awaiting his arrival. As a result, A.L. stated he would only have the kids away from home one to two hours at the most.

[109] A.L. stated that the family determined who could go with him on service calls based on whoever got into his service vehicle first. A.L. claimed that he took C.S and J.S. on an equal number of service calls because they did not get along.

[110] A.L. testified that he never took the kids, including C.S., on service calls to […] and denied any sexual conduct with C.S. anywhere, including at work.

[111] A.L. stated that if he was called out to a […] he would find the […] manager, who would take him to the computers to show him what was wrong. A.L. testified that he would also have to sign in at the […] courtesy desk. After all of that, the […] manager would let him into the […] (generally located at back of the store). A.L. added that he did have the ability to call in to the […]ahead of time to find out what service problem he might be facing.

[…] Room

[112] C.S. told the Court that when A.L. took her to work with him, he sometimes had intercourse with her in […]. She also stated that once or twice they had sex in a […], but more often they had sex in the […].

[113] C.S. testified that there was a metal box […] that she recalled sitting on while A.L. stood in front of her and had intercourse with her. C.S. identified the large metal box from photographs presented to her at trial that depict a […].

[114] The investigating officer, Constable McGowan, also testified on this point, advising that she went to the […] in question to view and take photographs of a […]. She testified that in order to gain entry to the […] she had to climb a steep flight of stairs, unlock a door at the top of the stairs, then once in the […] she had to unlock another door to gain entry to the […] room. Constable McGowan stated that the locks on the […] room door she examined are on the exterior, not the interior.

[115] Constable McGowan testified that during the course of her investigation, when she showed C.S. a photograph of the transformer box in the […], C.S. cried.

[116] During the course of questioning during the trial, A.L stated that he was familiar with the […] room where C.S. claimed they had intercourse. A.L. described accessing the […] room from the […] room. He emphasized that the door to the […] room and the door to the […] room are both locked from the outside. A.L. did not dispute that certain of the […] rooms could be locked with a deadbolt from the inside.

[117] A.L. advised that he did bring C.S. into […] rooms on occasion, but added that managers would be in and out of those rooms frequently while he was doing his work.

[118] Although he was familiar with these […] rooms, A.L. was adamant that he would have no reason to be in the […] room other than in the event of a major power failure. A.L. said he certainly would not take C.S. on a complicated service call like a major power failure that could require him to work in the […] room. A.L. denied having any sort of sexual contact with C.S. in an […] room.

[119] A.L. said that the large box C.S. said she was sitting on in the […] room when having intercourse with A.L. was a "step down transformer" and he initially implied that the temperature of this box would be far too hot and dangerous for anyone to sit on. During cross-examination, the following exchanges occurred:

> **MR. LEVESQUE:** And I'm suggesting to you that at - at least one occasion, when we look at photograph number 6, C.S. was actually sitting on this transformer when you had sex with her standing up in front of her.

A.L.: No sir.

MR. LEVESQUE: Never happened also?

A.L.: No, not on that anyways so. You know how hot that would be?

MR. LEVESQUE: Pardon me.

A.L.: Do you know how hot they run?

MR. LEVESQUE: Tell me.

A.L.: They probably run in the summer time 120 degrees. You don't go around transformers like that. You don't go sitting on those.

MR. LEVESQUE: Why not?

A.L.: Because. It's a stepped down transformer.

MR. LEVESQUE: Yeah, okay, so why wouldn't you sit on it?

A.L.: Because you wouldn't.

MR. LEVESQUE: Why not?

A.L. Because it's dangerous.

MR. LEVESQUE: Well, there's nothing that would prevent you from sitting on that - ah - transformer, right?

A.L.: I wouldn't sit on it.

MR. LEVESQUE: Well, you wouldn't sit on it –

A.L: No.

MR. LEVESQUE: But I mean, there's nothing preventing a person from sitting on that transformer, correct?

A.L.: Oh no, someone could sit on it yeah –

MR. LEVESQUE: Yeah.

A.L.: - I'm not saying they couldn't but I've - you don't go sitting on transformers.

MR. LEVESQUE: Well that's your version of – you're saying you wouldn't go sit on a transformer but the fact remains that a person could sit on this transformer, yes?

A.L.: Yes.

MR. LEVESQUE: And I am suggesting to you C.L. did sit on this transformer and you stood in front of her and had sexual relations with her.

A.L.: No I didn't, sorry.

[120] A.L.'s credibility is impacted in two ways by this exchange. The more obvious issue is A.L.'s initial claim that the box would be too hot to sit on. This statement is clearly made to discredit C.S.'s claim of sitting on the box while having intercourse with A.L. The second issue is the curious statement made by A.L. when the Crown suggested to him that he had intercourse with C.S. while she was seated on the box. After repeated denials through the course of his testimony regarding any sexual activity with C.S., A.L. in this instance stated "*No, not on that anyways so*". Standing on its own, the common sense interpretation of that comment is that A.L. does not agree that he had intercourse with C.S. on that box, but suggests that A.L. had intercourse with C.S. in another location. However, that comment was preceded by numerous denials by A.L. in this regard. No follow-up questions were asked by the Crown after A.L. made this statement so I cannot speculate as to where this may have led.

[121] The Court eventually asked several questions of A.L. about the temperature of the box. Those questions were then followed up by further questions from the Crown:

> **THE COURT**: In relation to - ah - the questions about - ah - the item noted in Exhibit 3 photograph number 6 that - ah - that being the – ah - transformer.
>
> **A.L.:** Yes.
>
> **THE COURT**: Ah - did - was it your testimony that that transformer would actually always be at 120 degrees?
>
> **A.L.:** Yeah it's pretty hot all the time. Summertime would be worse, yeah.
>
> **THE COURT**: And have you actually touched one of those transformers to see what –
>
> **A.L.:** Oh yes, I've been in - in different rooms at different times yes, working.
>
> **THE COURT**: Okay and what if it's not the summer? What's the temperature of those transformers?
>
> **A.L.:** Ah usually 90.
>
> **THE COURT**: And that's the external temperature, if you touched the top of the transformers?
>
> **A.L.:** The cabinet temperature yes, yeah.
>
> **THE COURT**: The cabinet temperature.

A.L.: Yeah. And that's as long as the ventilation's functioning properly in the room.

…

QUESTIONS ARISING FROM MR. LEVESQUE:

MR. LEVESQUE: Just maybe clarification on that transformer that you talked about. You're saying that the transformer itself would be 120 degrees? Is that -

A.L.: Yes, in the summer time. They run very –

MR. LEVESQUE: Summer time?

A.L.: - very hot yeah. They still –

MR. LEVESQUE: Is that 120 degrees Fahrenheit?

A.L.: Fahrenheit, yes.

MR. LEVESQUE: Fahrenheit.

A.L.: Yes.

MR. LEVESQUE: And in the winter time it would be 90 degrees?

A.L.: Yes, as long as the ventila - as long as the ventilation system's functioning.

MR. LEVESQUE: This - ah - photograph number 6 on Exhibit 3 - is that sort of a casing that goes over the transformer?

A.L.: Over a big, big - yeah - a big, big - ah – it's just a big - looks like a big coil inside with all the wires wrapped around it and it changes 600 down to 347 or 120 or 220.

MR. LEVESQUE: Okay so there's sort of a big transformer inside this metal –

A.L.: Box.

MR. LEVESQUE: Box here.

A.L.: That's - yes - yes.

MR. LEVESQUE: And mine - is it - is it correct or am I wrong that the 120 degrees and the 90 degrees would be for the actual transformer inside this box, not - not this actual box itself?

A.L.: Yeah, the internal components of that would be running extremely hot.

MR. LEVESQUE: Right.

A.L.: So the cabinet temperature itself would be really hot too, even though it's got ventilation. The top of that gets really hot; the sides get really hot. Transformers run hot especially when they're under heavy load.

MR. LEVESQUE: Right, but the 120 and 90 degrees would be for the coils that are inside this casing here, is that correct?

A.L.: No. That would be the cabinet temperature, like the external - the metal itself yes would be really - really hot, yeah.

MR. LEVESQUE: So if we went to this cabinet here, the transformer - ah - and we put our hand on it this transformer would be like a 120 degrees?

A.L.: Yes.

MR. LEVESQUE: Fahrenheit?

A.L.: Yes.

MR. LEVESQUE: And if we went there sort of in the winter time it would be 90 degrees –

A.L.: 90 degrees yeah.

MR. LEVESQUE: Fahrenheit. On this –

A.L.: Yes. Sometimes - sometimes warmer too depending on how much of a load was on it and what - what was being used in the store.

MR. LEVESQUE: Sometimes even higher than 120?

A.L.: Oh in the summer if the ventilation – it's got an exhaust fan on it and an intake.

MR. LEVESQUE: Right.

A.L.: Ah - there should be a vent there somewhere. No, it doesn't show you. Oh yes it does. See right there, on the wall. That's an intake vent and that's in the […] room so it sucks air from the […] room into the room and then there's an exhaust fan above that, right, that blows the air out. It doesn't move a - lot of - a lot of air but it just - it just ventilates that room and if that fan seizes up or if there's any issue with the ventilation of course the transformers are going to get hotter and hotter because they need to be cooled because they're regulating power.

MR. LEVESQUE: So, we're not in the summer months right now so is it your testimony then that this - this metal case that's over the coils would be about 90 degrees –

A.L.: Yes.

MR. LEVESQUE: Right now?

A.L.: Yes.

MR. LEVESQUE: And in the summer months would be about 120 degrees?

A.L.: Yes.

MR. LEVESQUE: So if it's 120 degrees or 90 degrees, you'd have a hard time keeping your hand on that metal box I presume?

A.L.: No, at 90 degrees, we're 89.9 our bodies. 90 degrees is warm to the touch. 120 degrees would be like ah - hot water not boiling water but hot water.

MR. LEVESQUE: Okay, so –

A.L.: Right so you're talking like - a normal hot water tank runs at 140 degrees Fahrenheit for your hot water and if you put your hand under 140 or hotter you'll scald but I mean 120 you can put your hand in water that's 120 degrees and it's hot – it's just like if you were washing your hands with hot - hot water.

MR. LEVESQUE: Okay.

A.L.: It's not super –

MR. LEVESQUE: So.

A.L.: - it's not gonna cook you but I mean it's - they run pretty hot.

MR. LEVESQUE: Okay so if it's sort of 90 degrees, it's close to our body temperature so you wouldn't have a problem putting your hand on this - ah – transformer here?

A.L.: No you just notice a slight temperature increase, yes.

MR. LEVESQUE: Okay and if it's 120 you're saying that it - ah - could be like washing your hands with hot water?

A.L.: Hot water yeah. That's normally the operating temperature of them, yeah.

MR. LEVESQUE: So it wouldn't scald you or burn you or anything like that?

A.L.: No, no.

[122] A.L. was initially trying to imply that the box would be far too hot to sit on which he later agreed was not accurate. Why would he suggest this?

The Van

[123] C.S. claimed that A.L. also had intercourse with her in the back of his work van, on a blanket that he kept in the vehicle. She said that on one occasion this took place near a secondary road behind the airport.

[124] C.S. also claimed that while they were traveling to a service call in Bridgewater, A.L. pulled off the highway onto an ATV type trail. C.S. testified that A.L. had intercourse with her while she was sitting in the work van and he was standing next to the door.

[125] C.S. said that while driving to Bridgewater on another occasion, they had intercourse on a blanket that A.L. had placed on the ground next to the van. C.S. testified that A.L. told her that if anyone happened to discover them she should keep her head down, not make eye contact and should try to look older and bigger.

[126] A.L. agreed that he owned a […] service van. He also testified that he went back and forth to Bridgewater quite often on service calls while C.S. was living in the home. A.L. stated that he drove to Bridgewater every two weeks on service calls. However, A.L. denied that he ever took any of the kids out of town on service calls for a time. He denied having sex of any sort with C.S. in the service van, on a blanket near the service van or anywhere else.

[127] J.S. also testified that A.L. never took either C.S. or himself out of town on service calls. B.S. confirmed this.

Lily's Lingerie

[128] C.S. testified that when she was in grade eight or grade nine, A.L. took her to a high end lingerie shop called Lily's Lingerie in Halifax. C.S. claimed that A.L. told her that it would be nice if they bought something that they could both enjoy. According to C.S., A.L. purchased her a black bra, panties and a nightgown. C.S. stated that A.L. gave her his bank card and PIN to make similar purchases at other times. She said the PIN code A.L. gave her was "1960".

[129] B.S. testified that she was aware that A.L. took C.S. to Lily's to purchase custom type underwear. B.S. claimed that C.S. needed good support bras. B.S. did not know what colour bra was purchased and did not know whether panties and/or a nightgown had also been purchased. B.S. stated that C.S. typically wore pajama pants and a t-shirt to sleep, not a nightgown.

[130] B.S. testified that she was not aware of C.S. ever being given A.L.'s bank card, credit card or PIN. She did confirm that 1960 was the PIN code A.L. used for those cards.

[131] A.L. told the Court that he took C.S. to Lily's to buy support bras. B.S. agreed. A.L. said he did not find it unusual that he took C.S.to a lingerie shop as opposed to her mother taking her. He said that C.S. had poor posture and she was taken to Lily's to try and assist her with this problem. A.L. denied buying C.S. anything at Lily's except support bras. He denied giving C.S. his bank card, credit card or his PIN. A.L. agreed that "1960" was the PIN code he used for his cards.

The Black Eye/Facebook

[132] C.S. told the Court that one evening when she was in grade nine, B.S. was at work but J.S. was home, so she and A.L. could not have intercourse. C.S. therefore made plans to stay at a friend's house overnight. After those plans were made J.S. left the house to go skateboarding. C.S stated that A.L. asked her to change her plans so that they could stay home and have intercourse. According to C.S., when she refused, A.L. hit her in the face. A.L. then became angrier and blamed C.S. for making him hit her.

[133] C.S. had an immediate swelling on her face so C.S. felt she had to cancel her evening out with friends. A.L. told her to come up with an excuse for her injury. C.S. said she told everyone that when she bent over to pat her dog, "[…]", the dog jumped up and head butted her. C.S. took pictures of herself to show the injuries and posted them on Facebook with a caption blaming her dog for hitting her in the face.

[134] B.S. told the Court that they had a young […] dog named […]. B.S. went on to say that C.S. had a habit of taking pictures of herself with […], face to face with the dog. She recounted an incident when she arrived home to find C.S. with a large bump on her left eye. B.S. said C.S. was laughing when telling the story saying that […] had jumped up and head butted her when she was trying to take a picture of him. C.S. then posted pictures of her injury on Facebook, blaming the dog. B.S. was not aware of any cancelled plans on the part of C.S. that evening as a result of her injury.

[135] A.L. stated that he never hit C.S. He said that he recalled seeing postings on Facebook of a bruise or lump on C.S.'s face and C.S. stating that […] caused the injury.

The Gun

[136] C.S. testified that A.L. threatened to shoot her on several occasions. On those earlier occasions, C.S. said that A.L. did not show her a weapon. She told the Court that subsequently A.L. became very upset with her because she told him that she was disgusted with herself for having sex with him. This comment was allegedly made when they were in the living room of the home. A heated argument about her feelings ensued. C.S. claimed that in the heat of the argument A.L. told her that he was going to hurt her like she hurt him. She said A.L. then pulled a gun out of the closet nearest to the living room. When C.S. saw A.L. with the gun, she said she ran out of the house and down the driveway. When questioned by her neighbours as to her behaviour, C.S. said she told them she was upset because she could not find her dog. When C.S. returned to the home, she said the gun was outside the closet, leaning against a wall and A.L. was laughing at her.

[137] B.S. confirmed that a rifle was kept in a closet in the home when C.S. was living there. Eventually the gun was moved to the basement.

[138] A.L. testified that he did have an antique gun in a closet. He denied ever pulling the gun out of the closet in anger or threatening C.S. with it. A.L. claimed that when he and B.S. moved in 2009, although the gun had sentimental value, it had been poorly looked after and was thrown away.

Frequency of Sex

[139] C.S. testified at some length about the frequency with which she claimed A.L. would molest her and have intercourse with her. According to C.S., after the first incident of intercourse, A.L. would have intercourse with her almost every weekend as long as her mother was working. She says that A.L. would also have intercourse with her on random weeknights when he was able to sneak into her room. She said they also had intercourse a couple of times in the downstairs' bathroom at night.

[140] C.S. added that every Saturday morning she would go to A.L.'s bedroom between 7:30-8:00 a.m., as soon as her mother left for work, and have sex with A.L., as long as no one was home. She said A.L. had instructed her to go into his room as soon as her mother left for work. On a couple of occasions, C.S. said she slept in and missed the proscribed time for sex. She described A.L. as coming into her room on those occasions very irate, and claimed he would kick her in the side and in the stomach to wake her up, as she was sleeping on the floor.

[141] On those weekend mornings when she did go to A.L.'s room, C.S. said A.L. would be naked, waiting in bed for her. She would simply get into bed, take her clothes off and they would have intercourse.

[142] C.S. said they would also have sex on weekdays, depending on her mother's work schedule at various […] locations. When B.S. worked either Wednesday or Thursday evenings, she would leave the home around noon and not return until between 9:00 p.m. and 10:00 p.m. C.S. would arrive home from school by 3:30 p.m. most weekdays and therefore, according to C.S., as long as J.S. was not home, she and A.L. were free to have sex as often as they wished once A.L. arrived home from work.

[143] According to C.S., on the nights B.S. working, C.S. was positioned on the outside of A.L.'s bed so that she could leave quickly if B.S. arrived home unexpectedly. C.S. said intercourse took place just about every night B.S. was working and A.L. was not on a service call. She added that every now and then if another opportunity arose, A.L. would seize the moment to have sex. This led to intercourse on occasion on the couch downstairs if B.S. was upstairs sleeping, as well as in the downstairs' bathroom.

[144] A.L. denied all of these allegations.

Insults, threats and promises

[145] As previously noted, C.S. testified that following the first incident of intercourse, the promise by A.L. to take care of her family if she continued to have sex with him was very significant to her.

[146] C.S. testified that the sexual activity between herself and A.L. started in her grade seven year and continued to partway through her grade eleven year. During the course of her living with A.L. she says that A.L. told her on more than one occasion that he would like to kill people who bother him.

[147] C.S. also said that A.L. told her that he planned to buy her a condominium when she was old enough to have sex with him legally so that he could see her whenever he wanted.

[148] However, according to C.S., the older she became the more resistant she became to having sex with A.L. She said that when she failed to go to A.L.'s room for a weekend session of intercourse, he would become angry, insult her and make

comments such as: "Why would I have you and your family here, you're such stupid fucks", "Why would I have you here if we're not doing this, just to remind me of what I can't have", "You need to get out if you're not going to do this", "I don't care where you go, you can live in a shelter or on a street corner, if you're not going to have sex with me", "No one would believe you", "Your mother doesn't even care", "You can explain to your mother and brother why you have no home and can't afford to eat".

[149] According to C.S. these alleged comments made her feel pressure to have sex with A.L. or face the possibility of her family being thrown out of his home. C.S. said that she told A.L. that this made her feel disgusting.

[150] C.S. also stated that on one occasion in grade seven or eight, A.L. was angry at her and started throwing shoes at her, kicking her in her sides, throwing staplers at her, kicking her in the back and choking her. C.S. said that this incident ended because J.S. intervened and said "no hitting". She said that A.L. then took her out shopping at Walmart and bought her an iPod to apologize to her.

[151] B.S. told the Court that she never saw A.L. being inappropriate with C.S. in any way. B.S. stated that she never saw A.L. hitting or assaulting C.S. She added that C.S. never complained to her about A.L. while she was living at home.

[152] J.S. testified that he never saw A.L. hit or push C.S. nor did he ever have to say "no hitting" to A.L., or intervene during a physical assault by A.L. on C.S.

[153] A.L. denied ever hitting or kicking C.S.

Vasectomy and Description of A.L.'s Penis

[154] According to C.S., A.L. told her that he had a vasectomy and as a result ejaculated inside her vagina on every occasion of intercourse following the first time where she said A.L. withdrew his penis and ejaculated into his own hand.

[155] C.S. described A.L.'s genitals as follows: a six and a half inch long and uncircumcised penis; dark pubic hair with white strands; and two testicles, one with a small black mole.

[156] B.S. confirmed that A.L. had a vasectomy. She also confirmed that A.L.'s penis was not circumcised.

The Dildo

[157] C.S. described a hatch over A.L.'s bed at their home. Through the hatch, in the attic, she said there was a bag of various sex tools, including dildos and vibrators. C.S. said that they were left behind by a former girlfriend of A.L.

[158] C.S. described one occasion during sex with A.L. in the master bedroom, when A.L. inserted a large pink dildo into her vagina. C.S. said she was injured by the dildo, as it was too big for her. She said A.L. became nervous once he determined that C.S. was hurt, because he was concerned he might have to take her to a doctor. A.L. advised C.S. that he was going to throw all of the sex tools into a dumpster in […].

[159] On cross-examination C.S. agreed that she had not mentioned the alleged vaginal injury to the police when she gave her initial statement.

[160] B.S. agreed that there was a hatch to the attic over their bed. She said that in the summer she would pop the hatch and push it to the side for ventilation. However, her head was always below the hatch due to height, and as a result she never saw inside the hatch past the rafters.

[161] A.L. denied knowledge of any sex tools in the home, and denied there ever had been sex tools left in his home by a former girlfriend.

Skull light, Vibrator and Rocky Lake Drive

[162] C.S. testified that when she was in grade seven, A.L. took her on a service call to a […] in downtown Halifax. C.S. waited in the work van for A.L. to finish the service call. According to C.S., when A.L. returned to the van he had purchased a seven inch long battery powered vibrator from an adult store called Night Magic Fashion. A.L. told her the new vibrator was not too large and would not hurt her.

[163] The following weekend, C.S. said A.L. used the vibrator on her for the first time. The second occasion of vibrator use occurred when A.L. announced he had a service call and told C.S. to go with him. Once in the van, A.L. advised C.S. that there was no actual service call and instead he wanted to have some time with her. She said that he drove her to a private area near Rocky Lake Road, produced the new vibrator, had her take off her pants and place her feet on the dashboard, activated the batteries, inserted the vibrator into her vagina and pressed it against her clitoris. When another vehicle arrived in the area, C.S. said A.L. drove away.

[164] C.S. said this vibrator was initially kept in the attic for safekeeping. Eventually, she and A.L. went to a flea market and purchased an illuminating skull and a foot long chest. A.L. attached the illuminating skull to the small chest, attached a small padlock to the chest and kept the vibrator locked in the chest so that B.S. and J.S. could not look inside. C.S. said he hung the key in her closet.

[165] C.S. said that on one occasion after using the vibrator, they mistakenly put it on a bookshelf and not in the skull box. Subsequently, when C.S. returned home from visiting J.P. she was confronted by A.L., who whispered to her: "You don't know where it is or where it came from". Shortly thereafter, B.S. approached C.S., showed her the vibrator and said "I know what that is and I found it on the bookshelf". C.S. said she told her mother that A.L. had purchased the vibrator for her so that she would not become interested in boys. When C.S. later told A.L. what she had said to B.S., she said he became angry and called her "a piece of shit" for not covering for him better.

[166] B.S. said that in 2008 she was cleaning out a tiny drawer in the bottom of a bookshelf in what was the office and found a small vibrator. When confronted, B.S. said C.S. told her that that the vibrator was shared between herself and her friend J.P. B.S. denied that C.S. ever said that A.L. bought it for her so that she would not be interested in boys.

[167] B.S. also said that C.S. had a skull nightlight mounted on top of a small chest with a tiny master lock on it. According to B.S., C.S. obtained the box and nightlight the first year they moved in with A.L. B.S. said the key was kept in the top drawer of C.S.'s dresser. She said that, as a mother, she felt it was proper for her to look inside the locked chest, and when she did, there was nothing inside except papers and notes.

[168] A.L. admitted to taking C.S. on a service call to the […]. He denied going shopping at Night Magic Fashion. He also agreed that he took C.S. to the Rocky Lake Quarry with him, but he said the purpose was for rock hounding, not sex, and that no sexual activity occurred.

[169] According to A.L., the illuminated skull was purchased at a flea market. He said the chest had been in the house for a long time prior to the arrival of B.S. and was not purchased at the flea market. He said that he had previously stored keys in the chest. A.L. confirmed that the chest had a lock on it, but said it was C.S. who put the lock on it. He said C.S. kept the key on a nail inside her closet upstairs and showed A.L. where the key was kept. When questioned on cross-examination why

a young girl would show her stepfather where the key to a box holding her personal items was kept, A.L. had no answer.

Oral Sex

[170] According to C.S., the first instance of oral sex occurred shortly after the first incident of intercourse. She described A.L. lying on her mattress at bed time, exposing his penis and instructing her how to perform oral sex. Once finished, A.L. told C.S. that she had done a great job and told her that her abilities would improve over time.

[171] Again, according to C.S., the first time A.L. performed oral sex on her occurred in his bedroom when B.S. was at work. Once A.L. finished having oral sex with C.S., they had intercourse.

[172] A.L. denied any sexual activity with C.S.

Office Lock Code

[173] C.S. said that A.L. constructed two small buildings behind their home while she was living there. The buildings housed an office for A.L.'s business and a home theater. Once the office was built, A.L. transitioned his home office to the outbuilding. C.S. then moved her bedroom from upstairs in the home to downstairs, where the office had been located.

[174] According to C.S., A.L. asked her to help with the construction so that they could have intercourse while working together. As a result, they had intercourse in both new buildings during their construction. Once the buildings were completed, C.S. said A.L. bought two futons for his office so that they would have a comfortable place to have intercourse.

[175] C.S. testified that A.L.'s office had both a key (which only A.L. had possession of) and a combination code entry lock. The combination code "1960" was known to all of A.L.'s employees and was the main code. According to C.S., A.L. could change the entry code very easily and quickly. He would change it to "1949" if they were in the office having sex, to ensure privacy, and then change the code back to "1960" once they were done. C.S. described having sex with A.L. in the office and the home theater on many occasions.

[176] B.S. confirmed that A.L. did have futons in the outbuildings. She said the entry code to the office was 1960. B.S. said there was never an occasion when she tried to punch in the code and it failed to work.

[177] J.S. described the office as having an outside padlock with a numeric punch code combination. He said that all family members, C.S.'s friends and business associates of A.L. knew the lock code and were frequently in and out of the office. J.S. knew the entry code to be 1960 and did not know whether the code could be easily changed.

[178] A.L. confirmed constructing outbuildings for an office and a home theater while C.S. was living at his home. A.L. said in 2007 he had five employees who all knew the entry code, in addition to his business partner, family members and friends. He described the office as containing two couches (futons), a fireplace, bookshelves, file cabinets and a computer.

[179] A.L. stated that the entry code was always 1960. He denied ever changing it. He denied having intercourse with C.S. in the outbuildings.

New Store Construction

[180] C.S. testified that A.L.'s company was involved in construction of a new […] in Cole Harbour. She said A.L. took her to the […] while it was under construction and had intercourse with her there on three separate occasions. C.S. said that one noteworthy item when the […] was being built was a one-way mirror that was installed incorrectly (backwards).

[181] Constable McGowan confirmed that the […] in question is located in Cole Harbour.

[182] A.L. initially said that he never took the kids to the new […] while it was under construction but then stated that he had taken C.S. to the new […] once to help with construction clean up, as she wanted to earn money to buy an iPod. He said the entire time C.S. was at the new […] on that occasion, his business partner was also there. A.L. added that other trades' people were in and out of the […] also on the one and only occasion C.S. was there. He denied any knowledge of an improperly installed one-way mirror. A.L. denied having intercourse with C.S. at the new […].

Aerosmith

[183] An Aerosmith concert took place in Prince Edward Island in 2007, when C.S. was in high school. According to C.S., A.L. purchased tickets and told her that he was excited about the concert because he and C.S. would be able to have their own hotel room and have intercourse as much as possible without interruption. She said she then invited her friend, B., to attend the concert with them. According to C.S., when he heard that B. had been invited, A.L. became angry and threatened to cancel the trip because he did not want to share a room. A.L. relented under the agreement that he and C.S. would share one bed and B would have the other bed.

[184] C.S. said that after the concert, she slept in the hotel bed with A.L. During the course of the night A.L. pulled her pants down and had intercourse with her while B. was sleeping in the adjacent bed. The next morning, and through the remainder of the weekend, A.L. was angry with her for not taking advantage of having a hotel room and having more sex with him.

[185] B.S. testified that she was aware C.S. had travelled to P.E.I. with A.L. and her friend B. to see Aerosmith. She said that C.S. would have been 16 years old at the time. B.S. claimed that she did not find it odd to hear that C.S. slept with A.L. instead of her friend, B., because both C.S. and B. were large girls and likely would not have comfortably fit in one bed.

[186] A.L. agreed that he took C.S. and B. to the Aerosmith concert in P.E.I. He testified that they all stayed in one room at the Best Western. A.L. said that he slept alone in one bed and that C.S. and B. slept together in the other bed. He denied having sex with C.S. while in P.E.I.

Video Camera

[187] C.S. said that on one occasion, while she was having intercourse with A.L. in his bedroom, B.S. came home unexpectedly. Subsequent to that incident, she said A.L. purchased an inexpensive portable video camera that could connect to a television screen. According to C.S., A.L. told B.S. that the camera was purchased to allow him to secretly monitor employees. C.S. said the camera was actually used to monitor the driveway while they were having intercourse to ensure privacy. C.S. said that A.L. also told her that he used the camera to watch her and her friends when they were in the home theater socializing.

[188] B.S. told the Court that A.L. had stated he was concerned about employee theft, so bought a surveillance camera on line for $29.99. The camera arrived six

to eight weeks after having been ordered and, according to B.S., A.L. and B.S. tested it the day it arrived. B.S. said it was a small camera that did not produce a good quality picture. She added that after the initial screen test, they determined that the camera was of such poor quality that it was useless. It was taken apart and put away, possibly in A.L.'s office.

[189] According to A.L. he became interested in purchasing a surveillance camera after being advised by a neighbour about thefts going on in the neighbourhood. He said he ordered the camera on line for $29.99. He said that there was a wireless package that was supposed to allow the camera to connect to a computer; however, once tested he determined that the picture was of such terrible quality the camera was essentially useless. A.L. denied using the camera to keep watch while having intercourse with C.S.

C.S. Wanting Sex When Younger

[190] C.S. testified that when she was 11 or 12 years old she wanted to have sex with A.L. and enjoyed the entire situation. She expressed that she now feels deep regret and experiences self-loathing as a result of acknowledging those feelings.

[191] As she aged, C.S. described she had many forms of resistance to having sexual relations with A.L. For example, according to C.S., A.L. told her frequently that he did not like fat women. She said he would then often tell her how fat she was getting. C.S. said that as she got older she overate as a result of A.L.'s comments, with the hope that he would lose sexual interest in her. She said that she also refused to shower and wore clothes to bed for similar reasons. Eventually, C.S. said that she told A.L. directly that she felt terrible about herself as a result of the sexual activity with him.

[192] B.S. testified that C.S. was a large or heavy person from the age of five onwards.

The Attempted Suicide

[193] C.S. said that in April 2006, at the age of 14, she became so overwhelmed by the abusive situation with A.L. that she took numerous pills in an effort to kill herself. After taking the pills, she became hysterical and left the home for the woods to die. On her way out of the home, she met A.L. who asked her what was going on and she confessed to having taken pills. A.L. drove her to […], and she said A.L. berated her during the drive.

[194] At the […], C.S. said she told them that she had taken a number of pills but said no more, as A.L. remained in the room with her the entire time she was being questioned. C.S. said B.S. arrived fifteen to twenty minutes later. She went on to state that a doctor arrived and wanted to question C.S. privately about her behaviour, but A.L. refused to leave the room. As a result of A.L.'s presence, C.S. said she told the doctor that she did poorly on a math test and was overwhelmed. C.S. advised the Court that she generally did well in school and was not actually having any issues academically. She said the story about problems with a math test was merely something she made up on the spot.

[195] According to C.S., she was examined by a doctor, given charcoal to drink and was eventually discharged. She said the doctor recommended counselling. C.S. claimed that A.L. drove her home when she was discharged, and that during the drive home, he told her she could not go to counselling because the counsellor would be too smart and would figure the situation out.

[196] C.S. said that B.S. never spoke to her about this incident. She said the IWK Mental Health Unit called their home to follow-up; however, A.L. would not allow her to attend counselling.

[197] B.S. said C.S. called her at work and told her she had taken a bunch of pills. B.S. says that C.S. said she had tried calling A.L. first but could not reach him. A.L. then called B.S. and said he had C.S. and they were on their way to the […]. B.S. said she then notified her work supervisor she was leaving and went to the […]. B.S. claimed when she arrived, A.L. was waiting at nurses' station, not in the examination room, since A.L. was not C.S.'s legal guardian.

[198] B.S. testified that while she went into the treatment room with C.S., A.L. went home to get the pill bottle to show the hospital what milligram amount C.S. had ingested. According to B.S., C.S. told everyone that she was upset because she felt she had failed an important math test. B.S. told the Court that although counselling had been recommended, C.S. said she felt "stupid" and did not want counselling. B.S. therefore did not follow-up with any counselling.

[199] On cross-examination, B.S. was shown one of C.S.'s report cards. The report card revealed that on February 15, 2006, C.S. had a mark of 84 in math. It was suggested to B.S. that a story of suicide over a math test did not make sense. B.S. claimed she believed C.S. was driven to do well academically and was devastated at the prospect of doing poorly on a test.

[200] During cross-examination, B.S. was also shown the discharge report which suggested the family call the IWK Children's Hospital for follow-up counselling. B.S. said she spoke directly to C.S. about counselling at the time, but she did not want to go. B.S. said she never forced either of her children to do anything they did not want to do.

[201] A.L. initially stated that in the late morning or early afternoon C.S. called him to say she had taken a bunch of pills in an effort to kill herself. He later testified that he saw C.S. coming out of the house when he was coming up the driveway and said that C.S. may have called him on his cell phone but he was not certain that he ever spoke to her. In any event, A.L. stated C.S. told everyone that she tried to kill herself because she had a problem with a math exam and was scared she might fail it.

[202] A.L. said B.S. arrived at the […] ten minutes after he arrived there with C.S., and as soon as B.S. was present, he went home to get the pill bottle. According to A.L., B.S. and C.S. were at the […] during that time period. Therefore C.S. could have accused A.L. of abuse while he was absent.

Thanksgiving Dinner and the Proposition to J.P.

[203] C.S. testified when she was in grade 10, she and J.P began a same-sex relationship. J.P. began to spend the night at her home. According to C.S., when this came to A.L.'s attention he became angry and called C.S. "disgusting" and a "piece of shit".

[204] Subsequently, C.S. says A.L. told her he wanted to talk to J.P. about having a threesome, that is, sexual relations between J.P., C.S. and himself. C.S. refused and said this proposal upset her greatly. C.S. added that A.L. was infuriated by her relationship with J.P. and told her if she was not going to have intercourse with him, there was no point in having the rest of her family around.

[205] The same week in October 2008 that A.L. became aware of C.S.'s relationship with J.P., and the same week as his alleged proposition to C.S. to have a threesome, C.S.'s grandmother had planned a Thanksgiving Dinner. According to C.S., A.L. told B.S. that he wanted to end their common-law relationship and refused to go to the Thanksgiving Dinner. C.S. asked permission to bring J.P. to the dinner since A.L. was not going. J.P. went to the dinner with the family, excepting A.L., who refused to attend. J.P. returned to A.L.'s home after the dinner with C.S. to spend the night.

[206] The next morning C.S. says that she told J.P. that A.L. was angry with her and then explained about the emotional, physical and sexual abuse. J.P. told C.S. to pack up and leave, which they did within minutes.

[207] J.P. testified at this trial. J.P. says that her relationship with C.S. had ended years prior to testifying at this trial. Nothing was raised during J.P.'s testimony on either direct examination or cross-examination to impact on her credibility.

[208] J.P. says that she met C.S. in high school when C.S. was in grade ten and J.P. was in grade eleven. J.P. says that by 2007 she was spending a lot of time at C.S.'s house, including many weekday mornings and weekends. J.P. stated that on weekends B.S. was sometimes there, J.S. was rarely there and A.L. was at home every weekend she was there with C.S.

[209] According to J.P., A.L. would text J.P. when she was in school and ask her how her day was going and make other types of small talk. A.L. asked J.P. if things were serious between her and C.S. According to J.P., A.L. asked her if he could be involved in an intimate encounter with C.S. and her. On cross-examination, J.P. confirmed that A.L. had a conversation with her about having a threesome. J.P. said that she thought it was a joke and initially laughed it off. According to J.P., having expressed to A.L. that she thought he was joking, A.L. clarified to J.P. that he was serious.

[210] J.P. confirmed C.S.'s testimony that the morning after the Thanksgiving Dinner, C.S. told her of abuse at the hands of A.L. J.P. told C.S. to pack up her things and leave.

[211] J.P. said that on their way out of the house they encountered B.S. According to J.P., they told B.S. that C.S. had suffered sexual and physical abuse at the hands of A.L. J.P. said that B.S. started sobbing and would not look up at the girls as they were leaving.

[212] B.S. confirmed that in 2007, J.P. starting spending early mornings at their house through the week. On weekends, J.P. would be at their house by 7:30 a.m. if she had not spent the night, which she did frequently.

[213] B.S. said that in October 2008, A.L. had argued with her about not wanting to go to the family Thanksgiving dinner. According to B.S., J.P. came to the Thanksgiving dinner and A.L. did not. She said that afterwards J.P. came back to their home and J.P., C.S. and A.L. all watched movies together that evening.

According to B.S., J.P. stayed overnight and the next morning C.S. simply said she was going to J.P.'s house. B.S. denied J.P. and C.S. left the house upset. She denied that as they were leaving C.S. or J.P. told her that A.L. had abused C.S.

[214] J.S. attended the Thanksgiving Dinner. He confirmed that A.L. did not attend. J.S. said he did not hear any argument between A.L. and B.S. about A.L. refusing to go to Thanksgiving dinner and said he did not know why A.L. did not go to the dinner. J.S. was not home when C.S. and J.P. left the next day.

[215] A.L. denied asking J.P. about joining her and C.S. for sex in any way. A.L. says that he never liked J.P. and never spoke to her in that way. He also denies knowing J.P.'s telephone number and denied ever texting her.

[216] A.L. agrees that he argued with B.S. just before that Thanksgiving dinner, but claimed that he could not recall the context of the argument. He agreed that he did not attend Thanksgiving dinner. In direct examination, A.L. suggested that he simply did not feel like going, so he did not go. In cross-examination he testified that he felt he was too busy and did not have time to attend the dinner.

J.H.'s House

[217] According to C.S., after leaving the home, she and J.P. went to J.P.'s house. On arrival at J.P.'s house they very briefly told J.P.'s mother, J.H., that A.L. had been abusing her. J.H. called the R.C.M.P.

[218] According to C.S., the police arrived within the hour and advised her that if she disclosed certain information the matter would be out of her hands, they would have to lay charges and she would lose her ability to make choices about proceeding with charges. She said the police also advised her that she could call them later if she changed her mind. C.S. said that she was very upset, having just left her home an hour or so previously and having no frame of reference about the legal process. C.S. said that she chose not speak to the police at that time.

[219] According to C.S., A.L. called J.H.'s home later that day looking for her. J.H. answered the phone and told A.L. not to call again. C.S. said that A.L. then called J.P.'s cell phone. C.S. alleged that A.L. spoke directly to her begging her to come home, promising to be less strict and asking if C.S. had "told anybody anything". C.S. said she told A.L. that she was not coming home and hung up.

[220] C.S. said that after a couple of days away from home, B.S. called and told her to come home.

[221] J.H. is J.P.'s mother. J.H. also testified during this trial. She is 50 years old, has four children and has a very responsible management job. As far as J.H. was aware, J.P. and C.S. became friends in grade nine or ten. When J.H. first met C.S., she said she found her quiet and withdrawn.

[222] J.H. said that in October 2008, C.S. arrived to spend the night, upset and crying. She said that C.S. told her that she had been sexually assaulted over a period of time. As a result J.H. contacted the R.C.M.P. and two police officers arrived within twenty minutes. J.H. said the police were there for about an hour and then they left.

[223] J.H. said that she then talked to B.S. and told her that she thought C.S. had been victimized. J.H. was trying to find out whether B.S. planned on moving out of A.L.'s home.

[224] J.P. said that when they left A.L.'s house after Thanksgiving, they went directly to her parents' place. C.S. was crying and emotional and J.P. eventually cried. They told J.H. roughly what was going on and J.H. called the R.C.M.P. who arrived shortly thereafter. According to J.P., C.S. refused to tell the police anything and sent them away.

[225] B.S. has a very different story. She testified that the day after Thanksgiving, C.S. simply told her that she was going to J.P.'s house. B.S. claimed that around lunch time that same day, J.H. called her and asked her to come over to her house to talk. When she arrived, she sat down with J.H., J.P. and C.S. and C.S. told her that she was upset because of the arguing between A.L. and B.S. She said that C.S. told her that she could no longer handle the arguing. B.S. said that she thought C.S. was being dramatic and allowed her to stay at J.H.'s for a couple of days.

[…]

[226] When C.S. was 15 years old A.L. bought a […]. Eventually it was agreed that when each child earned their driver's licence, C.S. and J.S. would share the vehicle. C.S. earned her licence first.

[227] According to C.S. she continued to use the car after she moved in with J.P. since B.S. would drop the car at J.H.'s house for her to use when necessary. C.S. said that she eventually told B.S. that using the […] was not mentally healthy for her. C.S. also stated that she signed up for driver training but did not finish it, as she was trying to waste A.L.'s money.

[228] According to J.S. he received his full licence at the age of 19, although C.S. earned hers at age 16. They tried to share the […]while C.S. was still living at home. When C.S. left home, they no longer had to share the car and J.S. now owns it.

[229] A.L. said he purchased the […] in November 2006. Although neither J.S. or C.S. had a licence when he purchased that car they were both expected to have one soon after and the car was reasonably priced. It was anticipated that the two kids would share the vehicle.

The Note

[230] C.S. testified that on one occasion when the […] was dropped off at J.H.'s home, she found a note in the car from A.L. addressed to her. C.S. said that in the note A.L. apologized, claimed that he would change and expressed his love for her. C.S. said that J.P. was in the car when she discovered the note and also read it. C.S. said that she tore the letter up and threw it away the same day it was received. Evidence was tendered that A.L.'s pet name for C.S. was "[…]". The name […] was referenced in the note.

[231] J.P. confirmed that she was in the E[…]when C.S. discovered the note stuffed between the console and the driver's seat. J.P. said she read the note prior to C.S. tearing it up and throwing it away. She said that the note appeared to be from A.L. and said that he did not want to lose her.

[232] A.L. agreed that he wrote C.S. a note and left it in the […] for her, but did not agree that the note was inappropriate in any way. He said he did not know about the allegations C.S. was making about him when he left the note. He agreed his pet name for C.S. was "[…]" and that he may have addressed C.S. as "[..]" in the note. He agreed that the note was signed "Love, A.". He denies saying that he did not want to lose her.

[233] B.S. initially testified that she was unaware of A.L. having a pet name for C.S. but eventually agreed that "[…]" sounded correct.

A.L.'s Vehicle at Her School

[234] After this, as her grade twelve year continued, C.S. said she would see A.L. in his vehicle parked around the school area. She became concerned that A.L. would harm her and claimed that she stopped going to school as a result.

[235] A.L. denied parking near C.S.'s school and said that he would be working during school hours.

Information provided To B.S.

[236] J.H. testified that after C.S. had stayed at her home for several days she set up a meeting with B.S. at her house to discuss what B.S.'s plan was for her daughter. According to J.H., B.S. had no plan, and B.S. left the meeting complaining that J.H. was bullying her. After that meeting, the only contact J.H. had with B.S. was when C.S.'s furniture was dropped off. B.S. did not try to contact J.H. again.

[237] J.P. said that the week after Thanksgiving, B.S. came to their home by herself. According to J.P., C.S. then told B.S. about everything she claimed A.L. did to her. J.P. described B.S.'s response as "lifeless".

[238] B.S. had an entirely different version of these events. She claimed that sometime after C.S. went to J.H.'s house she met C.S. at a Tim Horton's to talk. B.S. said that it was during this meeting at Tim Horton's that C.S. first told her that A.L. had been having sex with her. B.S. said that following that meeting she allowed C.S. to stay at J.H.'s while she went home to talk to A.L. B.S. said that prior to that meeting C.S. never complained about A.L.

[239] B.S. said that she has only seen C.S. on a couple of occasions since that meeting years ago for small things.

[240] When contacted by Constable McGowan to provide information in relation to this investigation, B.S. refused to speak to her and did not provide a statement to the police.

[241] J.S. told the Court that he had not seen C.S. since she moved out in 2008. He said that B.S. told him that C.S. had moved out because she and C.S. had fought. J.S. testified that he had no interest in seeing C.S.

[242] J.S. told the Court that the first time he heard about C.S.'s allegations was when Constable McGowan contacted him in 2012 while conducting her investigation. J.S. also refused to provide a police statement.

[243] Constable McGowan confirmed that B.S. and J.S. refused to provide statements to her in March 2012.

The Tattoo

[244] C.S. told the Court that moving away from A.L. was so significant to her that each year she celebrates the date she left A.L.'s home. She also has a large commemorative tattoo inked on her body permanently honouring the date of her departure. C.S. showed the Court her tattoo and described it as being elaborate and including more than just numbers and letters.

[245] C.S. mainly continued to live at J.H.'s home until August 2011.

Memories

[246] C.S. said that after she started dating J.P. she had intercourse with A.L. on a couple of occasions. However, she said she could not recall the final occasion of intercourse with A.L. prior to moving out.

[247] C.S. testified that she had been suppressing a lot of memories over the years, and the memories come flooding out. She stated that when being questioned about these incidents, "a lot of things I know I'm forgetting and a lot of things my brain is not letting me remember". Some selected examples of C.S.'s testimony in this regard include:

> **Q.** So, are you … are you telling us today that he was reading to you until you were in grade eight?
>
> **A.** Yes, sir. I am telling you today that … you know … and it's hard … this has been really hard for me. I have been suppressing a lot over the years. And the memories, they flood sometimes. The … you know, they come and go as … as they please. But yes, I … I remember it was … and I mean, he had been reading before we had intercourse. He would read every night, every week night. And a little while after we had intercourse he would come up and still read every week night. And then it just … it kind of petered off. I remember, you know, he'd come up and the oral sex time, you know, that I gave him oral sex and he was on the floor. I mean, I was … I was … late grade seven and I'm sure it must have happened a couple of times when I was in grade eight.

Q. But you remember back in Dartmouth at the Preliminary Inquiry?

A. Yes, sir.

Q. You were testifying under oath?

A. Yes, sir.

Q. And you had promised to tell the truth, right?

A. Yes, sir.

Q. And at that time, you said that after you turned eleven, the reading had stopped?

A. Yes, sir.

Q. Okay. But that's not your testimony today?

A. No, sir.

Q. So why are you changing it?

A. You know, it's … it's a lot … it's a lot. It happened over a lot of years. There is a lot of things I know I am forgetting for sure. There's a lot of things that my brain is not going to let me remember. But … It's just hard, you know, and I'm not trying to lie to you or anybody at all, and I understand that I was under oath, but sometimes you get confused, sometimes you … certain things take priority in your mind, I suppose to other things. And I really am trying to give it a hundred percent to get everything organized so that you guys can know the truth.

Q. Now, before you came here yesterday, were you given a copy of the preliminary inquiry transcript to review?

A. Yes.

Q. Were you given a copy of the two statements that you gave to Constable McGowan?

A. The … the video statements?

Q. Yes.

A. Yes, sir.

Q. And you had a chance to review those?

A. Yeah.

Q. Okay. When you reviewed the transcript of the Preliminary Inquiry …

THE COURT: Can I … can I just stop you there Mr. Singleton.

MR. SINGLETON: Pardon, My Lord?

THE COURT: You asked her, you asked her … you asked the witness if she received a copy of them, and you asked her if she had a chance to review them, but you didn't actually ask her whether she did review them. So maybe you could just take it a couple steps further before you jump to where you are going.

MR. SINGLETON: Yeah, okay.

THE COURT: Thank you.

Q. You did have a chance to review all of those documents: the transcript of the preliminary?

A. Yes, Sir.

Q. The transcript of your two statements?

A. Yes, sir.

Q. Okay. And did you notice the difference that I just pointed out to you on page 127 regarding when he stopped reading to you?

A. I did take the time to review some of it. I'm sorry, I didn't get very far into any of them. You know … this is another job for you guys. This is a very traumatic time in my life and I did not want to go through ever seeing word for word. So no I did not notice.

. . . .

Q. Was it the same time that your room changed from upstairs to downstairs?

A. I am pretty sure it was just a little bit before my room went downstairs, just a little bit before. We had known my room was going to be moving downstairs so …

Q. So where we were before talking about you moving downstairs, we were talking about when the metal frame was taken out of the bedroom, right?

A. Yes, sir.

Q. Okay. And you are not able to say when?

A. You know, not right here at this moment. But again it's … it's really hard … the memories, they flood and you know, sometimes other memories take precedent. So like I can't remember right this second, but that doesn't mean it won't come to me, you know. I'm sorry, I can't be more specific.

. . . .

Q. How many nights altogether did he end up going out having sex with you in the tent?

A. I think there were …

Q. Sorry, I didn't hear you.

A. I said, I think there were maybe three or four different times in the tent on that air mattress. You know, there might have been more. It's hard to go back and try to remember this so …

Q. Would you stay out in the tent alone some nights?

A. No, no, I would not stay out in the tent alone. I did not stay out in the tent alone.

[248] Those comments were not followed up by either counsel.

LEGAL FRAMEWORK FOR ANALYSIS

The Presumption of Innocence

[249] There are certain basic legal principles that impact on this decision. Section 11(d) of the **Canadian Charter of Rights and Freedoms** states:

> **11. Proceedings in criminal and penal matters** – Any person charged with an offence has the right
>
> . . . .
>
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

[250] C.S. describes a grim upbringing, filled with physical, emotional and sexual abuse. A.L. denies any abuse of C.S. This case is not about choosing who to believe. This is not about sympathy for a young child who *may* have had a disinterested and uncaring mother and *may* have had an abusive stepfather. A.L. is presumed innocent. While C.S. describes A.L. as a sexual predator of the lowest sort who abused her for years, the Crown must prove this beyond a reasonable doubt.

Reasonable Doubt

[251] The Crown must prove each essential element of its case beyond a reasonable doubt. What does reasonable doubt mean? In **R. v. Litchis**, [1997] 3 SCR 320, Cory J., speaking for the majority of the Supreme Court of Canada, stated at para. 27:

> 27 First, it must be made clear to the jury that the standard of proof beyond a reasonable doubt is vitally important since it is inextricably linked to that basic premise which is fundamental to all criminal trials: the presumption of innocence. The two concepts are forever as closely linked as Romeo with Juliet or Oberon with Titanic and they must be presented together as a unit. If the presumption of innocence is the golden thread of criminal justice then proof beyond a reasonable doubt is the silver and these two threads are forever intertwined in the fabric of criminal law. Jurors must be reminded that the burden of proving beyond a reasonable doubt that the accused committed the crime rests with the prosecution throughout the trial and never shifts to the accused.

[252] While discussing reasonable doubt in the context of jury instructions, Cory J.'s comments are equally applicable to a judge sitting alone. Cory J. summarized the majority position on the reasonable doubt standard at para. 36 of **R. v. Litchis**, **supra**:

> 36 Perhaps a brief summary of what the definition should and should not contain may be helpful. It should be explained that:
>
> · the standard of proof beyond a reasonable doubt is inextricably intertwined with that principle fundamental to all criminal trials, the presumption of innocence;
>
> · the burden of proof rests on the prosecution throughout the trial and never shifts to the accused;
>
> · a reasonable doubt is not a doubt based upon sympathy or prejudice;
>
> · rather, it is based upon reason and common sense;
>
> · it is logically connected to the evidence or absence of evidence;
>
> · it does not involve proof to an absolute certainty; it is not proof beyond <u>any</u> doubt nor is it an imaginary or frivolous doubt; and

> · more is required than proof that the accused is probably guilty -- a jury which concludes only that the accused is probably guilty must acquit.

[253] It is therefore not for a trier of fact to simply choose which version of the events that it believes. The trier of fact must consider all of the evidence. In this case, I have to decide if I am satisfied beyond a reasonable doubt that A.L. committed the various crimes against C.S. over the time period that she states the offences happened. In discussing reasonable doubt, Iacobucci J., writing for the Supreme Court of Canada in **R. v. Starr**, [2000] SCC 40, stated at para. 242:

> In my view, an effective way to define the reasonable doubt standard for a jury is to explain that it falls much more closer to absolute certainty than to proof on a balance of probabilities. As stated in *Litchis*, a trial judge is required to explain that something less than absolute certainty is required, and that something more than probable guilt is required, in order for the jury to convict. Both of these alternative standards are fairly and easily comprehensible. It will be of great assistance for a jury if the trial judge situates the reasonable doubt standard appropriately between these two standards. The additional instructions to the jury set out in *Litchis* as to the meaning and appropriate manner of determining the existence of a reasonable doubt serve to define the space between absolute certainty and proof beyond a reasonable doubt. In this regard, I am in agreement with Twaddle J.A. in the court below, when he said at p. 177:
>
> > If standards of proof were marked on a measure, proof "beyond reasonable doubt" would lie much closer to "absolute certainty" than to "a balance of probabilities". Just as a judge has a duty to instruct the jury that absolute certainty is not required, he or she has a duty, in my view, to instruct the jury that the criminal standard is more than a probability. The words he or she uses to convey this idea are of no significance, but the idea itself must be conveyed …

[254] In a case such as this, having heard the testimony of all witnesses, it is not necessarily difficult to achieve the civil standard of "a balance of probabilities"; however, probability in a criminal case is not the test. If a judge in deciding any criminal matter determines only, "I think he's probability guilty" and then registers a conviction, that decision will be wrong in law. Probability is never enough in a criminal matter. The standard in a criminal matter is that the Crown must prove the guilt of an accused person, in this case A.L., beyond a reasonable doubt - which

lies somewhere between probability and absolute certainty, but closer to absolute certainty.

Assessing Credibility

[255] In **Faryna v. Chorny**, [1952] 2 D.L.R. 354, the British Columbia Court of Appeal stated, at p. 357:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth the story of a witness in such a case must be its harmony with the preponderance of the probabilities which are practical and informed person would readily recognize as reasonable in that place and in those conditions.

[256] In **R. v. W.(D.)**, [1991] 1 S.C.R. 742 at 75 -758, Cory J. provides clear instructions for a trier of fact when assessing credibility:

> **27** In a case where credibility is important, the trial judge must instruct the jury that the rule of reasonable doubt applies to that issue. The trial judge should instruct the jury that they need not firmly believe or disbelieve any witness or set of witnesses. Specifically, the trial judge is required to instruct the jury that they must acquit the accused in two situations. First, if they believe the accused. Second, if they do not believe the accused's evidence but still have a reasonable doubt as to his guilt after considering the accused's evidence in the context of the evidence as a whole. See *R. v. Challice* (1979), 45 C.C.C. (2d) 546 (Ont. C.A.), approved in *R. v. Morin*, *supra*, at p. 357.
>
> **28** Ideally, appropriate instructions on the issue of credibility should be given, not only during the main charge, but on any recharge. A trial judge might well instruct the jury on the question of credibility along these lines:
>
> > First, if you believe the evidence of the accused, obviously you must acquit.
> >
> > Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
> >
> > Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

> If that formula were followed, the oft repeated error which appears in the recharge in this case would be avoided. The requirement that the Crown prove the guilt of the accused beyond a reasonable doubt is fundamental in our system of criminal law. Every effort should be made to avoid mistakes in charging the jury on this basic principle.

[257] In **R. v. H.(C.W.)** (1991), 3 B.C.A.C. 205, Wood J.A., speaking for the Court, commented on the **R. v. W.D., supra**, instructions and stated:

> I would add one more instruction in such cases, which logically ought to be second in the order, namely:
>
> > If, after a careful consideration of all of the evidence, you are unable to decide whom to believe, you must acquit.

[258] The majority of the Supreme Court of Canada at para. 29 in **R v. Litchis**, **supra**, articulated some of the issues facing a trier of fact when assessing a witness's credibility:

> 29 Nonetheless there is still another problem with this definition. It is that certain doubts, although reasonable, are simply incapable of articulation. For instance, there may be something about a person's demeanor in the witness box which will lead a juror to conclude that the witness is not credible. It may be that the juror is unable to point to the precise aspect of the witness's demeanor which was found to be suspicious, and as a result cannot articulate either to himself or others exactly why the witness should not be believed. A juror should not be made to feel that the overall, perhaps intangible, effect of a witness's demeanor cannot be taken into consideration in the assessment of credibility.

[259] The Supreme Court of Canada again examined the issue of assessing credibility in the context of reasonable doubt in **R. v. Dinardo,** 2008 1 S.C.R. 788, where Charron J. spoke for the unanimous Court:

> **23** The majority rightly stated that there is nothing sacrosanct about the formula set out in *W. (D.)*. Indeed, as Chamberland J.A. himself acknowledged in his dissenting reasons, the assessment of credibility will not always lend itself to the adoption of the three distinct steps suggested in *W. (D.)*; it will depend on the context (para. 112). What matters is that the substance of the *W. (D.)* instruction be respected. In a case that turns on credibility, such as this one, the trial judge must direct his or her mind to the decisive question of whether the accused's evidence, considered in the context of the evidence as a whole, raises a reasonable doubt as to his guilt. Put differently, the trial judge must consider whether the

> evidence as a whole establishes the accused's guilt beyond a reasonable doubt. In my view, the substantive concerns with the trial judge's decision in this case can better be dealt with under the rubric of the sufficiency of his reasons for judgment.

[260] Charron J. went on to add at para. 31:

> **31** As I explained at the outset of the analysis, the inquiry into the sufficiency of the reasons should be directed at whether the reasons respond to the case's live issues. In this case, the complainant's truthfulness was very much a live issue — the trial judge recognized it as so during the *voir dire* to determine whether the complainant was competent to testify. At trial, two of the witnesses testified that the complainant could be untruthful and manipulative. While it was open to the trial judge to conclude that he was convinced beyond a reasonable doubt of the guilt of the accused, it was not open to him to do so without explaining how he reconciled the complainant's inconsistent testimony, particularly in light of the accused's own evidence denying her allegations.

Consent

[261] Section 150.1 (1) of the **Criminal Code of Canada** states:

> 150.1 (1) **Consent no defence** – Subject to subsections (2) to (2.2), when an accused is charged with an offence under section 151 or 152 or subsection 153(1), 160(3) or 173(2) or is charged with an offence under section 271, 272 or 273 in respect of a complainant under the age of 16 years, it is not a defence that the complainant consented to the activity that forms the subject-matter of the charge.

[262] Section 153(2) states:

> 153 (2) **Definition of "young person" –** In this section, "young person" means a person 16 years of age or more but under the age of eighteen years.

[263] If C.S. was under the age of 16, then she could not in law consent to A.L.'s alleged sexual activity. Therefore, it would not be a defence that C.S. consented to the activity that forms the subject matter of any of the sexual offences because C.S. could not consent in law. If she was between 16 and 18, and if A.L. was in a position of trust or authority, then C.S. also could not consent in law. For the majority of the time frame alleged in the indictment, C.S. was under the age of 16. She therefore could not consent to sexual activity with A.L. during the majority of the time frame alleged in the indictment, if the Crown has proven that any

occurred. A.L. does not raise consent as a defence. A.L. denies each and every allegation made by C.S.

[264] At all material times A.L. was in a position of trust or authority toward C.S. There is no question that C.S. was in a relationship of dependency with A.L. at all material times. For the remainder of the time alleged in the indictment when she was not under 16 years old, C.S. was between 16 and 18 years old. Consent is, therefore, not an issue in this case, as C.S. could not consent in law to sexual activity between herself and A.L. If the Crown has proven that sexual activity occurred between C.S. and A.L., then A.L. is guilty of the relevant sexual offences and consent cannot be a defence.

Analysis

[265] As I stated initially, if I was dealing with the civil standard of a balance of probabilities, I might find in favour of C.S. Should she pursue this matter civilly she might end up with a very different result than will be found by applying the criminal standard. C.S. had a very hard and unhappy life during her childhood years. At best, she lived in a home with a disinterested and uncaring mother and a disinterested and uncaring brother. If her testimony is taken at face value, C.S. alleges that she was subjected to mental, physical and sexual abuse for years at the hands of someone who was supposed to care for her.

The test in *R. v. W.(D.)*, *supra*

[266] First, if I believe the evidence of the accused, obviously I must acquit.

- I do not believe all of the evidence of the accused, A.L.
- I have carefully considered all of the evidence, and I tend to *favour* much of the evidence of C.S., as supported by J.L., J.P. and J.H.
- However, there is also the evidence of B.S. and J.S.

[267] Second, if I do not believe the testimony of the accused but I am left in reasonable doubt by it, I must acquit.

[268] Third, even if I am not left in doubt by the evidence of the accused, I must ask myself whether, on the basis of the evidence which I do accept, I am convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

The test in *R. v. H. (C.W.)*, *supra*

[269] Put another way, by the British Columbia Court of Appeal, if, after a careful consideration of all of the evidence, I am unable to decide whom to believe, I must acquit.

Issues impacting reasonable doubt

[270] The evidence has been reviewed in detail. Some significant issues where the testimony of C.S. (and others) was challenged or refuted by the defence evidence include:

- C.S. says A.L. never read to J.S.
- J.S., B.S. and A.L. all state that A.L. did read to J.S.
- C.S. says that A.L. rarely actually read to her.
- J.S. says that he could overhear A.L. reading to C.S.
- C.S. says that A.L. "read" to her for at least a year.
- J.S. and B.S. state that A.L. only read to C.S. (and J.S.) for four or five months.
- J.S. says that his bedroom was adjacent to C.S.'s bedroom and they both kept their doors open at night.
- J.S. testified that he never saw A.L. abusing C.S. in any way.
- B.S. says that on the occasions when she was upstairs going to bed during reading time, she observed A.L. sitting on the floor of C.S.'s room while reading to her.
- A.L. says that while he did sit on C.S.'s bed on occasion, he most often sat on the floor while reading to her.
- C.S. says that A.L. had her wear a nightgown to bed so that he could access her more easily while "reading" to her.

- B.S. says that C.S. wore pajama bottoms and a t-shirt to bed.
- C.S. says that her bedroom door was opened, but the lights in her room would be turned off while A.L. was "reading" to her.
- J.S., B.S. and A.L. variously describe C.S. as being scared of the dark and having lights on in her room at night time.
- C.S. says that J.S. was rarely home and therefore A.L. had plenty of opportunity to molest her undisturbed.
- J.L. confirms that on the weekends he visited, J.S. was rarely home.
- J.S. and B.S. say that J.S. was home more often than C.S. suggests and was home most weeknights.
- J.S., B.S. and A.L. all say that A.L. was often away from home working from 7:30 a.m. until 9:00 p.m. and would not have had as much time alone with C.S. as she claims.
- C.S. says that there were no lengthy periods of time without the abuse.
- B.S. says that she was home on short term disability for a month and observed no abuse.
- B.S. and J.P. both say that J.P. spent mornings and weekends in the home in 2008 and 2009 (for about ten months) and there would have been little opportunity for A.L. to abuse C.S.
- C.S. says that J.S. walked in on her in A.L.'s bed with A.L. on a couple of occasions.
- J.S. denies ever seeing C.S. in bed with A.L.
- C.S. says that her bed was old, metal and squeaky and made too much noise when she was having intercourse or sexual relations with A.L. C.S. says that as a result she had the metal bed frame removed from her room and slept with her mattresses on the floor.
- B.S. and A.L. confirm that C.S. had a metal bed but deny that it was removed from her room or that she slept with mattresses on the floor.
- J.S. denied that C.S. had no bed and slept with mattresses on her bedroom floor.

- C.S. says that A.L. slept overnight with her and molested her in two different tents that had been set up in their backyard during her first summer living at A.L.'s house.
- B.S. and A.L. say that they only ever had one tent set up in their backyard and that A.L. never stayed overnight in that tent with C.S.
- J.S. also stated that A.L. never stayed with C.S. in the tent in the backyard. J.S. says that C.S. did stay in the tent with a female friend of hers.
- C.S. says that A.L. loaded his ATV on a utility trailer and took her to remote areas on his ATV and had intercourse with her.
- B.S. and A.L. say that A.L. never took C.S. off their property to go four wheeling on the ATV.
- J.S. says that A.L. never took the ATV anywhere on the utility trailer.
- C.S. says that A.L. took her on work calls and had intercourse with her while travelling to Bridgewater and in Bridgewater.
- A.L. and J.S. both testified that A.L. did not take any of the kids, including C.S., on service calls outside of the Halifax Region.
- C.S. says that A.L. had intercourse with her in the grocery store's compressor and electrical rooms.
- J.L. confirmed that he was taken into the […] by A.L. without a store escort.
- J.S., B.S. and A.L. said that A.L. could not enter the […] without having an escort by a store manager.
- C.S. says that on one occasion when she refused to have intercourse with A.L., he hit her in the face.
- B.S. and A.L. say that C.S. advised that her black eye was caused by their dog headbutting her when she was attempting to take a "selfie" picture with the dog and that C.S. posted the pictures on Facebook with a caption explaining that the injury was caused by […] headbutting her.
- C.S. says that on one occasion A.L. was hitting her and J.S. had to intervene and tell A.L. to stop.
- J.S. denies ever seeing A.L. assaulting C.S. and denies ever having to tell A.L. to stop hitting C.S.

- C.S. says that when confronted by B.S., who had just found a vibrator that C.S. says A.L. used on her, C.S. says she lied to B.S. and said that A.L. had given her the vibrator so that she would not be interested in boys.
- B.S. denies C.S. said this and says that C.S. explained that the vibrator was used with her girlfriend, J.P.
- C.S. says that this vibrator was kept locked in a small chest with a skull light mounted on top.
- B.S. says that she snuck a look inside the skull chest on one occasion and there was no vibrator in it, just papers.
- C.S. says that A.L. had intercourse with her in the outbuilding office and kept the doors locked with a punch code. C.S. testified that A.L. changed the punch code from the widely known "1960" to "1949" when they were having intercourse.
- J.S., B.S. and A.L. essentially deny that the punch code was anything but "1960", advise that many people knew the "1960" code and B.S. added she never tried the code and had it fail to work.
- C.S. says that A.L. purchased a video camera on-line and used it to conduct surveillance of his driveway while he was having intercourse with C.S.
- B.S. and A.L. state that the video camera purchased on-line was junk, never worked properly and was put away.
- C.S. says that she gained weight in an effort to make herself less attractive to A.L.
- B.S. says that C.S. was heavy from the age of five.
- C.S. says that she attempted to overdose on pills because of the sexual abuse perpetrated by A.L.
- B.S. and A.L. said that C.S. told them and the health care providers she overdosed because she thought she had done poorly in a math test.
- C.S. says that A.L. stayed with her at the […] while being treated for her overdose so she could never tell the health case providers the truth.
- B.S. and A.L. say that B.S. stayed with C.S. at the […] while A.L. went home to get the pill bottles so the doctors could determine the dosages,

therefore, C.S. had the opportunity to speak to health care providers at that time without A.L. being present.

- C.S. says that she did not attend for follow-up counselling because A.L. told her not to as he felt the counsellor would figure out he was having intercourse with C.S.

- B.S. says that C.S. told her that she was too embarrassed to go to counselling.

[271] Additionally, some issues regarding C.S.'s memory came to light during the trial:

- C.S. cannot recall when she stopped having intercourse with A.L. or when the last incident of intercourse occurred.

- C.S. testified that she has been suppressing memories of the sexual abuse and that the memories come flooding out.

[272] While I do not necessarily believe some of the testimony of the accused, A.L., taking the evidence of the defence as a whole: including the testimony of J.S. and B.S.; some of the issues that arose during the testimony of C.S., those being the conflicts in her testimony with that of J.S. and B.S.; the reliability of C.S.'s memory on the whole; considering the presumption of innocence and the reasonable doubt standard; I am left with a reasonable doubt. There are simply too many inconsistencies between C.S.'s version of events (even as supported in part by J.L., J.P. and J.H.) and the version presented by B.S., J.S. and A.L. A careful examination of the evidence leads me to the conclusion that it would be wrong in law to convict A.L. of the criminal charges in this case.

Evidentiary Questions

[273] During the course of the trial, certain evidence was either called, or not objected to, by counsel that caused me concern. This being a judge alone trial, at the conclusion of the evidence, I asked counsel to address these issues. Counsel forwarded written arguments to the Court on these evidentiary points prior to their closing oral submissions on April 11 and 17, 2014. I then forwarded to counsel further questions on these evidentiary points and counsel provided the Court with further written arguments, the last of which was received July 25, 2014. Before coming to the conclusion that there is a reasonable doubt in this case, I considered

and determined the evidentiary questions raised during the course of the trial. For the purpose of releasing this decision, I will include my analysis below.

The Dish Incident with J.L.

[274] This evidence was not objected to by the defence. J.L. told the Court about an incident when he was 15 years old and his friend M. was visiting him at A.L.'s home. J.L. said he and M. had been tasked by A.L. to do the dishes. A.L. did not feel they had completed the job properly so A.L. dragged J.L. by the neck down the stairs and forced him to do more dish cleaning in front of his friend. During this incident, J.L. said A.L. called him numerous derogatory names, demeaned him, insulted him and asked him to step outside for a fistfight. J.L. said he left A.L.'s home after this incident and never returned.

[275] B.S. said that she observed J.L. coming to A.L.'s home between 2002 and 2005/2006. She did not witness A.L. losing his temper with J.L. but said she did drive J.L. home on the last occasion he stayed over and recalled consoling him during the drive.

[276] A.L. agreed he had an argument with J.L. over dishes not being washed. He agreed he may have grabbed J.L. and cursed at him but denied calling him names and denied asking him to go outside for a fistfight. A.L. agreed that after this argument, J.L. never came back to his home.

[277] Considering the principles outlined in **R. v. B. (F.F.)**, [1993] 1 S.C.R. 697, **R. v. Handy**, [2002] 2 S.C.R. 908 and **R. v. C.J.**, 2011 NSCA 77, the question arises: Is the evidence admissible? In **R. v. C.J.**, **supra,** Fichaud J.A., speaking for the Nova Scotia Court of Appeal, summarized the law relating to this issue:

> **Character Evidence - The Principles**
>
> [20] In *R. v. Handy*, [2002] 2 S.C.R. 908, Justice Binnie for the Court discussed the principles for the admissibility and use in a sexual assault trial of discreditable similar fact evidence of the accused's prior sexual conduct. Justice Binnie described the exclusionary rule:
>
> > 31. The respondent is clearly correct in saying that evidence of misconduct beyond what is alleged in the indictment which does no more than blacken his character is inadmissible. Nobody is charged with having a "general" disposition or propensity for theft or violence or whatever. The exclusion thus generally prohibits character evidence to be used as circumstantial proof of conduct, i.e., to allow an inference from the "similar facts" that

> the accused has the propensity or disposition to do the type of acts charged and is therefore guilty of the offence.
>
> . . . .
>
> 33. Subsequently, and most famously, the general exclusionary rule was laid down by Lord Herschell L.C. *Makin v. Attorney-General for New South Wales*, [1894] A.C. 57 (P.C.), in these terms, at p. 65:
>
> > It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried
>
> 34. The court spoke there of "criminal acts", but this has been broadened to include any proffered "similar facts" of a discreditable nature (*Robertson, supra*, [1987] 1 S.C.R. 918], at p. 941; *B.(L.), supra*, [*R. v. B.(L.)*, 102 O.A.C. 104 (O.C.A.)], at pp. 45-46), a category which includes the conduct alleged by the ex-wife in this case.
>
> . . . .
>
> 36. The exclusion of evidence of general propensity or disposition has been repeatedly affirmed in this Court and is not controversial. See *Morris v. The Queen*, [1983] 2 S.C.R. 190; *R. v. Morin*, [1988] 2 S.C.R. 345; *R. v. B.(C.R.)*, [1990] 1 S.C.R. 717; *R. v. Arp*, [1998] 3 S.C.R. 339.

[21] Justice Binnie then summarized the authorities governing the exception to the exclusionary rule:

> 49. The present rule was succinctly formulated by McIntyre J. in *Sweitzer v. The Queen*, [1982] 1 S.C.R. 949, at p. 953:
>
> > The general principle described by Lord Herschell may and should be applied in all cases where similar fact evidence is tendered and its admissibility will depend upon the probative effect of the evidence balanced against the prejudice caused to the accused by its admission whatever the purpose of its admission.
>
> 50. The rule received more extended and comprehensive treatment by McLachlin J. in *B.(C.R.), supra*, itself. ... :
>
> > ... [E]vidence which is adduced solely to show that the accused is the sort of person likely to have committed an offence is, as a rule, inadmissible. Whether the evidence in question constitutes an exception to this general rule depends on whether the probative value of the proposed evidence outweighs its prejudicial effect.

> 51. The Court thus affirmed that evidence classified as "disposition" or "propensity" evidence is, exceptionally, admissible. McLachlin J, continued at p. 735:
>
> > In a case such as the present, where the similar fact evidence sought to be adduced is prosecution evidence of a morally repugnant act committed by the accused, the potential prejudice is great and the probative value of the evidence must be high indeed to permit its reception. The judge must consider such factors as the degree of distinctiveness or uniqueness between the similar fact evidence and the offences alleged against the accused, as well as the connection, if any, of the evidence to issues other than propensity, to the end of determining whether, in the context of the case before him, the probative value of the evidence outweighs its potential prejudice and justifies reception.

Justice Binnie (paras. 53-54) also adopted passages from Justice Cory's reasons in *R. v. Arp*, [1998] 3 S.C.R. 339, paras. 41-2, 50, 65:

> ...evidence which is adduced <u>solely</u> to show that the accused is the sort of person likely to have committed an offence is, as a rule, inadmissible. Whether the evidence in question constitutes <u>an exception</u> to this general rule depends on whether the probative value of the proposed evidence outweighs its prejudicial effect. [*Arp*, para 41, quoting *B.(C.R.)*]
>
> It can be seen that in considering whether similar fact evidence should be admitted the basic and fundamental question that must be determined is whether the probative value of the evidence outweighs its prejudicial effect. [*Arp*, para 42]
>
> In summary, in considering the admissibility of similar fact evidence, the basic rule is that the trial judge must <u>first</u> determine whether the probative value of the evidence outweighs its prejudicial effect. [*Arp*, para 50]
>
> The issue in <u>every</u> case is whether the probative value of the evidence outweighs its prejudicial effect. [*Arp*, para 65]
>
> [Justice Binnie's underlining]

[22] In *Handy*, Justice Binnie then summarized the balancing test for the exception:

> 55. Similar fact evidence is thus presumptively inadmissible. The onus is on the prosecution to satisfy the trial judge on a balance of probabilities that in the context of the particular case the probative value of the

> evidence in relation to a particular issue outweighs its potential prejudice and thereby justifies reception.

[23] Justice Binnie then set out directions for the trial judge's application of the balancing test. These included:

> 69. ... McIntyre J., in *Sweiltzer, supra*, emphasized that whether or not probative value exceeds prejudicial effect can only be determined in light of the purpose for which the evidence is proffered (p. 953). ...
>
> 70. An indication of the importance of identifying "the issue in question" is that the trial judge is required to instruct the jury that they may use the evidence in relation to that issue and not otherwise.
>
> 71. This Court has frequently gone out of its way to emphasize that the general disposition of the accused does not qualify as "an issue in question". As stated, the similar fact evidence may be admissible if, but only if, it goes beyond showing general propensity (moral prejudice) and is more probative than prejudicial in relation to an issue in the crime now charged. ...
>
> . . .
>
> 73. The requirement to identify the material issue "in question" (i.e., the purpose for which the similar fact evidence is proffered) does not detract from the probative value/prejudice balance, but is in fact essential to it. Probative value cannot be assessed in the abstract. The utility of the evidence lies precisely in its ability to advance or refute a live issue pending before the trier of fact.
>
> 74. The issues in question derive from the facts alleged in the charge and the defences advanced or reasonably anticipated. It is therefore incumbent on the Crown to identify the live issue in the trial to which the evidence of disposition is said to relate. If the issue has ceased to be in dispute, as for example when the fact is admitted by the accused, then the evidence is irrelevant and it must be excluded:
>
> . . .
>
> 81. The decided cases suggest the need to pay close attention to similarities in character, proximity in time and frequency of occurrence. Wigmore put it this way:
>
> > Since it is the improbability of a like result being repeated by mere chance that carried probative weight, the essence of this probative effect is the likeness of the instance. ...
>
> . . .
>
> 82. The trial judge was called on to consider the cogency of the proffered

> similar fact evidence in relation to the inferences sought to be drawn, as well as the strength of the proof of the similar facts themselves. ...

[Justice Binnie's underlining]

[24] More recently, in *R. v. Mahalingan*, [2008] 3 S.C.R. 316, at para 159, Justice Charron (dissenting on another issue, but speaking also for the majority on this point - see para 1, per McLachlin, C.J.C.) confirmed *Handy*'s exposition of the exclusionary rule. Justice Charron then said:

> 160. It is clear that the rule extends not only to criminal acts, but to "similar acts" of a discreditable nature: *Handy*, at para. 34.
>
> . . .
>
> 163. The similar fact evidence rule therefore precludes the Crown from adducing evidence that the accused engaged in criminal or discreditable conduct beyond what is alleged in the indictment, unless it is established on a balance of probabilities that the probative value of the evidence in relation to an issue in the case outweighs its potential prejudicial effect. ...

[25] To apply these principles, I will discuss two questions. (1) Did the judge's admission and use of the testimony of prior occasions when C.J, watched televised pornography, recorded televised pornography and used telephone sex violate the general exclusionary rule against propensity or character evidence? If so, (2) was the evidence and its use within the exception under the principles in *Handy*?

The Exclusionary Rule in C.J.'s Case

[26] On the first question - the scope of the rule - the Crown submits that only evidence disclosing illegal activity is "bad character" evidence, citing *R. v. Erez*, 2010 ONCA 776. The Crown's factum says that "the evidence led regarding the Appellant watching pornographic movies on television and participating in a phone sex line did not disclose any illegal activities by the Appellant", and therefore escapes the exclusionary rule.

[27] In *Erez* the appellant appealed his conviction of possession of cocaine for the purpose of trafficking. The Crown led evidence that Mr. Erez earned income from gambling. The Ontario Court of Appeal said:

> 4. The appellant argues that these activities and in particular the gambling reflect badly on the appellant's character and amount to what is in essence bad character evidence. We do not accept this submission. We do not agree this evidence can amount to bad character evidence. The trial judge ruled that the witness could not, however, testify about any illegal gambling activities in which she claims the appellant was involved. In our view, the ruling was correct and fair.

[28] The Crown also cites an article by John L. Gibson, Criminal Law: Evidence, Practice and Procedure, looseleaf (Toronto: Carswell, 1988-) that

states: "The dividing line between evidence which reflects badly on a person, and bad character evidence, which triggers legal rules of exclusion appears to be criminality." Gibson cites Erez, and no other authority.

[29] I disagree that the dividing line is criminality. I have quoted (above para 20) Justice Binnie's statement for the Court in Handy, para. 34:

> The court spoke there of "criminal acts", but this has been broadened to include any proffered "similar facts" of a discreditable nature ...

Justice Binnie cited authority from the Supreme Court of Canada and Ontario Court of Appeal. I have also quoted earlier (para. 24) Justice Charron's statement in Mahalingan, para. 160:

> It is clear that the rule extends not only to criminal acts, but to "similar acts" of a discreditable nature: Handy, at para. 34.

To similar effect: *R. v. Robertson*, [1987] 1 S.C.R. 918, para. 46; *Morris v. The Queen*, [1983] 2 S.C.R. 190; *Dhawan v. College of Physicians and Surgeons of Nova Scotia*, [1998] N.S.J. No. 170 (C.A.), para. 59.

[30] Neither *Erez*, nor the Gibson article, nor the Crown's factum in this case cited these authorities on this point. I take *Erez* as finding that the gambling evidence in that case was not discreditable. I do not read the Ontario Court of Appeal's ruling as a deviation from *Handy's* definition of the rule.

[31] Clearly C.J.'s prior use of televised pornography and phone sex is discreditable. This engages the rule. The Crown's evidence would be inadmissible unless it fits within an exception.

The Exception - Balance of Probative Value and Prejudicial Effect in C.J.'s Case

[32] The second question in C.J.'s appeal is the application of the exception to the exclusionary rule - involving the balance of probative value against prejudicial effect. At this question's threshold is an important distinction, in C.J.'s case, between his prior use of televised pornography and his prior engagement in phone sex.

[33] In *Handy* (paras. 73-74, quoted above para. 23) Justice Binnie said that the probative value for the balance must relate to "its ability to advance or refute a live issue pending before the trier of fact", and "[i]t is therefore incumbent on the Crown to identify the live issue in the trial to which the evidence of disposition is said to relate".

[278] Justice Fichaud went on to explain:

> [41] In *Handy*, Justice Binnie said (para. 55, above para. 22) the "onus is on the prosecution to satisfy the trial judge on a balance of probabilities that in the context of the particular case the probative value of the evidence in relation to a

> particular issue outweighs its potential prejudice and thereby justifies reception". Justice Binnie outlined the process to be followed:
>
> > 74. ... It is therefore incumbent on the Crown to identify the live issue in the trial to which the evidence of disposition is said to relate. If the issue has ceased to be in dispute, as for example when the fact is admitted by the accused, then the evidence is irrelevant and it must be excluded.
> >
> > . . .
> >
> > 81. The decided cases suggest the need to pay close attention to similarities in character, proximity in time and frequency of occurrence. .
> >
> > 82. The trial judge was called on to consider the cogency of the proffered similar fact evidence in relation to the inferences sought to be drawn, as well as the strength of the proof of the similar facts themselves.

[279] Applying Fichaud J.A.'s thorough analysis in **R. v. C.J., supra**, to the evidence in A.L.'s case, at best, from the Crown's perspective, the "dish incident" could show that A.L. had a bad temper and could be verbally and physically abusive to his children. This evidence could be stretched to support the inference that if A.L. exhibited a violent behaviour on that lone occasion with J.L., he might have the propensity to threaten and bully his children if they expressed resistance to his wishes. On the other hand, this was a single incident over unwashed dishes, to which A.L. partially admitted.

[280] In my opinion, there is little probative value to this evidence and its prejudicial effect is significant. The Crown has not proven on a balance of probabilities in the context of this case that the probative value of this evidence outweighs its prejudicial effect. It is not admissible. I will add that even if this evidence was admitted it would not erode the reasonable doubt created by the defence evidence and the conflicts between the evidence of C.S. and the defence witnesses.

The Skateboard Incident

[281] Like the dish incident, evidence relating to the skateboard incident was not objected to by the defence until I raised the issue at the conclusion of the trial and long after the evidence had been tendered.

[282] C.S. recounted an incident when J.S. broke A.L.'s CD player. She said that A.L. grounded J.S. and J.S. ignored the punishment and left the home to go

skateboarding. C.S. said that while J.S. was out, A.L. became angry and cut the remainder of J.S.'s skateboard collection with a saw. J.L. and B.S. both recalled an incident when A.L. was angry and cut up J.S.'s skateboards with a saw.

[283] J.S. said that on one particular occasion he broke his curfew, not A.L.'s CD player, and A.L. cut his skateboard in half. J.S. said that he made shelves out of the broken boards. He said that A.L. eventually apologized and bought him a new skateboard.

[284] A.L. agreed that he cut J.S.'s skateboard in half when he broke a curfew and says he later apologized and bought him a new skateboard.

[285] Again, considering the principles outlined in **R. v. B. (F.F.), supra**, **R. v. Handy, supra**, and **R. v. C.J.**, **supra**, there is little probative value to this evidence and its prejudicial effect is significant. The Crown has not proven on a balance of probabilities in the context of this case that the probative value of this evidence outweighs its prejudicial effect. It is not admissible. It could tend to show, along with other evidence, that A.L. may have been ill-tempered and did not consider the feelings of the children living in his home. However, where does that take us in the reasonable doubt analysis involving allegations of physical and sexual abuse allegedly perpetrated on C.S.? A.L. admits to the skateboard incident. There is nothing in this evidence that touches on A.L.'s credibility.

[286] This incident involves a stepfather cutting up the skateboards of a stepson who broke his curfew to go skateboarding. The stepfather later apologized once his point was made and replaced the skateboard. The probative value of this evidence is low. This evidence is not helpful to any determination required on this trial. I will add that even if this evidence was admitted it would not in any way erode the reasonable doubt created by the defence evidence and the conflicts between the evidence of C.S. and the defence witnesses.

Computer Pornography

[287] J.L. told the Court that prior to B.S. moving into A.L.'s home there was a desktop computer in the home office. J.L. testified that he stumbled across six or seven pornographic movies downloaded on this home computer through a file sharing program. J.L. said these videos generally depicted young girls (13-15 years old) having intercourse with older men (35 and older). J.L. said he also saw

these videos on A.L.'s computer after B.S. and her family moved in. J.L. agreed that after B.S. moved in, everyone in the household had access to the computers. Before that, J.L. is not sure who had access to the computer as lots of people were in and out of the house.

[288] C.S. testified that when the family initially started visiting A.L., he had a desktop computer in his home office. C.S. said A.L. purchased a laptop shortly after they moved in. The desktop computer was then moved upstairs and C.S. and B.S. were allowed to use it. Eventually the desktop was moved into C.S.'s room. Once the office was moved to the outbuilding, C.S. said A.L. bought a new computer. According to C.S., J.L. sometimes used the computers at the house.

[289] J.S. explained when they moved in there was only one computer in the house and he and C.S. used it to do their homework. He said that after they had lived in the home for a couple of years A.L. purchased a new computer. J.S. said he never observed anything unusual such as pornography on the home computers.

[290] B.S. testified that initially there was one computer in the house shared by J.L., J.S., C.S., A.L. and B.S. Eventually, J.S., C.S. and B.S. all had their own computers.

[291] A.L. said that there were several computers in the house. He said he never saw pornography on any of the home computers nor did he put any there.

[292] Has the Crown proven that A.L. downloaded/put the pornography on the computer? Has the Crown proven whether A.L. ever actually watched the pornography that J.L. says was on the computer? I am not satisfied that the Crown has proven either of these assertions.

[293] From the overall evidence presented during the trial it appears that other unnamed persons were in and out of A.L.'s home, including former roommates and ex-girlfriends, prior to B.S., C.S. and J.S. moving into the home. Additionally, A.L.'s office was located in the home. J.L. did not identify a specific date when he first noticed these movies. Any of the unnamed people who were in and out of the home could have downloaded movies onto the computer without A.L.'s knowledge. We have no idea how long those pornographic movies were on the computer, what was on the computer when it arrived at A.L.'s home, where the movies came from, or who, if anyone aside from J.L., ever opened or watched the movies. J.L. said they were connected to a file sharing program. Was A.L. even

aware of this program or the movies? Did those files advertently or inadvertently end up on the computer? The evidence in this regard is non-existent.

[294] Was A.L. obsessed with sexual interaction between a man his age and a girl of C.S.'s age? Does the evidence of pornography on the computer help to answer this question? This issue is a little less straightforward than the dish and skateboard incidents. However, our Court of Appeal provides some significant guidance in **R. v. C.J.**, **supra**.

[295] As Justice Fichaud noted in **R. v. C.J., supra**:

> [35] The Crown's theory was that C.J. committed a sexual assault while he watched televised pornography. Clearly the availability of televised pornography was a live issue, to which the evidence of his past use or recording of televised pornography would be relevant. I agree with the Crown that this evidence would have some probative value, and this triggers the balancing test of probative value *versus* prejudicial effect.
>
> [36] Telephone sex was not involved in the alleged sexual assault on the day in question in January 2009. The most that can be said is that the phone sex evidence showed C.J. to have a lascivious sexual appetite. During her direct examination by the Crown about C.J.'s phone sex, K.W. was asked "And how did you deal with that situation?", to which K.W. replied "I was upset. Like, I ... I think that stuff's sick ...." (above para 7). The Crown's closing submission referred to the evidence of C.J.'s prior use of televised pornography and phone sex, then said:
>
> > ...and I think it would be typical of someone who committed this offence to say, yeah, I've done this type of thing but very much playing it down. And I think that's what speaks volumes.
>
> [37] The point of the exclusionary rule is that an accused be judged on the evidence for the event in the charge. He is not to be convicted because evidence related to his prior "sick" conduct on "this type of thing" is "typical of someone who committed this offence".
>
> [38] In *Handy*, Justice Binnie (paras 59-68) prefaced his remarks with the subtitle "Propensity Evidence by Any Other Name Is Still Propensity Evidence", then added (para 71): "This Court has frequently gone out of its way to emphasize that the general disposition of the accused does not qualify as 'an issue in question'." In *Handy*, *B.(C.R.)* and *Arp* (above para 21), the Supreme Court of Canada made it clear that "evidence which is adduced solely to show that the accused is the sort of person likely to have committed an offence is, as a rule, inadmissible".
>
> [39] In my respectful view, the evidence of C.J.'s prior engagement in phone sex had no relevance to a live issue at trial, other than the forbidden topic of

> C.J.'s propensity itself. This evidence bore no probative value to be weighed in the balancing test for the exception to the exclusionary rule. The evidence should not have been introduced by the Crown. The defence should have objected. Once the evidence entered without objection, the judge should not have used that evidence in his analysis. By using this improper evidence in his reasoning that led to the convictions (above paras 12-14), the judge erred in law.
>
> [40] Next is the evidence of C.J.'s prior watching and recording of televised pornography. As noted earlier, I accept that this evidence had some relevance to a live issue at the trial. So the evidence had some probative value that must be weighed against its potential prejudicial effect.

[296] If there was some proof that A.L. had opened or watched pornographic movies of older men of approximately his age having intercourse with younger girls of approximately C.S.'s age, this could have some relevance. However, unlike the facts in **R. v. C.J.**, **supra**, there is no evidence that A.L. ever watched the pornography on the computer. Additionally, the computer pornography is not related to a live issue at trial as was the case in **R. v. C.J.**, **supra**, where the Crown's theory was that the accused watched televised pornography while committing a sexual assault. In **R. v. C.J.**, **supra**, evidence of the accused's past use or recording of televised pornography was highly relevant.

[297] The prejudicial effect of evidence of an accused person charged with sexual assault watching pornography is enormous. There is some probative value attached to the evidence in this case considering the specific description of the pornography in J.L.'s testimony (an older man with a young girl). However, this is not at all analogous to the factual scenario in **R. v. C.J.**, **supra** (watching pornography while committing a sexual assault). In my opinion, considering the lack of proof of A.L.'s knowledge of these movies, there is little probative value to this evidence and its prejudicial effect is significant. The Crown has not proven on a balance of probabilities in the context of this case that the probative value of this evidence outweighs its prejudicial effect. It is not admissible.

[298] Even if the evidence of J.L. regarding the computer pornography was admissible, the weight attached to this evidence would be extremely low since the Crown cannot actually prove, on any standard, that A.L. had knowledge of these movies. Such evidence would at best be miniscule, but incredibly prejudicial, piece of evidence to be used by the Crown to build their case against A.L. If this evidence was admitted, the connection between the pornography J.L. saw on the computer and A.L. is so tenuous that it would not erode the reasonable doubt

created by the defence evidence and the conflicts between the evidence of C.S. and the defence witnesses.

Comments Made to C.S. and J.L.

[299] C.S. testified that A.L. made sexual comments to her about other young women her age. C.S. specified that A.L. spoke about his business partner's young daughter in this way by stating: "You can tell she's a dirty girl" and "I bet she gives good head". C.S. said that A.L. made similar comments to her about young girls he saw around her school.

[300] J.L. also testified that A.L. made what he described as "uncomfortable" comments to him about young girls aged 15 to 17 that A.L. saw on the street when they were attending service calls in his work van. According to J.L., A.L. would talk to J.L. about wanting to: "Take them off the street and fuck them in the back of his van". J.L. recalled A.L. seeing a young girl of Asian descent on the street and commenting: "I bet her nipples are as hard as a coffee cup."

[301] J.L. testified that he stopped visiting A.L. when he was fifteen. He is now in his mid-twenties. He testified that he has had no contact with C.S. at all since moving out of A.L.'s home at age fifteen. J.L. testified that he has no idea what C.S. looks like as an adult.

[302] Much of the evidence called on this topic is propensity evidence in respect of A.L. This evidence also goes to his credibility. A.L. denied making such comments about young girls on the street, while both C.S. and J.L. claim he did.

[303] One particularly relevant aspect of this evidence is J.L.'s testimony to the effect that when they saw girls of an age similar to C.S. walking by A.L.'s work van, A.L. said that he wanted to: "Take them off the street and fuck them in the back of his van". This relates to a live issue at trial. C.S. testified that A.L. had intercourse with her in the back of his work van.

[304] When balancing the prejudicial effect (significant) against the probative value (also significant), I would admit the comments reported by J.L. and C.S. for consideration at trial. While obviously troubling, the comments made by A.L. in this regard do not have a significant impact on the overall strength of the Crown's case. Simply, the lecherous comments by A.L. do not erode the reasonable doubt created by the defence evidence or the conflicts between the testimony of C.S. and the defence witnesses on critical points. Those conflicts are just too significant.

A.L.'s alleged request to join J.P. and C.S. in an intimate relationship

[305] The evidence relating to this issue has been reviewed in detail. This evidence relates directly to whether or not A.L. considered C.S. merely a stepdaughter or a potential sexual partner, despite her age for much of the time she was living in his home and despite A.L.'s position of authority and trust the entire time C.S. was living under his roof. J.P.'s testimony about the request by A.L. to have a threesome with her and C.S. supports C.S.'s claims in this regard. The evidence is probative. The evidence is also prejudicial in that it is evidence of bad character on the part of A.L.

[306] In my opinion, the Crown has proven the probative value of this evidence in relation to a particular issue, A.L.'s boundaries in relation to what or was not appropriate with C.S., outweighs its potential prejudice and thereby justifies reception. The evidence in this regard is admitted. However, the defence evidence, and the conflicts between the testimony of C.S. and the defence witnesses, raises many other issues regarding the credibility and reliability of C.S. There simply is a reasonable doubt about A.L.'s alleged abuse of C.S.

B.S. and A.L's failure to arrange counselling for C.S. after the attempted suicide

[307] Both Crown and defence agree that any prejudicial inference arising from the failure to take C.S. to counselling after her suicide attempt should not be extended to A.L.

B.S.'s and J.S.'s failure to give a police statement

[308] In **R. v. Taylor**, [2013] 1 S.C.R. 465, the Supreme Court of Canada considered whether the trial judge erred in rejecting the appellant's son's exculpatory evidence as a fabrication, partly because he had not come forward previously. The Supreme Court of Canada adopted the dissenting reasons of Hoegg J.A., of the Newfoundland Court of Appeal. In a decision reported at 2012 NLCA 33, Hoegg J.A. stated at paras. 26-33:

> [26] The central issue concerning the treatment of Stephen's evidence relates to the second reason the trial judge gave for rejecting it. Mr. Taylor argues that Stephen had no obligation to notify anyone about his being at the shed that day and having evidence which could possibly help his father, and in any event, the

evidence was eventually brought to counsel's attention as shown by the subpoena for Stephen issued by the defence in advance of the trial.

[27] In relation to this issue, the trial judge said the following at page 24 of the transcript of his oral decision:

> Stephen Taylor stated in his evidence that when he, referring to his father, that when he got charged I told him I could testify about the water gun. However he later testified on cross-examination that I was not going to – I was not going to the police because he was the one getting charged and I did not think I could. Surely if Stephen Taylor had information that could assist his father, who he testified that he was very close to, he would've gone to the police with it or he would've gone to a lawyer, or he would've gone to the prosecutor's office, or he would've gone to somebody to get help for his father with what he knew. Why would he put his father through that? He testified that he first became aware of [the complainant] and the water gun after dad got charged, yet with that information he did nothing.

[28] Although the trial judge commented that Stephen Taylor "did nothing with the information", it is clear that he meant, as Stephen Taylor himself testified, that he did nothing with it at the time Mr. Taylor was charged.

[29] The trial judge neither stated nor insinuated that Stephen had any obligation to provide his evidence to the authorities. Rather, he questioned the truthfulness of the evidence because Stephen did not do so, given that it could possibly assist Mr. Taylor in defending himself. The trial judge effectively considered the evidence to have been recently fabricated.

[30] The record reveals that when Stephen was asked by the Crown why he did not come forward with his evidence when he learned his father was facing serious charges, he said that he did not know that he had to contact anyone with the information, and that he did not go to the police because he was not the one charged.

[31] Stephen is a witness. He has every right to remain silent about his involvement in his father's case. The trial judge did not suggest otherwise. However, if a witness gives unexpected evidence in circumstances where that evidence could reasonably be expected to have been disclosed earlier, he runs the risk of it being considered to be recently fabricated. This is what happened here. Stephen had the opportunity to address the Crown's insinuation of recent fabrication for the Crown attorney questioned Stephen as to why this evidence was just coming forth at trial, and Stephen explained his reasons. The reasons did not ring true to the trial judge. The trial judge found Stephen's evidence wanting and rejected it, as he is entitled to do. Just because there was no obligation on Mr. Taylor or Stephen to disclose Stephen's evidence does not mean that a negative inference cannot be drawn against its late disclosure. There is no logical connection between the two concepts.

> [32] I agree with my colleagues that this is not a case involving alibi evidence. In this regard, Mr. Taylor's reliance on *Chambers*, *supra*, is not appropriate. *Chambers* is a case which involves the right to silence, and whether an adverse inference can be drawn from the fact that an accused remains silent when being questioned by the police. It is different from the case at hand. Mr. Taylor did not remain silent when questioned by police. He made exculpatory statements to the police when he was arrested and if Stephen had been working on the truck the day of the assault, the trial judge would have expected Mr. Taylor to have said so to the police.
>
> [33] I agree with Mr. Taylor and my colleagues that there is no obligation on an accused to disclose his defence to the Crown, save in such circumstances as alibi. I also agree that there is no obligation on a witness, alibi or otherwise, to bring forward evidence in advance of trial. However, there is no prohibition on a trial judge considering Stephen's testimony about fixing the truck on the day of the assault and rejecting it on the basis of the reasons he gave. It therefore cannot be said that the trial judge dismissed Stephen's evidence "out of hand".

[309] From their testimony at trial, it appears reasonable to infer that J.S. and B.S. received some sort of legal advice to the effect that they were not required to provide a statement to the police prior to their refusing to provide information. Of course, this was accurate advice in the circumstances of this case. J.S. and B.S. were under no obligation to speak to the police. I would not elevate the refusal of J.S. and B.S. to provide statements to the police as reason to dismiss their evidence. As the Newfoundland Court of Appeal noted in **R. v. Taylor, supra**, those non-party witnesses whom a court might reasonably expect to have disclosed their evidence earlier run the *risk* of having their evidence considered less reliable and trustworthy depending on the circumstances of the case. This *potential* finding is miles away from being mandatory.

[310] As is the case with all witnesses, the court can choose to rely on some, none or all of a witnesses' evidence on a case-by-case basis. I am not required to automatically discount or reject the evidence of B.S. and J.S. simply because they refused to speak to the police or disclose their evidence prior to trial. This was a dated sexual assault investigation. When Constable McGowan approached these witnesses the evidence was not fresh. B.S. and C.S. had time to consider their options prior to speaking with the police. A.L.'s lawyer called B.S. and J.S. at trial. The inference is that A.L.'s lawyer knew what J.S. and B.S. were going to say prior to their testifying. This fact situation is distinguishable from that in **Taylor, supra.** There was absolutely no obligation whatsoever for the defence to disclose anything to anyone in advance of A.L.'s trial.

Conclusion

[311] As I am left with a reasonable doubt on the evidence, I am required to find A.L. not guilty on all charges.

Arnold, J.