SUPREME COURT OF NOVA SCOTIA
Citation: R. v. A. N., 2009 NSSC 166

Date: 20090402
Docket: CRH 288914
Registry: Halifax

Between:

Her Majesty the Queen

v.

A. N.

Restriction on publication: S.486.4 C.C.C.

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Revised Decision: The text of the original decision released on May 22, 2009 has been corrected to reflect the dates heard as March 23-27, March 30, April 2, 2009.

Judge: The Honourable Justice Duncan R. Beveridge.

Heard: March 23-27, March 30, April 2, 2009, in Halifax, Nova Scotia

Oral Decision: April 2, 2009

Released: May 22, 2009

Counsel: Eric Taylor and Terri Lipton, for the Crown
A. N., self-represented

By the Court:

INTRODUCTION

[1] In 2003 J. N. decided to contact the police alleging that her father, A. N., had sexually abused her. Mr. N. was interviewed by detectives from the W. Police Service. He was told that the Halifax Police intended to charge him with rape and indecent assault based on allegations by J. N.. During that interview Mr. N. made a number of admissions. He said he intended to plead guilty to the anticipated charges. Charges were eventually laid. Mr. N. did not plead guilty.

[2] L. N. is J.'s younger sister. She and J. at some point disclosed to each other their respective claims of sexual abuse by their father. When L. N. first learned from J. of her intention to contact the police, she tried to talk her out of it. L. did not understand why she was doing it. She asked J. what was she hoping or looking for. She was not going to change anything. However, when L. found out that her father had, in her view, pled not guilty and was thereby denying the allegations by J., L. came forward and disclosed to the authorities the sexual abuse she said she suffered at the hands of the accused.

[3] The allegations from the two complainants J. and L. N. resulted in a nine count indictment. These charges were simplified by the Crown into a new six count indictment. The first three counts on the indictment set out charges of indecent assault and rape with respect to J. N., alleged to have occurred between 1970 and 1974. The last three counts charged Mr. N. with indecent assault, rape and incest with respect to L. N. from 1974 to 1980.

BACKGROUND

[4] As will soon become evident, this was a most unusual trial. For reasons that are not relevant to any of the issues in this trial, Mr. N. represented himself. Some of this background information is useful in understanding why this was an unusual trial.

[5] Mr. N. originally had counsel for the early stages of the criminal process. He elected trial by judge and jury. That lawyer withdrew. A new lawyer then completed the preliminary inquiry and appeared for Mr. N. in Supreme Court in November 2007 to set a date for a jury trial. That date was October 6, 2008. This lawyer was forced to withdraw, citing Mr. N.'s failure to communicate and unwillingness to complete the requested terms of a retainer to handle the trial. In the summer of 2008 he officially withdrew.

[6] Mr. N. did not retain new counsel. He did not appear in court as directed. He was arrested on a warrant on October 3, 2008. His trial did not proceed on October 6, 2008 as he indicated he wanted a lawyer and had applied to Legal Aid. The trial judge set a new trial date of March 23, 2009. She warned Mr. N. that if he did not have a lawyer on that new date he better be ready to represent himself, because the matter would not be adjourned again. Check back dates were set for Mr. N. to confirm with the court the status of his efforts to have counsel.

[7] I would note that on October 6, 2008 the trial judge canvassed with Mr. N. the potential option of re-electing to trial by judge alone. It was noted by the trial judge as well that Mr. N.'s first language is French. Neither of Mr. N.'s previous counsel had raised the issue of a French language trial. It was pointed out to Mr. N. at that time that when you are representing yourself, sometimes language is more of an issue than when counsel represents you. The trial judge specifically canvassed with Mr. N. at that time whether he was looking for a French trial or whether he was content to have an English judge and an English Crown. He assured her it was no problem.

[8] Apparently Legal Aid turned Mr. N. down. On the check back dates of February 5 and 12, 2009 Mr. N. was reminded the trial would proceed whether he had counsel or not. He did not indicate on those dates any inability from a financial point of view to retain counsel. An in-person recorded pre-trial conference was held on March 11, 2009. Mr. N. at that time announced he had contacted a criminal defence lawyer on March 10 and had an appointment that afternoon, and he had the necessary money to retain that individual.

[9] Given the responses by Mr. N. as to why he had delayed in contacting counsel until March 10, 2009 I advised him that I was not prepared to adjourn his trial, but I would revisit that decision if he appeared again with a lawyer concretely retained to conduct his trial.

[10] Trial procedure was thoroughly discussed with Mr. N.. I proved to him a break down of the elements of the offences then set out in a nine count indictment.

Mr. N. advised the court that he could kick out or knock out six of the nine counts right away. I outlined for him the rules and purposes of direct and cross-examination, his right to disclosure, how to subpoena witnesses and to try to obtain third party records that may contain relevant evidence. I explained to him the difference between evidence and submissions. I directed a further in court recorded pre-trial for March 19, 2009 to review with Mr. N. jury selection process and confirm the status of his anticipated retainer of counsel. Mr. N. failed to appear as directed. A warrant was issued.

[11] Mr. N. was arrested on that warrant and brought to court on the first date set for his trial, March 23, 2009. He claimed at that time he could not afford to retain a lawyer. The money that he had said he had on March 11, 2009 was gone due to a "bad investment". The Crown repeated its offer of consenting to a re-election from trial by judge and jury to judge alone. Mr. N. was provided with a copy of the new indictment reducing the counts from nine to six.

[12] Mr. N. consulted with duty counsel. Following that consultation Mr. N. consented to remand and expressed a desire to re-elect to trial by judge alone. He also wanted to bring a *Rowbotham* application. After hearing evidence, I dismissed that application.

[13] On March 24, 2009 Mr. N. again consulted with duty counsel. He then confirmed his desire to re-elect from trial by judge and jury to judge alone, and that I would be the trial judge.

[14] A written notice was prepared and was signed by Mr. N. and filed with the court along with the consent of the Crown. Mr. N. duly re-elected on the new six count indictment from judge and jury to judge alone. The trial commenced in the afternoon of March 24, 2009.

[15] During the trial the Crown called six witnesses. The two complainants, one of their brothers, M. N., their mother M. S., and the two police officers from the W. Police Service who interviewed the accused in April 1, 2005.

[16] What made the trial so unusual were some of the comments made by Mr. N. when he cross-examined the witnesses or when he declined to do so. Many of these comments could be interpreted as inculpatory. The Crown did not suggest that I take those comments into account in deciding this case. For the purposes of this decision I place no weight what-so-ever on his comments in deciding whether or not the Crown has proven these allegations beyond a reasonable doubt.

[17] I would note that in the pre-trial conference I had with Mr. N. he confirmed his ability and willingness to have this trial in English. Mr. N. was given every opportunity to cross-examine each Crown witness. In a number of instances he asked either no questions or no questions dealing with either the reliability or credibility of the witness. He was reminded of the apparent relevance of what the Crown witness had testified to and urged to ask questions, particularly if he intended to contradict what the witness had said by calling other witnesses or testifying on his own behalf.

[18] A *voir dire* was held to determine the admissibility of Mr. N.'s responses, verbal or any actions said to have been taken by him, to a demand by J. N. in January or February 2003 for a payment of $400.00 per month to a maximum of $50,000.00 and a requirement that he attend therapy for sexual offenders. J. N. testified that she told him if he did not agree she would press charges. I concluded that J. N. was a person in authority and that her demand was clearly a threat. At the conclusion of the *voir dire* the Crown did not press for admission of any response said to have been made by Mr. N.. Subsequently telephone conferences between Mr. N. and J. N. in April 2006 and September 2006 I ruled admissible. In those instances Mr. N. initiated the calls to J. imploring her not to proceed with the charges as it would ruin his life and that of his new family. I did not see any forensic value to the Crown's case with respect to these telephone conversations, but they wished a ruling on their admissibility.

[19] A *voir dire* was also held to determine the admissibility of a video taped interview of the accused conducted by Detective Sergeants Sarkis and Boots on April 1, 2005. It was a blended *voir dire* to determine both the issue of whether or not the Crown could establish beyond a reasonable doubt that the statements by Mr. N. to the police were free and voluntary, and if there had been any violation of the various rights afforded to anyone arrested or detained to retain and instruct counsel. The only police officers who had any contact with Mr. N. were the two detective sergeants.

[20] Both before and during the trial I outlined to Mr. N. the relevant legal principles with respect to freeness and voluntariness and the issues of detention

and the obligations of the police under s.10(b) of the *Charter*. Mr. N. had no questions of these officers. He did not testify, nor in any way suggest that he felt detained, nor offered any hope of advantage or fear of disadvantage in speaking with the police. I found that the Crown had proved beyond a reasonable doubt that his comments to the police both before and during the video taped interview were free and voluntary. I also concluded that Mr. N. was neither arrested nor detained and there was therefore no violation of his right to counsel. The statements that the Crown intended to tender I ruled admissible.

GENERAL PRINCIPLES

[21] It must never be lost sight of that in the criminal trial the burden is on the Crown to prove the charges against any accused. It is nonetheless for Mr. N.. The requisite standard is proof beyond a reasonable doubt. Mr. N. is presumed to be innocent of the six charges until the Crown has proved beyond a reasonable doubt, if it can, his guilt. The presumption means that Mr. N. does not have to testify, present any evidence or prove anything. The burden is on the Crown and it never shifts to Mr. N..

[22] The concepts of presumption of innocence and proof beyond a reasonable doubt are fundamental principles, but the standard of proof beyond a reasonable doubt does not mean nor require the Crown to prove allegations to an absolute certainty. Nonetheless the standard of proof beyond a reasonable doubt falls much closer to absolute certainty than on a balance of probabilities. A reasonable doubt is not a far-fetched or frivolous one. It is not one based on sympathy or prejudice.

It is a doubt based on reason and common sense. It is sometimes said it is a doubt that logically arises from the evidence or lack of evidence. By this I mean there may sometimes be inherent frailties in the evidence presented by the Crown. This evidence may be so vague, inconsistent or improbable or lacking in cogency as to lack sufficient strength to constitute proof beyond a reasonable doubt. Obviously reasonable doubt can also arise from testimony by an accused or evidence tendered by the defence from other sources.

[23] It has long been recognized that there are usually significant problems for both the Crown and the defence where the charges before the court are allegations of historical sexual abuse. Memories fade over time. Relevant witnesses may no longer be available to testify. Documents can no longer be located. These kinds of allegations can be particularly difficult for a defendant.

[24] Mr. N. is 70 years of age. The allegations by the two complainants range from being 29 to 39 years ago. Frequently all that an accused can do is deny that the alleged acts occurred. The Crown need not prove beyond a reasonable doubt every fact that it seeks to establish in the course of presenting its case. They need only prove beyond a reasonable doubt the essential elements of the offences charged. Here the essential elements of the six counts are as follows:

COUNT 1 s.141(1) INDECENT ASSAULT

- date, time and jurisdiction alleged, that is, between June 1, 1970 and September 1, 1970 at or near E. B., K. County, Province of Nova Scotia
- that the accused applied force directly or indirectly to J. N.

- that J. N. was a female person
- that the accused intended to apply force to J. N.
- that J. N. did not consent to the application of force by the accused
- that the accused knew that J. N. did not consent
- that the assault was of an indecent nature
- the identity of the accused as the person alleged to have committed the indecent assault

COUNT 2 s.149(1) INDECENT ASSAULT

- date, time and jurisdiction alleged, that is, between July 15, 1971 and August 12, 1976 at or near D. in the County of H., Province of Nova Scotia
- that the accused applied force directly or indirectly to J. N.
- that J. N. was a female person
- that the accused intended to apply force to J. N.
- that J. N. did not consent to the application of force by the accused
- that the accused knew that J. N. did not consent
- that the assault was of an indecent nature
- the identity of the accused as the person alleged to have committed the indecent assault

COUNT 3 s.144 RAPE:

- date, time and jurisdiction alleged, that is between July 15, 1971 and August 12, 1976 at or near D., in the County of H., Nova Scotia
- that the accused did have sexual intercourse with J. N.
- that J. N. was a female person
- that J. N. was not the wife of the accused
- that J. did not consent to sexual intercourse
- that the accused knew that J. was not consenting to sexual intercourse
- that the accused did not have an honest but mistaken belief that she was consenting to intercourse
- identity of the accused the person alleged to have committed the act of intercourse

COUNT 4 s.149(1) INDECENT ASSAULT

- date, time and jurisdiction, that is, between May 24, 1974 and May 24, 1980 at or near D. in the County of H., Province of Nova Scotia
- that the accused applied force directly or indirectly to L. N.
- that L. N. was a female person
- that the accused intended to apply force to L. N.
- that L. N. did not consent to the application of force by the accused
- that the accused knew that L. N. did not consent
- that the assault was of an indecent nature

- the identity of the accused is the person alleged to have committed the indecent assault

COUNT 5 s.144 RAPE

- date, time and jurisdiction, that is, between May 24, 1974 and May 24, 1980 at or near D., in the County of H., Province of Nova Scotia
- that the accused did have sexual intercourse with L. N.
- that L. N. was a female person
- that L. N. was not the wife of the accused
- that L. N. did not consent to intercourse
- that the accused knew that she did not consent to intercourse
- the identity of the accused as the person alleged to have committed the act of intercourse

COUNT 6 s.150(2) INCEST

- date, time and jurisdiction, that is, between May 24, 1974 and May 24, 1980 at or near D., in the County of H., Province of Nova Scotia;
- that the accused did have sexual intercourse with L. N.
- that L. N. was the daughter of the accused
- that the accused knew that L. N. was his daughter
- the identity of the accused as the person alleged to have committed the act of intercourse

SPECIFIC ISSUES:

[25] There are a number of specific legal issues that I raised with the Crown. Obviously at the time that these alleged incidents occurred, the legal landscape was decidedly different. For some of these allegations, no conviction could be entered absent corroboration. For others, the trier of fact had to be directed that it was dangerous to convict without corroboration. In addition, the absence of a recent complaint, a trier of fact had to be directed that it told against the truthfulness of a complainant.

[26] If Mr. N. was standing trial prior to January 1, 1988, the issue of corroboration would have had to been specifically addressed and ruled on, as well as that of recent complaint. However, it has now been well established the specific rules with respect to corroboration no longer apply. (see *R. v. A.D.* 2005 SKCA 21)

[27] In addition, the so-called recent complaint rule was abrogated by Parliament and by the courts with respect to historical allegations. (see *R. v. P.S.M.*, [1992] 77 C.C.C. (3rd) 402 (Ont.C.A.) and *R v. Bat 2000* 145 C.C.C. (3d) 449 Ont. C.A. This does not mean that the court should not look for evidence that tends to confirm, or note the absence of evidence to confirm, a criminal allegation, nor ignore the impact on the credibility of a complainant for his or her failure to make a timely complaint.

[28] The last significant issue is the request by the Crown to have the evidence of J. N. admitted as similar act evidence on the counts involving L. N., and to have

the evidence L. N. admitted as similar act evidence on the counts dealing with J. N..

ANALYSIS

[29] To Mr. N.'s way of thinking, the N. family households were not happy ones. He would say the unhappiness was due to marital strife. According to the children who testified, they all clearly loved their brothers and sisters, and despite the inevitable difficulties associated with their teen years, both of their parents. It is also safe to conclude that both complainants had a normal healthy relationship with their father up until the time they say he began to sexually abuse them.

[30] M. S. and A. N. married in 1959. At that time, J. was 1 ½ years old. Her biological father was not involved in her life, then or ever. Shortly after marriage, A. N. legally adopted J.. To J., A. N. was her dad. She says she did not learn until she was 10, 11 or 12 that she had been adopted. In all, the marriage between M. S. and A. N. was blessed with six children. J. - born August *, 1957, J. F. - born June *, 1960, L. - born May *, 1962, S. - born January *, 1965, A. - born July *, 1966 and M. - born July *, 1969.

[31] A. N. is a skilled tradesman. He was a *. The family lived at various locations. They moved to D., Nova Scotia the end of the summer 1970. That is when J. started Grade 7. The family had spent the whole summer in accommodations at E. B.. Although there were family vacations, M. S. would also

go away on trips on her own to visit her family in Q.. These would usually last one to two weeks or more and would occur once or twice a year.

[32] J. N. testified that during the summer of 1970 she was 12, turning 13 in August. Up to that summer, she said she had a normal relationship with her dad. She said she has one specific recollection of a day in the summer of 1970 when she was 12. She said her mother was away for 2 weeks. There may have been a babysitter, but she did not sleep over. She says Mr. N. called her into one of the bedrooms. She was clothed. Mr. N. was lying on his back in the bed with no clothes on. She said he asked her to touch his penis and she did so. She says he talked about his penis. How it was enjoyable when she touched it and it was normal for it to get hard. She says she knew that this was wrong. She does not recall anything else happening on that occasion. Her only other recollection was that her father had asked her to go get L. and to perhaps show her. She says she did go to get L., but has no recollection as to what happened after that. She said this was the first time and it stuck in her mind, but it escalated.

[33] She testified the family moved to R. D. in D. for the school year where she attended A. School. She says while living there the accused would get her to masturbate him, and after that, put his fingers into her vagina, and after that, full penetration. She said the accused put his penis in her vagina.

[34] J. was candid that she had no specific recollection of where in the house this abuse occurred. She had no recollection of her bedroom. She does recall moving to P. Street where she attended Grade 8. While at this residence, she provided

considerably more specific details as to where and what kind of acts occurred. She said there was full penetration. She was 13 going on 14. She described acts of oral sex. She said he would frequently come into her bedroom in the middle of the night and she would wake up and he would be rubbing his penis on her face. She used to suck her thumb and he would try to get her thumb out of her mouth and put his penis in. Once she was awake he would take her to the bathroom and there she was to masturbate him. She said often he would take over as she was not doing it fast enough. He would make her kneel down in front of him and when he was ready to ejaculate, put his penis in her mouth, ejaculate and tell her to swallow the sperm as it was healthy for her.

[35] There was one incident on P. Street where she recalls sexual intercourse happening in a bedroom. Her mother was away on a trip. It was in the middle of the afternoon. Her father arrived home, took her in the house and had sexual intercourse with her. She recalls this because her siblings were all outside. At one point they had come home and they were banging on the door and ringing the doorbell to get in, but her father would not let them in until he was finished. Afterwards J. recalls her sister L. asking why the door was locked. She could not tell her why.

[36] By Grade 9 they had moved to *, where she attended C. School. She recalled that it was basically every Sunday morning her father would tell the rest of the kids to go downstairs and wait for him and he would have sexual intercourse with her.

[37] As well on *, he would take her into the rec room or laundry room in the basement. The other children would be on the other side of the wall. He would have her masturbate him and perform oral sex. She also recalled that once when her mother was simply out of the house, they were upstairs in the bedroom when her mother came home. Her father stopped intercourse, rolled up the condom he had been using and put it in the dresser drawer. J. had seen this. She took the condom out and punctured it with the hope or expectation that maybe the next time he used it with her she would get pregnant and everyone would find out and she would not be the one responsible for breaking the family up.

[38] Her evidence is abundantly clear that she had at no time consented to any of these acts. She testified the accused often told her she was stiff like a board, that she was feelingless or emotionless, and that she would not get married, as men did not like that. She found it repulsive when he tried to kiss her. She lived in fear when it was going to happen again. She would say to him “I don’t want to do this, it hurts”. She recalled him putting Vaseline on her for his penis to be able to penetrate her. At the very beginning she described he would get her to lay on top of him and he would just say “gradually let it go in”. She said it was very painful. She does not know whether she suffered any injuries. Certainly none that she was aware of.

[39] To these complaints, she said, to him it did not matter. He did what he did. She also said that she would say to him “I don’t want to, stop, it hurts.” She described that often afterwards he would tell her “It won’t happen again, I’m

sorry." But it did happen again. He also performed oral sex on her more than once.

[40] In terms of frequency of intercourse, she testified it was a weekly thing - as frequent as couples. She says at least once a week, every Sunday. Every time it happened she told him she did not want to. She cried. At different times he cried. She said that she saw that he regretted it. She believed him because he was crying when he said it would not happen again.

[41] She never told anyone of these complaints until she was 16. She explained she had not done so earlier because her father warned her that if she did her mother would leave him, in essence kick him out. As her mother did not work outside the home, the children would all have to go out to foster homes. She said she was very close to her siblings. In essence, she could not bear to see this happen to her family.

[42] Nonetheless, when she was 16 she said she disclosed the sexual abuse to her mother. J. described her feelings leading up to that disclosure. She said she had a lot of anger. She was having violent dreams. One day she came home from C. School. She asked her mother if somebody had a really big secret to tell, but it could hurt a lot of people and cause a lot of damage and hurt, should you tell anyway? She was reluctant, but she told her mother that her dad was having sex with her. She did not tell her word for word what was happening, but she did say it was full sexual intercourse. She said "everything grown-ups do sexually, they

did." She said nothing specific about the oral sex and swallowing semen. Her mother cried.

[43] At supper time she recalled her mom and dad went for a drive. After that the fighting in the house became worse. Her mother would yell "child abuser" at her dad when she got mad. To her, the other family members knew of the abuse. Despite having disclosed the abuse, J. says it started all over again. Right away it was the same, and this went on until 1976. She was able to specify that date because that was the year that she had driven with her father to * in January or February to attend her aunt's funeral.

[44] On the return trip, they encountered a severe winter storm, cars were off the road, trucks stopped. When her father suggested they had to stop to get a room, she insisted they keep going, drive more slowly. She said this because of her fear that if they stopped he would try to have sex with her. She says he even guessed at her reasons for insisting on going on. He said to her "The only reason is you're scared I'm going to have sex with you", and he assured her that he would not touch her. They did stop. She has no specific recollection as to whether or not he did or did not touch her sexually.

[45] When she was 19 she moved away from home. She acknowledged that even after even moving away she still kept seeing her father through the years. Why would she do so when she says this man committed these horrible acts of sexual abuse? She explained that her family is always important. If there were family

gatherings at her dad's, she even went there. Her dad would also attend other family gatherings.

[46] J. described her troubled life and her struggle at relationships. Although she would see her father at family gatherings, it was nonetheless awkward. She said every time he saw her he would take her aside and say to her "If you know what your mother was like." She said Mr. N. was using her mother as a reason. Her response was "You did what you did. You're responsible for that. Mommy has nothing to do with it". When she was at a Christmas dinner in 2002, this was again repeated to her by her father. She decided that was enough.

[47] She found a place for therapy. The counsellor was Paul Adams who she says dealt with sexual offenders and abuse. She calculated that counselling would cost her $400.00 a month for herself. She did not have a sufficient source of income to afford this. Growing up, she testified she struggled with the concept of laying charges. She explained "He's my dad and I didn't want to see him go to jail and I still don't want to." Nonetheless when she approached him in January 2003 she told him he would have to go to therapy as long as necessary and pay her $400.00 a month. The payments not to exceed a total of $50,000.00. If he did not agree, she would press charges.

[48] Within a few months, she did go to the police. She gave a video taped statement on June 4, 2003. Before doing so she alerted her mother and her brothers and sisters about what she intended to do. Her mother was cautious. As

she said, she was silent as she could see the garbage can being opened. But if she did pursue charges her mother would be supportive.

[49] L. was far less supportive. She was asked by J. if she could make a statement attesting to J. N.'s experience, but she could not as she had not seen nor heard anything, just the fighting in the house. Personally, L. did not want to go to court. That changed in 2006 when J. N. called her and said "Can you believe it, he's denying it." As L. said "If he denies it, he denies our very existence". She then decided to come forward.

[50] I have no hesitation in accepting the evidence of J. N.. I found her to be a credible witness who described in a generally careful and restrained manner the acts of sexual abuse and intercourse she suffered at the hands of the accused. Her evidence was not seriously challenged in cross-examination.

[51] Mr. N. was urged to put to her any inconsistencies he says there is in her evidence from previous statements or what she had said to others on earlier occasions or to put to her why her evidence does not accord with any evidence he may call, or his version of events. The theme of the cross-examination by Mr. N. was to have her accept her evidence from the Preliminary Inquiry where she had testified intercourse occurred six to seven hundred times, and to suggest to her that this made no sense. J. N. admitted that she had said that intercourse had happened on six to seven hundred occasions. She explained that it was an estimate based on an average. She insisted that sexual acts including intercourse were a regular part of her life.

[52] Mr. N. also challenged her in her evidence about intercourse happening on Sunday mornings. He had J. N. admit that he cooked breakfast for the children every Sunday morning and then afterward cleaned the house together, and went to get the French language newspaper in H.. J. N. readily admitted all these things. There was no hesitation in that admission.

[53] In re-direct she explained the intercourse occurred before he went downstairs to cook breakfast. She also admitted in cross-examination that she remembered a lot about him other than intercourse or abuse. That he was a normal, good dad. Her friends used to think he was a great dad. Mr. N., in his cross-examination also seemed to focus in his questions in the marital strife in his life. He had her acknowledge that at E. B. that J. had told him that his wife had spent the afternoon with one A. L. and that M. S. had told him that he should mind his own business, and that she was not in love with him.

[54] Mr. N. also had J. N. admit that she did not like his new wife or tried to get or to admit that. J. explained that it was not that she did not like her, it was that she was indifferent towards her.

[55] There is almost an overwhelming amount of evidence that confirms the evidence of J. N.. In no order of priority it is as follows.

[56] There is the evidence of M. S.. She testified that in 1972 or 1974, about the time that she had gone to AA, J. N. came home from school. She guesses that J.

was then in Grade 9. They were alone in the livingroom. J. asked her "Ma, if you know something very bad is happening and someone is doing something very bad and you know if you say it will get much worse - it will be very, very bad, do you say it?" M. S. testified that she told her "I guess you have to say it." She then asked her why. And after 20 to 30 minutes J. told her that "Daddy is abusing me sexually." M. S., naturally enough, asked "What do you mean?" J. said "He's been abusing me for the last two to three years". When pressed for details J. said "He puts his penis in me. He does the full thing."

[57] The fact that the complaint was in consistent terms with what J. N. alleges is of no forensic value. What is of relevance is the admission by the accused to M. when she confronted him. At the supper table that day she said to him "We're going for a ride". She said she had usually become known as a shouter and screamer, but at the table that night she had no voice. He said "I have to work" and she said "We are going for a ride" and nothing was said after that. They went for a ride. It was not a very long one. As soon as they were in the car she said to him "For Christ's sake, why did you rape her day after day, night after night? What is the reason? Did you want vengeance? You took what was most precious to me. You were to love her and cherish her and be her father and give her security, and that is what you do?" She said "Why"? His response was "There is no reason". She said "You are the sickest man. A son of a bitch." She acknowledges she was doing most of the talking. The only thing he ever offered when she challenged him as to why was, "There was no reason".

[58] While there is no specific review by M. S. to Mr. N. as to what was alleged to have happened, nor specific evidence of detailed admissions or denials of details or denials of events, any father, any husband, when confronted with such an allegation, if it did not happen, would offer more than his response of “There was no reason” for what had happened.

[59] After this, marital strife was indeed evident. As M. S. put it, fights broke out all the time. A. N. then started sleeping in the basement. She admitted calling him a “child fucker”. The rest of the family heard these fights and labels.

[60] Mr. N. did not dispute the evidence of M. S.. His cross-examination of her was to do with their unhappy relationship. He suggested they fought even before the marriage. This, M. S., denied. She denied still being in love with the father of J. N.. She denied his suggestions of having carried on affairs with a Priest and other named men. She did admit taunting A. N. with the question “Which one of these kids are yours?” But Mr. N. did not ask one question about the key aspect of her testimony - the confrontation in his admission of the sexual intercourse with his daughter J.. He was encouraged to do so by me.

[61] He then posed to M. S. that he did say to her that time in the car “When I admit everything”, he asked them to do one thing, “If you’ve got to press charges, do what you’ve got to do.” “Why was I at that time did not get charged?” M. S. denied he ever said “Do what you got to do”. She explained that when she spoke to J. N. about going to the police, she was not ready and she respected her decision.

[62] The evidence of J. N. and obviously that of M. S. is also confirmed by that of M. N.. Mr. N. struck me as a very straightforward, honest, credible witness. An individual who had just as much difficulty coming to court to testify against his father as did his two sisters. Mr. N. is the youngest in the family. He had no direct knowledge of any sexual abuse. He had a normal relationship with his mom and dad. He got along well with all of his siblings. He said he continued to have a good relationship with them. When asked as to when he first became aware of the allegations, he said it was kind of always there. He said he had no direct conversations with anyone and he knew no details. He learned that there would be court proceedings in 2003 or 2004. Mr. N. was careful in his evidence. He struck me as an individual who truly did not want to be in court, but was present because he wanted to do the right thing.

[63] He related an argument he had with the accused in 1993 or 1994. They had been working together in W.. Mr. N. had been staying with F.. Obviously, in a general way, F., M. and the accused were on good terms. One day after work they went to the neighbourhood bar. F. left. M. N. could not pinpoint how the subject came up, but he recalls telling his father how angry he was at what he had done to his sister J. N., sometimes referred to as N. N., and how that abuse had also hurt his brother, F..

[64] M. N. acknowledged that he and his father had both been drinking. They had about six beer over three hours. He said the only impact this consumption had on them was that it made them more open. He said his dad’s responses to the conversation were appropriate, in context.

[65] Although he could not remember how the argument or the topic started, he well remembered how it ended. He said to his father “If I was there, I would have beat the fuck out of you”. He said this was in reference to the times that the accused had abused his sister, J.. He said that when discussing this issue in the bar his father appeared to know what he was talking about. He knew this as his father admitted it and tried to justify what he had done to his sister. He explained that his father told him that he had had a hard life and he was not happy and that his sister, N. seemed to understand what he was going through and what he was doing to her.

[66] Mr. N. did not cross-examine M. N. on any aspect of this argument or conversation in 1993 or 1994. When urged to look at issues of reliability or credibility, about how M. N. could recall this conversation or the words used. How he could reliably recall what he testified to, Mr. N. said “Whatever he said I kind of agree with that”.

[67] There is also the evidence L. N. about the P. Street incident where the doors were locked. She said it was a weekend day and her father was at work. She said her sister, J. had to clean the house so she took her two younger brothers outside. She is not sure where they went, but when they returned the front door was locked. Her father’s truck in the laneway. Her reaction was “good, dad’s home”. The side door was also locked, so they just waited in the backyard. She could not say how long they waited, but it was perhaps 15 minutes or a half an hour. At the end of that nothing happened. She has no recollection as to why the door was locked.

[68] Lastly, there is the video taped interview with Detective Sergeants Sarkis and Boots on April 1, 2005. Mr. N. was told that Halifax Police had asked Detective Sarkis to interview him with respect to allegations that between the age of 13 and 17 he had sexually assaulted J. N.. Not a lot of details were canvassed with Mr. N. in this interview, but he was told that the allegation was that she said it started out fondling and quickly escalated to having her perform oral sex on him and sexual intercourse at all three locations in H.. He was specifically advised that they intend to charge him with rape and indecent assault, all between 1970 and 1974.

[69] His response was essentially the same as referred to by J. N. and by M. N., when he referred to his unhappy marriage to M., that she did not love him. Nonetheless, Mr. N. made a number of very clear admissions. He said to the police he had lived with this all his life. When asked "So why did you do it?", he said, "You know there's no explanation really. She was starting to look good." And then he referenced that M. had nothing to do with him. Sergeant Sarkis asked Mr. N. "How old was she when this started?" His response was he didn't know, 13 or 14. There are many more inculpatory comments during this interview. I need not review them.

[70] Mr. N. did not dispute that the police treated him well or that he did not say these things. Indeed, in final argument he actually approved of what the officers had said to him and what he had said in response to them.

[71] Bearing in mind the burden on the Crown that the charges against Mr. N. must be proven beyond a reasonable doubt, I have no such doubt that the sexual abuse described by J. N. did in fact happen. I also have no doubt that J. N. in no way consented to these acts, nor that he had any honest but mistaken belief that she was consenting.

[72] I find him guilty of counts 2 and 3 on the indictment, that is of indecent assault between July 15, 1971 and August 12, 1976 and of rape between those same dates.

[73] I do not know how many times intercourse or other sexual acts occurred. It may not have been the six to seven hundred times estimated by J. N., in light of the evidence about the times that Mr. N. was away working, but I am certainly satisfied that not only did the acts occurred, but they occurred on a regular basis - easily into the hundreds. The credibility and the reliability of J. N. is not detracted due to her estimate that over the years it was six to seven hundred times.

[74] While I have no doubt that the incident of fondling of Mr. N.'s penis did occur at or near E. B. during the summer of 1970, the Crown has failed to establish that there was any assault. The law today is very much different than it was 30 odd years ago. Today, it is a criminal offence for an adult or a person in authority to invite, counsel or incite persons of certain age groups to touch them for a sexual purpose. There was no such offence in existence in 1970. The Crown quite fairly acknowledged that the law at the time of the incident required that there be some assault and the invitation to touching could not in the circumstances disclosed by

the evidence, amount to an assault. (see *R. v. Baney* (1971), 6 C.C.C. 2d 75 (Ont. C.A.); *Re. Stillo* (1980), 56 C.C.C. (2d) 178. Mr. N. is acquitted on the first count.

SIMILAR ACT EVIDENCE

[75] To be admissible the Crown must first satisfy me on a balance of probabilities that the evidence in issue is not the product of collusion. Mere opportunity for collusion is quite insufficient to exclude it. I would note that not all of the evidence led by the Crown through its witnesses would be inadmissible between the counts regardless of my ultimate ruling on the Crown's application. In other words, some of the evidence adduced from the Crown witnesses would be admissible on all the counts without a similar fact or act application.

[76] The evidence of M. N. is in no way relevant in relation to the counts involving L. N.. By this I mean his evidence concerning the conversation in 1993 or 1994 where he described his father trying to justify his actions with J.. Nonetheless the evidence of M. N. can have relevance about the family dynamics including the opportunity for and actual discussion that may have taken place amongst the siblings. In the same way the evidence of M. S. is admissible in relation to counts involving J. N. as a complainant, her evidence would also be relevant in providing context to the complaint by L. N.. For example, the times that she was away, and the children were left at home with the accused; the time that L. N. moved into the apartment with the accused. It is also relevant and helpful to the defence, as M. S. confirms that she in fact confronted L. N. about whether the accused had committed or had been involved in any sexual acts with

her when she moved back home by May 24, 1980. L. N. denied to her mother any such conduct by her father.

[77] The video tape of Mr. N.'s interview with the W. Police officers is admissible on the counts involving J. N.. The admissions he made concerning his conduct with J. N. are only relevant and hence admissible on the counts involving J. N.. However, also on the tape are questions posed to Mr. N. as to whether or not he sexually assaulted any other child, to which Mr. N. offered that he had touched his daughter L. a couple of times. To the extent that the admissions are in relation to L. N., they are admissible without more or any further qualification in relation to the counts where L. N. is the complainant. Absent a similar act application the evidence of J. N. is not really relevant to the counts involving L. N. except by way of describing the general family background and dynamics.

[78] The same is not true of the evidence of L. N.. Some of her evidence is relevant to the counts involving the allegations of J. N.. In particular L. N.'s evidence of the sleeping arrangements and the tendency of J. N. to insist on sleeping with L. in the same bed when two beds were available. And of course there is the incident on P. Street where L. N.'s evidence confirms the daytime incident of sexual intercourse where the doors were locked and the accused would not answer until he had finished having intercourse with J. N..

[79] On the first aspect of the test, there is an air of reality to the issue of collusion. If the Crown cannot establish on a balance of probabilities that the evidence in issue is not the product of collusion, the proffered evidence really has

no probative value. Similar act evidence generally takes its relevance from the improbability of coincidence. It comes from witnesses who are independent of each other and their ability to describe conduct that is so similar to what is alleged to have happened that it could not have happened unless it actually took place. The Crown has satisfied me that the evidence of J. N. is not the product of collusion, nor is the evidence of L. N..

[80] J. was asked if she had discussions with anyone about what the accused did to her. She freely acknowledged the issue was talked about over the years. It was no secret. She said "Everybody knew what daddy did." She said she only found out about L. years and years later - that L. claimed that she had been abused. Her evidence was they never sat down and talked about details. She said that she did call L. to tell her that she was going to press charges. I have already referred to the evidence of J. N. and her discussions with L. after the accused was officially charged, but in her view, had pled not guilty. This caused L. to react and make her come forward.

[81] J. N. testified that "We never discussed details, but simply said intercourse is intercourse."

[82] I take her evidence that she even tried to suggest to L. N. that "How could she not remember her trying to pinch her to wake her up when her father would come in the room in the middle of the night?" Despite this suggestion, L. claimed then and still claims now to have no recollection of her father ever coming into the bedroom on any residence in the middle of the night to take J. N. out. This was

surprising to J. N. because she said “I pinched her really hard”. L. N. had every opportunity, if she wanted to engage in collusion, to do so. She did not.

[83] Collusion, of course, means more than a purposeful adopting of or concocting of details from another witness’ testimony, but innocent, much more subtle rationalization or reconstructed memory, adopting what others say happened without any recollection yourself.

[84] J. N. acknowledged that in terms of the numbers of conversations they had over the years about the fact of abuse, she could not put an exact number on it, but if she had to say it would be ten or a dozen times. She said the only time she knew about L.’s claim of abuse was after S. was born, which was in 1982.

[85] J. testified that L. never really told J. anything, that L. did not want to talk about it. The only thing she admitted to J. was there had been intercourse but gave no details. They never talked about the use of Vaseline or other matters of that nature.

[86] L. N. talked about the different times and the different people that she had disclosed the abuse to. She said that when she spoke with J., that J. would ask her “Don’t you remember about the times in the night?” She said she could not. She did remember that J. always wanted to share the bed, even though it was a small bed. When she was contacted by J. to make a statement attesting to J.’s experience, she said in all honesty she could not, as she had not seen anything -had just witnessed the fighting in the house. She was asked what influence had there

been on her from J.'s discussions. She said it had not influenced her. She said J. was more liberal sharing her story, but that her story is not L.'s, it's just not the same.

[87] Mr. N. tried to suggest and did suggest that there had been many family discussions over the years about the abuse. Both J. and L. acknowledged that, but disputed that there was any adoption, subtle or otherwise, from one witness to the other. L. N. was insistent that N. had told her things that she did not put in her story, as it simply was not her story and she was not influenced by what others may have said.

[88] Although there was obviously ample opportunity for these witnesses to talk together about what they say happened between them and their father, and they did so, I am satisfied that the claims by L. are not the product of collusion, at least on the balance of probabilities, and that the allegations of J. are not the product of collusion from her exposure to discussions with L. or any others.

[89] I recognize that the evidence of similar acts is presumptively inadmissible. The Crown must show on a balance of probabilities that the probative value is greater than the prejudicial effect from admission. Prejudice does not mean that the evidence merely works against the accused. Prejudice means it works unfairly against the accused by risking an unfocussed trial and potential wrongful conviction - one that is based on the use of a forbidden line of reasoning. Two common examples are cited. The trier of fact may punish an accused for other acts that it believes he committed by convicting on the actual charges or by inferring

guilt from concluding that the accused is a person of bad character and has a general disposition to commit offences.

[90] The first step in determining the overall admissibility, after being satisfied that the proffered evidence is not the product of collusion, is that the Crown must identify the issue to which they say the evidence has relevance. Here, in my opinion, the sole issue is that of the credibility of the complainants where they allege: touching, fondling, oral sex and sexual intercourse, each at times between the age of 12 and 17 and 12 and 18 in the family home, in the morning, in their mother's bedroom with others, at times, in close proximity; the persistence of the accused to achieve his sexual approaches despite their claimed lack of consent; their respective failure to more actively resist by physical force; his ability to insist on their compliance without the use of force; and their failure to cry out for help or to voice a complaint afterward; the family dynamics that could explain why they would associate with the man they say abused them.

[91] All of these issues are simply another way of saying the evidence is relevant to whether or not the evidence of the respective complainants is in fact true. It is certainly not admissible to show the accused as a person of bad character. It has been well recognized that similar act evidence is admissible where the sole issue is claimed to be relevance to credibility. (see *R. v. B.(C.R.*) 55 C.C.C. (3d) 1 (S.C.C.); *R. v. H.* (1997), 119 C.C.C. (3d) 238 (N.S.C.A.).

[92] The accused himself raises issues as to how this many assaults could occur without others knowing of them. It is admitted by the Crown that with the

exception of the disclosure by J. N. to her mother when she was 16, no one else had any first-hand knowledge of the claimed sexual acts. The evidence is probative, it says, as going to show a pattern of behaviour that has at least some similarities in terms of timing, location and kinds of acts engaged in. But similarity is not the test. It is probative value versus prejudicial effect. The evidence cannot be used simply to show the accused is a person of general bad character, but it can be used if it is established that the acts occurred to show that he does have the propensity to commit the offences alleged. One simply cannot conclude that because I am satisfied J. is telling the truth, that L. N. is also telling the truth.

[93] Although the potential prejudicial effect of the evidence of J. N. is high, as she describes morally repugnant acts, on balance, the probative value outweighs any prejudicial effect. The evidence demonstrates a willingness on the accused to engage in sexual acts in the family home, and elsewhere, where there was a significant risk of being discovered, and to exert his will over his daughters in such a manner as to secure their compliance in satisfying his sexual desires.

[94] I admit the evidence of J. N. with respect to the counts involving L. N..

[95] As noted earlier, in light of all the evidence I am satisfied beyond any reasonable doubt the claimed acts described by J. N. did occur without any consideration of similar act evidence. Hence, that evidence is credible.

[96] L. N. confirmed in many ways the evidence of M. S. and J. N. about the various households they lived in and the atmosphere at home, both the good and the bad. She described a trip to * in the summer of 1974. This camper trip and the events she describes occurring on it is not the subject of any criminal charge. Nonetheless the Crown led that evidence on the basis that it was important to the narrative in helping to understand how L. N. recalls when the abusive conduct started.

[97] L. N. described that they stopped at a campground, likely someplace, somewhere in the Province of Q.. Three boys slept in the bunk above and L. below. She says during the night Mr. N. started to fondle her. He made her turn around on her hands and knees and tried to penetrate her with his penis. She has no recall of being awakened. She said that he played with her genitals, rubbing them and trying to make her climax. She did not know. She says he stuck his fingers inside of her. She did nothing. She has no recollection of responding or if he ejaculated. She says she was scared the three boys would see. She knew what he was doing was wrong. She described that after fumbling he attempted penetration. She could feel it and he penetrated her a little bit. He was very large and it was difficult. She described her feelings of pain, fear and bewilderment. Later she said that he did achieve full penetration.

[98] She ended up staying that summer with her friends in *. She remembers as well that was the summer she started her period. When she returned home to D. at their residence on * she said the abuse happened there as well. She was quite vague on her evidence about the abuse at B.C.. She does not recall how many

times it happened, but said it did happen. She recalled once they were in her mom's bedroom. Her mother must have been away. She says she was crying and she remembers asking Mr. N., her father, why he was doing what he was doing. She has no recollection of his response. He fondled her genitals and had her play with his penis, making her stroke it and putting it in her mouth. She frankly admitted she has no recollection of how many times this would have occurred on B. C..

[99] When she turned 16, she quit school and moved out to live with her father at his apartment on L.. She said F. was already living there. It was a three-bedroom apartment. Her bedroom was the closest to the living room, then F.' and then her father's. She says she stayed there for one and a half years, but while there the sexual abuse started up again. She explained that she thought maybe it would not happen with her brother in the bedroom next door.

[100] Nonetheless, she testified that the accused would come in the night, get in her bed, fondle her and make her fondle him. She says she was scared her brother would know or see, but that he never did get up. She said Mr. N. used to play with her genitalia, her clitoris and all of that. Put his fingers inside of her. Make her stoke his penis. He would try and put his penis inside of her. She would be on her back or on her hands and knees. She used this language because she said it did not work very well because he was too big. When she was asked was he successful at all in having intercourse, she said yes he was successful. She was unaware of any form of birth control. She was not using any. Her reaction was it scared her. She was fearful she would become pregnant. She has no recollection of Mr. N. ever

ejaculating. She told him “I didn’t want to”. She said she would just lay there and was mostly quiet. She made no sounds. She did not want to call out as she did not want her brother to know.

[101] In terms of the number of times it happened, she had difficulty articulating this. Overall between B. C. and L. she said it occurred 15 to 20 times. In terms of intervals at L. she said “It didn’t happen on a regular basis. It wasn’t once a week. It would happen, then stop again.” She acknowledges when she returned home to B. C., she denied to her mother any sexual abuse by her father.

[102] She said there was never any consent to any sexual acts. She told him she did not want to. She said that whenever he approached her she told him it was wrong. When he wanted her to play with his penis or masturbate it, she would stop, he would take her hand and put it back on his penis. She also described, once leaving, there was never any further sexual contact. After undergoing therapy she confronted him by writing a letter where she wrote to him that it was wrong what he had done and he was sick man. She recalls putting the supposition, what would happen if she pursued it legally and encouraged him to make apologies and amends.

[103] She described how he did speak with her in person shortly after that letter. He had come for a visit with his then wife. L. says that he told her at that point to go on with her life, she had a good life with D., and to move forward and forget about it. They had a good little house. She said to him that he had hurt her and he should at least say he is sorry.

[104] In cross-examination Mr. N. established that L. did not like his new wife, that she was envious of the much more luxurious surroundings that he and his new wife seemed to enjoy, and also that, despite her feelings about the sexual abuse that she claimed, he had been invited by her to stand at her wedding. Somewhat odd, and even more troubling was that this was in direct contradiction to her sworn testimony at the preliminary inquiry that she would never have him do so.

[105] Mr. N., in cross-examination suggested to her that he might have apologized to her 50 times for what he did. L. N. said she could not recall that.

[106] L. N. also admitted in cross-examination that she was able to recall details for the trial that she had not recalled two years ago. The Crown assisted Mr. N. in reviewing her statement and preliminary inquiry in identifying for him instances where it could be said that there were differences between what she had testified to and what she had said before. Mr. N. cross-examined her on these. Sometimes L. N. would agree that there were differences. Other times she explained why there was not. She appeared to agree that the acts of intercourse at L. perhaps should have been heard by F.. She always wondered why he had not, but added that she always tried to be quiet as she did not want F. to hear and there was no specific reason that he would hear it.

[107] She freely acknowledged the family discussions amongst her siblings and as Mr. N. put it “the gossiping”, but those discussions in no way impacted or influenced her evidence in any way.

[108] There are some aspects of her evidence that are troublesome, for example why would she go to L. after he had already abused her a number of times, I think she described it at one point, as a dozen on B. C.. Why would she not cry out so that her older brother might hear? Why would the accused risk detection with his son sleeping in a bedroom next door? Why, when confronted by M. S. on moving back to B. C., would she specifically deny any sexual abuse at the hands of her father?

[109] Nonetheless, I found L. N. to be a credible and reliable witness. She testified in a straightforward unembellished manner. I found her to be truthful and reliable. It must be recognized that sometimes people, particularly in complex and conflicting family scenarios, do not always act in a way that others may consider to be rational.

[110] Furthermore, her evidence of sexual contact between her and her father is corroborated or confirmed by Mr. N.'s comments to the police in his interview of April 1, 2005 where he was simply asked "You didn't sexually assault any other child?" His answer was "Well, I just...I touched L. a couple of times". He was asked "How old was she at the time?" "I don't know, 12, 14". He was asked "Where did this happen?" "It happened in H.." "Where did you touch her?" His answer, although difficult to make out on the tape, was "In her private." Detective Sergeant Sarkis then asked "her vagina, did you touch her?" His answer was "Yeah." "Can you tell me what happened?" Mr N. "just that" and his voice trails off. Detective Sergeant Sarkis asked him "Where did it happen?" "Right there in

that same house." He says this happened in the living room. He denied taking her clothes off, but admitted putting his hand down her pants. He denied that he had her do anything to him. "How many times did this happen?" Sergeant Sarkis asked him. His answer was "Oh, I don't know. A few times. Not much."

[111] I am also entitled to rely on the similar act evidence with respect to J. N.. I found beyond a reasonable doubt that he committed those very same kinds of acts in circumstances of a willingness to risk detection, to engage in persistent and insistent behaviour to achieve sexual gratification with his teenage daughters. I do not use that evidence to merely conclude he is a person of bad character, but that when presented with an opportunity to engage in sexual acts with his daughters, he was quite prepared to do so.

[112] I am satisfied beyond a reasonable doubt that the sexual acts described by L. N. in the camper, at B. C. and at L. did occur.

[113] As I noted, the act in the camper is not the subject of a charge, nor could it be, as it likely occurred somewhere in Q.. It was admitted as part of the narrative and to provide context as to how and when L. N. could say when the sexual abuse started.

[114] With respect to all three counts dealing with L. N., I am satisfied beyond a reasonable doubt the Crown has established all the necessary elements of the offences and find him guilty on all three of those counts.

[115] By way of summary I would say despite the historic nature of the allegations, the Crown has proved the charges against the accused beyond a reasonable doubt.

[116] The only evidence before me is that called by the Crown. This is despite many invitations extended to Mr. N. to call witnesses or to testify, including an offer made as late as during his closing argument.

[117] The evidence of the complainants is accepted. I have no doubt that the acts of sexual encounters as described by them did occur. The Crown has established beyond a reasonable doubt all the necessary elements for the offences set out in counts 2 to 6 inclusive in the indictment.

[118] Mr. N. is acquitted of count 1, as I am not satisfied there was any assault involved in the invitation to sexual touch him.

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Beveridge, J.