SUPREME COURT OF NOVA SCOTIA
Citation: R. v. MacIntosh, 2010 NSSC 300

Date: July 20, 2010
Docket: PtH:311459
Registry: Port Hawkesbury

Between:

Her Majesty the Queen

Plaintiff

v.

Ernest Fenwick MacIntosh

Defendant

Editorial Notice

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

Restriction on Publication:	Ban on publication due to sexual assaults on young persons
Judge:	The Honourable Justice Simon J. MacDonald
Heard:	July 5 - 9, 2010
Written Release of Oral Decision:	July 27, 2010
Counsel:	Diane McGrath, Counsel for the Crown Brian Casey, Counsel for the Defence

By the Court:

[1] First of all I want to thank counsel. It's been a difficult case through the process, given the time frames, and I congratulate both of them for the professional way they conducted themselves throughout the trial. Each side has adequately displayed to me their particular positions.

[2] These types of cases involving alleged improper sexual activity on children are difficult because children need protection, and the Criminal Code has sections to do so. However, the law also requires that the crown must prove beyond a reasonable doubt those circumstances where criminal charges are laid.

[3] I'm taking the time to explain some detail about the law in relation to these matters, so that we will understand the particular authorities for the arrival of decisions that I make.

[4] This is a criminal prosecution. The burden of proving guilty beyond a reasonable doubt rests with the prosecution and never shifts to the accused. That burden is inextricably linked with the presumption of innocence. The accused is

presumed innocent until the prosecution proves his guilt beyond a reaonsable doubt. The doubt must be a reasonable doubt not one based on sympathy or prejudice, nor one which is imaginary or frivolous.

[5] The Supreme Court of Canada in **R. v. Lifchus** [1997] 3 S.C.R. 320 states:

> "Any doubt which I might have must be a reasonable doubt. It must be grounded in the evidence or absence of evidence. It cannot be fanciful. It cannot be speculative."

[6] In short, the court must weigh and consider all the evidence and after this is done, the court must ask itself whether the crown has proven the alleged offence or offences against Mr. MacIntosh beyond a reasonable doubt.

[7] There is also the caution in **R. v. Star** (2000) 2 S.C.R. 144, from our Supreme Court of Canada. It says, proof is much closer to absolute certainty than to proof on a balance of probabilities. But I am mindful, as well, that the crown is not obliged to prove its case with absolute certainty.

[8] I find the central issue in this case is credibility. As usual, this is not an easy task. One must assess the whole of the evidence in this regard to determine if each

offence charged against Mr. MacIntosh has been proven beyond a reasonable doubt. As Gray, J. said in **R v. Golightly** 2007 CarswellOnt 3198, at para. 65:

> There are many factors that go into the assessment of credibility. A trial judge must consider, among other things, a witness's powers of observation, his or her memory, his or her age at the time of the events in question, the passage of time, any bias or partiality, interest in the outcome, and demeanour. Of importance is the inherent probability or reasonableness of a particular version of the facts, against the backdrop of uncontroverted facts.

[9] In assessing credibility I also bear in mind what was said by O'Hallarhan, J.A., in the oft quoted case of **Faryna vs. Chorny** [1952] 2 D.L.R. 354 (B.C.C.A) at pages 356 to 357:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour 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 of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken....

[10] The court is aware it must follow the Supreme Court of Canada principles as set forth in **R. v. W.D.** [1991] 1 S.C.R. 742 in this case and I will refer to them shortly.

[11] However, it is of importance to know that the standard of proof beyond a reasonable doubt also applies to the issue of credibility, as can be seen from the Supreme Court of Canada case of **R. v. Levasseur** [1994] 94 C.C.C. (3d) 384. As well the direction given by the Supreme Court of Canada in **R v. W.D., *supra***, does not apply to each piece of evidence individually, but rather to the evidence as a whole, which can be seen in **R v. W.B.K.** [2005] N.S.J. 67, para. 30:

> The direction given the by the Supreme Court of Canada in R. v. W.(D.) does not apply to each piece of evidence individually but rather to the evidence as a whole.

[12] In this case, the adult complainants testified about events alleged to have occurred when they were children and in their adolescence. In circumstances such as the present, where an adult testifies about events that are alleged to have occurred when the witness was a child, credibility should be assessed according to the criteria applicable to adult witnesses, bearing in mind that inconsistencies should be considered in the context of the age of the witness at the time of the

relevant events. Credibility should be assessed according to the witness' mental development, his or her understanding and the ability to communicate. In R. v. (A.W.) , 2010 PESC 19, Campbell J., said the following about the evidence or testimony in cases involving evidence given about events that occur as a child at para. 26:

> In 1992, the Supreme Court of Canada commented on two significant changes in the law concerning the evidence or testimony of children. (See R. v. W. (R.), [1992] 2 S.C.R. 122 (S.C.C.)) First, the notion, found at common law and codified in legislation, that the evidence of children was inherently unreliable and therefore to be treated with special caution has been eliminated. Various provisions requiring a child's testimony be corroborated were repealed. Second, it is not appropriate simply to apply adult tests for credibility to the evidence of children. While the evidence of children is still subject to the same standard of proof as the evidence of adult witnesses in criminal cases, it should be approached not from the perspective of rigid stereotypes, but on a common sense basis, taking into account the strengths and weaknesses that characterize the evidence offered in the particular case. At paragraph 26, McLachlin J, as she then was, states:
>
> > In general, where an adult is testifying as to events which occurred when she was a child, her credibility should be assessed according to criteria applicable to her as an adult witness. Yet with regard to her evidence pertaining to events which occurred in childhood, the presence of inconsistencies, particularly as to peripheral matters such as time and location, should be considered in the context of the age of the witness at the time of the events to which she is testifying.

[13] I have also found this to be followed in the case of **R v. C(D.C.) 2000 BCCA 618,** para. 9.

[14] This court must determine whether or not, or to what extent, the testimony of each witness is to be believed. The court is not obliged to accept everything a witness says or conversely to reject the whole of a witness' testimony because of some discrepancies. In other words, the court may accept the whole, some or none of a witness' testimony.

[15] I note as well the words of Saunders, J. where he said in **R. v. DDS,** 2006, N.S.C.A. 34 at para. 35.

> "This responsibility invites particular and often exacting inquiry in a "she said ... he said" context, something which frequently arises in cases where sexual assault has been alleged."

[16] The Supreme Court of Canada also pointed out in **R. v. Lifchus, *supra***:

> It is not proof beyond a reasonable doubt when you suspect guilt, nor is it proof beyond a reasonable doubt when there is a probability of guilt.

[17] Those factors must be taken into consideration. I've looked at all of the evidence , not simply to see if there was other evidence which supported, and enhanced that of the complainants, but also to determine if there was evidence that

contradicted or tended to contradict that of the various complainants. More importantly whether that evidence, or lack thereof, created reasonable doubt on each count in the Indictment.

[18] In **R. v. DDS, *supra***, Saunders, J.A., said at para. 50:

> What constitutes sufficient reasons on issues of credibility may be deduced from *Dinardo* [2008] 1 S.C.R. 788, 2008 SCC 24, where Charron J. Held that findings on credibility must be made with regard to the other evidence in the case (para. 23). This may require at least some reference to the contradictory evidence. However, as *Dinardo* makes clear, what is required is that the reasons show that the judge has seized the substance of the issue. "In a case that turns on credibility...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" (para. 23) . Charron J. went on to dispel the suggestion that the trial judge is required to enter into a detailed account of the conflicting evidence: *Dinardo*, at para. 30.

[19] I have considered all of the evidence presented during the trial, and in reaching my conclusions. At the beginning of their summations crown and defence counsel presented the court with a document containing a breakdown of the incidents which they said applied to the various counts in the Indictment. I have considered this as part of my argument also. In my view, I related the various incidents as they applied to each count in the Indictment, and am aware of the

words of the Supreme Court of Canada in **R v. M(R.E)** [2008] 3 S.C.R. 3, at para. 67, where the Supreme Court of Canada said:

> It may have been desirable for the trial judge to explain certain matters more fully. In particular, it would have been preferable to relate the charges on which the accused was found guilty to the evidence of the specific incidents disclosed by the evidence. Given the trial judge's mixed findings on credibility, the relationship between the 11 incidents to the convictions may not have been totally clear. However, on the law enunciated above, the question is whether the reasons, considered in the context of the record and the live issues at trial, failed to disclose a logical connection between the evidence and the verdict sufficient to permit meaningful appeal. The central issue at trial was credibility. It is clear that the trial judge accepted all or sufficient of the complainant's ample evidence as to the incidents, and was not left with a reasonable doubt on the whole of the evidence or from the contradictory evidence of the accused. From this, he concluded that the accused's guilt had been established beyond a reasonable doubt. When the record is considered as a whole, the basis for the verdict is evident.

[20] In the trial before me the crown has called witnesses and cross-examined defence witnesses in presenting its evidence to prove the guilt of the accused.

[21] Mr. MacIntosh testified that he had a consensual sexual relationship with DRS, and that it was later between the years 1979 - 1983. He, as well, indicated that he had a consensual relationship with JAH, to which I will refer later.

[22] Crown counsel has argued that the failure to cross-examine crown witnesses about this defence should lead to an interpretation that Mr. MacIntosh is

fabricating his evidence or, at least, the court should question its credibility. In the case of **R v. Paris** [2000] 150 C.C.C. (3d) 162, Doherty, J.A., said at paras. 22 & 23:

> 22. Where a witness is not cross-examined on matters which are of significance to the facts in issue, and the opposing party then leads evidence which contradicts that witness on those issues, the trier of fact may take the failure to cross-examine into consideration in assessing the credibility of that witness and the contradictory evidence offered by the opposing party. The effect of the failure to challenge a witness's version of events on significant matters that are later contradicted in evidence offered by the opposing party is not controlled by a hard and fast legal rule, but depends on the circumstances of each case: R. v. Palmer (1979), 50 C.C.C. (2d) 193 at 209-210 (S.C.C.); R. v. H.(L.M.) (1994), 39 B.C.A.C. 241 at 255 (C.A.); R. v. Verney (1993), 87 C.C.C. (3d) 363 at 375-76 (Ont. C.A.); R. v. K.(O.G.) (1994), 28 C.R. (4th) 129 at 131 (B.C.C.A.); R. v. Letourneau and Tremblay (1994), 87 C.C.C. (3d) 481 at 522-23 (B.C.C.A.); R. v. McNeill, supra, at 565; A. Mewett, Witnesses, 2d ed., looseleaf (Toronto: Carswell, 1999) at 2-32 to 2-34.
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> 23. The potential relevance to the credibility of an accused's testimony of the failure to cross-examine a complainant on matters that the accused subsequently contradicts in his testimony will depend on many factors. These include the nature of the matters on which the witness was not cross-examined, the overall tenor of the cross-examination, and the overall conduct of the defence. In some circumstances, the position of the defence on the matters on which the complainant was not cross-examined will be clear even without cross-examination. In other circumstances, the areas not touched upon in cross-examination will not be significant in the overall context of the case. In such situations, the failure to cross-examine will have no significance in the assessment of the accused's credibility. In other circumstances, however, where a central feature of the complainant's evidence is left untouched in cross-examination or even implicitly accepted in that cross-examination, then the absence of cross-examination may have a negative impact on the accused's credibility.

[23] In any event, I am satisfied this goes to the weight in assessing the accused's credibility.

[24] Mr. MacIntosh has denied any sexual activity with DRS as claimed in the Indictment. He argues, along with his cross-examination of DRS, that the exhibits he has tendered supports a finding of not guilty on all counts, along with the consensual relationship he says existed at a later date, outside the dates in the Indictment.

[25] The accused also testified and strongly denies any sexual activity with BAS. He stated so on the witness stand and through cross examination of BAS that the crown has not proved any of the charges against him.

[26] The accused also denies any sexual activity with JAH, except one, he says, which was consensual and occurred outside the date of the Indictment.

[27] Mr. MacIntosh in direct testimony told the court he has a criminal record. He said he was convicted in 1982 of indecent assault, and second, he was convicted in 1983 of sexual assault.

[28] I am aware the law requires me to only use those convictions when assessing his credibility. I am not, as required, using them in any way as a sign of propensity for him to commit the offences.

[29] I am satisfied as to the identification of Mr. MacIntosh as the accused in all the counts. This was not the issue. The issue here is whether or not he was involved in the allegations made by the complainants within the dates contained in the Indictment.

[30] I am also satisfied as to the jurisdiction of the court in all counts on the Indictment.

[31] I am further satisfied, if the events, as alleged by the complainants, occurred, they occurred within the time frame contained in each count of the Indictment.

[32] I note on that point, that in discussing validity of date, place, and time of an offence involving sexual assault, (the term used by both counsel in this trial on

occasion) Wilson J., of the Supreme Court of Canada said in **G.B., and C.S. v. The Queen**, 56 C.C.C. (3d) 200 at para 4:

> ..."Indeed, the date of the offence is not generally an essential element of the offence of sexual assault. It is a crime no matter when it is committed."

[33] Each count of indecent assault in the Indictment requires an assault accompanied by circumstances of indecency by the accused towards the person assaulted. Indecent, in this matter, means morally offensive or offending against prevailing notions of modesty or decency. The act may be indecent in nature, such as an intimate touching of the complainant's body, or tearing off clothing. An act, otherwise not indecent, may become indecent by surround circumstances, for example, holding the complainant's arm and suggesting a sexual act. It is a question of fact for me to determine, whether that which I find was done, was done indecently.

[34] In each count of the Indictment involving gross indecency the words gross and indecency are given their normal meaning. Gross means out of all measure or proportion, glaring, flagrant, monstrous. Indecent means in extremely bad taste,

offending against propriety or delicacy, immodest, suggesting, or tending toward obscenity.

[35] An act of gross indecency is the performance of something flagrant, shameful, offensive, or against propriety - a shameful, immodest act tending toward obscenity. Gross indecency is a very marked departure from the decent conduct expected of the average Canadian in the circumstances which I find existed in all the surrounding circumstances.

[36] As I've indicated before, and made reference to the case of **R. v. W.D., *supra***. This case must be applied to each and every count contained in the Indictment, and I have done so. I have followed the principles set forth in **R v. W.D., *supra***, in making my conclusion on each and every count of the Indictment. Those principles which I followed and set forth in **R v. W.D., *supra* are**:

> 1. "If the evidence of the accused person is believed he or she should be acquitted;
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> 2. If the evidence of the accused is not believed, but still raises a reasonable doubt, he or she should be acquitted;

> 3. Even if the evidence of the accused does not raise such a reasonable doubt, the person must be acquitted if a reasonable doubt is raised after considering the whole of the evidence."

[37] I propose to deal with the counts in the Indictment as they relate to the various individuals named therein. This was the way they were argued by both crown and defence and are not necessarily in time sequence. The first 16 counts deal with DRS.

[38] Counts #1 and #2 deal with allegations made by DRS against Mr. MacIntosh for events that are alleged to have occurred at Farquhar House, on Granville Street in Port Hawkesbury, Inverness County, Nova Scotia, between the dates of September 1, 1970 and September 1, 1975. The counts contain charges of indecent assault and gross indecency, respectively.

[39] I find the description of the actions, if they occurred, occurred between Mr. MacIntosh and DRS are such that they were of an indecent assault as required in Count #1 and Gross Indecency as required in Count #2. The question that applies for these counts, and all other counts, is whether or not they occurred at all in the time frame contained in the Indictment.

[40] Mr. MacIntosh's whole defence in relation to DRS is that these events did not happen as alleged and told by DRS, but that the sexual activity occurred at a later date and that they were, in fact, consensual. In DRS's evidence he told about "the routine" that the accused would follow in committing the indecent assault and gross indecent assaults upon him.

[41] DRS said he was born in 1961 and from his evidence I find he said these events, as alleged in all counts involving himself, happened to him between the ages of 9 and 14 years.

[42] He testified that Mr. MacIntosh would start rubbing his hands down his legs, to his thigh, then rub his genitals. Eventually, he said, this lead to oral sex. He described the oral sex happening at Farquhar House between the dates contained in the Indictment and I am satisfied that the events that occurred in Farquhar House as alleged by DRS would amount to indecent assault . The feeling of his legs, thigh, and rubbing of his genitals, in the circumstance as he disclosed, amounts to what is required in the first count. The acts of oral sex as described by him, in those circumstances which he described, would also amount to gross indecency as alleged in the second count in the Indictment.

[43] His testimony further described an incident where he said that Mr. MacIntosh put his penis in his mouth and performed oral sex. Again, I am satisfied this is an offense of gross indecency, in the circumstances as described as I indicated earlier. DRS said that his standard procedure was that he would pretend to be asleep, hoping it would be over.

[44] In assessing credibility, I am fully aware of the law relative to adults recalling evidence as children to which I have referred earlier on in this Decision. I also am aware of those issues on credibility that I have to examine in assessing credibility from the various witnesses. In this particular case, I am, and do find, there were instances that occurred at Farquhar House as alleged by DRS.

[45] I am aware during the hockey season, there were hockey players staying at the Farquhar House at the time. DRS's recollection of the rooms and the layout of the building was corroborated by other witnesses and, in particular, by the defence witnesses - Mr. MacInnis, Mr. MacQuarrie, and the accused, himself.

[46] The evidence further corroborates the property was acquired in 1972, as indicated by Mr. MacQuarrie. Of course, at that time the intentions of Mr. MacQuarrie and Mr. MacIntosh were to hold the property for a while and then flip it over for a profit. However, that didn't happen. It was a boarding house at the time and Mr. MacQuarrie, along with Mr. MacIntosh, both moved in, in separate rooms.

[47] DRS said he knew Mr. MacQuarrie was there and he recalled having a piece of pie and, as I watched him describe his evidence of what occurred in Farquhar House and his trying to recall instances, I was impressed with his recall ability about those matters which happened to him when he was a child. To me, those recollections would be of someone going back in the period of time when they were 11, 12 or 13 years of age. That age bracket would fit in the contents of the time frame contained in the Indictment.

[48] I am also, in assessing the credibility, aware of the comments of Mr. MacQuarrie, where he said under cross-examination by Mr. Casey, he never had any inclination that Mr. MacIntosh had children stay with him in the room next to him. He also said in a definite tone, as I watched him answer the questions, and

considering his overall evidence in response to counsel, that he never walked into Mr. MacIntosh's bedroom and found him with DRS, because he said that would be something he would recall. I agree with that.

[49] I conclude, and must say that I was, from the overall evidence, impressed with the evidence of DRS and the manner in which he testified regarding the events he was trying to recall. I have concluded because of his age at the time, DRS could have been mistaken as to Mr. MacQuarrie finding him in bed with the accused. I also conclude over the time of these instances from all of the evidence that it is possible for DRS and the accused to have stayed there on occasion without Mr. MacQuarrie knowing. I have no hesitation in concluding these were events that occurred at the Farquhar House between the dates alleged in the Indictment.

[50] I must say that I reject outwardly, Mr. MacIntosh's denial and assertion that he and DRS had a consensual relationship between 1979 and 1983 as indicated. This was denied by DRS. He explained where he was residing at the time, and denied giving his address in * to Mr. MacIntosh. Mr. MacIntosh produced a photocopy of a page he said was from his address book of an address in *, * which

was allegedly, he said, given to him by DRS. I do not accept that information as being truthful, rather from DRS's rebuttal evidence, I accept it did not happen. Where there is a conflict of evidence between DRS and Mr. MacIntosh, I accept that of DRS in these matters.

[51] I do appreciate the ability of DRS attempting to recall the recollections of his childhood and what happened. I accept his evidence that it bothered him so much it was very hard for him to break the recollections of the number of instances he had into various time-frames. I agree he tried to do that before the Court and what happened to him, as he said, "was eating him up inside" and that's what motivated him to bring the matter forward at such a late stage.

[52] In summary, I have applied the principal of **R. v. W.D.,** ***supra***, I do not find from the totality of the evidence that I have any reasonable doubt that I can assess in favour of Mr. MacIntosh The crown does not have to prove how many times it occurred, but that it did occur, and I am satisfied, as I said earlier, and explained earlier about the indecent assault that it did occur, sufficient enough for me, to find a conviction on Count #1, and that gross indecency assault did occur, as I

indicated earlier when I was discussing this matter, and that that did occur and, therefore, I find Mr. MacIntosh guilty on Count #2.

[53] Counts #3 and #4 are allegations by DRS of instances which are alleged to have occurred at his home in *, *, N.S. Once again, I am satisfied if the instances occurred as described by DRS, they amounted to indecent assault and gross indecency as alleged in Count #3 and Count #4, respectively.

[54] DRS testified to instances alleged to have occurred in the t.v. room in the basement of his home, and in a room adjoining the kitchen area of his home, which led to the charges in Counts #3 and #4. He told of Mr. MacIntosh feeling his legs, groin, and private parts, and of his performing oral sex by him in these locations.

[55] I have difficulty with these two counts because the crown must prove its case beyond a reasonable doubt, to which I described earlier. In this case, when I apply **R. v. W.D., *supra***, the accused has raised concern and a reasonable doubt in these particular counts. Firstly, in dealing with the instances in the basement, DRS stated that they occurred in the t.v. room and that it was in the basement. The evidence does confirm, he said, that it happened there, and I watched as he testified

in the video-statement shown by Mr. Casey. These instances involved, once again, oral sex in the manner and routine as described by DRS, and to which I have referred above. DRS told Cst. Deveaux that it occurred in the basement in the t.v. room about a half a dozen times. It turns out that there was no t.v. room in the basement of the home until 1981. I find his testimony about this was not just a mistake made in trying to recall past events, but they just didn't happen.

[56] Under cross-examination, as I watched and listened to his evidence, I became concerned that this may not have happened as described by DRS, and I found he was hesitant, and there were contradictions in what he was saying, and what, in fact, was the situation. Once again, I appreciate he is trying to recall memories - how events occurred when he was a child, but on the other hand, as I said the onus is on the crown to prove each case beyond a reasonable doubt.

[57] I do find difficulty from the cross-examination again of Mr. Casey, and of his own evidence, that the other occasion involving the incident on the chesterfield behind the wall - a 5 ½ foot wall - with his mother working and cooking in the very next room, could not have happened as alleged by DRS. I believe he has had many instances of sexual activity he described, but that he was mistaken on this one. The

defence raises a reasonable doubt in my mind and I, therefore, am not satisfied, even though I listened to the description of the lay out of the rooms, I have concern that, on the whole of the evidence, the crown has not proved its case beyond a reasonable doubt on the two counts, Counts #3 and #4, and in applying the principles of **R. v. W.D**, ***supra***, I find the accused not guilty on Counts #3 and #4.

[58] Counts #5 and #6 of the Indictment deal with incidents that are to have allegedly happened in the accused's car at Goose Harbour Road in Guysborough County. In assessing the totality of the evidence and relating it to Counts #5 and #6, I accept DRS's evidence that a lot of these incidents occurred in Mr. MacIntosh's car. Besides denying this took place as explained by DRS, the defence, Mr. MacIntosh argues that it could not have happened in a vehicle as described by DRS because Mr. MacIntosh did not own a vehicle of that nature at that time, according to the exhibits tendered from the Motor Vehicle Department. However, in that regard, the vehicle information supplied does not cover all the time-frame in the Indictment. I find when I consider the totality of the evidence, especially that of DRS, and as I noted his evidence about the Goose Harbour Road incidents, that he seemed to recall a change in the way his life was with these incidents. His life changed from not being able to ejaculate and then being able to

ejaculate as one of the things that sticks out in his mind about the incidents that occurred in that particular location. Once again, the activity was the same. He said Mr. MacIntosh would unzipper his pants, start feeling his leg, then eventually going up to his penis area. He would then put his mouth on DRS's penis and have oral sexual relations with him. He said it was very repetitive in that area, although he couldn't remember each specific time. He said this happened when he was between the ages of 10 and 13, which would place him within the time-frame in the Indictment.

[59] I find DRS's evidence about these events to be genuine and forthright. I reject Mr. MacIntosh's evidence of denial and that they may have occurred on a later date. I was not impressed about Mr. MacIntosh testifying of these incidents. I do appreciate the difficulty in cases where there's only two people present and that's normally what occurs when charges of this nature are laid. However, I must say that I do not, as I said before, find any kind of consensual relationship occurred between DRS and Mr. MacIntosh as alleged by him.\

[60] The acts of touching as described during these occasions by DRS amount to indecent assault, and the acts of oral sex, in the circumstances as described by

DRS, in these occasions amounts to gross indecency. Thus, I find, applying the principle of **R v. W.D., *supra***, I do not have any reasonable doubt, and I find Mr. MacIntosh guilty of indecent assault on Count #5, and gross indecency on Count #6.

[61] Counts #7 and #8 are counts that took allegedly place at * in Guysborough County involving indecent assault and gross indecency. In that area, and around that time, DRS described an incident occurring at a mobile home. He said he went inside and that he remembered it being a transition period where the involvement between Mr. MacIntosh and he went further than just simply horsing around. He says he told Mr. MacIntosh to stop - that he was just a little boy - and he wasn't able to stop him. He described that Mr. MacIntosh went straight to his penis and scrotum, and he didn't know why, but he knew that's what he wanted. He said he was approximately 10 years old when the incident happened and there was nobody there. He told the court that Mr. MacIntosh just wanted to touch that part of his area with his fingers and that he would get his zipper down, put his fingers inside and, as he said, he couldn't recall if Mr. MacIntosh did too much beyond that. He couldn't recall if his penis was fully exposed. When he pulled away, that ended it.

[62] During the same time-frame he indicated there was oral sex between he and Mr. MacIntosh, beginning the same way at Mrs. Grady's home. That would be Mr. MacIntosh's mother.

[63] DRS, as well, told about hunting with Mr. MacIntosh around his father's house in Port Shoreham. What was still in his mind about that particular incident, was the story about the shooting of a rabbit. He said he was 11 or 12.

[64] Mr. MacIntosh's brother, Keith, testified that his father bought a mobile home sometime after 1982. He explained the deeds, which defence tendered and argued to show, that the acquisition of the property referred to, upon which the mobile home was placed.

[65] In essence, Mr. Keith MacIntosh said he lived in the mobile home that's been referred to in the evidence, but that he left there and lived 30 years in Ontario, however, he came back in July and August of each year.

[66] In his testimony, however, he also said that he couldn't say for sure if a mobile home was there before his father's mobile home.

[67] Mr. MacIntosh is denying these events occurred and that if there was any sexual relationship between DRS and himself it was after the dates contained in the Indictment, and it was consensual. As I watched and listened to the totality of the evidence, and I listened to DRS testify, and Mr. MacIntosh, and as I apply the principles of **R. v. W.D.,** ***supra,*** and I assessed them in relation to the whole totality of the evidence and, in particular, credibility, I find that these incidents did happen as described by DRS, and I reject the evidence of Mr. MacIntosh where it conflicts with that of DRS about those incidents. Thus, I would enter a guilty finding where Mr. Intosh touched DRS's penis and scrotum area of indecent assault, contrary to Count # 7. On Count #8, I enter a guilty finding because I find that, given the circumstances as described by DRS, where Mr. MacIntosh performed oral sex on him would be sufficient proof of evidence for a conviction on Count #8.

[68] Counts #9 and #10 involve various occasions where DRS alleges other locations that Mr. MacIntosh committed assaults of a sexual nature upon him

amounting to indecent assault and gross indecency. The allegations, again, involved hunting incidents where DRS said Mr. MacIntosh would take him on hunting trips to various locations and perform oral sex on him. DRS said some of these hunting trips took place around his father's house; that they went rabbit hunting in the Giants Lake area in Guysborough County. DRS described the shooting incident and about the excitement of having shot a rabbit and how it led to oral sex. He remembers the dates because of his age - telling the Court that he got the gun to go hunting with Mr. MacIntosh when he was either 11 or 12. He described another incident at Red Head Beach, which involved a hunting trip in Guysborough County, and he said he remembers this because it was the first time that he shot a rabbit. He said he took it to the car to show Mr. MacIntosh who was asleep. He awoke him to show him the rabbit. He said it was on this occasion that, again, Mr. MacIntosh performed oral sex upon him.

[69] He described an incident, as well, about staying at a hunting cabin where they stayed overnight. He alleges Mr. MacIntosh performed oral sex on him there. However, I have difficulty with the allegation involving this camping trip. I find that DRS was vague and unsure on that particular point. He didn't know who was around. He wasn't sure of the time of the year. I'm satisfied that the defence has

raised a reasonable doubt on that particular occasion. I am not satisfied that particular incident was proven beyond a reasonable doubt.

[70] DRS described another incident at *, which is before *, but near the * family cottage. He described about how he remembered that particular incident because he knew Mr. MacIntosh was trying to teach his mother how to water ski. He seemed to have a recollection of the property, and described an incident when he was on the way to the cottage. He said Mr. MacIntosh, who was driving a motor vehicle, pulled it over and did, as he said, the routine by massaging him and having oral sex. He said he was 12 or 13 years of age and it didn't occur during the wintertime. I find that that would bring it within the time frame of the Indictment.

[71] As well, I am satisfied that the incidents at Reagan's Dam Road, as referred to by DRS, which was located in the back of Steep Creek and Mulgrave, and Guysborough, are included in the incidences involving Mr. MacIntosh's car. DRS said these events occurred when he was 12 or 13 years of age, and that he referred to the Dam being built for the oil refinery that was going to be built up in that area. He told about Mr. MacIntosh pulling his vehicle over on the road in that area, and

performing oral sex on him. There was, as I said earlier, reference by Exhibit #1, Tab 6, to show a list of motor vehicles owned by Mr. MacIntosh, however, I'm satisfied, as I say, when you look at the age, and location, and time of the alleged incidents, the Registry of Motor Vehicle's information does not cover that particular time frame. Thus, DRS evidence is believable in a sense that there was an opportunity at that time, and there is no doubt in my mind, that Mr. MacIntosh always had a motor vehicle.

[72] Once again, as I apply the principle of **R v. W.D., *supra***, and assess the credibility as outlined above, I come to the conclusion after listening to DRS, the way he described these matters, given nature of the recollections he had, I find him to be credible and I accept his evidence that these events occurred as alleged in the Indictment. Once again, in coming to that conclusion, of course, I have considered the evidence of Mr. MacIntosh, and the cross examination, and I also reject Mr. MacIntosh's contention that there was a consensual relationship later on, in the late 70's, early 80's.

[73] I must say that in coming to the conclusion that I have, I weighed all the evidence, and with the exception of the one incident that I refer to above, I accept, on the totality of the evidence, that where the evidence of DRS conflicts with that of the accused, I accept that of DRS. I find, therefore, Mr. MacIntosh, when he committed the acts of feeling DRS's private parts, and penis area, to be indecent assault as provided under Count #9, and find him guilty therefore, and that the circumstances described when and how the oral sex took place to be sufficient evidence as proof of gross indecency, and I find him guilty of Count #10.

[74] In saying that, I am aware, as indicated by me earlier, that DRS, as I watched him, was held on the recollection of a nature one would expect a person to have who was trying to recall the incidents as best he could as to what occurred in his childhood involvement with Mr. MacIntosh. Thus, I find him guilty of the indecent assault relating to the massaging or the feeling of DRS's penis as told by DRS on Count #9. To reiterate on Count #10, the charge of gross indecency conviction which would arise from the oral sex, under the circumstances described by DRS existing on different occasions, with the exception of the camping incident, to which I referred earlier.

[75] Counts #11 and #12 deal with the sexual incidents in area of Port Hastings in Inverness County, Nova Scotia. The allegations in those counts are that Mr. MacIntosh committed oral sex upon DRS while parked in a car near the Canso Causeway and, secondly, on a boat trip to Prince Edward Island shortly after passing through the locks at the Canso Causeway.

[76] As I assess the evidence and listened to DRS testify, I was impressed with the details that he recalled about the boat trip to PEI and how he became sea-sick. He said he went down underneath the top floor of the boat and tried to get to sleep because of how sick he felt. He went on in detail to describe how Mr. MacIntosh approached him, put his hand under either a blanket, or a sleeping bag, or something he used to cover himself up, and began performing oral sex on him, in what has normally been referred to by DRS as the "routine". DRS said he was 11 at that time, when this incident occurred bringing it in the time frame of the allegation. I find comfort in believing and accepting the evidence of DRS from all the evidence of the boat trip. The evidence about the boat trip where it conflicts with that of Mr. MacIntosh, I accept DRS. In applying the test in **R. v. W.D.**,

supra, I do not accept the evidence of Mr. MacIntosh this did not happen. I looked at the picture of Mr. MacIntosh's boat, I listened to his evidence about having to drive and steer the boat, but I conclude, and I prefer DRS's evidence that this incident happened. I find there was an opportunity and the event did occur. I find DRS's evidence, as he recalled it, and the way he described the trip to be very credible. On the totality of the evidence, I do not have any reasonable doubt in this matter. I am satisfied that Mr. MacIntosh did perform oral sex on DRS during that boat trip.

[77] The other allegations during this period was referred to as the one in the parking lot by the Canso Causeway. I listened to DRS talk about that, yet I must find that I'm not convinced beyond a reasonable doubt that this incident happened. In my opinion, there were a lot of instances DRS spoke about, and he could possibly have been confused on this particular incident. Mr. MacIntosh has raised reasonable doubt in this incident. However, I find in the circumstances the oral sex by him would be sufficient proof of gross indecency, and I therefore find him guilty on the Count #12. I do not find that there was evidence of an indecent

assault on the boat, but rather was evidence of proof of gross indecency under Count #12. Thus, I find him not guilty of Count #11.

[78] Counts #13 and #14 deal with incidents alleged by DRS to have occurred at a motel in Bedford in the Municipality of Halifax. I do have some hesitancy after listening to the defence cross-examination of DRS and the denial by Mr. MacIntosh that this event occurred at Bedford as described by DRS. He had talked about the motel incident with Mr. H. and, although he said they did not go into great detail about it, I consider the totality of the evidence, particularly that of DRS. In his evidence, DRS said that he presumed it was Mr. MacIntosh's business trip, he said he was not sure what time of the year, he believed he was fairly young, namely 10 to 12. He said he remembered the motel a bit. He just believed it happened that time but he couldn't remember that much about it. These are serious criminal offenses and they must be proven beyond a reasonable doubt. I just have some concern about his evidence when he says he can't remember anything particular, or know if they slept in separate beds. In doing so I am aware Mr. MacIntosh testified none of this happened. I, as well, do appreciate that DRS is trying to recall of his childhood, but I am not satisfied, on a serious charge as this,

on the evidence, to enter a conviction under the criminal code on the evidence of this particular occasion. I am satisfied that, as I apply the principle of **R. v. W.D., *supra***, I do have reasonable doubt. Proof must be beyond a reasonable doubt. Although I do give DRS consideration, as required, when he is testifying about events that occurred when he was a child, but even with that in mind, as I said, if I'm applying the required test of **R v. W.D., *supra***, the defence has raised a reasonable doubt. Consequently, I would find Mr. MacIntosh not guilty of Count #13 and Count #14.

[79] The last two counts involving DRS are Counts #15 and #16, which are alleged to have occurred at or near the laundromat, and in a little house at the back of the laundromat. As I listened to DRS testify most of the incidents which occurred inside the laundromat in Mulgrave, or the little house that was adjacent to it, I am satisfied he described it in detail, which was something I find he would recall. He described the chair, the way the oral sex took place, and again describe what Mr. MacIntosh did as his routine. He said he had a strange sensation, that it scared the hell out of him. He said it was in that location that he first ejaculated. I have considered the denial by Mr. MacIntosh, and the evidence of DRS, who were

the only two present. I find, and as I balance all of the evidence as required under **R. v. W.D.**,***supra***, I am more than satisfied that the allegations made by DRS are true. He was very credible and sincere. I accept his evidence in this case and I find the crown has proven its case beyond a reasonable doubt of Mr. MacIntosh touching DRS's body and penis area, thereby committing indecent assault contrary to Count #15. His acts of oral sex, under the circumstances as described, are acts of gross indecency sufficient for a finding of guilty on Count #16. Thus, I find him guilty under Counts #15 and #16.

[80] Counts #21 through to #26 deal with allegations that Mr. MacIntosh sexually committed indecent assault and gross indecency upon BAS. I have applied those principles of law referred to at the beginning of this decision to those counts as applicable. In assessing the credibility in this particular case and bearing in mind that BAS is recalling incidents which occurred when he was a child, I have serious reservations about his whole testimony. I watched him, I observed him, I compared his evidence, and I listened to him testify under cross-examination.

[81] He was told by DRS that in 1988 that DRS was sexually assaulted by Mr. MacIntosh. During the course of that conversation, BAS admitted that he told his brother DRS that nothing like that had ever happened to him. He, as well, told other family members that nothing similar to what happened to DRS happened to him. This is of note because BAS said that he and DRS were closer than being brothers. I'm also aware that it wasn't until 2001 that BAS contacted the police. Also, after he told his story, the police sent a document to him to have signed and completed and he didn't do it. They kept trying to get him to complete documentation relevant to his allegations, but he wouldn't complete them. I reject BAS's explanations that it was as a result of moving and that it was a matter of miscommunication.

[82] He said he appreciated these were extremely important documents, but I find as I watched and listened to him, he didn't seem like the type of person who, if these acts had been committed upon him, would act as he said he did. I do not accept that he was unsure or confused as to proceedings and not quite understanding it. I observed that at the time of the cross-examination dealing with the letters from the crown attorney about the Affidavit from Mr. MacKinnon, that

in my opinion, he was wishy-washy and seemed to be differing in his story. He was also told to go to the police and to talk to them about his allegations and he admitted he didn't go to the RCMP in Port Hawkesbury as requested. He said he didn't follow through. I do not accept that he didn't intentionally avoid going to the RCMP and he said he takes responsibility for that. Also further implications with regard to his evidence is the fact that he was in Nova Scotia in 2002, and in the vicinity, and he didn't go to see the RCMP about this matter until July, 2007. Also, he told the RCMP he had already given a statement and he didn't want to add anything more to it. The original was the only one he was giving. I have serious concerns about his credibility. The way he proceeded, the time of his allegations, and the manner in which he reacted to the investigation.

[83] I mention all of the above to indicate my concern about the evidence of BAS and his allegations against Mr. MacIntosh. I accept that he described many incidents of sexual activity of indecent assault and gross indecency during the time frame when he was involved in hockey. He said in his mind, he knew that they happened when he was between the ages of 9 and 12. He said he suffered anxiety - biting his nails, failing in grades at school. He said he couldn't tell which incident

was first, but his indication was he had a very good memory. I appreciate his allegations about what took place. I realize the difficulty of testifying in this regard, but on the totality of the evidence, I have to determine whether or not in this criminal proceeding, his credibility is accurate, and sufficient enough for me to determine if the crown had proven its case beyond a reasonable doubt under the principles I have enunciated earlier in this matter with regard to adults testifying as children. There must be sufficient proof beyond a reasonable doubt accomplished for me to find guilt on one or more of the counts to which I referred against Mr. MacIntosh involving BAS.

[84] Mr. MacIntosh testified these incidents never happened. He testified strongly in that regard.

[85] Thus, as I apply the principle of **R. v. W.D., *supra***, and those matters to which I referred earlier about credibility, a reasonable doubt has been made on these counts and consequently, on each and every count therein contained involving BAS and Mr. MacIntosh, namely Counts #21, 22, 23, 24, 25 and 26, I find Mr. MacIntosh not guilty.

[86] Counts #17 and #18 in the Indictment alleges a sexual activity by Mr. MacIntosh against JAH. In his testimony, JAH referred to his being picked up going to and from school. He said he would walk and Mr. MacIntosh was a friend of the family. That became obvious through the testimony. The only time the friendship seemed to come to an end was after an argument over political donations. JAH was born in 1963. He said he was between 11 and 13 when he was going to school. He said at the very least he could be 10 or 11. Given that JAH was born in 1963, as I said, that would make the years somewhere between 73 and 76, in that vicinity. Thus, that would bring it within the time frame of the Indictment. I appreciate the period of time frame that Mr. MacIntosh must respond to and his denial of the events occurring as JAH states. Mr. MacIntosh says that he had sexual encounters with JAH around 1979, and that it was consensual. I appreciate as well the evidence of JAH in testifying about these events now which occurred when he was a child. As I consider each of the counts individually against Mr. MacIntosh, as alleged by JAH, I have applied those legal principles set out at the beginning of this decision.

[87] Thus, applying the principles to which I referred earlier, and in dealing with credibility and from my observation and my assessment of the whole of the evidence, I conclude on the cross-examination of JAH by Mr. Casey, I do have doubt that any of these sexual events occurred at Farquhar House as described by JAH. Mr. Casey brought out under cross-examination that in fact JAH had given a statement in February, 1995, wherein he said nothing about the Farquhar House. He told the officer he did not remember incidents at the Farquhar House. He agreed with Mr. Casey on cross-examination that he, in essence, told Constable Deveaux that he didn't have oral sex at the Farquhar House.

[88] Now I watched him testify in this line of questioning to Mr. Casey and paid attention to the way and manner in which he answered these questions. In response to a question from Mr. Casey, JAH said he deliberately thought he would be making it easier for himself if he gave less information. That has raised some concern to me insofar as this is a serious criminal charge and requiring proof beyond a reasonable doubt that he might possibly be not telling all of the information necessary. I conclude that the incidents did not happen at Farquhar

House as alleged because I am satisfied a reasonable doubt has been raised under **R v. W.D.,** ***supra***, by the defence.

[89] I am not satisfied as well that in his direct examination he provided sufficient evidence about the rooms in detail at Farquhar House. As I listened to him, I would have thought that he might not be able to describe the room in total detail, but surely if had been there four or six times as he indicated, or a few times he referred to in his direct evidence, one would think he would remember some things about the room. As I said, those are aspects I considered in relation to Farquhar House

[90] I do accept, however, that he did describe a blue Jeep Cherokee being used by Mr. MacIntosh. As Ms. MacGrath pointed out, the motor vehicle records indicate that Mr. MacIntosh had the vehicle before 1976, so it is conceivable this vehicle was being used by Mr. MacIntosh at the time to which JAH refers.

[91] Now JAH also described an incident that is alleged to have occurred in Mr. MacIntosh's car. He said that he was driving in the car with Mr. MacIntosh and he

was talking about a girlfriend and that he had an erection and that Mr. MacIntosh was rubbing his penis. On that particular incident, I was impressed with the way that JAH was trying to be credible, and I do accept that he was. I watched him tell his evidence of this incident. I do not find it to be consensual, but rather an indecent assault by Mr. MacIntosh about JAH. I accept JAH's evidence over that of Mr. MacIntosh on that particular incident, and I do not find he has raised any reasonable doubt in applying the principles of **R. v. W.D., *supra***. I thus find Mr. MacIntosh guilty of indecent assault as alleged in Count #17, being the incident above involving the car, and not guilty of gross indecency under Count #18. Once again I might have my suspicions but suspicions, as the law says, is not proof beyond a reasonable doubt.

[92] Counts #19 and #20 contain allegations of incidents of indecent assault and gross indecency against Mr. MacIntosh, which are alleged to have occurred between January 1, 1971 and March 23, 1977. They involve, in particular, a trip to the Sea King Motel in Bedford, Nova Scotia, as described by JAH. Mr. MacIntosh testified he and JAH took a trip to Halifax as he said, just for a break, in 1979 or 80. This is not the same incident that JAH referred to, but Mr. MacIntosh says that

JAH could be mistaken. He said he believed they might have stayed at the Sea King Motel, and it was JAH who initiated sexual activity leading to oral sex.

[93] As I have indicated above, I can believe all, none, or some of what a witness says as I assess their credibility in light of the above principles earlier stated by me at the outset of this decision. In these particular counts, I do not have any reasonable doubt whatsoever. I have no difficulty in coming to the conclusion that this incident occurred as described by JAH. I listened and I observed JAH, and I listened, and I observed, and watched Mr. MacIntosh testify. The description of the time, and the event by JAH has been denied by Mr. MacIntosh. I listened to the evidence of JAH where he said Mr. MacIntosh and he were sitting on the bed and the accused told him to relax, took his penis, and performed oral sex on him. I accept that. I have come to the conclusion that incident happened and he was trying to recall it, and that was the way he recalled it happening as a young child. He was credible. He described the motel in some detail and about them going there. Simply put, I believe him. He was truly remembering the incident as he testified, and I am not satisfied that the accused has raised any reasonable doubt as under the provisions of **R. v. W.(D),** ***supra***, either in his credibility or on the whole

of the evidence. I simply reject Mr. MacIntosh's version as untruthful or either a version of convenience.

[94] I would say that in coming to this conclusion, I have considered the fact that the first person JAH told was *. This was pointed out and it was revealed they had this conversation because DRS had said something to him and he happened to mention the same thing happened to him. I don't find that to be an uncommon conversation, and in any event, of such a sufficient way to draw a reasonable doubt, under **R v. W.D,** ***supra***. Under the circumstances that existed when Mr. MacIntosh performed oral sex on JAH, in the motel room in Halifax, I find him guilty of gross indecency on the Count #20. I find the evidence reveals gross indecency and not indecent assault, and thus I find Mr. MacIntosh not guilty of Count #19.

[95] I would also comment, as pointed out by Ms. MacGrath, the discussions around the extradition of Mr. MacIntosh running into difficulty was by way of questioning put by Mr. Casey. I reviewed the matter and I could not find any evidence in this trial of any extradition proceedings of Mr. MacIntosh that showed

there was any difficulty. I agree that Mr. Casey put questions to witnesses about the extradition running into trouble, but I do not have in front of me any evidence that it did.

[96] In summary, in reaching my conclusions as to the guilt or innocence of the Accused on the 26 counts contained in the Indictment, I have applied the principles of **R. v. W.(D.),** ***supra,*** as it applies to the whole of the evidence and in particular to that of credibility on each and every count therein contained.

[97] I have, as well, considered the ability and the nature of the testimony being given by the complainants as adults testifying about sexual activity that occurred to them when they were children.

[98] I have considered as well the denial by Mr. MacIntosh and, in particular, his assertion that he and DRS had a consensual sexual relationship in later years between 1979. As well, his contention and denial of the other incidents involved, and in particular, his denial of JAH and his evidence that he had a consensual sexual relation with JAH. I have also considered the Exhibits, including the deeds,

the photos, the pictures, and the reference to when the road work was done for the possible development of oil, but I find even all those documents, and their explanation have not caused me any kind of doubt on the findings I've made. Especially doubt amounting to reasonable doubt under **R v. W.D., *supra***.

[99] Those principles along with the usual principles a trial judge must consider in criminal matters has been considered by me in reaching the conclusions I have. As I have said before, I might have my suspicions about certain incidents upon which I have found Mr. MacIntosh not guilty, but under the Supreme Court of Canada law I am satisfied that suspicions are not proof beyond a reasonable doubt as per their instructions.

J.