

SUPREME COURT OF NOVA SCOTIA

Citation: R. v. MacIntosh, 2011 NSSC 340

Date: 20110131

Docket: CRPH 339509

Registry: Port Hawesbury

Between:

Her Majesty the Queen

v.

Ernest Fenwick MacIntosh

Editorial Notice

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

Restriction on publication: Pursuant to s. 486 of the *Criminal Code*

DECISION

Judge: The Honourable Chief Justice Joseph P. Kennedy

Trial Heard: December 6, 7, 8, 9, 13 and 14, 2010 at Port
Hawkesbury, Nova Scotia

Oral Decision: January 31, 2011

Written Decision: September 8, 2011

Counsel: Diane McGrath and Alicia Kennedy for the Crown
David Bright, Q.C. for the accused

By the Court:

[1] Ernest Fenwick MacIntosh stands charged before this Court on ten counts, ten counts of historic sexual offences, five of indecent assault and five of gross indecency.

[2] These ten charges span a time frame between 1970 and 1975 and they involve three complainants. As is usual with charges of this nature, the credibility of witnesses is central to this trial. There were only two people present at the nexus of each of these various charges, Mr. MacIntosh and a complainant, and in Mr. MacIntosh's case, in many instances, he denies that there was ever a contact.

[3] Because he has testified and denied each of the accusations, the Supreme Court of Canada decision in **R. v. W.(D.)**, [1991] 1 S.C.R. 742, **R. v. W.(D.)** has guided this decision process. I have applied **R. v. W.(D)** in my determination on each of the counts. This is also a multiple count indictment, so I have concentrated on using the evidence only in relation to the specific count that I was dealing with in determining a finding on that count.

[4] The Crown, of course, must prove these charges beyond any reasonable doubt – beyond any reasonable doubt. That is the heaviest onus that exists in our law and it exists whether the events occurred 35 years ago or yesterday. The fact that the events that are the subject of this trial happened so long ago is certainly a factor and has been a factor in the trial throughout but does not affect the onus on the Crown to prove the constituent elements of these offences beyond a reasonable doubt, very heavy onus.

[5] I will not deal with the ten counts in the order that they appear on the Indictment but, rather, I am dealing with them as I associate them with each of the complainants. And I have taken the complainants out of turn. I will repeat, in the process of giving this decision some of the evidence given at trial. I have, though, considered all of the evidence. At times relevant, the Defendant, Fenwick MacIntosh, was a businessman in Port Hawkesbury and in the Strait area of this Province. He was at time relevant approximately between the ages of 29 and 32 years.

[6] I am going to first deal with the complainant A.M. Those of us in the courtroom heard the witnesses testify, know that the complainant A.M. is A. M.. A

publication ban relates to the communication of his name. A.M., two charges, counts five and six. Count five reads:

Ernest Fenwick MacIntosh did between the 1st day of February, A.D., 1971 and the 1st day of February, A.D., 1973, at or near Mulgrave, in the County of Guysborough, in the Province of Nova Scotia, being a male person, did commit an indecent assault on a person having the initials A.M., a male person, contrary to then Section 148 of the **Criminal Code of Canada**.

[7] First count in relation to A.M., indecent assault. Indecent assault, very simply, assault, a non-consensual touching that has an indecent element to it in this instance, sexual element to it. The other count in relation to A.M. is count six on the indictment and it reads,

Between the 1st day of February, A.D., 1971 and the 1st day of February, A.D., 1973, again at or near Mulgrave, in the County of Guysborough, in the Province of Nova Scotia, did commit gross indecency (gross indecency) with A.M., contrary to then Section 149 of the **Criminal Code**.

[8] Say something about gross indecency. No longer exists. It is not a charge anymore in the **Criminal Code**. It was repealed back in 1988, January the 1st, 1988. It existed at all times relevant but has not existed in the **Code** since January the 1st, 1988. Test in relation to gross indecency, when we consider gross indecency, the Courts are told to consider the following terminology, "out of all measure, shameful,

flagrant." Therefore, an act of gross indecency is the performing of something flagrant, shameful, an offence to common propriety, a very marked departure from the conduct expected from an average Canadian in the circumstances.

[9] Court of Appeal of this province looked at gross indecency retroactively, 1994, remember it was repealed in '88. They looked at it in 1994 in a case called **R. v. M.H.M.** 91 C.C.C. (3d) 504 paragraph 69 ... paragraph 39, 39, quoting from Justice Chipman: "Under such a test" ... this is Justice Chipman speaking ... "Under such a test, the trier of fact is given very wide latitude and a verdict of guilty can only be set aside where it is so unreasonable that the conduct in issue could not, in law, be said to amount to gross indecency." That's Justice Chipman in 1994.

[10] So back to A.M. Two charges arising ... two charges before this Court in relation to A.M., both arising out of the same incident, charge of indecent assault, charge of gross indecency. A.M. testified. He testified. He said that he was born February *, 1961, so that during the time frame of these charges, he would have been between the ages of 9 and 12 years. In fact, he was, more specific. He told the Court that he believed that he was nine or ten years old when the incident happened. I consider A.M. to have been a child during the relevant time frame. The age of

consent, at that time, was 14 years. Age of consent relevant to these two charges was 14 years, so he was not capable of consent at that time. He was under age.

[11] Further, because A.M. was a child at the time, I have assessed his evidence in the context of his age at the time of these events as is set out in **R. v. W.(R.)**, [1992] 2 S.C.R. 122 Supreme Court of Canada. I have assessed his evidence as an adult testifying to events that he experienced as a child. Let me be clear as to what I am considering in relation to A.M. I am considering those events that allegedly took place in Mulgrave. That's what the counts make reference to. That's what I am considering.

[12] A.M. said that he had been a fan of the Strait Pirates, the local junior hockey team and, as a result, he got to know the Defendant, Fenwick MacIntosh, who he said he believed had some involvement in the management of that team. As a matter of fact, other witnesses have testified that he was on the Executive. A.M. said, "I used to see him around the arena," meaning Mr. MacIntosh. And the Defendant MacIntosh had a speed boat and A.M. liked boats. He liked boats. He said, "He offered me a ride in the boat, but the boat was in Mulgrave." To those who are not from the area, it is across the strait from Port Hawkesbury. Boat was in Mulgrave.

[13] So A.M. says Mr. MacIntosh took him in his car to access the boat in Mulgrave, going over to get the boat. A.M. testified that the car was a grey or black Mercedes, a grey or black Mercedes Benz. On cross-examination, A.M. was shown an affidavit that he had signed back in July of 2002 in which he had said that they went over to Mulgrave in a boat, went over in a boat, not in a black or grey Mercedes. But he maintained at trial that he believed that they drove over in that Mercedes.

[14] A.M. testified that when they got to Mulgrave, they went to a building that he thought Mr. MacIntosh owned or had some connection with. He remembered it being a white house with sort of a store in it and he says that at that premises, the Defendant, Fenwick MacIntosh, gave him alcoholic beverage. He said he thinks it might have been lemon gin. He became giddy. A.M. said that MacIntosh laid down on a bed, then called me over. He sat down beside me, put his hands down my pants and his arm around my waist, unquote. A.M. said that Fenwick MacIntosh then put his hand on his penis, A.M.'s penis, first outside his clothing and then under his clothing, first outside his clothing and then under his clothing. A.M. testified, I wasn't sure what this was all about.

[15] A.M. said at this trial, when he testified before me at this trial, that Fenwick MacIntosh touched his penis directly, directly, with his hand under A.M.'s undershorts. But the preliminary inquiry, A.M. testified, making reference to page 502 of the transcript, and I'm quoting from the transcript, "I was wearing underwear, yes. He had his hand down between my underwear and my jeans or whatever pants I had on."

[16] The question put to him by Defence counsel at the preliminary, "Question, Well, his hand wasn't directly on your flesh, on your skin, was it?" And the answer A.M. gave at the preliminary was, "No." So at the preliminary inquiry, he said there was no direct touching of Mr. MacIntosh's hand flesh-to-flesh on his penis. At the trial, he said otherwise. He said that it was direct, that the hand was under the undershorts.

[17] The Defendant, Mr. MacIntosh, denies A.M.'s allegation, period. Says it didn't happen. Says he now, as of the date of this trial, can barely recall A.M., can barely remember him. He said that when the charges were laid in matter, he didn't know who A.M. was and he claims the incident simply did not happen. The Mulgrave incident testified to, didn't happen, he says. Yes, he said, he did own a grey

Mercedes, but he produced a lease to show that he didn't acquire the vehicle until 1991, which was approximately eight years after the time line alleged in the charges. So the suggestion obvious being that A.M. could not have gone from Port Hawkesbury to Mulgrave, as he testified, in a black or grey Mercedes driving by Mr. MacIntosh because Mr. MacIntosh didn't have that vehicle until about eight years later.

[18] Crown has admitted that A.M. is now confused on some of the details as to the relevant events. The Crown asked this Court to remember (a) that he was a child at the time, and (b) to consider his consistency as to the manner of the touching by the defendant.

[19] I am not concerned about A.M.'s inconsistency as to whether they went to Mulgrave by boat or by automobile. Doesn't bother me a lot as to how they got there. It is probably correct that the defendant, Mr. MacIntosh, did not drive a grey Mercedes during the time frame alleged. It is possible that A.M. witnessed him drive this vehicle years later and is now confused about the use of that vehicle. That is the kind of mistake that our memories make when we are trying to remember things that happened a long time ago. That doesn't bother me greatly. These are memory

mistakes, inconsistencies that are common in testimony that addresses events, in this case, 37 years in the past.

[20] I do conclude, though, firstly, I conclude I find as fact that an incident in Mulgrave involving A.M. and Mr. MacIntosh took place. I find that. To the extent that Ernest Fenwick MacIntosh denies that an incident took place with A.M. in Mulgrave, I do not believe him. I am, though, concerned about A.M.'s testimony as to the *actus reus*, as to the nature of the sexual contact alleged. I think that is significant.

[21] This is a crucial element of these charges and his testimony on this crucial element is not consistent. I am troubled by the fact that A.M. is testifying now at this trial that the touch was a skin-to-skin direct contact inside, under his shorts, directly on his penis, in contrast to his evidence at the preliminary hearing that the defendant's hand was between his underwear and his jeans or his pants and his denial that there was any direct contact with his flesh, that he agreed with Defence counsel that there was no direct contact.

[22] I see this as an escalation of the nature of the contact between preliminary and trial and that bothers me. It is correct that either version would be an indecent assault if it was accomplished with ... well, in this instance, A.M. was incapable of consent, so that either version would be an indecent assault. But what troubles me is that A.M.'s testimony on such a crucial part of the evidence, evidence that I have got to be able to find beyond a reasonable doubt in order to assess indecent assault and gross indecency, that such a crucial part of his evidence is inconsistent, crucial part of his evidence is changed. And, in fact, this inconsistency is sufficient to cause me to have a reasonable doubt as to the exact nature of the act and the acts complained of, which causes me a reasonable doubt as to the *actus reus* of the offence. As a result, I find the defendant not guilty on counts five and six, those counts that are specific to A.M.

[23] As to the complainant, W.J.M.R., W. J. M.R., there are four charges, four counts, count seven, eight, nine, and ten; four charges, to incidents. Mr. MacIntosh, in relation to Mr. MacIntosh-Reynolds, W.J.M.R., is charged that,

Between the 1st day of January, A.D., 1972 and the 31st day of August, 1973, at or near Port Hawkesbury, the County of Inverness, in the Province of Nova Scotia, did, being a male person, commit an indecent assault on a person having the initials W.J.M.R., a male person, contrary to Section, as it then was, 156 of the **Criminal Code of Canada**.

And further,

Ernest Fenwick MacIntosh is charged between the 1st day of January, A.D., 1972 and the 31st day of August, 1973, at or near Port Hawkesbury, in the County of Inverness, in the Province of Nova Scotia, did commit gross indecency with W.J.M.R., contrary to then Section 157 of the **Criminal Code of Canada**.

[24] Different section number for gross indecency, same charge. Further, he's charged

Between the 1st day of January, A.D., 1972 and the 31st day of December, A.D., 1972, at or near Port Shoreham, in the County of Guysborough, in the Province of Nova Scotia, did, being a male person, commit an indecent assault on a person having the initials W.J.M.R., a male person, contrary to Section 156 of the **Criminal Code of Canada**.

[25] Count nine. And finally, in relation to W.J.M.R., count ten,

further, Between the 1st day of January, A.D., 1972 and the 31st day of December, A.D., 1972, at or near Port Shoreham, in the County of Guysborough, in the Province of Nova Scotia, did commit gross indecency with W.J.M.R., contrary to Section 157 of the **Criminal Code**. So four counts, two incidents. One incident allegedly taking place in Port Hawkesbury, the other incident allegedly taking place in Port Shoreham, that area. Four counts, two incidents.

[26] The complainant, W.J.M.R. testified. He said that times relevant to these charges, 1972/'73, he was living with his parents in Port Hawkesbury. He would have been roughly 16 - 17 years of age during that time. I do not consider him to have been

a child at that time. When assessing his credibility, I do not consider him to have been a child at that time.

[27] He comes into contact, he said, with the defendant, Fenwick MacIntosh, when Mr. MacIntosh comes to his parents' home after a funeral, funeral of a mutual acquaintance, an acquaintance of both Mr. MacIntosh and his parents. Comes to the home after the funeral. Before leaving Mr. M.'s home on that day, his parents' home, Mr. MacIntosh, the accused, the defendant, says that he is going to Guysborough and invites W.J.M.R. to join him, come with him, this trip to Guysborough, same day. He did so. He went with him.

[28] During the course of that trip, W.J.M.R. says that they stopped at the defendant's mother's house where his mother lived. We know from the totality of the evidence that his mother lived in the area of Port Shoreham. At some point after a visit to the mother's house, as they are back on the road, as they are driving back, Mr. MacIntosh, Fenwick MacIntosh driving, W.J.M.R. a passenger in the vehicle, W.J.M.R. testifies that as they continue their trip, the defendant "puts his hand on my penis." And the complainant says the defendant was rubbing him. The quotation, I told him not to. That's a quote, W.J.M.R.

[29] The defendant pulls the motor vehicle into a side road. W.J.M.R. says that he put his hands down inside my underwear and rubbed my penis a few times, unquote. Further quote, I ejaculated. They continue the trip back towards Port Hawkesbury. Back on the way, W.J.M.R. says Fenwick MacIntosh takes the complainant's hand and places it on his own penis. Back in Port Hawkesbury, they go directly to the defendant's apartment, Mr. MacIntosh's apartment. This is the testimony of W.J.M.R. He says that at the apartment, Mr. MacIntosh pulled down my pants and my underwear, got down on his knees, put my penis in his mouth. I told him to stop. He then continued. I ejaculated on my clothes. Said MacIntosh laid down on the sofa. Said, I pulled up my pants and went home. I consider these evening's events, these events to be a continuous scenario that is addressed by the charges that are specific to Port Shoreham, counts nine and ten in the indictment.

[30] As to the charges that allege Port Hawkesbury, counts seven and eight, W.J.M.R. testified that about two weeks later, later, subsequent, the defendant MacIntosh picked him up at the mall in Port Hawkesbury. This time, it's a rust-coloured car, he believes. Fenwick MacIntosh took him to a boarding house called

Farquhar House, premises that Mr. MacIntosh was involved in the ownership with respect to, co-purchased in July of 1973.

[31] W.J.M.R. says he is picked up. He is taken to that boarding house or that premises. I don't know at the time whether it was a boarding house or not, but it was a premises that he associated with Mr. MacIntosh. W.J.M.R. says that at Farquhar House, "Fenwick MacIntosh pulled down my underwear. He laid on a cot and wanted me to have sex with him. I said no." Quotation continues, "He grabbed me by the back of the head, pushed me down to his penis. His penis was in my mouth for a couple of seconds." W.J.M.R. testified that he left Port Hawkesbury, moved from Port Hawkesbury, shortly after that summer of 1973.

[32] The defendant, Fenwick MacIntosh, testified as to W.J.M.R.'s allegations. As to the Port Shoreham allegations, Fenwick MacIntosh said that he would not have gone to his mother's home, Port Shoreham, 1972/'73, because he was estranged from his stepfather and any direct contact he had with his mother during that period was away from that premises, which leads him to deny, at least in combination, he denies the contact with W.J.M.R. that is associated with Port Shoreham. Didn't happen, says Fenwick MacIntosh.

[33] The defendant MacIntosh, though, does acknowledge that he did have a sexual relationship with W.J.M.R. Fenwick MacIntosh claims that that relationship was consensual. Fenwick MacIntosh testified that at times relevant, it was generally known in the Port Hawkesbury area that W.J.M.R. was gay, he said openly gay.

[34] Mr. Fenwick MacIntosh says that the first time that he had sex with W.J.M.R., it was at his apartment, but it was on an occasion that he, the defendant, had arrived home and found W.J.M.R. in the parking lot of the building. They had some conversation. He invited him in. And Fenwick MacIntosh says, He performed oral sex on me. Fenwick MacIntosh says that he had subsequent sexual encounters with W.J.M.R., to quote him, two or three times. Said he used to come to my apartment at night. Each time it was him, meaning W.J.M.R., performing oral sex on me, so says Fenwick MacIntosh. So MacIntosh agreed that W.J.M.R. visited with him at Farquhar House. He said, "I can't remember having sex with him at that premises," Farquhar House.

[35] I accept that there was a trip to Guysborough, Port Shoreham. I believe that. I find W.J.M.R.'s testimony in that respect to be fully creditable. And I also believe

that it involved a visit to a house over there that W.J.M.R. remembers to have been Mr. Fenwick MacIntosh's mother's house. Whether it was his mother's house or not, at this stage, is not that important. I believe that they went to Port Shoreham. I believe that there was a visit to a house, I so find.

[36] W.J.M.R.'s testimony on that point as to that trip is convincing. He ties the trip to the get-together at his parents' home after the funeral, said it happened later the same day. He knows about the existence of a house in Port Shoreham. He says that it happened on the way to Guysborough. It was Guysborough that they were going to. His testimony was clear and detailed and consistent, and consistent as to the nature of the sexual contact that happened on the journey to Port Shoreham.

[37] I am satisfied, after considering all of the evidence on that point, that this sexual contact happened and I have used **R. v. W.(D.)** in the process of coming to that determination. I believe M.J.M.R.'s testimony as to that incident. The question remains, Was the contact consensual? Did W.J.M.R. consent to the sexual contact that happened between these parties on that motor trip? Again, it is to be noted that Mr. MacIntosh does not claim, in this instance, that W.J.M.R. consented to the sexual contact on the trip to Guysborough. He denies that the trip happened, didn't happen.

[38] I find that there was no consent. I am satisfied beyond a reasonable doubt that W.J.M.R. did not consent to what happened to him on that motor trip to Port Shoreham. He was in Mr. MacIntosh's motor vehicle. He was a distance from home, was restricted. He testified that this was the first time this kind of thing had happened to me, first time. I was confused. I considered the touching of ... and I have confused the initials, obviously, in relation to this accused, but there can be no confusion as to who I'm making reference to ... the touching of M.J.M.R.'s penis. I consider that touching, as he testified, to have been an indecent assault. I consider the stroking of that penis to a point of ejaculation which I so find to have been a gross indecency in the context of the times and I find guilt, I find guilt, on counts nine and ten. Guilty, count nine; guilty, count ten.

[39] I will not be convicting on the charges that are specific to Port Hawkesbury, the Farquhar House. The defendant has introduced the issue of consent in relation to his contact with this complainant. I have a reasonable doubt on the issue of consent in relation to Farquhar House situation. I believe that an incident happened, however, I am concerned about the complainant getting himself into that situation after what had happened to him on that trip to Port Shoreham.

[40] Page 311 of the preliminary transcript, which was shown to the witness when he testified, and I quote. Mr. Casey was acting on behalf of Mr. Fenwick MacIntosh at the time of the preliminary. The question is this,

Let me ask you some questions about that. I get the sense from your evidence that you understood or you were apprehensive that if you got in the car with him again, there might be some other kind of sexual contact.

Answer, Yes. Uh-huh.

Question, And I understand you weren't consenting to any of that, but it sounds to me like you anticipated that would happened if you got in.

Answer, You're possibly correct.

Question, But even though knowing all that, you still got in the car because he threatened to tell your parents if you didn't.

Answer, Uh-huh. I still got in.

[41] Let me address the threat to tell the parents. The witness acknowledged that it was an idle threat. He had already told his parents. He had already told his parents, that was no threat. I still got in, notwithstanding the fact that he suggests that it was possibly correct that he had anticipated sexual contact. Personally, I find that there

was an incident. It is incumbent upon the Crown, the onus on the Crown is to establish that this was non-consensual sex. I cannot so find beyond a reasonable doubt. I've expressed why. This situation is unlike the Port Shoreham situation. This is a situation where the witness, by his own candid testimony, has indicated an anticipation, at least. I have reasonable doubt, as indicated. For the reasons indicated, I will find verdicts of not guilty on count seven and count eight.

[42] Let me say further about that Port Shoreham thing, when they get back to the apartment, I did not make reference to going back to the apartment in my finding in relation to Port Shoreham. I believe there was a complete offence in relation to indecent assault and gross indecency prior to ever going back to that apartment. What happened at the apartment ... frankly, I'm troubled by the fact that after having experienced what the witness, the complainant, has testified to on that trip, that he would have accompanied Fenwick MacIntosh up to that apartment that evening. I have not made any finding in relation to that apartment. The Mulgrave situation was a continuing situation. I have found, on the basis of the information of the evidence that was specific to the trip, complete offences, and that is the evidence that I have considered in relation to those two counts.

[43] As to the complainant R.M.M., we now know R.M.M. to be R. M. and we're talking about four counts, counts one, two, three, and four. Fenwick MacIntosh is charged that,

On the 1st day of September, A.D., 1970 and the 1st day of September, 1975, at or near Halifax, in the Halifax Regional Municipality, in the Province of Nova Scotia, being a male person, did commit indecent assault on the person having the initials R.M.M., a male person, contrary to Section 148 of the **Criminal Code of Canada**, as it then was.

[44] Allegation is indecent assault and it is specific to Halifax. Count number two.

Further:

Between the 1st day of September, A.D., 1970 and the 1st day of September, 1975, at or near Halifax, the Halifax Regional Municipality, in the Province of Nova Scotia, did commit gross indecency with R.M.M., contrary to Section 149, the **Criminal Code of Canada**.

[45] In fact, there was no Halifax Regional Municipality at that time, but that's irrelevant. In fact, the offence was described as having taken place in Bedford and I am satisfied that Bedford is at or near Halifax and was at that time.

[46] Further charge,

Between the 1st day of June, A.D., 1973 and the 30th day of September, A.D., 1974, at or near Guysborough, in the County of Guysborough, Province of Nova Scotia, being a male person, did commit an indecent assault on a person having the initials R.R.M., a male person, contrary to Section 156 of the **Criminal Code**.

[47] And finally, count number four,

Between the 1st day of June, A.D., 1973 and the 30th day of September, A.D., 1974, at or near Guysborough, in the County of Guysborough, in the Province of Nova Scotia, did commit gross indecency with R.M.M., contrary to Section 157 of the **Criminal Code of Canada**.

[48] Four charges arising out of two alleged incidents. Let me also say this so that it's on the record. The counts one and two are so broad that they encompass a period of time when Mr. M. would have been less than 14 years of age. In fact, what I am finding in relation to both of these alleged incidents, is that they happened approximate to one another, close to one another, the same summer. Mr. M. believed 1974. On cross-examination, it was suggested that it might have been 1975 and he agreed that that was a possibility. Neither of these alleged offences would have taken place by any of the testimony before the Court at a time when R.M.M. was under the age of consent. So consent is a factor in relation to both counts, notwithstanding the fact that the first two counts start ... the time frame starts as early as September 1970.

[49] Four charges arising out of two alleged incidents. R.M.M., Mr. M., testified that he met Fenwick MacIntosh in, he believes, 1972 through 1974. He said that he would have been 15 to 17 at those times. He was, Mr. M., enthusiastic about boats. And Fenwick MacIntosh owned or certainly had access to a Cape Islander, a converted Cape Islander.

[50] Fenwick MacIntosh invited R.M.M. to come on that boat, says Mr. M., for a sail to Guysborough for the weekend to attend the Come Home celebrations in that town. Also aboard on that trip was one M.. Mr. M., an adult, was a business associate of Mr. MacIntosh at that time. The complainant M. remembered the sail over to Port Hawkesbury. He says it was a warm, sunny day. And, significantly, he remembers, "They gave me the wheel," and how pleased he was to have been given the wheel.

[51] He said the first night of their arrival over at the celebrations at Guysborough, the first night, Mr. M., the complainant, stayed on the boat. This is his testimony. He said the next day, Fenwick MacIntosh took him to the home of one C.B. about four or five kilometers, he thinks, away from the wharf where the boat was. Mr. M. said that he stayed the night with Mr. MacIntosh at that home, at that house.

[52] Mr. M. said that he was given an upstairs bedroom for his use. He said he went to bed approximately 11:00 or 12 o'clock that second night of the trip. Mr. M. testified that, subsequently, he wakes up, that Mr. MacIntosh, Fenwick MacIntosh, had come to his bed. I quote Mr. M.'s testimony, "He removes my underwear. He strokes my penis." Mr. M. testified that he, Mr. M., became erect. He said, "Fenwick MacIntosh had his mouth on my penis, performing oral sex." Mr. M. said he ejaculated, that MacIntosh consumed it, that he swallowed it.

[53] Mr. M. said that after the event, "He patted me on the head and said, Good boy, like I was a dog." Mr. M. said, "I remember it so well. I didn't know what to do. Never happened to me before." It was Mr. M.'s belief that he did not return to Port Hawkesbury on the boat with Fenwick MacIntosh. Mr. M. testified that he believes that he drove back to Port Hawkesbury from Guysborough and that the driving involved a brown truck.

[54] Mr. M. testified to the second incident, Halifax. He said it involved a trip to Halifax. He said he believed that trip happened the same summer as the boat trip to Guysborough weeks later, subsequent, weeks later. And he did believe that it was the

summer of '74. Again, on cross, he said it might have been 1975, but the same summer.

[55] Mr. M. believed that the purpose of the trip to Halifax was to pick up a motor vehicle and he associated the trip with Fairley & Stevens auto dealership. He associated it with Fairley & Stevens. Mr. M. said that he and Fenwick MacIntosh drove to Halifax in a Monte Carlo, a cream Monte Carlo, or an Oldsmobile. Mr. M. said that as soon as they got across the causeway, Mr. MacIntosh started talking about homosexuality. He said, "I just let it roll off." Testified that they got some beer in Truro and went to Bedford, the Sea King Motel in Bedford. And he testified that Mr. MacIntosh told me that John Buchanan owned that motel, that it was a Tory motel. John Buchanan, I take judicial notice, was a former premier of Nova Scotia, now senator. Told him that John Buchanan owned that motel. It was a Tory motel.

[56] Mr. M. said that this was the first time that he had ever been in that area, that he remembers they went to the Chickenburger, Bedford. Said they shared a room, separate beds. Separate beds, one room, he says, at the Sea King Motel in Bedford. He testified he wakes up, Mr. MacIntosh is fondling his penis until he becomes aroused, then performs oral sex.

[57] Mr. M., R.M.M., said that he did not remember what vehicle he was in, coming back to Port Hawkesbury. He thought it might have been a van, might have been a van vehicle. Remember, he said that he went there with Fenwick MacIntosh in either a Monte Carlo, a cream Monte Carlo, or an Oldsmobile, but he may have come back in a van.

[58] The defendant, Fenwick MacIntosh, denies both of these allegations absolutely. He does acknowledge that there was a boat trip to Guysborough. The boat trip took place. It was connected with the Come Home Festival. He acknowledges that. He says that. Says that his associate, Mr. M., was there and that the complainant M. also accompanied them. He believed that it happened in August of 1975, maybe even later, but he does acknowledge a boat trip that involved Mr. M. and Mr. M..

[59] Fenwick MacIntosh said that the incident that R.M.M. described at the B. House didn't happen, period. He said that he was sure that he never stayed over at that residence. Mr. MacIntosh said, I never stayed over at that residence; that incident didn't happen. Fenwick MacIntosh says, though, that Mr. M. did not return to Port Hawkesbury in the boat. Mr. M. didn't come back on the boat but that Mr. M. did.

And, remember, Mr. M.'s testimony was that he drove back to Port Hawkesbury, mentioned a brown truck.

[60] Fenwick MacIntosh says, no, Mr. M. did not come back but the complainant, Mr. M., did and that there was consensual sex. There was a consensual sexual encounter between he and Mr. M. on that boat on the trip back from Port Hawkesbury, that trip to the Come Home Festival, consensual sexual encounter on the way back. Mr. MacIntosh, Fenwick MacIntosh, says that Mr. M., R.M.M., was "very much consenting, that he pulled his own pants down." This is Mr. MacIntosh's testimony. He said that he also had consensual sex with R.M.M. after the boat trip at the Farquhar House and on the boat again within weeks, maybe even days.

[61] As to the boat trip allegation, trip on the boat, two guys go to take in the Come Home Festival. I find, Mr. M., R.M.M.'s testimony to be creditable as to this incident. I have no difficulty believing his testimony on all constituent elements. Trip is confirmed by the defendant's own testimony. The defendant's former business associate confirms that he was on the trip. We know the trip took place.

[62] Mr. MacIntosh does not acknowledge, says there was not an overnight at the B. residence. However, I find that there was, that this happened. I find that beyond a reasonable doubt. I believe Mr. M. on that point. He's not making that up. Particularly I find, specifically I find that Fenwick MacIntosh stroked R.M.M.'s penis and performed oral sex on R.M.M., on Mr. M., as he testified, as Mr. M. testified. I find that that happened beyond any reasonable doubt. I have considered testimony of both parties, both Mr. M. and Mr. MacIntosh, in so finding and I have used **R. v. W.(D.)**.

[63] I am satisfied that Mr. M. did not, did not, consent to this sexual contact that took place at the B. residence close to Guysborough. He told this Court that he didn't know what to do, that it never happened to him before. He's away from home, he's in a strange house, not familiar with. He's with an adult businessman who has brought him there on that trip, had a sexual contact with him. Mr. M. said that he did not consent. He described, on cross-examination, the act as an oral rape. Absolutely denied that he had consented to that sexual encounter with Fenwick MacIntosh in Guysborough or vicinity.

[64] I have found him creditable and I find, on the totality of the evidence, beyond a reasonable doubt that that non-consensual sex took place as testified to by Mr. M.. I'm finding Ernest Fenwick MacIntosh guilty on the counts that relate to Port Hawkesbury which would be count number three, count number four. In relation to gross indecency, it is the testimony that was specific to the penis in the mouth. Respect to indecent assault; stroking of the penis. Guilty on both counts.

[65] As to the allegation specific to the trip to Halifax, I find that this trip happened. As Mr. M. testified, I recognize that Mr. Fenwick MacIntosh denies that it ever took place. I'm satisfied that it involved an overnight at the Sea King Motel in Bedford. And I listened to the testimony that Mr. M. may have been in the same motel with a school class some time subsequent thereto. I have considered that evidence, but I am satisfied that this happened, that this took place, as Mr. M. testified. I am satisfied that Mr. MacIntosh had a sexual contact with Mr. M. in that motel room in Bedford.

[66] However, as to this Halifax trip incident, again, I find on the issue of consent that I cannot find beyond a reasonable doubt. I cannot find non-consensual beyond a reasonable doubt. I will say why I have difficulty with the fact that R.M.M., after what had happened to him in Guysborough on that boat trip, would have gone on that

overnight trip with Mr. MacIntosh to Halifax. Mr. M. is not a child at the time. He's a young man. So I have concerns about his having been able to anticipate that a sexual encounter would happen again.

[67] I have considered his circumstances in that in so determining. I recognize the evidence about the dysfunctional home situation and the reality that here was this businessman with the fancy cars and the boats who was showing interest in him. That he had an interest in working for Mr. MacIntosh or his associate. I know what he said in that respect. He has told this Court that that, this is Mr. M., that that sexual encounter in Halifax was not consensual and, in fact, he may be right. He may be right. Certainly, he seemed to honestly believe that. On the totality, though, in the circumstances of this situation happening so soon, so proximate to the events that I have found took place in Port Hawkesbury, I cannot find the non-consensual aspect that is essential to these counts beyond a reasonable doubt and so I will be finding Fenwick MacIntosh not guilty in relation to counts one and two.

[68] The totality, the bottom line is this. We could go down the indictment.

[69] My finding on count number one, not guilty; on count number two, not guilty; on count number three, guilty of an indecent assault; on count number four, guilty of gross indecency; count number five, not guilty; count number six, not guilty; count number seven, not guilty; count number eight, not guilty; count number nine, guilty of indecent assault; count number ten, guilty of gross indecency.

Joseph P. Kennedy
Chief Justice