SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. W.G.L.*, 2020 NSSC 144

Date: 20200421
Docket: 489303
Registry: Truro

Between:

Her Majesty The Queen

v.

W.G.L.

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Restriction on Publication: *Criminal Code* s. 486.4

Judge:	The Honourable Justice Peter P. Rosinski
Heard:	February 18, 19, 20, 2020, in Truro, Nova Scotia
Counsel:	Thomas Kayter, Crown Attorney David Mahoney, Defence Attorney
Subject:	"He said/She said" in context of historical sexual assaults
Summary:	As a live-in stepfather to LM, WL is alleged to have sexually molested her over five years (1996 – 2001) during which time she was between 10 and 14 years of age. LM and her mother DL testified for the Crown. LM did not reveal the allegations to her mother until 2012. LM gave a statement to police and charges were laid in the Spring of 2018. WL, and J3 (son to WL and DL, born 1998) testified for the Defence. The defendant denied committing any of the offences, noted that as a result of work commitments etc. he realistically had no opportunities to commit the offences in the home, and that DL and LM were not credible witnesses.

Issues:

A number of issues presented in this case in relation to which the legal principles were canvassed including:

(1) When adults testify in relation to events that occurred to them as children;

(2) The use of preliminary inquiry transcript by judges beyond references made by witnesses when referred to such transcripts;

(3) The difference between absence of apparent motive and proven absence of apparent motive to fabricate allegations;

(4) The relevance of the fact of the timing of disclosure, and avoidance of the accused by a complainant in such cases;

(5) Whether an accused's evidence standing on its own and found to be superficially plausible without reference to all the evidence, must necessarily raise a reasonable doubt regarding guilt?

The court also addressed a suggested improvement in the wording of the arguably problematic three-step *R v DW* credibility instruction.

Result:

1. Special instructions apply for this issue;

2. Judges must not attempt to contextualize answers given by witnesses based on references to preliminary inquiry transcript, by examining further portions of those transcripts;

3. Special instructions apply for this issue – proof of the absence of an apparent motive to fabricate is required before this factor can be used to buttress the credibility of a complainant;

4. It is in error to presume certain expected behaviours from victims of sexual abuse – however their actual

behaviour may become relevant in a given case, and then may be considered;

5. "An outright rejection of an accused's evidence based on a considered and reasoned acceptance beyond a reasonable doubt of the truth of the conflicting evidence is as much an explanation for the rejection of an accused's evidence as is a rejection based on a problem identified with the way the accused testified or the substance of the accused's evidence" *R. v. JJRD.*, (2006) 215 CCC (3d) 252 (Ont. CA) leave refused [2007] 1 SCR x (Note).

Accused found guilty of both offences (ss. 151 and 271)- *DW* instruction suggested by Justice Paciocco in a 2017 academic article:

1. If you accept as accurate evidence that cannot coexist with a finding that the accused is guilty, obviously you must acquit.

2. If you are left unsure whether evidence that cannot coexist with a finding that the accused is guilty is accurate, then you have not rejected it entirely and you must acquit.

3. You should not treat mere disbelief of evidence that has been offered by the accused to show his innocence as proof of the guilt of the accused.

4. Even when evidence inconsistent with the guilt of the accused is rejected in its entirety, the accused should not be convicted unless the evidence that is given credit proves the accused to be guilty beyond a reasonable doubt.

In deciding whether the Crown has proved the accused to be guilty beyond a reasonable doubt the evidence must be considered as a whole. It is therefore possible to reject entirely evidence that is inconsistent with the guilt of the accused and

convict because of the considered and reasoned acceptance beyond a reasonable doubt of evidence that the accused is guilty.

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Decision

Judge:	The Honourable Justice Peter P. Rosinski
Heard:	February 18, 19, 20, 2020, in Truro, Nova Scotia
Counsel:	Thomas Kayter, Crown Attorney David Mahoney, Defence Attorney

By the Court:

Introduction

[1] WL is charged that between January 1, 1995 and December 31, 2000 at or near Colchester County, Nova Scotia he did commit a sexual assault on LM, and furthermore did for a sexual purpose touch LM, a person under the age of 14 years directly with the part of his body, to wit his hands and body, contrary to sections 271 and 151 *Criminal Code* ["*CC*"].[1]

[2] I find him guilty of both offences.

Background

[3] WL was born in 1956. Sometime between the Fall of 1996 and the spring of 1997, when he was living at his grandparents house in Wentworth, Nova Scotia, (see p. 191(21) Transcript) he met DL, (born in 1963) while she was living in Parrsboro, Nova Scotia. She had three children at that time living with her (whose father is MA, from whom she was then permanently separated):

1. a daughter LM-DOB February 1, 1986;

[1] At the times of the offences, the elements of sexual assault may be gleaned from the reasons in *R v. Chase*, [1987] 2 SCR 293 and *R. v. Ewanchuk*, [1999], 1 SCR 330 and the *Criminal Code*; likewise for sexual touching (s. 151 *CC*) see Justice Derrick's reasons in *R v JDC*, 2018 NSCA 5, at para. 32.

2. a son J1 – who moved to live with his father within a couple of months after June 1997, and did not testify;

3. a son J2 – DOB September 15, 1990, who did not testify.

[4] In June 1997, WL and DL moved in together with her children. They lived in a small house in Great Village, where their own son J3 was born (DOB May 28, 1998, and who did testify). They lived there until October/November 1998 when they moved to Bass River for approximately six months. They returned to the small house in Great Village, sometime between February and May 1999, where they lived until WL and DL (and all the children) separated in October 1999, until they resumed living together at a trailer in North River/Highway 311, in the late spring of 2002.

[5] LM alleges sexual touchings by her stepfather WL while they lived together, in Great Village, at the trailer in North River/Highway 311, and at their next residence at Pictou Road, Truro where the evidence suggests they moved in the Summer/Fall of 2003.[2]

[2] The time-period in the indictment alleges the offences occurred no later than December 31, 2000. At that time LM was almost 15 years old. The Crown did not seek to amend the allegation to extend the time-period, though it had successfully requested the court to amend the beginning of the time-period from a start date of January 1, 1997 to a start date of January 1, 1995. While the Defence did not object to the evidence being called in relation to LM's testimony that WL kissed her by placing his tongue in her mouth two times in the kitchen at the North River/311 Highway residence (where they started living in late spring 2002) and several times at the Pictou Road residence (where they started living in late summer 2003), and in spite of jurisprudence such as in *R v Bowden*, 2016 NSCA

[6] The witnesses for the Crown were limited to LM and her mother DL. The witnesses for the Defence were limited to WL and his son J3, who lives with him.

[7] In his testimony WL denied that any of the touchings alleged by LM happened at all.

The basic allegations by LM

[8] In summary, LM testified that WL did the following things to her between January 1, 1995 and December 31, 2000 (i.e. while she was between 9 and almost 14 years of age):

1. "the car incident" – (se p.33 Transcript) while they were still living at Parrsboro, she came to be at WL's mother's house in Wentworth Nova Scotia, across from a hotel on the highway. WL took her for a short drive to a store approximately five minutes away. He asked her if she wanted to drive the car, and she agreed. He let her sit on his lap while he operated the gas and brake pedals. While driving in that fashion with her holding the steering wheel he put his right hand into her pants and underwear and placed a single finger into her vagina

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17 (which is distinguishable). I conclude that it is appropriate for me to a disregard entirely that evidence, and will not consider it in relation to the allegations made by LM regarding incidents before December 31, 2000.

where he “wiggled it” for not very long – she estimated less than a minute. His left hand was resting on her left leg and no one else was in the car. She said it ended when she turned around to see him, but he said nothing, yet smiled, laughed and raised his eyebrows (see page 35 transcript; in contrast to WL’s testimony at pages 222 –223). She recalled that there was no snow about and it was very sunny, so although she doesn’t exactly know when it would happened her best estimate was that it was in the fall of 1995 or 1996 because it was before they initially moved in together as a family to the Great Village home. She also based her estimate on her recollection that she had not yet taken the sex-education course, which she believed she had taken in the Spring of her Grade 5 year-which the evidence suggests likely was in the Spring of 1997 since she was anticipated to graduate from Grade 12 in June 2004. I accept that LM is correct when she says that she would’ve graduated in June 2004, but for her failing grade 11, and consequently graduated in June 2005 instead. In June 2004 she would’ve been 18 years of age. She would therefore have been in Grade 5 in September 1996 and graduated in June 1997. In September 1996 she would’ve been 10 years old, and on February 1, 1997 she

turned 11 years of age. Moreover, they moved in together as a family at Great Village in June 1997;[3]

2. the "sharing" incidents – she testified that these incidents happened only at the Great Village home and more than 10 times and less than 50 times, mostly while she was 10 to 11 years old and less so as she was 12 years old (i.e. February 1, 1996 – January 31 , 1999). She said that after the first occasion, WL gave these incidents the name,

[3] Although she was not asked what she understood to be the months that constitute "Spring" – customarily it is considered to be from approximately March 20 to June 20 of any given year. WL testified that he never had LM sit on his lap in the car or that he touched her inappropriately. He admitted that he had twice let LM "drive" his Oldsmobile Cutlass, by having her sit beside him in the middle seat using a lap seatbelt and holding onto the steering wheel while he kept his feet on the gas and brake pedals-see his direct examination at pages 220 – 223 of the transcript, which, although I recognize that the recorded testimony itself is the best evidence, I ordered created for my review prior to rendering a decision, dated March 12, 2020 and signed by Lynn Sorensen registration number 2017 – 003. Therein, WL says firstly, he was bringing LM back from the dentist in Pugwash when this happened around the Folly Mountain area before the highway was twinned (which he says was completed shortly after they moved to Great Village in June 1997). DL agreed in her testimony that WL had driven LM to the dentist in Pugwash at some point in time, but did not recall precisely when that was. LM testified she never travelled to the dentist with WL, although she had regular annual checkups with her Pugwash dentist even after they moved to Great Village (she did testify that DL always drove her, and elaborated that: ["Q. Is it possible that [WL] let you drive on the way back from the dentist…sat beside him…? A. I'm gonna say no, not possible, because again, I don't remember…him ever going to the dentist.." at p.104(4)- (20)). Exceptionally, she also visited her dentist for monthly adjustments of her braces when she was in Grade 6-Sept 1997 – June 1998 - see her cross-examination testimony in the transcript at pages 102 – 104; in redirect at pages 175-177. I bear in mind that LM had a somewhat dysfunctional upbringing and that she was relatively young, as well as that during the relevant times there were multiple residence changes, including that at that time she and her brother J2 would often spend weekends with their father – which both DL and WL agreed with - see page 214 transcript. In spite of LM's difficulty at times with confidently identifying specific dates when events happened in the years 1995 - 2000 (eg. she acknowledged that she had forgotten that they moved back to Great Village after being in Bass River – page 124 transcript) I nevertheless found this did not significantly detract from her testimony regarding the reliability of her ability to recall the alleged inappropriate interactions between WL and her. WL referred to a second incident where he let LM "drive" his car in a similar fashion to the first incident, when they (WL, LM and J2) were going to the hospital to visit J3 and DL, after the birth of J3 – see pages 220 – 223. This must have been in late May or early June 1998. I bear in mind that this scenario of a second time when LM was "driving" WL's car was put directly to LM in cross-examination, however she testified: "we weren't allowed to go to the hospital. Like the plan was when J3 was born, I was going to be allowed in the room and then last-minute mom changed her mind and I wasn't allowed to go. So I don't remember even going to the hospital to see J3." -see pages 104-105.

"sharing" – e.g.: "come share with me". She says they all took place on the couch in the Great Village home while they were watching TV. Their frequency varied with his opportunity to do so, which she stated was "as often as we were alone together… There were stretches that it was not that frequent". He would always first kiss her by putting his tongue in her mouth, and then grind his pelvis area against her pelvis area (which has been colloquially referred to as "dry humping") for some time, which always seemed to end with: "his breathing would change and he would always go into the bathroom". LM testified that these incidents usually took place after school and before her mother was in the household from work, and sometimes they happened after supper when her mom was not present;[4]

[4] As to the frequency of such incidents at Great Village, see LM's testimony at transcript pages 43(3), 47(3), 52(5)-53(8) in direct examination and in cross-examination at pages 144(4) and 144(20)-145(6). In summary, LM's evidence is to the effect that her estimate of the total numbers of these "sharing" incidents is between 10 and 50 times (p. 47(20) transcript), and that they would happen any time WL had the opportunity to be sufficiently alone with her. In direct examination she was asked: "How frequently were you home alone with [WL] at that time? Answer: I think it varied, maybe, once a week, once every two weeks, something like that."… And "as often as we were alone together, *if* that was once a week, or biweekly, or [her answer was cut off by counsel's next question]." In cross-examination it was suggested to her "it happened once a week or one or two times a week frequency?" Answer: "I think I said once a week or once every two weeks." Question… And that happened for the duration of the time that you lived with [WL] at the Great Village residence?" Answer: "Yes". In summary, I am satisfied that she was saying it happened as described by LM; such that they were sufficiently alone and unable to be seen on the couch in the living room at Great Village, and that in total this happened between 10 and 50 times over the period that they lived at Great Village. I did not understand her answer that the frequency " varied, maybe, once a week, once every two weeks, something like that" was the case for every month of the time they resided a Great Village, but rather to explain that sometimes the opportunity presented itself more often during a particular month.

3. the tongue-in-mouth kissing incidents (these are incidents in which there was no associated "sharing" activity, and LM acknowledged sometimes other people were in the house, but not in the specific room in question)-LM estimated these incidents happened:[5]

    a. at the family home in Great Village, twice in the kitchen (i.e. June 1997 – October 1999 based on the dates they lived together as a family there, as testified to by WL and DL)

    b. at the family home at North River/311 Highway, twice in the kitchen (i.e. late Spring 2002 – summer 2003)

    c. at the family home at Pictou Road, Valley, NS-once in each of the dining room, living room, and once to twice in the kitchen (i.e. summer 2003 – summer 2005).[6]

W*hen did the parties live in Great Village, North River and Pictou Road?*

[5] I bear in mind that the allegations are of a sexual assault contrary to section 271 and "for a sexual purpose touch LM a person under the age of 14 years directly with the part of his body, to wit his hands and body contrary to section 151" *CC*. Two observations: LM turned 14 on February 1, 2000, thus the section 151 offence cannot in law have happened after that date; it is arguable that the tongue in mouth kissing is not necessarily a "sexual" assault – that is, one consisting of an intentional touching, without consent, that violates the sexual integrity of the complainant. In this respect I note that when an accused who pled guilty to sexual assault for such an offence in relation to a 14-year-old girl, and appealed his sentence, the court did not comment on whether the "sexual" element of the offence had been proven – *R v WMD*, [1992] NSJ No.161 (CA). I conclude that in the circumstances of this case, they constitute "sexual assaults".

[6] As noted earlier, I am disregarding the evidence of the offences alleged outside the time period of the indictment: January 1, 1995 – December 31, 2000.

[9] Given that LM has referenced incidents occurring at the Great Village home, the mini-trailer at North River/ 311 Highway and house at Pictou Rd., I believe it contextually helpful to try to determine during which years LM and WL were present together in those various residences.

[10] I conclude that there are some reliable touchstone dates as follow.

[11] LM was born February 1, 1986. J2 was born September 15, 1990. DL said that she was pregnant with J3 when WL and she got married. J3 was born May 28, 1998.

[12] WL testified that he met DL at the Bass River dance in the Fall of 1996, (DL testified that it was March 1997) while he was living in the Wentworth area at his grandparents' home. He says he worked for Jim Tanner for approximately two years and was still working for him when they moved into the Great Village house for the first time (June 1997). He claimed to have started working with Leland McNutt in the Spring of 1998. He testified that from June 1997 to October 1999 he was living with DL and the kids.

[13] Both DL and WL agreed that they moved into the Great Village home for the first time in June 1997. They also both agree that they got married in November 1997, and that J3 was born while they were living there (May 28, 1998).

[14] WL and DL agree that in either October or November 1998 they moved to Bass River, but stayed only for a short time (about 6 months) and that by approximately February – April 1999 they had moved back to the same house at Great Village.

[15] The evidence of WL and DL places their date of separation thereafter in October 1999, when DL and the children went to the transition house in Bible Hill. After less than a week there, only DL and the children then moved back to the house at Great Village.

[16] WL says that he lived in the Salmon River Road trailer court between November 1999 and November 2000, and then moved to the mini-trailer at North River/311 Highway around November 2000.

[17] DL was certain her LPN diploma was issued in December 2001. She testified that it was a 15-month program – therefore it started in September 2000; and that she and WL were separated during that time;[7]

[18] Both DL and WL agreed that they were separated between 2 to 2 ½ years (October 1999 – Spring 2002) while she took the LPN diploma course, although

[7] Generally speaking I found DL's evidence regarding specific dates was not always independently verifiable, however I find she was accurate insofar as these dates are concerned.

during that time, WL had sometimes helped her with childcare. Feeling that he had changed, after the completion of her LPN program, DL considered moving in with him again. She says she did so around the time school ended for the summer in 2002. They (DL, LM, J2 and J3) then moved into his mini- trailer at North River/Highway 311. DL recalled that LM, J2, and J3 were living there on May 28, 2002, because she distinctly remembers they were there when her father died, because that was on J3's fourth birthday – May 28, 2002.

[19] Both DL and WL agree that (in the summer, and before the winter respectively) they bought the house at Pictou Rd. in 2003.

[20] Further confirmed contextually relevant chronology includes that:

1. LM graduated from high school in June 2005 and was living at the Pictou Rd. house at the time;
2. LM and her partner C. moved to Moncton New Brunswick between 2005 and 2007- and returned and moved into their Londonderry, NS. house in the Spring of 2010;
3. LM's daughter was born March 25, 2012, and her christening was three months thereafter;

4. While continuously living with WL, J3 had a very serious motor vehicle accident rendering him paraplegic on December 21, 2017;

5. About 3 months after LM's daughter's birthdate (March 2012), namely June 2012, LM told her mother for the first time that WL had molested her. This matter did not come to the attention of the police until the early part of 2018, (as a result of disconcerting information received by DL from another source which prompted her to approach LM as to whether she would agree to speaking to the police if they contacted her about what WL had done to her). LM agreed, and the police called her, and shortly thereafter, on April 5, 2018, she provided a statement to police accusing WL of committing the offences that formed the core of the allegations before the court.

The position of the Crown

[21] Mr. Kayter for the Crown argues that:

1. LM's testimony is honestly given and may be relied upon in relation to the core allegations made. The court must bear in mind that LM is reporting these incidents to the court after only having disclosed them to her own mother first in 2012 (when she was 26 years old),

thereafter having given a police statement in 2018. In assessing her credibility (honesty and reliability), one must keep in mind that as a 34-year-old adult she is recounting matters that happened when she was between 10 and 14 years of age (*R v RW*, [1992] 2 SCR 122). Nevertheless she does recall details such as that: the vehicle was a brown Oldsmobile Cutlass; it was very sunny that day, (no snow present); she was alone in the car with WL on a trip to a store just five minutes from his grandparents house in Wentworth, Nova Scotia, across the street from a motel, and she and her family were there together that day – and it was before she had taken the sexual education course in the Spring of Grade 5; while in relation to the house at Great Village, she distinctly remembered and accurately described consistent with her mother's testimony, (the "slightly bumpy weave") fabric of the couch as being brown in colour with woven material that was somewhat rough in nature, and that those instances usually started with WL kissing her tongue in mouth, him "dry humping" her groin area, ending with a change in his breathing, and then WL always went to the bathroom, and usually had a shower.

2. The time that the offences occurred is not an essential element of the offences or crucial to the defence: *R v GB*, [1990] 2 SCR 30, (and more recently elaborated upon in *R v Bowden*, 2016 NSCA 17);

3. LM alleged between 10 and 50 incidents of "sharing", and that they only occurred at Great Village; the separate instances of tongue in mouth kissing incidents as occurring twice at Great Village, twice at North River/311 Highway and less than four times at the Pictou Road residence. In the circumstances, the Defence position that WL could not have had that number of opportunities to commit these offences without being detected should not carry much weight. In relation to the sharing incidents, WL's claim that he was "never" alone with LM in the house, or that he could not have committed these offences if either of DL or J2 was present in the home must take into account that there was testimony by DL and LM, and even to some extent by WL, that DL was employed or volunteering or visited for social purposes outside the home during the time they lived at Great Village, and that even if J2 were present, (e.g. after school and before DL returned home) he would have been between six and nine years of age and was by all accounts very withdrawn, diagnosed with Asperger's

syndrome and preferred to spend his time in his room with video games. Moreover, WL's claim that he was effectively employed 100% of the time full-time during the relevant time in Great Village in particular is not credible;

4. LM's testimony was given in a straightforward manner, and does not suggest any *animus* by her as against WL – she did not instigate the complaint to the police and conceded matters appropriately when brought to her attention. She was not shown to be materially inconsistent as between her police statement, preliminary inquiry testimony (transcript), and her evidence was internally consistent, as well as consistent with other reliable evidence on material matters;
5. LM had no motive to fabricate her allegations against WL;
6. The fact that LM acknowledged WL had been generous to her, that she accepted his generosity yet did not disclose these matters until 2012/2013 when she first told her mother (although she had opportunities to do so when they went to the transition house in 1999, and during the period of separation between DL and WL October 1999 – late Spring 2002 when she was already 16 years of age, and thereafter) are effectively neutral facts in relation to assessing her

credibility as no particular conclusion can be drawn from these facts in the circumstances of this case.

The position of the Defence

[22] Through his very thorough submissions, , and in particular, Mr. Mahoney drew the court's attention to the following:

1. In relation to the three step analysis suggested by the Supreme Court of Canada in *R v DW*, [1991] 1 SCR 742, WL suggests that his evidence is believable;[8] that even if his evidence is not believed, the Defence evidence raises a reasonable doubt about his guilt; and even if this suggestion is rejected, on the whole of the evidence there is at least a reasonable doubt about his guilt;
2. WL's evidence is reliable; DL's evidence is not reliable; and LM's evidence is not reliable, and not internally consistent, nor consistent with the other evidence presented by the Crown, in particular DL's evidence;
3. In relation to the Crown's evidence, WL notes:

[8] i.e. honest and reliable- see *R v Perrone*, 2015 SCC 8.

a. There was very little opportunity for these incidents to haven take place as frequently and when LM alleged (the sharing incidents only happened at the Great Village house-they only lived there between June 1997 and October/November 1998,and from February – April 1999 to October 1999; WL was steadily employed throughout those times, working long hours; DL was only minimally required to attend outside the household for employment reasons before the birth of J3, and stayed at home for a considerable time after J3 was born (DOB May 1998); given their ages, if WL was at home with LM while DL was gone, J3 most likely was also home and so WL and LM were not "alone"; LM and J2 were frequently in the custody of their father on the weekends during this time (see LM at page 106(20) and WL at page 214(3)/DL testified that LM and J2 had many weekend access visits with their father);[9]

[9] WL adamantly testified that: "Occasionally I would look after LM and J2… Question: Is it possible that you were alone in the home with LM while J2 was physically in the home but not present? Like for example, you and LM watching TV on the couch, J2 upstairs playing video games, did that ever occur? Answer: Yes. Question: And were there any occasions, ever, ever that you and LM were alone anywhere, anytime, at these three locations [Great Village June 1997 – October/November 1998; and Bass River October/November 1998 to February – April 1999, and Great Village February – April 1999 to October 1999]? Answer: No. Question: Ever? Answer: Ever." (pages 261-263); and WL testified that he was completely unaware of these allegations until he was arrested in the Spring of 2018.

b. The home was near a public highway, and a not-too-distant neighbour, with two separate windows providing visual access to the living room couch area where LM says the offences occurred, making it particularly risky for WL, and therefore unlikely that he would have committed these acts in those circumstances;

c. LM's evidence was inconsistent in that she claimed the sharing incidents happened usually after school and before her mother got home from work, *a total of 10 to 50 times*, yet also testified that they happened *once weekly or once every two weeks*, and that they happened "every time we were alone";

d. In relation to the "sharing" incidents, during which LM suggested that WL was grinding his penis into the area of her groin for some period of time, and after which he always went to the bathroom and usually had a shower – suggestive of

sexual gratification – however not once did she mention that she noticed him to have had an erection;[10]

e. WL's counsel suggested that LM had at no time prior (i.e. neither in her police statement or Preliminary Inquiry testimony) to her testimony at trial referenced WL always going to the bathroom and usually having a shower after the sharing incidents;[11]

f. WL's counsel argued that LM's reference to the always going to the bathroom and usually having a shower is much more likely an observation made by an adult, and therefore unlikely that LM would have remembered that from her time as a child;

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[10] I observe here however that she was not once asked a question at trial that would have called out for an answer that referred to WL having an erection or not at these times.

[11] LM's answer to this was: "I don't remember if I said that or not, I don't know… [In relation to her police statement] okay if you're telling me that I didn't, then I believe you, I believe that's true, but I don't remember the statement. Like there was a lot to it; it was an hour long. So there are things that stuck out in my mind, that's not one of them. So if you're telling me that it I didn't say it, then yes I believe you." Question: "Well as you sit here… Do you recall saying that in your statement? Answer: "No, I don't remember saying that in my statement…" Question: "During the preliminary inquiry would you agree with me that you never once, anywhere in the preliminary inquiry, said that after the sharing activity your father went immediately went to the bathroom and had a shower or a bath or shower or anything?…: Answer:" I don't remember being asked about that at the preliminary trial, so no, I don't remember testifying to that… I don't know, I don't remember if I said it or not… " Question: "Do you want an opportunity to review your evidence from the Preliminary Inquiry?" Answer: "I believe you if you're telling me that I hadn't said it like, it's written down; I'm not going to argue with you that I did or did not say it. I'm saying I don't remember saying it. So if you're saying it's not on the record than yes, it's… I didn't say it…" Question: "So, the first time you said that is in court here yesterday? " Answer: "Yes…" Question: "Is that true, that [WL] would go and have a shower or is it something that you just kind of thinking up now?" Answer: "No, that's the truth. I'm actually surprised that I haven't said it before."- at pages 166 – 170 transcript.

g. In relation to when the "car incident" happened, LM testified: "I think that my best guess when I try to remember and put together things that make sense and things that don't make sense, my best guess is that this is *Fall of 1995* but I am not certain… So, the reason I think that, is because I do believe this was before we had moved in together and like, in Great Village… and I do know at the time, *I had not taken Sex Ed in school, and I know that happened in the spring of '96, like Grade 5"* (pp.36-37); she believed that it was before they had moved to the house at Great Village which she believed was "in 1996, but I'm not positive if that's true or not… I'm not positive what year it was. *I think it would've been 1995 or 1996*" (see page 32(12-20) transcript); and more precisely "summer or fall" (page36(8); she believed it was in the Fall of 1995, because she had not yet taken the sexual education course which she believed she took in Grade 5 in the Spring of 1996 (page 97(12)- however this is not possible because the testimony of both WL and DL on this point, which I accept,

suggest that the earliest they could have met was in the Fall of 1996;[12]

h. WL testified that he could not have had LM sitting on his lap while he was behind the steering wheel operating the pedals, because he could not have reached the pedals with her in that position, and his counsel suggests that this is a reasonable assertion on his part;[13]

i. WL argues that it is hard to accept LM's evidence insofar as she alleges that there were *three* incidents of tongue in mouth kissing at the Pictou Road residence (I conclude that they moved there in the Summer/Fall 2003), at that time LM

[12] I noticed that LM strove to be precise in giving accurate answers in my opinion, and frequently before answering such questions, relied on making a careful consideration of how old she was and in which grades she would've been, when asked such questions, going so far as to resort on one occasion to actually taking a pen and writing down a chronology of her age over the years from her birth to approximately the year 2000 (page 39(19)).What is clear is that she is certain it happened before they moved to Great Village, and before she had the Sex Education course. She stated that she believed they moved into the house at Great Village in 1996. I conclude that she was mistaken about this – they moved into that house in June 1997. Even based on her own chronology which I accept as reliable (that she should have graduated from Grade 12 in June 2004, but for failing grade 11), she would've been in Grade 5 from September 1996 until June 1997. Thus, her reference to the Fall of 1995 is merely a mistaken extrapolation by her. I conclude that the evidence I accept suggests that, if it happened, the "car incident" happened in the Fall of 1996 or the Spring of 1997 *before* she took the Sexual Education course in Grade 5.

[13] No photographic or other evidence of the measurements of the front seat interior of a 1985 Oldsmobile Cutlass Supreme (page 274(9)) were presented to the court.

would've been 17 years old, and well able to rebuff or report such transgressions by WL.[14]

Understanding the relationship between credibility and proof beyond a reasonable doubt of the essential elements of criminal offences[15]

[23] Jurisprudence recognizes that there is a difference between credibility and reliability. In *R. v. Morrissey* (1995), 22 O.R. (3d) 514 (C.A.), Doherty J.A. wrote (at p. 526):

> Testimonial evidence can raise veracity and accuracy concerns. The former relate to the witness's sincerity, that is, his or her willingness to speak the truth as the witness believes it to be. The latter concerns relate to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves considerations of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony. Obviously a witness whose evidence on a point is not credible cannot give reliable evidence on that point. The evidence of a credible, that is, honest witness, may, however, still be unreliable. …

[24] In *R. v. H.C.*, 2009 ONCA 56, 244 O.A.C. 288, Watt J.A. described the difference between credibility and reliability (at para. 41):

> Credibility and reliability are different. Credibility has to do with a witness's veracity, reliability with the accuracy of the witness's testimony. Accuracy engages consideration of the witness's ability to accurately

[14] I observe that LM also testified that in 2003 she took an apartment in Truro with friends, indicating some self-sufficiency consistent also with her testimony that she had worked full time since she was 14 years old.

[15] I should point out that, when many jurists (myself included) and lawyers refer to a witness's "credibility", they intend to be understood as referring to the witness's honesty/truthfulness *and* the reliability of their testimony. Strictly speaking, a witness's "credibility" is only a reference to their veracity or honesty/truthfulness.

(i)observe;

(ii)recall; and

(iii)recount

events in issue. Any witness whose evidence on an issue is not credible cannot give reliable evidence on the same point. Credibility, on the other hand, is not a proxy for reliability: a credible witness may give unreliable evidence: *R. v. Morrissey (R.J.)* (1995), 80 O.A.C. 161; 22 O.R. (3d) 514 (C.A.), at 526 [O.R.].

[25] With those distinctions in mind, let me then turn to the jurisprudential evolution of this issue.

[26] In *R v DW*, [1991] 1 SCR 742, the Supreme Court of Canada proposed a three-step analysis for juries when considering credibility of the witnesses and whether the Crown had proved the essential elements of a offence.

[27] Many appeal courts have since commented on the confusion for triers of fact generated by the Supreme Court's attempted simplification referenced as the 3 step *DW instruction*.[16]

[16] E.g. see the reasons in *R v EMW*, 2011 SCC 31 affirming the dissenting reasons of Fichaud, JA which upheld the reasons for conviction, and articulation and assessment of the *DW instruction* by Campbell PCJ (as he then was) in a "he said – she said" father/daughter sexual assault case (see paras. 107-114 per Fichaud, JA). This may be most recently be seen in the reasons given by the Alberta Court of Appeal recently, which are perhaps the most ambitious judicial experiment to better rationalize the so-called *DW instruction*: *R v Ryon*, 2019 ABCA 36; *R v Achuil*, 2019 ABCA 299-see also *R v HC*, 2018 ONCA 779 and *R v Matthews*, [2019] NJ No. 39. For what may be the most recent word from the Supreme Court of Canada, see the court's brief reasons in *R v MRH*, 2019 SCC 46 allowing an appeal "substantially for the reasons of Mr. Justice Savage" (he neatly summarizes the trial judge's instruction on this issue at para. 30) and reinstating a conviction.

[28] However, in my opinion, the most insightful and comprehensive consideration thereof is contained in an academically impressive and principles based article written by Justice David Paciocco, of the Ontario Court of Appeal – "Doubt about Doubt: Coping with R v W (D.) and Credibility Assessment", 22 Can. Crim. L. Rev. 31 (2017) Thomson Reuters Canada Limited.

[29] In considering credibility in the case at Bar, I have carefully considered and applied the relevant jurisprudence as well as Justice Paciocco's observations, the underlying principles he references, suggested "propositions", and his "credibility checklist".

[30] I will quote directly from the article rather than attempt to summarize it:

> "What, then, are the underlying principles that drive *W. (D.)* reasoning? Framed as they apply in criminal trials where there is evidence inconsistent with guilt, they are:
>
> (1) Criminal trials cannot properly be resolved by deciding which conflicting version of events is preferred;
>
> (2) A criminal fact-finder that believes evidence that is inconsistent with the guilt of the accused cannot convict the accused;
>
> (3) Even if a criminal fact-finder does not entirely believe evidence inconsistent with guilt, if the fact-finder is left unsure whether that evidence is true there is a reasonable doubt and an acquittal must follow;
>
> (4) Even where the fact-finder entirely disbelieves evidence inconsistent with guilt, the mere rejection of that evidence does not prove guilt; and
>
> (5) Even where the fact-finder entirely disbelieves evidence inconsistent with guilt, the accused should not be convicted unless the evidence that is given credit proves the accused guilty beyond a reasonable doubt.

…

(b) The Reach of the *"W. (D.)* Framework"

Despite popular belief, the *W. (D.)* framework is not confined to "he said/she said" cases, or to sexual offence cases where the accused person testifies, such as *R. v. W. (D.)*. The facts of the case do not drive the framework. Instead, the underlying purpose of preventing conviction in the face of reasonable doubt does.

The link between the *W. (D.)* framework and the concept of reasonable doubt can best be demonstrated by considering a civil case, *C. (R.) v. McDougall*.[17] There the civil defendant sought to rely on *W. (D.)*'s underlying principles. The Supreme Court of Canada held that they do not apply, and with good reason, to the standard of proof in a civil case, which is "the balance of probabilities." Consequentially, balance of probability inquiries can legitimately devolve into credibility contests. In a civil lawsuit, for example, the plaintiff will win if it offers testimony addressing the components of the relevant cause of action, and that testimony is preferred to conflicting testimony offered by the defendant.
…

*37 For this reason, the *W. (D.)* framework does not apply in criminal cases where the Crown bears a "balance of probabilities" burden, such as in criminal forfeiture order applications under s. 16 of the *Controlled Drugs and Substances Act*, or in mental disorder fitness hearings.
Similarly, the *W. (D.)* framework does not apply where "reasonable grounds" standards are used, such as in firearms prohibition applications under *Criminal Code* s. 111, or during contested "peace bond" hearings either at common law[18]or under *Criminal Code* s. 810 and its associated provisions.
Simply put, if the standard of proof assigned to the Crown is not proof beyond a reasonable doubt, the *W. (D.)* framework does not apply. If the standard of proof is beyond a reasonable doubt, the *W. (D.)* framework may apply, depending upon the nature of the factual issues at stake.

In an informative extra-judicial paper Justice M. Code offered judges this advice on the nature of the factual issues that trigger the framework:

"[T]he *W. (D.)* instruction should be introduced into your reasons, and into the charge to the jury, when dealing with elements of the offences charged and the elements of any defences raised by the evidence, assuming there is conflicting evidence in relation to those elements, thus giving rise to issues of credibility."[19]

When Justice Code used the term "credibility" he did what all jurists do when it comes to *W. (D.)*. He spoke of "credibility" not in its narrow, technical sense, as relating solely to whether the witness was attempting to be honest or truthful.[20] He used the term

"credibility" more generically as including "reliability" concerns relating to the ability of an honest witness to provide accurate information.

Simply put, when references are made in the *W. (D.)* framework to "credibility," they must be understood as including both the credibility and reliability of the evidence in question. The case of *R. v. L. (T.)*[21] is illustrative. There, witnesses offered descriptions of the suspect that were inconsistent with the accused being the perpetrator. The Crown did not contend that these witnesses were being dishonest when describing the suspect. Its position was that other evidence in the case showed the witnesses to have honestly been mistaken. Even though technically the contest was about reliability and not credibility, the Ontario Court of Appeal held that the *W. (D)* framework should nonetheless have been applied to determine whether this identification raised a reasonable doubt about the guilt of the accused.[22] References to "credibility" in the *W. (D.)* framework include "reliability."

*38 The meaning of the term "conflicting evidence" referred to by Justice Code also has to be understood. First, this phrase is not confined to situations where two witnesses offer competing accounts. Suppose, for example, that the Crown case on the issue of identity is entirely circumstantial, as it would be where DNA or fingerprints are relied upon to link the accused to the offence. If the accused testified and denied committing the crime, the *W. (D.)* framework would have to be applied, even though no Crown witness said that the accused did so.

By the same token, as Justice Code's formula makes clear, not all conflicting evidence triggers the need for the *W. (D.)* framework. In the language of Justice Blair in *R. v. D. (B.)*, the *W. (D.)* framework applies not to "any single fact or item of evidence", but rather to "vital" issues,[23] what Justice Code describes as the "elements of the offence," or the "elements of a defence."

…. As the Supreme Court of Canada made clear in *R. v. Morin*,[24] the standard of proof, "beyond a reasonable doubt," does not apply to "individual pieces of evidence." It applies to the overall "determination of ultimate issues."[25]

As indicated, Justice Code captured this basic point by referring in his proposition to conflicting evidence relating to the "elements of the offences charged and the elements of any defences raised by the evidence." This is helpful, since these are the things that the burden of proof "beyond a reasonable doubt" generally applies to during a criminal prosecution. The Crown must always prove the elements of the offence beyond a reasonable doubt, and where an ordinary defence--such as self-defence, necessity, duress, provocation, or mistake of fact-- is in issue, the Crown must disprove that defence beyond a reasonable doubt.

Not all defences operate this way, however. There are three "reverse onus defences" known to law--"mental disorder,"[26] "automatism,"[27] and "extreme *39 intoxication."[28] As the name "reverse onus defences" suggests, when these defences are put in play the Crown need not disprove them beyond a reasonable doubt, as it ordinarily must when there is an

air of reality in the evidence that a defence might apply. Instead, the burden is on the accused to establish "reverse onus defences" on the balance of probabilities, or the defence fails. The *W. (D.)* framework therefore has no application when deciding whether reverse onus defences have been made out. The suggestion that the *W. (D.)* framework applies to "any defence" that is in issue should therefore be approached with caution. The framework applies to most defences--"ordinary defences"--but not to "reverse onus defences."

Speaking generally then, there will be "conflicting evidence" giving rise to the application of the *W. (D.)* framework where testimony is offered during the guilt phase of the trial that, if believed, can raise a reasonable doubt on a matter the Crown is required to prove beyond a reasonable doubt to secure a conviction. As indicated, the framework will apply where this is so, even if testimony from the accused is not the source of the evidence inconsistent with guilt."

Next, are the propositions that Justice Paciocco puts forward:

"**Proposition 1**: The *W. (D.)* framework applies in determining guilt during criminal trials where:

• there is evidence (whether from the testimony of the accused, or defence witnesses, or arising from the Crown case) that, if true, is capable of preventing the Crown from proving beyond a reasonable doubt, (1) an element of the offence, or (2) capable of preventing the Crown from disproving beyond a reasonable doubt an element of a defence that is in play (other than mental disorder, automatism or extreme intoxication);and

• that evidence must be evaluated for its credibility and/or reliability before it can be acted upon.

Proposition 2--A criminal trial is not a "credibility contest." It is a trial to determine whether the Crown has proved the guilt of the accused on the specific charges alleged, beyond a reasonable doubt. It is therefore wrong to decide criminal cases where there is conflicting evidence about whether the accused is guilty, simply by deciding which version of events is preferred. The decisive question is whether, considering the evidence as a whole, the Crown has proved the guilt of the accused on the specific charges alleged, beyond a reasonable doubt.

Proposition 3--In deciding whether the Crown has proved the accused to be guilty beyond a reasonable doubt:

(a) If you accept as accurate evidence that cannot co-exist with a finding that the accused is guilty, obviously you must acquit;

(b) If you are left unsure whether evidence that cannot co-exist with a finding that the accused is guilty is accurate, then you have not rejected it entirely and you must acquit;

(c) You should not treat mere disbelief of evidence that has been offered by the accused to show his innocence as proof of the guilt of the accused; and

(d) Even where evidence inconsistent with the guilt of the accused is rejected in its entirety, the accused should not be convicted unless the evidence that is given credit proves the accused to be guilty beyond a reasonable doubt.

Proposition 4--In deciding whether the Crown has proved the accused to be guilty beyond a reasonable doubt the evidence must be considered as a whole. It is therefore possible to reject entirely evidence that is inconsistent with the guilt of the accused and convict solely because of the considered and reasoned acceptance beyond a reasonable doubt of evidence that the accused is guilty.

Proposition 5--As a matter of best practices in a judge alone trial where there is conflicting evidence about guilt that has to be evaluated for its credibility:

(a) it is prudent to make explicit reference to the *W. (D.)* principles when giving judgment;

(b) trial judges may assess the evidence in the order that logically commends itself, so long as they do not arrive at an ultimate conclusion about the guilt of the accused before considering the evidence in its entirety, and so *73 long as it is clear that they are not simply comparing conflicting evidence to find the version they prefer; and

(c) trial judges should explain how and why they have resolved each of the *W. (D.)* rules by addressing each of the important, live credibility issues that arose in the case.

Proposition 6--The principles underlying the *W. (D.)* framework, expressed to fit the relevant context, must be respected whenever there is testimony before a court that is inconsistent with an effort by the Crown to discharge a burden it carries to prove a fact beyond a reasonable doubt, including in voluntariness voir dires, during sentencing hearings where aggravated factors relied upon by the Crown are contested, or where the Crown seeks to rely on a single item of evidence that, if accepted, would be determinative of guilt."

[31] This is also an opportune moment to reiterate that, according to Justice Paciocco:

"it is common for jurists to believe… that if the exculpatory evidence, viewed alone, cannot be rejected in its entirety because of its own inherent credibility problems, an acquittal must follow. This is a misconception, no doubt provoked by the sequential presentation of the *W. (D.)* rules--"first," "second," "third." *In fact, evidence favourable to the accused is not to be assessed in isolation from the conflicting evidence offered by the Crown.*[56] *Even under W. (D.), the evidence in a criminal trial must be considered as a whole. As a result, it is permissible for a trial fact-finder to reject entirely the exculpatory evidence simply because of the imposing strength of the Crown case, even if no specific reasons can be articulated for why the accused's evidence is disbelieved.*

The decision in *R. v. D. (J.J.R.),*[57] once again a "he said/she said" case, is illustrative.[58] There, the trial judge explicitly recognized that "there was nothing in the substance of the appellant's evidence or in the manner in which he gave his evidence that would cause the trial judge to disbelieve the evidence."[59] A *48 conviction was nonetheless upheld because the trial judge "rejected totally the appellant's denial because stacked beside [the complainant's] evidence and the evidence concerning the diary,[60] the appellant's evidence, despite the absence of obvious flaws in it, did not leave the trial judge with a reasonable doubt." Justice Doherty went on to comment:

> "*An outright rejection of an accused's evidence based on a considered and reasoned acceptance beyond a reasonable doubt of the truth of the conflicting evidence is as much an explanation for the rejection of an accused's evidence as is a rejection based on a problem identified with the way the accused testified or the substance of the accused's evidence*."[61] [17]
>
> …
>
> *In my view, it is important to allay the misconception that an acquittal must follow if the defence evidence, viewed in isolation, cannot be disbelieved beyond a reasonable doubt. It is equally important, however, to emphasize the need for a demonstrably "considered and reasoned" basis for accepting the inculpatory evidence beyond a reasonable doubt before conviction is appropriate in such cases. I would therefore recommend the following proposition*:
>
> > Proposition 4--In deciding whether the Crown has proved the accused to be guilty beyond a reasonable doubt the evidence must be considered as a whole. It is therefore possible to reject entirely evidence that is inconsistent with the guilt of the accused solely because of the considered and reasoned acceptance beyond a reasonable doubt of evidence that the accused is guilty.

[17] See also *R v RA*, 2017 ONCA 714 at paras.34-35 and 52-6.

[My italicization added]

[32] When I address the specific credibility considerations in the case at Bar, *inter alia*, I will follow Justice Paciocco's so-called "credibility checklist", as I find it captures the material and salient considerations:

Appendix II--Credibility Checklist

[33] In determining whether to credit evidence, consider whether the evidence appears to be "credible" (honestly given) and "reliable" (not inaccurate because of honest error), including by considering:

Credibility

- Endemic Credibility Factors--Is there an evidentiary basis indicating that the witness may not be a trustworthy person, including:
    - admissible proof of a criminal record;
    - evidence of discreditable conduct; or
    - proof of a reputation for untrustworthiness that has not been rebutted?
- Situational Credibility Factors--Is there an evidentiary basis for finding that the witness does or does not have a motive to mislead?
- Demeanour--Does the way the witness testified support a safe and responsible inference that the witness may not be telling the truth?
- Evidentiary Content
    - Is the testimony of the witness plausible, or does it lack an air of reality?
    - Is there admissible evidence that materially supports or contradicts the testimony of the witness?

o Is the evidence "externally consistent" in the sense that it fits with other evidence in the case?

o Are there "internal inconsistencies" that, by their nature, could reasonably be attributed to dishonesty, including:

• Material inconsistencies on matters the witness would not be apt to forget, or on matters the witness could have a motivation to mislead about; or

• More peripheral inconsistencies which, by their nature and frequency might reasonably indicate an inability of the witness to remain consistent when presenting a false story *74

o Was the evidence presented in a "balanced" way (for example, through the admission of relevant unflattering or personally difficult facts; or a readiness to make appropriate concessions; or a readiness to respond to the questions asked) or was the evidence presented strategically (for example, by evading questions, or by attempting to anticipate where a line of questioning is going, or otherwise attempting unreasonably to control the narrative)

Reliability

• Ability to Observe

o Endemic Reliability Factors--How capable is the witness of making the relevant observation (given factors such as their eyesight, or hearing, or their emotional state or their well-being), and of understanding what they observed (given factors such as their maturity, or their level of experience or, for experts, their expertise)

o Conditions of Witness--Are there conditions in which the observations were made that could impede the ability to accurately observe (such as obstructions, distance, the speed of events, lighting, or distractions)?

o Is the thing observed apt to have grabbed the attention of the witness at the time?

o Are there external inconsistencies between the testimony and other evidence in the case that may reasonably be attributable to inaccurate observation or analysis of what has been observed

• Memory

o Are there endemic factors creating concern about the memory of the witness, including evidence of dementia, or credible indications of alcohol blackout?

o Are there factors arising from the manner of testifying creating concern about the accuracy of the witness's memory, including such things as:

• Credible acknowledgments by the witness of memory problems

• The passage of considerable time

• Demonstrated insecurity when providing details

• An inability to answer questions on matters that are apt to have been noticed at the time

o Are there internal inconsistencies that, by their nature, could reasonably be attributed to memory including:

• Inconsistencies on peripheral matters or points of detail, or

• Inconsistencies on matters about which the witness would have little reason to lie

o Are there external inconsistencies between the testimony and other evidence in the case that might reasonably be attributed to memory problems of the witness or is it confirmed in material ways by other dependable evidence, suggesting a dependable memory?

*75 • Communication

o Are there indications that the witness may not be communicating their observations accurately or completely, including:

• Poor vocabulary or careless or imprecise language, or
• Admissible opinions unsupported by material detail; or

• Implausible details that may rationally be attributed to inaccurate description

The credibility analysis as applied to the witnesses in the case at Bar

J3

[34] J3 is the son of WL and DL. He was born in May 1998. Bearing in mind the time of the offences (January 1, 1995 – December 31, 2000), he had no direct knowledge of the facts of the allegations *per se.*

[35] His testimony in direct examination was largely oriented toward supporting the position that LM and WL appeared to get along very well, that LM made no efforts to avoid WL, but in cross-examination he referenced LM as being under DL's control, and that LM would go along with these false allegations as she would "do anything for money".

[36] I observe however that the trial evidence generally left the court with the impression that the Defence was relying on as significant evidence the mere fact and timing of the allegations against WL in the spring of 2018, summarized as follows:

1. J3 had lived exclusively with WL, since 2010;[18]
2. WL and DL had had a serious falling out in relation to, and after, J3's December 21, 2017 single vehicle crash;

[18] LM testified that WL and DL broke up for the last time while she was living in Moncton, and thereafter her mother "started really drinking a lot" at pp.7 and 10(16) Transcript. She testified that she moved from Moncton back to Nova Scotia, and into her father's vacant home in Londonderry in February 2010. DL testified that she and WL broke up permanently in 2010.

3. WL and J3 testified that this falling out arose largely in part because they believed that DL was motivated to have care and control of the financial insurance payout that J3 anticipated in relation to his very serious injuries arising from his car crash;

4. That if WL was charged with the commission of the alleged offences against LM, this would either create a rift between WL and J3, or somehow otherwise make it possible for DL to assert that WL was not the best parent to care for J3, and that by default DL should assume that role;

5. That DL enlisted (perhaps without LM being aware of DL's true motivation) LM's help to advance her scheme to get her hands on J3's money for herself; and

6. That DL was able to convince LM to fabricate molestation allegations against WL, which LM then agreed to make known to the police, which resulted in the charges before the court.

[37] During his testimony, J3 made no secret of his intense dislike of his mother, DL – he saw the present proceedings as without merit and instigated by her. Not only did he surmise that, but he testified that she told him only months before his father's arrest that if responsibility for his affairs was not transferred to her

custody, there were going to be consequences, stating: "I'm sick and tired of working – I know you have insurance – I'm going to use you as a cash-cow".

[38] He was also upset with LM, his step-sister. He testified that WL had been very generous in providing for LM, for example, his time and money when he and J3 assisted LM and her husband by repairing the roof on their home in Londonderry[19] and otherwise assisted her financially. He noted that LM never gave any indication that WL had ever been inappropriate with her, nor did she ever show any inclination to avoid him ,but rather embraced him, telling J3 that WL was welcome at her home, including inviting WL over for supper (and asking J3 how WL was doing)- and going so far as to say to J3 that she wished that WL had

[19] Which I note must have been before her daughter's christening in the Spring of 2012 when LM insisted he thereafter stay away from the premises-which accusations WL confirms he became aware of: "Question:… *You've known about these – the suggestion or – you've heard for some time that [LM] was saying that you did these things to her correct? Answer: Yes.* Question: And in fact, it was as… perhaps as even previous, but *at least in and around the time of this baptism when you first caught wind that [LM] was saying these things correct? Answer: Yes… Question: But in and around 2012 at least, you were aware that she was saying you did these things to her when… she was a kid? Answer: Yes. Question: Surely that had an impact on your relationship with her? Answer: It had… I couldn't understand why she would say this stuff… like I heard accusations that she was saying this stuff, but I never really heard it on my own until after J3's accident and that I was arrested and told I was being charged… At the time of the baptism, when we left the baptism [June 2012], her first birthday for her daughter [March 2013], I did not go to that.* [DL] indicated here the other day that [LM] called her and said she didn't want me there, that was the first time I've heard of that. At the time, I was busy doing a roof job, so I did not go to the party…. [Shortly thereafter WL claimed that it was a shock to him that LM was making these allegations because he was unaware of them beforehand] … Question: … How can you have been surprised or it have been a revelation [at the time you were arrested] if you just finished telling me that you knew about them six years ago? Answer: Well, I misunderstood your question there. I didn't know about them six years ago. I didn't know about any of these accusations of sexual assault until the day I was arrested." In direct examination he was asked, "Question: Now since… [LM] had a daughter and you went to the christening? Answer: Yes. Question: Since then, have you had much contact with her? Answer: Not too much, no. Question: Have you initiated contact with her? Answer: No; Question: Do you recall any incident at the time of the christening? Answer: None, no" (p.246). In his testimony, J3 confirmed he had gone to the christening of LM's daughter and recalls that LM was annoyed with DL at some point; he could not stay very long as he had to be at the Armouries later that day. He agreed that there was not as much interaction between WL and LM since , but suggested this was because "everyone is busy".

been her biological father, around the time that he and his father helped repair the roof of her new house.

[39] While LM agreed that WL had been generous to her and her husband, she adamantly denied that she had made the latter comment.

[40] As will become evident later when I examine LM's credibility, where the testimony of J3 (who I conclude was not testifying impartially) and LM differ on material points, I reject his testimony and accept hers.

DL

[41] I can accept all, some, or none of it witnesses testimony as truthful and reliable. Although DL had some difficulty recalling specific dates, I do accept generally her testimony as reliable and truthful.[20] Where her evidence and that of WL differ about her presence in the household at Great Village during the times of the alleged offences, I find her evidence more reliable, *inter alia*, because she is more likely to have recalled accurately what she was doing during those times. WL had no reason before his arrest in the late spring of 2018 to harken back to those

[20] She noted in direct examination, that :she used to drink to excess likely between the years 2010 and 2015, but that she was now five years sober; she had had a stroke, but it had not affected her recall.

years (1996-2004) regarding the specifics of where and when he and DL were each day that they were living at Great Village in particular. Moreover, DL's presence or absence after school, or while she was at work or volunteering, were entirely routine matters of which it is unlikely he would have taken note.

[42] However, I do not accept her evidence that it was after DL inquired with LM about WL attending the first birthday celebration of LM's daughter in March 2013, that LM had first told her that WL had molested her, and did not want him attending. In that respect I prefer the evidence of LM over that of DL.[21]

LM

[43] There are some applicable general principles that assume importance in this case:

A- Specific applications of general principles

[21] I accept that, as LM testified: 1)at her daughter's christening party in June 2012, when DL was holding her daughter and asked WL to go change her diaper, LM adamantly told her that WL was no longer welcome as he is a child molester, in response to which DL stated that he would not do that to her daughter, and LM responded, "well he did it to me" (pp. 13, 62(9). While LM agreed that "No, it's not the first time I told her that he had molested me. But it's the first time I meant it when I said he is to stay away. So, that was, you know, like, the last time I ever had contact with him"(p.14(11) I conclude that what she was saying was it was not the first time she tried to tell her mother WL had molested her, as that is more consistent with the remainder of the reliable evidence I accept and also consistent with her explanation in cross-examination at pages 134(13)- 135 (15) wherein she admits that when her mother asked her why she did not want to move back in with WL at North River/Highway 311, "well, he's never done anything to you" – *at that time*, she did not correct her mother; and since LM reiterated in her testimony, which I accept, that after that point in June 2012, any pretense on her part of a relationship with WL had ended, and she never had contact with WL again, except most incidentally when visiting J3 in the hospital in December 2017.

1. LM is presently 34 years old and testified regarding alleged offences when she was between 10 and 14 years of age.[22]

2. LM was cross-examined based on her testimony given at the preliminary inquiry and on her police statement. WL's counsel suggested to her that she at no time prior to her testimony in court (i.e. not in her police statement and not in her preliminary inquiry testimony) had she said that after the "sharing" incidents at Great Village, WL always went to the bathroom, and usually had a shower. LM's evidence was to the effect that she did not recall being asked a question to that effect, nor whether she spontaneously gave such an answer in her police statement or her testimony at the preliminary inquiry. WL's counsel argues that this diminishes her credibility.[23]

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[22] Bear in mind that I am restricting myself to evidence relevant to any offences that occurred before December 31, 2000.] In *R v JMM*, 2012 NSCA 70, (leave refused [2012] SCCA No.402) Justice Saunders reiterated that in such cases, different considerations apply when gauging the reliability of the complainant's testimony depending upon the age they said they were when the events occurred. He cited from *R v RW*, [1992] 2 SCR 122 where the court stated: "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."

[23] See sections 10 and 11 of the *Canada Evidence Act*, R.S.C. 1985, C.5.

[44] Her police statement was not in evidence before the court – either by being made an exhibit, or portions thereof being directly put to her for her responses. On the circumstances before me, it cannot fairly be argued that her reference at trial to WL's always going to the bathroom and usually having a shower is a prior inconsistent statement.

[45] Portions of her preliminary inquiry testimony were directly put to her for responses on this issue. I have addressed this earlier when outlining the Defence position, however to summarize, LM did not remember being asked a question to that effect, or testifying about that, but stated in cross-examination that: "I believe you, if you are telling me that I hadn't said it like, it's written down… I'm saying I don't remember saying it…".

[46] While I was tempted to review the preliminary inquiry transcript to see if at any point LM had been asked, or testified about WL always going to the bathroom afterwards and usually taking a shower, I did not do so. My legal research reveals that this was a prudent course of action. In *R v JP*, 2014 NSCA 29 per Beveridge JA:

> "117 The parties agree that not all of the content from pages 143 - 148 of the Preliminary Inquiry was put to the complainant in cross-examination. The Court requested further input on this issue. Both parties filed supplementary submissions on this issue, which included copies of the pages the judge referenced.

> 118 The appellant argues that at least some of what is contained in those pages is prejudicial because some of it is out of context. *In addition, he says it is impossible to know when, and how much of, the Preliminary Inquiry transcript was actually read by the trial judge.*
>
> 119 The Crown acknowledged that it was "ill-advised" for the trial judge to have read the entirety of the pages in question. *There are a number of dangers triggered by doing so, not the least of which is deciding a case based on evidence not actually admitted in the trial* (see for example *R. v. H.(J.J.M.*), 2009 NLCA 27 at para. 23; *R. v. Asapace,* 2011 SKCA 139 at paras. 29 - 39).
>
> 120 *However, after reviewing the pages from the Preliminary Inquiry, I am satisfied that the substance of it was already in evidence. Hence, trial fairness was not compromised*. The comments by Weiler J.A., writing for the Court, in *R. v. Cloutier,* 2011 ONCA 484 are also apt in this case:
>
> > [102] This was not a jury trial. The trial judge's extensive reasons do permit us to review the extent to which he referred to material not in evidence. Having reviewed those reasons, I would conclude that in each instance the trial judge's reference to material not in evidence was either not central to his conclusions or else the substance of the impugned reference was already in evidence elsewhere. Examples of the appellant's specific submissions as well as my comments are found below prior to my conclusion on the conviction appeal.
> >
> > [103] What the impugned references do illustrate is the danger of a trial judge accepting a copy of the preliminary inquiry transcript or a prior statement of a witness which is being used in cross-examination and which, of course, is not part of the evidence unless the prior statement is specifically adopted by the witness. If counsel wish to assist the trial judge, it is preferable to give the judge a copy of the relevant portions of the pages used in cross-examination only and with the portions of the page that are not to be referred to in cross-examination blacked out.

[47] In the case at Bar, LM did not agree that it was at trial that she for the first time referenced WL always going to the bathroom and usually having a shower- nor did she disagree that it was possible that she had not previously mentioned it. Therefore, once again there has been no demonstration that in stating this at trial, she was making a statement inconsistent with a previous statement made by her.

[48] In summary, there is no such inconsistency in her testimony at trial – therefore her evidence should not be diminished on that basis.

3. the difference between absence of apparent motive and proven absence of motive.[24]

[49] There was also an argument about whether the Crown should properly be able to rely upon LM's purported lack of motive to fabricate as a relevant factor in assessing her credibility. WL's counsel argued strongly against this, based on decisions from the Ontario Court of Appeal.

[50] On careful consideration of the evidence presented here, I am satisfied that LM demonstrably had no motive to fabricate.

[51] Although WL presented the evidence of J3 and WL to suggest that DL had a motive to force J3 to live with her rather than his father WL, in order to access monies he had received in an insurance settlement regarding his serious motor vehicle accident, I found such evidence strained credulity, but more importantly, even if this was a motivation for DL, I am satisfied that LM was in no way similarly motivated. She had been living independently of her mother with her

[24] Although this is a legitimate consideration in relation to any witness, when dealing with the accused's credibility special care must be taken that the burden of proof upon the Crown is not thereby diminished- see Justice Oland's reasons in *R v JAH*, 2012 NSCA 121 at paras. 11-12.

partner C since 2005. She testified on more than one occasion to the effect that: "I did not want this court process – I value my privacy". The manner of her testimony also reflects a restrained presentation of the facts. She strove to be precise in her answers, and to clarify something she had said earlier which she thought might be slightly misleading, even if it might put her in an unfavourable light. I am satisfied she was doing her best to testify truthfully and reliably.

[52] While she was certainly closer to her mother DL than WL, there is no evidence she was pushing for a police investigation regarding these matters.

[53] DL testified that it was that around the time of LM's daughter's first birthday (i.e. March 2013) that LM had said to DL that "[WL] is not invited" to the birthday celebration, and alleged he had molested her as a child. I find DL's testimony is reliable about the former, but not the latter, which I find was first was disclosed to DL in June 2012.

[54] LM testified that it was at her daughter's christening which was three months after her birth, therefore approximately in June 2012, when she first expressly told her mother that WL had molested her. And while there, DL was holding her daughter and presented her to WL asking that he go change her diaper. LM told her mother that he is a child molester. LM says her mother responded that

he would not do that to her (LM's daughter) and LM responded "he did it to me". However, nothing was done until six years later. The uncontradicted evidence is that some other troubling information became known to DL in early 2018, which prompted her to contact LM to see if DL had her permission to give LM's name to the police should they wish to contact LM. LM did not contact the police. The police contacted her, and she attended at the police station and answered their questions.

[55] In direct examination WL was asked:

> Question: Now the relationship changed [with DL] at the time of J3's accident? Answer: Yes it did. Question: … In brief, did you have a conversation with DL at that time, that DL indicated her intentions with respect to J3? Answer: Yes… My girlfriend and I and my niece went down to see J3 – J3 was on the phone with his mother [DL]. She said to J3 she wanted to talk to me, I put the phone on speaker, she said to me that if I didn't go to her place immediately to discuss about taking J3, that the outcome for me wouldn't be very good… I told her, I said, "I've had enough of your bullshit" and I hung the phone up… Two weeks later, I was charged." (pp.247-8).

[56] WL was asked in cross-examination, if DL contacted the police regarding WL hoping to have him charged with these offences, how would DL effect her access to and control of J3's insurance monies (given that he is an adult and appears to have had a long-standing animosity against DL). WL explained:

> "Question: … But you still think that [DL] contacted the police because you wouldn't agree to give her care of [J3] [after his December 21, 2017 accident] and started this whole kind of investigation rolling? Answer: Yes, I do. And the reason why is, I'll tell you why. When a mother would take and clean her son's bank account out twice, she's a gold digger.

> Then she was in court with her ex-husband for support, the judge told her she was a gold digger and never wanted to see her in his courtroom again. She would do anything to benefit herself." (p. 267 Transcript); and
>
> "If she took custody or care of [J3], [he] would have nothing… Question: … What was your fear? How could it be effected? How would the misappropriation of J3's insurance money… did you see how that would be possible by [DL]… Was there some way or method that you felt she could actually get at his insurance money? Answer: Definitely. Question: What was that? Answer: Ah, she's quite a manipulator – like [J3] said about her trying to get him to sign that release form for the benefit from Facebook, the Go Fund Me thing." (pp.271-272 Transcript)

[57] Notably, WL's counsel objected to what he characterized as the Crown suggestion in cross-examination of WL, that WL should explain why LM would be lying about these allegations, since although DL may have had a motive, there is no evidence to suggest that LM did.[25]

[58] WL's counsel stated that: "We did not suggest that LM was involved in any plot with DL… The evidence for the Defence is that this investigation was initiated by DL for her own personal gain… The Defence has not alleged any evidence that LM was part of that, other than knowing that she was going to bring the allegation to the police. But it was started by DL for reasons that may have had some sort of

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[25] Per *R v LL*, at paras.14 and15: "Questions in cross-examination that ask an accused person to explain why a complainant would fabricate his or her allegations are improper for two reasons. First, as a general matter, it is improper to invite one witness to comment on the veracity of another: *R. v. Brown*, [1982] A.J. No. 1038, 1 C.C.C. (3d) 107 (C.A.), affd [1985] 2 S.C.R. 273, [1985] S.C.J. No. 57. This principle has particular application to an accuser and the accused. As noted by Charron J.A. in *R. v. Rose* (2001), 53 O.R. (3d) 417, [2001] O.J. No. 1150 (C.A.), at para. 27, "…this court has held repeatedly that it is improper to call upon an accused to comment on the credibility of his accusers".

profit motive… As far as why LM is saying these [things], we don't know… The question was, all dealt with [DL], so we are not proposing why LM – what motive LM has for this. We don't know.… I want to make it very clear we did not lead that evidence; my Friend led that evidence from J3, not us. "(pp. 257-8)[26]

[59] Even WL testified that he was unaware of any motive that DL would have had until J3's accident (and his entitlement to insurance proceeds after December 21, 2017). (p.248(1) Transcript).

[60] I accept LM's evidence in cross-examination regarding what DL told her regarding J3's welfare around the time of his accident:

> "Question: Subsequently DL called you on the phone and said that she was going to go to the police about [WL]? Answer: Yes. Question: And she gave you a heads-up about that? Answer: Yes. Question: And it's after that the police called you? Answer: Yes. Question: Did your mother ever discuss with you that she wanted to have WL out of the picture so that she could have [J3] and come and live with her? Answer: No., Let me think about that. Did mom suggest she wanted WL out of the picture, No. Did she suggest she wanted J3 to live with her, No. She suggested that she did… Well, suggested, mom had intimated to me that she didn't feel that [WL] was putting J3's best interests to J3, and that she felt that she had a better idea of what could be done with J3."

[61] With that backdrop, the Crown argues that LM has no motive to fabricate these allegations – otherwise stated, the Crown is saying that there is evidence

[26] However, in the particular circumstances of this case, if the Defence argues that: the explanation for LM's going to the police in early 2018 was DL's doing, and that DL was motivated by the goal of removing WL as J3's primary parent to have access to his financial resources (per WL at pp.267-272); and that the Defence is not proposing a specific motive LM had to go to the police with false allegations, doesn't that make more tenuous a claim by the Defence that LM should not be demonstrably considered to have no apparent motive to fabricate?

upon which the court should conclude that there is a proven absence of any apparent motive on the part of LM to fabricate.

[62] As Simmons, JA stated for the court in *R v LL*, 2009 ONCA 413 (see also to similar effect more recently *R v Bartholomew*, 2019 ONCA 377 and *R v SH*, 2020 ONCA 34) an appropriate instruction to jurors in such cases could read:

> [53] At a minimum, the corrective instructions should have addressed the following matters:
>
> - Because a persons' motives can sometimes be hidden, there is a difference between absence of apparent motive and proven absence of motive;
> - Although the defence had raised some possible motives for the complainant to fabricate her evidence, depending on their view of the evidence, it was open to the jury to find an absence of any apparent motive on the part of the complainant to fabricate;
> - Although absence of apparent motive to fabricate is a proper factor to consider in assessing the credibility of the complainant, it is but one of many factors to be considered; and
> - Whatever their view of the evidence relating to the complainant's motive to fabricate, it was essential that the jury bear in [page429] mind that the accused has no obligation to prove a motive to fabricate and that the onus remains on the Crown throughout to prove guilt beyond a reasonable doubt.

4. The relevance of the timing of disclosure and avoidance of the accused by a complainant of alleged sexual abuse

[63] I made reference to the jurisprudence in my decision *R v CRH*, 2012 NSSC 101:[27]

> 45 Around that same time, the doctrine of recent complaint was also extinguished, [which only allowed evidence of a sexual complaint to be admissible if made: 1. At the first reasonable opportunity; 2. without questions of the leading, inducing or intimidating character or suggesting the guilt of the accused, and 3. In relation only to the alleged offence and nothing else: *R. v. Creemer and Cormier* [1968] 1 C.C.C. 14 (N.S.C.A.)].
>
> 46 In contrast, the modern principles regarding behaviour of sexual offence victims have rejected stereotypical presumptions about how victims will react to such offences -- whether that be at the time of the offence itself [by for example resisting or screaming out, etc.] or thereafter, particularly as to when and under what circumstances they disclose the allegations.
>
> 47 In *R. v. DD* 2000 SCC 43, Justice Major for the Majority put the issue in that case as follows:
>
> > This appeal raises the question of whether expert evidence may be admitted to inform the jury that children who have suffered sexual abuse respond in different ways with respect to disclosing the abuse. The expert here did not interview the child, so his evidence was not specific to this complainant, but was a general explanation applicable to all children. -- Para. 44.

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[27] As Chief Justice McLachlin stated in *R v ARJD*, 2018 SCC 6 at para. 2: "In considering the lack of *evidence of the complainant's avoidance of the [convicted accused],* the trial judge committed the very error he had earlier in his reasons instructed himself against: he judged the complainant's credibility based solely on the correspondence between her behaviour and the expected behaviour of the stereotypical victim of sexual assault. This constituted an error of law." Interestingly, the Supreme Court decision also included the statement: "We do not read the majority reasons, including paragraph 39 and 41 highlighted by the defence, as suggesting otherwise." The Alberta Court of Appeal majority gave its answers at paragraphs 39 – 48 to the question*: What can lack of avoidant behaviour tell a trier of fact?". In part they stated "Stereotypicality is never a legitimate anchor on which to tie crucial credibility assessments in the context of sexual assaults. And, counter-stereotypicality must never translate to less credibility… We agree that an evaluation of the 'actual evidence' in a given case is the proper means to assess whether the Crown has met its burden of proof beyond a reasonable doubt.* Where however, that evidence and its relevance is not clearly identified by the trial judge, and the complainant's credibility is instead assessed solely in comparison to what the trial judge concludes would be 'expected' post – sexual assault behaviour by a complainant, in our view that evaluation is fully rooted in reliance on impermissible reasoning based on myths and stereotypes." In an interesting twist, Justice Beveridge had this to say in *R v WJM*, 2018 NSCA 54 relying upon the reasoning in *R v ARJD*, regarding an argument by the defence on appeal that the trial judge had used stereotypical reasoning to discount the *accused's* exculpatory police statement: "I do not read those reasons as suggesting it is an error to rely on *the actual conduct of an adult complainant*, witness or accused in the context of the case being heard. [My italicization added]

48 Justice Major continued on:

> In my view, the content of the expert evidence admitted in this case was not unique or scientifically puzzling, but was rather the proper subject for a simple jury instruction. This being the case, its admission was not necessary. Distilling the probative elements of Dr. Marshall's testimony from its superfluous and prejudicial elements, one bald statement of principle emerges. **In diagnosing cases of child sexual abuse, the timing of the disclosure, standing alone, signifies nothing.** Not all victims of child sexual abuse will disclose the abuse immediately. It depends upon the circumstances of the particular victim. I find surprising the suggestion that a Canadian jury or judge alone would be incapable of understanding the simple fact. -- Paras. 58-59.
>
> [Emphasis added]

49 Furthermore, in relation to the discredited common law doctrine of recent complaint, he stated:

> Application of the mistake reflected in the early common law now constitutes reversible error. See *R. v. RW* [1992] 2 S.C.R. 122 per McLachlin, J. [as she then was] at page 136:
>
> > Finally, the Court of Appeal relied on the fact that neither of the older children was "aware or concerned that anything untoward occurred which is really the best test of the quality of the acts." This reference reveals reliance on the stereotypical but suspect view that the victims of sexual aggression are likely to report the acts, a stereotype which found expression in the now discounted doctrine of recent complaint. In fact, **the literature suggests the converse may be true; victims of abuse often in fact do not disclose it, and if they do, it may not be until a substantial length of time has passed**.
> >
> > **The significance of the complainant's failure to make a timely complaint must not be the subject of any presumptive adverse inference based upon now rejected stereotypical assumptions of how persons [particularly children] react to acts of sexual abuse** [citations omitted]. -- Para. 63.
> >
> > [Emphasis added]

50 Notably, he continued to expand on this theme and stated:

> A trial judge should recognize and so instruct a jury that there is no inviolable rule on how people who are the victims of trauma like sexual assault will behave. Some will make an immediate complaint, some will delay in disclosing the abuse, while some will never disclose the abuse. **Reasons for delay are many and at least include embarrassment, fear, guilt, or a lack of understanding and knowledge. In**

> **assessing the credibility of a complainant, the timing of the complaint is simply one circumstance to consider in the factual mosaic of a particular case. A delay in disclosure, standing alone, will never give rise to an adverse inference against the credibility of the complainant**. -- Para. 65.
>
> [Emphasis added]
>
> 51 Nevertheless, in *R. v. RGB*, 2012 MBCA 5, that court reminded triers of fact that having rejected previous stereotypical presumptions about sexual offence victims, we must be careful not replace them with an unreasoned acceptance of a new form of stereotypical presumptions [for example that one should expect non-disclosure from a true victim and that that standing alone should therefore enhance their credibility -- see paras. 51 -- 59].
>
> 52 Ultimately the non-disclosure of sexual abuse/offences should be a neutral factor standing on its own, unless in the circumstances of any particular case it is prompted to relevance by other evidence -- e.g. See also the comments of O'Connor, ACJO in *R. v. LCT* 2012 ONCA 116 at para. 96.[28]

[64] In summary, no inferences may be drawn regarding the credibility of a sexual assault complainant based on a trier of facts' belief regarding the expected behaviour of such victims (including the timing of disclosure) standing alone. However, the actual behaviour of complainants may become relevant in an individual case – and if so, may be used, as but one of many factors, to assess a complainant's credibility.

[65] The evidence is that LM first disclosed her claims, that WL molested her between 1995 and December 31, 2000, to her mother DL in 2012.

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[28] For jurisprudence regarding the evidentiary value of young sexual assault complainant's "acting out", see *R v CRH*, 2012 NSSC 101 at paras. 53-58. Regarding the proper use of prior consistent statements by a complainant, see Justice Fichaud's reasons in dissent in *R v EMW*, 2010 NSCA 73, which were confirmed when the majority opinion was overturned on appeal,:2011 SCC 31; and Justice Watt's statements in *R v KT*, 2013 ONCA 257 at paras. 34 – 39.)

[66] LM testified that arguably she could have disclosed these matters earlier, and in particular:

1. At the time she was taken by her mother to a transition house around October 1999 which was in the beginning of an approximately 2 ½ year separation between DL and WL (however she testified that she had said nothing earlier in part because she felt she was protecting her younger brother J2 while they were living in the household with WL (p 121 Transcript), and after they went to the transition house there was no longer a need to disclose because "if [WL] is gone, then I don't have to worry about it anymore. Any reason I would've had to mention it has now disappeared." (p.133(15));
2. To her mother in that time period after that separation when she was considering getting back together with WL, to which LM testified [". Question: You didn't say to your mom, 'look, don't get back together with him. I don't want you to get back together with him'. Answer: Yes, I did several times… we argued about it a lot. Question: … Why didn't you tell your mom then, '… he's a molester'…? Answer: I did, actually say that to her and she said, 'Well, he's never done anything

> to you' and I did not correct her… Because I did not want to talk about it. I still don't want to talk about it." (p.134-5)

[67] I note that LM credibly contended that her father was a dysfunctional parent, and these attributes more so manifested themselves when he was living alone – see her comments on pages 17 and 18 Transcript regarding the years between 1998 and 2001. She made similar commentaries about her mother DL – for example see her comments at pages 6-7 and 63.

[68] LM testified that she first disclosed her general allegation against WL to her mother DL in June 2012 during a party coincident with her daughter's baptism (pp.11-14 Transcript). She testified in relation to her contact with WL, "[her partner] and I worked similar hours, so I wasn't like at home without him a lot. And sometimes [WL] would come when [my partner] wasn't home, and I wouldn't answer the door.… So, that's sort of how things were going, like he was around, I didn't want him around, he would show up. And then it all sort of changed, and I became a mother, that's how things continue to be."

[69] Then at the party at LM's house, the incident occurred where DL asked WL to go change LM's infant daughter's diaper and LM interjected that "the party is over". She told her mother "[WL] is not welcome here ever again… because he's a

child molester. I don't want him near my daughter". By all accounts that was LM's last in-person contact with WL (absent once encountering him at the hospital where J3 was after his accident- p. 119(15).

[70] I bear in mind that LM was 26 years old in 2012. WL's counsel has suggested *inter alia* that, her not having made earlier disclosure should lead to an inference that she is not being truthful in her testimony at trial. I disagree.

[71] Her testimony about the underlying facts is credible. However, as much as I do *not* rely on her failure to disclose earlier to detract from her credibility, I also find her evidence regarding why she did not disclose earlier, and her non-avoidance of in-person contact with WL between 1995 and 2012, and avoidance of in-person contact with WL after June 2012, are neutral factors in assessing her credibility.

[72] Similarly, I accept as credible (and corroborated by the reliable testimony of DL on this point) her testimony that she did not seek to invoke, and only reluctantly agreed to be involved in, the prosecutorial and judicial process to deal with her allegations against WL. Specifically, in this regard she stated:

> "Question… How did you come to six years after that incident at the baptism find yourself in a police station making this disclosure to a police officer?
> Answer: well, for me… this action today, like testifying and going… This was not my idea, this is not something that I want. For me, this process is well, it's humiliating, and I

> really value my privacy and to overcome the things that I have in my life, I feel like you have to be a really strong person. And to do anything, to even voice your problems I feel is like asking for pity, and that is the last thing I want. So I don't want anyone to know my personal problems and I don't want anyone's pity. So, that's one of the reasons why I didn't tell anyone sooner. I didn't want anyone to know about this, what had happened, what [WL] had done to me, I never wanted anyone to know…". (p. 22 Transcript)

[73] Moreover, I accept the evidence of DL and LM, that DL approached LM to ask her for consent to mention her name to police regarding the allegations herein, that DL provided the police LM's contact information, the police contacted LM, after which she agreed to go to the police station to provide a statement regarding these allegations on or about April 5, 2018. (p 120 Transcript)

B- Further considerations of LM's credibility

[74] Although I will be focused on Justice Paciocco's suggested "credibility checklist", it has been common and considered good practice in relation to the assessment of the credibility of witnesses, while it is by no means an exhaustive list, to consider the following aspects, cited by Provincial Court Judge Clyde F. Macdonald in *R. v. DLC* [2001] N.S.J. No. 554 at para. 8, where he said, in part:[29]

> And I certainly keep in mind in this case, as well, that the task of finding the facts ... involves the weighing of the evidence but it is certainly not an exercise in preferring one witness' evidence over that of another. And of course, that's because the doctrine of reasonable doubt applies to the issue of credibility ...

[29] See similarly my references at para. 17 in *R v RRDG*, 2014 NSSC 78, which I will also bear in mind in this case.

I'm going to indicate some aspects of a witness's testimony that I find helpful and this determination is as follows. They are in no particular order:

1. The attitude and demeanor of the witness. I ask whether the witness is evasive, belligerent, or inappropriate in response to questions and I keep in mind the existence of prior inconsistent statements or previous occasions where the witness wasn't truthful. Those are useful to me.

2. I consider the external consistency of the evidence. And by that, I mean, is the testimony of the witness consistent with independent witnesses which is accepted by me, the trier of fact; and

3. I consider the internal consistency of the testimony. By that I mean, does the witness' testimony or evidence change while on the stand.

4. I concern myself with whether the witness has a motive to lie or mislead the Court. I consider the ability of the witness to originally observe the event, to record it in memory and recall the event; and

5. Of course, the passage of time since the event in question is a factor in this regard….

6. I concern myself with a sense of the evidence. Does common sense, when applied to the testimony of the witness, suggest the evidence is impossible, improbable or unlikely? And what other results are there when I apply my common sense to the evidence?

[75] Let me then next move on to an assessment of the credibility of LM and WL in greater detail.

[76] While this is not an attempt to list in an exhaustive manner all the details leading to my conclusion that LM is a truthful and reliable witness, the following indicia cumulatively are significant in that respect.

Some observations regarding the credibility of LM

1. Is there an evidentiary basis indicating that LM may not be a trustworthy person? LM does not have a criminal record, nor is there discreditable conduct or reputation for untrustworthiness that has not been rebutted.

2. Is there an evidentiary basis for finding that LM does or does not have a motive to mislead? I have concluded that the Crown has proved that LM does not have an apparent motive to fabricate these allegations.

3. Does the way the witness testified support a safe and responsible inference that the witness may not be telling the truth? [No]

[77] There are a number of examples of answers by LM that suggest "a ring of truth" to their substance, and others that demonstrate LM was striving to be precise and prepared to make concessions that would place her in an unfavourable light. For example:

1. in relation to the "car incident:

    a. "the first thing that happened was my family, my mom, [J2] and I were at [WL's] mother's house in Wentworth, and WL and I left alone to go to the store and we were in his brown

car and he asked me if I wanted to drive, so I said ‘yes’. I was really excited about that… So he pulled over the car and told me to sit on his lap and I was like ‘oh well, that’s’… You know, in my mind I was thinking ‘well, that’s not what I had in mind when I envisioned me driving. I will take it because it’s still cool’. So I sat on his lap and he was using the pedals and I was steering the car and we were travelling down the old number four highway through Wentworth and he put his hand in my pants, down the front.”

b. “Question: How or why did it end? Answer: I don’t know. I remember turning around and looking at him, like questioningly, I would say, like looking at him with a question like, ‘what are you doing?’ And then he stopped, he took his hand out. Question: What if anything was said between you at the time? Answer: There were no words. He laughed and like, raised his eyebrows, I can’t… I know the recording is important, so it’s… I’m trying to use words and not actions. He smiled and raised his eyebrows and he laughed, but there were no words. Question: Do you recall how you were dressed?

Answer: No. Question: Do you recall how he was dressed?: Answer: Specifically, no. I mean, for both of your questions, how I was dressed and how he was dressed, I could tell you what we typically wore at the time but that specific day, I don't remember what he had on."(pp.32-36 Transcript)

2. in relation to the "sharing" incidents:

   a. "Well, the first time it happened, him and I were alone in the house and we were watching TV and sort of… I want to say he pushed me over, but that almost makes it sound violent; it wasn't violent, like I wasn't hurt. But I was sitting, and I ended up lying down with him on top of me on the couch and he started, I'm going to say, humping me, grinding his pelvis against mine and it lasted maybe 20 minutes… It ended when he got off of me… After the first several, he had a name for it: he called it "sharing". So, the first maybe three or four times it was exactly the same. I would be sitting on the couch and then I would end up laying down on the couch with him on top of me. As time went on, he would tell me that were going to go do some sharing or like if no one was home, he would say 'come

to the couch, you're going to share…' No, 'we're going to share'; or if he might be talking about something later, like, 'later tonight we are going to share'

b. … Sometimes I would, like, if I knew in advance that was going to happen, then I would just lay down, but other times he would either like you know playfully… I guess you don't know, but he would playfully push me down or he would sit beside me on the couch and like rub my leg or he would sit beside me on the couch and kiss me. Question: How would he kiss you? Answer: [WL] always kissed me the same way. He would always like, just force his tongue in my mouth, it was very gross. Question: And how long would those kisses last? Answer: A minute." (pp.42-44)

c. "Question: [WL] was working during the days? Answer: Yes. Question: He'd get home after supper? Answer: Sometimes, yes; sometimes he came home early, and it would be just a moment of dread for me to see his vehicle pull in if mom wasn't home." (p. 143-144)

d. “Question: During the preliminary inquiry, would you agree with me that you never once, anywhere in the preliminary inquiry, said that after the sharing activity your father went… immediately went to the bathroom and had a shower… or, had a bath or shower or anything? Answer: Okay – my mom’s husband, not my father, please… I don’t remember being asked about that at the preliminary trial, so no, I don’t remember testifying to that… Question: Do you wish to have an opportunity to review your evidence at the preliminary inquiry? Answer: I believe you if you’re telling me that I hadn’t said it. Like it’s written down; I’m not gonna argue with you that I did or did not say it. I’m saying I don’t remember saying it. So, if you’re saying it’s not on record, then yes… I didn’t say it… Question:… Did you have an opportunity to review the transcript of the preliminary inquiry last week in preparation for court today? Answer: Inquiry, yes… Question: And as you sit here today, you agree with me you don’t recall anywhere in your preliminary inquiry mentioning that WL would go and have a shower after the sharing incidents – you never said that?

Answer: Yes, I did not say that, that's true. Question: The first time you said that is in court here yesterday? Answer: Yes. Question: Is that true, that WL would go and have a shower or is it something you just kind of thinking up now? Answer: No, that's the truth. I'm actually surprised that I haven't said it before. I guess –" (pp. 167-170)

e. "Question: do you ever recall wrestling with [WL] to get the spot on the couch… best spot on the couch to watch TV? Answer: No. Question: Is it possible that happened and you just don't remember it, or just never happened? Answer: It is possible, yes. I really feel like it did not happen, but I can't say it's impossible that it had happened… Question :… You had mentioned that when the sharing activity took place you were always alone, like… and in fact, you said it was every time you were alone it happened – is that correct? Answer: Yes. Question: And whenever it happened you were the only person in the house? Answer: Yes, but again, yesterday I said that it's possible that J2 was there and upstairs or not in the room or not

> on the same floor. But what I remember is yeah, being alone." (pp.142-3)

[78] In addition, I will say that I observed carefully LM while she was testifying, and based on the manner and content of her testimony, I found her to be candid when she was not certain of evidence and in relation to evidence that could reflect badly on her, yet striving to be accurate and precise to the best of her ability. To my mind, she was striving to be responsive to questions, without attempts to purposefully tailor her evidence.

4. evidentiary content:

    a. is the testimony of the witness plausible, or does it lack an air of reality?

[79] LM's evidence is plausible. She was 10 years old when WL met her. She was old enough to understand that what was going on was wrong, and to remember it reasonably accurately. She testified that when they were alone he would commit these offences. She described how they were carried out without detection by others and when the circumstances of these opportunities arose. The offences did not require lengthy periods of opportunity, and given that WL had this opportunity for "sharing" incidents between June 1997 and October 1999 (albeit only while at

Great Village), given LM's estimate of 10 to 50 times, her testimony is plausible on this point.

b. is there admissible evidence that materially supports or contradicts her testimony?

[80] WL's testimony superficially contradicts hers.

c. is LM's evidence externally consistent in the sense that it fits with other evidence in the case?

[81] LM's evidence in relation to her core allegations does fit with the other evidence in the case, in spite of there being some conflicting evidence on immaterial matters such as dates when things happened. Her evidence is consistent with that of DL on material points. For example, both WL and DL agree that the material times WL had a brown Oldsmobile Cutlass Supreme, and had the opportunities to commit the "sharing" offences. I accept, as WL testified, that he was living with his grandparents in Wentworth across from the motel on the Old Hwy., #4 when he met DL (pp 191-192); and that he then started dating DL. Generally, WL, DL and J3 agree that, as claimed by LM, she had no in-person contact with WL after June 2012.

d. are there internal inconsistencies that by their nature could reasonably be attributed to dishonesty including:

i. material inconsistencies on matters the witness would not be apt to forget, or on matters the witness could have a motivation to mislead about [There were none. I have referenced herein that LM did not overstate matters, conceded matters that placed her in an unflattering light or were the result of genuine uncertainty from her perspective and tried to correct matters spontaneously when they came to her attention – she was not attempting to control the narrative -she was responsive to questions] or

ii. more peripheral inconsistencies which, by their nature and frequency might reasonably indicate an inability of the witness to remain consistent when presenting a false story [there were not many peripheral inconsistencies in LM's testimony, therefore their effect is neutral]

Some observations regarding the reliability of LM's testimony

1. ability to observe

    1. how capable is the witness of making the relevant observations (given factors such as their eyesight, or hearing or their emotional state or their well-being) and of understanding what they observed (given factors such as their maturity, or their level of experience or, for experts, their expertise)? [I have addressed this earlier and concluded that given her age of 10 years at the time of the first incident, LM had sufficient capacity to understand what was going on and was also in a position to observe, recall and now recount the events in issue.]

2. Conditions of the witness

- are there conditions in which the observations were made that could impede the ability to accurately observe? [None in this case.]

- is the thing observed apt to have grabbed the attention of the witness at the time? [Yes, and therefore more likely to be remembered.]

- are there external inconsistencies between the testimony and other evidence in the case that may reasonably be attributable to inaccurate observation or analysis of what has been observed? [Not in relation to material matters.]

2. Memory

i) are there factors creating concern about the memory of the witness, including evidence of dementia, or credible indications of alcohol blackout etc.? [None in this case.]

ii) are there factors arising from the manner of testifying creating concern about the accuracy of the witness's memory, including such things as:

• credible acknowledgements by the witness of memory problems? [None in this case.]

• the passage of considerable time? [This is a factor, however on the core allegations and most peripheral matters LM's testimony derived from her memory is reliable.]

• demonstrated insecurity when providing details? [To the extent that LM does so, it is largely a reflection of her candour, or in cross-examination acknowledging the impossibility of being perfectly certain of controversial facts (e.g. at p.37(7): "Question: I asked you to think about how old you were [when the "car incident" occurred]… Answer: I think that my best guess when I try to remember and put together things that make sense and things that don't make sense, my best guess is that this is Fall of 1995, but I am not certain… So, the reason I think that, is because I do believe this was before we had moved in together in Great Village, I think it was before then. And I do know at the time, I had not taken Sex Ed in school and I know that happened in the Spring of 1996, like Grade 5. So I'm pretty sure that this would have been… the best time that this would've happened in my mind, that's what makes the most sense.").]

• An inability to answer questions on matters that are apt to have been noticed at the time? [None in this case.]

iii) are there internal inconsistencies, that by their nature, could reasonably be attributed to memory including:

• inconsistencies on peripheral matters or points of detail? [Given the interval between these events and LM's police statement, the preliminary inquiry and the trial, it is to be expected that there would be times when LM may inconsistently testify on peripheral matters – for example, her having forgotten that they moved from Great Village to Bass River and back to Great Village- p. 124 and136(17).]

• Inconsistencies on matters about which the witness would have little reason to lie? [Yes, for example her estimation of when the "car incident" happened. She suggested that it was in 1995, however the evidence I accept establishes that WL and DL likely met for the first time in the Fall of 1996.]

(iv) are there external inconsistencies between the testimony and other evidence in the case that might reasonably be attributed to memory problems of the witness or is it confirmed in material ways by other dependable evidence, suggesting a dependable memory? [Yes, there are some inconsistencies, as noted above, as a result of the time-lapse between the dates of the alleged incidents and LM's disclosure thereof, first disclosed to her mother in 2012, and then to police in 2018. Notably however, on many of the factual disagreements between LM's testimony and that of DL, J3 and WL, I found LM's evidence most reliable.]

3 Communication

1. are there indications that the witness may not be communicating their

observations accurately or completely, including:

- Poor vocabulary or careless or imprecise language ? [Not by LM]

- admissible opinions unsupported by material detail? [Not by LM]

- implausible details that may rationally be attributed to inaccurate description? [Not by LM]

[82] In summary, on the core allegations, I found LM was testifying truthfully and reliably. Her evidence is credible and compelling.

WL

[83] I bear in mind that, regarding inconsistencies in an accused's testimony, in *R v JP*, 2014 NSCA 29, leave refused [2014] SCCA. No, 255), Justice Beveridge for the court noted that "it is an error of law for the trial judge to say that because he found [the convicted accused's] evidence not convincing on one point, it casts doubt on the credibility of his other evidence… Mere disbelief of exculpatory evidence cannot be used to bolster the Crown's case… Furthermore, mere doubt or even non-acceptance of the [convicted accused's] evidence on some point cannot be used to cast doubt on the credibility of his other evidence.… Simply because he did not view the [convicted accused's] evidence as persuasive does not equate to a dismissal of it as not being "credible". This smacks of a credibility contest between the Crown's witnesses and the [convicted accused]." (paras. 71-77 and 111-113)

[84] WL's testimony was largely oriented towards establishing that: he had no opportunity to commit the "sharing" offences; that it was extremely risky to have

committed such offences as a result of the risk of detection in the living room of the Great Village home; and that he simply did not commit any of the offences (the car incident, the sharing incidents, and the stand-alone kissing incidents).

[85] I acknowledge that it is difficult to "prove a negative"-that WL did not commit any of these offences. Having said that, there is no burden of proof upon WL to prove anything; the burden of proof is upon the Crown, to prove beyond a reasonable doubt the elements of the offences.

[86] I believe it helpful to examine some of the testimony he gave which has a superficial plausibility.

[87] Regarding the car incident, he suggests it was impossible to have LM seated on his lap behind the steering wheel because he would thereby have been unable to reach the gas and brake pedal with his feet. Notably, that proposition was not expressly put to DL or LM (there was some discussion around it in cross-examination at pp. 98 – 102), nor was there evidence of the car's dimensions, photos of WL in the car driver's seat, or other witnesses' evidence in support.

[88] Regarding the sharing incidents on the couch at Great Village, in direct examination WL testified that his continuous work schedule precluded any opportunities as claimed by LM:

1. When living at Great Village he was working for Jim Tanner from 1996 until June 1998 (pp.191 and 199), and started working for Leland McNutt in approximately March April 1998 (as well as doing some work for his own recently started contracting business [which I have abbreviated as "ERC"]) (p.199-200);

   His hours of work on dayshift were Monday to Friday (and sometimes the odd Saturday) required him to leave home at 3:30 AM and he'd get home "anywhere from 530 to 6" (pp. 193-4) and similarly 2:30 PM until 430 – 5 AM when he was working night shift for Mr. Tanner (p.195);

   His hours of work for Leland McNutt (during four years from the Spring of 1998, five days a week, with weekends off, starting work at 7 AM in the morning and finishing between 5:30 PM, and "sometimes you might not get home till 830 or whatever at night" (pp.200-202 – he neglected to mention that for at least four weeks each Spring during each year, he may either not have been working at all or have had reduced hours of work- p. 293);

2. In direct examination he testified that between June 1997 and the Fall of 1999:

"Question: *During that time, who looked after the children?*
Answer: Before [J3] was born [May 1998], when, *LM would look after J2, when they got home from school until her mother got home.*
…
Question*: To what extent were **you** looking after the children when the kids got home from school?* Answer*: **very seldom***.

Question: Why is that?
Answer: Well, I wouldn't get home until after she'd get… got home, I wouldn't be around by the time the kids got home from school. I think they got home around 330 somewhere in that vicinity.

Question: Where would you be at 330 on a weekday?
Answer: I'd be working.
…
Question: Now, you mentioned that you would be working, you get some days off, though, as you mentioned – holidays, Sunday okay and days of that nature. ***During the days you were off, who would look after the kids?***
Answer: ***The days that I was off, well, I'd be there when the kids got home from school.***

Question: pardon me?
Answer: I'd be there if the kids got off the bus if I had a day off.

Question: So, there were some days you would be home with LM and J2 when they got home from school?
Answer: yes.

Question: *How often did that occur?*
Answer: ***Not very often***.
…
Question:… *On what occasions, if any, would just you and LM be home?*
Answer: There'd be no… None of just LM and I being home… because there would always be J2 there and after J3 was born, J3 was there. I'd be watching J3. But there'd be no time that J2 would

> never be there, because J2 never went nowhere, other than in the… soon as he'd get off the bus, he'd be in the house.
>
> Question: ***And how often was DL home on the days when you would be home, how often would DL be there?***
> Answer: *She'd be home* ***pretty much the days that I'd be off.***"
> (pp.213-215)

[89] WL said that before J3 was born [May 1998] *"LM would look after J2, when they got home from school until her mother got home."* According to WL and LM this was the norm, before J3 was born.

[90] He was also asked:

> "Question: So there were some occasions when you'd be home when LM would come home from school?
> Answer: **The odd occasion**, yes.
> …
> Question: She did chores around the house?
> Answer: Yes, she did.
>
> Question: What kind of chores did she do?
> Answer: Sometimes she'd mow the lawn, other times *when she'd come home she would do the dishes, like if her mother was out, say on… doing… For VON. After supper, she… If she had a tuck in, sometimes LM would do the supper dishes and tidy the house up for her while she was gone… tuck in, wouldn't be gone any longer than an hour at a time…* J2 would be there at the house. We'd be either watching TV or he'd be playing a game at the table. (pp. 216-218)

[91] J3 was born in May 1998. Therefore, WL himself testified that from June 1997 until at least May 1998, he had opportunities to commit "sharing" offences (including when he was not working as a result of seasonal considerations approximately four weeks in the Spring of each year (p.293)).

[92] More importantly however, if one accepts his evidence that he was unaware of these false allegations, (namely that they came as a "shock" to him) until he was arrested in 2018 (or even if it was sometime after June 2012), it is simply incredible that he would claim to have any specific memory of entirely routine and unremarkable matters from 1997-1998, such as, how often he was at home when the children got home from school, how many days he actually worked in the relevant time period, and whether DL was also home when the children got home from school. Even an honest witness without some form of *aide memoire* could at most be testifying to what the normal routine was for the household. Yet not once does WL make such a concession.

[93] There is another example of such incredible claims of recall of routine matters by WL in the following exchange during his direct examination:

> "Question: Did LM like sitting on the couch and watching TV?
> Answer: Yes.
>
> Question: To what extent, if any, did you have any competition with her for getting to the couch?
> Answer: Oh, there was always competition.
>
> Question: Well, just tell the court about that, just you know, tell what happened.
> Answer: Well, sometimes as soon as you finish supper, she'd make a mad dash in – because there'd be shows coming on. Sometimes she'd stretch out full-length on the couch – so I'll ask her to move her legs; she wouldn't move her legs. *There was one time* that when she was face down on the couch, I sat on her legs to see if she'd move them. She wouldn't, so I took her under the arms, pulled her up to the far end of the couch on this end so I had a place to sit down.

Question: *How many times did that happen*?
Answer: *Probably one or two times*.

Question: *Was anybody home* when this happened?
Answer: Yes.

Question: Who?
Answer: *DL was home, J2 was home*.

Question: *Any other type of horseplay* associated that you can recall associated with going and watching TV or on the couch?
Answer: No, *none that I can recall*.

Question: Were there *any occasions*, if ever, you were lying on top of her on the couch?
Answer: *No*." (pp.229-30)

[94] Regarding when WL first became aware of LM's allegations, his testimony is internally inconsistent. In cross-examination he first agrees that he "at least in and around the time of this baptism [June,2012] you first caught wind that LM was saying these things [the allegations]" (pp.252-254), but then when asked to explain why he later stated that it was a shock to him, (i.e. he first became aware of them when he was arrested) he answered that: "I misunderstood that question" (p.260-1; see also his answer in redirect at p.292(16)). WL draws a distinction about when he personally was advised by police in 2018 of the allegations, versus him indirectly hearing about the allegations sometime after June 2012, to explain his misunderstanding. Either he is a careless witness, which I do not believe, or he is structuring his answers to his best advantage, which I do believe in this instance. After all, the question merely asked him if he became aware around the time of

LM's daughter's baptism, that LM was alleging he had molested her. It was a simple question. Moreover, WL admits that he was at the June 2012 christening party, and since then he has had "not too much" contact with her. (p.246) In fairness to WL, LM's premature ending of the party was not expressly put to him for his response.

[95] An example of his carelessness can be found in the following exchange:

> "Question: … So, *take us now to May 1999*.
> Answer: *1999, she started taking a course* for… LPN course.
>
> Question: Were you with her when she *was taking the LPN course*?
> Answer: No.
>
> …
> Question: You mentioned she was taking an LPN course. Were you living with her when she took that course?
> Answer: No. *She took that after I had moved out, she applied for that*." (pp.210-11)

[96] Notably, the evidence is clear that they separated in October 1999. I have found credible and accept the evidence of DL that her LPN certificate is dated December 2001, and it being a 15-month program that she began it in September 2000. Moreover, the evidence is that WL, DL and children moved from Great Village to Bass River for approximately six months sometime between October and November 1998, and then returned to the same house in Great Village between February and May 1999,according to DL and WL respectively.

[97] In summary, having observed carefully the manner in which WL testified, and having examined the content of his testimony in particular, I conclude that he was not testifying truthfully in relation to numerous material matters.

[98] He was shown to have an *animus* against DL, which I find infected his testimony in relation to LM. He was careless about the accuracy of his testimony. He answered in generalities, questions put to him which requested precise answers. He not once acknowledged that he was answering in generalities, attempting rather to pass off his answers as certainties. He left the court with the impression that he was not being candid, nor responsive to questions at all times. His evidence was not consistent with other evidence which I accept from witnesses including DL and LM. His evidence was not internally consistent. His evidence did not have "a ring of truth" at times.

Conclusion

[99] I find it helpful to express my conclusions by using Justice Paciocco's Proposition 3, in deciding whether the Crown has proved the accused to be guilty beyond a reasonable doubt:

1. if you accept as accurate evidence that cannot coexist with a finding that the accused is guilty, obviously you must acquit [I do not find that to be the case]
2. if you are left unsure whether evidence that cannot coexist with a finding that the accused is guilty is accurate, then you have not rejected it entirely and you must acquit [I do not find that to be the case]
3. you should not treat mere disbelief of evidence that has been offered by the accused to show his innocence as proof of the guilt of the accused [I have not done so]
4. even where evidence inconsistent with the guilt of the accused is rejected in its entirety, the accused should not be convicted unless the evidence that is given credit proves the accused to be guilty beyond a reasonable doubt [I have followed this instruction as well considering the evidence as a whole].

[100] Stated otherwise, I have rejected entirely evidence that is inconsistent with the guilt of WL and have convicted him because of the considered and reasoned

acceptance by me beyond a reasonable doubt of evidence that the accused is guilty.[30]

Rosinski, J.

[30] See for example *R v RA*, 2017 ONCA 714 at paras. 55-6: Trial judges are "entitled to reject [an accused's] evidence, 'based on a considered and reasoned acceptance beyond a reasonable doubt of the truth of the conflicting credible evidence: *R v JJRD*,(2006) 218 OAC 37 (CA) at para. 53."