

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *R. v. Maessen*, 2020 NSSC 256

**Date:** 2020 09 24

**Docket:** CRH No. 480585

**Registry:** Halifax

**Between:**

Her Majesty the Queen

v.

Marcel C.W. Maessen

**Restriction on Publication: Sections 486.4 and 486.5 of the *Criminal Code***

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**TRIAL DECISION**

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**Judge:** The Honourable Justice Joshua M. Arnold  
**Heard:** July 13, 14, and 15, 2020, in Halifax, Nova Scotia  
**Final Written Submissions:** August 4, 2020  
**Decision:** September 24, 2020  
**Counsel:** Stephanie Morton, for the Crown  
Eugene Tan, for the Defendant

## **By the Court:**

### **Overview**

[1] Marcel Maessen is charged with sexually assaulting and unlawfully sexually touching J.M. between January 1, 2000 and December 31, 2002. Mr. Maessen was J.M.'s neighbour, family friend and basketball coach during the relevant time period. J.M. was ten or eleven years old when the incidents are alleged to have occurred and, at the time, was close friends with Mr. Maessen's daughter, Laura Maessen.

[2] Three witnesses testified for the Crown and three testified for the defence.

### **Facts**

[3] Marcel Maessen is charged as follows:

That he between the 1st day of September, 2000 and the 30th day of June, 2001, at, or near Dartmouth, in the County of Halifax, in the Province of Nova Scotia, did unlawfully commit a sexual assault on J.M., contrary to Section 271 of the *Criminal Code*.

And further, that he at the same time and place aforesaid, did for a sexual purpose touch J.M., a person under the age of fourteen years, directly with a part of his body, to wit, "his hands", contrary to Section 151 of the *Criminal Code*.

[4] The Crown called J.M., as well as her mother, M.M., and a childhood friend, M.E.

### **M.E.**

[5] M.E. was 30 years old when she testified. On direct examination she said that J.M. contacted her and asked if she remembered anything about their old basketball coach, Marcel Maessen. M.E. said that she remembered one incident. She said that the neighborhood girls used to play basketball together on a particular street corner. M.E. identified J.M. and Laura Maessen as being in this group. She also said that Mr. Maessen sometimes drove her, J.M. and Laura to school.

[6] M.E. said that one day between May and June (or possibly August), on a weekend, right after lunch, the ball they were using got stuck in a tree. She said that she could recall she had bicycled to the area where the kids were playing with a toothbrush still in her mouth. The girls asked Mr. Maessen to help them retrieve

the ball. According to M.E. Mr. Maessen first told the girls to stand together and push the tree to see if they could shake the ball loose. She said while they did this Mr. Maessen stood behind them and watched. When this didn't work, Mr. Maessen chose J.M. to boost up into the tree to get the ball. M.E. said that although Laura was taller than J.M. he did not choose his own daughter to boost up to get the ball. She said that Mr. Maessen stood behind J.M., told her he was going to pick her up and, in front of the other girls, including M.E. and Laura, put his hands on J.M.'s breasts. J.M. froze. Mr. Maessen then put his hands on J.M.'s waist and picked her up. She could not reach the ball so Mr. Maessen eventually found a way to get the ball down on his own. The kids then went back to their play. She said that she had never seen anything like this previously and that J.M.'s reaction was so pronounced that it was unforgettable.

[7] M.E. also said the portable basketball net on the street was sometimes placed in front of one home and at other times in front of a different home. M.E. was able to describe the size of the tree the ball got stuck in but was not able to say what type of tree it was. M.E. also explained why they went to get Mr. Maessen (he lived close by and was tall), and described what he was wearing. She said the kids were wearing shorts and tank tops, and that it was warm out.

[8] M.E. said that Mr. Maessen's behaviour was inappropriate with the girls he interacted with when they were young, including unnecessary physical touching. She said on direct examination that Mr. Maessen coached her when she was ten or eleven years old, but she transferred to another team because she felt so uncomfortable around him. On cross-examination M.E. was presented with team pictures from the relevant time periods, 1999-2000 and 2000-2001, that Mr. Maessen coached. She was not in them or identified as a player on those teams, but she was able to identify J.M. and Laura in the pictures. M.E. said that she must have been on other teams that Mr. Maessen coached. She said she had pictures of herself in uniform with Mr. Maessen and J.M. after a game that she could bring to court. However, the court was never presented with those alleged photos.

## **M.M.**

[9] M.M. is J.M.'s mother. She described attending a skating party approximately six years ago with her husband and J.M. M.M. and J.M. enjoyed the skating aspect of the party. While socializing off-ice after skating, in a reception area, J.M. saw Mr. Maessen and immediately became upset and agitated

and said she wanted to leave. M.M. said that she had never seen J.M. act like this before. J.M.'s parents agreed to leave. On the way out she told them that she hated Mr. Maessen. Prior to that J.M. had once mentioned to her that she did not like Mr. Maessen. M.M. said she had seen Mr. Maessen at the skating party.

[10] Subsequently J.M. told M.M. about her allegations regarding Mr. Maessen and made her promise not to tell anyone, including her father. She later told her father about the allegations.

[11] M.M. said that their house was close to the Maessens' house when J.M. was growing up. She also recalled that J.M. and M.E. were close friends. M.M. recalled M.E. playing basketball. She could not specifically remember whether J.M. and M.E. were teammates on Mr. Maessen's basketball team during the relevant time periods but was fairly certain that they were not.

[12] M.M. denied that J.M. was attention-seeking as a child. (J.M. also denied this in her own evidence.)

### **J.M.**

[13] J.M. was 30 years old when she testified. She is a well-educated and highly accomplished person. She presented her evidence clearly and articulately.

[14] She said that when she was in Grade 5, and approximately 10 or 11 years old, every day she would walk to the Maessen house to pick up Laura to walk to school. Robin (Patterson) Lake, Laura's cousin, lived across the street and also often walked to school with them. J.M. would stop at the Maessen home, pick Laura up and they would then walk to school together, often with a number of other children.

[15] On one particular morning J.M. arrived at the Maessen home to get Laura. On direct examination she said that she guessed she knocked on the door and Mr. Maessen answered or was at the door to greet her. J.M. also suggested that she may have walked into the home without anyone answering the door. In any event, when she went into the entranceway Laura was still upstairs getting ready for school. While J.M. waited in the house for Laura to come downstairs to walk to school she saw Mr. Maessen's erect penis sticking out of his bathrobe. J.M. said she looked away, he covered up, Laura came downstairs and they left. Her evidence continued:

**MS. MORTON:** Okay, so I'm just going to take you back.

**J.M.:** Okay

**MS. MORTON:** You're saying the first time, when you mentioned the erection, we'll just break that down.

**J.M.:** Okay.

**MS. MORTON:** So, you said you went to his house. Who, how did you come to be inside the house?

**J.M.:** Um, I guess I would have knocked and he would have answered the door.

**MS. MORTON:** And do you recall anyone else being there?

**J.M.:** I know that Laura was there, but she was upstairs. The only one that was in the front hallway was him and I at the time.

[16] J.M. said that in retrospect, the bathrobe incident tied into the incidents that followed with her and Mr. Maessen. At trial J.M. said that she believed that Mr. Maessen's erection was related to her. However, in her original statement she told the police that the door was unlocked, she walked into the house unannounced, and Mr. Maessen greeted her in the hallway, about five feet away from her, with his housecoat tied. J.M. said, on cross-examination:

**MR. TAN:** His housecoat, at least in your memory, is tied.

**J.M.:** Yes.

**MR. TAN:** Okay. So, it's not as if he's making any attempt to expose himself.

**J.M.:** Yes.

**MR. TAN:** It, at least from your prior statement, it was relatively clear that you considered it unintentional.

**J.M.:** Sorry?

**MR. TAN:** From your prior statement, it was relatively clear that you considered that whole event unintentional.

**J.M.:** Unintentional?

**MR. TAN:** Unintentional.

**J.M.:** Yeah, it seemed like, at the time, it seemed like a mistake, yeah. And I don't want to assume, like, what he might have been thinking or what that sort of situation was. I just want to say, like, the facts of what I recall.

**MR. TAN:** Okay, but in your mind you have linked that to all the events that have since resulted in charges.

**J.M.:** Yeah, whether he had an erection, I feel like you don't purposely get. In my mind, anyways, one does not purposely get an intent, like, an erection, unless they touch themselves, right? But he would have an erection if he was aroused and at that time I was the only one in the house, and I was there for a minute or two before I noticed his erection.

**MR. TAN:** Okay.

**J.M.:** Whether it was intentional or not, the feeling behind that is true.

**MR. TAN:** Okay, so fair to say then that in this case, your perception is driving the reality.

**J.M.:** Can you rephrase the question?

**MR. TAN:** Yes. Your perception is what you assume to be the reality.

**J.M.:** I feel that I have been very honest with my recollection of that event and that I have been very open to not interpreting whether he had any sort of, if it was on accident or purposeful, if he was trying to see how I would react. I tried to make none of those assumptions and literally just say the exact facts of what I saw that day.

**MR. TAN:** Okay, but you would agree me that not just a couple minutes ago you have related this event to the events that are the foundation of the charges.

**J.M.:** Yes, because they are sexually explicit.

**MR. TAN:** Okay. Alright. It became very clear from the circumstances, however, that it, that erection, your viewing of it, was entirely accidental, correct?

**J.M.:** It could have been.

**MR. TAN:** Well, he realized it and you said that after a couple beats he sort of said, "Oh shit," right.

**J.M.:** Yeah.

**MR. TAN:** Which can very well be interpreted as, you know, having been entirely accidentally.

**J.M.:** Yeah, I was pretty honest with that in the original, when I went to the police. I was very honest that I thought it could have been an accident.

**MR. TAN:** Okay. So, say, the words that have been used, right, I think both in your direct and in this statement, were that after a few beats, right that's what you said, he said, "Oh shit," you had turned away at this point, right, and nothing more ever really became of that until you sort of pieced things together later in your life.

**J.M.:** What do you mean?

**MR. TAN:** Okay, you had said in your previous statement that, after, well, the phrase you used was after a couple of beats.

**J.M.:** Mmhmm

**MR. TAN:** Okay. What do you mean by a couple of beats?

**J.M.:** Like, I didn't have a timer on, but a couple of beats could be like anywhere between a minute or so.

**MR. TAN:** A minute? Okay, alright. And then he made an adjustment, right.

**J.M.:** Yup.

**MR. TAN:** I take it you didn't see that adjustment.

**J.M.:** No, I saw him kind of move out of the corner of my eye, but I wasn't, I could not, like...

**MR. TAN:** Okay, 'cause you had turned to your left and were looking at the mirror.

**J.M.:** Yup.

[17] J.M. said that Mr. Maessen was a playful parent. She said he would often pick the young neighbourhood kids up in a playful fashion and swing them around. She said that approximately two weeks after the bathrobe incident the first sexual assault, or the first incident of sexual touching, occurred. She said she was again picking up Laura to go to school. J.M. recalled that Laura Maessen and Robin (Patterson) Lake, were also there. She recalled that Robin was between her and the door and Laura was close by to her left. She said the entranceway or hallway just inside the home was fairly tight. Photos presented at the trial confirm that if there was more than one person inside the entranceway they would be in very close proximity to each other and would be able to see what was happening next to them if they were paying attention or looking in the proper direction.

[18] J.M. said that shortly after she arrived to pick up Laura, in the presence of Laura and Robin, Mr. Maessen lifted her up by her armpits and swung her around, which was not unusual for him to do with her and her friends. However, when putting her down, she said, Mr. Maessen flipped his hands over, cupped her breasts, and lifted and fondled them for five to ten seconds. J.M. said this made her feel uncomfortable but she did not know what to do. J.M. said that Robin and Laura were there but may have been looking elsewhere. Either way she said they acted as though they had not seen anything. J.M. said she was shocked, uncomfortable and scared, but did not believe that she reacted visibly, and tried to act as though nothing happened. She could not say whether she looked uncomfortable. She denied that she laughed after Mr. Maessen touched her

breasts. She denied that he said something to the effect that he was sorry, that he said he slipped, or that he said immediately afterward that no one should ever touch her like that.

[19] J.M. could not remember what time of year this occurred, but recalled that it was sunny and she was not dressed in heavy clothes. Her evidence continued:

**MS. MORTON:** Okay, so I'm just going to take you back.

**J.M.:** Okay

**MS. MORTON:** You're saying the first time when you mentioned the erection, we'll just break that down.

**J.M.:** Okay.

**MS. MORTON:** So, you said you went to his house. Who, how did you come to be inside the house?

**J.M.:** I guess I would have knocked, and he would have answered the door.

**MS. MORTON:** Do you recall anyone else being there?

**J.M.:** I know that Laura was there, but she was upstairs. The only one that was in the front hallway was him and I at the time.

**MS. MORTON:** Do you remember their home address?

**J.M.:** Uh, no, sorry. It was just Laura's house.

**MS. MORTON:** When you stepped into the home, where would you be standing?

**J.M.:** Just, like, right in front, the front entrance, where the stairs come down to meet the hallway downstairs.

**MS. MORTON:** Do you recall the home décor?

**J.M.:** Like, the decorations in the house?

**MS. MORTON:** Can you describe where you were standing, are you able to describe?

**J.M.:** Yes, so the front doorway opens up and there's a hallway right in front of you and at the end of the hallway is where the kitchen is and between that is the living room. Up to your left is where the stairs are, so there is, like, about, I don't know, two or three stairs going up to the left and then you go, you turn right to go up the rest of the stairs to the second floor. I can describe the rest of the house if you want.

**MS. MORTON:** Is there anything that you can recall about the foyer, just in from the door, anything else?



**J.M.:** Uh, well, I remember that there was a mirror at the sort of bottom of the stairs, just up those couple of stairs before you turn, there was a mirror there. Um, I can't quite, like, remember what else, like what sort of decorations or anything like that would have been around other than that.

[20] J.M. described another specific incident of sexual assault or sexual touching. She said she was walking home one day with Laura and M.E. and they saw Mr. Maessen. She said that normally she would run to him and engage in horseplay. However, after the first incident J.M. said she stopped any such horseplay with him. On this occasion, when J.M. did not run to Mr. Maessen, M.E. asked her why she wasn't going over to him to play. In an effort divert attention from herself for fear of someone asking her more questions and somehow discovering that Mr. Maessen had touched her breasts, she went over to play with him. She said he lifted her up by her armpits, spun her around, and again felt her breasts.

[21] For the next couple of weeks, J.M. said, when she went to the Maessen home to pick up Laura, Mr. Maessen regularly engaged in horseplay with her in the entranceway, lifted her up and then put her down and cupped her breasts with his hands. She said this happened "maybe every time" or every second time she stopped to pick up Laura for school. She said that Laura would have either been present in the entranceway or upstairs each time. J.M. also said that other children may have been present as well. She did not have a clear recollection of who else may have been there when she was touched, but believed it would have often been Laura and Robin. J.M. said this went on for several weeks, but less than six months. She was not sure precisely of the time frame. J.M. said that although she was only 10 or 11 years old at the time, she had gone through through puberty early and her breasts were developed.

[22] According to J.M., the touching ended one day when she went to pick Laura up on her way to school and Mr. Maessen told her that Laura had already left. He offered to drive her to school. On the way out of the house she said Mr. Maessen said "Why do you let me do this to you?" and "If you don't like people touching you, you shouldn't let them." J.M. said that she shrugged, and then Mr. Maessen said, "The first time it happened it was a mistake and I wanted to see how long it would take you to say something. If you don't like being touched that way you shouldn't have let me." She did not think she replied.

[23] J.M. said Mr. Maessen had also given her drives on other occasions. She could not recall what type of vehicle he drove. She denied the suggestion that Mr.

Maessen ever told the kids that they should walk more, and would not give the kids drives.

[24] J.M. described other incidents of Mr. Maesson's behaviour that she felt were related to the sexual touching. She said he told her that if she was ever too drunk to go home she could stay at their house. J.M. said that her own father was very understanding and offered to pick her up any time she might be uncomfortable or unable to drive and suggested that there was no legitimate reason for Mr. Maessen to say this to her.

[25] J.M. described attending a neighbourhood holiday or New Year's Eve party when she was eight or nine years old. Although the kids were given carbonated drinks to make a toast, she believed that Mr. Maessen gave her and other kids, including Laura, a red plastic cup full of alcoholic champagne. J.M.'s answers on cross-examination suggested that Mr. Maessen was possibly joking, making the kids think he was giving them real alcohol, when he was not. Although she described Mr. Maessen treating her the same way as Laura during the "champagne" incident, she said that this made her feel like he was trying to make himself appear more as her peer than an adult parent.

[26] J.M. believed that Mr. Maessen's overall behaviour showed a predatory pattern.

[27] J.M. continued to hang out with Laura for another year or so after the touching incidents but did not feel safe in the Maessen house. She said she never spoke to Laura about what happened. She said that she had to discontinue her friendship with Laura and most of her old friends because of her discomfort around Mr. Maessen. J.M. became emotional when describing this decision.

[28] In outlining her contact with Mr. Maessen over the years, J.M. said that when she was in university in 2011 she needed a toy wagon for a project. She asked the Maessens if they had one and although Mr. Maessen told her they did and that she could have it, J.M. could not bring herself to go get it.

[29] J.M. said that she next saw Mr. Maessen at a neighbourhood skating party at Christmas time in 2013 or 2014. She said that off the ice in the reception area Mr. Maessen approached her when she was alone and in the corner of the room and tried to speak to her. She was not sure whether she responded. She became upset and immediately left the party with her parents.

[30] J.M. also described being at work in a service industry job as an adult, seeing a man that looked like Mr. Maessen and having a panic attack.

[31] J.M. confirmed that M.E. was not on the same basketball team as her during the relevant time period. She remembered playing basketball on the street around that time but not in precisely the same location as that described by M.E. She did not recall a tree near the basketball net. She did not remember any incident when they were playing basketball and the ball got caught in a tree.

[32] J.M. said that she reached out on Facebook to some of her friends and old basketball teammates from this time period. In explaining the decision to do this, J.M. said that she had “sort of” suppressed some of the facts. J.M. said, on cross-examination:

**J.M.:** I asked her maybe two or three years earlier and when I decided that I wanted to do something about it, I had questions whether she was honest in, that nothing happened to her, and I wanted to give her another chance, basically, to speak up if something had happened to her, um, to help fill in some of the information that I had and my own fears and sort of suppression of the facts. And I wanted to reach out to her with a group of other women to try to help support her if she wanted to share and help heal with me.

**MR. TAN:** Okay, so there is a little bit of a theme there and I think this is contained at the end of the statement you had previously given to Detective Constable Opelka. You described pieces of a puzzle. Is that, do you recall saying that?

**J.M.:** I don't remember the, I don't remember if those were the words that I said, but if that's what's written in the document then I would assume that that's correct.

**MR. TAN:** Okay, well in the answer that you just gave to me a few moments ago, it sounds like there were still some pieces missing for you. Am I stating that correctly?

**J.M.:** I think I was looking for more, not necessarily pieces of the puzzle of what happened to me, but more pieces of a puzzle of me figuring out what kind of a person Marcel Maessen was.

**MR. TAN:** Okay. When did that sort of quest or when did that question first, when did that question really arise and come to the forefront of your mind?

**J.M.:** What kind of man Marcel Maessen is?

**MR. TAN:** Yeah.

**J.M.:** The day he did that to me.

**MR. TAN:** Okay, so that was a process that was 18 years in the making.

**J.M.:** Yes.

**MR. TAN:** Okay.

[33] J.M. answered all questions in a straightforward fashion. She was generally a credible witness.

[34] Three witnesses were called by the defence, Robin (Patterson) Lake, Laura Maessen and Marcel Maessen.

### **Robin (Patterson) Lake**

[35] Ms. Lake, known as Robin Patterson until she changed her name following her marriage, was approximately 30 years old when she testified. She is well educated and articulate. Ms. Lake is Mr. Maessen's niece and Laura's cousin. She is one year younger than J.M. and Laura. She grew up across the street from the Maessens and went to the same schools as J.M. and Laura. She played sports with J.M. and said they were close friends as children.

[36] Ms. Lake said that in elementary school she walked to school together with Laura every day, with very few exceptions. Because she lived directly across the street from the Maessens, the routine was that she would wait to see Laura and her brother come outside of their house and they would then meet on the street and walk to school together. Sometimes if one or the other was early or late they might go to the front door of each other's home and then walk to school. J.M. would frequently walk with them. Ms. Lake did not believe that horseplay in the mornings among the kids happened often because they were on a tight timeline to get to school, but it did occur occasionally. Mr. Maessen was the parent she saw in the mornings at that house. She described him as a neighbourhood fixture, being an outgoing stay-at-home dad.

[37] Ms. Lake described the entranceway to the Maessen's home as being a small space. If she and Laura, along with J.M. and Mr. Maessen were in that front hallway, they would be very close together. She had no memory of Mr. Maessen ever lifting up her or her friends in the front hallway of his home. She did not remember ever seeing Mr. Maessen engaging in horseplay with the neighbourhood kids or lifting them up and swinging them around. Ms. Lake had no specific memory of J.M. interacting with Mr. Maessen.

[38] Ms. Lake said that by junior high school, Laura and J.M. were spending less time together.

[39] On cross-examination Ms. Lake said that J.M. did not walk to school in the group with her and Laura every day, but she did walk with them regularly.

[40] Ms. Lake testified in a clear and straightforward fashion. She was a credible witness.

### **Laura Maessen**

[41] Laura Maessen was also 30 years old when she testified. She is also well educated and articulate. As previously noted, she is Marcel Maessen's daughter. Ms. Maessen confirmed that she and J.M. were neighbours and close childhood friends from the beginning of elementary school through to junior high school. Like the other witnesses, she describes the neighbourhood as being full of kids.

[42] She recalled that J.M. regularly walked to school with her and other kids, including Ms. Lake. They would meet at the Maessens' house and walk together in a group. Mainly, the kids would meet outside, however if the weather was poor the other kids would wait inside the Maessen's house for Laura. She denied that they would ever have time for horseplay at her house before walking to school. She did not have a firm recollection of these mornings, as they were routine.

[43] She also said that her father did not engage in physical interaction with the other kids, except maybe for a high five. She did not remember her father having any vested involvement with neighbourhood kids. Ms. Maessen did remember her father lifting the kids up with their arms locked by their sides. She said he did this the same way with J.M. as with herself, or the others. She did not recall him picking J.M. up any differently, and said he only picked J.M. up when she demanded he do so. She said the only reaction she ever saw from J.M. when picked up was positive, never negative.

[44] Ms. Maessen said she could not remember J.M. ever coming into the house alone in the hallway in the morning before school and waiting for her. She also did not recall her father picking up J.M. in the front hall when Robin was present. Ms. Maessen said she never saw her father act in a physically inappropriate way toward J.M. She said she never saw him reach from behind and cup J.M.'s breasts, and that he never used inappropriate language toward J.M. in her presence. She said she never saw J.M. appear afraid to come into their house.

[45] Ms. Maessen said she was never driven to elementary school and her father would not drive the kids to school even if they asked on a cold wet day.

[46] Although she recalled playing basketball with J.M., Ms. Maessen said she did not recall M.E. ever being on her club team. She recalled a basketball net outside of a neighbour's house, on the street near her house, in a different location than that described by M.E. She said that although there were a lot of trees on the street, there was no tree near the basketball net, and therefore it was unlikely a basketball would get stuck in a tree. She did not recall M.E. or J.M. regularly playing basketball with them, but agreed that she may have played basketball outside with J.M. on occasion.

[47] Ms. Maessen did not recall the holiday party with the "champagne" incident described by J.M. She said she did not hear her father offer to let J.M. stay at their house if she was drinking underage.

[48] Ms. Maessen did not provide a statement to the police about this matter when requested. She appeared to be more cautious and hesitant when answering critical questions about the alleged horseplay leading to touching of J.M.'s breasts than she was when answering other questions. However, she was internally consistent during direct examination and cross-examination. Nothing in or during her testimony raised significant concerns about her credibility.

### **Marcel Maessen**

[49] Mr. Maessen was sixty-six years old when he testified at the trial. He was forty-seven during the time of the allegations. He has a university degree in physical education. He worked off and on and was a stay at home parent of his three children starting in 1992.

[50] Mr. Maessen described the front hallway/entranceway to their home. It would be crowded if more than one person at a time were next to each other. Photographs entered into evidence confirm this design. Mr. Maessen is a tall person, standing 6'7", and could easily reach up and touch the eight foot ceiling of his hallway. He said he would not pick a child up in that front hallway as there was little room. His hand size was commensurate and in proportion with his height,

[51] At the relevant time, Mr. Maessen said there were a lot of kids living in the area. He was a basketball coach of some of his kids' teams. He said that while Laura and J.M. were on his team at the relevant times, M.E. was not. Mr. Maessen said he did not put up a basketball net in his driveway until 2003 (after the alleged incidents), but agreed that there was a basketball net down the street during the time of the allegations.

[52] Mr. Maessen said that in the mornings kids might come to his home on their way to school, but he did not have a clear recollection of this. He recalled that J.M. was part of a group that regularly walked to school with Laura. He said his kids walked to school almost everyday with their relatives, including Robin Lake.

[53] Mr. Maessen said that J.M. lived nearby, that Laura and J.M. were in school together from an early age, and that as a child J.M. had been around his house for years playing. He said J.M. was a happy, silly, and loud child. He was not sure if he could independently recall lifting the kids up while their arms were locked, as described by the previous witnesses. He thought he did this with J.M., but was not certain, explaining that hearing other witnesses testify about this may have “triggered a memory”. Although uncertain, Mr. Maessen described J.M. as persistently asking him to pick her up like he did with his own kids and relatives. He said that he never picked a child up like this unless they asked.

[54] Mr. Maessen recalled the holiday party described by J.M. He said the hostess had two large punch bowls, one that was alcoholic for adults and one that was non-alcoholic for kids. He could not recall if J.M. attended that party. He denied giving J.M. any alcohol, and said he would not have given alcohol to anyone underage.

[55] Mr. Maessen said he did not remember J.M. entering his house on a school day morning and seeing him in a housecoat with an erection. He agreed that he owned a housecoat as described by J.M., but said he rarely used it. He said that he always got dressed when he got out of bed in the morning. He said that he never wore the housecoat in the mornings when the kids were getting ready for school, although that may have happened if he was in an unusual rush. He confirmed that his front door was often unlocked and open in the mornings at that time, and the neighbourhood kids were permitted to come into the house without knocking on the way to school.

[56] Mr. Maessen said that he could not recall doing anything that would result in charges such as he is facing. Mr. Maessen also said that he has no recollection of an event when, without J.M.’s permission, he picked her up from behind and fondled her breasts when he was putting her down. On direct examination, he described an occasion where he picked J.M. up in the entranceway:

**MR. TAN:** Can you tell me exactly what you recall from the time that she arrived until the time she left?

**MR. MAESSEN:** Yeah, sure, yeah. The front door was open, she came in through the storm door, stood there. Laura was upstairs finishing up and I said “hello” and then she said, “Mr. Maessen, can you bounce me,” and that was a new one on me.

**MR. TAN:** What do you mean that was a new one on you?

**MR. MAESSEN:** Well, she never asked that before. She’d say you know, “pick me up, hold my arms straight, or swing me,” whatever, but “bounce me,” that was a new one. So, I reached down around her midsection, around her belly section, with my arms around like this, and picked her up, and then...

**MR. TAN:** Okay, before you go any further, sir, you’re making some motions so I’m going to describe them if I can.

**MR. MAESSEN:** Okay.

**MR. TAN:** So, what you just showed to us is that you reached around and then you grasped, like, your forearm or perhaps your wrists with one hand.

**MR. MAESSEN:** Yeah, like...

**MR. TAN:** So what I’m seeing is your left hand grabbing your right wrist.

**MR. MAESSEN:** That’s right.

**MR. TAN:** Okay, forming a circle in front of your body.

**MR. MAESSEN:** Right.

**MR. TAN:** Okay, so now tell me where is it that you picked her up on her body?

**MR. MAESSEN:** Well we were in the foyer and looking at the mirror, and I was standing behind her looking at the mirror, and she was facing the mirror and I picked her up around the belly and then picked her up, bounced her and shook her like this.

**MR. TAN:** Okay and so, again, I’m just going to describe that. So, you were initially bent over with your arms, hand on wrist, and then you straightened up and then you shook her by using your arms like up and down.

**MR. MAESSEN:** Right, shaking my body and arms up and down like this.

**MR. TAN:** Alright and so then tell me what happened next.

**MR. MAESSEN:** Well, she slipped down through my arms.

...

**MR. TAN:** So tell me what you recall next.



**MR. MAESSEN:** Well, remember that she slipped down and then my recollection is her breasts rubbed against my forearms and I'm looking in the mirror and she smiled and giggled.

**MR. TAN:** Okay and was this smile or giggle was this out of character for her?

**MR. MAESSEN:** I mean she was a happy person anyway, but just at the moment it went down that's when she had an odd little giggle and smiled.

**MR. TAN:** Okay. What was your reaction, sir?

**MR. MAESSEN:** I.I..My interpretation was that I thought maybe she thought that was a neat thing, I thought maybe she got a kick out of it or something.

**MR. TAN:** Okay and again I realize that you've talked a little bit about this, but what were sort of the external cues there that made you think that?

**MR. MAESSEN:** Well as she was going down, bouncing her in the mirror, as she was going down, then smiled and giggled as her breasts rubbed against my forearm and I thought, I thought she thought that was a good thing.

**MR. TAN:** Okay and so that was your sort of mental reaction.

**MR. MAESSEN:** That was my mental reaction, yeah.

**MR. TAN:** What, if anything, did you do next?

**MR. MAESSEN:** Well, I put her down and I said something like, "don't let anyone do that to do, don't let anyone touch you there." It was just, it was, to me it was like a teachable moment thing.

**MR. TAN:** Tell me what you mean by "teachable moment"?

**MR. MAESSEN:** Well, it was an activity that I thought that I wanted her to know that was not right.

**MR. TAN:** Okay.

**MR. MAESSEN:** It was just what a parent would say to a kid.

**MR. TAN:** Alright. Are you able to recall or do you have specific recollection as to how you said that, including any recollections you'd had about your tone, your demeanour, your physical gestures?

**MR. MAESSEN:** I think it was just a matter of fact tone.

**MR. TAN:** Okay

**MR. MAESSEN:** Like you might tell someone, "Don't forget to look before you cross the street."

**MR. TAN:** Yeah.

**MR. MAESSEN:** "Don't scream, don't hit, don't let anyone do that, don't have," something to that nature.

**MR. TAN:** So in terms of your demeanour, were you, would you say, you're lighthearted, you're serious, do you have any recollection of that?

**MR. MAESSEN:** I think it just was a, I just said it.

**MR. TAN:** Okay and just to confirm at this point, at the outset you'd said that your daughter Laura was upstairs.

**MR. MAESSEN:** Yeah

**MR. TAN:** Okay. Was any other person present or did they arrive while this happened?

**MR. MAESSEN:** No.

**MR. TAN:** Okay. Alright so tell me what happens next. So you've had that...you've had that...I won't call it a discussion, but you've said what you've said.

**MR. MAESSEN:** We've had that exchange.

**MR. TAN:** Yes.

**MR. MAESSEN:** Yeah. Laura came downstairs.

**MR. TAN:** Yes.

**MR. MAESSEN:** And off they went to school.

**MR. TAN:** Now how quickly would you say, how much time had elapsed between you finishing what you had to say and your daughter coming down the stairs?

**MR. MAESSEN:** I don't recall, but probably not much time.

**MR. TAN:** Okay. Do you have any recollection that day whether either of your nieces either came to the door or that you were able to see any of your nieces?

**MR. MAESSEN:** That day?

**MR. TAN:** Yes.

**MR. MAESSEN:** I don't remember that.

**MR. TAN:** What about your son, Connor?

**MR. MAESSEN:** No, I don't know where he was.

**MR. TAN:** Okay. Mr. Maessen, we've heard some allegations that this happened more than once, in Ms. M's words, it became a pattern.

**MR. MAESSEN:** Right.

**MR. TAN:** Do you have anything to say about that, sir?

**MR. MAESSEN:** I don't know what she's talking about.

**MR. TAN:** Okay. Do you, did you pick her up on any other occasion that you recall?

**MR. MAESSEN:** Again, she would, you know, she would ask me to, you know, pick her up and shake her couple of times outside.

**MR. TAN:** Alright and did that happen after this event?

**MR. MAESSEN:** I think, I don't recall. Probably before, if I had to guess.

**MR. TAN:** Okay. Did you notice any change in J.M.'s demeanour that day, immediately after you had spoken to her?

**MR. MAESSEN:** No.

**MR. TAN:** Okay. Did you notice any particular change in her demeanour or the way that she interacted with you after that day?

**MR. MAESSEN:** No.

**MR. TAN:** Did you continue interacting with J.M.?

**MR. MAESSEN:** Yes, I continued. She was on the...this was grade...she says I had grade five. I coached her when she was in grade five and then coached her again when she was in grade six.

**MR. TAN:** Did you coach her again after that time?

**MR. MAESSEN:** Yes.

**MR. TAN:** Okay when did you coach her again?

**MR. MAESSEN:** In the, there was a school team 2002.

**MR. TAN:** Okay

**MR. MAESSEN:** Grade six school team.

**MR. TAN:** Basketball?

**MR. MAESSEN:** Basketball.

**MR. TAN:** Okay and after that, sir?

**MR. MAESSEN:** After that they were in junior high, so no, I did not coach her after that, no.

...

**MR. TAN:** Mr. Maessen, I just would like to clarify and it's just a question of language, I think.

**MR. MAESSEN:** Yeah.

**MR. TAN:** On a couple of occasions, I asked you, you know, did this happen or did this happen or do you recall this happening, and your answers were, "I don't recall that happening". I just want to clarify, is it that you don't have any memory of that time period or your recollection is that they did not happen, I just want, can

you be clear. So, for example, picking up J.M., either frequently or infrequently, either before or after, when you say, "I don't recall something," what is it that you mean?

**MR. MAESSEN:** Well, I don't remember how frequent. I picked her up a couple of times because she would ask, "pick me up and shake me," or whatever.

**MR. TAN:** Okay, let me take you through a couple of those then. So, what are your recollections about picking up J.?

**MR. MAESSEN:** I picked her up a few times.

**MR. TAN:** Alright and what are your recollections about how you picked her up?

**MR. MAESSEN:** It was underneath the armpits or putting my forearms underneath her armpits, you know, with her facing away.

**MR. TAN:** Okay. Do you recall any other occasions, well let's talk about this incident where she alleges she saw an erection.

**MR. MAESSEN:** Right.

**MR. TAN:** When you say you don't recall that, what do you mean?

**MR. MAESSEN:** I have no memory of that.

**MR. TAN:** You have no memory of that.

**MR. MAESSEN:** No.

**MR. TAN:** Okay, so does that mean in your memory it did not happen or you just don't have any recollection?

**MR. MAESSEN:** In my memory, I don't remember that incident at all.

**MR. TAN:** Okay. Alright, so does that mean that you could have forgotten or does that you don't believe it to have happened?

**MR. MAESSEN:** I don't believe it could have happened.

**MR. TAN:** Okay, and perhaps, and I don't want to put words in your mouth, but I would like to be very clear on those points.

**MR. MAESSEN:** Right.

**MR. TAN:** Right, so if you don't believe that it would have happened, I think it's probably, if you could perhaps say that rather than, "I don't recall".

**MR. MAESSEN:** Okay.

**MR. TAN:** Okay. Again, I don't want to put words in your mouth, sir. So, that erection incident, your response is?

**MR. MAESSEN:** I have no recollection of that.

**MR. TAN:** Okay, right, so leading you to believe what?

**MR. MAESSEN:** I don't believe that happened.

**MR. TAN:** Okay. Picking her up from behind and then fondling her breasts.

**MR. MAESSEN:** Right.

**MR. TAN:** Okay. What is your response to all of those allegations?

**MR. MAESSEN:** No, there's not fondling, there's nothing, no. I mean picked her up and the bounce bounce thing, no, that never happened.

**MR. TAN:** Okay. Alright, what about awkward interactions?

**MR. MAESSEN:** No.

**MR. TAN:** Meeting her at a skating party and approaching her when she was alone?

**MR. MAESSEN:** I, you know, I could have walked by and said hello. Sure, that could have happened, I don't remember it.

...

**MR. TAN:** Okay, I'm just going to ask you to hold up your hands right now, and we've got the pictures of your hands, yes?

**MR. MAESSEN:** Yes.

**MR. TAN:** That are in Exhibit Number 4.

**MR. MAESSEN:** Yeah.

**MR. TAN:** Do you have any recollection whether by picking somebody up sort of around the waist with your hands or around the chest area with your hands, you know, someone of J.M.'s size at the time, how would your hands be situated?

**MR. TAN:** Okay, now...

**THE COURT:** Mr. Tan, for the record, you've got to describe this.

**MR. TAN:** I was about to.

**THE COURT:** Thank you.

**MR. TAN:** Okay. So that's how they are. But I would like, now imagine a child of that size.

**MR. MAESSEN:** Right.

**MR. TAN:** Okay.

**MR. MAESSEN:** You'd have to be wrapped right around their upper body.

**MR. TAN:** Okay, right. So you've held your hands and extended fingers, would you say that's about 30, 40 centimeters apart, 30 centimeters apart?

**MR. MAESSEN:** Oh, her waist?

**MR. TAN:** Yes, not...

**MR. MAESSEN:** Yeah, no, like this, she was a small girl.

**MR. TAN:** Alright, so your fingers, sort of at their closest, would be how far apart, would you say, sir?

**MR. MAESSEN:** She was a small girl, like this.

**MR. TAN:** So, maybe 20 centimeters apart?

**MR. MAESSEN:** I guess.

**MR. TAN:** Alright, and if you sort of lost control of somebody or you know you were trying to catch somebody a little bit, how would you react to try and control them? So, let's say you were holding somebody up and they slip a little bit, what would you do?

**MR. MAESSEN:** Oh, you know, hold them tighter.

**MR. TAN:** Would you have any particular reason to try and be aware of where their breasts were and whether you were touching their breasts?

**MR. MAESSEN:** That was just, no.

**MR. TAN:** Very good, thank you.

**MR. TAN:** I'm sorry, this is my last question, sir. When you spoke to J.M. immediately after that incident where you say she slipped, you said a teachable moment, I'd just like to explore that a little bit more. Why is it a teachable moment? Like, what is your motivation or what is the message you're trying to get across to her?

**MR. MAESSEN:** The message I wanted her to get is that was, it's not right, it's not appropriate for anyone to touch her, her private parts.

[57] On cross-examination, Mr. Maessen was asked about this incident and said:

**MS. MORTON:** So you said she asked you to bounce her and you proceeded to pick her up around the waist, correct?

**MR. MAESSEN:** Yes.

**MS. MORTON:** So you didn't say no?

**MR. MAESSEN:** Nope

**MS. MORTON:** And you described that you created a circle with your arms, locking your left hand on your right wrist, correct?

**MR. MAESSEN:** Yeah.

**MS. MORTON:** Okay. So then your right hand, that would have been touching her body around her waist against her body.

**MR. MAESSEN:** You know what? My arms are so long, a hands, it would have been the arms that were around her body.

**MS. MORTON:** So your arms would be against her body and that's where the force came from to lift her.

**MR. MAESSEN:** Exactly.

**MS. MORTON:** Okay. So if your hands weren't touching her body, there was a space between your hands and her body, correct?

**MR. MAESSEN:** Yeah.

**MS. MORTON:** Is that your recollection or...

**MR. MAESSEN:** Listen, all I know is I had my arms wrapped around to pick her up around the waist. Where were my hands exactly? I, in front of her, in front of her waist, in front of her bellybutton.

**MS. MORTON:** Okay. So hands in front may or may not have made contact with her body, during the pickup motion.

**MR. MAESSEN:** Right. Well to pick her up it was all in contact.

**MS. MORTON:** It was all in contact? Okay. Is that, you said it was all in contact?

**MR. MAESSEN:** I think so.

**MS. MORTON:** Okay. And then you say you picked her up and you were standing in front of the mirror.

**MR. MAESSEN:** Yes.

**MS. MORTON:** And you bounced her a couple times.

**MR. MAESSEN:** Yeah.

**MS. MORTON:** You did what she asked, correct?

**MR. MAESSEN:** Right.

**MS. MORTON:** And then she slipped.

**MR. MAESSEN:** She was slipping down through.

**MS. MORTON:** Is that because you were losing your grip?

**MR. MAESSEN:** It's because of her weight. You bounce, bounce, bounce, and then she was maybe wearing something slippery and then she was just slipping down through.

**MS. MORTON:** And as she was slipping, so she was moving downwards...

**MR. MAESSEN:** Yes

**MS. MORTON:** Do you recall what you were doing? Were your hands staying the same?

**MR. MAESSEN:** Yes. They were the same.

**MS. MORTON:** They stayed the same. So, as she was slipping and your hands stayed the same, your forearms would be moving up towards her chest area, correct?

**MR. MAESSEN:** Right.

**MS. MORTON:** Do you recall how long the bouncing motion lasted?

**MR. MAESSEN:** Oh, moments.

**MS. MORTON:** So, are you able to give us a one second, two second, five second, something like that?

**MR. MAESSEN:** One thousand one, one thousand two, one thousand three, you know three, four seconds.

**MS. MORTON:** So, less than five seconds.

**MR. MAESSEN:** I think so, yeah.

**MS. MORTON:** And then you say that as she slipped, your forearms came into contact with her chest, right, and it was at that point you remember her giggling and she smiles.

**MR. MAESSEN:** Her reaction in the mirror, correct.

**MS. MORTON:** Okay, so you remember her reaction in the mirror.

**MR. MAESSEN:** Yes.

**MS. MORTON:** And what about while you were bouncing her. Was she giggling?

**MR. MAESSEN:** She was smiling.

**MS. MORTON:** She was smiling. Do you recall her laughing?

**MR. MAESSEN:** No.

**MS. MORTON:** So she showed no discomfort, correct?

**MR. MAESSEN:** No.

**MS. MORTON:** And the contact of your forearms to her chest, how long did that contact last?

**MR. MAESSEN:** A second, two.

**MS. MORTON:** One or two seconds?

**MR. MAESSEN:** Sure.

**MS. MORTON:** Was she in the air?

**MR. MAESSEN:** Yes, her feet were off the ground.



**MS. MORTON:** So, can you describe, so if it's one or two seconds, you're holding her in the air, and so for one or two seconds your forearms are in contact with her chest?

**MR. MAESSEN:** Right.

**MS. MORTON:** And do you recall why it wasn't a millisecond, where there was contact and then you let go, or?

**MR. MAESSEN:** It slipped right down right to her armpits.

**MS. MORTON:** Okay

**MR. MAESSEN:** She slipped right through her armpits.

**MS. MORTON:** Okay, so your forearm is caught in her armpits.

**MR. MAESSEN:** Right.

**MS. MORTON:** And then you stayed there for one to two seconds.

**MR. MAESSEN:** Oh, once she fell to the armpits, I just dropped her down 'cause...

**MS. MORTON:** So, it was more like armpits and immediately let go.

**MR. MAESSEN:** Yeah, right.

**MS. MORTON:** So, probably not two seconds.

**MR. MAESSEN:** Probably not two seconds.

**MS. MORTON:** Okay and then she giggled and smiled. So, if it was an armpit and let go and she showed no discomfort, why did you feel that you had to make a comment about it?

**MR. MAESSEN:** I, because I thought she smiled and giggled at the reaction of my forearms touching her breasts. So I thought something had to be said. I thought she, I thought she had some enjoyment or pleasure out of it.

**MS. MORTON:** So you thought that a 10- or 11-year-old girl received, had enjoyment or pleasure out of a millisecond touch of your forearms to her breasts?

**MR. MAESSEN:** Yeah.

**MS. MORTON:** Why did you think that?

**MR. MAESSEN:** Because she laughed and giggled as it slipped down through my forearms.

**MS. MORTON:** And instead of thinking that she was giggling because of the game you were playing, you thought she giggled out of enjoyment or pleasure of being touched on her chest area, is that correct?

**MR. MAESSEN:** That's what I thought, yeah.

**MS. MORTON:** So after that happened, how did you feel about the interaction?

**MR. MAESSEN:** How did I feel about the...

**MS. MORTON:** Interaction.

**MR. MAESSEN:** It's just, I mean, I said what had to be said and life goes on.

**MS. MORTON:** Right, you knew it was innocent, right?

**MR. MAESSEN:** Sure.

**MS. MORTON:** Can you, are you able to say why this memory is so specific in your mind, so detailed in your mind?

**MR. MAESSEN:** Because of what I told her, I said, you know, don't let anyone touch you, and I've never said that to her before or anyone before in that way.

**MS. MORTON:** Did you ever say that to your children?

**MR. MAESSEN:** Um, I didn't. I think that was something that my wife would have, might have mentioned, talked about.

**MS. MORTON:** Is it possible that you've said things like that to your children?

**MR. MAESSEN:** Sure.

**MS. MORTON:** Okay, but you just can't recall?

**MR. MAESSEN:** No, I don't have a memory of any actual incidents, no. Just all part of parenting, you know?

**MS. MORTON:** Right, it's a regular part of parenting, so it's not something you would necessarily remember.

**MR. MAESSEN:** Parenting is just full of continue of teachable moments always. If you're a parent that's all you do.

**MS. MORTON:** So, when you said to J., and you can correct me if I'm getting your quote wrong, please.

**MR. MAESSEN:** Sure.

**MS. MORTON:** "Don't let anyone ever touch you in that way,"

**MR. MAESSEN:** Right.

**MS. MORTON:** What about the forearm touch was inappropriate that made you say that?

**MR. MAESSEN:** Because of the contact with my arms and her reaction in the mirror.

**MS. MORTON:** Okay. The giggling reaction.

**MR. MAESSEN:** Yes.

**MS. MORTON:** Did you tell her it was an accident?

**MR. MAESSEN:** No, I just assumed that everyone knew that it was an accident.

**MS. MORTON:** Can you recall any other times that you would have grazed or accidentally come into contact with the chest area of any other child?

**MR. MAESSEN:** No.

**MS. MORTON:** And you said that you had played this picking up from behind armpits game with J. before, right?

**MR. MAESSEN:** A couple of times, yeah.

**MS. MORTON:** Do you recall doing the same thing with Laura?

**MR. MAESSEN:** Oh, yes, and the boys.

**MS. MORTON:** And was this while they, while Laura was in grade five or six?

**MR. MAESSEN:** I don't, I have no memory of what grade they were in. Something typically you do when the kids are young, you pick 'em up, and it's like a helicopter and you swing them around. Once they're getting older, they're getting too heavy and it's, they're too heavy to just swing them around like that. And it's something you do when they're kids, not when they get older. It's just not an older kid activity.

**MS. MORTON:** So you would agree that when the forearm touching happened with J., there was some sort of breast development, right?

**MR. MAESSEN:** I, yeah, I could feel something along my forearms, so yes it felt like there was something there.

[58] Mr. Maessen denies sexually assaulting J.M. or improperly touching her for a sexual purpose in any way. He denies ever confronting J.M. about inappropriate touching other than the time he accidentally grazed her chest with his forearms. He also denies having any recollection of anything sexual or inappropriate happening in the presence of M.E.

[59] Regarding the peripheral matters, Mr. Maessen said he did not recall telling J.M. that she could stay at their house if she was drunk. He said underage drinking was not on the radar for his kids and he never spoke to them about it. He said that he never drove the kids from his home to elementary school. He said that they lived close by and it made no sense to drive them that short distance.

[60] Mr. Maesson did recall a holiday skating party hosted by a neighbour. He does not skate but attended the party. He did not recall seeing J.M. at that skating party, speaking to her in the reception area or seeing her leave upset.

**Law**

### ***Consent***

[61] Mr. Maessen is charged with offences under ss. 151 (sexual interference), and 271 (sexual assault) of the *Criminal Code*.

[62] Section 151 makes it an offence to “for a sexual purpose, [touch], directly or indirectly, with a part of the body or with an object, any part of the body of a person under the age of 16 years.” Prior to May 1, 2008, the relevant age under s. 151 was fourteen years.

[63] Section 265 of the *Criminal Code* defines the offence of assault:

265. (1) A person commits an assault when

(a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;

(b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or

(c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.

[64] Section 271 sets out the offence of sexual assault.

[65] Section 150.1 provides, *inter alia*, that where an accused is charged under ss. 151 or 271 “in respect of a complainant under the age of 16 years, it is not a defence that the complainant consented to the activity that forms the subject-matter of the charge.” Prior to November 1, 2005, the relevant age was fourteen years. (Sections 273.1 and 273.2 expand on the meaning of consent, and the availability of consent as a defence.) These offences are alleged to have occurred between September 1, 2000, and June 30, 2001. At all material times J.M. was under fourteen years old. Therefore she could not have consented to any sexual activity with Mr. Maessen, pursuant to s. 150.1.

### ***Elements of the offences***

[66] The Crown must prove each essential element of the offences beyond a reasonable doubt. In *R. v. Barton*, 2019 SCC 33, Moldaver J., for the majority, reviewed the essential elements of sexual assault:

[87] A conviction for sexual assault, like any other true crime, requires that the Crown prove beyond a reasonable doubt that the accused committed the *actus reus* and had the necessary *mens rea*. A person commits the *actus reus* of sexual assault “if he touches another person in a sexual way without her consent” (*R. v. J.A.*, 2011 SCC 28, [2011] 2 S.C.R. 440, at para. 23). The *mens rea* consists of the “intention to touch and knowing of, or being reckless of or wilfully blind to, a lack of consent on the part of the person touched” (*R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at para. 42).

[67] The *actus reus* of sexual assault was described in more detail by Major J., for the majority, in *Ewanchuk*:

25 The *actus reus* of sexual assault is established by the proof of three elements: (i) touching, (ii) the sexual nature of the contact, and (iii) the absence of consent. The first two of these elements are objective. It is sufficient for the Crown to prove that the accused’s actions were voluntary. The sexual nature of the assault is determined objectively; the Crown need not prove that the accused had any *mens rea* with respect to the sexual nature of his or her behaviour...

[68] As to *mens rea*, Major J. said, “Sexual assault is a crime of general intent. Therefore, the Crown need only prove that the accused intended to touch the complainant in order to satisfy the basic *mens rea* requirement” (para. 41).

[69] More recently, in *R. v. Mawanga*, 2020 ONSC 2350, the court said, “[t]he *mens rea* for sexual assault requires the Crown to prove beyond a reasonable doubt that the accused intended to touch the complainant in a sexual manner and knew or was reckless or willfully blind to the complainant's lack of consent” (para. 102).

[70] The elements of a charge under section 151 were summarized by the Court of Appeal in *R. v J.D.C.*, 2018 NSCA 5: “that the complainant was less than 16 years old at the time; that the appellant intentionally touched the complainant either directly or indirectly...; and that the touching was for a sexual purpose” (para. 32).

[71] The legislation has removed consent as an issue. The remaining issues are whether Mr. Maessen touched J.M. in a sexual manner (s. 271) or for a sexual purpose (s. 151).

### ***Burden of proof and presumption of innocence***

[72] Section 11(d) of the *Canadian Charter of Rights and Freedoms* provides that a person charged with an offence has the right “to be presumed innocent until

proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.” Mr. Maessen is presumed innocent of the charges, unless the Crown proves each element beyond a reasonable doubt. Justice Cory, speaking for the majority in *R. v. Lifchus*, [1997] 3 S.C.R. 320, summarized the principles of reasonable doubt, as it should be explained to a jury:

36 ... It should be explained that:

- the standard of proof beyond a reasonable doubt is inextricably intertwined with that principle fundamental to all criminal trials, the presumption of innocence;
- the burden of proof rests on the prosecution throughout the trial and never shifts to the accused;
- a reasonable doubt is not a doubt based upon sympathy or prejudice;
- rather, it is based upon reason and common sense;
- it is logically connected to the evidence or absence of evidence;
- it does not involve proof to an absolute certainty; it is not proof beyond any doubt nor is it an imaginary or frivolous doubt; and
- more is required than proof that the accused is probably guilty -- a jury which concludes only that the accused is probably guilty must acquit.

[73] Justice Iacobucci, for the majority, said in *R. v. Starr*, 2000 SCC 40, that “an effective way to define the reasonable doubt standard for a jury is to explain that it falls much closer to absolute certainty than to proof on a balance of probabilities” (para. 242). Mere probability of guilt is never enough in a criminal matter. The Crown must prove the guilt of an accused person, in this case Marcel Maessen, beyond a reasonable doubt - which lies somewhere between probability and absolute certainty, but closer to absolute certainty.

### ***Credibility and reliability***

[74] The trier of fact must consider all of the evidence. In this case, I have to decide if I am satisfied beyond a reasonable doubt that the Crown has proven that Marcel Maessen committed a sexual assault on J.M. or committed the crime of sexual interference on J.M. This will require consideration of the credibility of witnesses, including the complainant. In *Faryna v. Chorny*, [1952] 2 D.L.R. 354, [1951] B.C.J. No. 152, the majority of the British Columbia Court of Appeal discussed credibility as follows:

- 11 The credibility of interested witness, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour

of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions...

[75] In *Baker v. Aboud*, 2017 NSSC 42, Forgeron J. summarized the principles governing credibility assessment (some citations omitted):

13 Guidelines applicable to credibility assessment were canvassed by this court in paras. 18 to 21 of *Baker-Warren v. Denault*, 2009 NSSC 59, as approved in *Hurst v. Gill*, 2011 NSCA 100, which guidelines include the following:

\* Credibility assessment is not a science. It is not always possible to "articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events:" *R. c. Gagnon*, 2006 SCC 17 (S.C.C.), para.20. ... "[A]ssessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization:" *R. v. M. (R.E.)*, 2008 SCC 51 (S.C.C.), para. 49.

\* There is no principle of law that requires a trier of fact to believe or disbelieve a witness's testimony in its entirety: *Novak Estate, Re*, 2008 NSSC 283 (N.S.S.C.). On the contrary, a trier may believe none, part or all of a witness's evidence, and may attach different weight to different parts of a witness's evidence, *Novak Estate, Re*, supra.

\* Demeanor is not a good indicator of credibility: *R. v. Norman*(1993), 16 O.R. (3d) 295 (Ont. C.A.) at para. 55.

\* Questions which should be addressed when assessing credibility include:

a) What were the inconsistencies and weaknesses in the witness' evidence, which include internal inconsistencies, prior inconsistent statements, inconsistencies between the witness' testimony and the documentary evidence, and the testimony of other witnesses: *Novak Estate, Re*, supra;

b) Did the witness have an interest in the outcome or were they personally connected to either party;

c) Did the witness have a motive to deceive;

d) Did the witness have the ability to observe the factual matters about which they testified;

e) Did the witness have a sufficient power of recollection to provide the court with an accurate account;

- f) Is the testimony in harmony with the preponderance of probabilities which a practical and informed person would find reasonable given the particular place and conditions: *Faryna v. Chorny*...;
- g) Was there an internal consistency and logical flow to the evidence;
- h) Was the evidence provided in a candid and straight forward manner, or was the witness evasive, strategic, hesitant or biased; and
- i) Where appropriate, was the witness capable of making an admission against interest, or was the witness self-serving?

[76] The majority in *Lifchus* acknowledged that “certain doubts, although reasonable, are simply incapable of articulation” and emphasized that a “juror should not be made to feel that the overall, perhaps intangible, effect of a witness’s demeanor cannot be taken into consideration in the assessment of credibility” (para. 29).

[77] A related principle to credibility is reliability. The relationship between the two concepts was explained in *Cameco Corporation v. The Queen*, 2018 TCC 195:

[11] The reliability of a witness refers to the ability of the witness to recount facts accurately. If a witness is credible, reliability addresses the kinds of things that can cause even an honest witness to be mistaken. A finding that the evidence of a witness is not reliable goes to the weight to be accorded to that evidence. Reliability may be affected by any number of factors, including the passage of time. In *R. v. Norman*, [1993] O.J. No. 2802 (QL), 68 O.A.C. 22, the Ontario Court of Appeal explained the importance of reliability as follows at paragraph 47:

. . . The issue is not merely whether the complainant sincerely believes her evidence to be true; it is also whether this evidence is reliable. Accordingly, her demeanour and credibility are not the only issues. The reliability of the evidence is what is paramount. . . .

[78] Care must be taken in differentiating credibility from reliability. In *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193, [1995] O.J. No. 639 (Ont. C.A.), Doherty J.A. said, for the court:

33. 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. In this case, both the credibility of the complainants and the reliability of their evidence were attacked on cross-examination.

[79] Justice Doherty pointed out that the passage of time can affect the reliability of a witness's testimony.

[80] In *R. v. H.C.*, 2009 ONCA 56, Watt J.A. discussed the difference between credibility and reliability. Justice Watt stated for the court:

[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

- 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...

[42] This case required the trial judge to assess the credibility of two mature adults, T.F. and the appellant, as well as of a child of ten, K.F. Credibility requires a careful assessment, against a standard of proof that is common to young and old alike. But the standard of the "reasonable adult" is not necessarily apt for assessing the credibility of young children. Flaws, such as contradictions, in the testimony of a child may not toll so heavily against credibility and reliability as equivalent flaws in the testimony of an adult... [Citations omitted.]

[81] In *R. v. F.(C.C.)*, [1997] 3 S.C.R. 1183, Cory J., for the court, discussed a child's reliability in the context of a sexual assault complaint:

19 It will be self-evident to every observant parent and to all who have worked closely with young people that children, even more than adults, will have a better recollection of events shortly after they occurred than they will some weeks, months or years later. The younger the child, the more pronounced will this be. Indeed to state this simply expresses the observations of most Canadians. It is a common experience that anyone, and particularly children, will have a better recollection of events closer to their occurrence than he or she will later on... It follows that the videotape which is made within a reasonable time after the alleged offence and which describes the act will almost inevitably reflect a more accurate recollection of events than will testimony given later at trial. Thus the

section enhances the ability of a court to find the truth by preserving a very recent recollection of the event in question.

20 There is another aspect of the section that cannot be ignored. Any kind of assault on a child may be traumatic. Assaults of a sexual nature are still more likely to have a serious deleterious effect. This traumatic effect will be greater still when the perpetrator is a parent, guardian or person in authority. Recalling the events will be extremely difficult for every child and the more sensitive the young person, the greater will be the difficulty experienced. It follows that anything that can be done to ease the traumatic effect upon a child should be encouraged. Thus a record of events made in more informal and less forbidding surroundings than a courtroom will serve to reduce the likelihood of inflicting further injury upon the child witness. [Citation omitted.]

[82] Justice Cory went on to say:

[47] ... In *R. v. B. (G.)*, [1990] 2 S.C.R. 30, at p. 55, Wilson J. stated that

a flaw, such as a contradiction, in a child's testimony should not be given the same effect as a similar flaw in the testimony of an adult. ... While children may not be able to recount precise details and communicate the when and where of an event with exactitude, this does not mean that they have misconceived what happened to them and who did it.

[48] She concluded that, although each witness' credibility must be assessed, the standard which would be applied to an adult's evidence is not always appropriate in assessing the credibility of young children. This approach to the evidence of children was reiterated in *R. v. W. (R.)*, [1992] 2 S.C.R. 122, at pp. 132-34. There McLachlin J. acknowledged that the peculiar perspectives of children can affect their recollection of events and that the presence of inconsistencies, especially those related to peripheral matters, should be assessed in context. A skilful cross-examination is almost certain to confuse a child, even if she is telling the truth. That confusion can lead to inconsistencies in her testimony. Although the trier of fact must be wary of any evidence which has been contradicted, this is a matter which goes to the weight which should be attached to the videotape and not to its admissibility.

[83] As Arbour J. said for the majority in *R. v. A.G.*, [2000] 1 S.C.R. 439, while the integrity of the presumption of innocence must be maintained, delayed disclosure of uncorroborated allegations of sexual abuse does not bar the possibility of a conviction:

[30] ...I appreciate Finlayson J.A.'s unease in the face of what the trial judge termed the "well known difficulties" associated with the features of these types of cases, with which he was also very familiar. Having been exposed, like many in the criminal courts, to several such cases, the trial judge was aware of the need for

caution in preserving the integrity of the presumption of innocence. He was entitled to believe the uncorroborated evidence of the complainant in this case as in any other case, and he did. If it were unreasonable for him to do so, it would be impossible to convict in the many similar cases where there is a long delay in the disclosure of the uncorroborated allegations of a complainant in a sexual assault case. This is not the law.

[84] J.M. was a mature 30 year old adult when she testified. Her testimony related to events that she said occurred when she was somewhere in the range of ten or eleven years old. In discussing how to assess the testimony of an adult testifying about events that occurred when they were a child, McLachlin J. (as she then was) stated, for the court, in *R. v. R.W.*, [1992] 2 S.C.R. 122, that the court must take a common sense approach:

24. The second change in the attitude of the law toward the evidence of children in recent years is a new appreciation that it may be wrong to apply adult tests for credibility to the evidence of children. One finds emerging a new sensitivity to the peculiar perspectives of children. Since children may experience the world differently from adults, it is hardly surprising that details important to adults, like time and place, may be missing from their recollection. Wilson J. recognized this in *R. v. B. (G.)*, [1990] 2 S.C.R. 30, at pp. 54-55, when, in referring to submissions regarding the court of appeal judge's treatment of the evidence of the complainant, she said that

... it seems to me that he was simply suggesting that the judiciary should take a common sense approach when dealing with the testimony of young children and not impose the same exacting standard on them as it does on adults. However, this is not to say that the courts should not carefully assess the credibility of child witnesses and I do not read his reasons as suggesting that the standard of proof must be lowered when dealing with children as the appellants submit. Rather, he was expressing concern that a flaw, such as a contradiction, in a child's testimony should not be given the same effect as a similar flaw in the testimony of an adult. I think his concern is well founded and his comments entirely appropriate. While children may not be able to recount precise details and communicate the when and where of an event with exactitude, this does not mean that they have misconceived what happened to them and who did it. In recent years we have adopted a much more benign attitude to children's evidence, lessening the strict standards of oath taking and corroboration, and I believe that this is a desirable development. The credibility of every witness who testifies before the courts must, of course, be carefully assessed but the standard of the "reasonable adult" is not necessarily appropriate in assessing the credibility of young children.

25. As Wilson J. emphasized in *B. (G.)*, these changes in the way the courts look at the evidence of children do not mean that the evidence of children should not be subject to the same standard of proof as the evidence of adult witnesses in

criminal cases. Protecting the liberty of the accused and guarding against the injustice of the conviction of an innocent person require a solid foundation for a verdict of guilt, whether the complainant be an adult or a child. What the changes do mean is that we approach the evidence of children not from the perspective of rigid stereotypes, but on what Wilson J. called a "common sense" basis, taking into account the strengths and weaknesses which characterize the evidence offered in the particular case.

26. It is neither desirable nor possible to state hard and fast rules as to when a witness's evidence should be assessed by reference to "adult" or "child" standards -- to do so would be to create anew stereotypes potentially as rigid and unjust as those which the recent developments in the law's approach to children's evidence have been designed to dispel. Every person giving testimony in court, of whatever age, is an individual, whose credibility and evidence must be assessed by reference to criteria appropriate to her mental development, understanding and ability to communicate. But I would add this. 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.

***R. v. W.(D.)***

[85] In *R. v. W.(D.)*, [1991] 1 S.C.R. 742, Cory J., for the majority, instructed triers of fact in applying the burden of proof where evidence has been led on behalf of the accused. Noting that the "trial judge should instruct the jury that they need not firmly believe or disbelieve any witness or set of witnesses" (para. 27), he set out the following sequence, at para. 28:

First, if you believe the evidence of the accused, obviously you must acquit.

Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused...

[86] In *R. v. Dinardo*, 2008 1 S.C.R. 788, Charron J., for the court, commented on the application of the *W.(D.)* analysis:

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

[87] In this case, J.M. was testifying as an adult about events that she alleges occurred when she was a child. I must keep in mind the appropriate level of scrutiny to apply when assessing her evidence. Additionally, Mr. Maessen called two witnesses and also testified on his own behalf. Therefore, the test as laid out in *W.(D.)* applies to my analysis and provides considerable guidance in assessing the evidence in this case.

[88] I will now consider the evidence.

### **Analysis**

[89] J.M. describes an unknown number of incidents when she was ten or eleven years old where Marcel Maessen picked her up, and when putting her down, fondled her breasts. She said this initially, and mainly, occurred in the entranceway to the Maessen home and also happened once outside. She was able to specifically describe a couple of the incidents and others she described in general terms. She said that for most of these incidents Laura Maessen and Robin Lake may have been present.

[90] Laura Maessen and Robin Lake both testified. They were both credible witnesses. Ms. Lake said that she never saw Mr. Maessen engage in horseplay with kids in the entranceway to his house. That would have to include J.M. Ms. Maessen said she did not witness Mr. Maessen fondle J.M.'s breasts.

[91] J.M. also said that for one of the incidents M.E. was present. M.E. described witnessing a sexual assault on J.M. that was very similar in nature to what was described by J.M., but allegedly took place in totally different circumstances than those described by J.M.

[92] M.E. described an incident where she said that Mr. Maessen fondled J.M.'s breasts after he picked J.M. up and put her down. But M.E. specifically recalled this occurring while playing basketball outside with J.M., Laura Maessen and others, in their neighbourhood, in a specific location. She said the fondling occurred after the ball became stuck in a tree and they went to Mr. Maessen for help. J.M. did not recount such a situation. As well, Laura Maessen and J.M. both testified that there was no tree near the neighbourhood basketball net they used on the street during that time period.

[93] J.M. did not describe an incident where a ball became stuck in a tree and she was then lifted up and her breasts fondled. Instead, she said that on the one occasion of touching that occurred when M.E. was present outside in the neighbourhood, she approached Mr. Maessen to divert suspicion from her being previously fondled by him. J.M. said that when walking home from school with M.E., Mr. Maessen picked her up, swung her around and when putting her down fondled her breasts.

[94] M.E. also said that she played on the same basketball team as J.M. and Laura Maessen and that Mr. Maessen had coached them during the relevant times. From the evidence presented I do not believe that M.E. was accurate in her testimony in that regard. While M.E. presented as a credible witness, I was left with concerns about her reliability in recounting events from this time period.

[95] Marcel Maessen testified that he did not fondle J.M. He denied intentionally touching J.M. for a sexual purpose or in a sexual manner. He described one incident of accidental touching of J.M.'s breast when she was ten or eleven years old, and denied any other touching of her breasts, either accidentally or intentionally, on any other occasion.

[96] Mr. Maessen said he never served J.M. alcohol as a child, never drove her to school, and never offered to let her stay overnight at the family home if she was drunk underage. He said that he rarely wore a bathrobe but may have occasionally when in a rush. Regarding the bathrobe and penis incident, it is entirely possible that J.M. walked into the Maessen home one morning before school and saw Mr. Maessen's penis sticking out of his bathrobe. She said he acted surprised when he noticed his penis was exposed and, if so, there would be nothing nefarious about that incident. Nothing else is said to have occurred on that occasion.

[97] Mr. Maessen's evidence on the critical issue of whether he picked J.M. up and then fondled her breasts when he put her down, on multiple occasions, was

more detailed than a simple denial. He said he recalled picking J.M. up in the entranceway of his home one morning when Laura was not present. The physical manner in which he says he picked J.M. up does not seem plausible. The mechanics of the way he says he was holding her are overly complex and sound unworkable. However he was not challenged in any significant way on this point.

[98] Mr. Maessen's evidence was that J.M. simply slipped through his arms and that when her breasts briefly skimmed over his forearms she giggled. He opined that J.M. giggled due to her breasts touching his forearms. The Crown argued that at age ten or eleven this would have been an unusual reaction.

[99] Mr. Maessen said he then immediately spoke to J.M. telling her that she should not let anyone touch her that way. This also does not sound plausible. If J.M. accidentally slid through Mr. Maessen's arms, why would he need to give her some sort of parental type chat about inappropriate touching? If J.M.'s family lived nearby and Mr. Maessen was neighbourly with them (as he stated in his testimony) then why would he speak to J.M. about this directly and not talk to her parents or have her parents talk to her instead? He did not say that he ever mentioned this incident to J.M.'s parents, which also seems unusual. In any event, Mr. Maessen was not pressed about that issue in any significant fashion and those questions remain unanswered. Nonetheless, I did have concerns about his credibility regarding the critical issues.

### **W.(D.) Analysis**

[100] As noted earlier, the test as laid out in *W.(D.)* applies to my analysis.

#### ***First, if you believe the evidence of the accused, obviously you must acquit***

[101] On its face, I do not believe Marcel Maessen's testimony that any touching of J.M.'s breasts was purely accidental.

#### ***Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit***

[102] Mr. Maessen's testimony on its own does not leave me with a reasonable doubt about having touched J.M.'s breasts for a sexual purpose or in a sexual manner.

*Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused*

[103] J.M. said that M.E. was present when Mr. Maessen touched her breasts on one occasion outside. M.E. said she was present when Mr. Maessen touched J.M.'s breasts outside. However, those two witnesses described this occurring in very specific and very different circumstances. M.E. was a credible witness but not a reliable witness regarding the events of this time period. J.M. was both credible and reliable.

[104] J.M. said that Laura Maessen and Robin Lake were present for some of the sexual touching by Mr. Maessen during horseplay in his front entranceway. Ms. Lake denied ever seeing Mr. Maessen pick kids up in his entranceway. She had no specific recollection of any interaction between J.M. and Mr. Maessen.

[105] Laura Maessen denied ever seeing her father touch J.M.'s breasts.

[106] Both Ms. Lake and Ms. Masessen were credible and reliable witnesses.

[107] Marcel Maessen denies ever touching J.M. in a sexual manner or for a sexual purpose. I did not find Mr. Maessen to be entirely credible regarding the critical events.

[108] On the basis of all of the evidence, including that of M.E., Robin (Patterson) Lake and Laura Maessen, in combination with the evidence of Marcel Maessen, I am not sure whether the accused ever touched J.M.'s breasts for a sexual purpose or in a sexual manner. Because I am not sure, the Crown has not convinced me beyond a reasonable doubt that Marcel Maessen committed any crime against J.M.

## **Conclusion**

[109] I find Marcel Maessen not guilty of sexually assaulting and unlawfully sexually touching J.M.

Arnold, J.