SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. C. (J.D.)*, 2023 NSSC 230

Date: 20230717
Docket: CRH 507396
Registry: Halifax

Between:

His Majesty the King

v.

J.D.C.

Restriction on Publication of any information that could identify the victim or witnesses: Sections 486.4 486.5 *Criminal Code*

D E C I S I O N

Judge:	The Honourable Justice James L. Chipman
Heard:	April 17, 18, 19 and June 9, 2023, in Halifax, Nova Scotia
Written Decision:	July 17, 2023
Counsel:	Steven Degen and Nicola Hibbard, articled clerk, for the Crown Terrance Sheppard, K.C. and Samantha Gray, articled clerk, for Mr. C.

Order restricting publication — sexual offences

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

Order restricting publication — victims and witnesses

486.5 (1) Unless an order is made under section 486.4, on application of the prosecutor in respect of a victim or a witness, or on application of a victim or a witness, a judge or justice may make an order directing that any information that could identify the victim or witness shall not be published in any document or broadcast or transmitted in any way if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice.

By the Court:

INTRODUCTION

[1] By amended Indictment J.D. (J.) C. stands charged:

> that he, between the 31st day of December, 2009 and the 1st day of September, 2019 at or near Halifax, Nova Scotia, did unlawfully commit a sexual assault on B.D.W., 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 B.D.W., a person under the age of sixteen years, directly with a part of his body, contrary to Section 151 of the *Criminal Code*.

[2] At all material times the complainant was Mr. C.'s stepdaughter. Born as a female on [redacted], B.D.W. has recently transitioned and now identifies as a male. Given that the allegations pertain to the time when she was a pre-teen and teenager and because they involve groping and fondling of a female body, when discussing the allegations, I have exclusively referred to Mr. W. as a female. Further, to avoid confusion and for consistency, I have referred to all of the witnesses by their first names.

[3] The Crown called B.D., her mother, P.D.W., and a friend from her junior and senior high school years. A Statement of Admitted Facts was entered as exhibit 2 and reads:

> 1. On November 28th, 2022, D. W. provided a police statement to D/Cst. Tim Sheppard. In that interview Ms. W. stated that B.D.W.'s grades started to decline in Grade 10, high school. Ms. W. further stated that B.'s interest in hockey started to decline in grade 10. Ms. W. did not reference junior high school as the starting point for a decline in B.D.'s school marks or a decline in interest in hockey.
> 2. B.D.W. provided a statement to police on October 28th, 2020. The statement was 32 minutes in length.

The accused testified along with his mother, brother, son and a number of his friends.

GUIDING LAW

[4] The presumption of innocence is with J. throughout this trial. The burden of proof rests on the Crown throughout the case. Recently, Justice Jamieson had cause

to review the underpinnings of these legal foundations in *R. v. B.J.L.*, 2023 NSSC 123 at paras. 7 – 11 and I endorse and adopt these passages:

> **Presumption of Innocence and Burden of Proof**
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> 7. A fundamental hallmark of our criminal justice system, is the principle of the presumption of innocence. Every individual who is charged with a criminal offence is presumed to be innocent, unless and until that person is proven guilty beyond a reasonable doubt. The burden of proof rests with the Crown throughout the case. The question before me is not whether I believe that the events alleged by the complainant occurred; rather, the question before me is whether the Crown has succeeded in establishing each and every one of the elements of each charge beyond a reasonable doubt. The benefit of any doubt must be extended to the accused: *R. v. Lifchus*, [1997] 2 SCR 320, at para 36.
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> 8. The meaning of "proof beyond a reasonable doubt" is set out in *Lifchus, supra*, where Justice Cory discussed the history, essential components, and meaning of proof beyond a reasonable doubt at paras. 27-35, and provided a model jury instruction at para. 39:
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> > ...A reasonable doubt is not an imaginary or frivolous doubt. It must not be based on sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.
> >
> > Even if you believe the accused is probably guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the Crown has failed to satisfy you of the guilt of the accused beyond a reasonable doubt.
> >
> > On the other hand, you must remember that it is virtually impossible to prove anything to an absolute certainty and the Crown is not required to do so. Such a standard of proof is impossibly high.
> >
> > In short, if based upon the evidence before the Court, you are sure that the accused committed the offence, you should convict since this demonstrates that you are satisfied of his guilt beyond a reasonable doubt.
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> 9. In *R. v. Starr*, [2000] 2 S.C.R. 144 (S.C.C.), the Court pointed out that the burden of proof placed upon the Crown falls "much closer to absolute certainty than to a balance of probabilities." (para. 242). Proof beyond a reasonable doubt is not proof to an absolute certainty, but it is proof to a high level of certainty. It is beyond proof of probable or likely guilt. (*Starr* at para. 242 and *Lifchus* at para. 32) The standard of proof beyond a reasonable doubt applies to the final evaluation of guilt or innocence. I must not apply it piecemeal to individual items or categories of evidence. (*R. v. Ménard*, [1998] 2 S.C.R. 109, at para. 23).
>
> 10. Reasonable doubt can arise from the evidence or from the absence of evidence. It is grounded in reason and common sense, and determined without any

> basis in sympathy, prejudice, emotion, sentiment, leaps of logic, flights of imagination, or frivolous considerations: *Lifchus* at para. 36.
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> 11. It is important to highlight the presumption of innocence, especially in the context of alleged sexual assaults against children. As the Ontario Court of Appeal said in *R. v. J. (F.E.)*, (1990), 53 C.C.C. (3d) 64 (Ont. C.A.), courts must be vigilant to ensure the principle of the presumption of innocence is not eroded by a zeal to punish child sexual predators. Guarding against the injustice of the conviction of an innocent person requires strict compliance with the principle that an accused is presumed to be innocent until proven guilty beyond a reasonable doubt (See also *R. v. W.(R.)*, [1992] 2 S.C.R. 122, at para. 26).

[5] As will become apparent in this case, like so many other sexual assault cases, credibility is critical and both the complainant and accused testified. When an accused person testifies, their evidence must be assessed applying the reasonable doubt standard in the context of the *W.D.* analytical framework. Recently, Justice Keith considered the law in this context in *R. v. Shaw*, 2023 NSSC 152 at paras. 14 – 22 and I endorse and adopt these passages:

> **The *W.(D.)* Framework**
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> 14. In this case, Mr. Shaw chose to testify in his defence.
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> 15. As in many cases involving allegations of sexual abuse, concerns around credibility and reliability (credibility is sometimes referred to as "honesty" and reliability is sometimes referred to as "accuracy". The distinction admits the possibility that that honest witnesses acting in good faith might still be mistaken in their observations and recollections; thus making their testimony unreliable) loom large - not only with respect to Mr. Shaw's testimony but the witnesses called by the Crown as well.
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> 16. It is important to approach the assessment of credibility from the proper analytical perspective. As indicated above, the Crown bears the burden of proving guilt beyond a reasonable doubt and the Accused does not have to prove anything. The mere fact that Mr. Shaw elected to testify does not change these fundamental principles. Put slightly differently, just because Mr. Shaw testified does not mean that:
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> > 1. This criminal trial is transformed into a credibility contest where the question of guilt or acquittal is reduced to the binary choice where the Court selects either the evidence offered by the Crown (i.e. guilt), on the one hand, and the evidence offered by the accused (i.e. acquittal), on the other; or
> >
> > 2. An accused cannot be convicted simply because the Court deems his performance in the witness box deficient or insufficiently compelling to prove his innocence. This would improperly reverse the burden of proof because, again, the accused is not required to prove anything - let alone his

> innocence. As important, it completely undermines the accused's right to be presumed innocent.

17. In *R v. W. (D.),* [1991] 1 S.C.R. 742 ("*W.(D).*"), the Supreme Court of Canada established an analytical framework designed to reinforce the presumption of innocence and the Crown's burden of proof when assessing credibility. It stated, at para. 28:

> ... A trial judge might well instruct the jury on the question of credibility along these lines:
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> 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 a reasonable doubt by it, you must acquit.
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> 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.

18. Although *W.(D.)* provided these instructions in numerical order, the analysis is not rigidly sequential. *W.(D.)* neither endorsed a mathematical formula to be robotically repeated nor created "a magic incantation which trial judges acting as triers of fact must mouth to avoid appellate intervention" (*R. v. C.,* 2004 NSCA 135 at para. 21). "Lack of credibility on the part of the accused does not equate to proof of his or her guilt beyond a reasonable doubt" (*R. v. S. (J.H.)*, 2008 SCC 30, at para. 13).

Assessing Credibility Within the W.(D.) Framework

19. Bearing the *W.(D.)* principles in mind, the Court must still make findings regarding the credibility and reliability of the witnesses who testify. The jurisprudence reveals a number of factors which help guide that determination.

20. As a preliminary point, the cases recognize that the task of assessing credibility is not easy. Assessing credibility is more of an "art than a science" and is "particularly daunting where a judge must assess the credibility of two witnesses whose testimony is diametrically opposed" (*R. v. S. (R.D.)*, [1997] 3 SCR 484 at para. 128). 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. v. Gagnon*, 2006 SCC 17, at para. 20). Similarly, as the Nova Scotia Court of Appeal more recently stated in *R. v. Stanton*, 2021 NSCA 57 ("*Stanton*"), at para. 67:

> The exercise of articulating the reasons "for believing a witness and disbelieving another in general or on a particular point...may not be purely intellectual and may involve factors that are difficult to verbalize...In short, assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization" (*R. v. R.E.M.,* 2008 SCC 51, para. 49).

21. Ultimately, the process requires the Court to engage in thoughtful reasoning - not thoughtless instinct based, for example, on a knee-jerk "gut feeling" as to a witness' credibility and reliability. In *R. v. D.D.S.*, 2006 NSCA 34, Justice Saunders described this rational process as "...the painstaking, careful and repeated testing of the evidence to see how it stacks up. How does the witness's account stand in harmony with the other evidence pertaining to it, while applying the appropriate standard of proof in a civil or a criminal case?" (at para. 77).

22. In terms of more specific guidance, the key factors include (these factors were developed having regard to the Ontario Court of Appeal's decision *R. v. Tash*, 2013 ONCA 380 (at para. 40 - 42); Justice Warner's decision of *R. v. Farrar*, 2019 NSSC 46 at para. 15; and Justice Forgeron's decision in *Baker v. Aboud*, 2017 NSSC 42 at para. 13):

> 1. The presence and significance of inconsistencies or contradictions. This would include:
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> > (a) prior inconsistent statements and other impeaching evidence;
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> > (b) whether the witness' own evidence is internally coherent. This includes an assessment of whether the witness' own testimony hangs together as a matter of logic, reason and experience;
> >
> > (c) how the witness' evidence measures against (or interrelates with) the evidence as a whole. When the dispute involves allegations of sexual abuse, the Court must remain particularly vigilant to consider the evidence as a whole, including any ambiguous or contradictory conduct by the complainant (*Ewanchuk* at para. 29 - 30 and 61 and more recently cited in *Stanton* at para. 67). Moreover, discrete pieces of evidence should not be considered in isolation or "cherry-picked" and exploited to either selectively bolster or, alternatively, selectively undermine a person's credibility.
>
> 2. The presence of specific interests, motivations, or bias which might distort the witness' evidence or skew his ability/willingness to provide truthful evidence. This could also include feelings of hostility or animus towards either another witness or the subject matter of the proceeding.
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> 3. The physical context or surrounding circumstances which may have influenced the witness' ability or opportunity to accurately observe the events in question.
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> 4. Qualities specific to the witnesses themselves include:
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> > (a) the strength of their memory and whether it is accurate and complete;
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> > (b) whether their testimony was presented in a candid and straight forward manner; or was their testimony presented in a manner that was evasive, non-responsive, unnecessarily combative or strategic;

> (c) whether the witness, when appropriate, was prepared to make a candid admission against interest;
>
> (d) the witness' history and whether it reveals a relevant capacity for deception or being untrustworthy. These factors could include "prior untruthful conduct or the witness' associations". I note that, within limits, section 12 of the *Canada Evidence Act*, R.S.C. 1985, C-5, as amended and section 58 of the *Nova Scotia Evidence Act*, R.S.N.S. 1989, c. 154, as amended permit a person (including the accused) to be cross-examined on their criminal record. The policy reasons relate back to credibility. In *R. v. Corbett*, [1988] 1 S.C.R. 670 ("*Corbett*"), the Supreme Court of Canada stated that a person's criminal record goes to his/her character and trustworthiness - personal qualities that are obviously relevant to credibility and reliability. In explaining its rationale, at para. 25, the Supreme Court of Canada adopted the following quotation from an American Court:
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> > What a person is often determines whether he should be believed. When a defendant voluntarily testifies in a criminal case, he asks the jury to accept his word. No sufficient reason appears why the jury should not be informed what sort of person is asking them to take his word. In transactions of everyday life this is probably the first thing that they would wish to know. So it seems to us in a real sense that when a defendant goes onto a stand, "he takes his character with him." ... Lack of trustworthiness may be evinced by his abiding and repeated contempt for laws which he is legally and morally bound to obey, as in the case at bar, though the violations are not concerned solely with crimes involving "dishonesty and false statement.
>
> (e) demeanour, but approaching this topic with caution having regard to the risk or impermissible stereotypical thinking as to how a person should (or should not) be acting in Court (see *R. v. D.C.*, 2023 NSSC 20 at paras. 57 - 59).

[6] Both *B.J.L.* and *Shaw* involved the testimony of child complainants. Accordingly, both cases provide helpful guidance when assessing evidence coming from witnesses who are children. The case at hand is different because B.D. is now 20 years old. Nevertheless, some of her testimony dated back to her time as a pre-teen and in this regard I am cognizant of some of the same flexibility afforded to children who testify in court. In particular, I refer to Justice Keith's summary at para. 23 of *Shaw*:

> **Testimony from a Child Witness**

23. A certain leeway or flexibility is afforded children who testify in court. The following principles are distilled from the caselaw:

1. The Court adopts a "common sense approach" to testimony from children and does "not impose the same exacting standard on them as it does on adults" (*R. v. B.(G.)*, [1990] 2 S.C.R. 30 at page 17). "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." (*R. v. W. (R).*, [1992] 2 S.C.R. 122 ("*W.(R.)*"), at para. 25). The factors which bear upon this assessment will include the witness' mental development, their ability to understand the questions being asked, the presence of any animus, and their capacity to accurately recollect and communicate their memories to the Court;

2. Mistakes, inaccuracies or inconsistencies on "peripheral" matters will not necessarily raise a reasonable doubt or fatally wound a child's credibility. (*R. v. Bishop*, 2009 NSCA 32 at para. 5 and see also *R. v. R.B.*, 2018 NSCA 78 at para. 80). The Court will attempt to separate those issues which are "peripheral" from those which are "core". In doing so, the Court recognizes both the strengths and frailties of childhood memories in a common sense and contextual way while, at the same time, vigorously protecting the accused's fundamental right to a fair trial particularly on essential or "core" matters;

3. Separating evidence which is "core" from that which is "peripheral" is not always easy or straightforward. At times, the distinction may be obvious. At other times, the distinction can become more nuanced and driven by the unique circumstances of the case. That said, the following comments may help guide the analysis:

(a) Evidence which goes directly and inextricably to an essential element of the offence is obviously "core". It must be approached carefully and with a critical mind, taking into account the totality of the evidence. This is because "core" evidence going to an essential element leading possibly to a guilty verdict must be scrutinized. "Core" evidence includes testimony regarding those specific acts which form an essential element including touching for a sexual purpose when, as here, an accused faces charges of sexual interference;

i. "Core" evidence may also include such additional details or events that may be necessarily and inextricably linked to an essential element. Thus, certain acts may be considered "core" if they provide unique and essential context which is necessary to explain specifically how any alleged sexual act occurred. See, for example, *R. v. D.A.H.*, 2019 ABCA 26 at para. 7 - 8; *R. v. M. (J.M.)*, 2012 NSCA 70 at para. 52 - 53; and *R. v. H.(D.)*, 2016 ONCA 569 at para.

> 53 - 54. By contrast, evidence that otherwise goes to the narrative leading up to the actual alleged assault or invitation to sexual touching, but not directly to an essential element, is often considered peripheral. Evidence that relates to small discrepancies around frequency, or the precise timing of an alleged assault, or superfluous details around clothing, location or how furniture was arranged is also often peripheral in nature. See, for example, *R. v. G.S.*, 2021 NSSC 133; *R. v. D.G.*, 2020 ONCA 671; and *R. v. M.L.C.*, 2021 ABCA 224.

POSITIONS OF THE PARTIES

Crown

[7] The Crown acknowledges this as a difficult case which comes down to the credibility of the accused and complainant. With respect to B.D.'s evidence, the Crown concedes that it was lacking in detail in areas; however, they submit that this is consistent with someone who was ashamed of what happened and did not want to share the specifics of what transpired. The Crown submits that the complainant kept the abuse from others for years and that when she finally told her story that it was entirely sincere and credible.

[8] The Crown describes J.'s narrative as especially problematic. In the Crown's submission, J. embellished his evidence in an attempt to submit that B.D. had motive to fabricate her evidence.

[9] The Crown took direct aim at J.'s credibility in submitting that his account was like a sales pitch. Recalling his evidence about massaging B.D., the Crown suggested that he was spinning a story and that overall, his testimony does not pass scrutiny under the *W.D.* analysis. Accordingly, the Crown requested convictions on both counts.

Defence

[10] The Defence argued that it was B.D. who lied about the allegations and that her mother had her own agenda as well. The overall evidence of B.D. was general, evasive and lacking in any detail in the Defence submission.

[11] The Defence pointed to B.D.'s differing accounts about why the alleged abuse stopped. In taking on her credibility, the Defence also encouraged the Court to

examine her nervous demeanor which involved looking down and avoiding eye contact. In addition, the Defence characterized B.D.'s demeanor as at times flippant.

[12] Returning to credibility, the Defence submitted that B.D. could not provide details concerning whether the lights were on or off. They argued that she was non-specific about many related details. Overall, the Defence questioned the believability of her story which would have involved sexual abuse about four times a week during times when others were almost always present in the house(s).

[13] The Defence pointed to the evidence of others in the household who never saw anything untoward. The Defence emphasized B.D.'s younger brother's evidence as especially compelling as he had no concerns and was adamant that his sibling was making up the allegations. With regard to J.'s evidence, the Defence characterized it as clear, consistent and straightforward. In the result, they argued that it should be accepted in its entirety as being honest and both externally and internally truthful. Accordingly, the Defence requested acquittals on both counts.

Early Years

[14] From the testimony of D.W. and J. C. I find that B.D.'s early years – prior to the allegations – are consistently described. She was born in [redacted] and moved with her mother to [redacted] as an infant. D. and J. re-connected (they were friends from growing up in [redacted] and attended the same junior high school) and by the time B.D. was two years old they lived together in a basement apartment in J.'s mother's home. When B.D. was around four years of age, she moved with her parents (by this time she referred to J. as her dad) to a nearby apartment on [redacted]. Soon thereafter, on [redacted], 2006, D.C. was born, the biological son of J. and D.

[15] Shortly after D.C.'s birth the family moved to a house on [redacted]. At this time B.D. was in elementary school and playing minor hockey with the [redacted]. By all accounts she was an excellent player, excelling at the sport to the point that her parents dedicated considerable time (especially D.) and money (more so J.) so as the years went by she could play competitive hockey and attend camps. She continued as an exceptional hockey player up until the time she dropped out of competitive hockey in March, 2020.

The Allegations/Evidence/Findings of Fact

[16] B.D. alleges that she was abused by J. beginning at around age 10. She estimates "over a hundred ...hundreds" of times being sexually assaulted from this age up until she moved out of her stepfather's residence when she was seventeen. B.D. testified that J. inflicted the abuse while they lived on [redacted] and later during the time she lived with him when he moved to another residence on nearby [redacted].

[17] B.D. said she could not recall the first or last time she was sexually assaulted by J. She added, "I remember everything, its all just kind of the same. I was getting touched everywhere with his hands, mouth and dick." She said the touching was to her vagina, breasts and buttocks. B.D. said that J. licked her "private parts" and put his penis under her and moved it "while touching my vagina and bum in a jerking motion using my body to ejaculate."

[18] On cross-examination B.D. acknowledged that she did not mention in her police statement that J. touched her buttocks or breasts. Later she added, "I honestly thought it was a given." On re-direct she did not recall if she was asked about this by the police officer.

[19] Given the witness testimony and exhibit 1 (D.'s sketch of the main floor plan of the [redacted] residence) I find that the first house where B.D. alleges that she was sexually assaulted was a relatively small (under 900 square feet per floor) bungalow with a mainly finished basement with a separate entrance. B.D. had her own bedroom on the main floor, next to the living room with her parents' and brother's rooms in close proximity. The kitchen and bathroom rounded out the main floor and there was a French door which opened to the stairs to the basement. The basement consisted of a finished bedroom, television room, entry and laundry area. There was a nearby garage.

[20] B.D. lived exclusively at [redacted] between the ages of about seven and 14. Her parents separated and she then moved with her stepfather and D.C. to J.'s [redacted] rental accommodation on and off until about age 17. Given all of the evidence describing the [redacted] residence, I find that this was a rental apartment, roughly similar in size to the [redacted] bungalow. J.'s apartment consisted of the main floor where he converted an office to his bedroom, living room, kitchen and bathroom. Stairs led to an upper floor where there were two bedrooms; one occupied by D.C. and the other by B.D. It is in the main level bathroom where B.D. says that further sexual interaction occurred with J. On a number of occasions while he was showering, B.D. says that she pushed the shower curtain in so as to touch his penis

(through the shower curtain). Later she added that this also took place at [redacted] "multiple times."

[21] On cross-examination she agreed that she did not tell the police about the shower curtain incidents, "because I was so disgusted with myself." On re-direct she added that the police officer never asked her about the alleged incidents.

[22] At the [redacted] residence B.D. recalled that "the molestation was in my bedroom, maybe a few times not my bedroom, it could have been his bedroom or the living room … I don't know probably 10 – 20 times." At [redacted] she said that the abuse occurred in her bedroom or the living room. The abuse occurred at both residences almost exclusively at nighttime. Each episode lasted 20 – 30 minutes.

[23] B.D. testified that the abuse would typically start with J. rubbing her back and legs "and it would end up near my vagina." She said that J. removed her clothes (usually pajamas) and as he committed the sexual assaults said her name and "fuck, in a good way" in a whispering voice. She is "pretty sure every time he ejaculated; sometimes I'd freak and say stop, get the fuck out but that was in my head, I'd say stop a few times." On cross-examination she said he often ejaculated on her back and that she had to clean it up after he left the room, or, "sometimes he would help wipe it or whatever."

[24] On cross-examination it was pointed out that she testified that the abuse almost always occurred when she was lying face down; however, in her police statement she said that "he put his face down there [vagina] for a long time."

[25] B.D. testified that intercourse did not occur; however, "a couple of times intercourse was attempted and I would squeeze my legs together or it would hurt so it stopped, I had not put anything inside before, J. could tell because I was a child, he would go back to the rub thing." Throughout the numerous sexual assaults there was no kissing or embracing. Mr. C. did not wear a condom.

[26] B.D. recalled that J. would usually be wearing his boxers when he inflicted the abuse. She added that most often he put his penis through the underwear.

[27] B.D. testified; "I did my best my whole life to try to forget." She said that by the fall of 2018 she knew that she "had to get away from the situation." She elaborated that at ages 10 – 12 she wondered what was happening but as "I grew up I knew this was horrible …I felt disgusting." She said that towards the end when she could better defend herself that she kicked J. while he was sexually assaulting her.

[28] As things progressed, by the end of grade 10 B.D. rarely slept at J.'s home. She ultimately moved out in the fall of 2018 (grade 11). Asked why she initially moved in with J. on [redacted], B.D. described a sad relationship with her mother; "she was a mess, not there for me at all, she put herself first. She was abusing drugs and drinking a lot. She'd take money from me." B.D. also testified that her stepfather drank alcohol and used marijuana. By the age of 14, she said he also gave her marijuana on occasion and that sometimes she smoked "weed" with him. She said that when she was older, he also purchased liquor for her. She did not recall drinking with him. B.D. also suspected that J. used cocaine.

[29] B.D. said that she started smoking marijuana at age 14 and that she "smoked pretty much every day." She obtained "eighty percent" of her marijuana up until grade 11 from J. After grade 11 she very rarely got marijuana from him.

[30] B.D. recalled that her parents separated in 2015. There was supposed to be equal parenting, but she and her brother spent most of their time with J. She denied ongoing physical abuse by her mother. B.D. did acknowledge that she told J. that her mother had "smacked her" on one occasion. She described her mother as harder to deal with adding, "I didn't have expectations [placed on me] from J., I wasn't yelled at, Mom was still using [drugs and alcohol], she wasn't easy to tolerate."

[31] Over the years, B.D. is not sure if anyone saw what happened to her other than her brother; "I know he walked down in the middle of it happening." She said this took place in the living room. When she was in her bedroom she thought her door was closed most of the time. She elaborated that she was "scared someone could see what was happening because I felt it was wrong." On cross-examination B.D. clarified that while living on [redacted], she thought her brother probably "ten times" walked in on J. abusing her. She does not know if he saw anything – she was "scared about him seeing what was happening …a blanket was put on or I was pulling my pants up really fast." B.D. said that almost every time she was sexually abused that someone else was in the house.

[32] When she was in grade 11 she confided in her closest friends, [redacted] and [redacted] that she was being abused. She specifically recalled talking to [redacted] about being molested during a conversation in a car in grade 11.

[33] After confiding in Sapna, B.D. told her mother about the abuse and shortly thereafter reported the crimes to the police. She gave a police statement in late October, 2020. She said that part of her rationale for reporting J. was because she learned from a friend, [redacted] that he was also being taken advantage of by J. On

cross-examination she elaborated that J. gave [redacted] cocaine and that in her police statement she said this fact was what "triggered" her to report and that it "should also be punishable."

[34] Since reporting the abuse, B.D. and D.C. have become estranged. On cross-examination she acknowledged that D.C. was shocked when she told him that J. had abused her. As for J., she describes him as a "fucking loser, fucking disgusting" and says they now do not have much of a relationship. As for their relationship during the time of the matters in issue, she stated on cross-examination "for the most part, not much of a relationship, we were just using each other."

[35] On cross-examination B.D. agreed that she told the police that the abuse stopped when she moved out of [redacted], whereas she told [redacted] it ended when she could defend herself. B.D. denied moving out of the [redacted] residence on account of J.'s insistence that she attend classes and keep her room clean.

[36] On cross-examination she clarified that she mentioned the abuse to [redacted] at age 14 or 15 but did not provide details until the grade 11 discussion in the car. On cross-examination she said she was 90 percent sure the conversation took place in grade 11, even if [redacted] thought it was in grade 12. As for [redacted], she recalled mentioning the abuse happened but could not remember any details of her conversation with [redacted].

[37] [Redacted] described being "really good friends" with B.D. in junior and senior high. She recalled a May 2020 conversation during "covid times" with B.D. They were in [redacted] car and she parked by [redacted]. B.D. confided in [redacted] that her "step dad had been sexually abusive from the time of grade one to age 16." [Redacted] clarified that B.D. then said that the abuse started at age ten. They were both crying. Later, [redacted] asked B.D. how often this went on and she replied "at least once a week." [Redacted] said that B.D. told her that the sexual abuse stopped when she was big enough to defend herself.

[38] [redacted] recalled an earlier conversation with B.D. in August 2019, when B.D. told her that "up until a few years ago, I was abused my whole life." At the time, [redacted] thought she was referring to physical abuse.

[39] [Redacted] also recalled an October 2020 friend's birthday party and B.D. becoming very upset after speaking with their friend, [redacted]. [Redacted] stated that B.D. told her that she needed to go to the police.

[40] J. strongly denied any sexual interactions of any kind with B.D. He described his relationship with B.D. as "normal" and said that he loved her as a daughter. He recalled that over the years they played ball hockey, watched television and movies and that he taught her to play catch.

[41] From all of the evidence I find that by the time B.D. was school-age the C./W. household was dysfunctional. Both parents were using cocaine on a fairly regular basis and they used marijuana on a daily basis. Both D. and J. consumed alcohol and D. struggled with alcohol addiction. Child Protection workers made visits on multiple occasions. There were various borders living in the basement apartment at [redacted], many of whom testified at the trial. The garage was a party area and cocaine and other drugs were consumed by various attendees along with the homeowners. D. was charged with assaulting J. in 2014 or 2015 and the two were in and out of court.

[42] On cross-examination B.D. agreed that she went to [redacted] in [redacted]. She said that her mother wanted her to stay in Nova Scotia and play in a provincial hockey tournament. As for J.'s wishes, "he didn't care."

[43] It was put to B.D. on cross-examination that J. "did not like gay people" and had run-ins with "lesbians at his workplace"; however, she denied any knowledge of J. harbouring these views. She did recall that he said "trans[gender] men are gross and look fat."

[44] B.D. was asked whether J. had referred to her as having at one time strong body odour and saying, "you don't have to be a stinking dyke." B.D. denied that he ever said such a thing, adding; "he was never hateful towards me."

[45] D. testified that she never suspected any abuse was being inflicted on her daughter. Nevertheless, when she looks back she sees things differently on account of B.D.'s marks slipping and her loss of interest in school and hockey. On cross-examination she acknowledged that B.D.'s grades began to decline in grade eight or nine. D. learned of the abuse when B.D. told her in September, 2020. On a friend's advice she encouraged her daughter to report the sexual abuse to police.

[46] D. testified that she talked to J. on one occasion about B.D.'s decline in school. She recalled that he was not really interested in either B.D.'s education or hockey.

[47] D. recalled that B.D. had been to Cuba with her biological father on the 2019 March break. As for 2020, she did not recall J. being upset about B.D.'s plans to go back to Cuba rather than play in the Provincial hockey tournament.

[48] D. had no knowledge of J.'s alleged bad attitude about "LGBTQ people." She acknowledged that they discussed B.D.'s body odour issue.

[49] During the trial much time was spent by the Defence establishing that following her parents' separation B.D. chose to live predominantly with her stepfather. As well, extensive Defence time was devoted to establishing that there were tenants present in the basement room at [redacted] and in a basement apartment during the time B.D. was living at [redacted]. Further, an inordinate amount of Defence time was spent in an effort to have witnesses testify that the exterior doors were unlocked and that within the residences, doors (including bedroom doors), were routinely left open.

[50] Undoubtedly, all of this time (indeed, several witnesses were called for the above noted sole purposes) was spent in an attempt to demonstrate that the sexual assaults could not possibly have happened, given the proximity of people and the prospect of anyone walking in at any time. Rather than laying all of this evidence out in the minutia and dissecting it, I simply pause her to state that I am not persuaded by this argument in this case, particularly given what I have described as a dysfunctional household. Given all of the evidence I am of the view that the majority of the adult residents of [redacted] and [redacted] – whether they were family or friends – were preoccupied with other matters (predominantly partying and using drugs) to the point that little attention was paid to B.D. or D.C. Accordingly, as I examine the totality of the evidence, I have placed very little weight on what was led in this area. I would add that the minimal weight of this evidence is more than offset by what I must conclude was a concerted effort by the Defence to have witnesses – including J. – testify with certainty about whether doors were open or shut. Particularly in the context of the atmosphere of drug abuse and partying and given the passage of time, I found this evidence wholly choreographed and entirely disingenuous causing me to question the overall credibility of the accused and the witnesses called on his behalf.

[51] On cross-examination D. said that B.D. asked her "all the time" to massage her back on account of "a lot of knots" after playing hockey. She denied that her daughter regularly asked J. to give massages. She added that she never saw J. give B.D. massages.

[52] J.'s mother, T.T, testified that she spent a considerable amount of time with B.D., including during the time of the allegations. She said that it was not uncommon for her son or herself to massage B.D. and that she often asked her father for a massage. On cross-examination T. denied volunteering her evidence about the massages, adding that she watched her son massage B.D.'s back and entire legs.

[53] T. said that "if anything funny was going on in that house, my son would have told me." She also described "one big happy family" and denied any knowledge of cocaine use. On cross-examination, she said that if there was cocaine use, "they hid it pretty well." On cross-examination T. agreed that she was only at her son's residence "once in a blue moon" when the children went to bed.

[54] Over the years growing up as B.D.'s [redacted] brother, D.C. did not notice anything unusual about his father's relationship with his sister. Now [redacted] years old and a grade [redacted] student at [redacted], D.C. lives exclusively with his father. He recalled that B.D. played a lot of hockey and afterwards, she often asked his father or grandmother for a massage, adding "she even asked me to step on her back." He said that this mother did not give massages to B.D. D.C. said that of all the massages he saw B.D. receive that none were inappropriate.

[55] D.C. specifically denied ever seeing anything unusual take place between his sister and his father. He never witnessed a blanket or anything placed over his father and B.D.. On cross-examination he said the massages would involve the back, feet and shin areas but not the upper parts of B.D.'s legs.

[56] On cross-examination D.C. was asked about the living arrangements after his parents split and he allowed, "it was a weird situation to be in." He said that when they were together at [redacted] that his mother "would lock herself in her room every night …she was not emotionally present a lot of the time."

[57] J.D.J.C. (dob [redacted]) is [redacted] years of age. He met D. in [redacted] and "instantly fell in love with her." They re-connected shortly after B.D. was born and became romantically involved.

[58] J. described B.D. as an "amazing" child and said while she was growing up that "she was like my sidekick." He characterized B.D. as an "amazing athlete" and recalled teaching her catch and basketball. He said that they "bonded" over sports and recalled that B.D. was a "great student" and an "amazing hockey player" for most of her growing up years.

[59] J. testified that he "wanted to shield his kids from trauma"; however, on the totality of the evidence I find this not to be the reality. He was critical of his former common law spouse's lifestyle over the years, yet he engaged in similar drug use and partying in the presence of both of his children.

[60] J. said that D. was continually "violent" with B.D.; however, he offered no specifics to back up his claims. On cross-examination he said that the reason B.D. wanted to live with him on [redacted] was because when she was with her, "D. was beating B.D. every other day." He said he did not call police because B.D. said it "was fine" and "D. laughed it off."

[61] For close to twenty years J. worked as a [redacted] in the [redacted] department at [redacted]. He went on [redacted] leave in around redacted] and subsequently retired. He is now self-employed as a [redacted] and [redacted]. J. was embroiled in workplace strife at [redacted] on account of "a run-in with an aggressive lesbian" along with an incident involving "a homosexual." J. testified as to his homophobic views and stated, "I think it's disgusting, I don't believe in the trans agenda." J. emphatically stated that he made B.D. and D. aware of his bigoted views. J. says that he now realizes this period of time was around the time that B.D. came out as gay and that he did not realize she was gay until the summer of 2020.

[62] On cross-examination J. maintained that it "was very well known that I'm anti-gay." He said that he would "regularly" talk to D. and B.D. about his "issues with homosexuality."

[63] On cross-examination J. said he told B.D. about his "run-in with the lesbian" in response to her asking him how his day was. When he told her he recalled that B.D. "kind of giggled about it."

[64] J. stated that he did not know B.D. was struggling in school until around Christmastime in her grade [redacted] year. It was also around this time that he received "a crazy call from her mom" to the effect that B.D. was not attending classes and failing. Until this call, J. says he had "no clue" what was going on with B.D. On cross-examination he maintained that he was "shocked" when D. told him of B.D.'s poor school performance. He then acknowledged that he had never spoken with any of her high school teachers.

[65] From this point J. says that he told B.D. that there would be "no more free rein"; she would have to earn the use of his car, keep her room clean and "check in, that didn't' go well at all." On cross-examination he said he also threatened her

phone privileges and in response "she seemed more spiteful than anything." In the result, he says B.D. moved out to her mother's residence. Although she moved in with her mother by 2019, he maintains that he still saw her "almost daily because I had to take her to practice …she stopped by looking for money."

[66] Questioned about massaging B.D., J. said that from a young age his stepdaughter asked him to rub her back after hockey. J. provided a detailed description of how he would massage her back, neck and shoulder area. He also massaged – "once in a blue moon" – B.D.'s knees and feet. He denied massaging her calves or thigh area. He said that when she asked for a massage; "I would always oblige her" noting that when they lived at [redacted] that he gave B.D. massages mostly in her bedroom and once in awhile on the living room sofa or on the downstairs couch. In terms of the bedtime routine, he testified that he would often simultaneously read a book and massage B.D. When subjected to detailed questions on cross-examination surrounding this, J. struggled to explain how he held the book with his right hand and massaged with his left hand.

[67] J. said that by the time B.D. was age ten or eleven that he stopped reading books to her. Soon thereafter he moved to [redacted] and here he frequently massaged his stepdaughter until she moved out around age 16. When asked how it was that his massages were restricted to the lower leg area, he replied that B.D. had psoriasis and that he "wouldn't go further on the legs because it was itchy and painful."

[68] On cross-examination he acknowledged that over the years at both residences he sat on the couch with B.D. and watched television. He reluctantly conceded that B.D. would sometimes have a blanket over her.

[69] J. described himself as a social drinker. He acknowledged that since high school he has smoked marijuana on a daily basis. He said that until he stopped "a couple of years ago" that he regularly used cocaine over the course of most weekends while at [redacted] and [redacted].

[70] On cross-examination J. said he was able to hide his cocaine use from "Mom and everyone but D." He then allowed that his mother and "people knew I had a problem."

[71] J. denied supplying B.D. with marijuana; however, he later acknowledged that he suspected her of taking some of his marijuana. When he questioned his stepdaughter about from whom she got her supply she told him that it came from her

friend [redacted], whom he considered to be "a big drug dealer" at [redacted]High School.

[72] J. said another source of tension between him and B.D. arose from her March 2020 decision to go to Cuba and not participate in an important hockey tournament. On direct examination J. described this as a "SEDMHA Tournament" adding that he received "full on resentment" because he did not agree with B.D.'s decision (backed up by her mother) "just to go party" (in Cuba) and forego the potential for hockey advancement and potential scholarships.

[73] On cross-examination J. said he was "actively involved" in B.D.'s hockey career and "…started taking on the brunt in 2015." He allowed that his mother and her husband assisted with driving B.D. to the rink. When asked specific questions about B.D.'s hockey, I formed the distinct impression that J. knew very little in the way of details. For example, other than saying he "knew a few of her coaches" no specifics were provided. On more cross-examination questioning he acknowledged that D. was "more of the booster and on committees, I provided the money." Probed further about the 2020 hockey tournament, J. did not appreciate that it was a Provincial Tournament and not the less competitive SEDMHA Tournament (which takes place later in the season). He maintained that he cared about B.D.'s hockey career; however, he offered little by way of back-up for this statement.

[74] After the Cuba trip and B.D. spending time in Covid-19 mandated isolation, J. recalled a visit from B.D. when she had significant body odour. He said the smell was "terrible, worse than a hockey bag." He says that B.D. asked him for $50.00 to furnish her room at her mother's new residence and he gave her $250.00. On cross-examination he said this conversation likely took place in late July, 2020.

[75] J. became aware that B.D. was gay when he saw a photograph taken from the time of her graduation. In the picture she was wearing a tuxedo and with another young woman. By the fall of 2020 J. was recovering from gallbladder surgery and while quite heavily medicated he recalled a visit from B.D.; after she hugged him, he criticized her for her body odour. He went on to call her a "smelly dyke …she turned irate, took $20.00 and left, I did feel kind of bad."

[76] On cross-examination he acknowledged that he was merely prescribed Tylenol and Ibuprofen after the surgery, which he would have taken along with marijuana. He conceded that he would not have been "completely drugged out" when he allegedly made the derogatory comment.

[77] Following this visit J. next saw B.D. a couple of weeks later when she drove into his driveway to pick up D.C. He reached out to hug B.D. and told her that he loved her. On cross-examination he explained that the hug was a "reach through" because B.D. remained seated in the car. He said that he did not apologize for his "smelly dyke" insult. On this occasion he also agreed that he said that his mother was willing to pay for B.D.'s community college tuition.

[78] It was later that same evening when he received a text from his son telling him that B.D. was accusing him of molesting her. J. was taken aback by this; "my whole world exploded, I was in so much shock." J. became depressed and vowed to clear his name. He received counselling at his church.

[79] J. denied supplying any drugs to B.D. and [redacted] other than ephedrine, a weight-lifting supplement available over the counter. On cross-examination he said that [redacted]asked him if he could have some ephedrine and he provided him with the supplement.

[80] On cross-examination he revised this to say "maybe when she was 18" that he provided B.D. with marijuana. He went on to say that when B.D. was in grade 11 that he discussed with D. that D. permitted B.D. to smoke drugs at her house. At the same time he denied knowing B.D.'s marks were slipping until later on.

[81] J. denied observing B.D. high from marijuana when she lived at [redacted]. He surmised that she could have been impaired when she got in, but he would be in bed.

[82] Specifically asked about whether he ever touched B.D. in a sexual manner, J. replied, "no". He specifically denied ever touching her vagina or having his penis touched by B.D.

[83] On cross-examination he denied watching television at any time alone on the couch at either residence. He said that he had to get up early and that the television was always left on in his bedroom; "it was background noise to fall asleep to."

[84] I regard this testimony as J. going to any lengths to avoid saying that he was alone at night outside of his bedroom.

[85] I found B.D. gave compelling, honest evidence. She was candid in readily acknowledging that she could not remember exactly when the abuse started and ended. She did not embellish what went on and would not be drawn into saying that

the abuse involved digital penetration of her vagina. When pressed about whether intercourse ever occurred, I found her response to be most believable. She spoke of being a teenager at the time and how she had never had anything placed in her vagina and how J. ultimately resisted penetrating her.

[86] In terms of the sexual abuse that B.D. spoke about, I have no hesitation in concluding that she was being candid when she told of how J. fondled her and took his penis and rubbed it over parts of her body; in particular her breasts, buttocks and vagina. I also completely accept B.D.'s evidence surrounding how she touched J.'s penis at both residences. B.D. was visibly upset about this aspect of her testimony and while ever-cautious of demeanor evidence, I found her recounting of this to be entirely credible and reliable. The fact that she did not offer this information when she provided her October 29, 2020 police statement does not cause me concern. I accept that the police officer did not ask her about it, and I found B.D. credible when she said that she felt disgusting when she recalled these incidents.

[87] While on the topic of B.D.'s demeanor, I specifically reject the Defence submission that she was a nervous witness. In any event, I agree that although B.D. looked down and avoided eye contact at times, I regard this as her visceral reaction to having to answer detailed questions abut the sexual abuse, which clearly repulsed her.

[88] It is important to recall that B.D. spoke of the abuse happening from roughly age 10 to age 17. She provided enough detail concerning how the foundling and J.'s ejaculation occurred at both [redacted] and [redacted] such that I found her testimony both credible and reliable.

[89] I have considered B.D.'s evidence against all of the other evidence and find nothing to cause me to doubt her. For example, although D.C. says that he never witnessed any abuse and B.D. says that she is pretty sure that D.C. saw it, she was not emphatic in this area. I would add that it is possible that D.C. saw the abuse but was too young at the time to have it register for what it was.

[90] With respect to T., I did not find her to be a credible witness. Among other concerns, I am mindful of her denial that there was any cocaine use in the household. By T.'s testimony she would have the Court believe that her son's family had an idyllic life. This flies in the face of the sad realities that I have already canvassed and found as facts. In any event, T. stated herself that she was rarely at the household at bedtime, which is when I find the abuse transpired.

[91] With regard to the evidence of D.R., E.C. and J.C., I similarly find that none of these witnesses gave any concrete evidence of being near the confines of B.D.'s bedroom(s) or even the living room(s) during the material times.

[92] In assessing J.'s evidence, I am mindful of the *WD* instruction and the totality of the evidence. In response to the first instruction, I find that I do not believe the accused on the vast majority of his evidence and certainly with regard to his denials of the alleged sexual abuse. On to the second rung of the instruction, J.'s evidence does not leave me with any reasonable doubt. As for the final part of the instruction, I do not believe J., am not left with any reasonable doubt on his evidence and on the basis of the evidence that I do accept, I am convinced beyond a reasonable doubt that he committed the charged crimes.

[93] I have already set forth in a detailed fashion J.'s evidence. He was neither credible nor reliable in almost all aspects. I find on all of the evidence that he was not the caring stepfather that he tried to portray. For example, I do not accept that he routinely read books to B.D. This lie was exposed during his cross-examination when he most incredibly tried to explain how he read a book by holding it in his right hand and massaging B.D. with his left hand.

[94] I also take strong issue with J.'s claims to have been engaged in B.D.'s hockey and schoolwork. With regard to the former, he struggled to come up with any details concerning her coaches, tournaments and the like before finally conceding that he bankrolled her hockey and it was D. who had the involvement. As for schoolwork, I accept D.'s evidence that she was the school's point of contact over the years and that J. had no interest. I would add that B.D.'s evidence in this area (as in most all areas) was very credible and I accept that J. took little to no interest in her schoolwork.

[95] As for J.'s alleged homophobic (and the like) attitude, I cannot be sure if he truly holds these backward, prejudicial views. What I am sure about, given all of the evidence, is that if he held such extreme views, I find that he did not share them with B.D. or D. Indeed, it is my determination that this testimony was all a foiled attempt in order to establish an animus to try to explain B.D.'s reporting of the sexual abuse.

[96] With respect to the massages, I have already commented on the awkward cross-examination answers of J. on what I have determined beyond a reasonable doubt to be a false recounting of simultaneously reading to and massaging B.D. I would add more generally that the entire testimony about massages is all the more

outrageous when I consider T.'s attempt to precisely say where (on the body) B.D. was massaged by herself and, especially, her son.

[97] Additionally, there is the testimony of all of the peripheral witnesses, T. and D.C. of the positions of doors dating back years. Taken together, this tailored evidence "backfired" and to my mind, exposed it for what it was – a weak attempt to counter the notion that J. had any opportunity to sexually assault B.D. To the contrary, I find that the dysfunctional households on [redacted] and [redacted] (with partying and drug use by many of the adults present), afforded J. the opportunity to prey on his poorly parented stepdaughter. B.D. was especially vulnerable and I find that, sadly, she was abused in the manner she described.

[98] Given all of the evidence I am satisfied beyond a reasonable doubt that J.D.C. sexually abused B.D.W. in the manner outlined in the two-count Indictment. The Crown has satisfied the Court of its heavy burden and convinced the Court beyond a reasonable doubt that Mr. C. committed the crimes and is guilty as charged.

Chipman, J.