IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *R. v. D.K.M.,* 2023 BCSC 1467

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Docket: 36409-2
Registry: Fort St. John

2023 BCSC 1467 (CanLII)

Rex

v.

D.K.M.

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Before: The Honourable Mr. Justice Walker

Oral Reasons for Judgment

Counsel for the Crown:	D.M. Wightman
Counsel for the Accused:	E.K. Jones
Places and Dates of Trial:	Fort St. John, B.C. April 11-14 and 17, 2023
	Prince George, B.C. June 5-8, 2023
Place and Date of Judgment:	Fort St. John, B.C. August 21, 2023

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Introduction

[1] D.K.M., to whom I will refer as "Mr. M.", is charged with committing sexual offences, alleged to have occurred between 2005 and 2013, contrary to ss. 151, 152, and 160(3) of the *Criminal Code,* R.S.C. 1985, c. C-46. He is charged with six counts. Counts 2 and 3 were amended at the close of the Crown's case without objection from Mr. M.

[2] For count 2, both the date range and offence provision in the *Criminal Code* were amended. The date range was originally August 1, 2007 to August 30, 2007; it was amended to January 1, 2005 to December 31, 2007. As well, the impugned offence was amended from s. 151 to state "contrary to s. 151 or s. 152 of the *Criminal Code*".

[3] For count 3, the date range, originally stated to be January 1, 2007 to April 30, 2008, was amended to January 1, 2004 to April 30, 2007.

[4] Thus, the amended indictment reads as follows:

> Count 1
>
> [Mr. M.], from the 1st day of January, 2005 to the 31st day of December, 2007, inclusive, at or near [T.], British Columbia, did, for a sexual purpose, invite, counsel or incite C.M., a person under the age of 14 years, to touch, directly or indirectly, with a part of her body, or with an object the body of [Mr. M.], contrary to s. 152 of the *Criminal Code*.
>
> Count 2
>
> [Mr. M.], from the 1st day of January, 2005 to the 31st day of December, 2007, inclusive, at or near [C.L.], British Columbia, did, for a sexual purpose, touch, directly or indirectly, with a part of his body or with an object, the body of C.M., a person under the age of 14 years, contrary to s. 151 or did, for a sexual purpose, invite, counsel or incite C.M., a person under the age of 14 years, to touch, directly or indirectly, with a part of her body, or with an object the body of [Mr. M.], contrary to s. 152 of the *Criminal Code*.
>
> Count 3
>
> [Mr. M.], from the 1st day of January, 2004 to the 30th day of April, 2008, inclusive, at or near [T.], British Columbia, did, for a sexual purpose, invite, counsel or incite C. (L.) M., a person under the age of 14 years, to touch, directly or indirectly, with a part of her body, or with an object, the body of [Mr. M.], contrary to s. 152 of the *Criminal Code*.
>
> Count 4

> [Mr. M.], from the 1st day of April, 2013 to the 30th day of June, 2013, inclusive, at or near [C.L.], British Columbia, did, for a sexual purpose, invite, counsel or incite K.M., a person under the age of 16 years, to touch, directly or indirectly, with a part of her body, or with an object, the body of K.M., contrary to s. 152 of the *Criminal Code*.
>
> Count 5
>
> [Mr. M.], from the 1st day of April, 2013 to the 30th day of June, 2013, inclusive, at or near [C.L.], British Columbia, did, for a sexual purpose, invite, counsel or incite K.M., a person under the age of 16 years, to touch, directly or indirectly, with a part of her body, or with an object, the body of K.M., contrary to s. 152 of the *Criminal Code*.
>
> Count 6
>
> [Mr. M.], from the 1st day of April, 2013 to the 30th day of June, 2013, inclusive, at or near [C.L.], British Columbia, did incite K.M., a person under the age of 16 years, to commit bestiality, contrary to s. 160(3) of the *Criminal Code*.

[5] Mr. M. is 78 years old. The complainants, C.M., C. (L.) M., and K.M., are Mr. M.'s biological granddaughters. The complainants are now adults and the offences are alleged to have occurred when they were between four and 11 years old. At the time of trial, C.M., the eldest, was 25 years old, C. (L.) M. was 23 years old, and K.M. was about to turn 20 years old. C.M. works in the oil and gas industry. At the time of trial, C. (L.) M. planned to complete her course studies to obtain a Bachelor of Commerce degree by spring 2023 and was also engaged in a two-and-a-half-year course to obtain a certified professional accounting degree. K.M. works as a water technician for the pipeline industry.

What the Crown Must Prove

[6] It is useful at this juncture to set out each of the essential elements of each of the offences charged against Mr. M. which the Crown must prove beyond a reasonable doubt.

Section 151 *Criminal Code*

[7] Section 151 of the *Criminal Code* is often referred to as the "sexual interference" offence and provides the following:

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> s. 151. Every person who, for a sexual purpose, touches, 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
>
> > a) is guilty of an indictable offence and is liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year; or
> >
> > (b) is guilty of an offence punishable on summary conviction and is liable to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of 90 days.

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[8] In order to prove the offence of sexual interference, the Crown must establish beyond a reasonable doubt the following elements:

a) the identity of the accused;

b) the time and place of the commission of the alleged offence as set out in the indictment;

c) that the age of the complainant at the time of the alleged offence was under 16 years of age;

d) that the accused touched any part of the body of a child, directly or indirectly, with a part of the accused's body or with an object (the *actus reus* of the offence);

e) the touching was intentional (the *mens rea* of the offence); and

f) the touching was for a "sexual purpose" (also part of the *mens rea* of the offence).

[9] The *actus reus* of this offence covers a wide array of conduct, which can include both active and passive contact on the part of the accused. By way of example, the Manitoba Court of Appeal said in *R. v. Sears,* [1990] M.J. No. 296 at para. 6:

> In reading this section as a whole, it is clear that an accused who intends sexual interaction of any kind with a child and with that intent makes contact

> with the body of a child "touches" the child and is guilty of an offence. The section addresses not the instigator of the sexual conduct but rather the adult who for his or her own sexual purposes makes contact, whether as a primary actor or not, with the body of a child.

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[10] The offence of touching for a sexual purpose under s. 151 is a crime of specific intent: *R. v. Bone*, [1993] M.J. No. 222 (C.A.) at para. 15.

[11] While the phrase "for a sexual purpose" is not defined in s. 151 of the *Criminal Code*, courts in Canada have held that if the touching was done for the sexual gratification of the accused (see paras. 12, 15 of *R. v. Colley,* 2009 BCCA 289, leave to appeal ref'd [2009] S.C.C.A. No. 358) or for the purpose of violating the sexual integrity of the child (*R. v. Morrisey*, 2011 ABCA 150 at para. 21), it constitutes touching "for a sexual purpose". The "sexual purpose" may be proven by direct evidence, inferred from circumstantial evidence, or from the nature of the touching itself: *Morrisey* at para. 21.

[12] Identity of the accused, Mr. M., and the age of the complainant, C.M., as she was under 16 years of age at the time of the alleged offence, are not in issue.

Section 152 *Criminal Code*

[13] Section 152 of the *Criminal Code* is often referred to as the "invitation to sexual touching" offence:

> s. 152. Every person who, for a sexual purpose, invites, counsels or incites a person under the age of 16 years to touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites, counsels or incites and the body of the person under the age of 16 years,
>
> (a) is guilty of an indictable offence and is liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year; or
>
> b) is guilty of an offence punishable on summary conviction and is liable to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of 90 days.

[14] In order to prove the offence, and in addition to identity, time and place, and that the child was under 16 years old, the Crown must also establish beyond a reasonable doubt the following elements:

a) that the accused invited, counselled, or incited the child, verbally or non-verbally, to touch the accused, the child, or another person, directly or indirectly, with a part of the child's body or with an object (the *actus reus* of the offence); and

b) that the accused intended that his words and actions would be received by the complainant as an invitation to touch, directly or indirectly, the body of a person, including himself or the complainant, or was highly reckless (i.e., held a conscious disregard) as to whether his words or actions would be received by the complainant as counselling or an invitation to touch a part of the body of any person, including himself or the complainant, and for a sexual purpose (the *mens rea* of the offence).

See, *R. v. T.L.P.*, 2015 BCSC 618 at paras. 15-16; *R. v. Legare*, 2008 ABCA 138 at paras. 40-41, 45-46, aff'd 2009 SCC 56.

[15] Similar but not identical to s. 151, for a "sexual purpose" means:

a) the sexual gratification of the accused, the complainant, or another person; or

b) the violation of the complainant's sexual integrity; or

c) the sexual domination of the complainant.

See, *T.L.P.* at paras. 15-16.

[16] Identity of the accused, Mr. M., and the ages of the complainants (each under 16 at the time the offences are alleged to have occurred) are also not in issue.

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[17] Proving the *actus reus* of this offence does not require proof of actual physical contact between body parts or an invitation to that effect.

[18] For example, in *R. v. Fong*, 1994 ABCA 267, leave to appeal ref'd [1994] S.C.C.A. No. 523, the Alberta Court of Appeal held that this section covers not only actual touching but "indirect" touching and thus includes an invitation by the accused to the complainant to hold a tissue onto which the accused ejaculated: paras. 9-10. Specifically, the Alberta Court of Appeal said that the section should be "construed purposively in a manner consistent with the philosophy and rationale underlying Parliament's objectives" of "[preventing the] sexual exploitation of and interference with young children" and the "broad wording of the section": para. 10.

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[19] Proving the *mens rea* of the offence requires the Crown to establish that the accused "intentionally" or "knowingly" invited, counselled, or incited the child "for a sexual purpose": *Legare*, at paras. 41-46.

[20] An accused charged with an offence under s. 152 may also be found guilty where the Crown cannot prove express intent but where it can establish the accused had a conscious disregard of the unjustified and substantial risk that their conduct entailed, as described by the Supreme Court of Canada in *R. v. Hamilton*, 2005 SCC 47:

> 27 And it seems to me that the plain meaning of the terms used by Parliament to achieve this purpose point to a fault element that combines advertent conduct with a "conscious disregard of *unjustified* (and substantial) risk" that it entails: L. Alexander and K. D. Kessler, "Mens Rea and Inchoate Crimes" (1997), 87 J. Crim. L. & Criminology 1138, at p. 1175 (emphasis in original).
>
> 28 The "substantial and unjustified risk" standard of recklessness has venerable roots in Canada and in other common law jurisdictions as well: see, for example, *R. v. Leary,* [1978] 1 S.C.R. 29 (S.C.C.) at p. 35 (Dickson J., as he then was, dissenting on other grounds); and, generally, M.L. Friedland and K. Roach, *Criminal Law and Procedure: Cases and Materials* (8th ed. 1997), at pp. 508 ff, where Herbert Wechsler explains, at p. 510-11, why the American Law Institute required in its *Model Penal Code* that the risk consciously disregarded be both "substantial" and "unjustifiable".
>
> 29 In short, the *actus reus* for counselling is the *deliberate encouragement or active inducement of the commission of a criminal offence*. And the *mens rea* consists in nothing less than an

> accompanying *intent* or *conscious disregard of the substantial and unjustified risk inherent in the counselling*: that is, it must be shown that the accused either intended that the offence counselled be committed, or knowingly counselled the commission of the offence while aware of the unjustified risk that the offence counselled was in fact likely to be committed as a result of the accused's conduct.
>
> [Emphasis in original]

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[21] In *Legare*, the Court discusses conscious disregard in the context of s. 152 as follows:

> [40] The *mens rea* required by s.152 includes the "substantial and unjustified risk" standard described by the Supreme Court in *Hamilton*. This test of "substantial and unjustified risk" applies logically to crimes of communication and advocacy. There is a different test for crimes requiring proof of specific intent as to consequences. Ordinarily, in cases of specific intent as to consequences, the Crown must prove that the accused intended the consequences or at least intended to do conduct that the accused knew was substantially certain to produce such consequences: *R. v. Buzzanga and Durocher* (1979), 1979 CanLII 1927 (ON CA), 25 O.R. (2d) 705, 49 C.C.C. (2d) 369 (Ont. C.A.) at pp. 381 to 382 (C.C.C.), [1979] O.J. No. 4345 (QL); *R. v. Harding*, (2001) 2001 CanLII 21272 (ON CA), 160 C.C.C. (3d) 225, [2001] O.J. No. 4953 (QL), leave denied [2002] S.C.C.A. No. 95 (S.C.C.). Parliament has not signalled that the test in *Buzzanga* need be proven by the Crown in relation to an offence under s. 152. To the contrary, the approach taken in *Hamilton* more fits the language of s. 152.
>
> [41] For s.152, the Crown must show that the accused knowingly communicated for a sexual purpose with a child under the age of fourteen, and that the accused either intended that the child would receive that communication as being an invitation, incitement or counselling to do the physical conduct s. 152 would avoid, or that the accused knew that there was a substantial and unjustified risk that the child would receive that communication as being an invitation, incitement or counselling to do that physical conduct. The *actus reus* and *mens rea* must co-exist, so in that sense the *mens rea* must be present when the communication occurs.
>
> …
>
> [45] It is not necessary or appropriate to read into s. 152 of the *Code* a requirement that *mens rea* include present intent for *imminent* sexual touching of the child by the adult, or of the adult by the child, or of the child on herself. It would appear that the trial judge found no need of imminence in paragraph 23 of his reasons. I would agree with this. There is no indication by Parliament of any time limit on how soon after the communication it must be that the accused is anticipating to have the contact happen. Present intent does not require present action.
>
> [46] Nonetheless, the *mens rea* required must involve knowing communication for a sexual purpose, and either present intent that the child receive the communication as an invitation, incitement or counselling to do

> that physical conduct, or a present state of mind that the accused knew the substantial and unjustified risk that the child would receive the communication as being an invitation, incitement or counselling to do the physical conduct. Parliament was presumably conscious of the fact that a process of inviting, counselling or inciting a child may take time and may take different communications of varying forms. From the evidence, a trier of fact may infer that the requisite *mens rea* is present even if that state of mind happens to be accompanied by a longer view as to when any physical conduct might occur or by imprecision as to what form it might take or as to who might be involved.

[22] To "incite" means more than "passive acquiescence in sexual touching". The act of "incitement" requires some positive conduct by the accused to cause the complainant to engage in sexual touching: *R. v. Rhynes*, 2004 PESCTD 30 at para. 21, leave to appeal ref'd 2004 PESCAD 15.

Section 160(3) *Criminal Code*

[23] Section 160 of the *Criminal Code* is often referred to as the "bestiality offence"; the relevant portion is set out below:

> s. 160. (1) Every person who commits bestiality is guilty of an indictable offence and is liable to imprisonment for a term not exceeding ten years or is guilty of an offence punishable on summary conviction.
>
> (2) Every person who compels another to commit bestiality is guilty of an indictable offence and is liable to imprisonment for a term not exceeding ten years or is guilty of an offence punishable on summary conviction.
>
> (3) Notwithstanding subsection (1), every person who, in the presence of a person under the age of 16 years, commits bestiality or who incites a person under the age of 16 years to commit bestiality is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years or is guilty of an offence punishable on summary conviction.
>
> > (a) is guilty of an indictable offence and is liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year; or
> >
> > (b) is guilty of an offence punishable on summary conviction and is liable to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of six months.
>
> …
>
> (7) Definition of bestiality – In this section, "bestiality" means any contact, for a sexual purpose, with an animal.

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[24] To prove the offence of bestiality under s. 160, and in addition to identity and time and place, the Crown must establish beyond a reasonable doubt:

a) that the accused committed bestiality in the presence of a child under the age of 16 years or incited a child under the age of 16 years to commit bestiality; and

b) that the accused acted intentionally.

[25] Identity of the accused, Mr. M., and the age of the complainant, K.M., are not in issue in this case.

[26] The *actus reus* of the offence of bestiality requires the Crown to prove, under subsection 7, that the sexual act involved both a person and an animal. The provision is broad, and includes “any contact, for a sexual purpose” (supplanting *R. v. D.L.W.*, 2016 SCC 22, which held that penetration was an essential element of the offence).

[27] Bestiality is a crime of general intent: *R. v. Triller*, [1980] B.C.J. No. 2373. Because it is a crime of general intent, recklessness or wilful blindness can also establish the *mens rea* for the offence. The *mens rea* of the offence requires the Crown to prove a subjective “intention” to have any contact for a sexual purpose with an animal with the “knowledge” a child was present, or, a subjective “intention” to incite a child to have any contact for a sexual purpose with an animal.

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Governing Legal Principles

The presumption of innocence, burden of proof, and reasonable doubt

[28] The presumption of innocence is a foundational principle in our criminal justice system and guarantees that an accused is presumed innocent until the Crown has proven each and every element of the offence beyond a reasonable doubt. This burden lies on the Crown and should never shift onto the accused: *R. v. Morin*, [1988] 2 S.C.R. 345 at paras. 14, 19, 40, 70; *R. v. Arp*, [1998] 3 S.C.R. 339 at

para. 73; *R. v. B.J.*, 2020 ONSC 2596 at para. 6; *R. v C.J.H.*, 2023 BCSC 441 at para. 15.

[29] The reasonable doubt standard is a single, objective, and exacting standard of proof. It is based on reason and common sense, and not on sympathy or prejudice: *R. v. Lavallee,* 2018 ABQB 458 at para. 12, aff'd 2020 ABCA 464. The standard of proof is very high. It is not enough for me to believe that Mr. M. is probably guilty. Proof beyond a reasonable doubt is not proof to a certainty, although it is much closer to that than to the civil standard of proof on a balance of probabilities: *R. v. Lifchus*, [1997] 3 S.C.R. 320 at paras. 14, 36-37; *C.J.H.* at para. 16; *R. v. Mallay*, [2021] 177 W.C.B. (2d) 16 (N.L.P.C.) at para. 4; *R. v. Starr*, 2000 SCC 40 at paras. 231, 236.

[30] This case involves, in large measure, my assessment of the credibility and reliability of the evidence. However, as stressed above, the burden of proof never shifts to the accused. Nor is the standard of proof resting on the Crown any less.

[31] Not every individual piece of evidence requires proof beyond a reasonable doubt; it is the elements of the offence that are subject to the criminal standard: *Morin* at para. 66; *R. v. J.M.H.*, 2011 SCC 45 at para. 31; *C.J.H.* at para. 17.

[32] As the Ontario Court of Appeal points out in *R. v. B.D.*, 2011 ONCA 51, and reiterated in *C.J.H.* at para. 17, the standard of proof beyond a reasonable doubt is not to be applied piecemeal to individual terms or categories of evidence, unless it involves conflicting evidence on an essential element of the offence:

> [96] As a general rule, the standard of proof beyond a reasonable doubt is not to be applied piecemeal to individual items or categories of evidence. The Crown is not required to prove or disprove beyond a reasonable doubt any single fact, or any item of evidence, unless that fact or item is an element of the offence or an element of a defence. Different considerations arise, however, when conflicting evidence is presented to the jury on an essential element and the jury is required to make credibility findings with respect to that conflicting evidence.

[33] Since Mr. M. gave evidence in this case, it is essential that I consider the principles in *R. v. W.(D.)*, [1991] 1 S.C.R. 742. A useful summary is found in the

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reasons of the Court of Appeal in *R. v. Tyers*, 2015 BCCA 507, a case involving sexual assault:

> [12] The Supreme Court of Canada established a framework in *W.(D.)* to assist the trier of fact to properly apply the reasonable doubt standard on the whole of the evidence to the issue of credibility. Following the framework assists the trier of fact to avoid deciding a case by simply choosing between the Crown or defence version of events: *R. v. Vuradin*, 2013 SCC 38 at para. 21.
>
> [13] The *W.(D.)* three-step analysis involves consideration of the following three questions:
>
>> 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.
>>
>> *W.(D.)* at 758.
>
> [14] To this analysis is added a fourth step: “if … you are unable to decide whom to believe, you must acquit”: *R. v. C.W.H.* (1991), 1991 CanLII 3956 (BC CA), 68 C.C.C. (3d) 146 (B.C.C.A.) at 155.
>
> [15] These steps do not need to be followed religiously. *W.(D.)* does not dictate a “specific form or sequence of analysis”. Further, in assessing the judge’s analysis of *W.(D.)*, it is necessary to read the reasons for judgment as a whole: *R. v. Mann*, 2010 BCCA 569 at paras. 31-32. The order in which a judge makes credibility findings is “inconsequential” so long as the judge remains focused on the principle of reasonable doubt as the central consideration: *Vuradin* at para. 21. As Mr. Justice Chiasson stated in *Mann* at para. 31, what matters is that:
>
>> [a]t the end of the day, this Court must be satisfied that the analysis was done and that there was no compromise of the burden of proof that remains throughout on the Crown.

[34] Cases involving sexual offences often involve evidence where the complainant and the accused are the only witnesses to the alleged offence. It is essential that the accused is not found guilty because the trier of fact concludes the complainant’s version of events is more likely to be true: *R v. E.A.G.*, 2020 BCSC 1691 at para. 183.

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[35] This extract from the reasons of the Court of Appeal in *R. v. Pangan* (1996), 85 B.C.A.C. 54, 1996 CanLII 2461, explains why the trial is not a credibility contest between the complainants and the accused:

> [40] It is important to examine what we mean when we say that “a trial is not a credibility contest” because in some ways that statement can be misleading. The jury has two functions – to weigh the evidence for the purpose of reaching conclusions of fact, and, to apply the law to the facts that they find. When the jury engages in the first function – weighing the evidence – a trial is, in a sense, a “credibility contest”. In a case such as this where the accused and the complainant give opposing versions of what occurred, the jury must try to determine who and what to believe, and, who and what not to believe. The jury cannot convict unless it accepts the evidence of the complainant as true, and rejects the evidence of the accused as untrue. The vital point is that the jury must not be left with the impression that they have no choice but to pick one version of events over another. The members of the jury are entitled to reach the conclusion that the issue of credibility cannot be resolved. Once the members of the jury have reached whatever conclusions they choose to draw from the evidence they must then apply the law to their findings of fact or their lack of findings, as the case may be. It is here that they must apply the law as expressed in [*W.D.*].

[36] Thus, from those remarks, and others like it in cases such as *Morin* at para. 28; *R. v. B.J.*, 2023 BCCA 166 at para. 57 [*B.J. BCCA*]; *T.L.P.* at para. 24, *R. v. O.M.,* 2014 ONCA 503 at para. 42; and *R. v. R.D.*, 2016 ONCA 574 at para. 16, and as Justice Ker points out in *R. v. T.A.P.*, 2022 BCSC 2356 (excerpted below), where credibility is a key issue, as it is in this case, the evidence of the accused must not be weighed against the evidence of the complainants. The finding of guilt or innocence is based on the application of the law to the findings of fact, or lack thereof, from the whole of the evidence:

> [17] The finding of guilt or innocence is based on the whole of the evidence. In a case such as this – where credibility is the primary issue – I must not weigh the evidence of the accused against the evidence of the complainants. A finding that the complainant is telling the truth, or a finding that the accused is not telling the truth, does not equate to a finding of guilt. Thus, the trier of fact cannot engage in a simple credibility contest between the complainants and the accused. To resolve the outcome of a criminal trial simply by accepting one version of events over another is inconsistent with the presumption of innocence and the requisite standard of proof.
>
> [18] To summarize Justice Cory’s findings in *R. v. W. (D.)* [citations omitted], if I believe the evidence of T.A.P., I must acquit, if I do not believe the evidence of T.A.P., I must still consider whether his evidence raises a reasonable doubt and, if it does, I must acquit. I add parenthetically that I do

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> not, of course, consider his evidence in a vacuum, but in the context of the evidence as a whole. Further, even if T.A.P.'s evidence does not raise a reasonable doubt, I must still consider whether, on the whole of the evidence, the Crown has proved its case beyond a reasonable doubt: *W.(D.)* at para. 11.
>
> …
>
> [23] What I cannot do in my role as trier of fact is assume I must choose to believe one witness over the other: *Jeng* at para. 37. A judge must not compare differing versions of events and select the one the judge prefers: *R. v. C.L.Y.,* 2008 SCC 2 at paras. 27-33.
>
> [24] Thus, I remind myself that when the accused and the complainants testify and provide conflicting evidence, the determination of guilt or innocence does not devolve into a credibility contest: *R. v. J.H.S.*, 2008 SCC 30 at paras. 9, 13.

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[37] In *B.J. BCCA*, the Court of Appeal considered whether the decision of the Alberta Court of Appeal in *R. v. Ryon*, 2019 ABCA 36, adds an additional element to the *W.(D.)* analysis. Justice Voith noted at para. 64 that the Alberta Court of Appeal "ultimately proposed that the three prong *W.(D.)* instruction be modified: at para. 48." After remarking on the court's repeated use of the words "exculpatory evidence" in *Ryon*, Voith J.A. pointed out that the analysis must extend beyond the accused's evidence to consider all exculpatory evidence:

> [69] Thus, read carefully, *Ryon* confirms that it is necessary for the trier of fact to consider all of the "exculpatory" evidence before them. The emphasis on "exculpatory" evidence flows from the recognition that at each stage of the *W.(D.)* framework the court is concerned with evidence that is inconsistent with guilt. This is explained in a recent article authored by Justice Paciocco (writing extrajudicially), and again relied on by trial counsel for the appellant before the judge, entitled "Doubt about Doubt: Coping with *R. v. W.(D.)* and Credibility Assessment" (2017) 22:1 Can. Crim. L. Rev. 31.

[38] However, in his concluding remarks on the point, Voith J. said that *Ryon* did not change the *W.(D.)* analysis:

> [72] Thus, both *Ryon* and Justice Paciocco, in his article, explain what constitutes "exculpatory" evidence for the purposes of the *W.(D.)* framework. However, none of *Ryon*, the cases that have followed it, or Justice Paciocco cast any doubt on *Morin* or *W.(D.)*, broadly speaking. In *R. v. Demirovic*, 2021 BCCA 429, this Court said:
>
>> [45] In *Ryon*, the Alberta Court of Appeal held that the exact wording in *W.(D.)* was misleading. In particular, the Court

> suggested the jury instruction should make it clear that when assessing exculpatory evidence the jury has three choices: it may accept the evidence; it may reject the evidence; or it may be unsure whether the evidence is true or false. The Court suggested a reworked *W.(D.)* instruction.
>
> …
>
> [48] In my view, the suggested reformulation of the *W.(D.)* instruction in *Ryon* has not changed the message in *W.(D.)*, bearing in mind there is no ritualistic formula to explain the concept of reasonable doubt in the context a particular case. In any event, the instruction in this case is not inconsistent with the *Ryon* reformulation. The judge set out where the burden of proof lay; he told the jury it must acquit Ms. Demirovic if it believes her evidence or is unsure of whom to believe; and he clarified that the jury can only find Ms. Demirovic guilty if the evidence it accepts proves Ms. Demirovic's guilt beyond a reasonable doubt, not simply by rejecting her evidence. Each of these is an essential aspect of the *Ryon* reformulation.

[Emphasis in original]

[39] Thus, all exculpatory evidence adduced at trial must be considered. I am not required to examine the evidence in any particular order, but must consider the instruction provided from *W.(D.)*: *R. v. Turmel*, 2004 BCCA 555 at para. 14; *C.J.H.* at para. 25.

Credibility and Reliability

[40] The principles of assessing credibility are summarized in *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296:

> [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 1919 CanLII 11 (SCC), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally…Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).

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[41] In *T.A.P.,* Justice Ker points out that assessing the credibility of witnesses is an intricate process:

> [36] Assessing the credibility of witnesses is an intricate process, involving simultaneous weighing of a multitude of factors. One of the most important factors remains the assessment of whether the testimony seems plausible in terms of the inherent likelihood that events occurred as the witness described them. Therefore, included in this exercise is a measure of common sense and judicial experience.
>
> [37] The trier of fact will inevitably consider the extent to which a particular witnesses' evidence accords with other factual findings which either are not in dispute or are compelled by other evidence expected or considered reliable by the court. The order in which a witnesses' credibility is evaluated is not important, so long as proof beyond a reasonable doubt remains at the centre of the process: *R. v. Vuradin*, 2013 SCC 38 at para. 21; *R. v. Gerrard*, 2022 SCC 13 at para. 2.

[42] At paras. 39-46, Ker J. outlines various factors that are used in assessing credibility of witnesses, including but not limited to the following:

a) the demeanour of the witness, with the added caveat that findings of credibility should not be made on demeanour alone because witnesses come from different socio-cultural backgrounds which may cause them to react differently when giving testimony (see also, *R. v. J.T.*, 2019 BCCA 180 at para. 31; *R. v. A.F.*, 2021 BCSC 2662 at para. 14);

b) whether the evidence of the witness makes sense within the context of all the evidence (see also *Faryna v. Chorny*, [1951] B.C.J. No. 152 at para. 10 (C.A.));

c) internal consistency of the testimony;

d) prior inconsistencies; and

e) interest in the outcome and motive to fabricate; however, the court must not equate the mere absence of evidence that a complainant has a motive to fabricate evidence with a proven absence of motive; the onus is on the Crown to prove an absence of motive to fabricate, which is a high bar, and it is always the case that the absence of evidence of motive to fabricate or

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> a proven absence of motive does not conclusively establish that the complainant is telling the truth (see also, *R. v. Swain*, 2021 BCCA 207 at paras. 31-33, cited in *T.A.P.* at para. 44).

[43] Reliability, on the other hand, concerns the accuracy of the witness' testimony and involves concepts such as the ability to accurately observe, recall, and recount the events at issue. A witness who is credible may still be unreliable: *R. v. Plehanov*, 2019 BCCA 462 at para. 51; *Celones v. Chandra*, 2023 BCSC 38 at para. 112; *R. v. H.C.*, 2009 ONCA 56 at para. 41.

[44] The rule requiring corroboration in sexual offences was abolished on January 1, 1988, by virtue of s. 274 of the *Criminal Code*. Thus, it is possible to convict the accused on the evidence of a complainant alone, however, the assessment of credibility takes on significance: *T.A.P.* at para. 27.

[45] As I have pointed out, I must be vigilant that my analysis does not turn into a "credibility contest". Even if I find that the complainants' version of events is more believable than Mr. M.'s, I must still address the evidence as a whole to determine whether it raises a reasonable doubt as to Mr. M.'s guilt. If there is reasonable doubt, then Mr. M. must be acquitted: *C.J.H.* at para. 26.

[46] *R. v. W. (R.)*, [1992] 2 S.C.R. 122 is a leading case in which the Supreme Court of Canada discussed how to assess the evidence of witnesses who testify to abuse in relation to their age:

> [27] 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

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> location, should be considered in the context of the age of the witness at the time of the events to which she is testifying.

[47] Although all three complainants in the case at bar are now adults, their evidence pertaining to what occurred in childhood should be considered within the context of their ages at that time: *W. (R.)* at para. 134; *R. v. Kush*, 2021 BCSC 175 at para. 75; *C.J.H.* at para. 33. However, this does not mean that I am entitled to assess the entirety of the evidence as if the complainants are testifying as children: *R. v. M. (A.)*, 2014 ONCA 769 at para. 25. A “solid foundation” in the evidence is required for a verdict of guilt, whether the complainant is an adult or a child; the burden on the Crown to prove the essential elements of each offence is not lessened and the evidence must continue to be carefully assessed to guard against a wrongful conviction: *C.J.H.* at para. 35; *R. v. A.F.*, 2021 BCSC 2662 at para. 26. A useful summary of the overall approach is found in this excerpt from the reasons in *W. (R.)*:

> [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.

[48] Nonetheless, and as Justice Hughes said in *C.J.H.* at para. 35, “[W]hile 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: *R. v. B. (G.)*, [1990] 2 S.C.R. 30 at 54-55.”

[49] In *R. v. D.D.*, [2000] 2 S.C.R. 275, the Supreme Court of Canada said that a delay in disclosure, on its own, “will never give rise to an adverse inference against

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the credibility of the complainant." The Court also held that "there is no inviolable rule on how people who are the victims of trauma like a sexual assault will behave. Some will make an immediate complaint, some will delay in disclosing the abuse, while some will never disclose the abuse. Reasons for delay are many and at least include embarrassment, fear, guilt, or a lack of understanding and knowledge": para. 65.

[50] Factual findings and credibility assessments must be context-specific and grounded in the case-specific evidence. Stereotypical behavioural generalisations should not be used: *R. v. Campbell*, 2023 BCCA 19 at para. 49. I must guard against impermissible reasoning, such as credibility findings grounded in emotional evaluation, stereotypes, or guesswork: *C.J.H.* at para. 30. This includes stereotypes about how a victim of abuse might or might not react, and conversely, it also includes stereotypes that improperly reverse the presumption of innocence. Inferences must be tethered to the evidence: *R. v. A.R.J.D.*, 2018 SCC 6 at para. 2; *T.A.P.* at paras. 64-66, 68, 71-77, 81-87; *C.J.H.* at para. 32.

[51] In *T.A.P.*, Ker J. addresses circumstances where the accused's evidence consists of a bare denial of allegations. Citing *R. v. Garford*, 2021 ABCA 338, *R. v. Redden*, 2021 BCCA 230, and *R. v. D.E.*, 2022 SKQB 58, she said at paras. 49-51 that the accused's evidence of a bare or simple denial that they committed the offence must not be assessed in isolation but the context of the evidence as a whole as part of the court's determination of whether the Crown has met its burden to prove the essential elements beyond a reasonable doubt.

[52] I have approached the assessment of credibility and reliability of the evidence and my findings of fact with all of these legal and evidentiary principles in mind.

<u>Witnesses</u>

[53] Seven witnesses in all were called to give evidence. The Crown called the complainants, their mother, N.M., and a police officer to explain his involvement in the circumstances surrounding the report to the police. The defence called Mr. M. and his daughter, D.M.

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[54] The police officer's evidence was brief, was not controversial in any respect, was not challenged in any respect by the defence, and did not add or detract from the credibility and reliability of the evidence of the other witnesses.

[55] Mr. M. suggested in cross-examination that there was collusion amongst the complainants. His suggestion was in the nature of speculation as it was not based on any personal knowledge or evidence adduced at trial. With respect to K.M. in particular, he suggested that her account of events was a possible attempt to emulate her older sisters' disclosures and also possibly due to what he suggested was her embarrassment over an incident in his motor home involving K.M. and himself that concerns count 4 and count 6 (I discuss the incident in a later section of these reasons).

[56] Although D.M. testified about her discussions with N.M. immediately following the complainants' disclosures to their mother, nothing about D.M.'s evidence supported, directly or indirectly, any suggestion of collusion or concoction.

[57] Nor was any aspect of concoction or collusion put to the complainants in cross-examination.

[58] However, in view of Mr. M.'s suggestion of collusion, I view it appropriate to set out my findings of the background facts concerning each complainant's disclosure and the discussions between N.M. and D.M. as part of my analysis of the whole of the evidence adduced at trial.

Background

[59] The first report of an offence was made by C.M. in November 2019, when she sent an image of a handwritten letter she had written by text to her mother, N.M., reporting that her grandfather had engaged in sexually inappropriate conduct towards her. After sending the text with that image, C.M. testified that that she ripped up the letter and threw it in the garbage. The provenance of the image of the letter sent by text, marked as an exhibit at trial, was not challenged. C.M. was not living

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with her mother at the time (her father passed away in a tragic plane crash in 2016), as she was working in the oil fields.

[60] C.M. testified that she sent the letter because she could no longer live with what had occurred. She had repressed her anger and frustration for years, suffering from depression, but on seeing her grandparents at her mother's recent surprise 50th birthday party, she said in answer to the question, "What was it that prompted you to do that?":

> A Seeing them recently just had brought it back up and it just had been eating away at me for so long and it was a lot of weight on my shoulders and I felt like it was just a lot for me to handle and I couldn't take holding it in any more and not saying anything and just getting depressed and anxiety from all of it all of the time.

[61] Upon receiving that letter by text, N.M. spoke with C.M. by telephone, and learned that Mr. M. had engaged in inappropriate sexual conduct with C.M.

[62] N.M. testified that C.M. told her that Mr. M. exposed himself to her and told her to "do things" while speaking with her but never touched her; otherwise C.M. did not provide N.M. with any further details. Nor did N.M. press for them as she decided she would let her daughter discuss them when she was ready to. Upset by what she had just learned, N.M spoke with her other two daughters, and asked them if their grandfather had ever done anything to them. At that point, C. (L.) M. and K.M., each separately from the other – C. (L.) M. by telephone, and K.M. in person (after K.M. finished work later that evening) – told their mother that he had, when they were young children. Like C.M., they did not tell her specifically what occurred, only that Mr. M. had engaged in inappropriate sexualized conduct in front of them but had not touched them. N.M. did not press them for details.

[63] N.M. said she called D.M. after speaking with C.M. to tell her what she had just learned and asked her to meet her *en route* as she drove to Mr. M.'s home to confront him. N.M. said that D.M. agreed but when they met at an arranged meeting point, N.M. learned that D.M. did not want to go with her and wished her well. N.M. carried on, and before speaking with K.M., N.M. drove to her in-laws' home,

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confronted Mr. M., told him what she had learned, and told him to stay away from her family. N.M. testified that Mr. M. denied that he had engaged in sexualized behaviour with C.M. but admitted he was drunk on the day of an incident involving a crash of a quad vehicle while C.M. was riding as a passenger (discussed in a subsequent section concerning C.M.'s evidence).

[64] N.M. then contacted the police a few days later. A police investigation ensued, followed by the charges against Mr. M.

[65] Up until that point, N.M. and her family and Mr. M. and his spouse had been a close-knit family, although less so after N.M.'s husband died in 2016.

[66] D.M. corroborated much but not all of N.M.'s account of their discussions that day. D.M. described N.M. as highly distraught (D.M. described N.M. as "screaming" and "hysterical" during their initial phone call, to the extent that D.M. initially had trouble understanding what N.M. was saying) and that she, D.M., did her best to try to comfort her, "mostly trying to listen to her," since, D.M. said, she had gone through "something similar" with her own daughter about a year-and-a-half earlier. D.M. testified that she was empathic towards N.M. and tried to "validate" N.M.'s frustration. D.M. did not try to dissuade N.M. from going to Mr. M.'s home and instead, she said, only asked N.M. "not to touch him". D.M. said that when she met up with N.M. that day, both she and N.M. were crying and hugging each other "as mothers".

[67] D.M. testified that she has no "first-hand" knowledge of any incidents involving sexually inappropriate behaviour between her father and her children (and said she never suspected it) and does not know, and has made it clear that she does not wish to know, any of the details concerning the charges against her father. She said all she could do was speak to her experience and what she understood of her children's experience.

[68] Some of the evidence adduced from N.M. and D.M. constituted inadmissible hearsay. For N.M., it concerned her discussions with D.M.'s older sister and a

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discussion N.M. had with her husband. For D.M., the defence conceded D.M.'s brief evidence it led in her evidence-in-chief about a recent discussion she had with her now adult children was inadmissible hearsay. I have disabused myself of all of such evidence and have not considered any of it in reaching my determination of the charges against Mr. M.

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[69] There were some differences in the accounts given by N.M. and D.M. of the words each used during their discussions over that day (including whether D.M. said anything to cause N.M. to believe that D.M. suspected Mr. M. of having engaged in sexually inappropriate behaviour in the past), the specific sequence of some of their discussions, and whether D.M. had agreed to meet N.M. *en route* or whether they met after N.M. left Mr. M.'s home, none of which I found surprising or to detract from their evidence given their current recollections of the highly emotional nature of their interactions that day. What I find from their evidence is that: (a) N.M. called D.M. in extreme dismay at what she had just learned; (b) N.M. told D.M. about the letter she received from C.M. and that Mr. M. had "molested" C.M. by exposing himself to her; (c) N.M. told D.M. she was driving to Mr. M.'s house to confront him and later, told D.M. that when she got to Mr. M.'s home, she told Mr. M. about C.M.'s letter, told him she knew what had happened, yelled at him and left; and (d) D.M. tried to comfort and calm N.M. and, as D.M. said in her evidence, "validate" N.M.'s concerns during their conversations as best she could.

[70] The evidence of the complainants and N.M. in respect of the circumstances leading up to the report to the police was clear, forthright, consistent, and not challenged by the defence. I found their accounts, in these respects, both credible and reliable. I did not find the differences in the account of the interaction between N.M. and D.M. in the highly charged, emotional circumstances immediately following the initial disclosure to N.M. by her eldest daughter, the complainant, C.M., to affect my assessment that N.M. and D.M. were each endeavouring to provide what they perceived to be truthful evidence to the best of their recollection.

[71] The evidence of N.M. and D.M. corroborates the evidence of the complainants that their family had a close relationship with Mr. M. and his wife. In particular, N.M.'s evidence confirmed that her family and Mr. M. and his wife lived close to each other for significant periods and participated in many activities together. In other words, N.M.'s evidence confirmed that there were opportunities for the incidents described by each complainant in their evidence to have occurred.

[72] Other than N.M.'s evidence that Mr. M. said he was drunk on the day of the quadding incident, neither N.M. nor D.M. gave evidence of any admissions against interest made by Mr. M. In terms of the complainants, N.M. testified that shortly after the quadding incident, and following a brief discussion she had with D.M. (which D.M. was not asked about in her evidence; nor was N.M.'s evidence about that conversation challenged), she asked C.M. if Mr. M. had ever done anything to her or touched her, to which N.M. testified that C.M. said no (my assessment of C.M.'s response is discussed in a subsequent section of these reasons).

[73] All of that said, the evidence of N.M. and D.M. does not otherwise impact my assessment of the credibility and reliability of the evidence of Mr. M. and the complainants. N.M. and D.M. were not witnesses to or have any personal knowledge (beyond hearsay) concerning any specific incident involving Mr. M. described by each complainant.

[74] As mentioned above, identification and age are not in issue. Each complainant readily identified Mr. M. as the individual who they testified engaged in uninvited and inappropriate sexualized conduct with or towards them when they were each under 16 years old.

The Complainants' Accounts

[75] In this section, I set out each complainant's separate account of the incidents giving rise to each of the charges against Mr. M.

[76] Before I do, I wish to emphasize that in setting out their evidence, I am not, at this juncture, intending to make specific findings concerning the essential elements

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of each offence. My assessment of the evidence of the complainants and of Mr. M., and my findings in respect of the essential elements are set out in subsequent sections.

The Charges Concerning C.M.

[77] Counts 1 and 2 concern C.M. They arise from three alleged incidents involving Mr. M. that C.M. described in her evidence. The first two incidents concern count 1 and the third incident relates to count 2.

First Incident

[78] C.M. testified the first incident occurred around 2006, when she was 9 years old and in grade 4. As she had done in the past, C.M. rode her pedal bike to her grandparents' home, which was close by where she lived with her parents. Mr. M. and his wife were the sole occupants of their home, which was a "single wide", pink-coloured residence (Mr. M. described his various residences as trailers sitting on lots that he owned; I will refer to them as a "mobile home"). She walked up the deck to the front door. No one was inside. From her vantage point on the deck, C.M. could see out to the wooden shed in the backyard. The large door (big enough to allow easy access for a quad to be stored inside the shed) to the shed was open, and she could see Mr. M. moving about, working on his quad sports vehicle. She walked through a gate, to the backyard and to the shed, and walked into the shed as she watched her grandfather moving tools around while working on the quad.

[79] Mr. M. asked C.M. what she was doing and from there, C.M. described a normal, casual conversation ensued that lasted for a few minutes. At that point, Mr. M. started touching himself over the top of his pants and then began rubbing his hand on top of his pants over his genital area. She testified that this lasted for a couple of minutes before Mr. M. undid his pants. She could not remember if he was wearing underwear. He unclipped the top of his pants (she described them as a combination of a dress pant and a sweat pant), lowered the zipper, pulled his pants down partway (C.M. said a couple of inches), and exposed his penis in front of C.M. who was standing near the shed's entrance way, approximately a couple of child's

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arm lengths away from Mr. M. She could not recall how much of his penis was exposed. C.M. could see the tip of Mr. M.'s penis as he was holding it. She did not know if it was erect or flaccid, stating that she was not focused on that. Mr. M. then started masturbating in front of her, as he was facing his granddaughter, rubbing his hand up and down his penis. As he did, Mr. M. tried to engage C.M. in casual conversation. She testified she was trying to look away but her grandfather kept talking to her, nothing sexual in nature, just general questions, such as asking how her parents were.

[80] C.M. felt very uncomfortable. She told her grandfather she should not be there, and tried to make excuses to leave, saying at one point that her parents must be wondering where she is. While Mr. M. was masturbating, he asked C.M. if they should go for a quad ride instead of her leaving, to which she told him, "no, I have to go". C.M. then ran out of the shed (as Mr. M. continued masturbating), through the backyard to her pedal bike, and rode home. In cross-examination, she said she thought the "whole event" took no more than ten minutes.

Second Incident

[81] C.M. testified that the second incident occurred a couple of months later, on a weekend, at her grandparents' home (the same mobile home where the first incident occurred). It was close to the end of C.M.'s school year and followed closely after a school class trip. She rode to her grandparents' home on her pedal bike expecting to see both at home. She knocked on the front door and Mr. M. told her to come inside. Her grandmother was not home. C.M. recalls it being during lunch time or the very early part of the afternoon. Mr. M. was cooking fish in the kitchen. She remembers the "disgusting" smell of the fish as it was being cooked. She declined her grandfather's offer to eat some of the fish due to the smell. After he finished cooking the fish, Mr. M. told C.M. he wanted to show her something and said to follow him to his bedroom.

[82] The two of them walked down the hallway of Mr. M.'s mobile home into the bedroom. When they got into the bedroom, C.M. sat on the bed. She saw Mr. M. put

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something into the television, either a VHS tape or DVD, and saw him fast forwarding the video (she saw images moving quickly on the screen). Mr. M. stopped it at a certain point to play that part of a pornographic video showing two people having sex. Mr. M. then left the bedroom and shut the door behind him while the video was playing.

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[83] Alone in the bedroom, C.M. hid under the bed covers for five or ten minutes and covered her ears. She said she was scared to leave because she did not know what her grandfather would do if she left right away. C.M. waited for about ten minutes before leaving the bedroom (while the video was still playing). She testified that as soon as she walked through the bedroom door, she could see, from the opening to the bedroom door, directly into the kitchen and see the kitchen table. C.M. saw Mr. M. sitting on a chair at the kitchen table, facing the kitchen, with the table to his right side, such that C.M. had an unobstructed view of his left side. Mr. M.'s dark navy-blue pants (same type she said he wore during the first incident in the shed) were pulled down a few inches below his waist, around his thighs, with his penis exposed. He was holding his penis with his hand, masturbating. C.M. believes his penis was erect because he was holding it with one hand. She does not know if Mr. M. was wearing underwear. She said there was a bottle of lotion sitting on the table.

[84] C.M. walked down the hallway to the living room to the living room couch. The kitchen adjoined the living room and was in plain view as there are no walls separating the two rooms. The only way to get the living room was to walk directly past Mr. M. As she did, Mr. M. said to her, "now you know what to do, so you can do it". At other points in her evidence, she said Mr. M. said, "now you know what to do, you can do it for me." C.M. said, "no". She walked to the living room and sat on the couch. Mr. M. continued to masturbate while C.M. sat on the couch in the living room and tried to concentrate on the television (which was on, tuned to a news network). She avoided eye contact as best she could, all while her grandfather was talking to her, asking her questions, including whether she had ever seen anyone else's penis before (including her father's), to which she said "no". When Mr. M. finished, he

stood up, pulled his pants back up, and began to walk around near the kitchen counters. C.M. thinks approximately ten minutes elapsed from the time she left the bedroom to the point when Mr. M. finished. Thinking of an excuse to tell him why she had to leave, C.M. told her grandfather she needed to go home, and left. She said did not leave before then as she was scared of what her grandfather might do if she left while he was masturbating, particularly since she would have to walk past him to get to the door leading outside.

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Third Incident

[85] According to C.M., the third incident occurred in the spring of the following year, when she was on a family quadding/camping trip with her family and members of her extended family, including Mr. M. and his wife. She was, or was close to, ten years old at the time. C.M. recalls it was late spring, although she remembers there was still some snow on the ground.

[86] During the multi-day family event, C.M. and the other children took turns riding on quads (four or five in total) with different adults. C.M. was well used to riding on quads and had no fear of them, a fact she said was known to Mr. M.

[87] At one point during the day, C.M. went on the vehicle being driven by Mr. M. She sat on the back seat. After riding for a short while, approximately 15 to 20 minutes, while Mr. M. was driving at what C.M. said was a "medium to slow speed" on trails and in riverbeds (she estimated 10 to 15 km/h), the quad in front sped away from them. She said she clearly remembers Mr. M. reached his left arm and left hand around, touched C.M.'s left hand, and tried to pull it away from the side rail she was holding onto, towards his waist and upper thigh near his genital area. It appeared to C.M. that he was trying to pull her hand to put it on top of his pants over his genital area. She pulled her hand away from him each time he tried. She said this happened a couple of times, and each time he pulled her hand away as it was holding on to the railing. At one point, her hand came into contact with Mr. M.'s pants.

[88] Her grandfather then pulled over, off to the side of the trail in the riverbed, stopped the quad, turned around (a three-quarter turn) to face C.M., and reached over to pull C.M.'s hand away from the rail she was holding towards him, and said to C.M. that she could hold on to him while he was driving, to which she said she did not want to. C.M. does not believe that her grandfather's hand made contact with hers at that time. She said the area they were riding in at the time was a riverbed and not rough terrain. While this was happening, C.M.'s aunt, D.M., who is, as I have mentioned, Mr. M.'s daughter, drove up beside them. As soon as she did, Mr. M. stopped, turned around, and drove away. A short time later, Mr. M. and the rest of the group met up, at which point C.M. changed quads to ride with someone else. There was no contact between C.M.'s hand and Mr. M.'s genital area. D.M. was not asked about nor did she give any evidence concerning C.M.'s testimony.

[89] C.M. said she did not fall off the quad at any time; nor did she ever have a discussion with Mr. M. about falling off of the quad.

[90] Later that day, closer to the evening, C.M. found herself on a different sports vehicle, called a "side-by-side", with Mr. M. She said he was drunk (she had observed her grandfather drinking throughout the day and immediately before this incident), and he was laughing continuously as he was driving. He was speeding, driving recklessly given the terrain. C.M. was scared and could hear her parents, who were racing towards him in another quad, yelling and screaming at Mr. M. to stop. Mr. M. lost control, crashed his quad, and was ejected from it. C.M. was trapped underneath the front dash and she blacked out. Her next memory is of her mother pulling her out of the side-by-side. Fortunately, she had no broken bones. Coincidentally, a medically trained person was near the area and examined C.M. and determined that she likely suffered from a concussion as well an indentation to part of her forehead caused by her sunglasses hitting her head during the crash. C.M.'s parents were encouraged to have their daughter medically assessed, which they did.

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The Charges Concerning C. (L.) M.

[91] Count 3 concerns C. (L.) M. and arises from two alleged incidents.

First Incident

[92] C. (L.) M. testified that the first incident occurred at Mr. M.'s mobile home in the Fort St. John area. She was about four years old. She cannot remember why she was at her grandparents' home that day or where her parents were. She remembers staying at her grandparents' homes from time to time when she was not well. She does not know if anyone else was in the house when the incident occurred but testified that she did not see anyone inside.

[93] C. (L.) M. walked into house from the outside and into the living room, and saw her grandfather, who had just come out of the shower (his hair, she said, was wet and styled as if he had just come out of the shower), wearing a robe and sitting on the living room couch, with his feet on the floor, slightly spread apart. She remembered the robe being light brown in colour and made of a "fuzzy terrycloth material". When she first walked into the living room she saw Mr. M. reaching under his robe, then pull his robe back, and begin rubbing his penis in an "up-and-down motion". As she stood at the opposite side of the room a few feet away from him, near the coffee table, with her back to the kitchen, and as she was asking Mr. M. something, and as she saw his hand on his penis stroking it, she said Mr. M. pulled his robe back from his leg and asked her to come closer and touch his penis. He asked her if she knew what it was. From where she was standing on the far side of the coffee table, she could see his bare legs fully exposed (and he was not wearing any clothing under his robe that she could see). C. (L.) M. remembers just saying "no", walking away, and going outside to the yard.

[94] Although C. (L.) M. did not know at that time what it meant, she remembers seeing his penis was hard. Mr. M. asked her to come closer, to come and feel it, and asked her if she knew what it was. C. (L.) M. thinks the elapsed time from first seeing her grandfather rubbing his penis to her walking away was approximately one minute.

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Second Incident

[95] C. (L.) M. testified that the second incident occurred approximately three or four years later, in the spring or summer (she recalls it being warm outside) when she was seven or eight years old and in grade 3, after her grandparents moved to another mobile home in Fort St. John. She recalls it occurred some time after her seventh birthday party that took place at her grandparents' home (her birthday is in January and C. (L.) M. recalls having her friends over for a tobogganing birthday party because there was a large hill in her grandparents' backyard that was ideal for tobogganing).

[96] On the day the second incident occurred, C. (L.) M. said she was with her family, who were all outside at the time getting ready for a camping trip. C. (L.) M. was speaking with her grandmother and saw Mr. M. walk into his home (it was a different mobile home at this time). Shortly after Mr. M. did, C. (L.) M. followed to see if he needed any help. She saw Mr. M. standing in his bedroom, facing the television. She stood at the door to the bedroom and asked him what he was doing. Mr. M. told C. (L.) M. he was getting a video ready for the camping trip and rewinding it (she does not know if the video was a VHS tape or DVD). C. (L.) M. saw her grandfather holding a remote-control device in his hand and using it to rewind the video. Mr. M. told her to come into the bedroom to look at what was on the television screen. She walked in, turned to look at the screen, and saw a pornographic video playing on the television, showing a female performing oral sex on a male. C. (L.) M. looked down, and as she moved to walk away, Mr. M. held her shoulder to stop her from leaving the room and told her to look at the video. He held her shoulder until she looked at the video. C. (L.) M. looked at the screen for a moment, then looked down because she did not want to watch it, and remembers as she was trying to pull herself away from her grandfather's hold on her, Mr. M. laughed "a little bit" at her and asked her if she liked the video. She eventually freed herself, left the bedroom, and went outside.

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The Charges Concerning K.M.

[97] Counts 4, 5, and 6 concern K.M. and arise from two separate incidents.

The First Incident

[98] K.M. testified that the first incident, relating to counts 4 and 6, occurred in late spring when she was in grade 5 and either 10 or 11 years old. She was with Mr. M., checking on the well-being of K.M.'s family's pregnant horse, whose name she said was "Princess", who was in the midst of foaling. Although she cannot recall the reason why, K.M. specifically remembers walking into her grandfather's motor home (Mr. M. referred to it as a "motor home" as opposed to a mobile home/trailer, and for convenience, I will do so as well) which was parked in front of the shop located at her parents' home. She walked into the motor home with Mr. M. Once inside, K.M. walked over to and sat on a love-seat style couch facing the entrance door. K.M. testified that Mr. M. sat down on a reclining chair close by, three to four, possibly five feet away and across from the couch. While he was sitting, Mr. M. asked K.M., repetitively, to take her pants off, telling her, "You should take your pants off", without telling her why. She ultimately complied with his request.

[99] Once K.M. removed her pants (she cannot recall if she removed them part-way or altogether) and her underwear, Mr. M. asked her to touch her vagina. He told her to use her two fingers and to rub her vagina (she cannot recall if he used the word "vagina" specifically or a slang word) in a circular motion, and she complied, all while her grandfather directed her on what to do and how to do it. She recalls Mr. M. telling her to touch her clitoris (she does not think that he used the word "clitoris" specifically as K.M. said she was too young to know what that was). Mr. M. sat and watched.

[100] While K.M. was engaged in doing what Mr. M. asked her to do, he walked over to the refrigerator and took a tub of margarine out of it and then brought it over to K.M. Initially, K.M. said that Mr. M. applied the margarine to her vagina, but then immediately corrected herself to clarify that she complied with his instruction and applied the margarine to herself. K.M. testified that when Mr. M. held the tub of

margarine in front of K.M., he told her to take some margarine out of its container and put it on her vagina. She complied, and took out approximately a tablespoon of margarine with her fingers and placed it on her vagina. Mr. M. then took a hold of his small dog (a chihuahua mix) off of the floor and "cornered" (K.M.'s word) the dog, placing the dog on the couch near to K.M.'s vaginal area. Mr. M. then used his arms to guide his dog to smell the margarine. He held his arms out to keep the dog on the couch and to prevent him from jumping off and running away. The dog then licked the margarine off of K.M.'s vagina while Mr. M. watched as he sat on the couch facing K.M., with his legs extending below the couch, angled towards her.

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[101] K.M. thinks the incident lasted up to five minutes. Once the incident concluded, K.M. put her pants back on and she and Mr. M. walked out of the motor home and met up with Mr. M.'s wife and K.M.'s parents and sisters.

The Second Incident

[102] K.M. said the second incident, relating to count 5, occurred a couple of days later, while she was in the boot room of her parents' home. K.M. recalls she was wearing black sweats, underwear, and a grey t-shirt with a Minecraft logo on it. She was sitting on one of two benches in the boot room at the time (she believes that she was getting ready to go and see the pregnant horse) when Mr. M. (whose motor home was still parked in front of the shop at her parents' home) walked into the boot room and closed the door to the outside. One of two other doors to the boot room (to the garage) was closed; the other door to the main part of the house was open. K.M.'s middle sister, C. (L.) M., was downstairs in her room and her mother and father were up at the horse pasture checking on their pregnant horse. Mr. M. asked K.M. to take her pants off, and repeated his request several times. He kept saying to her words such as, "You've done it once, why does it hurt to do it again" and "Come on, take your pants off, you've done it once, why not do it again." K. M. testified that he asked her to take her pants off seven to eight times. K.M. knew what he meant, i.e., that Mr. M. wanted to watch her rub her vagina again.

[103] She eventually acquiesced, lowered her pants (she cannot recall if she fully removed them or only lowered them part-way and believes, although cannot specifically recall, she moved her underwear to have access to her vagina), and rubbed her vagina, including her clitoris, in front of her grandfather in circular motions in the same way he had told her during the first incident, which she did for approximately five minutes, all in front of Mr. M. who was standing in front of her, at an angle, watching. According to K.M., given his proximity to her and the manner in which he was facing as he was standing right across from her, and also that she had no clothing covering her vagina at this time, she is certain that Mr. M. could see her vagina as she rubbed it. The entire incident lasted for approximately ten minutes. Mr. M. then left before K.M.'s parents came inside the house. K.M. pulled up her pants as Mr. M. was about to leave and then went to her room.

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Mr. M.'s Evidence

Overview

[104] The contrast between Mr. M.'s evidence-in-chief that focused on the incidents described by each complainant, and his cross-examination was striking. With only a few exceptions, which are identified in the excerpts set out below (the underlining in the excerpts is my emphasis), when the complainants' version of events was put to him in his examination-in-chief, Mr. M. did not provide his own account of what occurred or deny it. His responses were that he had no recollection. When asked whether the incidents the complainants described in their evidence occurred, Mr. M. responded at times that "anything was possible". However, during cross-examination, his evidence became more definitive, often argumentative and confrontational (sometimes resorting to foul language), at times internally inconsistent with his other evidence in cross-examination, often evolving, when pressed in questioning, to outright denials.

[105] The stark differences in Mr. M.'s testimony between examination-in-chief to cross-examination, inconsistencies in evidence in cross-examination, and his approach to answering straightforward questions are critical factors in my

assessment of the credibility and reliability of his evidence and my ultimate determination that his exculpatory evidence cannot be accepted as credible and that much of his evidence was not reliable.

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[106] For those reasons, I have included a number of examples from Mr. M.'s evidence in these reasons. Inclusion of these extracts should not be interpreted to mean that I engaged in greater scrutiny of Mr. M.'s evidence than all other evidence, including the complainants' evidence. I have reviewed all evidence with the same scrutiny, including a search for candour and inconsistencies affecting credibility and reliability.

Pornography

[107] Before I review Mr. M.'s evidence, including the contrast between Mr. M.'s evidence-in-chief and his cross-examination, I will begin with Mr. M.'s evidence corroborating the evidence of C.M. and C. (L.) M. that he kept pornographic videos in the bedroom of his home.

[108] Before Mr. M. was asked in his evidence-in-chief about the individual alleged incidents involving the complainants, he was asked about adult pornography. He testified that he possessed two videos that he and his wife watched on their bedroom television:

> Q Now, before I get into these individual incidents, we heard some discussion about, if I can call it, legal adult pornography. Did you and your wife enjoy pornography from time to time?
>
> A From time to time, yeah.
>
> Q Okay. And what would be the -- how would that be played? Like, would it be Internet, or DVDs or --
>
> A DVDs.
>
> Q DVDs? Okay. And, generally, where would that activity take place?
>
> A At home.
>
> Q At home, but, I mean --
>
> A In the bedroom.
>
> Q In the bedroom? Was that something that, generally, people were aware of?

A Well, it was no big secret, that's for sure.

[109] When asked about the extent of others' knowledge of his interest in pornographic videos, Mr. M. said he did not keep it a big secret:

Q And, now, you had said -- my friend had asked you -- I think he had asked you if this is something that people were aware of.

A People knew about it. I didn't keep it a big secret.

Q Okay. And when you say that people knew about it, who are we talking about?

A Oh, I don't know, lots of people, probably, by the end, when they're mouthing off about things. I mean, I'm not -- not hanging flags out saying, "Free Porn."

Q Right. Okay. And so the people that knew about it, would they have been your neighbours?

A Friends, not -- no neighbours that I know of ever watched it, but --

Q Okay. They're -- your friends might have known that you watched it?

A Yes.

Q Okay. And is there anyone else that you -- that might have known that you had pornography?

A Oh, it could be anybody, I have no idea.

Q Okay. And those would have been people you -- they knew because you told them that, right?

A Well, somebody must have told them.

Q Okay. And it was -- are you the one that told them?

A I don't know who you're talking about.

Q Well --

A I probably told someone. Don't have a clue.

Q Okay. Now, if you didn't tell them, who else would tell them?

A Christ, do I know.

Q Now, none of those people would have been in your bedroom to know?

A Oh, maybe we might be a threesome in there, you never know, eh?

Q Well, I'm -- I'm --

A Keep your -- keep your ears and eyes open.

Q I'll just ask you to ask -- answer the questions in a serious manner.

A Well, ask them in a serious manner.

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[110] He also said that he only watched pornographic videos in his bedroom.

[111] I will now turn to Mr. M.'s evidence concerning the incidents described by each complainant.

C.M.

Examination-in-chief

[112] Mr. M. was taken in his examination-in-chief to count 1, specifically, the evidence that C.M. gave, beginning with the first incident where C.M. testified that Mr. M. was masturbating in his shed in front of her. He said he recalled it being brought up but could not recall any such event having occurred:

> Q Okay. Now, I want to talk to you about the evidence that [C.M.] gave, all right? She talked about the first incident, and apparently she said that she went to the door of a shed, where you were working on a quad. Do you remember her saying that?
>
> A I remember it being brought up the last time we were in court, yeah.
>
> Q Do you remember any event like that?
>
> A No, I don't remember that at all.
>
> Q All right. She told Mr. Justice that she saw you touching yourself, and then she described you masturbating. Was that something that you recall?
>
> A No, it ain't. Thank you.
>
> CNSL K. JONES: I'll let you get that on.
>
> THE COURT: I'm sorry, the last part of his evidence trailed off, and he said "no . . .," something?
>
> A I didn't get that.
>
> CNSL K. JONES: Sorry?
>
> A I didn't get the last bit there, what --
>
> Q She said that she saw you touching yourself and then watched you masturbate, in the trailer; do you remember her saying that?
>
> A No, I don't even remember the -- her -- you mean the last question?
>
> Q Yes.
>
> A I don't remember her saying it, no, I don't.
>
> Q Do you remember occasion on which you might have been masturbating in front of [C.M.]?
>
> A No.

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[113] When asked if he remembered working in the shed on a quad when C.M. came into talk with him, he said he was cutting grass at the time, and was then taken to the second incident (which also concerns count 1) where C.M. said he had taken her into his bedroom to watch a pornographic video and a short time later, while masturbating in front of her, asked her if she had ever seen a penis before:

Q Do you remember working in the shed, on a quad, when she came in to talk to you?

A No, I remember her saying that in the last court case, but I was actually cutting grass when they came over.

Q Well, she talked about two incidents, and the second incident involved viewing pornography.

A Yeah.

Q And you told Mr. Justice that you and [Mr. M.'s spouse] had pornography, and people generally knew it?

A Yeah.

Q But she said that you instructed her -- let me just see if I can find the note. This is a couple of months after the first event, which you don't remember anyway. <u>She said that you were cooking fish and watching a porn movie. Do you remember</u> --

A <u>No, I don't</u>.

Q <u>No?</u>

A <u>No.</u>

Q <u>Do you remember that happening?</u>

A <u>Cooking fish and watching a porn, no.</u>

Q <u>She said that you were at the table and you were masturbating, and then she told Mr. Justice that you asked her if she'd ever seen a penis before</u>.

A <u>Well, I sure don't remember, no</u>.

Q <u>Did that happen?</u>

A Not that I can ever even imagine, <u>but I don't think so</u>.

…

Q Yeah, we're back at the second event, which she said was a couple of months after the shed event, which you don't remember. And this is where she told Mr. Justice that you were sitting -- you were cooking fish in the kitchen and sitting at the table, masturbating, and you asked her, "Have you ever seen a penis?" <u>Do you remember that?</u>

A <u>No, I would say no to that</u>.

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[114] Mr. M. had a similar lack of recollection regarding the third incident (concerning count 2) which C.M. testified occurred while she was riding on a quad with Mr. M. He said he could recall the day and suggested she was holding onto his waist:

Q All right. And she told Mr. Justice that you had taken -- you reached with your left hand and took her hand and put it on top of your penis; do you remember her saying that?

A I remember her saying it, yeah.

Q Do you remember ever doing that?

A No.

Q Do you remember anything that could have been -- that might have occurred that was sort of like that in any way?

A I don't remember her putting her hand anywhere, but hanging onto my waist, or whatever, but other than that, no.

Q All right. And I believe this was the same time when you had an accident, I think, on another machine?

A Later that day, yeah.

Q Yeah. So you remember the day?

A Oh, yeah, I sure do. I broke my leg that day, I remember it well.

Q All right. Do you remember ever making any comments or anything like that to her about hanging on, or anything like that?

A No, I don't. We said lots throughout the day. I -- I don't remember anything special about hanging on, or letting go, or anything else.

[115] Mr. M. was then brought back to the first incident during questioning-in-chief. He again said he had no recollection, and added that anything is possible:

Q All right. I think those are the only events that she described. If we go back to the shed event where she says she saw you working on the quad, and she said that you were facing the entrance and you made eye contact with her; do you remember anything like that happening?

A No. No, I don't remember.

Q She said that you undid the clip on your pants and pulled them down a couple of inches; is that something you can recall?

A Well, like I said a while ago, I don't remember anything going on in the shed. I was cutting grass when those three kids came over that day and so all this about the pulling pants down, unzipping, or whatever, don't make sense.

Q Is it possible that that happened and you just don't --

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A Anything's possible.

Q And you don't remember it?

A No, I don't.

Cross-examination

[116] When initially asked in cross-examination about the first incident described by C.M., Mr. M. denied it. He maintained that she was not alone, she was with her sisters, and he was cutting grass at the time and not working in the shed while his three granddaughters were at his home.

[117] When pressed on whether there was a different occasion that C.M. came over to his home alone, he said he did not know:

Q Okay. Now, do you remember any occasion when you were working in the shed and [C.M.] came over?

A Oh, Christ, I don't know.

[118] After giving that answer, and to the opposite of his evidence-in-chief, he then denied, adamantly so, C.M.'s version of events:

Q Okay. Okay. Now, [C.M.] testified that one day she came over, you were working in the shed, and she said that you were -- I think she described it as a normal conversation, you were talking about everyday type of topics. And she said that at some point, you lowered your pants and took your penis out of your pants. Did that happen?

A No, it did not.

Q Now, when you say no, it didn't, what you're referring to, there was never a time you took your penis out of your pants in her presence?

A There was nothing going on in the shed, period, so you're halfway through the story and it's still no.

Q Okay. Now, there would never have been a time when, perhaps, your fly was down or you might have been exposed inadvertently?

A Anything's possible.

Q Is there a time that you can remember when you --

A No, there isn't.

Q Sorry, and I'll just ask you to let me finish the question. Just -- I -- [Mr. M.], I want it to be clear for the court -- when you answer the question, I just want to be really clear what question you're answering, right?

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A I'm really clear.

Q So I think -- or my question was is there any time that you can remember that you noticed that you had -- you were exposed inadvertently?

A That's exactly the question I just answered. No, there was not.

Q And is there -- was there ever a time when you might have been masturbating in the shed that perhaps you didn't notice anyone else was there?

A I didn't go to the shed to masturbate.

Q So the question I asked was is there ever a time when you might have been masturbating in the shed --

A If I never went there to masturbate, there couldn't have been.

Q Okay. So it -- are you saying that it's not possible that you ever --

A No, it ain't possible.

Q Now, [Mr. M.], I'm going to suggest to you that, in fact, there was a time when you were masturbating in the shed in your granddaughter's presence and you may not remember that?

A You can suggest what you want, but it never happened.

Q You're certain that that never happened?

A I already said no, it never.

Q Well, I'm asking if you're certain about that.

A Yeah, I'm certain.

Q All right. So it's not possible anything like that happened?

A No, it is not.

[119] When asked about the second incident, and whether C.M. came to his home while he was cooking fish, Mr. M. initially said he could not recall any specific incident, adding he cooks fish a lot, at least once a week:

Q Now, you described a different incident where -- my friend had asked you about an incident that involved masturbating and cooking fish. Now -- and I'm wondering if that was put a little strangely. As I recall [C.M.'s] evidence, she described a time shortly after what she says occurred in the shed, when she came to your house and at that time, she said the only thing that was happening when she got there was that you were cooking fish.

A So?

Q Do you recall an incident when you --

A I cook fish lots, yeah.

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Q I'm asking if you recall any specific incident when [C.M.] might have come over by --

A No.

…

Q Okay. Now, on this occasion, [C.M.] said when she got to the house, it was just you in the house, and she said that you were cooking fish so, presumably, that would have just been for yourself on that occasion?

A Well, that's kind of a stupid question because how the hell do I know when I last cooked a fish?

…

Q Okay. And fish was a -- it was a dish that you liked?

A Still do.

Q Okay. And you would cook it pretty often for lunch?

A I wouldn't say that often, but once a week type of thing, maybe.

[120] In contrast to his lack of recollection in his evidence-in-chief, he then denied that he put on a pornographic video while C.M. was at his home:

Q Okay. Now, what [C.M.] said was that on this occasion, she'd gone there, you were cooking fish, and then she said that you had put on a porn DVD?

A That is a lie.

Q She said that you had got her to come with you and you had put on the video and got her to watch the video. Did that happen?

A No, it didn't.

[121] A short time later in his cross-examination, Mr. M. testified there was an occasion when C.M. did watch a pornographic video in his bedroom. He explained that it occurred when he came in from cutting the lawn outside and found C. (L.) M. and K.M. sitting in his living room watching television. When he was told that C.M. was in his bedroom, he said his first reaction was that she must be watching pornography on the television in his bedroom. As he headed towards his bedroom, he encountered C.M. coming down the hallway. However, he did not know that she had in fact watched the television in his bedroom, or if she had, what she had watched. He could not say when this incident occurred nor the ages of the complainants at that time. He said he assumed C.M. watched pornography because when he later went to turn on his bedroom television, he saw the screen say “DVD”

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or "HMI". He also said that a pornography video is always set to play in that television. Nonetheless, he conceded that he and his wife watch other things on that television, for example, his wife will watch a show on it if he is watching hockey on the living room television and again conceded that he did not actually know if C.M. was actually watching the television in his bedroom on that occasion.

[122] Mr. M. also said that he determined that C.M. watched pornography from her testimony in court:

> Q Okay. Now, do you know if [C.M.] was even watching anything on the television on that occasion?
>
> A I don't know.
>
> Q Okay. Nobody said she was watching anything?
>
> A Nobody knew, they weren't in the bedroom.
>
> …
>
> Q So, [Mr. M.], just before the lunch break, you had described an incident that you recalled where you were cutting grass outside of the residence and came in to find the three girls inside?
>
> A Yes.
>
> Q Okay. And, although you hadn't seen anything, your conclusion was that [C.M.] had been watching pornography on your bedroom television; is that right?
>
> A Yes.
>
> Q Okay. All right. And now, what made you conclude that?
>
> A That's what she said to you guys, and it made up my mind.
>
> Q Okay. All right. So the reason that you concluded she was watching porn then is because of what she said in court?
>
> A That's right.

[123] After trying to say that he also thought she watched pornography in his bedroom from reading a document from the police (which was never put into evidence nor described), Mr. M. was asked again for his recollection of C.M.'s age at the time he said she watched pornography in his bedroom. At first, he said he had "No idea what age she was", but after being pressed, said C.M. would have been between seven and ten:

Q Now, would she have been about nine years old when that happened?

A I don't know. No idea what age she was.

Q Okay. Would she have been older than about five years old, do you think?

A No, she was older than that. The other kids were probably three and five or somewhere in there. I don't know.

Q Sorry, you believe that her sisters were about three and five?

A In that ballpark. I don't know.

…

Q Okay. Okay. Does it seem reasonable, then, that this might have happened between when she was about eight to 10 years old?

A I have no idea how old she was.

Q Does that seem like --

A I have no idea, period. You're just asking me their ages because I don't know them yet.

Q Okay. But you -- now, you saw [C.M.] on that day.

A Certainly.

Q And do you remember how she looked?

A Like [C.M.].

Q I didn't hear that.

A Just like [C.M.].

Q Okay. Now, do you have a picture in your mind about what she looked like?

A That's a pretty stupid question, as far as I'm concerned, but she looked like my granddaughter.

Q Yes. And I'll ask you not to comment on the question, but just simply to answer the questions, [Mr. M].

A Well, ask them so I can answer them.

Q [Mr. M.], just please answer the question if you would. So I'm asking -- you're saying you have a memory of this event; is that right?

A Whatever event that she was at the house and in the house, yes.

Q Okay. And you have some image in your mind of what she looked like at that time, wouldn't you say?

A Like a small kid.

Q Right. Okay. And so you're able to say, "I know for certain she wasn't 15."

A That's right.

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Q Okay. And you're able to say, "I know for certain she was older than five."

A That's right. So somewhere in there.

Q Okay.

A I would say between eight and 10, and seven and 10, whatever.

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[124] When it was suggested to him that he had a discussion with C.M. about the pornography she watched, Mr. M. initially responded, "Not that I know of", and then denied it was possible that he did.

[125] Unlike his inability to recall in his evidence-in-chief, Mr. M. denied it was possible that there was ever a time that C.M. was at his home alone with him without anyone else present. As C.M.'s version of events was put to Mr. M. in a sequential fashion, he became emphatic that none of it was true.

[126] His lack of recall in his evidence-in-chief is to be contrasted with his ready ability in cross-examination to recall wearing a bathrobe at home that was only of one colour. He said his bathrobes were only black, which he thought were made of a corduroy type of material, but then moments later admitted to uncertainty about owning a terrycloth bathrobe (the material described C. (L.) M.):

Q Okay. So you're -- I'll ask you this, then: do you recall if you ever had any kind of a fuzzy robe at all?

A No, I don't think I've ever owned nothing like that.

[127] Mr. M. also testified that he got rid of the pornographic videos "shortly after" the incident he described, in which C.M. watched pornography while C. (L.). M. and K.M. watched television in his living room, but could not say when, other than that it was not the same day and was at a later time. When pressed, and asked, "So sometime that summer, you got rid of your porn?", he said, "Towards the fall. Somewhere in there… Yes, late summer, whatever the hell." Later in his cross-examination, he said he probably had pornographic videos at his home in 2008, but later, when asked again, said he did not know when he got rid of them:

Q So my question was -- and I'll break this question down so it's smaller parts. -- in 2007, you would have owned pornography; is that right?

A I don't know. I guess probably.

Q Okay. And in 2008?

A Right in that ballpark area. I don't know exactly when.

…

Q Okay. And is it your evidence that 2008 was when you say that you got rid of the pornography?

A I don't know the year, like I told you.

[128] The Crown then put it to Mr. M. that the way he described this particular incident (i.e., on the day he said he was cutting grass) was an attempt to explain away C.M.'s evidence about the circumstances in which she was watching pornography in his bedroom, and in the course of answering questions, Mr. M. said he did not know if she was in fact watching pornography:

Q Okay. I'm going to suggest to you that the reason that you're describing this incident is because it's an attempt to explain how [C.M.] found herself to be watching porn.

A I don't understand what you're talking about.

…

Q Okay. And I'm going to suggest to you that there was no time when you believed she watched porn on her own.

A Not that I would have any idea when, or if she did, or ever did, or -- I had no idea.

Q There's no time that you -- as far as you know, there's no time that she watched it on her own at your house?

A That's right.

Q Okay. So I'm going to suggest to you that you're essentially inventing the grass-cutting incident as a way to explain why -- how it is that she came to watch porn.

A Well, I suggest you're wrong.

[129] For the third incident, concerning events during a quad ride, Mr. M. admitted consuming alcohol – four beers, possibly five or six, but not as many as seven to eight – during the day while driving the quad. He denied feeling the effects of alcohol or that it impaired his ability to operate the quad and his memory of events. He also admitted consuming another eight to ten drinks when he returned to camp before

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setting off on a different vehicle that he crashed when he hit a bridge while C.M. was riding with him.

[130] When questioned about C.M.'s account of his attempts to take her hand, he could not be certain but believed he did not:

> Q Okay. So the two of you were riding the quad. She said you kept grabbing her hand. You're not really sure if that happened?
>
> A No.
>
> Q Okay. Okay. And she said that you were grabbing her hand and that she was pulling away from you. Are you able to say whether that happened or not?
>
> A Well, I don't remember grabbing her hand for any particular reason, or grabbing her hand, period. So I don't know if she was pulling away or not.
>
> Q Okay. But you're not sure if you were grabbing her hand?
>
> A I would say no.
>
> Q Okay. Are you sure about that?
>
> A Well, I ain't 100 per cent sure about nothing. I'm pretty damn sure I wasn't grabbing her hand unless I was bugging her about something, but…
>
> Q Okay. So when you say, unless you were bugging her about it, it's possible you might have been doing that as a joke?
>
> A I would say no, period. But we were always jacking around, all of us, throwing shit on each other.
>
> Q Okay. But you don't -- you don't remember grabbing her hand as a way to keep her on the vehicle, do you?
>
> A No.

[131] He also admitted that he was not worried about C.M. falling off as she was an experienced quad rider.

[132] A short time later in questioning, Mr. M. denied grabbing her hand.

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C. (L.) M.

Examination-in-chief

[133] Mr. M. also gave evidence in his examination-in-chief of his lack of recollection concerning the first of the two incidents (concerning count 3) described by C. (L.) M. in her evidence.

[134] With respect to the first incident – concerning C. (L.) M.'s evidence that while Mr. M. was masturbating in front of her he asked her to touch his penis – Mr. M. testified that had no recollection and said "anything is possible" but at the same time said he doubted it:

Q All right. I'm going to start asking you now about [C. (L.) M.], I think she answers to [L.]? Do you know who I'm talking about?

A Oh, yeah.

…

Q Now, this was -- this relates to an event that she said happened in [T.], at the first house you lived in in [T.]. Do you know the house that she's talking about?

A Well, I know the first house, yeah.

Q All right. She was about four at that time and she said [as read in]:

> Grandpa got out of the shower and he had his hand on his penis.

Is that something that you recall?

A No.

Q Is that something that you might have done?

A Anything's possible, but I doubt it like hell.

Q All right. She says that on that occasion, you invited her to come closer. Do you remember ever doing anything like that?

A That's pretty hard to answer to because we were always close and always buggering around and so the whole family, adults and kids do.

Q All right.

A But not sexually.

Q All right. But specifically, when you were masturbating, did you ask her to come closer to you?

A Who the hell said I was masturbating?

Q Okay. Well, you had your hand on your penis.

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A Well, so the story goes.

Q Yeah.

A I said I -- so the story goes. I don't remember anything along that line at all.

Q All right.

A Especially if she was four years old.

Q She told Mr. Justice that you invited her to touch it; do you remember saying that to her?

A I don't remember the incident period so I can't answer that one.

Q Is it possible that that happened and you just don't remember?

A Like I said before, anything is possible in this world, but I -- I doubt it like hell.

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[135] His evidence was similar for the second incident (which also concerns count 3), where C. (L.) M. described her grandfather restraining her in his bedroom to watch a pornographic video. In the course of answering questions, Mr. M. reverted to the first incident and said he could not remember if he lifted his robe and asked her to come closer:

Q All right. Now, the second event that [C. (L.) M.] talked about was -- it occurred during a tobogganing party so I'm going to assume it was in the wintertime. Do you remember a tobogganing party?

A Quite a few of them, yeah.

Q I'm sorry?

A Quite a few of them.

Q All right. She told Mr. Justice that you were watching a video and you said to her, "Come and look." Do you remember saying that to her?

A No.

Q She also told Mr. Justice that you held her shoulder and sort of more or less forced her to look. Do you remember doing anything like that?

A No.

Q And she was talking about the first incident, this was the house in [T.], where you just got out of the shower, she said you had your hand on your penis, she said you -- she saw you sitting on the couch and your hand was under your robe and you appeared to be rubbing your penis for a couple of seconds. Do you remember anything like that?

A No, I don't. And you just said we -- we were in the kitchen and now you're saying it was in the front room so --

Q I think this might be a different incident. This was the event that she talked about, when she was four years old, and you'd just got out of the shower. If I'm not mistaken, I think the other one you're talking about, you're cooking fish, with respect to [C. (L.) M.], okay?

Is it possible that something like that might have happened, that she might have observed it, but --

A Which incident are you talking about?

Q I'm talking about an incident where she says you had your hand under the flap of your robe and you appeared to be fingering your penis?

A <u>I'd have to say no to it. And they're kind of two mixed up stories you've got going on there.</u>

Q <u>She told Mr. Justice that you lifted the flap of the robe with your left hand and your penis was exposed, and she said you asked her to come closer;</u> <u>do you remember that?</u>

A <u>No, I do not.</u>

Q <u>Did that happen?</u>

A <u>I don't remember, period.</u>

Cross-examination

[136] In cross-examination, when questioned about C. (L.) M.'s evidence, Mr. M. responded that he could not recall what she said in court, "Other than claiming that she's seen my penis and what have you, other than that, not much of anything." He denied any difficulties with his memory. When asked if the reason for his stated lack of recall is that he was trying to block it out of his mind, he said it was "a good possibility", although he did not recall attempting to do so, nor could he offer any reason for why he was having a hard time recalling the evidence she gave just under two months earlier (C. (L.) M. testified on April 12, 2023 and Mr. M. testified on June 5 and 6, 2023).

[137] He could not recall if an incident occurred when C. (L.) M. was four or five years old when she saw him touching his penis. When asked if it was possible when she was older, he replied, "<u>I would say no</u>". He then denied that it was possible that the incident occurred. Then, when asked if he was quite certain that nothing had occurred, he responded, "Guaranteed".

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[138] Mr. M. was equally certain when he denied the second incident ever occurred, explaining that if he was packing for a camping trip he would not have been watching pornography (C (L.) M.'s evidence was that he was getting the video ready for the trip when she walked into his bedroom):

Q She said -- I'm going to suggest to you that what she said in court is that her and her parents and her sisters were all over at your house, that everyone was outside, that they were helping packing for the trip, that you were inside, and that she had gone into the house to help you pack. And she said that you were in the bedroom, facing the TV, getting the video ready, and that you had said, "Come in and look at it." Do you remember her saying that in court?

A No. In court? I half-ass remember her saying something like that in court, but I mean, if everybody else was outside help -- the parents and everybody, who would be sitting in the bedroom with a kid with porn on or whatever?

Q Okay. So you do remember her saying that in court?

A I remember that part of it in court, yes.

Q <u>And do you remember her saying that you told her to look at the video?</u>

A <u>No</u>.

Q <u>Do you remember her saying that?</u>

A <u>No</u>.

Q And just to be clear, Mr. M., I'll just ask you to wait to the end of the questions that I'm asking. <u>Do you remember her, in court, saying that you told her to look at the video?</u>

A <u>Yes, I heard her say that in court, yes</u>.

Q Okay. And she said that you told her, "Don't walk away", and that you had held her shoulder so that she had to look at it. Do you remember her saying that in court?

A I don't remember the wording but anyway, along that line, yes.

Q All right. Now, I'm going to suggest to you that there was, in fact, a time when everyone was getting ready for a trip, when you were in your bedroom with the video, when [C. (L.) M.] came into the bedroom.

A No.

Q <u>I'm going to suggest that that did occur.</u>

A <u>I'm saying it didn't.</u>

Q That would have been when she was about seven or eight years old.

A No.

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Q And she said that when she tried to walk away, you had held her shoulder. I'm going to suggest to you that that is what occurred on that day.

A You can suggest it, but it never happened.

Q Okay. Your evidence is that nothing like that happened?

A Never.

Q Okay. Is that something that you feel quite certain about?

A Definitely on that.

Q Okay. That's it, that's -- you're 100 per cent certain that --

A Yes.

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K.M.

Examination-in-chief

[139] In his evidence-in-chief, Mr. M. testified to a specific recollection of the first incident involving K.M. in his motor home, which concerns counts 4 and 6. When first asked in his evidence-in-chief about it, he said that when he walked into his motorhome he observed K.M. masturbating, his dog was sitting on the couch, and he probably told K.M., "You better lube that", and then left:

Q Now, we'll talk about [K.M.]. She also spoke about two events. The first event, [K.M.] told Mr. Justice that -- this was in the motorhome, I take it, and you instructed her to take her panties off. Do you remember any event with [K.M.] that was remotely similar to that?

A No, because you're getting the two stories mixed up again, from what I remember from the last time.

Q I'm sorry?

A You're getting the two stories mixed up again, from what was said the last time.

Q I think, when I was cross-examining her, I asked her -- she was in the motorhome, and you came in, and I asked her -- this is -- was your version of the event --

A Go ahead.

Q -- that you recalled, that she was on the couch with her panties down, and you said something like, "You better lube that."

A Yeah, I remember that.

Q You remember that event?

A I do.

Q Do you remember saying that to her?

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A I probably did. I don't remember saying it, but --

Q Okay.

A -- I probably did.

Q That there was a dog there?

A My dog was with me in the motorhome, yeah, when I was up there --

Q And --

A -- looking after the mares.

Q -- he was, apparently, on the couch at that --

A He was sitting on the end of the couch, yeah.

Q All right. And my note says that you just left? Do you remember?

A I left, yeah.

[140] Mr. M. denied putting his dog on the couch and denied asking his dog to lick K.M.'s vaginal area:

Q And I think this had to do with you putting [the dog] on the couch so she -- so he could lick the margarine off her vagina. That's what she said happened? Did that happen?

A I didn't put the dog on the couch. You've -- you've got two stories going on, and two days apart, or whatever, there. So what do you want me to answer?

Q Well, this is -- this has to do with the first event.

A I said yes to that.

Q All right. The dog was on the couch?

A Yes.

Q Did you ask the dog to lick --

A No, I did not.

[141] He did not say anything in his evidence-in-chief about margarine.

[142] For the second incident, which concerns count 5, that K.M. said occurred in the boot room of her parents' home, initially, Mr. M. could not recall if it occurred. He then immediately denied it took place, and in the process, also denied encouraging K.M. to take her clothes off and masturbate:

Q All right. She said that there was -- I don't know if it was the same event, or not -- sorry, but -- a couple of days after the first event, you came into the -- where she was, there was nobody else in the house,

you closed the door -- and I'm reading from my notes -- "he asked me to take my pants off and said, "You've done it once, why not again?" And then she said, "I took them off." Do you remember that?

A No, I do not.

Q She said she started rubbing herself and you were watching. Did that happen?

A I said it didn't happen the first time so --

Q All right. Was there ever any occasion at any time when you tried to encourage [K.M.] to take her clothes off and to masturbate herself?

A No, I did not.

Cross-examination

[143] Mr. M. added more details about the first incident when questioned in cross-examination.

[144] At first, he testified, "[I]t was quite obvious that she was playing with herself" from what he observed from his vantage point standing at the front door of the motor home approximately six feet away from where K.M. was laying on the couch. He testified that is when he made the remark to K.M., "You better lubricate that thing", and that he meant her vaginal area. He said it was the very first thing he said to her. He also said she giggled in embarrassment.

[145] Yet, Mr. M. admitted that he did not actually observe K.M. masturbating. He conceded that he could not see K.M. touching her genital area and instead assumed she was masturbating:

Q Okay. Now you said that you'd -- you'd gone into the motorhome. I think the screen door opens out the way, does it?

A In.

Q Okay. And did the screen door close behind you?

A I don't think it ever got closed. I was still in it, standing partway in the door when I seen her.

Q Okay. So the reason it didn't close it was essentially you were in the way of the screen door?

A Yeah.

Q Okay, and you never left the entranceway to the motorhome?

A Well I went back out again, but other than that, no.

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Q Okay. So you didn't -- you didn't step any further into the motorhome other than right in that entranceway?

A Right in the entranceway.

Q Okay. And you never sat down in the motorhome?

A No, I didn't.

Q Okay. Do you remember if you got anything out of the motorhome before you left?

A No, I didn’t.

Q Okay. Now you said that you came into the motorhome, you saw [K.M.] lying on the couch. And you said that it was obvious that she was playing with herself. What do you mean by that?

A Exactly what I said. It was quite obvious she didn't have her pants down to go to the bathroom laying on the couch.

Q Okay, and so she had her pants down?

A Partially, yeah, like I told you.

Q Okay. And when you say playing with herself, what do you mean?

A I already said, masturbating.

Q Okay. Did you see her do that?

A No. It was pretty obvious, but I didn't see her actually doing it, no.

Q Okay, what -- what did you see?

A Exactly what I said, her lying on the couch, her pants down partway; end of story.

Q Okay. You don't remember seeing anything other than the pants partially down?

A Nothing special, no.

Q Okay. And when you came and saw her with her pants down, about how long were you able to see her there with her pants down?

A Less than a minute.

Q Less than a minute? Okay. And you said that she wasn't asleep?

A Yeah, I said that.

Q Okay. How did you know she wasn't asleep?

A Well unless she sleeps with her eyes open.

Q Okay. And you said she was lying there with her pants down. How do you know she wasn't just lying there with her pants down?

A I don't know anything other than what I seen.

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[146] When pressed further, Mr. M. said he had no idea what K.M. was doing with her hands and admitted that he did not see her touching herself and any part of her genitalia:

> Q Okay. So you saw -- you saw the pants down. Did you see her actually do anything?
>
> A No.
>
> Q Okay. Did you -- did you see her touching herself?
>
> A No.
>
> Q Okay. Do you remember seeing her do anything with her hands?
>
> A No.
>
> Q Okay. Do you remember, when you came into the trailer, where were her hands?
>
> A I don't have a clue.
>
> Q Okay. Do you know if her hands were on her pants?
>
> A I don't know where they were.

[147] Mr. M. then said he saw her hands on her pants, and at first suggested K.M. was in the process of pulling her pants up as he was leaving, but then varied his account to say that she had not begun to pull her pants up before he spoke with her and he did not know where her hands were:

> Q Okay. Do you know -- after you entered the motorhome and spoke to her, do you -- do you remember if she moved her body at all?
>
> A Yeah, she was in the process of getting her pants pulled up when I left, so...
>
> Q In the process of getting her pants pulled up?
>
> A It looked that way, yeah.
>
> Q Okay. What -- what did you see that made you think that she was getting her pants pulled up?
>
> A Her hands on her pants.
>
> Q Okay. Would that have been on the waist area of her pants?
>
> A Oh, I don't have -- I would imagine.
>
> Q Okay. But -- but she had -- she had her hands on her pants?
>
> A Yeah.
>
> Q Okay. And was she starting to pull them up?
>
> A No, not yet.

Q Okay. And now before -- before you spoke, you don't know where her -- where her hands were?

A No, I don't know.

Q Okay. Is it possible that her hands were already on her pants?

A It's possible.

Q Okay. Now when you entered the trailer, you were standing, I take it?

A Well I wasn't crawling in there.

[148] Despite testifying that K.M. was masturbating, he also said that all he could see was her bare stomach and that her hands were not covering her genitalia:

Q Okay. And so when you came into the motorhome, you said that her pants were partially down. Were you able to see any part of her genitalia?

A Not really, no.

Q Okay, you weren't?

A No.

Q Okay. When you say not really, did you see any part of her genitals?

A No.

Q Okay. Do you remember if you saw any pubic hair?

A No.

Q No you don't remember, or no you didn't see that?

A No, I did not.

…

Q Okay. And do you remember if she had her hands covering her genitals?

A I would say no.

Q Okay. Do you know if she had something else like blanket, or a newspaper or something covering her genitals?

A Nothing. All I could see was her bare stomach. I don't know what she had pulled up.

Q Okay. And you say you could see her bare stomach?

A Bare upper stomach -- or bottom stomach, yeah.

Q Bottom stomach, okay. We're talking about the navel area?

A That's right.

Q Okay. And you could -- could you actually see her navel?

A I wasn't looking for her navel.

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[149] Mr. M. also testified that K.M.'s legs were not spread, although her knees were raised in the air with her feet close together placed on the couch.

[150] When asked to convey what he meant by his lubrication comment he made to K.M., Mr. M., initially said, "Just being a smartass". On further questioning, he admitted that he intended K.M. to follow his direction:

> Q Okay. And [what] you said about that is, "You'd better lubricate that thing." Is that right?
>
> A That's right.
>
> Q Okay. What did you mean by that?
>
> A Just being a smartass.
>
> Q So -- but what -- what did you intend to convey by saying those words?
>
> A Exactly what I said. Obvious she was playing with herself, and I just said that on my way out and then I walked out the door.
>
> Q So my question is, when you said, "You'd better lubricate that thing," what did you mean with those words?
>
> A Pretty obvious. I don't know what else you want me to tell you.
>
> Q Mr. M., you were the one that spoke those words?
>
> A Yeah.
>
> Q Okay. None of us in the courtroom knows what you meant by those words other than you. You are the only one that's able to tell us.
>
> A Well, what else was there to lubricate, is what I'm asking you. Like lubricate whatever she had down there between her legs.
>
> Q Is that what you meant?
>
> A That's what I meant, yeah.
>
> Q Okay. So whatever she had between her legs, what did you mean?
>
> A Well, most women have a vagina down there.
>
> Q Is that what you meant?
>
> A Obviously, yes.
>
> Q Okay. So you were telling her to lubricate her vagina?
>
> A That's right.
>
> Q Okay, 'cause you were being a smartass?
>
> A Yeah, obvious.
>
> Q Sorry?
>
> A Yes.

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Q Okay. And so when you say that, that was meant as sort of a joke?

A Yeah, but I also meant it.

Q What do you mean, you also meant it?

A I meant exactly what I said.

Q What -- what -- when you say you also meant it, what -- what does that mean?

A I meant exactly what I said to her, "Better lubricate that thing if you're gonna play with it."

Q Sorry. And you said, "You'd better lubricate that thing if you're going to play with it"?

A No, I didn't say "if you're gonna play with it". Obvious she was.

Q Okay. So you meant it as a joke, but you also wanted her to use lubrication; is that right?

A That's right.

Q Okay. So your intention was that after -- after you said that to her, she would use some kind of lubrication when she was doing it; is that right?

A That's right.

Q Okay. And you intended that as -- as sort of like advice I guess?

A I said it meaning it, but being a smartass at the same time.

Q Okay.

A I had eight kids of my own at that particular time, and it wasn't the first one I've seen playing with themselves, so I knew what the hell I was talking about.

Q Sorry, when you say that wasn't the first one you've seen playing with themselves, what do you mean by that?

A I've seen my kids grow up, and there ain't one of them that didn't obviously play with themselves at one time or another.

Q Okay. So this was intended as -- as advice?

A And a joke, yeah.

Q Okay, but when you said that, the -- the intention was she would take that seriously?

A Yeah.

[151] When asked if it struck him as an appropriate thing for a grandparent to say to his granddaughter, Mr. M. replied, “I don’t know if it was appropriate or not, but it was said.” When asked if it was a sexually inappropriate comment, he said K.M.’s head was not in the sand and it was “no big deal”:

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Q Okay. Does the -- would that strike you as a sexually inappropriate comment?

A No. Her head wasn't in the sand and neither was mine. We were -- that shit went on all the time; it was no big deal.

Q When you say her head wasn't in the sand and your --

A I mean she knew what was going on or she wouldn't have been in there.

Q Okay, when you say she knew what was going on, what do you mean?

A Well, why would I have to describe to her how to whatever, masturbate or whatever?

[152] When Mr. M. was asked if he had seen K.M. use margarine, he testified that he had given it to K.M. He said he reached into the refrigerator, retrieved the tub of margarine, and tossed it onto K.M.'s stomach for her to use:

Q Now, you didn't ever see her use any margarine or anything while you were in the motorhome?

A No, I didn't, but I did throw -- the fridge is right at the door, and I did throw her a thing of margarine when I said, "You better lubricate that thing."

Q Okay. And the -- sorry, the margarine was in the fridge or outside of the fridge?

A It was in the fridge 'til I took it out.

Q Okay. And this is a typical plastic margarine container?

A Yeah.

…

Q Okay. Okay. And you say that you -- you picked up the margarine and you -- you tossed it towards her?

A Yes, I did.

Q Okay. Do you know if she caught it?

A I don't know. I think it landed on the couch there, her -- on her stomach or something.

Q Okay. So you think it landed on her stomach, or -- or that's where it landed?

A It landed somewhere on her stomach and the couch, half and half.

Q Okay, all right. Okay, so you -- and was that before you spoke to her, or after?

A All at the same time. I wasn't in there very long, so all within a minute.

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Q Okay. So within a minute, you had come in and you had said that, "You better lubricate that thing." Is that the words you can recall?

A Basically, yeah.

Q Okay. And then at that point you took the margarine from out of the fridge and tossed it over to her?

A That's right.

Q Okay. Do you know if that hurt her when it hit her?

A I doubt it.

Q You doubt it?

A What?

Q Did you say you doubt it?

A Yeah, I mean a little thing of margarine, and it land [indiscernible] feet or whatever, I would say no.

Q Okay. Did you throw it underhanded?

A Good question.

Q Okay. You don't -- you don't remember exactly how you threw it?

A No, I don't remember.

Q Okay. And -- and just for the -- for the court record, you're motioning kind of like you're throwing a Frisbee?

A Yeah.

…

Q Okay.

A So [indiscernible] conversation about margarine, lubrication or anything else. That was all we talked.

Q All right. Now, were you concerned about her being embarrassed when you tossed the margarine to her?

A No, I wasn't.

…

Q Okay. Now, when you opened the fridge to take out the margarine, did you step into the trailer at all?

A I didn't have to. I was halfway through the screen door, and I just reached ahead and grabbed the handle on the fridge, and it was right there.

Q Okay. So, sorry, you said you were halfway through the screen door?

A Yeah, I never closed the screen door, so I was a foot and a half or two into the trailer and -- into the motorhome I should say. Grabbed it and that was it.

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Q Okay, so you're about a foot or a half -- foot and a half to two feet into the motorhome?

A Yeah.

Q Okay.

A So I was roughly two feet from the fridge, and I reached out and grabbed the door and the margarine.

Q Okay. Now -- so at the time that you opened the fridge door, were you still in the doorway to the motorhome?

A Yeah.

Q Okay. And the screen door never closed?

A No, it didn't.

Q Okay, and that's 'cause your body was blocking it?

A Yeah.

Q Okay. And that would've been like your back or your buttocks?

A Or my leg or whatever the hell, yeah.

[153] Otherwise, Mr. M. denied the remainder of K.M.'s account. These excerpts are apt illustrations of the approach he took in his evidence:

Q Okay. Now, when you were in the trailer [indiscernible], I guess tossing the margarine, do you remember anything about where your dog was at that point?

A As far as I know, he was still sitting on the end of the couch, where he was when I opened the door there.

Q Okay. So you -- you don't remember if the dog moved anywhere or did anything?

A He was an old castrated dog, and he wasn't much interested in what the hell was going on.

Q Okay. Now I'm going to suggest to you that what occurred in the trailer is that you and [K.M.] went into the trailer together?

A No, that ain't true at all.

Q And I'm going to suggest to you that initially what happened is that the two of you had a normal conversation in the trailer?

A That ain't true either.

Q And [K.M.] had sat down on the couch, and that you had sat in a chair in the motorhome; is that right?

A That ain't true.

Q Okay. And [K.M.] indicated that what occurred is that you asked her to take off her pants.

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A That's absolute bullshit.

Q Okay. She said that you directed her how to -- how to masturbate; is that...?

A Bullshit.

Q Okay. And she described what occurred as that you had actually dropped the margarine over to her, and that you had directed her to use the margarine.

Q I told you exactly what went on with the margarine.

Q Okay, but I'm going to suggest to you that what [K.M.]'s evidence was, is that you had actually brought it to her and told her to use it.

A I didn't.

Q Okay. And that after she had applied margarine to herself, that you -- you used your -- your arms around the couch to prevent your dog from leaving the couch area; is that what happened?

A I heard her say that in court the last time, but that's absolute crock of shit.

[154] Mr. M. could not remember a time when any of his grandchildren came into his motor home on their own. When asked if he found it strange that K.M. would choose to masturbate in the less private area of the living room area as opposed to the separate bedroom area, he said the thought never occurred to him. He said he did not tell K.M.'s parents what he had observed.

[155] Mr. M. also denied any incident occurred with K.M. in the boot room of her parents' home. He also suggested K.M.'s evidence was possibly a "kickback" for her embarrassment "about the motorhome deal."

Assessment

[156] In considering the whole of Mr. M.'s evidence, I reject his proffered exculpatory evidence concerning each incident as wholly lacking in credibility. As seen from the excerpts above, the inconsistencies between much of his evidence-in-chief and cross-examination are glaring. As well, certain key aspects of his cross-examination evidence were internally inconsistent. In terms of demeanour, Mr. M. was argumentative and unnecessarily confrontational when answering straightforward, non-combative questions put to him in cross-examination. Having

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rejected his attempts to exculpate himself as wholly lacking in credibility, I do not need to determine, as the Crown asks me to do, that much of it was fabricated.

[157] What I do take from Mr. M's evidence and accept as reliable is his evidence that: (a) he possessed pornographic videos that he watched on his television in his bedroom; (b) he wore a bathrobe at home; (c) he consumed alcohol during the day while operating the quad vehicle that C.M. was riding as a passenger; (d) he was residing in a motor home at K.M.'s parents' property to assist while the family's horse was foaling; (e) he told K.M. to lubricate her genital area while masturbating herself and handed her a tub of margarine in order to do so; (f) his dog was present at the time of the first incident involving K.M; (g) he regularly engaged in family activities (such snowmobiling and quadding) with the complainants and their parents; (h) he spent time working on quad vehicles in the shed at one of his residences fairly commonly; and (i) he corroborated the evidence of the complainants and N.M. concerning the location and layout of the mobile homes and motor home where he resided.

[158] Even if I were to accept Mr. M.'s account of events concerning the incident involving K.M. in his motor home, Mr. M. admitted that that he intended by his "lube it up" comment for K.M. to continue to touch her genital area for a sexual purpose and gave her the margarine by which to do so, and in this respect, he has admitted to the essential elements of s. 152, and I would find him guilty on count 4 in any event.

[159] However, this is not the end of the analysis as I must, per the instruction from *W. (D.)*, now assess the evidence of each of the complainants in the context of the whole of the evidence to determine whether some or all of it is credible and reliable and if it is, whether the Crown has proven the essential elements of the offences charged against Mr. M.

<u>Assessment of the Complainants' Evidence</u>

[160] I found the evidence of each complainant describing the incidents involving Mr. M. to be both credible and reliable.

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[161] Each complainant was clearly oriented to time and place in relation to landmark events in their lives when each incident they described occurred. They placed and described the impugned incidents within the context of their age, grade in school, and specific events surrounding them. Each complainant was clear and consistent in their descriptions of the locations where each incident occurred, including the exterior colour and internal layout of Mr. M.'s mobile homes and motor home and some of the clothing he was wearing at the time. Each one gave their evidence in a straightforward, readily responsive, and candid manner, without embellishment, candidly acknowledging what they could not recall and when they assumed something as opposed to actual recollection. I am satisfied that their individual accounts of the incidents giving rise to the corresponding counts against Mr. M., given now as adults, reflect their observations and reactions as young children.

[162] I found C.M.'s explanation for her fear to make disclosure as a child and her eventual decision to do so in her letter to her mother in 2019 to be credible. C. (L.) M. and K.M. were not challenged for their delayed disclosures to N.M. and the police. As pointed out earlier in these reasons, delayed disclosure on its own will never give rise to an adverse inference against a complainant as there can be many reasons why a victim may not make an immediate complaint: *D.D.* at para. 65.

[163] That said, I wish to be clear that I have separately assessed each complainant's evidence for consistency, context, approach to answering questions, and demeanour and have not engaged in any form of assessment involving similar facts (no such application was made by the Crown and there was no suggestion of it in argument). Nor have I considered whether Mr. M.'s conduct towards one complainant could give rise to inferences concerning possible propensity towards another complainant(s).

[164] Mr. M.'s suggestion that the complainants' evidence was the result of collusion or emulation was conjecture not tied to any evidence or to any inference supported by the evidence. Likewise, a suggestion made by the defence in closing

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submissions that some alleged family disharmony said to have arisen after the death of the complainants' father was a possible factor in the complainants' disclosures was also unfounded conjecture untethered to any specific evidence.

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[165] However, the onus is not on Mr. M. to prove fabrication or a motive to fabricate. The onus is on the Crown to do so if that is what it intends. If the Crown intends to argue that there is a proven absence of motive to fabricate (which it did not in this case and instead submitted that there was no evidence from which I could find fabrication), the onus is on the Crown is a high one: it must prove it beyond a reasonable doubt.

[166] Although I carefully looked for it, I could discern no basis to support a finding of fabrication by any of the complainants. I have also scrutinized the evidence for and could not find any hint of collusion, collaboration, or cross-pollination.

[167] Nonetheless, my analysis does not end there. The absence of evidence of motive to fabricate, or even a proven absence of motive, does not conclusively establish that the complainants are telling the truth.

[168] In terms of my overall assessment, and in addition to what I have said above about the nature and character of each complainant's evidence, apart from the instance when K.M. said that Mr. M. had put the margarine on her genital area and immediately corrected herself during her examination-in-chief, and the difference in C.M.'s account of her grandfather telling her, "Now you know what to do, so you can do it" in contrast to "Now you know what to do, you can do it for me", I found the evidence of each complainant was internally consistent. Otherwise, I did not find any potentially problematic aspects with each complainant's evidence. Each complainant's evidence was unshaken in their brief cross-examinations.

[169] In terms of K.M., I did not find her initial misstatement about who applied the margarine, which she immediately corrected, to affect the credibility and reliability of her evidence.

[170] Nor did I find the variation in C.M.'s account of the words Mr. M. used to adversely affect my view of her evidence. Given the context of the circumstances observing Mr. M. masturbating as a young child, I am satisfied that the difference between "do it" and "do it for me" to be a minor difference that reflects C.M.'s efforts to be as accurate as possible in recounting events. I found no basis to doubt C.M.'s unchallenged evidence that she said no to her mother when asked after the quadding incident, when C.M. was, or was close to, ten years old, if Mr. M. had ever done anything to her because, as C.M. said, she "was just too scared about everything at the time. I didn't want to say anything", and I accept it as credible.

[171] I found both C.M. and K.M., as well as C. (L.) M., attempted throughout to candidly and truthfully account for events that occurred when they were children.

[172] Thus, I accept the veracity and reliability of each complainant's factual account of the events that occurred for each incident involving Mr. M.

[173] Having accepted each complainant's account of the incidents they described in their evidence involving Mr. M., I turn to determine whether the Crown has proven the essential elements of each offence charged against Mr. M. Within that discussion, I have separately considered each complainant's evidence in the context of all of the evidence concerning each of them, whether there are possible explanations exculpatory in nature for Mr. M. for each incident described, and whether on the whole of the evidence I am left with a reasonable doubt concerning each element of the offences charged against Mr. M.

Determination

Counts 1 and 2

[174] Counts 1 and 2 concern C.M. Count 1 relates to the first and second incidents (in the shed and mobile home) and count 2 concerns the third (when, according to C.M., Mr. M. tried to take C.M.'s hand and move it towards his waist during a quad ride).

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First Incident

[175] From C.M.'s evidence, which I accept, the Crown has proven beyond a reasonable doubt the essential elements of the offence concerning Mr. M.'s identity, the time and place of the commission of the alleged offence (including that the first two incidents fell within the date range identified in count 1 and likewise, that the third incident fell within the time period identified in count 2), and that C.M. was under the age of 16. I find that the Crown has also proven C.M.'s account that Mr. M. masturbated in front of her in his shed as she described while he engaged in casual conversation with her.

[176] Has the Crown has proven the remaining essential elements of ss. 151 or 152 beyond a reasonable doubt?

[177] In terms of s. 151, it is clear, I find, that Mr. M. did not touch C.M., in the sense defined in the case authorities (i.e., direct or passively).

[178] In terms of s. 152, I am mindful that an invitation or incitement does not have to be communicated directly. As the Alberta Court of Appeal pointed out in *Legare* at paras. 33-38, aff'd 2009 SCC 56, there are various forms of communication that may convey an invitation or incitement to sexual touching not limited to express communications:

> [33] The ordinary and grammatical reading of the language of s.152 requires the Crown to prove that an accused, for a sexual purpose, communicated with a child in a manner constituting an invitation, incitement or counselling of conduct wherein the child would touch any person, including either the accused or the child himself or herself. That conduct does not itself have to be imminent. The two individuals do not have to directly touch each other, as the touching may be indirect: *Fong*. Indeed, there does not need to be any touching at all as the core verbs involve communication.
>
> [34] As to the manner of communication, modern realities of communication are that there are numerous forms of verbal and nonverbal clues which may or may not, in various contexts, convey sufficient meaning to be inviting, inciting or counselling. On the other hand, the Crown's reliance upon *R. v. D. (H.)* (1990), 1990 CanLII 7304 (NB KB), 112 N.B.R. (2d) 91 paras. 17 - 19 (Q.B.), which dealt with s. 153 of the Criminal Code, for the proposition that if the touching can be indirect, the invitation, counselling or incitement can similarly be indirect is misplaced. It is not necessary for us to interpret s.153 or have that interpretation migrate to a different part of s.152.

> If Parliament wanted to do so, it could easily have expressed s.152 in a manner to ensure that "directly or indirectly" would apply in the manner described here by the Crown.
>
> [35] Nonetheless, there is nothing in the section language to suggest that Parliament insisted only on *express* communication. The grammatical and ordinary sense of the words "invite", "incite" and "counsel" include communication that is express or implied. It would be unduly restrictive of the three verbs to suggest that each of them must embody an *express* communication to presently achieve a prompt physical response by the child of the sort set out in the count charged and that itself takes the physical form of the child exploitation contemplated by ss.151 or 152.
>
> [36] What is important is to respect Parliament's language, the object of the enactment, and the intention of Parliament. This is an offence of communication, not of assault. The *actus reus* of invitation, incitement or counselling is within the prohibition of Parliament. Harm to the child is not required to be proven, but a trier of fact may well infer that harm is caused by the communication. Accordingly, Parliament did not require the touching to occur in order to complete the *actus reus* of an offence under s. 152, although one can readily assume that Parliament intended to prevent the touching from happening.
>
> [37] Moreover, even if the specific words used only suggest that the adult wishes to be the initiator of sexual activity, a trier of fact could reasonably find that the adult communicates for a sexual purpose with a child and invites, incites or counsels the child to touch the adult sexually. If it were otherwise, one could expect that predators would soon arrange their word choices accordingly. Indeed, it is nonsensical to suggest that designing the communication content so as to only use words to convey physical activity by the predator upon the child, that the child is not in that sense touching as much as being touched. On the facts here, in any event, it was certainly possible to interpret the conduct advocated by the respondent towards this child as having mutuality.
>
> [38] In sum, I am not persuaded that a trier of fact would have to find that the respondent's statements to the complainant expressing a desire to perform sex acts on her exclude a finding that he was inviting, inciting or counselling her also to touch him. The trial judge implicitly excluded that form of analysis, and did not address the count in that manner. He erred in so doing. Nonetheless, that does not settle this case for reasons set out below.
>
> [Italics emphasis in original; underlining added]

[179] Yet, there is nothing in the evidence that I do accept to establish that Mr. M. said anything to C.M. or used any part of his body (such as his hands or head) from which I can infer that he intended to invite, incite, or counsel C.M. to touch him or herself or a third person, and for a sexual purpose. While it is possible to draw such an inference, that is insufficient to establish those particular essential elements of the offence in s. 152 beyond a reasonable doubt.

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[180] However, I agree with the Crown's alternative submission that it has proven the essential elements of the lesser included offence that Mr. M. exposed his genitals in front of C.M. (who was under 16 years old at that time) for a sexual purpose (i.e., Mr. M.'s gratification) contrary to s. 173(2) of the *Criminal Code*, which states:

> Indecent Acts
>
> Exposure
>
> (2) Every person who, in any place, for a sexual purpose, exposes his or her genital organs to a person who is under the age of 16 years
>
>> (a) is guilty of an indictable offence and is liable to imprisonment for a term of not more than two years and to a minimum punishment of imprisonment for a term of 90 days; or
>>
>> (b) is guilty of an offence punishable on summary conviction and is liable to imprisonment for a term of not more than six months and to a minimum punishment of imprisonment for a term of 30 days.

[181] However, that determination is of no moment in light of the determination I have made concerning the second incident, specifically, that the Crown has established the essential elements of s. 152 beyond a reasonable doubt.

Second Incident

[182] In terms of the second incident involving C.M., the Crown has proven the facts described by C.M., i.e., that Mr. M. took her into his bedroom and left her there alone to watch a sexually explicit video for her, and then, while masturbating in open view of C.M. once she came out of his bedroom, told her that since she now knew what to do, she could do the same, either to herself or to him. Whether it was the former or latter, or both, makes no difference as the essential element is satisfied because I find Mr. M. intended for his conduct and words to be taken by C.M. to touch herself or Mr. M. for a sexual purpose.

[183] Consequently, I am satisfied that in respect of count 1, the Crown has proven beyond a reasonable doubt each of the essential elements of the offence of invitation to sexual touching, as discussed at the outset of these reasons, i.e., identity, age, the time and place of the commission of the offence, the counselling,

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invitation, or incitement to touch herself or Mr. M. for a sexual purpose contrary to s. 152 of the *Criminal Code*. I find Mr. M. guilty of that offence and hence, guilty on count 1.

Third Incident

[184] For the third incident involving C.M. and the quad ride, which relates to count 2 and is alleged to contravene either s. 151 or s. 152, the Crown has proven identity, age, and time and place of the commission of the alleged offence beyond a reasonable doubt. However, I am left with reasonable doubt as to whether in attempting to move C.M.'s hand towards him, the Crown has proven that Mr. M. intended to have C.M. touch him for a sexual purpose contrary to s. 151. In terms of s. 152, I am also left with reasonable doubt as to whether Mr. M. intended through his conduct to invite, counsel, or incite C.M. to touch him for a sexual purpose, or that he knew there was a substantial and unjustified risk that C.M. would receive his conduct as such. It is possible Mr. M. tried to have C.M.'s hand come into contact with his waist and thus, part of his pants including his genital area because: (a) C.M. was an experienced quad rider; (b) there was nothing to suggest that she needed to hold her grandfather for support; and (c) in light of his prior conduct towards C.M. However, "possible" is insufficient for the criminal standard of proof. In the absence of any words or other conduct on his part other than reaching for C.M.'s hand and drawing it towards his waist, it is also possible that he intended to have C.M. hold his waist for support particularly as he had consumed alcohol throughout the day. I am unable to find an express or indirect communication of an invitation, incitement, or counselling. Consequently, the Crown has not proven all of the essential elements of the sexual invitation to touching offence involved in the third incident, and I acquit Mr. M. on count 2.

Count 3

[185] Count 3 concerns C. (L.). M. and relates to two incidents, the first being described by C. (L.) M. where Mr. M. was masturbating in front of her in his mobile home and asked her to come closer and to touch his penis. The second incident,

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described by C. (L.) M. to have occurred a few months later, when Mr. M. restrained her in his bedroom to watch a sexually explicit pornographic video and then asked her if she liked it.

[186] For the first incident, the Crown has established identity of Mr. M., time and place of the commission of the offence (including that it fell within the date range identified in count 3), and that C. (L.) M. was under the age of 16. For the remaining essential elements, I find that Mr. M. invited C. (L.) M. to touch him as she described, he intended it for a sexual purpose, and knew there was a substantial and unjustified risk that C. (L.) M. at four years old would receive it as such. Thus, I am satisfied that the Crown has established beyond a reasonable doubt each of the essential elements of the offence concerning the first incident.

[187] Likewise, for the second incident, the Crown has established beyond a reasonable doubt identity of Mr. M., time and place of the commission of the offence (including that it fell within the date range identified in count 3), and that C. (L.). M. was under the age of 16. The Crown has also established beyond a reasonable doubt that Mr. M. invited C. (L.) M. into his bedroom to watch a pornographic video, restrained her in order to compel her watch the video, and asked her if she liked it.

[188] Has the Crown established beyond a reasonable doubt that Mr. M. invited, counselled, or incited C. (L.) M., verbally or non-verbally, to touch him, or herself, or another person, directly or indirectly, with a part of her body, for a sexual purpose, or knew there was a substantial and unjustified risk that his actions would be received by C. (L.) M. as such?

[189] From all of the evidence I do accept concerning the whole of Mr. M.'s interactions with C. (L.) M., and also having had the benefit of listening to Mr. M.'s evidence (and at the same time, being mindful that demeanour is not the only basis to determine credibility), I am satisfied and find that it is very likely, particularly from his question whether C. (L.). M. liked what she had just watched, that Mr. M. intended to incite C. (L.). M. to engage in some form of touching with him or herself

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for a sexual purpose, and knew there was a substantial and unjustified risk that she would receive his conduct and remarks as such.

[190] Yet, “very likely” is insufficient to establish guilt. I am left with a reasonable doubt as to what Mr. M. actually intended at that time as it is possible that he was intending to show her a pornographic video for some other reason that did not involve inciting or inviting her to engage in touching for a sexual purpose. For example, in *Legare*, the Alberta Court of Appeal notes the difference between sexual communication as a form of fantasy entertainment for the accused and instances where the trier of fact is able to infer that that the accused intended his communication to influence the child to engage in sexual touching:

> [47] Predators can construct their words to convey the communication as a form of fantasy entertainment, which it may well be for themselves. As to s. 152, the communication by the accused must involve *mens rea* beyond merely intending ‘dirty talk’ to a child as suggested by the trial judge. But it may contravene s. 152 if the trier of fact is prepared to infer from the “dirty talk” that the present *mens rea* of the accused is within s. 152. For example, a trier of fact might find present intent to manoevre the child psychologically towards sexual touching by normalizing, casualizing and making enticing the behaviour by means of the ‘dirty talk’.

[191] Consequently, the Crown has not established each of the essential elements concerning the second incident.

[192] Nonetheless, in view of my determination regarding the first incident concerning C. (L.) M., I find Mr. M. guilty on count 3.

Counts 4, 5, and 6

[193] Counts 4, 5, and 6 concern K.M. Counts 4 and 6 relate to the incident in Mr. M.’s motor home, and count 5 concerns the incident in the boot room.

[194] As I have said, I accept as proven both incidents described by K.M. in her evidence. For all three counts, the Crown has proven identity of Mr. M., the time and place of the offence (including that the incident in the motor home fell within the date range identified in counts 4 and 6 and the incident in the boot room fell within the

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date range identified in count 5), and that K.M. was under the age of 16 beyond a reasonable doubt.

[195] For count 4, for the first incident involving the margarine, the Crown has proven beyond a reasonable doubt that Mr. M. directly incited K.M. to remove her pants and to masturbate, counselled her how to do it (including with the use of margarine) for a sexual purpose, and that he intended his requests for her to remove her clothing and to touch herself, his comment to “lube it up”, and his conduct in handing her the margarine, to be received by her as such. I find Mr. M. guilty on count 4.

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[196] For the second incident, in the boot room, i.e., count 5, I am also satisfied that the Crown has proven beyond a reasonable doubt that Mr. M. invited K.M. to masturbate as she had done before, i.e., to touch herself for a sexual purpose and that he intended his comments to be received by her as such. Consequently, I find Mr. M. guilty on count 5.

[197] For count 6, the Crown has also proven beyond a reasonable doubt that Mr. M. guided his dog towards K.M. so that his dog would lick the margarine that he had given K.M. to place on her vagina. Thus, the Crown has proven the essential elements of s. 160(3).

[198] Accordingly, I find Mr. M. guilty on counts 4, 5, and 6.

<u>Summary</u>

[199] In summary, I have found Mr. M. guilty on counts 1, 3, 4, 5, and 6, and have acquitted him on count 2.

“Walker J.”