
CANADA / JUDGMENT

R. v. Lennax

2008 BCSC 1227

COURT

Supreme Court of British Columbia

DECIDED

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2008 BCSC 1227err1 R. v. Lennax

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Lennax,

2008 BCSC 1227

Date: 20080821

Docket: X070663

Registry: New Westminster

Regina

v.

Kyle David Lennax

Ban on Disclosure 486.4(1) C.C.C.

The name of the complainant or anything identifying

the complainant may not be published

Before: The Honourable Madam Justice Bennett

Oral Reasons for Judgment

Counsel for the Crown

D.M. Ballyk

Counsel for the Accused

E. Cooper

& S. McCallum

Date and Place of Trial:

July 21, 2008

Vancouver, B.C.

- [1] THE COURT: There is a ban on publication pursuant to s. 486.4 of the Criminal Code, R.S.C. 1985, c. C-46 banning the name or identity of the complainant and anything that might identify the complainant. As a result, I have used initials for the name of the complainant and her mother.
- [2] Kyle Lennax is charged with three counts of sexual offences arising from incidents alleged to have occurred at the Funshine Daycare in Coquitlam, British Columbia, when he was an employee at that establishment. Specifically, between September 7, 2004, and June 30, 2005, he was charged with sexual assault of A.B., contrary to s. 271 of the Criminal Code; touching A.B., a person under the age of 14 years for a sexual purpose, contrary to s. 151 of the Criminal Code; and for a sexual purpose inviting, counselling, or inciting A.B., a person under the age of 14 years, to touch him, contrary to s. 152 of the Criminal Code.
- [3] The following witnesses testified: A.B., the complainant; C.B., the mother of the complainant; Constable Jim Devine who took photographs of the daycare; Constable Shelby Murphy who conducted a videotaped interview of A.B.; Kyle Lennax; Lisa Marie Farius, a friend and former co-worker of Mr. Lennax; and Shelina Lalani, the owner of the daycare.
- [4] A.B. was born April 14, 1999. She and her older brother attended Funshine Daycare approximately three days per week while her mother worked. The two children started in September 2004 and the last day was June 30, 2005. A.B. turned six years old in April 2005. She was nine years old when she testified at trial. A.B. gave her evidence by video statement pursuant to s. 715.1 of the Criminal Code and also testified. The video statement was taken on July 1, 2005. A.B. testified outside the courtroom via a live-link video pursuant to s. 486.2 of the Criminal Code. She also had a support person present with her during her testimony pursuant to s. 486.1 of the Criminal Code. Both A.B. and her support person could be seen on the television screen in the courtroom during A.B.'s evidence. These applications were all properly consented to by defence counsel.
- [5] Before commencing a review of the evidence, my analysis, and findings of fact, I will discuss the fundamental principles of law applicable to this case. First and foremost, as with every criminal case, the accused is presumed innocent and the Crown bears the burden of proving each essential element of each offence charged beyond a reasonable doubt. Mr. Lennax does not have to prove anything. The burden of proof relates to each essential element of the offence and not to the individual pieces of evidence led by the Crown: see *R. v. Morin*, [1988] 2 S.C.R. 345, 66 C.R. (3d) 1.

- [6] 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 complainant. A finding that the complainant is telling the truth does not equate with a finding of guilt, nor does a finding that the accused is not telling the truth equate with a finding of guilt. As Cory J. said in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, at 757-758 the correct approach is, and I summarize, that if I believe the evidence of Mr. Lennax, I will find him not guilty. His evidence is that these events as described by A.B. did not occur. If I do not believe the evidence of Mr. Lennax, I still must consider whether his evidence raises a reasonable doubt, and if it does, I must acquit. I add parenthetically I do not, of course, consider his evidence in a vacuum, but in the context of the evidence as a whole. Finally, even if Mr. Lennax'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: See also *R. v. Horton* (1999), 133 C.C.C. (3d) 340 (B.C.C.A.).
- [7] There are other principles which require mention and these relate to assessing credibility when the witness is a child. A.B. was six years old when she made the allegations and the videotaped statement. Some events may have occurred when she was five. She was nine years old when she testified in Supreme Court. She also testified at a preliminary inquiry in June 2007, when she was eight years old. The law in relation to the evidence of children has changed dramatically over the past 30 years. At one time, an accused could not be convicted of an offence solely on the evidence of a child unless the evidence was corroborated, as a child's evidence was presumed to be inherently unreliable. While these requirements are long gone, it is not an error for the trier of fact to consider whether there is evidence which corroborates the child's evidence.
- [8] In *R. v. B.(G.)*, [1990] 2 S.C.R. 30, 56 C.C.C. (3d) 200 [cited to S.C.R.], the court commented on how a trier of fact should approach the evidence of a child. Madam Justice Wilson, speaking for the court, said this at 54-55:

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

- [9] This statement was echoed by Madam Justice McLachlin in *R. v. W.(R.)*, [1992] 2 S.C.R. 122 at 134, 74 C.C.C. (3d) 134. Thus, while the standard of proof beyond a reasonable doubt remains as rigorous with allegations made by a child as it is with an adult, the evidence of the child is not to be approached the same way as that of an adult. For example, inconsistencies between statements and testimony which may be significant when assessing credibility of an adult will take on less significance when assessing the credibility of a child, particularly with reference to peripheral matters such as time and place.
- [10] Another change has been the advent of the admissibility of the video-recorded statement pursuant to s. 715.1 of the Criminal Code. Judicial comment on this provision makes it clear that a statement made in short proximity to the events may provide a better recollection of the events and a more complete version of the allegations: see *R. v. F.(C.C.)*, [1997] 3 S.C.R. 1183 at para. 19, 154 D.L.R. (4th) 13. Further, the videotaped statement of A.B. and her evidence in chief given in court is her evidence in chief. The videotape is not considered a prior consistent statement: see *R. v. A.(J.)* 2006 BCCA 258, 209 C.C.C. (3d) 423 at paras. 34-36.
- [11] I must make an observation about the videotaped statement, a point which was also appropriately conceded by the defence in submissions, and that is the statement was conducted properly with open-ended questions. Only once did Constable Murphy specifically direct A.B. in the form of a question, which was at the very end of the statement, when she asked if A.B. had ever seen anything come out of Mr. Lennax's privates and the answer was no. The support person present with A.B. during her testimony was on view the entire time A.B. testified. At no time did she prompt A.B. or in any subtle way direct her to an answer.
- [12] The charges were precipitated by events which allegedly occurred on June 30, 2005. C.B., the mother of the complainant, testified that she enrolled A.B. and her son in the Funshine Daycare commencing in September 2004. A.B. was in kindergarten at the time and her son was in grade three. The children attended three days per week, usually Tuesday, Wednesday, and Thursday. Sometimes the schedule changed, but those were the main days the children attended. Funshine Daycare is a renovated house. The upstairs is primarily for the younger children, kindergarten age and below, and the downstairs is reserved for the older children age six and above.
- [13] School ended on June 29, and June 30, 2005 was the first full day of daycare for the children. C.B. said she arrived at the daycare at around 8:15 to 8:20. The sign-in sheet for parents indicated that she signed her son in at 8:30. A.B. wanted to stay downstairs with her brother and Mr. Lennax said it would be all right. C.B. went upstairs to take A.B.'s backpack upstairs and spoke with an employee named Kim for about 10 minutes. There is evidence that Kim had to approve that A.B. stay downstairs and that approval was given.
- [14] C.B. decided to return downstairs to tell A.B. that she had given Kim the movie that A.B. wanted to watch. When she entered the downstairs, it was dark. She recalled bumping by tables that were in the front area. She passed the bathroom, but did not see anyone in the

bathroom. The back area was quite dark and she could not see either of her children. Several children were watching a video. She said she eventually found her son playing with some irregular-shaped blocks in the back. The block area is seen in the photos of the premises.

- [15] She turned around and walked back and saw A.B. coming out of the bathroom. She said A.B. had a funny "look" on her face, a look she had not seen before. She avoided eye contact with her mother and was going to walk by her when her mother asked what was wrong and A.B. replied, "Nothing." C.B. looked up and saw Kyle Lennax in the bathroom. He turned away from her. C.B. described the funny look as if she had caught someone doing something and the person was trying to hide it, as if the person was trying to look normal keeping a straight face. It was a look of something that had gone wrong. Her description is apt and it is a look that I recognize as common to children who are trying to pretend that nothing is wrong, and that they have done nothing wrong.
- [16] C.B. decided to go to work, but was worried all day as a result of this incident. She had an overwhelming feeling that something was not right. When she picked up A.B. at the end of the day, she was buckling her into the seatbelt and asked her why she had a funny look on her face, what she was doing in the bathroom, and why Kyle was there. In response to the last question, A.B. disclosed to her mother what had occurred. I add that A.B. also gave this evidence.
- [17] Out of an abundance of caution, I did not permit A.B.'s actual statements to be led in court. However, the fact of the statement is permitted as part of the narrative; see *R. v. Dinardo*, 2008 SCC 24, at para. 37, 293 D.L.R. (4th) 375. The statement to the mother is not to be considered as truth of the contents, but is relevant to the timing of the complaint. As noted, A.B.'s evidence was given through a videotaped statement made the day after the allegations, along with her evidence in chief and cross-examination.
- [18] C.B. called the police the next morning. A.B. told Officer Murphy that she was at the police station because one of her daycare teachers was "gross," that he had "touched her privates and stuff." She said he touched her privates and put his tongue in her mouth. She said that he touched her in April. When asked about yesterday, which was June 30, she replied that he was still touching her privates and stuff. She said that she was watching the beginning of a movie, the movie *Shrek*, when Kyle Lennax carried her to the bathroom and started touching her privates. She told him to let her go. At one point, she had said that she ran to the bathroom. At the preliminary inquiry she said she had walked to the bathroom with Kyle.
- [19] She said that Kyle told her to go to the bathroom to make her privates more slippery so he could slip his hand in. She said she had already gone to the bathroom at home and she told him she did not have to go. She said that when they got to the bathroom, instead of making her go, he started touching her private parts. She said this happened outside the toilet area, not in the toilet. She said he unbuttoned her pants and touched her under her underwear

with one finger. She said, "It really hurted really bad." In cross-examination, she agreed that at the preliminary inquiry she said that he had not touched her that day because her mother came. At trial, when faced with the preliminary inquiry evidence, she said that he had touched her once and then her mother came.

- [20] A.B. also said in her video statement that Kyle often touched her privates. She said he would find a hiding spot where no one would come in and see them. She described how he took her to the computer room on Wednesday, which appears to be a reference to June 30, 2005 and licked her on the mouth. She said he was sitting in the room and she was standing. She said, "he stucked his tongue and spinned it around in my mouth." At the preliminary inquiry, she said the incident in the computer room occurred on a different day.
- [21] A.B. described that when Kyle touched her that he moved his finger around, and demonstrated a back-and-forth motion on her vagina. She said that he "shakes his finger around" and, "It really hurts." She also said that Kyle Lennax put her hand on his privates. She said she touched his skin and it felt "gross." She said, he "pulled it out of his shorts and it was just hanging there and stuff". She said, "it was not smooth, but felt gooey". She said he put her hand on his privates and "shakes it around" on her hand. She said that he had touched her hand to his privates yesterday, meaning June 30, 2005. She also drew a picture of his privates.
- [22] She also said that Kyle Lennax had touched her outside of her clothes in the lunchroom when she was sitting at the table. There is an area in the upstairs of the daycare where there are a number of little tables and chairs. Kyle Lennax is six-foot-one and 300 pounds. A.B. agreed that he was too big for the chairs, but she said that he sometimes sat on them. She said that he touched her when he was sitting beside her. At the preliminary inquiry, she said that Kyle did not touch her privates in the lunchroom. However, at trial, she was firm that he did touch her in the lunchroom.
- [23] In her evidence in court, she said that once she was being noisy when the preschoolers were sleeping so she was sent for a nap. She said Kyle took her into the boss's room and made her touch his private parts. She said he was sitting down and she was standing. She said he also stuck his tongue in her mouth. This event was not described in the videotaped statement. In cross-examination, A.B. said that the office door was usually closed. This was confirmed by both Kyle Lennax and Lisa Farius. When A.B. was questioned about when she remembered this incident, she replied, "I remember, I think," and then she said, "I've always remembered it." She said she told her mother that Kyle was touching her privates when her mother came to pick her up at the daycare at the end of the day.
- [24] In cross-examination, she was asked about an incident in the TV room and her evidence at the preliminary inquiry regarding the TV room. Her memory of this event was not clear. At the end of her cross-examination, she confirmed that she was sure that Kyle touched her private parts.

- [25] Kyle Lennax testified. He is now 22 years old and was 19 years old when he worked at Funshine Daycare. He had completed grade 10, but had no training in childcare. His last day of work was June 30, 2005, and he had worked there for 14 months. He had recently been promoted to a supervisory position. He worked primarily downstairs with the older children. However, he also worked with the children upstairs, starting around 9:00 a.m. when the older children went to school. He helped with supervision and with lunch and clean-up. He often worked a split shift. During lunchtime, he sat on the ledge in the room. He said he was six-foot-one and 300 pounds and, if he sat on the chairs, he could not sit with his legs under the table. By this, I think he meant he would have to sit sideways. He said that he did not sit on the little chairs. During free play, he would sit on the floor.
- [26] Mr. Lennax testified that it was unusual for an upstairs child to remain downstairs. He said the upstairs children would get jealous if other children were allowed downstairs. The upstairs children required more qualified supervisors, although acknowledged that kindergarten children do not fall into that requirement. Mr. Lennax testified that A.B. would come to the downstairs near the end of the day to wait for her mother, usually five to 10 minutes. Otherwise, he dealt with her upstairs as he would with any child.
- [27] Mr. Lennax was asked if he had any recollection of hugging A.B. He replied that if she was hurt he might have, but he had no recollection. He was further asked if he had any recollection of kissing A.B. and he replied, "No."
- [28] Mr. Lennax testified that on June 30, 2005 he arrived at work at 7:00 a.m. He testified that he did not work a split shift that day. In fact, his timesheets indicate that he worked from 6:30 to 10:00 and then from 1:00 to 5:00. Yet, he was also present when C.B. came to pick up A.B. around 5:45, so the accuracy of these timesheets is not perfect. Mr. Lennax testified that he worked alone until around 9:00 a.m. Again, the timesheets reflect that the next staff person for downstairs did not arrive until 10:00 a.m.
- [29] Mr. Lennax testified that he put on a movie at around 8:00 a.m. for the children to watch. Indeed, he recalled the movie he chose was Shrek. This is consistent with the evidence of A.B. with respect to what movie was playing. Mr. Lennax testified that there were an unusual number of children there and that they were understaffed. The sign-in sheets reflect that C.B.'s son was the seventeenth child to arrive downstairs. A.B. wanted to stay downstairs to watch the movie and that was approved.
- [30] Mr. Lennax testified that A.B. asked him if she could go to the washroom. He said after about a minute she called and said that there was no toilet paper in the stall. Mr. Lennax said that the other two stalls were out of order and taped shut. He said he undid the tape on one and it had no toilet paper. So he undid the tape on the second one and it had toilet paper. He said he took the toilet paper from that stall and handed it to A.B. overtop of the stall. He said she reached and grabbed it.

- [31] I pause at this point to remark that this scenario was not put to A.B. Indeed, she testified that she did not have to go to the bathroom because she had gone at home. I also specifically say that I do not draw an adverse inference against Mr. Lennax based on the principle of *Browne v. Dunn* (1893), 6 R. 67 (U.K. H.L.).
- [32] One aspect of this evidence that troubles me is that Mr. Lennax said that he passed the toilet paper over the stall and A.B. reached and grabbed it. There are photos of the stalls. The doors are not short. Presumably, A.B. was sitting on the toilet or she would have retrieved the toilet paper herself. A.B. was a very little girl at this time. This is apparent from the video. I find it very difficult to believe that if this had occurred that Mr. Lennax would have passed the toilet paper over the top of the stall. It would have been difficult for her to reach. He would have passed it under the stall where it would have easily been in reach.
- [33] Also, Mr. Lennax said that there were no toilet paper supplies downstairs which is why he opened the taped-up stalls to take toilet paper out of there. He testified that every time a roll of toilet paper ran out, staff would have to go upstairs to replace it. This was contradicted by Lisa Farius and Shelina Lalani who both testified that there was toilet paper in the cupboard across from the bathroom. After further questioning, Mr. Lennax admitted that they would grab five or six rolls from upstairs and put it in the closet.
- [34] If A.B. was calling for toilet paper, then surely Mr. Lennax would have retrieved it from the cupboard rather than from going to the trouble of un-taping the doors on the other stalls. On Mr. Lennax's evidence, he did not even look in the cupboard. It is clear to me that this was a story that was fabricated to explain his presence in the bathroom. He testified that he assumed that the toilet paper had run out the night before. On the timesheets, it indicates he was the person on staff the night before responsible for filling up the toilet paper supplies. Yet with 16 children present, some since 7:00 a.m., his evidence was that A.B. was the first person to use the bathroom that morning. I do not find his evidence believable.
- [35] He said he left the bathroom and walked by the open doors and was standing by a pillar in the room. He was there for about two minutes. He said he did not see C.B., the mother of A.B., yet she had to be in the downstairs by that time and, if he was by the pillar, he would have to have seen her. He testified that when he left the bathroom, he passed both broken toilets, and then once outside, he remembered that he had to tape the door shut again. He returned to the bathroom when A.B. was washing her hands. He said he taped the door shut again, which took four to five seconds. He said he turned to walk out and that is when A.B.'s mother showed up. He said she was there in less than a minute from the time he re-entered the bathroom.
- [36] In cross-examination, Mr. Lennax was asked if that was the first time he realized that C.B. was downstairs and he replied, "Yes." He was then asked if the entrance door "dinged" when someone entered and he replied, "Yes." He said normally the ding can be heard in the bathroom, but he thought maybe the TV interfered with him hearing the door. He appeared to be scrambling for an answer to the question regarding why he did not hear the door. C.B.

testified that she saw A.B. leave the bathroom. She spoke with her and, when she looked into the bathroom, Mr. Lennax was not walking out of the bathroom, but was standing there holding the stall door and then turned away from her.

- [37] Mr. Lennax said the front lights were on and the back lights were off. He said the front area was lit up. There was much cross-examination and argument regarding whether the front area of the daycare was lit up. In my view, there is not much importance with respect to this point. C.B. believed that all the lights were off when she entered the premises and that it was dark when she went by the tables. Clearly, the back lights were turned off and it was dark in the back.
- [38] Mr. Lennax denied touching A.B.'s vagina, exposing his penis to her, asking her to touch his penis, and compelling her to touch his penis. He was not specifically asked regarding incidents in the office or the computer room. He did speak at length regarding the lunchroom in terms of the unlikelihood that he would sit at the table and the likelihood that every one would see him doing anything to A.B. because of the number of people present.
- [39] Mr. Lennax testified that he started the movie at 8:00 a.m. to keep the children in one area. A.B. said that the movie started when she arrived. Again, Mr. Lennax had said the front lights were on, the back lights were off.
- [40] Mr. Lennax testified that the children were not permitted into the computer room except to do homework after school. Children needed permission to go into the computer room. Mr. Lennax testified that he did not have access to the office when Shelina was not there. He said it was locked. No one was allowed in her office.
- [41] Mr. Lennax denied that C.B.'s son was in the back playing with blocks because it would be too noisy, yet the block area was just as described by C.B. and C.B. would have absolutely no reason not to tell the truth regarding the blocks. She described the unusual-shaped blocks and the block area can be seen in the photos and the videotape submitted by Ms. Lalani. The block area is also not so close to the TV that noise would be an issue.
- [42] Lisa Marie Farius also worked at the Funshine Daycare, although she had quit by June 30, 2005. She was a friend of Mr. Lennax and knew him prior to working at the daycare. She had no special training in childcare and also worked primarily in the downstairs. She said that she also worked upstairs. She testified that the staff sat at the lunch tables with the children. She never worked upstairs when Kyle Lennax was there. She said that sometimes the upstairs children came downstairs. She said that A.B. would come downstairs near the end of the day. Ms. Farius testified that she thought the office upstairs was locked when Ms. Lalani was not there, but she had not tried it.

- [43] Ms. Farius testified that the toilet paper was stored in the closet downstairs. If they ran out of paper, she would grab it from there. If they ran out completely, they would get rolls from upstairs. She recalled a time when the toilet was broken and was shut with tape. She could not recall if any toilets were broken around the end of June, her last day at work being June 24, 2005.
- [44] Ms. Farius testified that A.B. would come downstairs, but not very often. She was shown her statement to the police and agreed that she truthfully told the police that A.B. liked to go downstairs and then would go back upstairs. She said that other times the kindergarteners would go downstairs and then back upstairs.
- [45] Ms. Shelina Lalani also testified. She is the owner of Funshine Daycare. She has operated the daycare for 15 years. She testified that she is there every day. However, she was not there on June 30, 2005. She testified regarding how the daycare operated and how the schedule worked. She said that when a downstairs worker comes up to help, they are not alone with the children as there are a lot of staff. Ms. Lalani said that her office was the only room where you could close the door and have a private chat.
- [46] Ms. Lalani examined her records and tried to determine how much time Mr. Lennax would have been in contact with A.B. She concluded that he would only have been in contact with her for 45 minutes. However, it is clear that the timesheets do not accurately record everything. For example, A.B.'s attendance downstairs on June 30 was not recorded. It is not recorded when A.B. goes downstairs to wait for her mother at the end of the day. Ms. Lalani leaves the daycare at 4:30 or 5:00 and is not aware of the times that the upstairs children go downstairs. Her estimate of time is not reliable.
- [47] When asked about the toilet paper supplies downstairs, Ms. Lalani said that she stores a big package of toilet paper from Costco in the downstairs cupboard. She estimated that a package holds 14 rolls.
- [48] Ms. Lalani said that the upstairs staff have access to her office as there is a closet in there for paints and paper. She said that one has to enter the office in order to see the desk. A.B. described the desk in her evidence. She said the office door is closed when she is not there. She testified that her office door is not locked when she is not present. Ms. Lalani acknowledged that the computer room downstairs was another place where staff could have a private word with a parent.
- [49] The defence submits that the evidence of A.B. is unreliable and full of significant inconsistencies. The defence submits that A.B.'s evidence is not corroborated by any other evidence. I disagree with this submission and will return to it when I discuss A.B.'s evidence. I will address first the evidence of Mr. Lennax. The defence submits that Mr. Lennax's evidence was straightforward and forthright. I have commented on some of the frailties of his evidence in the summary above.

- [50] First, his evidence regarding what occurred on June 30, 2005 is fraught with difficulty. He testified that there were no toilet paper supplies in the downstairs closet in cross-examination. He was clearly trying to justify why he would take the odd step of removing tape from two broken toilet stalls instead of taking toilet paper from the closet across the hall. He eventually admitted that there was toilet paper stored across the hall. He would not have passed toilet paper to a little girl, who was sitting on a toilet, over the top of the stall when she could not have reached it. He would have passed it under the stall. He would not have walked by two open stalls with loose tape and then a few minutes later remember that he had to return to tape them up again. If this truly occurred, he would have taken the four to five seconds he said it took to tape each door shut when he was in the washroom the first time.
- [51] Further, C.B. had no reason to lie about her entry. While she was cross-examined carefully on the lighting in the premises, it was not suggested to her that she was incorrect about her timing of her entry downstairs or whether she saw her son in the back with the blocks. If Mr. Lennax was being truthful, either C.B. would have seen him waiting by the pillar after he says he gave A.B. toilet paper or he would have seen her. I do not believe Mr. Lennax's evidence regarding what occurred in the bathroom. It is, frankly, a work of fiction.
- [52] Mr. Lennax testified that when he worked upstairs, he never sat on the little chairs. There is no doubt that it would be difficult for him to sit on the little chairs. A chair was brought into court and measured and it is definitely a chair for a small child. Mr. Lennax did say that he sat on the floor with the children. There were usually a number of children in the lunchroom as well as other staff. A.B. said that Mr. Lennax touched her over her clothes in the lunchroom.
- [53] Mr. Lennax testified that the office upstairs was locked when it was not in use. This is not accurate according to Ms. Lalani. Though the door was closed, there are art supplies kept in there and the door was not locked.
- [54] Ms. Farius gave evidence that she often was with Mr. Lennax when he was working as she would wait for him to get off shift. When they worked together, she said she was always with him. However, Ms. Farius did not work on June 30. Indeed, she quit work on June 24. The timesheets indicate that there were times when they did not overlap. While her evidence, if true, reduces the opportunity for Mr. Lennax to commit the crimes alleged, it does not assist to a great extent. The times as alleged would take a matter of minutes. Mr. Lennax has lied regarding the specific allegation against him, that is, what occurred in the bathroom on June 30, 2005. The rest of his evidence relates to lack of opportunity and general denials.
- [55] I acknowledge that it is unlikely that the event in the lunchroom occurred as described by A.B. With respect to the office, Mr. Lennax is not accurate regarding the door of Ms. Lalani's office and I have not overlooked the evidence of Ms. Farius who said she thought the office was locked when Ms. Lalani was not present. As a trier of fact, I am entitled to accept all, part, or none of a witness's evidence. Having found that Mr. Lennax was untruthful

regarding a significant aspect of his evidence, I do not accept his denials regarding the other allegations. I do not believe his evidence, nor does it raise a reasonable doubt. This does not mean he is guilty. I must also assess the evidence of A.B. and determine guilt or innocence in the context of the whole of the evidence.

- [56] The defence has pointed to a number of inconsistencies in A.B.'s evidence. It is important to remember that the law and common sense tells us that her best recollection will be found on the videotape of July 1, 2005. In her statement that day, she described how she was taken to the bathroom by Kyle Lennax even though she did not have to go. She said he began touching her privates in a manner similar to what he had in the past. She left the bathroom and her mother saw her with a strange look on her face, strange to the point that her mother was troubled the entire day. Physical manifestations are corroborative of sexual allegations: see *R. v. Murphy* (1976), [1977] 2 S.C.R. 603, 29 C.C.C. (2d) 417.
- [57] The defence submits that A.B. was unable to provide times of events and, when she did, she was vague. For example, she said Mr. Lennax started touching her in April. She said an incident happened in May. She was uncertain when events occurred, except the events on June 30, 2005; however, she even backtracked with respect to those events, which I will discuss in a moment. However, it must be kept in mind that A.B. was six years old when these events took place and three years passed before she gave her evidence at trial. The law as stated above is clear. A child's perceptions of when things happened are not as clear or accurate as that of an adult. Just because A.B. was unable to definitively say when certain things occurred, it does not mean that these things did not occur.
- [58] There are inconsistencies in A.B.'s evidence. For example, in her video statement, A.B. is clear that Mr. Lennax touched her sexually in the bathroom on June 30, 2005. The evidence is supported by her reaction to her mother when her mother saw her coming out of the bathroom. At the preliminary inquiry, she said that nothing happened in the bathroom and, at trial, she said that Mr. Lennax was going to touch her and he only touched her once, but her mom came and he did not touch her. A.B.'s evidence was fundamentally consistent and that is that Kyle Lennax touched her sexually in the bathroom. She made the statement clearly when she was six years old, the day after she says that the incident occurred. The fact that she now minimizes the event itself is not unusual two to three years after the event. She maintained at trial that she was touched that day even if only once.
- [59] The defence submits that A.B.'s evidence regarding what occurred in the lunchroom is quite inconsistent and undermines the entirety of her evidence. She contradicted herself from the video to the preliminary inquiry to the trial. I have detailed this above. She was quite sure at trial that Mr. Lennax touched her over her clothes in the lunchroom. He may have, but this as a discrete event is not proved.

- [60] However, the allegations are not in discrete events, but between certain dates. The Crown is not obliged to prove each individual piece of evidence beyond a reasonable doubt. Does A.B.'s confusion over the lunchroom event and the unlikelihood that the event occurred because of the size of the chairs and the number of people in the room undermine the entirety of her evidence? I find that it does not for the following reasons.
- [61] While she may be confused over certain events, times, and places, the fundamental thrust of her evidence, which I summarize below, is unchanged. In her statement, A.B. described certain sexual acts in considerable detail, particularly for a six-year-old. She described acts of Mr. Lennax licking her mouth, sticking his tongue in her mouth, and swirling it around. She is describing a French-kiss. She described Mr. Lennax taking her hand, putting it on his privates, and shaking it around with her hand. She is describing what an adult would refer to as masturbation. She described Mr. Lennax putting one finger in her privates and moving it back and forth on her vagina and that it hurt her. She is describing digital penetration of her vaginal area. The descriptions provided of these acts by a child this age are clearly consistent with sexual acts described in childlike terms. It is improbable that this child would know these acts and describe this detail unless they happened to her.
- [62] The defence raises the issue of the allegation of assault in Ms. Lalani's office. This was not mentioned in the videotaped statement. The defence submits that A.B. is now having new memories of events and this should also cause concern over the veracity of all of her evidence. A.B. testified that she had to have a nap because she was disturbing the other children. She said Mr. Lennax took her into the office and assaulted her there. She described a desk in the office which Ms. Lalani said could not be seen unless you entered the office. Ms. Lalani acknowledged that the office was not locked. A.B. described the event in detail and I find this is not a new memory. She clearly stated that she "always remembered it." I said earlier that her best recollection would be July 1, 2005. However on that date, she described numerous incidents. The allegation in the office of kissing her and touching his privates was made on July 1, 2005. All she has added is a place. This ties to A.B.'s evidence that Mr. Lennax would find places to hide and then touch her. The office was the only room in the upstairs where he could find privacy.
- [63] Similarly, A.B. testified that Mr. Lennax took her to the computer room and assaulted her there. It was another room where he could close the door and, in her words, "hide." I acknowledge that she initially said this occurred on June 30 and then later had said that it occurred on another day. However, as noted above, inconsistencies with respect to time and place, while considered, do not undermine the credibility of a child's evidence as it might the evidence of an adult.
- [64] The defence also points to the fact that A.B. was willing to stay downstairs on June 30 even though she said that Mr. Lennax made her feel bad. The defence submits that this is inconsistent with A.B.'s allegations regarding Mr. Lennax. A.B., aged six years, wanted to stay downstairs and watch a movie with her brother. She did not want to be assaulted by Mr. Lennax. Again, one cannot judge the conduct of a child with the same rationality that one

can with an adult. The fact that she wanted to stay downstairs with her brother when Kyle Lennax was present does not undermine her comments that Kyle Lennax touching her made her feel bad.

- [65] The defence submits that C.B.'s evidence has been formed by her experience of A.B. disclosing these events to her. C.B.'s evidence of what occurred was only a few minutes. She had no reason not to be truthful and her evidence was corroborated by Mr. Lennax with respect to the darkness of the back of the room, and the video and photos in terms of the location of the blocks, and also with the timing of A.B. coming out of the bathroom and Kyle Lennax being in the bathroom. The defence also submitted that C.B.'s questions to A.B. at the end of the day suggested to A.B. that Kyle Lennax had done something wrong to her. As noted above, the questions were simple. There is no suggestion that anyone described detailed sexual acts to A.B. in advance of June 30, 2005. The question of "what happened in the bathroom" could not possibly have resulted in the detailed and accurate description of sexual acts as described by A.B. At age nine, A.B. is obviously a bright child. At age six, she was innocent and guileless.
- [66] For the reasons given above, I believe her testimony and, on the whole of the evidence, I find beyond a reasonable doubt that, on at least two occasions, Mr. Lennax touched her digitally in her vaginal area. It was crystal clear that when she gave her statement on July 1, 2005 describing what occurred the previous day, that this had happened to her before. I also accept beyond a reasonable doubt that, on at least one occasion, Mr. Lennax French-kissed A.B. I accept her evidence and, on the whole of the evidence, I find beyond a reasonable doubt that, on at least one occasion, Kyle Lennax placed A.B.'s hand on his penis and masturbated with her hand.
- [67] Mr. Lennax, would you stand up, please.
- [68] I am satisfied beyond a reasonable doubt that with respect to Count 1, that you sexually assaulted A.B., contrary to s. 271(1) of the Criminal Code. I am further satisfied beyond a reasonable doubt that you did, for a sexual purpose, touch directly or indirectly, with a part of your body, the body of A.B., a person under the age of 14 years, contrary to s. 151 of the Criminal Code. And further, I am satisfied beyond a reasonable doubt that you did, for a sexual purpose, invite, counsel, or incite A.B., a person under the age of 14 years old, to touch directly or indirectly, with a part of her body, your body, contrary to s. 152 of the Criminal Code. Count 1 relates to the digital penetration; Count 2 relates to the French-kiss; and Count 3 relates to the touching and the masturbation.

"E. Bennett J."

The Honourable Madam Justice Bennett

September 25, 2008 - Revised Judgment

Corrigendum to the Oral Reasons for Judgment issued advising that my Reasons for Judgment in this matter, with the citation number of 2008 BCSC 1227, reflected the date of hearing of August 21, 2008 which was an error. The correct date of this hearing was July 21, 2008 and has been amended on the first page of the Oral Reasons.

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