

CANADA / JUDGMENT

R. v. Porcher

2024 BCSC 2278

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2024 BCSC 2278 R. v. Porcher

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Porcher,

2024 BCSC 2278

Date: 20241121

Docket: 186577-1

Registry: Victoria

Rex

v.

Matthew Arlen Porcher

Restriction on publication. Pursuant to s. 486.4(2) of the Criminal Code of Canada restricting the publication, broadcasting or transmission in any way of evidence that could identify a complainant referred to in this judgment

Before: The Honourable Justice Morley

Oral Reasons for Judgment

Counsel for Crown:

S. Green

Counsel for the Accused:

O. James

Place and Date of Hearing:

Victoria, B.C.

October 28-November 1, 2024

Place and Date of Judgment:

Victoria, B.C.

November 21, 2024

I. Introduction

- [1] The following are oral reasons for judgment. If a written version is ordered, I reserve the right to edit it for verbal errors, clarity and to prevent identification of the complainant. The result will not change, nor will the basis for it.
- [2] Matthew Porcher is charged with one count of touching for a sexual purpose contrary to s. 151 of the Criminal Code and one count of sexual assault contrary to s. 271 of the Code. Both counts arise out of the same incident.
- [3] From the Fall of 2021 to April 2022, the accused was a resident support worker employed by a company that operated homes for youth in the care of the Director under the Child, Family and Community Services Act. The complainant lived in two different homes operated by that company, and the accused worked with him. The accused and the complainant developed a bond. The accused's employer became concerned that the accused had an unprofessional relationship with the complainant and decided they should be separated for at least three months.
- [4] On the evening of April 24, 2022, the accused was given time to tell the complainant about the separation. He stayed well past the time he was supposed to. After some drama involving the complainant's brother, which lasted into the early morning of April 25, the accused told the residential support worker on shift, Sam Bottrill, that she could go home and he would put the complainant to bed. As the complainant was supposed to fall asleep, the accused gave the complainant a back massage, as he had done on a number of previous occasions.
- [5] The complainant's evidence is that when the accused thought the complainant was asleep, he touched the complainant's testicles, penis and buttocks. The complainant says that after enduring this out of fear for what he estimates to be 20 minutes, he pretended to wake up again. The accused, according to the complainant's evidence, tried to get him to go back to sleep, but he would not. The accused then left.
- [6] The accused testified in his own defence. He denies that the incident occurred as described by the complainant. While he admits giving massages to the complainant contrary to his employer's policies, he denies he touched the complainant's genitals or buttocks.

- [7] Because the complainant was 14, and the accused was aware of this, there is no issue about consent or honest-but-mistaken belief in consent. The only issue is whether the Crown can prove, beyond a reasonable doubt, that the touching occurred substantially as described by the complainant. If it can do that, Mr. Porcher must be convicted. If there is a reasonable doubt as to whether this touching happened, he must be acquitted.
- [8] Since the accused testified in his own defence, the form of analysis mandated by the Supreme Court of Canada in *R. v. W.(D.)*, 1991 CanLII 93 (SCC), [1991] 1 S.C.R. 742 [W.(D.)] applies.

II. Factual Background

- [9] Before I set out what the W.(D.) analysis is, and how I understand it to apply in the current case, I will begin by setting out some background facts, leading up to the time of the alleged assault, as well as those events that have been established to have occurred afterwards. This is intended to be a discussion of the facts with respect to which there is no significant conflict in the evidence. To the limited extent these background facts are disputed, I find them to be established.
- [10] I will analyze important conflicts in the evidence or inferences I am asked to make later after first reviewing the substantive law in relation to the two offences and the W.(D.) analysis. At this point, when those issues arise in the course of the narrative, I will just note them.

A. Before April 22, 2022

- [11] IDM Youth Services Inc. (IDM) is a company that operates youth group homes on behalf of the Ministry of Children and Family Development (MCFD). These homes are for children and youth who are in the care of the Director under the Child, Family and Community Service Act, RSBC 1996, c. 46 and who have needs that cannot be addressed in ordinary foster homes.
- [12] IDM operates a number of youth group homes. Two are relevant here: Metchosin House and IDM House. Both are in the Western Communities part of the Greater Victoria area. They are within minutes of each other by car.
- [13] With the exception of the complainant, all the witnesses at trial were "resident support workers" or "resident house workers" employed by IDM in 2022. (The job title varied, but the responsibilities were the same.)

- [14] The role of resident support workers was to directly work with the youth resident in the youth group homes (known in IDM documents as the "person served"). The witnesses generally referred to this as being "on the front lines." Resident support workers would make meals, wake youth up and encourage them to get to school, take them to appointments, address problems that emerged, and put them to bed. They were also required to do a significant amount of paper work.
- [15] It is clear that there is a great deal of turnover among resident support workers. All resident support workers receive training, which I will speak about briefly later.
- [16] IDM, at least in the relevant youth homes, worked on a three-shift system. The exact beginning of each shift does not appear to have been standardized, but the morning shift would appear to begin either at 7:00 a.m. on school days or at 7:30 a.m. on weekends and end at 3:00 p.m. or 3:30 p.m. An afternoon/evening shift would overlap with the morning shift until a scheduled shift end of 11:30 p.m., although as I will discuss this sometimes had to be extended so that the afternoon/evening shift workers would work overtime.
- [17] "Sleep staff" would be in the home overnight. Their role was to address an emergency if it arose and they were woken up. No one else was supposed to be in a youth house during the overnight shifts, other than the sleep staff and the youth living there (referred to in IDM jargon as the "persons served").
- [18] Not surprisingly, IDM has a number of established rules and policies for its resident support workers. Some of these are designed to address the risk of sexual exploitation of youth in care. It is widely understood in the 21st century that children and youth in care are particularly vulnerable to sexual exploitation.
- [19] Among the rules that are relevant to this case are the following:
- a) Resident support workers were to contribute to a safe space for the "persons served", support their emotional needs and regulate behavioural boundaries.
 - b) Residential support workers were not to have personal contact with youth in IDM's care outside of work. They were not to communicate with them using personal cellphones or social media.
 - c) Residential support workers were not to touch youth in care, except to the extent appropriate for emotional support. If a youth initiated a hug, then residential support workers could reciprocate. However, they were not to have any physical contact beyond that.
 - d) Residential support workers were not to enter a youth's bedroom, unless invited, the youth was fully clothed (including a top), and the door was left open.
 - e) Youth were to be fully clothed in public areas of the homes.
 - f) No visitors of any kind were supposed to be in the youth homes after 10:30 p.m.

- 9) If a residential support worker needed to stay past the scheduled end of a shift, the reasons for this were to be reported to management as soon as possible and the additional time was to be approved. Residential support workers were not to remain in the homes during their own time.
- [20] All the residential support worker witnesses, including the accused, were trained in, and understood, these rules. There may have been minor variations in how each witness explained the rules, but no disagreement of substance.
- [21] There was some issue about IDM's policies in the event an incident occurred such that a resource worker had to stay past their regular shift end.
- [22] The evidence from the witnesses other than Mr. Porcher was that work past the regular time had to be approved that evening. Mr. Porcher's initial testimony was that he could ask for approval the next day. In the course of cross-examination, however, it became clear he had been warned not to do this by his employer. I find that it is an established fact that IDM had a policy that working past the regular shift end had to be approved as quickly as possible and, in any event, the same night as this occurred.
- [23] That being said, the evidence was that it was not unusual for a resource support worker to have to stay late as a result of incidents involving the youth in care and possibly reporting obligations as a result. Permission for overtime was required, but forthcoming, when this happened.
- [24] An important part of the job of a resident support worker is to fill out "Incident Reports" about what happens with youth in care. These Incident Reports (abbreviated as IRs) are provided to IDM management, MCFD's social worker and resource worker, and to others involved in the youth's care plan (which may include parents). At the time, resident support workers who may not have been directly involved in the care of the youth may also have been able to access these reports through company computers.
- [25] There are a number of categories of incident that must be reported, including medical events, illegal activity by the youth, use of physical force or restraint by staff. Incident reports must also be made in the case of reports of sexual abuse.
- [26] In late 2021 and 2022, the complainant was in the care of MCFD, as was his half-brother, who is approximately two years older than him. Up until April 2022, they were both resident in Metchosin House.
- [27] Like most youth unable to be integrated into foster homes, the complainant had some behavioural difficulties, likely arising at least in part out of the circumstances that brought him into the care of MCFD. He clearly exhibited oppositional behaviour. At the time of trial, he exhibited some insight into these issues and described himself at 14 as a "dumb kid". The complainant is bright, but did not like to go to school, and would sometimes lie to get out of going. The complainant stayed up late and often slept in past noon. I also heard evidence from the accused that he and his brother would get involved in mischief and property

damage, and the complainant would lie to police and authority figures to get out of trouble.

- [28] As a youth in a youth home, the IDM resident support workers were major figures in the complainant's life, and he got to know them well. The complainant tended to divide residential house workers into two types: he had a close bond with some and a primarily oppositional one with others. Among his preferred staff workers were the Crown witnesses Shahbaz "Shibby" Claire and Quinton Bracken. Another was the accused, Matthew Porcher.
- [29] The accused is now 23 years old. He was 20 or 21 during the time of these events. His ambition has been to be a police officer and he attended the Justice Institute after high school, graduating in June 2020. He started working for IDM as a youth residence worker in September 2021.
- [30] The accused got to know the complainant when he was covering another IDM employee's shift at Metchosin House in Fall 2021. He had worked there on a shift before, with nothing of note happening. But on this occasion the complainant got into an altercation with a staff member, who threw the complainant against a door. The complainant's back was injured, the police were called and the accused drove the complainant to the Victoria General Hospital emergency room.
- [31] When they arrived, the accused and the complainant waited overnight to see a doctor. The complainant was told that he would recover with rest and ice. He asked to be transferred to his mother's house, which was approved by MCFD. However, a few hours the complainant made a call to the accused to pick him up so he could return to Metchosin House, which the accused did.
- [32] Within a month of this incident, the accused saw an opening at Metchosin House and applied for it. He was accepted and began working there two or three days per week, with his other shifts at other IDM houses. While he worked at Metchosin House, the accused worked closely with the complainant. The accused was younger than most of the staff and therefore closer in age to the complainant. They would play video games together. The accused shared with the complainant his goal of being a police officer and the complainant expressed his desire to do that as well.
- [33] At some point, the accused began giving the complainant back massages, purportedly to address this injury he had experienced as a result of the altercation and to help him sleep. These occurred in the complainant's bedroom. The complainant's shirt would be off during all or at least most of these massages. The accused's testimony is that he would massage the complainant's lower back a few inches above the belt. There is no dispute that this was true at least up to the night of April 24-25, 2022.
- [34] The back massages must have been extremely common when the accused was on shift at Metchosin House for a period of months. The accused knew these back massages were against IDM policy. He hid them from other staff members, except perhaps those he believed to be sympathetic to him, such as Ms. Claire.

- [35] The accused's relationship with the complainant involved a number of other breaches of IDM policy. He frequently stayed later than he was supposed to, and was warned twice by his employer for doing this. He says this started when the complainant "barricaded" him from leaving at the end of his shift sometime in January or February 2022. The evidence is clear, however, that the complainant was small for his age when he was 14 and could not have been a serious obstacle for a grown man who wanted to leave the building. This was confirmed by Mr. Bracken's evidence and is, in any event, obvious. While the complainant may well have put up some symbolic resistance to the accused leaving, I do not think there is any doubt that the accused decided to stay, despite knowing it was against policy and, at some point, was even jeopardizing his job and his future as a police officer.
- [36] On at least two occasions, the accused engaged in roughhousing with the complainant and his brother while the complainant had his shirt off.
- [37] Within a month of the accused's start at Metchosin House, he and the complainant started messaging using the accused's personal phone number and social media apps. By January 2022, these messages occurred on days that the accused was not working and were frequent enough that it was unusual for a day to go by without messages.
- [38] At some point, Ms. Claire became concerned that the accused's relationship with the complainant was unprofessional and lacked boundaries. She reported her concerns to a supervisor.
- [39] On April 11, 2022, there was an incident in which the accused was found wrestling or "roughhousing" with the complainant and his brother on the floor by another resource worker, Rebecca Scott. Ms. Scott testified that when the complainant asked the accused whether he would stay later, he said he would check out of his shift and then decide whether to stay later (impliedly on his own time). It was put to Ms. Scott that she might be mistaken about this, and she disagreed with the suggestion, saying it was a clear memory.
- [40] Without at this point getting into details about the accused's credibility in general, which I will, I do not consider his denial of this event to be credible in light of his other admitted violation of the rules and my other concerns with his credibility that I will get into. So I consider it to be a proven fact that this occurred, albeit not one that establishes any element of the offence with which the accused is charged.
- [41] On April 14, 2022, the complainant was moved from Metchosin House to IDM House. The reason for doing this was not related to the accused, but because it was decided that it was necessary to separate the complainant from his brother.
- [42] After the complainant moved to IDM House, the accused met him twice in the accused's car in a nearby park. This required the accused to encourage the complainant to break his curfew. The accused says that this occurred after the complainant threatened to commit suicide if he could not see the accused.

- [43] I will address this issue later about the reasons for it. I do accept that while the complainant does not recall this occurred, it was clear that he did engage in threats of self-harm to get what he wanted, and although the evidence is that, generally speaking, these were regarded as "joking hyperbole" and were not taken as serious threats by IDM staff, including the accused. I will address what the accused's motivations were later, but I am prepared to accept as a fact that the complainant made a threat, joking or otherwise, of self-harm if the accused did not meet with him.
- [44] By April 2022, the accused and the complainant's relationship caused concern to IDM. This concern would have been magnified had IDM been aware that the accused was giving the complainant back massages in his room, exchanging text and Snapchat messages with him regularly, and meeting with him after curfew in his car in parks.
- [45] Based on the information she did know, the accused's supervisor told the accused he needed to have a break from working with the complainant for three to six months. IDM had a concern that, because there are emotional relationships between residential support workers and youth that are in care, it is important that these be handled appropriately. The accused was told that he could meet with the complainant for no more than 2 hours at IDM house during his shift at Metchosin House on April 24, 2022 in the expectation that he would explain the separation to the complainant.

B. The Night of April 24-25, 2022

- [46] I will now turn to the events of April 24-25, 2022, the undisputed or at least well-established events.
- [47] On April 24, 2022, the accused arrived for his shift at Metchosin House at 3:30 p.m. He did some paperwork and spoke briefly with a co-worker. He then left for IDM House in a company car. Ms. Bottrill was working the 3:30 to 11:30 p.m. shift at IDM House that evening/afternoon. At some point, probably shortly after she started the shift, she was told that the accused would be coming over to tell the complainant about the separation. The accused met with her when he arrived at IDM house. The complainant immediately came to see him, and wanted the accused to watch him play video games in his room, which the accused went to do.
- [48] The accused watched the complainant play video games for the two-hour period. When time was up, the complainant did not want the accused to go back to Metchosin House. He started crying. The accused decided to stay, contrary to his supervisor's instructions. He comforted the complainant in the living room. The complainant and the accused engaged in play fighting, with the complainant striking the accused.
- [49] Later that night, the complainant's brother arrived at IDM house without permission. The brother had alcohol and tried to get the complainant to drink some. The complainant and his brother started arguing. The accused was actively involved in this dispute, which seems to have gone on for some time. At some point, the complainant's brother physically

assaulted the accused, and the police were called. The complainant's brother remained after the police left, finally returning to Metchosin House around 1:00 a.m. The accused did not go with the complainant's brother, even though Metchosin House was where he was supposed to be working.

- [50] By midnight, the sleep staff had arrived, although none of the witnesses recall any interaction with them and do they not appear to have gotten involved with the events of that night.
- [51] Ms. Bottrill filled out an incident report about the police visit after it was over. When the complainant's brother finally left, Ms. Bottrill called IDM's emergency support line. The accused told Ms. Bottrill that she could go home and he would make the complainant a snack and put him to bed. Ms. Bottrill left.
- [52] The accused put the complainant to bed around 2:00 a.m. on the morning of April 25, 2022. The accused gave the complainant a back massage for approximately five minutes as he was supposed to go to sleep. The complainant then began to either actually fall asleep or appear to fall asleep. What, if anything, happened next is the heart of the case and so I will address that later. Both the accused and the complainant agree that a few minutes or up to perhaps 20 minutes after the complainant apparently went to sleep, the complainant either awoke or apparently awoke. The accused testified that the complainant had a nosebleed and that the complainant cleaned it up. The complainant does not recall this and there is no record of it. Nothing, in my view, turns on whether this happened.
- [53] In any event, the complainant told the accused he was not willing to go back to sleep and would "stay up until Shibby gets here" (i.e., until the morning). He began using Tik Tok on his phone. The accused responded that if the complainant was not going back to bed, he would "see you when I see you." The accused then left the complainant's room, put some equipment away, locked up IDM house, returned to Metchosin house, set the alarm there, and drove home in his own car.

C. Complainant's Partial Disclosure and Mr. Porcher's Reaction to It

- [54] The next day, another resource worker, Sahra Ibrahim, saw that the complainant was sleeping on the couch in the living room. This struck her because only a few days earlier he had been very happy with the setup in his bedroom. She approached him to tell him about his appointments that day and asked why he was sleeping in the living room. He then made a disclosure that she recorded in an incident report. She did this shortly after on the IDM laptop.
- [55] I note here that this disclosure is not relevant for the truth of its contents, but primarily because of the subsequent reaction of the accused to it. The accused also relies on it as a prior inconsistent statement, which I will discuss when I get to the credibility of the complainant. In any event, the disclosure is not itself evidence of the events it describes.

[56] The Incident Report form contains a number of boxes for "Type of Incident", one of which is "Reports of Sexual Assault". Ms. Ibrahim ticked this box.

[57] Under "Details of the incident", Ms. Ibrahim wrote the following (I have replaced the complainant's first name with "the complainant"):

Sahra [i.e., Ms. Ibrahim] approached [the complainant] on the couch to inform him of his appointments and asked why he is sleeping in the living room. [The complainant] stated he is unable to sleep in his bedroom due to an incident that occurred in there. Sahra asked what happened and if he is okay. [The complainant] disclosed that a staff member went into his bedroom and touched him inappropriately within the past 12 days at IDM House. And when asked the identity of this staff member [the complainant] said he wishes not to disclose this information because he doesn't want to get the staff in trouble. Sahra informed [the complainant] for his safety it is best to inform staff who it is so the appropriate measures can be taken. [The complainant] states he is scared to confront this individual and does not want to make it a big deal. Sahra inquired why [the complainant] decided to sleep on the couch last night since he said the incident happened before. [The complainant] said he did not want to make it obvious as to who touched him. He requested for staff to put a camera on his room door to track who comes in and out. Sahra comforted [the complainant] and he asked to stop discussing this matter.

[58] Ms. Ibrahim's Incident Report did not identify the alleged assailant beyond that he or she worked at IDM house and must have had access to the complainant during the 12 days he had been at IDM house. It was agreed that this could have referred to a number of people.

[59] The accused performed his Monday shift on April 25 apparently without incident. On Tuesday, April 26, when he arrived at Metchosin house for his shift around 3:30 p.m., he decided to check the complainant's electronic IDM file. When he did so, he saw Ms. Ibrahim's Incident Report.

[60] Mr. Porcher then sent a Snapchat message to the complainant, stating the following:

Holy shit, I just read the IR

Let's talk later

I didn't do that for me you were having a really tough day. Thought it would be what you wanted

It was really tough to do that but I thought it might help you pal

[61] Snapchat messages have the feature that they disappear once they have been read. However, the complainant took a picture of these messages with another cell phone and showed them to Ms. Scott. The accused admits that these were messages he sent shortly after he read Ms. Ibrahim's Incident Report.

[62] That evening, the accused called the complainant repeatedly from his cellphone. Even though the complainant never answered, the phone log shows the accused phoned him 11 times and tried to contact him by FaceTime Video once. Ms. Scott heard the calls as well. The accused became increasingly scared. He contacted Mr. Bracken, who had given him his contact information after he stopped working for IDM's Victoria-area homes.

[63] After he got off shift at Metchosin House, the accused texted the complainant. The first text was as follows:

Hey dude. I'm heading to the park. Do you want to meet me or do you want me to come to the house?

[64] The complainant did not respond. The accused went to the park. He then texted:

I'm at the park now. I'm not mad pal, I'm sure you're upset though. I want to see you and chat. Want to come meet me?

[65] The complainant continued not to respond. The accused sent him two "Crying" emojis and then the following:

I'm sorry. I want to talk to you

You know I won't lie to you.

Just come to the park. This is hurting so much

[Complainant] please.

I really want to see you. This is going to make it worse. I'm literally losing my shit right now.

Bro I'm parked at the park. Please come to see me.

It's okay. I'm not mad

I know you have your appointment tomorrow. I really want to see you

I will let you come punch me in the face rn

[Complainant] I'm so sorry. This hurts me so bad. I'm sorry it hurt you.

I can't go home without seeing you first.

[Complainant]. You know I care about you a lot.

Please just come and chat with me.

[66] On receiving the barrage of phone calls and texts, the complainant reached out to Mr. Bracken to ask what he should do. Mr. Bracken told him to call the police. On Mr. Bracken's suggestion, the complainant responded to the very last text with "Ok" so that the accused would remain at the park as the RCMP arrived.

[67] The RCMP arrived. They told the accused to go home. An investigation was initiated that eventually led to this prosecution.

[68] Both when the RCMP arrived in the park, and later when the accused gave a statement, the accused was told not to have any contact with the complainant. Notwithstanding this, about a week later -- it is not clear exactly when this message was sent, but it was approximately a week after the events in the park -- the accused sent the following message:

Hey pal. Just wanting to make sure you're doing okay. I haven't heard from you for a while. Just know that I'm still here for you.

Don't forget about all the fun we had. I'm so glad you really enjoyed our time together. I will have those great memories of us for the rest of my life.

Once this whole situation is sorted out, I would really like to reconnect with you. Maybe we could finally go fishing. Hope to talk sometime soon.

- Matt

III. Legal Principles

A. Elements of Sexual Touching

[69] Section 151(a) of the Criminal Code states in relevant part:

151 Every person who, for a sexual purpose, touches, directly or indirectly with a part of the body [] 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 not more than 14 years and to a minimum punishment of imprisonment for a term of one year...

[70] The actus reus of the offence of sexual touching under s. 151 of the Criminal Code requires proof beyond a reasonable doubt that (1) the accused used their body or an object (2) to touch the complainant's body and (3) the complainant was under 16 years of age.

[71] The mens rea requires, leaving aside the state of mind with respect to the age of the complainant which is not relevant here, intent to touch for a sexual purpose. Sexual interference is a specific intent offence. The ultimate question for the court is whether the purpose for the touching was "sexual in nature": R. v. G.B., 2009 BCCA 88 at para. 28.

[72] On the accused's version of what happened, namely that all that occurred were back massages, then clearly the Crown could not prove the touching was sexual in nature. On the other hand, if the complainant's allegation that the accused touched his genitals, testicles and buttocks while sleeping is established beyond a reasonable doubt, then there is no question that the elements of sexual touching would be made out.

B. Elements of Sexual Assault

- [73] As a general matter, the actus reus of sexual assault requires proof beyond a reasonable doubt of (i) touching, (ii) the sexual nature of the contact, and (iii) the absence of consent: *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 at para. 25. However, as a result of s. 150.1(1) and (2.1) of the Code, consent is not a defence in the circumstances since the complainant was 14 years old and the accused was both five or more years older than him and in a position of trust or authority.
- [74] Sexual assault is a general intent offence, under which the Crown must prove beyond a reasonable doubt that the accused intended to touch the complainant and was knowing of, reckless of, or wilfully blind to the complainant's lack of consent: *Ewanchuk* at paras. 23, 41-42. Since it is agreed that the accused knew the complainant was 14, and therefore knew he was not capable of consent, the only element in dispute is whether the accused intended to touch the complainant in a sexual manner.
- [75] As I mentioned in relation to the sexual touching charge, there is no doubt in this case that if the touching occurred as described by the complainant, it would be sexual in nature, while in the version described by the accused, it would not, or at least there would certainly be a reasonable doubt that it was not. As a result, the real question in this trial is whether, based on my assessment of the evidence of the accused and the complainant about what happened, I am in a reasonable doubt as to whether the touching occurred substantially as described by the complainant.

C. Presumption of Innocence and Reasonable Doubt

- [76] Any answer to this question begins with the principle, set out in s. 11(d) of the Charter of Rights and Freedoms, that a person charged with an offence has the right to be presumed innocent until proven guilty. In the context of a criminal trial, at least, this means the accused cannot be found guilty unless, the Crown proves every element of the offence beyond a reasonable doubt.
- [77] Mr. Porcher does not have to prove anything. As noted by Molloy J in *R. v. Nyznik*, 2017 ONSC 4392 at para. 16-17:
- [16] It is sometimes said that the application of these principles [of reasonable doubt] is unfair to complainants in sexual assault cases, that judges are improperly dubious of the testimony of complainants, and that the system is tilted in favour of the accused. In my opinion, those critics fail to understand the purpose of a sexual assault trial, which is to determine whether or not a criminal offence has been committed. It is essential that the rights of the complainant be respected in that process and that decisions not be based on outmoded or stereotypical ideas about how victims of assault will or will not behave. However, the focus of a criminal trial is not the vindication of the complainant. The focus must always be on whether or not the alleged offence has been proven beyond a reasonable doubt. [T]he presumption of innocence, placing the burden of proof on the Crown, and the reasonable

doubt standard are necessary protections to avoid wrongful convictions. While this may mean that sometimes a guilty person will be acquitted, that is the unavoidable consequence of ensuring that innocent people are never convicted.

[17] Although the slogan, "Believe the victim" has been popularized of late, it has no place in a criminal trial.

[78] As Molloy J would of course agree, a complainant may be believed if that is what an appropriate and even-handed analysis of credibility suggests is appropriate. However, it is not consistent with a fair criminal trial to employ a presumption that complainants are to be believed. On the contrary, the relevant presumption is the presumption of innocence, which can only be displaced by proof beyond a reasonable doubt.

[79] In *R. v. Lifchus*, [1997] 3 S.C.R. 320 at para. 36, Justice Cory summarized the principle of proof beyond a reasonable doubt which, as noted in *Nynik*, is designed to prevent wrongful convictions, as follows:

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

[80] The burden of proof does not apply to individual pieces of evidence. Nor does it apply to specific facts, other than those that constitute elements of the offence. What the Crown has to do is prove each element of the offence beyond a reasonable doubt, either by direct evidence or, circumstantially, as the only reasonable inference from the established facts.

[81] In this case, as in many sexual assault or sexual touching trials, the Crown's case turns on the evidence of the complainant, and the accused has provided evidence that the alleged touching did not occur. As such, the trial turns on an assessment of credibility: *R. v. T.A.P.*, 2022 BCSC 316 at para. 4. It is not, however, a "credibility contest": *R. v. J.H.S.*, 2008 SCC 30 at paras. 9, 13.

- [82] 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. To resolve the outcome simply by accepting one version of events over the other is inconsistent with the presumption of innocence and the requisite standard of proof: T.A.P. at para. 17.
- [83] Rather, I must, in my role as trier of fact, follow the analysis set out at in W.(D.) at pp. 757-58. This test was built on in R. v. H.(C.W.) (1991), 68 C.C.C. (3d) 146 at p. 155 (B.C.C.A.). I am going to use the formulation in R. v. Ay (1994), 93 C.C.C. (3d) 456 at pp. 476-77:
- (a) If the trier of fact believes the accused, they must acquit.
 - (b) If the trier of fact does not know whether to believe the accused, they must acquit.
 - (c) If the trier of fact does not reject the evidence of the accused, they will have a reasonable doubt and must acquit.
 - (d) If the trier of fact disbelieves the accused, that is if they reject his or her evidence as untrue, they have to be convinced beyond a reasonable doubt of the guilt of the accused on the whole of the evidence before they can convict.
- [84] In each of the first three tests, it is understood that what is at issue is whether the trier of fact believes or does not know whether to believe or does not reject the exculpatory evidence of the accused; i.e. the evidence that, if accepted, is inconsistent with a finding that one or more of the elements of the offence has been made out.
- [85] The trier of fact need not acquit if they believe the accused about some fact that is collateral to guilt. On the other hand, the first three tests apply not just to the exculpatory evidence of the accused but to all exculpatory evidence as well, including if led by the Crown.
- [86] The final test, arrived at only if the exculpatory evidence does not raise a reasonable doubt, is whether the whole of the evidence, both inculpatory and exculpatory, supports a finding that the guilt of the accused has been established beyond a reasonable doubt.
- [87] In this case, the accused gave the exculpatory evidence that he did not touch the complainant below the belt. Thus, if I believe, do not know whether to believe or fail to reject this evidence, I must acquit him. And even if I reject his evidence, I must still acquit him unless the complainant's evidence, along with the other evidence in the Crown's case, is sufficient to establish beyond a reasonable doubt all the elements of the offence.
- [88] In assessing the accused's credibility, I may (and indeed must) have reference to the Crown's evidence: R. v. Redden, 2021 BCCA 230 at para. 80. This of course includes the complainant's evidence. However, I cannot simply reject the accused's evidence as a consequence of believing the complainant: R. v. Guan, 2002 BCCA 542 at para. 24.

- [89] I must not apply more rigorous scrutiny to the evidence of the accused than to the evidence of the complainant: *R. v. Roth*, 2020 BCCA 240 at para. 7, although of course if I apply the same level of scrutiny I may come to different conclusions. I can accept all, part, or none of a witnesses' evidence: *T.A.P.* at para. 35.
- [90] To put it simply, the ultimate question for me, as trier of fact is whether, on all of the evidence, I am left with a reasonable doubt as to Mr. Porcher's guilt. A lack of credibility on his part does not equate to proof of guilt beyond a reasonable doubt, although a finding that he is credible would equate to an acquittal: *R. v. D.J.M.*, 2021 BCSC 1024 at para. 42.
- [91] It is not strictly necessary for me, as trier of fact, to consider the accused's exculpatory evidence first to follow the principle in *W.(D.)*: *R. v. Vuradin*, 2013 SCC 38 at para. 21. However, it is often a useful approach. In *R v. Mann*, 2010 BCCA 569 at para. 19, Chiasson JA cited, with apparent approval (see para. 31), the following analysis from the factum of the appellant in that case:
- [19] ...
33. *W. (D.)* recommends an approach that has the trier of fact commence by considering the accused's testimony, before assessing that of other witnesses. Such an approach is sensible. First, it provides the fairest process for the accused: his or her testimony may be evaluated with a fresh eye and an open mind, unencumbered by findings of credibility in relation to other witnesses. This helps to ensure that the burden of proof remains wholly with the Crown. It avoids the situation where the accused is expected to affirmatively prove his case in order to be acquitted (which of course amounts to a reversal of the burden of proof). Another advantage to having the accused's testimony considered first is that doing so is more consistent with the standard of proof beyond a reasonable doubt. By looking first to the accused's account and considering whether it raises a reasonable doubt or contributes with other evidence to a reasonable doubt, the focus remains on the proper question - whether a reasonable doubt arises in the case. A further benefit from the *W. (D.)* approach is rooted in logic and efficiency: if the accused's account raises a reasonable doubt, there is no need to go further into the analysis: the proper verdict is an acquittal.
- [92] I will follow the approach arguably recommended in *Mann*. I will consider Mr. Porcher's testimony first to consider whether it raises a reasonable doubt, either on its own, or in combination with other evidence. Only if I conclude it does not will I analyze the complainant's evidence to consider whether it, along with other Crown evidence, establishes Mr. Porcher's guilt beyond a reasonable doubt.

D. Factors for Weighing Credibility and Reliability

- [93] I should refer briefly to the factors for weighing credibility. In deciding what weight to put on a witness's evidence, it is important to distinguish between credibility, in the sense of veracity or subjective truthfulness, and reliability, in the sense of objective accuracy, which is about the witness's ability to observe, recall and recount what happened: *R. v. H.C.*, 2009 ONCA 56 at para. 41, appv'd in *R. v. Plehanov*, 2019 BCCA 462 at para. 51.
- [94] Obviously, if a witness is lying or being deliberately misleading, then their testimony cannot be a reliable basis for fact finding. But the converse does not hold. A witness may be telling the truth from their own perspective, but their testimony may be wrong either because of a failure of memory, of perception or of ability to express themselves.
- [95] In *R. v. P.A.*, 2024 BCSC 282 at para. 36, Watchuk J. adopted this helpful summary from *R. v. Parent*, 2000 BCPC 11 of a non-exhaustive list of factors that courts have considered in credibility and reliability analysis. These factors are non-exhaustive:
- a) The witness's ability to observe the events, record them in memory, recall, and describe them accurately. These factors all go to reliability.
 - b) The external consistency of the evidence. Is the testimony consistent with other, independent evidence which is accepted?
 - c) The internal consistency of the evidence. Does the witness's evidence change during direct examination and cross examination?
 - d) The existence of prior inconsistent statements or previous occasions in which the witness has been untruthful.
 - e) The "sense" of the evidence. When weighed with common sense, does it seem impossible or unlikely? Or does it "make sense"?
 - f) Motives to lie or mislead the court, namely bias, prejudice, or advantage. To consider the obvious possible motive of every accused person to avoid conviction would place an accused at an unfair disadvantage and should not be the basis for rejecting an accused's testimony. When considering the complainant's evidence, I will consider the Supreme Court of Canada's most recent guidance on this factor in *R. v. Gerrard*, 2022 SCC 13 [Gerrard].
 - g) The attitude and demeanour of the witness. Are they evasive or forthcoming, belligerent, co-operative, defensive, or neutral? However, this factor must be approached with caution. In assessing demeanour, a judge should consider all possible explanations for the witness's attitude, and be sensitive to individual and cultural factors, which may affect demeanour. Because of the danger of misinterpreting demeanour, it is unwise to rely on this factor alone.

- [96] Since the complainant was (and remains) a minor, when I consider his credibility, I must have regard to the principles articulated by the Supreme Court of Canada in *R. v. B.(G.)*, [1990] 2 S.C.R. 30 at 54-55, 56 C.C.C. (3d) 200 and *R. v. W.(R.)*, [1992] 2 S.C.R. 122 at 132-34, 74 C.C.C. (3d) 134 in relation to the evidence of children, which include:
- a) Courts should take a "common sense" approach when dealing with children's evidence.
 - b) A flaw, such as a contradiction in a child's evidence, should not be given the same effect as a similar flaw in an adult's testimony.
 - c) A child may not be able to recall all the details of an event, such as the time and place, while still accurately recalling what happened to them and who did it.
- [97] This does not mean the standard of proof is lower when dealing with children, or that their credibility and reliability should not be carefully assessed: *B.(G.)* at p. 55. The Crown must still prove its case beyond a reasonable doubt. To the extent this depends on the complainant's credibility and reliability, that credibility and reliability must be critically scrutinized. That scrutiny should, however, include taking into account differences in how children experience the world. Errors or inconsistencies that would sensibly be attributed to lack of credibility in an older person might not be in a child.
- [98] As the Supreme Court of Canada put it, the standard of a "reasonable adult" may not be appropriate when assessing the evidence of a child: *B.(G.)* at p. 55. Of course, this assessment must be sensitive to the age and development of the child.
- [99] In this case, the Court must consider the complainant's age at the time of the alleged incident and police statement, which was 14, as well as his age at the time of his testimony in court, which is 17.

IV. Mr. Porcher's Evidence

- [100] Following the approach suggested in *Mann*, I will begin with the accused's evidence to determine whether it is capable of giving rise to a reasonable doubt. At this stage, the rest of the evidence is relevant to the extent it sheds light on the accused's credibility.
- [101] In his testimony, both in direct and on cross-examination, the accused emphatically denied that he touched the complainant's genitals or buttocks in the early morning of April 25, 2022. He testified that he only gave the complainant a back massage, and did not touch him below the belt or in his front. He denied any sexual purpose.
- [102] This evidence is clearly incompatible with guilt. As a result, unless the accused's credibility is sufficiently discredited that I reject his testimony, I must acquit.

- [103] I note that this is clearly a question of credibility, not reliability. With the exception of very typical memory lapses after two years, I find that the accused had a high level of ability to observe, remember and recount details. He was very precise. On the critical exculpatory points, the accused had the indicia of reliability, as opposed to credibility. The issue is thus whether there is enough reason to conclude that the accused has been lying to reject his evidence.
- [104] I do not consider that anything about Mr. Porcher's demeanour weighs in either direction. He was very careful and unemotional when giving his evidence. This is compatible with credibility or non-credibility. I give this factor no weight. It is not a basis to reject his evidence.
- [105] I also give no weight to the factor of motive to fabricate. In this respect, Mr. Porcher is in no different position than any other person accused of a crime. This is also no basis to reject his evidence.
- [106] The important factors here are external and internal inconsistencies and the "sense" of his evidence. As I will explain, these give rise to serious concerns about the accused's credibility. I note, though, that some of the inconsistencies raised by the Crown are not very important. For example, in a contemporaneous police statement, the accused said he had a conversation with the complainant during the April 25 back massage, but during his court testimony he said he was silent during the back massage. At trial, the accused said he never saw the complainant with a bleeding nose before the night in question. In a police statement, he said he rarely saw the complainant with a bleeding nose, but that he had done so when the complainant was under stress.
- [107] These discrepancies seem to me to be easily explained in terms of ordinary failures of memory and have no implications for credibility.
- [108] A much bigger deal was the accused's explanations for flouting IDM's rules to protect youth from sexual exploitation and its employees from being accused of sexual misconduct. These raise issues of internal consistency, external consistency and "sense".
- [109] The external evidence, and in many cases the accused's admissions, shows he did the following:
- a) The accused had physical contact with the complainant, including roughhousing/play fighting and massages, including when the complainant was in a state of undress.
 - b) The accused communicated through text message and Snapchat with the complainant, not using IDM's phone, including when he was off work.
 - c) The accused met with the complainant after the complainant's curfew in a car in a nearby park.

- d) The accused stayed later than he was supposed to without supervisory permission, including on one occasion on his own time.
- [110] Without exception, the accused admitted to these breaches in his testimony. The defence says that I should say this bolsters his credibility, but I consider this just to be a neutral factor, since the external evidence that he did so was so clear.
- [111] More important from a credibility perspective is that the accused's explanations for why he breached these rules were inconsistent and implausible. The accused conceded in cross-examination that he understood why those rules were in place. He nonetheless claimed that he was a conscientious employee and his only motivation, other than salary, was the well-being of the youth in his care. He claimed that at various points that he was motivated by a desire to follow his employer's rules, by keeping the door to the complainant's bedroom open and in reporting when he stayed late. This is inconsistent with his admissions that he routinely flouted other rules.
- [112] The accused's explanations for why he flouted the rules do not make sense. The accused clearly knew he was putting not only his job, but his future as a police officer, at risk by messaging the complainant and especially by meeting him in his car after curfew in a park. He hid his behaviour.
- [113] The accused said he stayed late because the complainant "barricaded" him from going. I find that this is a hyperbolic way of characterizing the fact that the complainant wanted to spend time with him, a reaction the accused was clearly cultivating. The complainant could not have physically blocked him from leaving. By all accounts, he was small for his age at 14. The accused was a physically fit, adult male, with police training.
- [114] The accused claimed that if he had moved past the complainant's symbolic blocking behaviour, this would not be a "caring touch". This was a strange, and concerning, response. It is clear that at most the complainant was giving symbolic resistance. There would be nothing wrong with pushing past him. In the event that the accused genuinely thought this was impossible without risk of harm, then he could have sought assistance. There is no reasonable explanation for why he did not. Certainly this account does not explain the accused's consistent pattern of staying late and spending unscheduled time with the complainant, despite his employer's warnings.
- [115] Further, after the complainant left Metchosin House, the accused met with him, in his car, in a park, during the early morning hours, after the accused's shift and the complainant's curfew. Not surprisingly, he hid these meetings from his co-workers and employer. He explains these meetings as occurring because the complainant threatened suicide. Accepting that this happened, this makes no sense as an explanation. The accused - and other witnesses - testified that the complainant would make extravagant threats of self-harm, but these were not taken or intended seriously. If the accused had been seriously concerned, he would have documented the threat in an Incident Report. Meeting him after curfew in a car could not sensibly be a way to keep him from self-harm. In my view, the

only rational conclusion is that this is a pretext and the accused met the complainant after dark because he had developed a fixation on the complainant.

- [116] The accused's claimed that he took the complainant's threats on these occasions more seriously because the complainant referred to slashing his throat. Again, assuming that this is an accurate statement of what the complainant said, it does not make sense for someone who testified repeatedly that the complainant was often hyperbolic and made implausible threats of self-harm, to view the fact that he referred to slashing his throat as an exception to a hyperbolic threat of self-harm.
- [117] In direct, at least, the accused claimed that IDM had given him permission not to follow their rules about staying late. However, these claims were clearly false and were essentially admitted to be false on cross-examination. In fact, IDM management had warned him to stop on at least two occasions.
- [118] The accused repeatedly asserted he broke these rules to promote the complainant's well-being. This is not consistent with his knowledge that these rules were in place to protect youth from sexual exploitation.
- [119] The accused at one point denied he was trying to hide the massages, but this is not plausible. He admitted he only told Ms. Claire and expressed anger that she reported him, calling her "two-faced" and expressing his expectation that she would cover for him. It is very clear that he wanted to hide that he was giving massages to a topless complainant in his bedroom, since this would be a serious violation of IDM's rules, put in place to protect youth from sexual exploitation, as the accused understood.
- [120] The accused knew that he had been warned for having an unprofessional relationship with the complainant, and he must have known that if IDM had known about the massages, this would have increased their concern, probably to the point of firing him. He was clearly trying to hide these massages and his claim to the contrary undermines his credibility.
- [121] The accused's explanations for his reasons for accessing the complainant's electronic file on April 26, 2022 are inconsistent and do not make sense. He initially said that he did so out of concern for the complainant. This did not make sense, since on his evidence, he left the complainant calm and deciding to wait to see Ms. Claire in the morning. He was not going to have any role in the complainant's care for at least three months. His initial claims that he had valid employment reasons to access the complainant's file are not credible.
- [122] In cross-examination, the accused then said he accessed the complainant's file "For personal gain to see how he [the complainant] was doing." He denied that "personal gain" meant to see if a sexual assault had been reported, but provided no reasonable explanation for using that phrase. Since the accused was not going to see the complainant for at least three months, it is difficult to see what "personal gain" could have meant, other than to avoid being found to have done things that he should not have done.

- [123] Further, the accused's explanations for why he sent the complainant the Snapchat and text messages make no sense, and have internal contradictions. Those messages clearly suggest that the accused's immediate reaction to reading Ms. Ibrahim's Incident Report was that the complainant was talking about him, even though the report clearly says the complainant did not identify who had touched him and the description could have applied to other resource workers.
- [124] In his direct evidence, the accused initially testified that he did assume the disclosure was about him. He said his reason for that assumption was that he recognized that the messages were "inappropriate", since they were contrary to IDM's rules, although they were not sexual. There are several problems with this explanation. One is that the accused told the RCMP in his statement shortly afterwards that he did not regard the messages as "inappropriate" and testified in court that he only came to the view that they were in the time between that statement and trial. If this is true, then it would not be a reason why he would have assumed the Incident Report to be about him.
- [125] In any event, even if he thought the messages were inappropriate in the sense of being against the rules, albeit not sexual or criminal, then this would not explain why an Incident Report that referred to a report of sexual assault would be about him. On the complainant's account, he had no reason to think that the complainant had any negative reaction to the message or to what happened on April 25.
- [126] Later in his testimony, the accused contradicted himself and said he thought the disclosure might be about someone else. He then claimed that he was trying to meet with the complainant in order to investigate who that might be. The change in testimony, on such a central issue, is damaging to the accused's credibility in itself. Further, the second version is not consistent with the accused's testimony that he "panicked" on reading the Incident Report by way of explanation of why he sent the Snapchat and text messages and tried to phone the complainant so many times.
- [127] It is also not consistent with the accused's subsequent testimony that he was "mad" at the complainant for saying false things about him when he tried to get the complainant to meet him in the park. At no point in his numerous messages does the accused ask the complainant who assaulted him or suggest he wants to talk about that.
- [128] Finally, the accused's credibility is undermined by his explanations of what he meant in his Snapchat and text messages. These explanations also are contradictory and do not make sense.
- [129] The accused attempted to explain his comment, in the Snapchat message, that "I didn't do that for me" as referring to the IDM-ordered separation. But on his original testimony throughout his examination in chief, the separation was not something the accused did at all, since it was imposed by IDM management, and this is by both the complainant's evidence and the accused's evidence, what the accused communicated to the complainant.

- [130] Moreover, the context in which he says it makes that explanation completely implausible. The message starts with "Holy shit, I just read the IR". That suggests he thinks the complainant would know that there was an IR referring to something unusually serious, and that event is the subject of the text message. That could be a sexual assault, but it could not be the IDM-ordered separation, which the accused and complainant had already discussed.
- [131] When it was put to the accused in cross that the separation was not something he "did" at all, the accused responded, for the first time, that he had had a role in the decision and that he had in fact agreed with IDM's assessment that his relationship with the complainant was unhealthy and could benefit from a separation. This was said for the first time in explanation of this text on cross-examination. It was not put to any of the Crown witnesses. It is inconsistent with the accused's reluctance to stop seeing the complainant, including surreptitiously after his shift and after the complainant's curfew. I consider the change of story to undermine the complainant's credibility.
- [132] Further, the revised story would only be an explanation for the communication if the accused had communicated that he was part of the decision to the complainant, otherwise it would not make sense as a reference. Even if it was true, it would not make sense as a reference in the Snapchat message.
- [133] Neither the accused nor the complainant suggested that the accused had told the complainant that he was part of the decision, and this in particular was not put to the complainant in cross-examination. On the contrary, the suggestion throughout the evidence, up until the accused was confronted with the Snapchat message in cross-examination, was that the accused was conveying a decision he reluctantly had to abide by.
- [134] There is also a grammatical problem with the claim that "I didn't do that" referred to the separation. Further, the full line of the message is "I didn't do that for me you were having a really tough day. Thought it would be what you wanted." The phrase "you were having a really tough day" is in the past imperfect or past continuous ("were having"). This implies that the "really tough day" occurred before whatever action "I didn't do that for me" was referring to. The "really tough day" can only be April 24 to 25, including the announcement of the separation and the incident with the complainant's brother. Since the separation, and the announcement occurred before the really tough day, it could not have been what was referred to in "I didn't do that".
- [135] In addition, it would be a complete non sequitur to refer to the "really tough day" as an explanation for the separation. By contrast, it does make sense if the accused had a distorted belief that sexual activity would be helpful for the complainant after a difficult day. This also would make sense of adding the sentence "Thought it would be what you wanted." I will address these inferences at the last stage of the W.(D.) analysis, but at this point I make the finding that the accused's explanation for the Snapchat message undermines his credibility.

- [136] The complainant testified that the "it" in "Thought it would be what you wanted" referred to the back massage. Again, this is not consistent with ordinary English usage. No new noun or noun phrase is introduced after "that". The only reasonable interpretation would be that "it" and "that" have the same referent. The accused uses language effectively, and I find that this explanation is not credible.
- [137] I do recognize that text messages and Snapchat messages use abbreviated forms, but they do not, generally speaking, introduce references that are completely different from the previous reference without actually having a noun phrase introduced.
- [138] Moreover, the claim that the back massage was what the accused thought the complainant wanted also makes no sense in the factual context. There was no reason for the accused to think that the massage was unwanted by the complainant: on the accused's testimony, he had massaged the complainant dozens of times, always when the complainant asked him to. The complainant had not communicated with him at all since that point. The only new information the accused had was the Incident Report, which is what he sets as the subject matter of the Snapchat message. The Incident Report, of course, indicates what the complainant found to be unwanted, which was being touched inappropriately in a sexual assault.
- [139] The accused testified that in his phrase "It was really tough to do that but I thought it might help you pal", "that" and "it" both refer to the IDM-initiated separation, and not any touching. If this were the only thing the message said, this might be plausible, if we ignore the fact that the separation was not something the accused did and the complainant had no reason to think it was something he did. However, the accused's account is implausible in a message that is specifically about the Incident Report, which is what the accused says he wants to talk about. It also would be a non sequitur after talking about "a really tough day" and "what [the accused] thought you wanted."
- [140] Again, nothing about the accused suggests he is unable to use English in a way that disambiguates pronoun references. I recognize that language use in texts and Snapchat messages is different from ordinary spoken or written language. However, it is clear to me that no ordinary text message user would shift the references in pronouns and demonstratives in the way the accused claims he did. He is generally precise in his speech, and his texts reflect that, adjusting for the informal idiom that is typical in texts.
- [141] The accused's account of why he texted that he was "sorry", "so sorry" and would "let you come punch me in the face rn" also makes no sense. The accused said he was not actually sorry and that he was just encouraging the complainant to come to the park by offering roughhousing, which the complainant enjoyed.
- [142] In the first place, if this was true, then it was dishonest for the accused to claim to the complainant that he was sorry if he was not. The entire text is emotional manipulation, for which the accused had no legitimate reason to engage in.

- [143] Moreover, on the accused's version of events, it is also not plausible because on the accused's version of events, there was no reason that the complainant should expect or want him to be sorry. The accused initially claimed that offering to be punched in the face was "humorous". This is highly implausible in light of the tone of the texts, which clearly come across as desperate pleading by the accused. The accused then conceded, and this was put to him in cross-examination, that the reference was not humorous, but said he was trying to encourage the complainant to come because the complainant liked to punch him in roughhousing.
- [144] Again, this would be manipulative and, in any event, is implausible. Punching in the face is not just roughhousing, especially in the context of a meeting in a car in a park late at night. The only reasonable inference was that the accused was offering to be punished as amends for what he had done in order to encourage the complainant not to disclose what he had done to IDM or to the police.
- [145] In general, the accused's explanations for his text messages are obviously after-the-fact rationalizations and implausible ones. They show the accused has no compunction about lying. The only explanation that had the ring of truth was for the message in which the accused said "This is going to make it worse. I'm literally losing my shit right now."
- [146] The accused said what he meant was that "if he [i.e. the complainant] continues with these false allegations, [there will be] serious consequences." That has the ring of truth about his real reaction, leaving aside whether the allegations were false. Clearly, the accused thought the allegations in the IR, which are the only allegations he could have been referring to in this statement, were allegations about him and would have serious consequences if they were connected to him, that he was angry and panicked about it, and wanted to persuade the complainant not to identify him.
- [147] This statement, i.e., the "this is only going to make it worse" statement, under the accused's own interpretation, contradicts his claim that he was meeting with complainant to investigate who engaged in sexual assault. It instead shows that he knew the Incident Report was about him.
- [148] Finally, the text message sent after the accused was detained in the park, so the text message sent about a week later, the last text message, also is very concerning for the accused's credibility. The accused admitted the reason he sent that message despite being warned not to have any contact with the complainant, was to remind the complainant of what he would lose if he went through with his story.
- [149] I recognize the accused is not charged with obstruction or breach, but this was obviously an attempt to subvert the criminal justice process, one that an individual with police training could not possibly have been engaged in honestly. When asked by Crown counsel why he sent the text, the accused said he could not tell her why. He admitted that he wanted to remind the complainant of what he would lose if he persisted in allegations of sexual abuse.

- [150] I therefore find that even without having to refer to the complainant's evidence, I conclude that there are multiple reasons why I must reject the accused's evidence about what happened when he was alone with the complainant. The accused's evidence is internally inconsistent in ways that cannot be explained by slipups or mis-rememberings, and it is inconsistent with the established facts and always in a self-serving direction. It often makes no sense.
- [151] I find that the accused has demonstrably lied to the court repeatedly.
- [152] While it is possible to accept some, but not all, of a witness's evidence, I decline to do so in this case, at least with respect to any of the accused's evidence with respect to things that happened when he was alone with the complainant. The accused was lying about his intentions in sending the texts and about his breaches of his employer's rules. He did so without compunction and while speaking smoothly in a way that would be plausible if it was not provably false. I am persuaded he is a practised liar and manipulator. I therefore cannot give his testimony denying the alleged assault any weight at all. I not only do not believe it, I know not to believe it, and I reject it as not capable of giving rise to a reasonable doubt.

V. The Complainant's Evidence

- [153] Since I reject the accused's evidence as not giving rise to a reasonable doubt, I must consider whether the evidence, including the inculpatory evidence, is sufficient to positively conclude, beyond a reasonable doubt, that the accused committed the offences of which he is charged. This is a separate inquiry and it is not sufficient just to find the accused to be not credible.
- [154] The inculpatory evidence consists essentially of the complainant's testimony about the alleged assault and inferences from the accused's Snapchat and text messages, which are after-the-fact evidence that, in the appropriate case, can be probative of a material fact: *R. v. Calnen*, 2019 SCC 6 at para. 107.
- [155] I will start with the video statement the complainant provided to Constable Lori Horne of the West Shore RCMP on the afternoon of April 27, 2022. This statement was adopted by the complainant in direct examination and I admitted it as evidence under s. 715.1 of the Criminal Code.
- [156] In the statement, the complainant says the following about the alleged assault (filler words omitted):
- [I]t's two in the morning. Matthew brings me to bed and I guess he thought I was just fully asleep. And then he started touching me and I didn't say anything 'cause I was scared. So then I eventually did [wake] and he was trying to get me to go back to sleep and he was, "[Go] back to sleep [or I will] leave" and I was "okay. I'm not tired. I'm going to stay awake and wait for Shibby".

[157] When asked to provide more detail about the touching, the complainant said the following (filler words omitted):

[H]e was just rubbing my back and then he started putting his hands in my pants. I was, "what the fuck kinda thing". But I was scared to say anything. He was grabbing below the belt[] He was grabbing on my dick. And I didn't know what to do. So after [] I kinda pretended to wake up. And he kept trying to get me to go back to bed and I just wouldn't.

[158] When asked to describe where the accused's hands were during the alleged assault, the complainant said (filler words omitted):

A. First the back, and then he lifted me up and put [them] in the front.

Q. When he put the hand down the back of your pants did he rub your bum at all or did he penetrate you at all?

A. No, he was rubbing, rubbing my butt, yes.

[159] In the context, I take the original "no" in the last answer to be in response to the question about penetration and the "yes" to be in response to the question about touching of the buttocks.

[160] In the video statement, the complainant testified that the accused touched him with his entire hand. In direct examination, he clarified that when he said the accused "lifted him up", he meant that he was turned upwards on one side by the accused's hand that was touching his front. The complainant estimated that the alleged assault took about 20 minutes. He was unable to say whether he had an erection or ejaculated, but said he did not think he did. On cross-examination, a previous statement that the accused started by touching his testicles was one that he adopted.

[161] As with the accused, I do not give weight one way or the other to the complainant's demeanour. He was clearly reluctant to give a statement to the police or to testify in court. He reacted angrily in cross-examination when it was suggested he was not telling the truth, although he was willing to concede facts that did not necessarily make him look good. This demeanour is consistent with telling the truth or not telling the truth, and I do not put any weight on it one way or the other.

[162] The defence argues that the complainant gave different and contradictory versions of the alleged assault to different people, noting the following:

- a) In documenting the disclosure to her, Ms. Ibrahim wrote that the assailant (who he would not identify) "went into his bedroom and touched him inappropriately". In the version the complainant provided to the police and the court, the accused was already in the bedroom at the time of the assault.

- b) The complainant told Ms. Claire that he heard rustling and heavy breathing and was "pretty sure" that the accused was masturbating. He did not mention either of these things to the RCMP despite being told to be as specific as possible.
- c) The disclosure to Mr. Bracken suggested he woke up to a hand on his private parts, but in his evidence the complainant stated he never fell asleep.

[163] In my view, these are not inconsistencies of the kind that would put the complainant's credibility (as opposed to reliability about matters of detail) in doubt:

- a) Starting with the fact that Ms. Ibrahim wrote down that someone "went into" the complainant's bedroom and assaulted him, there is nothing inconsistent about the statement if taken literally. On the complainant's account in his testimony, the accused went into his bedroom and subsequently assaulted him. To be sure, in ordinary conversational English, there is an implication that when a person is described to have done A and B, B occurs more or less immediately after A. If the statement was a direct quote, it might imply that the assault occurred right after the assailant "went into" the room. But Ms. Ibrahim was reporting the gist of what she heard, not a direct quote, in a context where the complainant was trying to explain why he was not sleeping in his bedroom and did not want to identify an assailant. These were the salient facts and we do not have a direct quotation or intonation. I am therefore not prepared to find any inconsistency.
- b) The complainant explained that he did not mention his suspicions that the accused was masturbating, which he related to Ms. Claire, to the police because he was not sure and did not want to make allegations he was not sure about. This is appropriate and logical, and consistent with the complainant reluctantly disclosing and not wanting to say anything wrong. The accused argues he should at least have mentioned rustling and heavy breathing sounds, but his failure to do that is, at most, an "incremental disclosure": T.A.P. at paras. 67-71. Again, I see no inconsistency.
- c) The complainant apparently told Mr. Bracken that he was woken up by the assault. In my view, his account in court is consistent with having nodded off, being woken up, and then pretending to be asleep. It would be hard for the complainant to accurately perceive whether he had even a very short period of being unconscious. Further, there is evidence of the complainant referring to himself as "sleeping" in contexts where this must have been "should have been sleeping". If there is a discrepancy, it is a minor one that can be attributed to ordinary difficulties in perceiving, remembering and describing traumatic events, particularly at the complainant's age, and I am not prepared to give it any weight for credibility.

- [164] The accused argues, on the basis of common sense, that the complainant would have remembered whether he had an erection and especially whether he ejaculated, and therefore must be lying when he said he did not recall these details. In cross examination, the complainant recalled the accused touching his penis with his "fingers", but in his statement he said it was with the whole hand.
- [165] I disagree with the accused that "common sense" dictates that the complainant would be sure about whether he had an erection or ejaculated. I do not think that is a safe inference at all. The complainant said he felt fear and was debating what he was going to do. The mere fact that he was somewhat tentative about his belief that he did not have an erection or ejaculate is not a sign that he was lying. While I accept that he knew what erections and ejaculations were, I need to take into account the fact that he was 14 at the time and that this was a traumatic event. The fact that he was careful not to be too sure in his answers bolsters, rather than undermines, the complainant's credibility.
- [166] Ms. Bottrill told the RCMP that she met with the complainant and he disclosed to her that the accused wanted him to urinate in front of him. On the stand, the complainant denied telling this to Ms. Bottrill and denied having any post-incident meeting with Ms. Bottrill. Assuming Ms. Bottrill's memory is accurate, the complainant must have either forgotten this disclosure or be lying about it. In my view, a lack of memory about a less serious disclosure would not be surprising, given the complainant's age and the elapse of two years. Partial disclosures at different times are not inconsistencies. I see no reason to consider this to reflect on the complainant's credibility.
- [167] The Crown argues that the complainant's credibility can be shown from the fact that he did not exaggerate and in fact said no to suggestions that would have made the alleged assault more culpable, such as that the accused threatened him or took photos. I accept that this is a factor that suggests the complainant was not lying.
- [168] In considering the complainant's credibility, I have to consider that the complainant in 2022 clearly was willing to lie to authority figures to get what he wanted and to get out of trouble. He would threaten self-harm and unrealistic violence against others, pretend he was sick to avoid school and the accused's evidence was that he on two occasions denied that he was involved in mischief to police officers.
- [169] I accept that the complainant could be manipulative and deceitful in trying to get what he wanted in the IDM system. I accept that he would lie to authority figures to get himself out of trouble. Given my findings about Mr. Porcher's credibility, I cannot say that I am persuaded that the events with the police happened. Nonetheless, because of the fact that it is a reasonable doubt finding, I am willing to presume that these events did occur. But taking into account his age and situation, I do not think this provides a serious reason to doubt that he was telling the truth about a serious allegation of criminal behaviour to the police. There is no evidence that he lied to get other people into trouble, let alone about such a serious matter. And so while I take into account his willingness to lie to authority

figures overall in assessing credibility, I do not give it a great amount of weight in relation to the truthfulness of his testimony.

- [170] The accused argued that the complainant had a motive to lie about the assault. A defence theory, put to complainant, was that he did not want the accused to stop being in his life and so wanted to do something that would stop him from being a police officer, and that a false allegation of sexual assault would do this. The complainant denied this theory and there was no direct evidence for it.
- [171] Further, this theory makes no sense. For a 14-year-old, the complainant knew a lot about how the system worked. He knew what a pedophile ("skinner") was. Although it was not specifically put to him, I have no doubt that he understood that if the accused faced a serious allegation of sexual misconduct against a youth in care, he would not remain an IDM employee. The alleged motive to lie that he made a statement to the police in order to stay in touch with the accused makes no sense at all.
- [172] It was also suggested that the complainant was angry at the accused and wanted revenge on him. However, there was no evidence of this at all. All the evidence was that the complainant had a strong bond with the accused and that the complainant had comforted him about the separation. There was no suggestion that the complainant blamed the accused for the separation. On the accused's account, they left on very friendly terms.
- [173] The only reason for the complainant to have had an issue with the accused provided in any of the evidence was the alleged assault.
- [174] Indeed, the evidence is that the complainant was, and remains, reluctant to incriminate the accused. He tried to protect the identity of the assailant when he made his first disclosure. This is not only a lack of evidence of a motive to harm the accused, but positive evidence that he did not want to do so.
- [175] In my view, the evidence is that the complainant had no motive to lie, and indeed had a motive to try to protect the accused (as he initially did). Up until the alleged assault, he got along well with the accused and had every reason to expect to see him again in a few months. The evidence suggests that he did not want to be a "snitch" and he did not want to participate in the process of giving disclosures, police statements and testifying in court. This was clear from observing his testimony both on the video and in court.
- [176] The complainant was, on his account, scared of the accused, who was bigger than him, had police training, and reacted aggressively to the disclosure. This fear was confirmed by Mr. Bracken.

- [177] The complainant only made his initial disclosure to Ms. Ibrahim because he had to explain why he was not sleeping in his room. He tried to protect the accused's identity, until the accused repeatedly phoned him and he showed Ms. Scott that "Matthew" was phoning him. He was consistently reluctant giving statements to police and testifying in court. This is evidence that he would rather not make these allegations and had no motive to lie.
- [178] In *R. v. Gerrard*, 2022 SCC 13 at para. 4 (internal citations omitted), the Supreme Court of Canada gave the following guidance on the use of lack of evidence of a complainant's motive to lie:
- [4] ... Lack of evidence of a complainant's motive to lie may be relevant in assessing credibility, particularly where the suggestion is raised by the defence. Absence of evidence of motive to lie, or the existence of evidence disproving a particular motive to lie, is a common sense factor that suggests a witness may be more truthful because they do not have a reason to lie. That said, when considering this factor, trial judges must be alive to two risks: (1) the absence of evidence that a complainant has a motive to lie (i.e. there is no evidence either way) cannot be equated with evidence disproving a particular motive to lie (i.e. evidence establishing that the motive does not exist), as the latter requires evidence and is therefore a stronger indication of credibility -- neither is conclusive in a credibility analysis; and (2) the burden of proof cannot be reversed by requiring the accused to demonstrate that the complainant has a motive to lie or explain why a complainant has made the allegations.
- [179] Taking these cautions to heart, I would say this is a case of evidence that the complainant did not have a motive to lie, and that this bolsters the credibility of the complainant, although on its own it does not establish that credibility.
- [180] This evidence is of course not conclusive: it is hard to imagine conclusive evidence of a lack of motive to lie. However, there is positive evidence of a lack of such a motive. I recognize that the burden of proof is always on the Crown and the accused has no need to demonstrate a motive to lie or to explain why the complainant made these allegations. That being said, based on *Gerrard*, the apparent lack of motive to lie is a "common sense factor" that I can and do rely on in assessing the complainant's credibility.
- [181] Most importantly, the complainant's account gets external corroboration in the accused's reaction to Ms. Ibrahim's Incident Report. The accused's immediate reaction was to assume that the Incident Report was about him. Since there was nothing in the Incident Report that identified him, as opposed to other resource workers, this supports the complainant's account.
- [182] Further, the accused then said, in a communication to the complainant about the "IR" that, "I didn't do that for me you were having a really tough day. Thought it would be what you wanted". In my view, the only reasonable interpretation of what the accused was referring to was a sexual act on the complainant. The "IR" referred to a "report of a sexual assault". Sexual assailants often have the distorted view that their victims will "want" the assault and that this is a positive thing after a "tough day." Saying that this is what the accused thought

would be a way of trying to mitigate his culpability with the complainant to persuade him not to identify him. By contrast, "that" and "it" cannot sensibly be read to refer either to the IDM-ordered separation, which was not something the accused "did", or to the massage, which there was no reason to think, as a result of the "IR", was something the complainant did not want.

- [183] That is also the most reasonable explanation of why the accused would be "sorry", invited the complainant to punch him in the face, and was "sorry it hurt you". Repeated apologies and an offer to inflict violence in order to expiate guilt is only consistent with a serious wrong. There is one wrong that is referred to in the "IR" and it is a reported sexual assault. There is no other reasonable wrong that the accused could be apologizing for on the evidence.
- [184] Sexual interest is also the most reasonable explanation of why the accused was willing to take risks with his job and his future as a police officer in order to meet with the complainant. The roughhousing with a partially unclothed 14-year-old, the frequent texting, the massages and the emotional manipulation are all also consistent with sexual interest.
- [185] There are other possible inferences for what does appear to be a campaign of "grooming", although they would all involve at minimum an unprofessional emotional relationship. However, taken with the rest of the evidence, the reasonable inference is that this behavior, which risked the accused's job and future as a police officer, was in pursuit of sexual interest.
- [186] It is hard to see what inferences are available for why the accused assumed the disclosure in the Ibrahim Incident Report was about him other than that he knew he had in fact committed a sexual assault. If he just thought the massages were inappropriate, he would still have no reason to think that the complainant was claiming they were sexual assaults. He had no reason to think the complainant would be motivated to do that, and no reason to rule out the possibility that another resource worker had sexually assaulted the complainant after he moved to IDM house. But his behaviour is clearly only consistent with the assumption that the complainant was talking about him.
- [187] In conjunction with the complainant's indicia of credibility, the inferences from the accused's behaviour both before and after the alleged assault, persuade me that there is no reasonable doubt that the accused touched the complainant essentially as he described in his evidence.

VI. Finding of Guilt

- [188] Mr. Porcher, please stand up.

[189] Mr. Porcher, please stand up. Mr. Porcher, on the first charge in the indictment that on or about the 24th day of April in 2022, in fact on the 25th of April, 2022, at or near Colwood, in the Province of British Columbia, you did, for a sexual purpose, touch with a part of your body the body of [the complainant], a person under the age of 16 years, contrary to s. 151 of the Criminal Code. I find you guilty.

[190] On the second charge of the indictment, that on or about the 24th day of April, 2022 [INTERRUPTION] , in fact on the 25th day of April, 2022, at or near Colwood, you did sexually assault [the complainant], contrary to s. 271 of the Criminal Code, I also find you guilty.

"J. G. Morley, J."

The Honourable Justice Morley

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