

# SUPREME COURT OF YUKON

Citation: *R. v. T.J.H.*, 2020 YKSC 49

Date: 20201221  
S.C. No. 19-01514  
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

AND

T. J. H.

**Publication of information that could identify the complainant or a witness is prohibited pursuant to s. 486.4 of the *Criminal Code*.**

Before Justice E.M. Campbell

Appearances:

Kevin Gillespie and

Ludovic Gouaillier

André Roothman (by videoconference)

Counsel for the Crown  
Counsel for the Accused

## REASONS FOR JUDGMENT

[1] CAMPBELL J. (Oral): The accused, T.J.H., is charged with one count of sexual assault, pursuant to s. 271 of the *Criminal Code*, and one count of touching the body of a young person for a sexual purpose while in a position of authority, pursuant to s. 153(1)(a) of the *Criminal Code*. The two counts arise from the same alleged event, which is alleged to have taken place approximately 15 to 18 years ago when the accused and the complainant's mother were in a common-law relationship.

[2] It is alleged that during a family camping trip at Little Braeburn Lake, Yukon, the accused entered the tent where the complainant was having a nap, and, while she was sleeping, laid down behind her in a spoon-like position, put one of his hands on her breast, and pressed his erect penis against her buttocks. The actions of the accused awoke the complainant, who stood up and exited the tent as soon as she could.

[3] The Crown called three witnesses at trial: the complainant, her mother, and one of the complainant's aunts.

[4] The accused testified in his defence. In addition, a number of exhibits were filed and some admissions were made during the trial.

### **Legal Principles**

[5] A criminal trial is not a credibility contest between the Crown witnesses and the defence witnesses. The purpose of a criminal trial is to determine whether the Crown has proved the guilt of the accused beyond a reasonable doubt on each of the specific charges before the Court. As such, it would be wrong to decide a criminal case by choosing between conflicted versions presented at trial. In addition, T.J.H. is presumed to be innocent. The burden of proof is on the Crown to prove each of the essential elements of the offences before the Court beyond a reasonable doubt. This burden does not shift to the defence. In addition, a decision must be based on all of the admissible evidence.

[6] T.J.H. testified at trial. T.J.H. also presented other evidence which the defence contends is exculpatory. As conflicting evidence from the Crown and the defence was presented at trial, the framework set out in *R. v. W.(D.)*, [1991] 1 S.C.R. 742 ("*W.(D.)*"), applies. This framework may be summarized as follows:

1. If I believe the evidence of the accused or, in a broader sense, as explained by Justice Paciocco in his article "Doubt about Doubt: Coping with *R. v. W.(D.)* and Credibility Assessment," (2017) 22 Can. Crim. L.R. 31 [at p. 13] — evidence that cannot coexist with a finding that the accused is guilty, I must acquit.
2. If I do not believe the testimony of the accused, but I am left in a reasonable doubt by it, or if I am left unsure whether the evidence that cannot coexist with a finding of guilt is accurate, I must acquit.
3. Even if I am not left in doubt by the accused's evidence or by the evidence inconsistent with the accused's guilt, I must consider, on the basis of the evidence I do accept, whether I am convinced beyond a reasonable doubt of his guilt.

[7] I note that the *W.(D.)* framework does not direct the trier of fact to analyze the evidence in a certain order. In addition, the trier of fact is "entitled to believe all, some, or none of the witness's evidence" (*R. v. S.H.*, 2011 ONCA 215, at para. 8).

[8] Keeping these principles in mind, I now turn to the evidence adduced at trial.

### **The complainant**

[9] The complainant, K.K., was 33 years old at the time she testified at trial. She was born on October 17, 1986. She testified that the accused, T.J.H., and her mother, R.F., started seeing each other when she was in Grade 6, and that he moved in with them when she was in Grade 7. She testified that she was an adult and had already left home when her mother and T.J.H. separated. At the time, she viewed the accused as her stepfather.

[10] K.K. testified that during the Canada Day long weekend in 2003, while she was still living with the accused and her mother, she went camping to Little Braeburn Lake with them and her aunt, C.F. She does not remember what day it was when they arrived at the campsite, nor how many days they stayed there. She testified that they had set up a kitchen area, a campfire, and their tent at the campsite. There were no facilities there. She testified that all four of them slept in the same tent.

[11] K.K. testified that she awoke early one morning of the camping trip to go fishing with the accused. She testified that they went fishing in the accused's white boat and that the boat had an engine. Her mother and her aunt did not go fishing with them. She remembers that day because it was the first time she caught a fish, and that, in total, she caught 14 fish that day. She said that it was very exciting. She also testified that they released all the pike she caught but kept the lake trout for her aunt C.F. She stated that they were on the water fishing for a few hours.

[12] She testified that she is "pretty sure" it was hot that day, probably in the 20s or higher, if she had to give an estimate. She testified that they came back to camp in the afternoon for lunch. K.K. testified that she was excited to show her aunt the lake trout she had caught for her, and that she cleaned the fish with the accused.

[13] Then, as she was tired from getting up early, she went in the tent to have a nap. She testified that there was nobody else in the tent at that time, and that she went directly to her sleeping area in the tent. She does not recall what the sleeping arrangements were in the tent, but her mother would have slept closer to the accused. She testified that the sleeping bags were unzipped and spread out like a blanket. K.K. testified that she probably fell asleep right away. She testified that the first thing she

remembers after that is waking up to the accused's hand being on her breast. He was laying behind her in a spoon-like position and she could feel his erect penis pressed on her buttocks. She testified that the accused was under the sleeping bag with her.

However, she does not recall what side she was lying on, what breast the accused touched, or what hand he used to touch her. She testified that she did not believe the touching was skin to skin. She stated that the accused would have touched her on top of her sweater.

[14] K.K. testified that she was incoherent and groggy when she woke up. She also stated that when she woke up, the accused's hand froze, and that he was just lying still. K.K. testified that she believes the accused was pretending to sleep at the time, but indicated that she was not able to explain why. She testified that it was obvious that the accused was pretending to sleep because his body went from moving to being still. However, she also testified that she does not remember the accused's hand moving because she was just coming out of sleep. K.K. stated that it took a couple of minutes, which seemed very long to her, before she got the courage to get out, and that she did not move prior to exiting the tent.

[15] She testified that it was her first sexual encounter and that she did not know whether what was happening was normal or not. She did not know what to think. She was too scared to turn around and look. She was thinking that she needed to get out of there. She testified that it took a matter of seconds to get out of the tent when she started moving. She got out of the covers, opened the tent, and exited. She testified that she does not recall what she did with the accused's hand when she got up, and that nothing was said in the tent because she was too scared. She also testified that she

quickly looked at the accused before getting out of the tent. She saw him lying there with his eyes closed.

[16] K.K. testified that her mother and her aunt were by the campfire, which was a few feet away from the tent, when she exited the tent. Her mother asked her right away if she was okay. She said yes and left. She testified that she was near the tent when her mother asked her how she was. She believes she went for a walk after that. She then went on to state that she was assuming it was her mother who asked her if she was okay because everything was a blur after what happened in the tent. K.K. testified that she does not recall how long they camped after what happened in the tent, nor does she recall if the accused's behaviour changed towards her during the rest of the camping trip.

[17] She testified that after the events, her relationship with the accused changed. She went from having a good relationship with him to not seeing eye to eye on almost everything. She stated that she tried to avoid him, as she was scared to be alone with him.

[18] K.K. testified that she did not say anything about what happened at the time because she was worried her mother would not believe her. She testified that she was the only child still living at the house at the time, as her older brother and sister had been kicked out of the house.

[19] She testified that she did not consent to the accused touching her and that she did not do anything that would have made him think that he could do that to her.

[20] As for when the event took place, the complainant testified that she believes it took place on a long weekend because they usually went camping on long weekends.

She testified that she was "pretty sure" it happened on the Canada Day long weekend because it was warm that day, there was no snow, and the lake was open. She further testified that her belief that the event took place in 2003 is based on a video that the accused made of her catching many fish during a fishing outing, which he posted on social media a few years later. She also stated that she looks quite young in the video.

[21] K.K. was shown a video in which she is fishing and catching fish. She testified that she saw that video for the first time when it was posted on YouTube by the accused. She confirmed that it is her who is depicted fishing in the video wearing pyjama pants and a hoodie. The accused is the one filming and it is his voice heard throughout the video. K.K. testified that she had only gone fishing with the accused on a few occasions before that camping trip, and she does not recall how often she went fishing with him after that. She testified that she is a hundred percent sure that the video was filmed just before the sexual assault took place because she only caught a large number of fish once.

[22] The complainant also testified that she believes the events took place sometime between the summer of 2002 and the summer of 2004. She testified that it is highly unlikely it would have happened in 2001 because of the way she looked in the video. It could not have happened in the summer of 2005 either, because she was living on her own when she was 18. She added that she does not remember going camping after reaching the age of 17. She stated that she was not much into camping and the outdoors anymore as she got older. She testified that she believes she was 16 when the events happened. She added that she does not know how old the accused was at the time, but that he would probably have been in his mid-30s to early 40s.

[23] K.K. testified that she tried everything she could to forget about what had happened after that, and it was only in September 2018 that the events came back to her. She testified that she was in Alberta at the time. She added that the events came back to her during a phone conversation between her mother, who was living with her at the time, and her sister, H., who was in Whitehorse. She heard her sister talking to her mother about the accused inappropriately touching her when her mother was in a relationship with the accused. She testified that she had a flashback at that point, and that the events came back to her in bits and pieces. She testified that the first thing she remembered was the erection. Then, she remembered being at Little Braeburn and the fishing. She also recalled the accused being in the tent and sleeping.

[24] K.K. testified that she told her mother and sister, H., about what happened on the camping trip a couple of days later. She told her mother first. She had that conversation in the living room of her apartment. She testified that her mother had a lot of questions, and that she was afraid something worse had happened. She stated that her mother was pacing a lot after she told her. Her mother told her that the accused had come to her during that camping trip and told her he had touched the complainant mistakenly thinking the complainant was her. K.K. testified that it was the first time she had heard that story.

[25] After K.K. disclosed the events to her mother, K.K. indicated that her mother told her to tell her sister, which she did. Her sister told her to press charges. K.K. testified that she did not want them to tell her what to do. She testified that she decided to press charges because she feels she needs to speak up and do what is right, whereas before she did not think that way.



[26] K.K. does not think she was aware of the custody and access dispute between her sister, H., and the accused regarding her sister's son X., before she told her sister about what had happened to her. She testified that when X. was little, he had an accident. As a result, the accused and her mother were granted legal custody of X. She added that her sister worked hard on herself and regained custody of X., but that the accused was opposed to it. K.K. testified that even after the accused and her mother broke up, X. continued to visit the accused, as X. considers the accused as his grandfather. K.K. also testified that she knows her sister was charged with assaulting X., who is 13 years old now. K.K. testified that she only found out about the custody dispute and the outstanding charges against her sister after she reported the events to the RCMP in September 2018. She added that she did not make her decision to report the incident based out of anything her sister said. K.K. testified that she never said anything to anybody about the incident before she spoke to her mother in 2018.

**C.F.**

[27] I will now move to the testimony of C.F.

[28] C.F. is 68 years old. She is the complainant's aunt and the sister of the complainant's mother. She stated that she lived in Whitehorse from 2003 to November 2005. She testified that she is aware of the charges before the Court and knows that the events are supposed to have taken place on a camping trip she was a part of.

[29] She testified that parts of that camping trip are very clear to her because it took place on the Canada Day long weekend, and they were celebrating her 51<sup>st</sup> birthday. Her birthday is on June 30<sup>th</sup>, and she turned 51 in 2003. She stated that they went camping for three days, and that it must have been a long weekend because she would

not have taken time off work to go camping otherwise. She testified that her birthday would have been on the first day of the camping trip. She stated that she is very confident it happened on the July 1<sup>st</sup> long weekend and that it happened in 2003 because she celebrated her 50<sup>th</sup> birthday at the High Country Inn in Whitehorse in 2002. She added that she visited Whitehorse for the first the time in 2002 for a week. As a result, they would not have gone camping in 2002.

[30] C.F. testified that she went camping twice with her sister and the accused. Both camping trips were during long weekends. She added that she does not know what lake they went to the first time because all the lakes are the same to her. She testified that the four of them (being her, the accused, her sister R.F., and her niece K.K.) slept in the tent. She described the tent as big with a divider in the middle that came right down to the floor. She testified that the accused and her sister slept on one side of the divider while she and K.K. slept on the other side. They all had sleeping bags.

[31] She testified that they arrived at the campsite in the middle of the afternoon, and that they did not do much the first day. She testified the temperature was nice, in the low 20s. She added that she goes camping when it is cold as seldom as possible because she does not like to get cold.

[32] She testified that on the second day of the camping trip, K.K. and the accused went fishing. C.F. remembers that because it was her birthday and she wanted to go on the boat, but the accused would not take her. She estimates that it would have been lunch or supper when the accused and K.K. came back from fishing, and that they brought back a little fish. She believes that her sister cooked the fish and that they ate it pretty much right away. C.F. testified that they each had a little bite of the fish. She

testified that she could not remember another time when the accused and K.K. brought back a fish.

[33] C.F. testified that K.K. went for a nap not long after coming back from fishing. She added that there was nobody else in the tent when K.K. went in. C.F. testified that the accused sat around the campfire and chatted with her and her sister for a while before he too, went in the tent for a nap. C.F. testified that, at some point, K.K. came out of the tent. She stated that K.K. is usually sleepy when she gets up from a nap. However that day, she "flew out of the tent." C.F. remembered thinking that K.K. either had a nightmare or that there was a bumble bee in the tent. She testified that K.K. did not look like herself. C.F. testified that K.K. spent about 10 minutes speaking with her mother after she came out of the tent. She does not know what they said. She added that they were maybe 50 feet away from her to the right of the tent at that time; that K.K. went off to be by herself after that; and that her sister then came back to talk to her. She testified that she and her sister did not talk about anything in particular. Her sister just wondered if K.K. was okay. C.F. testified that the accused came out of the tent 10 to 15 minutes after that. She then saw the accused talking to her sister.

[34] C.F. testified that they went home the next day. She added that the rest of the trip was quiet, that K.K. was quiet, but that she is usually a quiet girl. She also testified that K.K. and the accused appeared distant after that.

[35] While, at first, C.F. testified that she did not remember the accused getting injured during the camping trip, she then stated that it was during that specific camping trip that the accused burned his hand, and that she was there when it happened. She testified that she was in shock. She added that they did not go back to Whitehorse right

away after the accident. Instead, her sister looked at the burn and the accused wrapped his hand. She thought that the accused was brave to go fishing after that.

[36] C.F. also testified that the second time she went camping with her sister and the accused was two years later. She was still living in the Yukon at that time. They went to Tarfu and Snafu Lakes the second time. She went camping with the accused, her sister, and another family member. She does not believe it was K.K. She thinks another person may have been there as well. She added that she remembers the second trip because she had a heatstroke on that trip and was really sick.

[37] C.F. testified that she does not remember exactly when her sister told her that K.K. would be pressing charges against the accused. However, she immediately thought about that fishing trip. She wondered if it was, and her sister confirmed that it was that trip. She wondered how K.K. was doing and why it took her so long to disclose it. She added that she did not discuss the charges against the accused with anybody else.

[38] Finally, C.F. agreed that there is "bad blood" between her niece H. and the accused.

**R.F.**

[39] I will now turn to the testimony of R.F.

[40] R.F. was 71 years old when she testified. She is the complainant's mother. She testified that she remembers the camping trip in question, and that it took place on the July 1<sup>st</sup> long weekend in 2003. At first, she testified that she was certain the camping trip took place in 2003 because that date appears on the video depicting K.K. and the accused fishing. Also, she thinks that the camping trip took place in 2003 because she

believes her sister moved up to the Yukon in 2001 and only lived in the Yukon for a short period of time. R.F. also stated that her sister does not do well in cold temperatures, so she would not have gone camping with them had it not been warm at the time.

[41] R.F. testified that they always went camping on long weekends because she had a daycare at the time and worked five days a week. She testified that she had to be at the daycare when it was not a statutory holiday. R.F. indicated that her memory is dim regarding the time of the fishing trip, and that it was the video that refreshed her memory. She testified that she is the one who remembered about the video. She also testified that she watched that video a number of times because K.K. had it. Also, K.K. caught a number of fish on that fishing trip. R.F. testified that she watched the video a few weeks after the camping trip. She also testified that the last time she watched it was four years ago. When it was suggested to her that the video does not display a date, she stated that the events could have happened a year later.

[42] R.F. testified that she started dating the accused in 1998, that they moved in together in November 1999, and that their common-law relationship ended in 2007. She testified that they remained friends until 2010. She testified that the accused acted as a stepfather to K.K. when they were together. R.F. decided to cut all ties with the accused because she felt he was turning her grandson, X., against his mother, H. R.F. testified that she is aware of the custody and access dispute between the accused and her daughter H. She is also aware that her daughter was charged with assaulting X.

[43] R.F. testified that she remembers going camping to Little Braeburn Lake with the accused, K.K., and her sister C.F. They went to their usual campsite along the lake.

They went to that site at least once a summer. She thought that trip was K.K.'s first and last time at that campsite, and that K.K. never went back after that.

[44] R.F. testified that she, her sister, the accused, and K.K. slept in a tent during the camping trip and that there was no privacy in that tent. She stated that they each had a foamy and a sleeping bag. She and the accused had put theirs together. She testified that K.K. had been on a few other camping trips with her and the accused at other lakes, but that there was just the one time that K.K. and her sister C.F. went on a camping trip together. She testified that nothing much happened the first day they were there.

[45] R.F. testified that on the second day of the camping trip, K.K. and the accused woke up early to go fishing. She stated that they came back around lunchtime, and that they brought back a fish. She added that only C.F. ate fish. She testified that K.K. was tired, and that she went straight into the tent. She testified that the accused sat around the campfire with her and C.F. for about 15 minutes before he too, went for a nap. R.F. testified that she prepared supper while they were in the tent napping, and that she went to get wood to get the fire going.

[46] R.F. testified that she does not know who came out of the tent first. She testified that she does remember seeing K.K. coming out of the tent. However, she does not remember seeing the accused coming out of the tent. She only remembers the accused coming up to her after his nap saying that he wanted to talk to her. She testified that he told her that he had crawled into the sleeping bag with K.K. when he went for his nap because he was cold. He also told her that he had fallen asleep, he had been dreaming about her and that when he woke up he had his hand on K.K.'s breast. She testified that

her first thoughts were for K.K. and that she asked the accused if K.K. had woken up. She testified that the accused said no, then "I don't know." She believed that she said, "No more sleeping with K.K. or the girls." She stated that the accused shrugged his shoulders and walked away.

[47] R.F. testified that she was skeptical of his story. She explained it as being "just a gut feeling". She felt the accused was telling her this because he had been caught, and he was coming to her before K.K. could. She added that the accused had never done anything sexual to her while he was sleeping.

[48] She testified that she went off to look for K.K. She found her sitting around the fire with C.F. As she wanted to know if K.K. had woken up during the incident, she sat down, grabbed a coffee, and asked her if everything was okay, and she said yes. K.K. seemed normal, but she was quiet; whereas she was so excited about the fishing before that. R.F. testified that she asked K.K. if she was okay three or four times that day, and K.K. said yes. R.F. testified that she did not say anything about what the accused had told her back then because she thought K.K. had slept through the events.

[49] R.F. testified that it was not unusual for the accused to cuddle up with K.K. They had a bed downstairs at their house and they would watch television on the bed. K.K. was comfortable and would put her hand on the accused's shoulder.

[50] R.F. testified that she remembered the camping trip where the accused burned his hand. She stated that the accident happened on a different camping trip at another lake. She also stated that C.F. was not with them on that camping trip.

### **The Accused (T.J.H.)**

[51] I will now turn to the accused's testimony.

[52] The accused testified that he was in a common-law relationship with R.F. and that they lived together for a number of years.

[53] He confirmed being the one who filmed the fishing trip and who put the video together. He agreed that the video depicts a fishing trip with K.K. at Little Braeburn Lake. He testified that he used to own a white boat, but that he had already sold it at the time of the fishing trip with K.K. He said that the boat they took on that fishing trip was a green canoe his friend G.T. had lent to him. He testified that he did not remember any camping trip associated with the fishing trip with K.K. at Little Braeburn Lake, or what happened around that fishing trip. He testified that he went fishing to Little Braeburn Lake often over the years, even just for the day, because it is not far from Whitehorse. He testified that the fishing trip with K.K. could have been a day trip. He acknowledged that it was a big deal for K.K. to catch that many fish. However, he testified that it was not that big of an event for him.

[54] The accused denied vehemently the sexual touching described by K.K. He testified that he would never have touched her that way.

[55] Two other videos, one of the accused fishing with his mother and one of him fishing with another young woman and a man, were played during the trial. The videos were similar to the one involving the complainant in that it shows the women catching fish. Different boats, including the accused's white boat, can be seen in those videos. The accused acknowledged remembering a number of things related to those two fishing trips, but not many.

[56] The accused testified that he remembers burning his hand on a fishing trip at another lake. He testified that C.F. was not on that camping trip. He testified that that



trip took place on the last weekend of June in 2003. He stated that he only went to the hospital after coming back to Whitehorse from the camping trip. The medical record filed as an exhibit at trial revealed that, on June 30, 2003, the accused went to the Whitehorse General Hospital for a second-degree burn to his hand.

[57] The accused also testified that he remembers the fishing trip with C.F. at Snafu Lake. He testified that the only reason why he remembers that trip is because C.F. had a heatstroke and was really sick. The accused testified that he only remembers camping trips or events that took place long ago when something unusual happened on those trips.

[58] The accused believes the complainant and her family concocted the story about the sexual assault to prevent him from seeing X. He indicated that he and H. reached an agreement regarding access to X. However, he was only charged with sexually assaulting the complainant around the time X. complained that his mother had assaulted him.

### **POSITIONS OF THE PARTIES**

[59] Crown counsel acknowledges that the evidence regarding the date of the events does not completely accord with the dates appearing on the Indictment. However, he submits that the date is not an essential element the offence of sexual assault (s. 271 of the *Criminal Code*), which is one of the two charges before the Court. In addition, he submits that there is no prejudice to the accused in this case. The accused knew prior to trial the nature and scope of the allegations he was facing. The allegations involved the accused sexually touching the complainant in a tent after a fishing outing during a family camping trip at Little Braeburn Lake. Crown counsel submits that there is no need

for the Crown to prove the exact date of the alleged offence beyond a reasonable doubt and the Crown does not intend to make an application to amend the dates on the Indictment.

[60] Crown counsel also submits that witnesses cannot be expected to remember all the details of an historical event such as this one. He further submits that while there were some inconsistencies in the evidence of the Crown witnesses regarding elements that are peripheral to the alleged offence, such as the date of the event and the type of boat used to go fishing, the complainant's evidence remained steady and unchallenged with respect to the sexual touching and the essential elements of the offence of sexual assault.

[61] Crown counsel submits that the accused's lack of memory of the events surrounding the fishing trip with K.K. at Little Braeburn Lake and his blanket denial that the events described never took place are not credible. Crown counsel submits that the Crown has proven beyond a reasonable doubt that the accused is guilty of sexually assaulting K.K. during the camping trip at Little Braeburn Lake.

[62] Defence counsel submits that the timing of the complaint and the numerous inconsistencies in the evidence of the Crown witnesses clearly demonstrate that they fabricated their story to help the complainant's sister in her custody and access battle against the accused, and to prevent him from having custody and/or access to X. Defence counsel submits that the accused should be acquitted based on his testimony and the evidence adduced by the defence at trial, which evidence is compelling. Defence counsel submits that, in any event, the Crown has not met its burden to prove the essential elements of the offence of sexual assault beyond a reasonable doubt.

According to defence counsel, it would be unsafe to convict based on the testimony of Crown witnesses who were unreliable and whose evidence was contradicted in many ways by the evidence adduced by the defence and by the admissions made by the Crown at trial.

### **ANALYSIS**

[63] With respect to the offence pursuant to s. 153(1)(a) of the *Criminal Code*, based on the evidence adduced at trial, and as fairly conceded by Crown counsel, I find that the Crown is not in a position to prove beyond a reasonable doubt that the alleged sexual touching took place when the complainant was a young person. As such, I agree with Crown counsel that date is an essential element of that offence. As the time of the alleged offence is an essential element of the offence pursuant to s. 153(1)(a) of the *Criminal Code*, I find the accused not guilty of that offence.

[64] With respect to the other offence on the Indictment, which is the offence of sexual assault. Based on the case law filed by the Crown and particulars of the alleged offence before the Court, I agree that the accused was not misled by the wording of the sexual assault charge and that the Crown does not have to prove the date of the offence beyond a reasonable doubt, as it is not an essential element of the charge of sexual assault in this case. As such, I agree that the Crown does not have to make an application to amend the Indictment to conform with the evidence adduced at trial with respect to the date.

[65] I will now go back to the test in *W.(D.)* and my assessment of the evidence.

[66] First, I do not believe the accused's blanket denial and lack of memory regarding the events surrounding his fishing trip with K.K. at Little Braeburn Lake. I come to this

conclusion in part because the fishing trip was at least a bit unusual due to the number of fish K.K. caught that day. The video depicts K.K. saying that she never caught a fish before and had already caught eight fish by that point. The video reveals that K.K. was very excited about catching so many fish. In addition, the accused took the time to put together a video of that fishing trip for K.K. and to post it on social media. I also find that the accused reacted defensively when challenged about his lack of memory in cross-examination.

[67] However, even if I do not believe the accused, I must acquit him if his testimony or the exculpatory evidence adduced at trial leaves me with a reasonable doubt with respect to the commission of the offence. Finally, even if I am not left in doubt by the accused's evidence or by the evidence inconsistent with the accused's guilt, I must consider, on the basis of the evidence I do accept, whether I am convinced beyond a reasonable doubt of his guilt.

[68] I now turn to the evidence of the complainant.

[69] In 2006, the complainant was convicted of theft and sentenced to a conditional discharge. While I acknowledge that theft is an offence of dishonesty, I note that the complainant's conviction is quite dated, that she was conditionally discharged, and that she now has a clean record. I am therefore not inclined to give much weight to that conviction in assessing the credibility of the complainant.

[70] In addition, I note that, at first, the plaintiff denied being kicked out of her mother's house by the accused because she had stolen his bankcard and withdrew money from his account without his permission. However, when pressed on this issue, she changed her story and acknowledged stealing money from him. I find that the fact that the

complainant changed her story about these events while she was testifying does have a negative impact on her credibility.

[71] In addition, during her testimony, the complainant testified to having some difficulty in school in or around Grade 11. She also acknowledged having some reading difficulties. C.F. and R.F. later testified that the complainant has a low IQ and has learning disabilities. The Court was not aware of that fact until after the complainant testified. However, I note that the complainant's learning or cognitive difficulties did not prevent her from asking Crown and defence counsel to repeat or rephrase questions she did not understand, that her answers were responsive to the questions put to her, that she did not appear to have any problems expressing herself or even disagreeing with certain statements put to her by counsel. As such, while, on the one hand, I must be mindful of the complainant's limitations, as reported by her family, in my assessment of her credibility, I am, on the other hand, unable to conclude based on my observations at trial that those reported limitations have a negative impact on her ability to remember or on her credibility. I am also mindful of the fact that witnesses should not be expected to remember every detail of events that allegedly took place 15 years or so ago.

[72] Having said that, there are a number of issues with the complainant's testimony and the evidence of her aunt and her mother.

[73] At the preliminary inquiry, the complainant testified that she had a clear memory that the incident happened when she was 16 years old, which would have been in 2003. However, at trial, she stated that she could not say for certain that it happened when she was 16. She testified that she believes the events took place sometime between the summer of 2002 and the summer of 2004. She further stated that it was highly unlikely it

would have happened in 2001 because of the way she looked in the video. In addition, she testified that it could not have happened in the summer of 2005 because she was living on her own when she was 18. She also stated that she did not remember going camping when she reached the age of 17 because she was not much into camping and the outdoors anymore at that time. In cross-examination, defence counsel put to her that the video could have been taken a year or two after 2003. Despite what she had said in examination in-chief, the complainant responded that it was incorrect. She maintained that the incident happened on the Canada Day long weekend in 2003, that it could have been in 2002, but no later than in 2003.

[74] R.F. testified that her memory of the date of the camping trip was dim and that it was the video of the fishing trip that refreshed her memory. She acknowledged at trial that she was the one who first thought about the video of the fishing trip that the accused had made after K.K. spoke to her about the events. She testified to seeing the date of 2003 on the video. However, she conceded at trial that no date appears on the video of the fishing trip. It is only after realizing that no date is displayed on the video that R.F. contemplated the possibility of the fishing trip taking place at a different time.

[75] In addition, at first, as I said, R.F. testified that the camping and fishing trip at Little Braeburn Lake took place on the Canada Day long weekend because her sister was with them and she does not cope well with cold weather. She added that she and the accused usually went camping on long weekends because of their work schedules. She also testified that her sister was not with them when the accused burned his hands, and that this particular incident occurred during another camping trip.

[76] However, it became clear during the trial that there was no long weekend at the end of June in 2003 because July 1<sup>st</sup> fell on a Tuesday that year. In addition, the medical record filed by the accused at trial, and admitted by the Crown, reveals that the accused attended the hospital in Whitehorse for a second-degree burn to his hand on June 30, 2003. The accused also testified to the effect that C.F. was not camping with them when he burned his hands.

[77] Based on this evidence, I am of the view that the fishing trip at Little Braeburn Lake could not have taken place on the weekend before July 1, 2003. This conclusion sheds doubt on the reliability of C.F.'s testimony, who testified to remembering the camping trip with the accused, her sister, and K.K. well because, according to her, it took place on the weekend of her birthday in 2003. Her birthday being on June 30<sup>th</sup>. C.F. also testified that the accused burned his hand during that specific camping trip and that she was there when that happened. She also testified that there was a divider in the middle of the tent, and that she and K.K. slept on one side of the tent and that the accused and R.F. slept on the other side. However, R.F. and the accused, who owned that tent, testified that there was no divider in the tent. Based on the evidence I accept, I conclude that C.F. does not have a good recollection of the events at issue, and that she confuses events that she may have been a part of with events she heard about from her family. As such, I am unable to rely on her evidence.

[78] Much was said about the fact that the complainant testified that the fishing trip took place on a nice sunny and warm day, whereas the video shows the complainant wearing pyjama pants, a hoodie, and even the accused's jacket at some point. Also, while the video shows that there were clouds in the sky, it also shows that there was

some sun later that day. In any event, since the fishing trip took place in the morning, I am prepared to take judicial notice of the fact that mornings are usually cool in the Yukon even in the summer months. Overall, I am unable to draw any conclusions based on the differences, identified by the defence, between the video and the Crown witness' testimony regarding the weather that day.

[79] The complainant also testified at the preliminary inquiry that she and the accused went fishing in a white boat with an engine. She testified that it was not a canoe.

However, when shown the video of the fishing trip at trial, she acknowledged that the inside of the boat depicted in the video was green and that it appeared to be a canoe.

She also agreed in her testimony that the accused owned a few boats and that she just remembered a white boat with an engine. K.K. then acknowledged that she had assumed she had gone fishing in a white boat that day.

[80] In order to dispense with the testimony of G.T., a friend of the accused, the Crown agreed to admit that he would have testified to the effect that he is the owner of a green canoe, which I find is the boat seen in the video of the fishing trip at Little Braeburn Lake. The Crown also admitted that G.T. would have testified to the effect that he did not lend his canoe to the accused before the end of the summer/beginning of fall of 2005. There is no reason for me to disbelieve G.T.'s evidence.

[81] I find it difficult to reconcile the fact that the accused did not have possession of the green canoe before the end of the summer/beginning of fall of 2005 with the evidence of the complainant that she was not into outdoor activities after she turned 17, and that she would not have gone camping with the accused when she was 18 because she was no longer living with him and her mother. The complainant testified to being a



hundred percent sure that the sexual assault took place after the fishing trip depicted in the video filed at trial. K.K. also testified that she did not disclose the events to her mother at the time or during the camping trip because she was afraid of her reaction and did not want to be kicked out of the house. However, in the video, she is seen fishing with the accused in the green canoe in the summer/beginning of fall of 2005 when she would have been 18 years old and, according to her testimony, no longer living with her mother at the time.

[82] I acknowledge that K.K. is heard in the video talking about giving one of the fish she caught to her aunt. According to the evidence, C.F. would have still been living in Whitehorse at the time, even in the summer/beginning of fall of 2005. However, because of the proximity of Little Braeburn Lake to Whitehorse, I do not find that the complainant's mention of her aunt automatically and conclusively means that they were on a camping trip together.

[83] In addition, the complainant did not recall some important details about the alleged sexual touching. She did not remember what breast the accused touched nor which side she was lying on when the accused touched her breast.

[84] I also note that the complainant and her mother gave divergent accounts of where they were when they interacted after K.K. came out of the tent and the number of times they interacted on that subject after she exited the tent.

[85] I am also concerned about R.F.'s credibility, considering the fact that she testified that her memory was triggered by the video of the fishing trip, which she thought, at first, had been taken in 2003 because she had seen that date displayed on the video, whereas the evidence at trial reveals that she was wrong about that.

[86] Based on all of the evidence before me, and considering the inconsistencies and uncertainties I found in the Crown's evidence, I am left with a reasonable doubt that the sexual touching alleged by the Crown against the accused occurred and, as such, I must acquit the accused.

[87] So, Madam Clerk, an acquittal will be entered on Count 1 and Count 2 of the Indictment.

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CAMPBELL J.