

Citation: *R. v. Deuling*, 2022 YKTC 49

Date: 20221209  
Docket: 19-00137C  
Registry: Whitehorse

**IN THE TERRITORIAL COURT OF YUKON**  
Before His Honour Judge Neal

REX

v.

PAUL THOMAS DEULING

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

Appearances:

Benjamin Eberhard  
Richard S. Fowler K.C. and  
Mathew Smith

Counsel for the Crown  
Counsel for the Defence

**REASONS FOR JUDGMENT**

**Introduction and Overview**

[1] This is a trial of charges levied against Mr. Paul Deuling with respect to alleged acts of sexual interference and sexual assault on D.M, a former student.

[2] Specifically, Mr. Deuling is charged with the following counts on Information 19-00137-C:

Count #1 - On or between the 1<sup>st</sup> day of January in the year 1980 and the 3<sup>rd</sup> day of January in the year 1983 at or near the City of Whitehorse in the Yukon Territory, did indecently assault D.M, a female person, contrary to Section 149 of the Criminal Code.

Count #2 - On or between the 1<sup>st</sup> day of September in the year 1983 and the 30<sup>th</sup> day of June in the year 1984 at or near the City of Whitehorse in the Yukon Territory, did commit a sexual assault on D.M., contrary to Section 246.1 of the Criminal Code.

Count #3 - On or between the 1<sup>st</sup> day of June in the year 1986 and the 30<sup>th</sup> day of September in the year 1986 at or near the City of Whitehorse in the Yukon Territory, did commit a sexual assault on D.M., contrary to Section 246.1 of the Criminal Code.

Count #4 - On or between the 1<sup>st</sup> day of October in the year 1986 and the 31<sup>st</sup> day of October in the year 1986 in the Yukon Territory, did commit a sexual assault on D.M. contrary to Section 246.1 of the Criminal Code.

Count #5 - On or between the 1<sup>st</sup> day of November in the year 1986 and the 31<sup>st</sup> day of December in the year 1988 at or near the City of Whitehorse in the Yukon Territory, did commit a sexual assault on D.M., contrary to Section 246.1 of the Criminal Code.

[3] Mr. Deuling has elected trial by Territorial Judge and entered not guilty pleas on all matters.

[4] Mr. Deuling is, of course, presumed innocent until proven guilty on some, or all, of the Counts set out above.

[5] The Crown assumes the burden of proving all elements of the relevant offences alleged beyond a reasonable doubt.

[6] The allegations giving rise to the Counts set out above all relate to a time period commencing in early 1980 and ending in 1988 in Whitehorse, Yukon Territory.

[7] The span of time covered by the charges set out above saw several important changes to the relevant provisions of the *Criminal Code of Canada*, detailed below.

[8] As such, in reviewing the facts and law, each time period must be separately considered in light of the relevant *Criminal Code* provisions then in effect.

[9] Counsel have agreed on certain facts and timelines that are relevant to these proceedings as follows:

- (a) The identity of the accused, Mr. Deuling, is admitted;
- (b) Mr. Deuling's birthdate is admitted to be August 11, 1949;
- (c) D.M.'s birthdate is admitted to be February 7, 1969;
- (d) In 1973 or 1974, V.K. moved in to join the M. family serving as stepmother to D.M.;
- (e) January 1, 1980, Mr. Deuling was hired as a teacher by the Government of the Yukon;
- (f) January 1980 to June 1980, Mr. Deuling served as teacher for the last half of D.M.'s grade 5 year when she was 10 and 11 years of age;
- (g) September 1980 to June 1981, Mr. Deuling taught D.M. for her grade 6 year when she was 11 and 12 years of age;
- (h) September 1981 to June 1982, Mr. Deuling taught D.M. for her grade 7 year when she was 12 and 13 years of age;
- (i) In the fall of 1982, V.K. moved out of the M. family home. B.K. moved into the home and assumed the role of stepmother to D.M.;

- (j) September 1982 to June 1983, Mr. Deuling taught D.M. for her grade 8 year when she was 13 and 14 years of age;
- (k) October 1982 to May 1984, D.M. attended as a student at Porter Creek Junior High School;
- (l) May 1980 to May 1984, Mr. Deuling coached D.M. in volleyball, basketball, soccer and cross country running between the ages of 11 to 15;
- (m) January 4, 1983, amendments to the *Criminal Code*, detailed below, came into force redefining matters of indecent and sexual assault;
- (n) September 1983 to May of 1984, Mr. Deuling taught D.M. in her grade 9 year when she was 14 and 15 years of age;
- (o) Early 1984 to June 25, 1984, D.M. was absent from school 22 ½ days;
- (p) September 1984 to June of 1985, D.M. attended Concordia College in Edmonton, Alberta;
- (q) September 1985 to November 1985, February 1986 to December 1986, D.M. attended Grade 11 at F.H. Collins High School, Whitehorse Yukon Territory;
- (r) September 1985 to June 1987, Mr. Deuling ran with D.M. outside school hours. Fred Smith, principal, also met with Mr. Deuling to

discuss information received concerning Mr. Deuling's ongoing contacts with D.M.;

- (s) Late June or early July 1986, Mr. Deuling and D.M. saw each other outside the [redacted], Whitehorse, and start training for a team road race;
- (t) October 1986, D.M. packed for a basketball camp and was driven to Porter Creek School to meet Mr. Deuling. Mr. Deuling was driving a Bronco style truck at that time;
- (u) October 25, 1986, Mr. Deuling filed a report of a grizzly bear kill;
- (v) Late 1986, B.K. met with Mr. Deuling at Porter Creek School. D.M. moved in with her former stepmother, V.K.;
- (w) December 16, 1986, D.M.'s name removed as student at F.H. Collins Senior Secondary School;
- (x) January 12, 1987, a meeting took place between Mr. Seipp, Vice Principal at F.H. Collins School, "Mrs. P.M." and D.M.;
- (y) September 8, 1986, to January 28, 1987, D.M. in last semester at F.H. Collins School;
- (z) May 1987, D.M. gave birth to A.;
- (aa) November/December 1986 to May 1987, Mr. Deuling resided with Mr. Gresley-Jones at [redacted];

(bb) June 1987, Mr. Deuling left Porter Creek Junior High;

(cc) September 1987, Mr. Deuling began teaching at F.H. Collins School;  
and

(dd) 1988, D.M. moved out of V.K.'s home and into a trailer park. Saw  
Mr. Deuling one more time.

### **The Law**

[10] There is general agreement between Counsel on the relevant law as set out in Crown's Roadmap to Relevant Law. These submissions are summarized in paragraphs (11) to (63) below.

[11] Section 149 of the *Criminal Code*, R.S.C.1970, c. C-34 was in force until its repeal on January 4, 1983.

[12] Section 149 of the *Criminal Code*, R.S.C.1970, c. C-34 is the indecent assault prohibition provision and reads:

(1) Everyone who indecently assaults a female person is guilty of an indictable offence and is liable to imprisonment for five years.

[13] The principal definition or basic unit of the assaultive behaviour in Section 149 is an "assault". Section 244 of the *Criminal Code*, R.S.C. 1970, c. C-34 is the assault definition provision and reads:

A person commits an assault when

(a) without the consent of another person or with consent, where it is obtained by fraud, he applies force

intentionally to the person of the other, directly or indirectly.

### **Elements of Indecent Assault on a Female**

[14] In order to convict the accused of the offence of Indecent Assault on a Female, the Crown must prove beyond a reasonable doubt:

- a. That the accused is the person who actually committed the offence of Indecent Assault on a Female;
- b. That the offence of Indecent Assault on a Female occurred at the time and place set out in the information;
- c. That the accused applied force directly or indirectly to the complainant;
- d. That the accused intended to apply the force to the complainant;
- e. That the complainant did not consent to the application of force by the accused (if the complainant is 14 years or older);
- f. That the accused knew that the complainant did not (or could not) consent; and
- g. That the assault was committed in circumstances of indecency.

### **Date or Time of the offence**

[15] The date of the offence is not generally an essential element of sexual offences. These are crimes no matter when committed: *R. v. B.(G.)*, [1990] 2 S.C.R. 30, at para. 56.

### **Application of Force and Intention to use force**

[16] Force simply means physical contact. There can be force without physical violence. In other words, this ingredient is proven if the Court is satisfied beyond a reasonable doubt that the accused touched the complainant.

[17] When people intend to do things, they do them deliberately. It is different when people are careless and do things accidentally. When people do things accidentally, they do not intend to do them. Intention is a state of mind. Thus, the Court must use common sense to infer from all the evidence whether the accused intended to apply force to the complainant.

### **Consent or Lack of Consent**

[18] Section 140 of the *Criminal Code*, R.S.C. 1970, c. C-34 sets out the unavailability of the defense of consent based on the age of the complainant and reads:

Where an accused is charged with an offence under section...149... in respect of a person under the age of fourteen years, the fact that the person consented to the commission of the offence is not a defence to the charge.

[19] If the Crown proves the complainant was under the age of fourteen at the time of the offence of Indecent Assault on Female, then it does not need to prove the element of consent or knowledge by the accused of the complainant's lack of consent.

### **Definition of “indecent” at common law**

[20] The term “indecent” is not defined in the *Criminal Code*, R.S.C.1970, c. C-34.

[21] Indecent assault is an assault committed in circumstances of an indecent or sexual nature such that the sexual integrity of the victim is violated. It is a general intent offence that does not require proof of sexual purpose or sexual gratification on the part of the accused. The test to be applied in determining whether the conduct is of a sexual nature is objective: *R. v. Trachy*, 2019 ONCA 622, at para. 72.



[22] The common law interpretation of indecency need not include whether the accused used words expressing an immoral purpose in engaging in the act so long as it can be shown that the relationship of the accused to his victim and reason the accused behaved in this way toward the victim made the assault an indecent one: *R. v. Court*, [1988] 2 All E.R. 221 (H.L.), at p. 5.

[23] The test to be applied in determining whether the impugned conduct has the requisite sexual nature is an objective one: "*Viewed in the light of all the circumstances, is the sexual or carnal context of the assault visible to a reasonable observer.*" The part of the body touched, the nature of the contact, the situation in which it occurred, the words and gestures accompanying the act, and all other circumstances surrounding the conduct, including threats which may or may not be accompanied by force, will be relevant: *R. v. Chase*, [1987] 2 S.C.R. 293 at p. 302, cited in *Trachy, supra* at para. 72.

[24] The mental element in indecent assault is the intention to touch. Proof of sexual purpose is not required because the:

...“factors which could motivate sexual assault are said to be many and varied...To put upon the Crown the burden of proving a specific intent would go a long way toward defeating the obvious purpose of the enactment”, which is to protect the sexual integrity of all persons...

[*Trachy, supra* at para. 74.]

### **Common Law Doctrine of Recent Complaint Inapplicable**

[25] The rules relating to recent complaint, being of an evidentiary or procedural nature, have retrospective application. See: *R. v. R. (A.)* (1994), 88 C.C.C. (3d) 184 (Man. C.A.).

[26] Accordingly, at the trial of an accused person for an historical indecent assault offence, the common law rules with respect to the doctrine of recent complaint do not apply. Consequently, the trier of fact on an historical indecent assault offence must not draw an adverse inference as to the credibility of the complainant's evidence in the absence of a recent complaint.

**Sexual Assault, Section 246.1 of the *Criminal Code*, R.S.C. 1970, c. C-34 [Counts #2-#5]**

[27] The "*Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof*", S.C. 1980-81-82-83, c. 125, was assented to on October 27, 1982, and came into force on January 4, 1983.

[28] The 1983 amendments varied the *Criminal Code*, R.S.C. 1970, c. C-34, adding the new offence of "sexual assault" and repealing *inter alia* the offences of rape and indecent assault on a female.

[29] Section 246.1 of the (revised) *Criminal Code*, R.S.C. 1970, c. C-34, 34 is the sexual assault prohibition provision and reads:

1. Everyone who commits a sexual assault is guilty of
  - (a) an indictable offence and is liable to imprisonment for ten years; or
  - (b) an offence punishable by summary conviction...

[30] The principal definition or basic unit of the assaultive behaviour in Section 246.1 is an “assault”. Section 244 of the (revised) *Criminal Code*, R.S.C. 1970, c. C-34 is the assault definition provision and reads:

1. A person commits an assault when
  - (a) Without the consent of another person, he applies force intentionally to that other person, directly or indirectly...
2. This section applies to all forms of assault, including sexual assault...
3. For the purpose of this section, no consent is obtained where the complainant submits or does not resist by reason of
  - (a) the application of force to the complainant...
  - (b) threats or fear of the application of force to the complainant...
  - (c) fraud; or
  - (d) the exercise of authority.
4. Where an accused alleges that he believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury when reviewing all the evidence relating to the determination of the honesty of the accused’s belief, to consider the presence or absence of reasonable grounds for that belief.

[31] Section 264.4 of the (revised) *Criminal Code*, R.S.C.1970, c. C-34, reinforces the abolition of the requirement for corroboration evidence in sexual assault cases and reads:

Where an accused is charged with an offence under section...246.1 (sexual assault) ..., no corroboration is required for a conviction and the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration.

[32] Even though corroboration is not required for the Crown to prove the elements of the offence of sexual assault, in practice confirmatory evidence is often sought in determining the credibility and reliability of the complainant in the situation where she is an adult testifying to events that occurred during her childhood.

[33] The Court must closely examine all the evidence, including “other” evidence, to ensure that any evidence that tends to corroborate the complainant’s evidence is reviewed. This “other” evidence will include events leading up to, surrounding, and following the commission of the offence, which the Crown will lead for the purpose of assisting the Court in making a fair and proper assessment of the evidence.

### **Elements of the offence of Sexual Assault**

[34] In order to convict the accused of the offence of Sexual Assault, the Crown must prove beyond a reasonable doubt:

- a. That the accused is the person who actually committed the offence of Sexual Assault.
- b. That the offence of Sexual Assault occurred at the time and place set out in the information.
- c. That the accused applied force directly or indirectly to the complainant.
- d. That the accused intended to apply the force / touch to the complainant.
- e. That the complainant did not consent to the application of force / touching by the accused.
- f. That the accused knew or was reckless or willfully blind to the fact that the complainant did not consent or did not consent validly.
- g. That the assault was of a sexual nature.

### **Time of the Offence**

[35] The date of the offence is not generally an essential element of the offence of sexual offences. These are crimes no matter when committed: *R. v. B.(G.)*, *supra*.

### **Application of force/Intention to Apply Force**

[36] Force simply means physical contact. There can be force without physical violence. In other words, this ingredient is proven if the Court is satisfied beyond a reasonable doubt that the accused touched the complainant.

[37] When people intend to do things, they do them deliberately. It is different when people are careless and do things accidentally. When people do things accidentally, they do not intend to do them. Intention is a state of mind. Thus, the Court must use common sense to infer from all the evidence whether the accused intended to apply force to the complainant.

### **Consent or Lack of Consent**

[38] For the purposes of sexual assault, the law defines consent as the voluntary agreement of the complainant to engage in the sexual activity.

[39] In *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, the Court clarified the following points:

- ii. consent, in the context of the actus reus, is determined by the complainant's subjective state of mind towards the touching at the time it occurred—the approach is purely subjective: See also *R. v. Sazant*, [2004] 3 S.C.R. 635 at para. 19, 44, 45; *R. v. Campbell*, 2018 YKSC 37 at para. 12, citing *R. v. A.(J.)*, [2011] 2 S.C.R. 440.
- iii. while the complainant's testimony is the only source of direct evidence as to her state of mind toward the touching, the credibility of her claim

that she did not want or consent to the sexual touching must still be assessed by the trier of fact in light of all the evidence, including the complainant's words and actions before and during the incident—A complainant is not required to offer some minimal word or gesture of objection and lack of resistance must be equated with consent: See also R. v. M. (M.L.), [1994] 2 S.C.R. 3 at para. 2. Mere submission will not be equated with consent: R. v. Pappajohn (1980), 52 C.C.C. (2d) 481 (S.C.C.), at p. 499, per Dickson J. dissenting on other grounds;

- iv. the accused's perception of the complainant's state of mind is not relevant here—it is only relevant when a defence of honest but mistaken belief in consent is raised in the context of the accused's denial of mens rea;
- v. the trier of fact may only come to one of two conclusions: the complainant either consented or she did not; there is no third option of implied consent (that is, a situation in which the trier of fact accepts the complainant's assertion that subjectively she did not want or consent to the sexual touching but finds that certain actions of the complainant were ambiguous as to the consent and thereby amounted to implied consent); and
- vi. even if the complainant ostensibly consented to the sexual touching, (or there is a reasonable doubt on that point), there is no consent in law if the complainant submitted or participated by reason of the factors listed in Section 246.1(3) of the (revised) *Criminal Code*, R.S.C.1970, c. C-34, i.e. illegally obtained consent.

[40] In a case where the complainant testifies that she did not want or consent to the sexual activity the Court must assess the credibility of her assertion based on all the admissible evidence.

[41] If the Court accepts the complainant's assertion that she did not consent, then there is no consent even if there is conduct on her part that might have led the accused or other persons to believe she was consenting.

[42] If the Court does not accept the complainant's assertion that she did not want or consent to the sexual activity or has reasonable doubt about it, then the Crown has

failed to prove beyond a reasonable doubt that the sexual activity occurred without the consent of the complainant (unless of course her consent was obtained illegally).

### **Illegally Obtained Consent/Vitiated**

[43] Section 244(3) of the (revised) *Criminal Code*, R.S.C.1970, c. C-34, declares that certain *de facto* consents are insufficient in law to excuse the accused from liability otherwise proven, for example “by reason of exercise of authority”: Section 244(3)(d). The conjoint effect of subsections 244(2) and (3) makes illegally obtained consent ineffectual for the purpose of sexual assault.

[44] A statutorily enumerated factor that can vitiate consent is “by reason of exercise of authority”. Furthermore, at common law, relationships fiduciary in nature can vitiate consent: *Norberg v. Wynrib*, [1992] 2 S.C.R. 226, at para. 36, 38, 39, 40, and 41 (“*Norberg*”); *R. v. Audet*, [1996] 2 S.C.R. 171, at para. 10 and 12.

[45] The Crown must prove that the accused knew that the complainant did not consent (or did not consent validly, for example, by reason of exercise of authority).

[46] Proof that the accused knew that the complainant did not consent (or validly consent) can be established in one of three ways:

- a. by actual knowledge,
- b. by recklessness, or
- c. by willful blindness

to the fact that the complainant submitted to or did not resist the sexual act, for example, by reason of exercise of authority.

[47] The Crown need only establish illegally obtained consent in one of the three ways noted.

[48] A person is reckless when he knows that certain conduct may result in criminal harm but goes ahead and acts anyway. In other words, he takes the chance.

[49] A person is willfully blind when deliberately deciding not to inquire about something because he does not want to know the truth. In other words, he shuts his eyes to something because he would prefer to remain ignorant.

### **Sexual Nature of the Assault**

[50] In a case where the Crown alleges that the accused had sexual intercourse with the complainant, the act is obviously sexual in nature.

[51] In a case where the Crown does not allege that the accused had sexual intercourse with the complainant, the Crown does not have to prove that the accused touched a specific part of the complainant's body or tried to have sexual intercourse with the complainant in order to prove the sexual nature of the assault.

[52] An assault is sexual when it is committed in circumstances of a sexual nature, such that the sexual integrity of the complainant is violated.

[53] The test for whether the assault was sexual is an objective test—would the touching appear to be of a sexual nature to a reasonable observer, viewed in the light of all the circumstances, including:



- a. the part of the body touched,
- b. the nature of the contact,
- c. the situation in which it occurred, and
- d. the words and gestures accompanying the act.

[54] Since the test for whether the assault was sexual is an objective test, it is not necessary for the Crown to prove that the assault was committed by the accused for the purpose of gratifying his sexual appetite: *Trachy, supra*.

[55] The intent of the accused in committing the assault is one factor that the Court can consider, along with the four factors set out above, in deciding whether the assault was sexual in nature.

[56] Even if the accused's purpose was not to gratify his sexual appetite, the Court may still find the assault was sexual.

### **Doctrine of Recent Complaints Abolished**

[57] Section 264.5 of the (revised) *Criminal Code*, R.S.C.1970, c. C-34, reads:

The rules relating to evidence of recent complaint in sexual assault cases are hereby abrogated.

### **Other Relevant Legal Tenets**

#### **Adults testifying to events from Childhood**

[58] Every person giving testimony in court, of whatever age, is an individual, whose credibility and evidence must be assessed by reference to criteria appropriate to her mental development, understanding and ability to communicate. In general, where an

adult is testifying as to events which occurred when she was a child, her credibility should be assessed according to criteria applicable to her as an adult witness. Yet with regard to her evidence pertaining to events which occurred in childhood, the presence of inconsistencies, particularly as to peripheral matters such as time and location, should be considered in the context of the age of the witness at the time of the events to which she is testifying: *R. v. W. (R.)*, [1992] 2 S.C.R. 122, at para. 27.

### **Impermissible Stereotypes**

[59] Assumptions about complainants and their behavior in particular circumstances have plagued the law of sexual assault for generations. The *Criminal Code* negates the relevance of many of them. There was a time when it was often assumed that a complainant who had really been sexually assaulted, would report the assault immediately, and would thereafter not associate with the perpetrator. In recent years many of the stereotypes surrounding sexual assault have been set aside, and the public is more aware of the various manifestations of this offence...: *R. v. Caesar*, 2015 NWTCA 4, at para. 6.

[60] Trial judges may rely on their common sense and experience without expert opinion, to understand why a complainant may act in a certain way. In the context of sexual offences, despite the lack of assistance of an expert, it has been held that evidence of declining academic performance, rebelliousness and running away could be relied upon to confirm allegations of sexual assaults: *R. v. V.(G.R.)* (1996), 76 B.C.A.C. 72; leave to appeal refused (1996), 136 W.A.C. 238 (S.C.C.).

### **Position of Authority**

[61] In the vast majority of cases teachers will indeed be in a position of trust and authority towards their students. "...in the absence of evidence raising a reasonable doubt in the mind of the trier of fact, it cannot be concluded that a teacher is not in a position of trust and authority towards his or her students without going against common sense": *Audet, supra* at para. 43.

[62] A "position of authority" invokes notions of power and the ability to hold in one's hands the future or destiny of the person who is the object of the exercise of the authority: *R. v. Kyle* (1991), 68 O.A.C. 18.

### **Credibility Assessments**

[63] Finally, both Counsel expressed agreement with the law set out in *R. v. Huson*, 2021 BCSC 1549, at para. 95:

The process of assessing credibility was set out by Justice Dillon in the often-quoted case of *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 298, leave to appeal ref'd [2012] S.C.C.A. No. 392 as follows:

186 Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet* (Township) (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis* (1926), 31 O.W.Noah 202 (Ont. H.C.); *Faryna v. Chorny* (1951), [1952] 2 D.L.R. 354 (B.C. C.A.) [Faryna]; *R. v. S.*

(*R.D.*), [1997] 3 S.C.R. 484 (S.C.C.) at para.128). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).

## **Evidence**

[64] The Crown called a total of nine witnesses in these proceedings, including D.M.

[65] Counsel on behalf of Mr. Deuling elected not to call evidence.

[66] My analysis will address the key aspects of the evidence of each witness and address any credibility or reliability concerns arising from consideration of all of the evidence.

[67] The only direct evidence of the offences alleged in the matters before the Court, arises from the testimony of the first Crown witness, D.M.

[68] All other witnesses testifying in these proceedings provided evidence on collateral matters relevant to D.M. and Mr. Deuling, often covering the span of several years.

[69] I will begin my review of the evidence by first considering the evidence of the Crown witnesses testifying after D.M. I will then turn to a review of D.M.'s evidence. I am satisfied that it is important to review D.M.'s evidence in the context of evidence provided by the other Crown witnesses.

## **Mr. Gresley-Jones**

[70] The second Crown witness was Mr. Daniel Gresley-Jones.

[71] Mr. Gresley-Jones testified that he worked as a teacher in Whitehorse from 1977 to 2002. He further explained that in January 1984, he transferred to Porter Creek Junior High School and later worked as a teacher at F. H. Collins High School in 1987 and 1988.

[72] Mr. Gresley-Jones explained that Mr. Deuling was a colleague who also taught at Porter Creek School.

[73] Mr. Gresley-Jones testified that he and Mr. Deuling often spent time hunting and fishing together.

[74] Mr. Gresley- Jones further confirmed that in December of 1986, he had invited Mr. Deuling to live with him at his home located at [redacted] in Whitehorse.

[75] Mr. Gresley-Jones explained that Mr. Deuling occupied the lower floor of the home with Mr. Gresley-Jones making use of the main floor.

[76] Mr. Gresley-Jones believes that Mr. Deuling paid rent but could not recall the details.

[77] Mr. Gresley-Jones also testified that D.M. frequently visited Mr. Deuling at the home. However, he was unable to confirm precisely when those visits had commenced.

[78] Mr. Gresley-Jones believes that D.M. visited Mr. Deuling at the home one to three times a week but was not sure on that point.

[79] Mr. Gresley-Jones was also uncertain about having taught D.M., what her activities were in school, and what her age was when the visits began with Mr. Deuling at the shared home.

[80] Mr. Gresley-Jones did recall that when D.M. phoned the home, she usually asked for “Paul”, calls that were often answered by Mr. Gresley-Jones on the upstairs phone.

[81] In general, Mr. Gresley-Jones confirmed that he did not recall if anyone else was in the home when D.M. visited Mr. Deuling. He did recall that D.M. generally entered the home through the front door and made her way downstairs to visit with Mr. Deuling.

[82] Mr. Gresley-Jones reported that in May 1987, he moved out of the home on [redacted] to live with his new wife. He also confirmed that D.M., Mr. Deuling and D.M.’s child came to that new home as a couple to have dinner with Mr. Gresley-Jones and his new wife.

[83] Finally, Mr. Gresley-Jones confirmed that Mr. Deuling appeared very fond of D.M.’s child, A., and that D.M.’s demeanor during visits seemed friendly.

[84] Mr. Gresley-Jones appears to have given his evidence in a forthright manner. Clearly there were gaps in his recollections of events given the time that has passed since he shared a home with Mr. Deuling.

[85] I find that Mr. Gresley-Jones had the ability to observe, recollect and report on some of what transpired between Mr. Deuling and D.M. in his presence, but certainly not all of the details relevant to that period of time.

[86] Having considered all of the evidence, I am satisfied that Mr. Gresley-Jones was a credible and reliable witness.

**B.K.**

[87] The third witness was B.K.

[88] B.K. moved into the M. family home in Whitehorse in the fall of 1982. As the common law partner to Mr. M., B.K. was a stepmother to Mr. M's three children, D. M., J.M. and TM.

[89] In that capacity, B.K. testified that she took over primary responsibility for cooking, cleaning, and dealing with the various needs of the children around the home and at school.

[90] B.K. could not recall D.M.'s age during the time she was her stepmother, but assumed she was a teenager.

[91] B.K. recalled that home life with the M. family was fairly good. However, B.K. did recall that her common law partner, Mr. M., "used to beat me up quite a bit" (page 8, Transcript, September 23, 2022) . She also testified that police were involved but did not initially provide details as to why or when.

[92] On cross-examination on this point, however, B.K. modified her evidence. She confirmed that the abuse she suffered at the hands of her partner did not arise until approximately 1989 or 1990. She also reconfirmed that prior to that, "life was pretty good" (page 17, Transcript, September 23, 2022) .

[93] B.K. was not sure whether or not D.M. was residing at the family home when the abuse from Mr. M. began in approximately 1989.

[94] B.K. denied abusing D.M. at any time, other than pulling her hair once. She also denied ever making D.M. live in the basement of the family home.

[95] B.K. recalled that D.M. was involved in outdoor sports, particularly jogging. She also recalled that D.M. had reported jogging with Mr. Deuling from time to time.

[96] On further cross-examination B.K. acknowledged that D.M. when asked about her running partner, would from time-to-time reply that “Paul” was coming over, referring to Mr. Duelling.

[97] Although unclear on dates and many details, B.K. testified that she believed D.M. ran with Mr. Duelling, who was thought to be her gym teacher roughly between ages 15 to 18. However, B.K. had no recollection of how often D.M. ran with Mr. Deuling, where they ran or under what circumstances.

[98] B.K. testified that she and her partner Mr. M. had discussed moving D.M. to a boarding school in Edmonton. Again, B.K. was uncertain of dates, times, or specific places. She was also uncertain as to the grade that D.M. was to attend if boarding school was pursued.

[99] Other than confirming that the decision to apply for boarding school for D.M. was made jointly by B.K. and her partner Mr. M., B.K. was vague on details for this period of time. She did recall that at some point D.M. became pregnant but could not be clear as



to when. On cross-examination she agreed that reference letters for the boarding school application were provided by school officials, including Mr. Deuling.

[100] B.K. did recall visiting D.M. two or three times in Edmonton with Mr. M., however, she could not recall when D.M. ultimately moved back home to Whitehorse.

[101] As for the reason for sending D.M. to boarding school, B.K. was initially vague. However, near the end of her testimony in direct examination, she finally outlined a series of concerns based on her belief that Mr. Deuling was “molesting” D.M. as early as Porter Creek Junior High School.

[102] B.K. outlined steps she took to confront Mr. Deuling concerning D.M., to no avail. She had a limited recollection of the details of the confrontation with Mr. Deuling, other than taking bags of D.M.’s clothes along.

[103] B.K. also outlined two attempted discussions with the Superintendent of Schools, and unsuccessful attempts to meet with an elected representative to discuss Mr. Deuling and B.K.’s concerns with respect to his involvement with D.M.

[104] Ultimately, it was B.K.’s evidence that the decision to send D.M. to an Edmonton boarding school arose from the lack of action regarding concerns with respect to Mr. Deuling.

[105] Uncertainty arose in B.K.’s recollection of next steps in D.M.’s education following her return from boarding school. However, she assumed that school resumed at F.H. Collins High School for D.M. but was unclear as to the grade entered.

[106] B.K. believed that before entering F.H. Collins High School, D.M. spent much of the summer jogging but again had no recollection of details.

[107] When school resumed in the fall, B.K. recalled that D.M. had personal issues that resulted in her being very upset, ultimately resulting in a meeting at the school. B.K. could not recall the reason for the meeting, who she met with on staff, or what took place at the school after the meeting.

[108] B.K. did report, however, that after the school meeting, D.M. moved out of the family home on [redacted] and occupied part of the other home on [redacted], also owned by the M. family.

[109] I find considering all of the evidence that B.K. testified as credible witness. However, aspects of her testimony were vague and less than reliable.

[110] Although generally consistent, there were many apparent material gaps in B.K.'s ability to recollect and report on events and the timing of events that took place concerning D.M., her education, her dealings with the school and ultimately, Mr. Deuling.

### **Emile Stehelin**

[111] Mr. Stehelin knew D.M. as a student at schools in Whitehorse. He also knew Mr. Deuling as teacher at some of those schools.

[112] Mr. Stehelin reported that he first began to “hangout” with D.M. after she became pregnant and began working at [redacted]. He also advised that from time to time he

would see D.M. and Mr. Deuling together, although he was uncertain as to times, locations, and circumstances.

[113] Mr. Stehelin expressed the view that seeing the two together outside school did not strike him as normal.

[114] Mr. Stehelin provided few other details of relevance. Although credible, the vagueness of his evidence suggests that it is of questionable reliability.

### **Mr. Seipp**

[115] The next witness was Mr. James Wallace Seipp. Mr. Seipp confirmed that as a career educator, he had served as Vice Principal of F.H. Collins Senior High School in Whitehorse between 1986 and 1987.

[116] Mr. Seipp testified that amongst his other duties, as Vice Principal he had responsibility for dealing with student and teacher discipline issues.

[117] In his role as Vice-Principal, Mr. Seipp explained that he had written a letter to D.M.'s father on December 16, 1986. The letter confirmed that D.M. had been removed from the school register of students due to lack of regular attendance.

[118] Mr. Seipp also confirmed that subsequent to that letter, he had met with D.M. and another woman on January 12, 1987. Mr. Seipp explained that the purpose of the meeting was to discuss accommodations that might be extended to D.M. to allow her to complete some of her exams.

[119] Mr. Seipp could not recall specifically who had accompanied D.M. to the January meeting. Nor could he recall the specific details of the conversation that took place beyond the fact that D.M.'s absences from school were related to her advanced pregnancy.

[120] When asked in cross-examination if there had ever been a discussion with D.M. on the subject of her pregnancy, Mr. Seipp emphatically denied having suggested to D.M. that she consider an abortion.

[121] The details of certain employment records concerning Mr. Deuling were put to Mr. Seipp for confirmation on cross-examination. The records appeared to confirm that Mr. Deuling had commenced employment in the Yukon in January 1980.

[122] Mr. Seipp was a thoughtful and careful witness. When he could not recall all details of matters that allegedly took place almost 40 years ago, he frankly acknowledged the same.

[123] Having considered all of the evidence, I find that Mr. Seipp was a credible, reliable and trustworthy witness, although the gaps in his recollection were readily apparent.

**T. M.**

[124] The next witness was T. M., the older sister of D.M.

[125] D.M. reported residing initially in Dawson Creek with her father and mother. However, T.M. noted that her biological mother left the family ultimately replaced by V.K. as stepmother.

[126] T.M. was not specific on the date the family moved to Whitehorse but was able to recall that they first lived at [redacted] until she was around 12 or 12 and then later at [redacted], probably close to 1979.

[127] T.M. confirmed that when she about 14 or 15, V.K. left, soon replaced by B.K. She recalled that the time before V.K. left, was often chaotic for the family. She also recalled that the family life remained similarly chaotic when B.K. lived with the family.

[128] T.M. reported that she attended Porter Creek and Jack Holland schools with her sister D.M. up to grade 7. She was always two grades ahead of her sister.

[129] When D.M. attended school in Edmonton, her sister recalls visiting her once. T.M. was, however, vague about any other specific contact with her sister during that school year.

[130] T.M. confirmed that her sister D.M. left the family home at some point in late 1986, after she became pregnant, and took up residence in the upper apartment of the home T.M. occupied.

[131] T.M. was less clear on when her sister had left that residence and moved to live with V.K. She believes that D.M. stayed with V.K. for some months after the baby was born.

[132] T.M. confirmed that she had been taught physical education and social studies for grades 5 to 7 by Mr. Deuling. She was also aware that D.M. had been taught by Mr. Deuling and coached by him as well for extra-curricular activities.

[133] T.M. has no clear recollection when she first learned that her sister was pregnant, nor does she recall the details of any conversation concerning the pregnancy.

[134] T.M. did recall seeing her sister preparing and packing for a basketball camp. T.M. was very uncertain on dates but thought it might have been in October 1986. She also thought that her sister may have been in grade 9 at the time and that she was wearing shorts and running shoes despite the cold. T.M. observed that her sister never dressed properly and that her father had given her a ride to the group meeting for the sports camp.

[135] T.M.'s recollection of details concerning her family life and specifically major events in her sister's life were inconsistent. It appears that her ability to accurately observe, recollect and report on events related to the counts before the Court is limited. I find that T.M. was a credible witness, however the reliability of her evidence was clearly in issue.

**J. M.**

[136] J. M. is the brother of D.M. He is two years younger in age.

[137] J.M. confirmed that he had attended Jack Holland, Porter Creek, and F.H . Collins schools in Whitehorse, approximately two years behind D.M.

[138] J.M.'s ability to recall specific details of his schooling was limited. He did recall that Mr. Deuling had served as his teacher and in particular, that he had taught J.M. social studies in or around 1986.

[139] J. M. testified that he had had conflict with Mr. Deuling in class but could not recall the year or relevant point in the school term beyond a vague recollection of it being while he was in grade 10.

[140] J. M. did recall being removed from the social studies class taught by Mr. Deuling as a result of the conflict, and ultimately, he left school entirely.

[141] Considering all of the evidence adduced, I find that while credible, J. M. was less than reliable as a witness. He had a very limited ability to recollect and report on events bearing on anything of relevance to these proceedings.

### **Frederick Smith**

[142] Mr. Smith served as Principal at Porter Creek Secondary School between September 1984 and April 1990. He testified that Mr. Deuling was a teacher at that school during part of that time, ending in 1987 with a transfer to F.H. Collins High School.

[143] Mr. Smith confirmed that Mr. Deuling taught physical education and social studies classes while at Porter Creek. He further confirmed that as a teacher, Mr. Deuling was actively involved in several student extracurricular activities, including coaching of volleyball teams.

[144] Mr. Smith confirmed that during his second year as Principal, approximately 1985, he had meeting with Mr. Deuling. He recalled that the purpose of the meeting was to discuss concerns that had been raised about an inappropriate relationship with D.M., then a student at the F.H. Collins school.

[145] Mr. Smith advised that Mr. Deuling denied any inappropriate relationship with D.M. responding that he simply ran with her from time to time.

[146] The evidence of Mr. Smith further confirmed that no notes were taken, and no investigation followed the meeting with Mr. Deuling.

[147] Mr. Smith was aware of legislation and a Teachers Association Code of Conduct that touched on the responsibilities of Yukon teachers in general. However, Mr. Smith could not recall any specific details of such provisions.

[148] On cross-examination with respect to the operation of physical education classes, Mr. Smith confirmed that classes were divided by gender, male students taught by a male teacher, female students by a female teacher.

[149] Mr. Smith also confirmed that the male and female physical education teachers had small offices adjacent to the school gym. His recollection was that each office had a clear window overlooking the gym floor. Mr. Smith reported that the windows not only allowed the teachers to monitor activities in the gym, but also provided a degree of protection for the teachers by ensuring that the offices were open to viewing from any users of the gym.

[150] Considering all of the evidence, I am satisfied that Mr. Smith was a credible and reliable witness.



**V.K.**

[151] The Crown's last witness was V.K. V.K. testified that she lived in a common law relationship with D.M.'s father between 1974 and 1982. During that time, she also testified about being a stepmother to D.M.

[152] V.K. further explained that after her relationship with D.M.'s father came to an end, she maintained her own residence and employment.

[153] In early 1986 V.K. reported that contact was made by D.M. asking if she could move in with her. V.K. testified that she knew D.M. was pregnant at the time, and in need of housing and other support having been asked to leave her family home.

[154] In light of those circumstances, V.K. reported that she allowed D.M. to move into her home, an accommodation that continued until after D.M.'s child A. had been born, for approximately a year and-a-half thereafter.

[155] On cross-examination V.K. was unshaken. V.K.'s answers were clear and unequivocal. Where she was unsure or did not know the answer to a question posed, she readily acknowledged the same.

[156] During cross-examination V.K. acknowledged that Mr. Deuling attended at her home to visit with D.M. once. She was able to provide basic details on the visit from her recollection but was unable to provide more than an overview of the interactions that took place.

[157] V.K. confirmed that D.M. was in regular contact with Mr. Deuling throughout her stay in V.K.'s home, including weekend visits with her child, to stay with Mr. Deuling who lived nearby.

[158] When questioned on cross-examination about D.M.'s evidence on home life with D.M.'s father, V.K. soundly, and clearly, rejected the assertions that had been made.

[159] Specifically, V.K. clearly rejected the assertion made by D.M. that she had been sent to school in dirty clothes, unclean, denied food, and abused.

[160] V.K. acknowledged that in the early days, the family had a number of challenges. She reported that for some time she was the only source of income, however, with the opening of the [redated], those concerns diminished.

[161] However, V.K. confirmed that although the family may have been short of money from time to time, they always had food available and that she regularly made school lunches and other meals for the children.

[162] As well, V.K. testified that in all other aspects, she ensured that the children in the family had appropriate food and meals.

[163] With respect to D.M.'s allegations of being forced to eat dog food to survive, V.K. adamantly and clearly denied any such circumstances ever arose.

[164] As to D.M.'s evidence of physical and emotional abuse in the family home, again V.K. was clear and unequivocal, that such events did not occur. She freely

acknowledged that the family home was often chaotic, however, she denied completely any contention that abuse in any form was part of family life.

[165] V.K. specifically denied the allegation made by D.M. that V.K. had held a hammer to her head and threatened to kill her.

[166] Finally, V.K. acknowledged that there were a number of details that she could not recall involving D.M. and Mr. Deuling. For example, she could not recall details of when D.M. called Mr. Deuling, nor how she referred to him.

[167] Overall, V.K. testified credibly in a full and frank manner, without equivocation. I find that she was able to observe, recollect and report on many of the matters in issue objectively and honestly.

[168] Overall, considering all of the evidence adduced, I accept V.K.'s evidence as credible, reliable, and trustworthy.

#### **D.M.**

[169] I will next review the evidence of D.M., the complainant.

[170] It is important to note that the only direct evidence of the indecent and sexual assaults alleged is that of D.M. As such, any issues arising from the credibility and reliability of D.M. must be very carefully considered.

[171] D.M. testified at length with respect to all five Counts before the Court.

[172] The interactions with Mr. Deuling described by D.M. span a time frame of almost ten years, first arising more than 40 years ago. Much of the time span in question arose during the childhood of D.M.

[173] In considering the credibility and reliability of D.M.'s evidence, I have acknowledged the extreme challenges of recalling and recounting details from so long ago, particularly from the perspective of a child, or young teenager. I have also considered the totality of the evidence before the Court in completing this analysis.

[174] There are a number of general issues raised by Counsel for Mr. Deuling relating to D.M.'s overall credibility and reliability. Other issues are more closely related to specific allegations set out in Counts #1 to #5.

[175] I will begin by considering the general matters of credibility or reliability raised by Counsel for Mr. Deuling.

### **Truthfulness of D.M.'s Testimony**

[176] The first issue advanced by Counsel for Mr. Deuling concerns the general credibility of D.M. Specifically, it is the submission of Counsel that D.M. not only lacks credibility, but has in fact lied under oath, and that such a lack of credibility taints all of her evidence.

[177] Counsel submits that D.M. has lied about abuse at the hands of V.K. In particular, Counsel submits that D.M. lied about death threats from V.K., the severe cutting of her hair by V.K., and the withdrawal of food as punishment by V.K. Counsel's specific submissions on these matters are as follows:

D.M. related the abuse at the hands of [redacted] as follows:

[Transcript of Proceedings, September 12, 2022, pg. 10, lines 25 to 35]:

A It was very difficult. There was a lot of abuse, a lot of physical abuse and emotional abuse.

Q That abuse, was that visited on you or is it something you witnessed?

A No, it was on me, my sister, (T), and my brother, J.C.

Q And who was the perpetrator of that abuse?

A [redacted].

Q How was nutrition in the home?

A We had food. There was good food. But sometimes she would punish us by not allowing us to eat for days. There was times I ate dog food because I was hungry. And I ate other – like not food. Like I would – I remember eating cream if we were punished by not having food.

[Transcript of Proceedings, September 12, 2022, pg. 11, lines 2-5]:

Q To whom did you turn for emotional support within your family unit?

A My sister.

Q Why not your parents?

A Because they beat us, so they weren't very nurturing.

[Transcript of Proceedings, September 12, 2022, pgs. 13-14, lines 41-8]:

A I think Mrs. Hackney because I would come in and I was very dirty and there was a period of time where all of our hair, just my sister and I, our hair was all cut off like right to our head, which is very unusual for girls.

So I think they would have noticed that we were dirty, that our clothes weren't clean and that we had no hair

Q What was the reason for the haircut?

A My theory is revenge on behalf of my step-parent because she didn't want to be the step-parent to us, so

she cut off all of our hair. That's my remembrance of that, like as a disciplinary measure.

We didn't have lice. She just didn't like having to brush our hair and our hair being knotted, so it was cut right to our heard. And she would often give us haircuts herself at home that would be embarrassing or cause us to get bullied at school, but her own children – her own child had long hair and my brother also had long hair, but my sister and I would get very unusual haircuts.

[Transcript of Proceedings, September 12, 2022, pg. 14, lines 44 to 46]:

A My stepmother, she moved out. She was having an affair with somebody that worked for my father and there was a lot of violence and stuff going on.

And she moved out.

[Transcript of Proceedings, September 12, 2022, pg. 13, lines 15, 23 to 33]:

A There was a lot of violence in the home.

...

A It was very hard. My stepmother was having an affair. My dad was out of town. And we weren't allowed to tell my dad and we had to talk to my dad on the phone and pretend that there was not another man in my father's bed and she would hold a hammer to my head and threaten to kill me if I said anything, so that was my home life at that time.

And she would hit the hammer on the table just to let me know that she would hit me with the hammer and kill me with the hammer if I said anything about that there was a man in my father's bed. And that was what my home life was like at that time.

There was a lot of violence that escalated intensely during that time.

[Transcript of Proceedings, September 12, 2022, pg. 28, lines 33 to 36]:

A ...Nobody knew that, but I went over there to tell him that. And I went into his office and – to tell him. It was really messed up for me because I never talked about my home life, really. I didn't

trust anybody and I knew we'd get the living crap kicked out of us if we said anything, so I never did.

[Transcript of Proceedings, September 12, 2022, pg. 39, lines 13 to 27]:

Q Now, we've heard about the incident in the office, but was there any other time during being taught or coached by Mr. Deuling that you spoke to him about your life outside school?

A I think over the years, but there's – I couldn't pinpoint which year. But I know over the years that I would come in and he knew that things were rough at home or I was having a hard time. I don't remember specifics, but more when I was older. Not so much when I was younger because I was pretty non-verbal.

Q Would Mr. Deuling have known you when your head was shaved?

A It wasn't shaved, but it was like right to my head. There's pictures.

Yeah, he would have seen me at the school and I'm sure all the teachers were wondering because "(D)" is a more masculine name, so like is that a boy or is that a girl? And a lot of times people didn't know if I was a boy or a girl, so there was times where, "Are you a girl or are you a boy?"

[178] V.K. denied all the abusive allegations made by D.M. while acknowledging, quite frankly, that during her time as stepmother, the family home was at times chaotic. I have found V.K. to be a credible and reliable witness.

[179] There was no evidence from either J.M. or T.M. that referenced the abuse and police interventions alluded to by D.M. Although T.M. also acknowledged an often chaotic home life. Such abuse and police involvement with D.M.'s father were identified by her as the key reasons to explain some of her absences from school.

[180] B.K., D.M.'s stepmother in grade 9, denied similar abuse allegations in that time frame. B.K. did acknowledge physical abuse at the hands of Mr. M. that on occasion led

to police involvement, however, reported that such only took place in the late 80's or early 90's, not D.M.'s grade 9 year.

[181] Furthermore B.K. specifically denied abusing D.M., with one exception, there was one incident of hair pulling was admitted. In general, D.M. reported a good home life with her partner Mr. M.

[182] There are, therefore, clear conflicts in some of the evidence of D.M. and other witnesses on the question of violence, abuse and police interventions in the M. family home while D.M. was in high school.

[183] I am, however, not satisfied that the disagreement between witnesses on the issues in the M. family home inevitably led to the conclusion that D.M. deliberately lied, and is therefore not a credible witness.

[184] In reaching that conclusion, I have taken into consideration D.M.'s age at the time these events allegedly arose; the general acknowledgement of a somewhat chaotic home environment by all material witnesses; and the passage of time since these events took place.

### **Use of Mr. Deuling's Name**

[185] Counsel for Mr. Deuling also raised the issue of how D.M. referred to Mr. Deuling. It was suggested that D.M. was incorrect in maintaining her position that she always referred to Mr. Deuling by his last name, and only began occasionally calling him by his first name, at his request, after she had left school.



[186] As noted above, the evidence of most witnesses did not add clarity to this issue. However, Mr. Gresley-Jones who had resided with Mr. Deuling confirmed that D.M. would often call or attend at the house and ask for “Paul”, not Mr. Deuling.

[187] Considering all of the evidence, I am satisfied that D.M. overstated the consistency of her references to the accused as Mr. Deuling in all her dealings with him. I am satisfied that in fact D.M. did make use of Mr. Deuling’s first name, “Paul”, at least from December 1986 onward. It is less clear that such references were regularly used before that time.

[188] D.M.’s evidence acknowledged the occasional use of the name “Paul” while visiting at the home he shared with Mr. Gresley-Jones but claims that such only took place at Mr. Deuling’s request during sex.

[189] I have considered the submission made that D.M.’s reluctance to acknowledge the use of Mr. Deuling’s first name raises either a credibility concern, or an issue related to the reliability of her recollections on this issue. I am also aware that D.M.’s position on the name issue may have been intended to support her position that she simply complied with directions received from Mr. Deuling over many years in her position as a vulnerable subordinate.

[190] I find that for much of the time covered by the five Counts before the Court, referring to Mr. Deuling by his last name could be consistent with D.M.’s experience as a student interacting with a teacher or coach.

[191] Overall, if there is an issue with respect to D.M.'s evidence concerning the use of Mr. Deuling's last name in all her dealings with him, I am satisfied that it is a collateral issue and does not fundamentally affect her credibility or reliability.

### **“My Teacher” References**

[192] D.M. was consistent in all of her evidence in describing Mr. Deuling as “my Teacher”. In fact, during her early testimony, D.M. was asked to be more specific as to who she was referring to in using those words, ultimately naming Mr. Deuling.

[193] Counsel for Mr. Deuling has submitted that the consistent use of the “my Teacher” descriptor by D.M. is contrived:

...sounding like something she's been told to say by someone else. It is rehearsed, not sincere. [Defence submissions page 26]

[194] In other portions of Counsel's submissions, it is noted that Mr. Deuling was in fact only D.M.'s actual teacher for a few years, and even accounting for coaching roles, was never D.M.'s teacher throughout her school years.

[195] The implicit submission of Counsel is that this is another issue affecting D.M.'s credibility, and perhaps even reliability as she exaggerated Mr. Deuling's role in her early life.

[196] I am not satisfied that Counsel's submission has merit. It is within the common experience of all former students to recall teachers from their past. It is also within such common experience to refer to such educators from time to time as “my teacher”. In that sense, I am satisfied that D.M.'s descriptor of Mr. Deuling was not inaccurate, although

without other evidence, such as actual teaching dates or context, it could well have been somewhat misleading. Finally, I am satisfied that such a conclusion does not fall into the category of an inappropriate myth or stereotype with respect to victims of alleged sexual assaults.

[197] There has been substantial other evidence adduced during these proceedings clearly establishing when Mr. Deuling had actual teaching responsibilities for D.M., and less clear evidence on his coaching duties with respect to D.M.'s extracurricular activities.

[198] In summary, therefore, I am not satisfied that D.M.'s reference to Mr. Deuling as her "Teacher" affected either her credibility, or the general reliability of her evidence.

### **Concordia College**

[199] A further issue raised by Counsel for Mr. Deuling was the nature of D.M.'s evidence concerning her attendance at Concordia College in Edmonton for grade 10.

[200] Counsel for Mr. Deuling noted that D.M. testified that she benefited from special treatment from Mr. Deuling at several points in her education. Some examples included being chosen to lead sports teams and being "chosen" to apply for a term at Concordia College in Edmonton.

[201] D.M.'s evidence was that Mr. Deuling had provided her with application forms to attend Concordia College explaining as follows:

Q So for your Grade 10, first year at high school, how was it — how did it come about that you were to go to Concordia College in Alberta?

A I don't have — I remember that I went in and my gym teacher had given me these forms to go to Concordia.

Q Do you remember the gym teacher's name?

A Yeah, Mr. Deuling.

Q Can you say that again, please?

A Sorry. Mr. Deuling.

And I don't know why I felt like I was special or chosen, but I kind of took it as an honour and took the forms home. And I was all excited to show my dad that this teacher would think of me as being good enough to do anything, let alone go to a special school. So I was pretty honoured.

And I took the forms home and my dad and [redacted], my dad's girlfriend, guess — I wasn't privy to their conversation about it, but for whatever reason, I was allowed to go.

[202] The evidence of D.M.'s stepmother B.K. on this issue was less than certain, however, did confirm that the decision to send D.M. to the Alberta school was jointly made between the two parents.

[203] It is clear that Mr. Deuling provided a reference letter supporting an application for D.M. to attend Concordia as did the school counsellor, Ms. Kitz.

[204] The evidence in total on this issue is inconclusive beyond the fact that Mr. Deuling provided a reference letter to D.M.'s parents supporting her application to Concordia.

[205] I am not satisfied that it has a material impact on the assessment of D.M.'s credibility or reliability.

### **Special Influence on D.M.'s Life**

[206] It is submitted by Counsel for Mr. Deuling that D.M.'s testimony concerning special treatment provided by Mr. Deuling were exaggerated, therefore affecting D.M.'s reliability as a witness.

[207] D.M.'s evidence was clear that she believed she was chosen to be a candidate for Concordia, selected for sports camps and leadership of school teams, all as a direct result of Mr. Deuling's influence or support.

[208] On cross-examination, it was suggested to D.M. that such was not in fact the case. With few exceptions, D.M. disagreed with the suggestions of Mr. Deuling's counsel.

[209] The totality of the evidence on the issue of special treatment extended to D.M. by Mr. Deuling is inconclusive. I am not satisfied that it results in the conclusion that her evidence on this point, or generally, lacks credibility or reliability.

### **Civil Claim initiated against Mr. Deuling**

[210] Counsel for Mr. Deuling raised an argument that the civil claim initiated by D.M. prior to the criminal complaint made to police, created a concern about to D.M.'s credibility.

[211] Specifically, Counsel argued that D.M. had a financial motive to proceed with the civil claim, an argument rejected by D.M.

[212] D.M. responded to the submission of Counsel by asserting that her purpose in initiating the civil claim against Mr. Deuling was to hold Mr. Deuling accountable for his actions in sexually assaulting her. D.M. maintained that any possible financial compensation arising from the filed civil claim was a matter to be determined by the courts.

[213] Mr. Deuling's Counsel submission is that D.M.'s apparent evasiveness in dealing with the civil claim raises a possible concern as to her credibility.

[214] However, it is also apparent that D.M. was only generally familiar with the civil claim. She was unclear on the details of the process involved, and the manner by which any financial compensation might be established.

[215] As such, it is possible that what may be viewed as evasiveness, may also be characterized as uncertainty as to the relevant facts and process on the part of D.M.

[216] Considering all of the evidence on this issue, I am not satisfied that it results in the conclusion that D.M.'s evidence on this point, or generally, lacks credibility or reliability.

### **Credibility and Reliability Findings**

[217] I have considered whether or not my findings with respect to D.M.'s credibility and reliability on the allegations set out in any of the individual Counts before the Court should have general application to her evidence as a whole. I am not satisfied that such is automatically the case.

[218] D.M.'s recollections and evidence on each of the time frames set out in the information before the Court span almost 10 years. The earliest events are alleged to have taken place almost 40 years ago. Clearly D.M.'s ability to have observed, recalled, and reported events from her childhood will vary with the passage of time and events.

[219] Given the range of time covered by these charges, I am satisfied that an assessment of D.M.'s credibility and reliability is best determined by specific consideration of her evidence on each count, unless a general issue of credibility or reliability arises from such analysis.

[220] I am further satisfied that an approach to analyzing D.M.'s evidence that takes into consideration the foregoing is consistent with the principles set out in *W. (R.)*.

### **Analysis of Counts #1 to #5**

[221] Having considered all of the evidence adduced, I make the following findings of fact relating to each of the Counts outlined above.

#### *Count #1*

[222] Count #1 as alleged against Mr. Deuling provides as follows:

Count #1 - On or between the 1<sup>st</sup> day of January in the year 1980 and the 3<sup>rd</sup> day of January in the year 1983 at or near the City of Whitehorse in the Yukon Territory, did indecently assault D.M, a female person, contrary to Section 149 of the Criminal Code.

[223] The amended time frame of the offences alleged in Count #1 extends from January 1, 1980, to January 3, 1983.

[224] As noted above, the only evidence related to the allegations in Count #1 is that of D.M.

[225] D.M.'s evidence was that the indecent assaults took place as a result of Mr. Deuling using her for demonstrations in "... every gym class, or every basketball practice, every volleyball..." (Transcript page 41, September 12, 2022).

[226] D.M. alleged that these assaults took place throughout grades 8 and 9.

[227] Specifically, D.M. testified that the assaults arose as a result of Mr. Deuling repeatedly selecting D.M. from the students present during the gym classes and practices that took place in grades 8 and 9.

[228] D.M. alleges that in each assault, her teacher, Mr. Deuling, moved behind her, holding her upper chest with his hand, then touching her back and bottom with his pelvis and penis as he demonstrated various skills such as ball throwing.

[229] D.M. explained the alleged assaults by reference to a general time frame (grades 8 to 9), a specific location ( her school gym), and specific details on how Mr. Deuling, her teacher, allegedly moved his hands and body to complete the assaults. However, on cross-examination, D.M.'s description of a number of important details of the assaults changed or resulted in equivocal answers.

[230] I find that D.M. exaggerated statements concerning the time when Mr. Deuling was her teacher. D.M. acknowledged in cross-examination that in fact throughout the years of concern, all gym classes were taught by a female instructor, not Mr. Deuling, although Mr. Deuling was also occasionally present as a coach.



[231] With respect to the frequency of the alleged assaults, in cross-examination, D.M. changed her answer from “every class, every basketball and volleyball practice” to “often” (Transcript line 43, page 13 to line 2, page 14, September 16, 2022). The reliability of D.M.’s recollection with respect to this issue is therefore in issue.

[232] D.M. was also vague and inconsistent in her reporting as to who was present when the assaults were alleged to have taken place (Transcript page 14, lines 25 to 41, September 16, 2022).

Q Right, so if I understand what you’re saying is that these occasions when you felt Paul Deuling’s penis on your butt, there were female teachers in the room. Is that right?

A We were — like the boys and the girls all had gym at the same time. They didn’t — like we weren’t in a male like half the men — like half the males were on the one side and half the girls were on the other side of the school. So gym would’ve been gym for boys and for girls. They didn’t separate —

Q Okay, so just —

A — us. There was only one gym.

THE COURT: Could you answer the question?

A Sorry.

THE COURT: Question was: Was —

MR. FOWLER: Question —

THE COURT: — the teacher still in the room, the female teacher.

A Oh, sorry. Often. Not all the time, perhaps, I don’t know. I guess she was not all the time.

[233] Again, it appears evident that D.M.’s recollection of the circumstances under which her female teachers may have been present during the alleged assaults by

Mr. Deuling was inconsistent. As result, a further issue arises as to the reliability of her evidence on Count #1.

[234] I also find that D.M.'s assertion that repeated sexual assaults by Mr. Deuling could have taken place in the presence of other students and female teachers, over the course of two school years in every gym class, basketball and volleyball practice attended by D.M. does not have the ring of truth and lacked an air of reality.

[235] As well, there were material inconsistencies in D.M.'s description of the assaults between her statement given to police, and testimony in these proceedings.

[236] Of particular significance is her failure to recount to police the allegation that she felt Mr. Deuling's penis rubbing against her back and bottom.

[237] D.M. explained that "as a child, I didn't know what that was. I just felt uncomfortable" (Transcript line 34, page 41, September 12, 2022).

[238] However, in making her initial complaints to police concerning the assaults alleged to have been committed by Mr. Deuling, D.M. did not ever mention that she felt Mr. Deuling's penis rubbing against her back and bottom ( Transcript lines 37 to 45, page 12, September 16, 2022).

[239] D.M.'s lack of understanding of the nature of the alleged touching by Mr. Deuling may well have been entirely accurate given her age at the time the alleged assaults took place.

[240] Of significance, however, is the following exchange in the direct examination of D.M.:

Q Why does this touching of Mr. Deuling's pelvis to your back stand out in your memory?

A Because I felt his penis and I didn't know what it was, but it felt creepy and wrong"

[Transcript lines 16 to19, page 42, September 12, 2022]

[241] The evidence of D.M. indicates that her initial statement to police concerning the various allegations made against Mr. Deuling took place in December 2017. At that point, D.M. was an adult, 48 years of age. She was no longer a child.

[242] D.M.'s failure to completely explain to police the details of the assault she endured in gym class and practices, including feeling Mr. Deuling's penis in her back and bottom, raises an important concern as to the reliability of D.M.'s recollections.

[243] The combined effect of the unreliable recollections of D.M. on this Count raise issues relating to the proof of the *actus reus* of Count #1. I find that there are significant concerns as to D.M.'s ability to accurately, and completely, observe, recall and report on interactions with Mr. Deuling in the gym area between grades 8 and 9.

[244] On this Count, therefore, I cannot find that D.M. was a reliable witness.

[245] Having considered all of the evidence, I am not satisfied beyond a reasonable doubt that the Crown has proven the *actus reus* of the offence alleged in Count #1.

[246] Specifically, I am not satisfied that any reliable evidence has been adduced to prove that Mr. Deuling indecently assaulted, or otherwise assaulted D.M. in any manner between January 1, 1980, and January 3, 1983.

[247] I therefore find Mr. Deuling not guilty on Count #1.

*Count #2*

[248] Count #2 as alleged against Mr. Deuling provides as follows:

Count #2 - On or between the 1<sup>st</sup> day of September in the year 1983 and the 30<sup>th</sup> day of June in the year 1984 at or near the City of Whitehorse in the Yukon Territory, did commit a sexual assault on D.M., contrary to Section 246.1 of the Criminal Code.

[249] The second allegation made by D.M. with respect to Mr. Deuling relates to a sexual assault, a kiss, that was reported to have taken place at the Porter Creek Junior Secondary School, in Mr. Deuling's gym office.

[250] In D.M.'s evidence on September 12, 2022, at page 28 of the Transcript, she responded to a question posed by Crown as follows:

Q When was the first occasion that you shared your experience at home with Mr. Deuling?

A I think we had walked over — me and my sister had walked over. I had missed a bunch of school and I felt like I should tell the teacher where I was because I was supposedly the head of all of these sport teams and I was — I had a responsibility. I was the student council president. I had a responsibility, and yet here I was missing all this school.

And it was a lot of school. It feels like it might have been a month of school and I felt like super guilty. And there were some girls picking on me and saying bad things about me for not being at the school and they wanted to take over my position and so I'd gone in to talk to Mr.

Deuling about it in his office because I just was overwhelmed with, you know, nobody knew what went on at my home, that my dad got arrested and there was a gun and somebody tried to shoot somebody and that's why I wasn't at the school.

Nobody knew that, but I went over there to tell him that. And I went into his office and — to tell him. It was just messed up for me because I never talked about my home life, really. I didn't trust anybody and I knew we'd get the living crap kicked out of us if we said anything, so I never did.

Q What grade did that —

A That was —

Q — occur in?

A Grade 9.

Q And where did you go to find Mr. Deuling to have that conversation?

A In his office.

Q What building was that in?

A At Porter Creek Junior Secondary School.

Q And where in the school was his office located?

A In the gym.

[251] D.M. further testified that there may have been some after school activity going on at the school but could not recall whether or not there were people in the gym.

[252] D.M. also confirmed that in order to access and leave Mr. Deuling's office, the only route lay through the school gym.

[253] In deciding to attend Mr. Deuling's office, D.M. testified that she "thinks" she walked over to the school with her sister, however, could not recall where her sister was as entry to Mr. Deuling's office took place or thereafter.

[254] Specific dates were not recalled by D.M. for either her school absences, or the visit to Mr. Deuling's office.

[255] However, D.M. did acknowledge a copy of her grade 9 report card that confirmed five days of school absence in the first reporting period, and a further 22 ½ days in the time frame of the second report. Again, specific absence dates, and reasons for the absences, do not appear to have been provided in the report acknowledged by D.M.

[256] D.M. did recall and report that the door to Mr. Deuling's office was closed during her discussion. Mr. Deuling's office was described as small and square with desks and shelves. D.M. also reported in direct examination that:

...There was like a- like a window that you could—but it had like more darker glass, I think..." [Transcript page 29, lines 27 and 28, September 12, 2022]

[257] And further in her direct evidence, D.M. said:

So I was just saying I think there was a window like looking—so there was an office and then kind of like here there's a window, right, but that would be going--sorry, that would be going out to the gym. And then there's a — the girls' gym teacher. There was another gym teacher on the other side. She had her office in there as well.

THE COURT: The witness is indicating from a seated position a glass partition approximately two feet in front of her. That's the description she's giving verbally and physically.

MR. FOWLER: Thank you very much, Your Honour.

MR. EBERHARD:

Q Was there anyone on the other side of the windows in Mr. Deuling's office when you attended on that day?

A No, it was like darker. I think the glass was like — not privacy glass, but just a little bit darker and there was just — I don't remember any

other people around. It was just me going in to speak to the teacher.  
[Transcript page 29, lines 45 to 47 and page 30 lines 1 and 2  
September 12, 2022]

[258] However, on cross-examination on this issue, D.M. provided another version of her description of the glass in Mr. Deuling's office:

Q Why did you go to the school?

A To tell my teacher Mr. Deuling why I was missing so much school.

Q How did you know he was going to be there?

A I remember in my testimony I said I wasn't — I don't quite remember what was going on at the school, whether there was a game or some kind of activity, but there was some kind of activity going on, and that's why I went there. I knew that all the teachers, people — well, not — maybe not all the teachers, but there would be teachers and staff there because there was some kind of activity.

Q Well, how did you know he was going to be there?

A I think it was a sporting activity, but I'm not sure. I just — that's why I went to the school. If he wasn't there, I wouldn't have told him then.

Q So if it was a sporting activity, there would've been people in the gym, right?

A There may have been, yeah.

Q Now, the window from Mr. Deuling's office looked out into the main gym. Correct?

A Correct.

Q And you could see into the gym from that office; correct?

A You could see out, but you couldn't see in. There was privacy glass, like I shared in my testimony originally. There was like — when I was showing with my hands. I don't want to do that again if I'm not allowed, but there was like darkened glass, so it was like privacy glass.

Q I'm going to suggest to you that that is simply not true, that the glass —

A I'm going to suggest it's very true, sir.

Q And you never mentioned anything about darker glass or privacy

glass —

A I did, sir.

Q — in your state —

THE COURT: Just —

MR. FOWLER: — in your state —

THE COURT: Just wait ‘til the —

A Sorry, sorry.

THE COURT: — question is asked.

A Okay, sorry.

THE COURT: And then respond, if you wouldn’t mind. Thank you.

A Yeah, sorry.

THE COURT: Please, Mr. Fowler, go again.

MR. FOWLER: Thank you, Your Honour.

Q You never mentioned anything about darker glass in the window to the office in your statement to the police, did you?

A I don’t think I would have in that original statement to the police, but I can’t remember, to be honest.

Q Would you like an opportunity to review your statement?

A No, I’m good.

[Transcript page 5, lines 6 to 37, September 16, 2022]

[259] As such, D.M.’s recollection of the nature of the glass in Mr. Deuling’s gym office varies considerably. D.M. also appears to omitted any description of the privacy glass from her initial statement to police.

[260] These omissions and inconsistencies are material because they relate to the circumstances described by D.M. leading up to the alleged sexual assault from



Mr. Deuling. D.M.'s evidence appears to describe a small office with a closed door and dark privacy glass preventing those outside, and in the gym, from seeing activity in Mr. Deuling's office.

[261] Those recollections stand in stark contrast to the evidence of Mr. Smith, the former school Principal. As noted above, Mr. Smith, whose evidence I have accepted as credible and reliable, was very certain that the glass in Mr. Deuling's office looking on to the gym floor was completely transparent. Mr. Smith explained this was intended to allow persons in the gym to see into the teacher's offices, in part, for teacher protection.

[262] In cross-examination, D.M. appears to have acknowledged that her express reason for choosing the time she did to visit Mr. Deuling was because she knew that there was some sort of activity taking place at the school. D.M. reported as follows on this issue:

Q Why did you go to the school?

A To tell my teacher Mr. Deuling why I was missing so much school.

Q How did you know he was going to be there?

A I remember in my testimony I said I wasn't — I don't quite remember what was going on at the school, whether there was a game or some kind of activity, but there was some kind of activity going on, and that's why I went there. I knew that all the teachers, people — well, not — maybe not all the teachers, but there would be teachers and staff there because there was some kind of activity.

Q Well, how did you know he was going to be there?

A I think it was a sporting activity, but I'm not sure. I just — that's why I went to the school. If he wasn't there, I wouldn't have told him then.

Q So if it was a sporting activity, there would've been people in the gym, right?

A There may have been, yeah.

[Transcript page 4, lines 39 to 45, page 5, lines 1 to 8, September 16, 2022]

[263] It is self-evident that if there were in fact others in the school gym, a visit to Mr. Deuling's office with transparent glass would have been public, and not the private encounter described by D.M. with the dark privacy glass. D.M.'s description of the physical circumstances surrounding the alleged encounter with Mr. Deuling in his office is, at best, uncertain. D.M.'s descriptions of those circumstances would appear to have been unreliable and perhaps, misleading.

[264] As noted above, D.M.'s express purpose in wanting to visit Mr. Deuling in his office after normal school hours was to provide an explanation for her school absences.

She testified on this point as follows in direct examination:

Q Do you remember specifically what you spoke to Deuling about? Mr. Deuling.

A Yeah. I just was telling him like there was some trouble at my home. I didn't go into great detail, but that my dad and [redacted] had had a big fight and my dad, he was arrested. There was a lot of trouble at my house, that kind of thing.

[Transcript page 30, lines 17 to 22, September 12, 2022]

[265] D.M. further explained in direct examination that she was in Mr. Deuling's office for 10 to 15 minutes. On cross-examination D.M. testified as follows:

Q You also said that you talked with Paul Deuling for 10 to 15 minutes. Right?

A Correct.

Q You said — you just said you told him there's some trouble at home but that you didn't go into any details. Right? That's what you told us the other day when you testified; right?

A Yes.

Q And that Mr. Deuling didn't provide any assistance to you. Correct?

A Correct.

Q In other words, he didn't say anything to you. Right?

A Well, he listened.

Q Well, my question was he didn't say anything to you, did he?

A Correct.

THE COURT: Is that a yes?

A Sorry, yes. Yes.

MR. FOWLER:

Q So what did you talk about for 10 to 15 minutes?

A Well, I was sharing what happened at home and about missing school and feeling bad about missing school.

Q But you told us you didn't go into any details with him. Right? That's what you told us on Monday.

A Well, it was a guesstimate, too, as well, to remember back 30-something years ago of how long that I would have spoke to my teacher. I didn't have a time clock on, and I wouldn't have written it down in a diary thinking I would be sitting before anybody to remember 10, 15 minutes of a conversation.

But best of my recollection, I shared that there was a lot of trouble at home and that my dad was in jail and there was some issues at home. And I probably wouldn't have gone into intimate details, but I remember saying all that and telling him, because I was scared. It's not every day that your dad gets put in jail. It was a scary time for me.

[Transcript page 5, line 45, page 6 lines 1 to 30, September 16, 2022]

[266] The foregoing responses on cross-examination reveal an important inconsistency in D.M.'s evidence. She was clear on direct examination, confirmed on cross, that she did not go into any details with Mr. Deuling about the trouble she was facing at home.

[267] D.M.'s assertions about details allegedly shared with Mr. Deuling are in conflict between the answers given in direct and cross-examination. Again, the question of the reliability of D.M.'s recollections on these issues appears to be a concern.

[268] A further issue of reliability arises with respect to the facts surrounding the circumstances of D.M.'s home life in grade 9, and the need to share those circumstances with Mr. Deuling.

[269] The evidence of J.M. and T.M., D.M.'s siblings, did not reference the abuse and police interventions alluded to by D.M. Although T.M. acknowledged an often chaotic home life. Such abuse and police involvement with D.M.'s father were identified by her as the key reasons to explain her absences from school, and to meet with Mr. Deuling.

[270] B.K., D.M.'s stepmother in grade 9, denied similar abuse allegations in that time frame. B.K. did acknowledge physical abuse at the hands of Mr. M. that on occasion led to police involvement. However, she testified that such abuse only took place in the late 1980's or early 1990's, not in D.M.'s grade 9 year.

[271] Furthermore, B.K. specifically denied abusing D.M., with one exception, one incident of hair pulling was admitted. In general, B.K. reported a good home life with her partner Mr. M.

[272] There is a clear conflict, therefore, in the evidence of D.M. and other witnesses on the question of violence, abuse and police interventions in the M. family home while D.M. was in high school. The issue is important as it ostensibly provided the motivation for D.M. to visit Mr. Deuling in his office. The existence of such home violence prior to the alleged meeting in Mr. Deuling's office has certainly not been proven beyond a reasonable doubt.

[273] With respect to the actual sexual assault, D.M. reports that after explaining the reason behind her absences from school for 10 to 15 minutes, Mr. Deuling said nothing. Rather, Mr. Deuling is reported to have risen, placed his hands on the upper part of both her shoulders, leaned forward and kissed her once on the lips.

[274] I find that D.M.'s recollection of the context surrounding the alleged sexual assault by Mr. Deuling was far from complete, nor was it consistent. The inconsistencies and unreliability in that context raise concerns as to the reliability of D.M.'s recollections of the sexual assault itself.

[275] I find that D.M. was not a reliable witness demonstrating the ability to accurately observe, recall and testify to the details of circumstances alleged to have taken place in Mr. Deuling's office.

[276] Clearly the reliability challenges in this area of D.M.'s evidence reflects the reality of attempting to recall events and circumstances objectively and accurately after the long passage of time, and from D.M.'s position as a child.

[277] Considering all of the evidence, I am not satisfied that the Crown has proven any facts relevant to Count # 2 beyond a reasonable doubt, including the *actus reus* of the offence.

[278] I am unable to make any findings of fact on this Count based on the inconsistent and unreliable evidence that is before the Court.

[279] In particular, I am unable to make any findings of fact of the allegation that Mr. Deuling committed an act of sexual assault, or any assault, on D.M. on or between the 1<sup>st</sup> day of September in the year 1983 and the 30<sup>th</sup> day of June in the year 1984 at or near the City of Whitehorse in the Yukon Territory.

[280] I therefore find Mr. Deuling not guilty of Count #2.

### *Count #3*

[281] Count #3 as alleged against Mr. Deuling is as follows:

Count #3 - On or between the 1<sup>st</sup> day of June in the year 1986 and the 30<sup>th</sup> day of September in the year 1986 at or near the City of Whitehorse in the Yukon Territory, did commit a sexual assault on D.M., contrary to Section 246.1 of the Criminal Code.

[282] In the time period covered by this allegation, D.M. was between grade 11 and 12 at F. H. Collins High School in Whitehorse. She was 17 years of age.

[283] D.M. has testified that at some point in the summer or early fall of 1986, Mr. Deuling invited her to go for a run in preparation for a cross country event to take place in the fall. D.M. further testified that this was an activity very similar to that previously undertaken with Mr. Deuling as her school cross country coach.

[284] The specific allegation made by D.M. is that at some point during the run when the two of them, Mr. Deuling and D.M., were in a more secluded area described as the ski trails, Mr. Deuling, aggressively took D.M. from behind by the hand, and pulled her to the ground. It is further alleged by D.M. that while on the ground, Mr. Deuling had forcible sexual intercourse with her, placing his penis into her vagina, without her consent.

[285] The specific evidence of D.M. with respect to this allegation is that she saw Mr. Deuling one day outside [redacted] and engaged in a conversation with him. D.M. reports that Mr. Deuling asked how school was going and whether or not she was still running.

[286] D.M. reports that the result of that conversation was an invitation from Mr. Deuling for her to join a group competing in the Alaska Road Relay that fall.

[287] According to D.M.'s evidence, Mr. Deuling explained that the relay team was one member short, and that training would be required. D.M. testified that she was honoured to be invited by Mr. Deuling, her former teacher and running coach. She further confirmed that a time was set for a practice run at a pre-determined trail near her family home.

[288] D.M. testified that she recalled preparing for the run by wearing sweatpants and a sweatshirt from Porter Creek Junior Secondary that had been given to her by Mr. Deuling. D.M. was able to describe a Dall sheep insignia in cobalt blue and the number "19".

[289] D.M. further reported that on meeting Mr. Deuling for the run, the two initially followed local roads for approximately a half hour. D.M. testified that at that point in the run, Mr. Deuling suggested heading down some adjacent trails and so she turned and ran where indicated by Mr. Deuling.

[290] D.M. confirmed that she did not see a distinct trail and struggled as she led running through the birch trees and sticks. Her specific evidence at this point was:

Q And how did that—the rest of that part of the run go?

A It—I didn't even like run very far. I went—I was running and so I went like this and when I swung my arm back, he grabbed my arm"

THE COURT: You're indicating with your right arm—

A Yeah

THE COURT: Going backwards?

A Yeah

THE COURT: Yes.

A So as I was taking a stride and my arm went back, he grabbed my arm and yanked me so hard, and I flew back. And I landed on the ground. And the next thing I know, he was on top of me.

[Transcript page 54, lines 14 to 24, September 12, 2022]

[291] D.M. further reported that while on the ground, Mr. Deuling put his arm against her throat rendering her unable to speak or breathe:

Q Were you saying anything at this point?

A I couldn't speak because his arm was over my neck. I couldn't breathe.

Q Were you thinking about anything at this point?

A I was thinking — I said to myself, "Oh, my god". I didn't even know what was happening, and he put his arm there and I couldn't breathe



and I couldn't move and I was scared. And he had his legs pushing my legs open and I was trying to keep my legs closed. And then he — he reached down and those sweat pants that I wore, he ripped them down.

And I remember just saying in my head no, no, but I couldn't scream because he had his arm across my neck. And I — I was crying. I was trying to breathe.

And I remember looking up and seeing all the — the leaves and the trees. And I was saying — screaming in my head, but I couldn't breathe. And he pulled my pants down, and then he — he had sex with me, and it hurt.

Q By had sex with you, can you physically describe what Mr. Deuling did?

A I just remember that it hurt so much and it happened so fast. I just heard like lots of noise. He was making all kinds of like disgusting sounds and I was still trying to keep my legs closed.

And I — I didn't really — it was so fast and it hurt so bad, and I don't remember what happened. And then he goes — he goes, "Oh" — pardon my language. He goes, "Oh, fuck, somebody's there. Oh, shit, somebody's there".

He was swearing, and I'd never heard him swear before and that kind of freaked me out, too.

And then he goes, "Get up, get up". And I — I couldn't move 'cause it hurt.

Q What part of your body was hurting?

A My vagina. It really hurt, but I — I was — it was like I wasn't even in my body so I couldn't move, and he was like, "Get up, get up. Somebody's coming".

And he was all freaked out and he — he had jumped up so fast and he pulled up his sweatpants. And I was still laying on the ground and I think I had sat up at that point. And I just couldn't even more, I was in so much pain. And I was so stunned that he did that to me.

And then I couldn't — I stood up and I was like — he kind of yanked me up and I stood up and he kind of — he pulled up my — my pants. He pulled up my underwear. He pulled — I couldn't do it. I was so — I was so stunned, I couldn't do it.

And I didn't see any other people. He said, "Oh, there's all these people" — he's, "Oh, there's people". There was no people. It was —

I was so — I didn't have time to think of how to react to what happened to me.

Q When you say Mr. Deuling pulled up his pants, had he been naked on top of you?

A No. He just pulled his pants down. They weren't off.

Q Okay. Had part of his skin been exposed while he had you on the ground?

A I don't remember. I couldn't see or anything because I was being held down across here and I didn't move. I was — I was frozen like that.

THE COURT: You're indicating with your head up. Is that right?

A No, I was like laying on the ground, but when he put his arm across my neck, I couldn't move. And so I didn't see what he was doing. I could just feel the — there was like sudden pain in my vagina.

MR. EBERHARD:

Q And what was the cause of the sudden pain in your vagina?

A Of him putting his penis in my vagina.

Q How long was his penis in your vagina?

A Not very long. Like this was minutes, and he was just making some sounds and it was repulsive to me. And then when he was done, he thought he heard people and he wanted to get his pants up really quick and then he wanted me to get my pants up really quick, but I was still stunned. I didn't even know what hit me.

And he yanked my pants up and he goes — slapped me on the ass, pardon my language, Mr. Judge. And he goes — he goes, "Good girl".

And like a good girl, I frigging ran out of there and we just — "Okay, goodbye", he says. "See you for the next training" or something like that. I can't even remember what he said. I just remember I had to get out of there, and I ran down to my dad's house. And he went off in his truck.

Q That summer, that time, how big were you compared to Mr. Deuling?

A I would have been 5'3, 110 pounds, 100 and — yeah, about 110 pounds.

Q And how did you feel physically after you were back up off the ground and your clothing was back on your body?

A I felt like my spirit had left my body and died. The pain from my vagina was really bad and it hurt. It hurt to walk, and it was disgusting because it was like this man I had looked at as my father all I had like pouring from my vagina this blood, this sperm from this guy that was supposed to be my role model.

[292] On cross-examination, a number of issues arose with respect to D.M.'s evidence.

[293] D.M. acknowledged that her reports of being choked by Mr. Deuling and unable to breathe or talk during the alleged sexual assault were never detailed to police in her December 2017 initial complaint.

[294] That omission is a material inconsistency to D.M.'s report of the sexual assault as it reflects a significantly increased level of violence. By failing to outline those facts in her police statement, D.M. raised a real question as to what had actually happened as Mr. Deuling allegedly pulled her to the ground in her testimony during these proceedings.

[295] A further issue arises from the evidence of D.M. concerning the clothes she claims to have worn on the date of the alleged assault. D.M. testified that she was wearing sweatpants and a sweatshirt given to her by Mr. Deuling at the end of grade 9. D.M. claims that she was honoured to receive the clothing:

When that teacher, Mr. Deuling, gave me those clothes, I was very honoured and because it also represented a time when I was doing pretty good in my life as a kid.

[Transcript, page 23, lines 1 to 3, September 16, 2022]

[296] A major theme of D.M.'s earlier evidence considered with respect to Count #2 centered on just how bad her grade 9 year at school had been for her at home and at school (Transcript page 28, lines 25 to 32, September 12, 2022).

[297] Obviously, the detail of D.M.'s recollection of the specific clothing she wore on the day in question is an important factor in considering the reliability of her recollections. However, those details were never made known in the initial police statement. As well, the apparent conflict in the explanation of the importance of the clothing puts in issue the reliability of D.M.'s recollection of events at this time.

[298] A further issue arises from the question as to when Mr. Deuling first touched D.M. during their run. D.M.'s evidence in direct was clear that the first touch was a grab of her hand from behind as she was in mid stride running through the bush. She also testified that the two had not run "very far" before the first touch when her hand was grabbed.

[299] However, in cross-examination D.M. acknowledged that:

Q Now, you told us that when you were running on this occasion, you say you were sexually assaulted. The only time he touched you before that was when he grabbed your arm; correct?

A Do you mean — he had touched my hand before. He held my hand when we were looking — he said, "Look at the view" and he grabbed my hand. That was the first time he had touched me, I guess, in an awkward way, but I didn't think anything of it. I just thought it was awkward and weird. I was uncomfortable.

Q Well, just to be clear, you didn't mention anything about that the other day, right, about looking at the view and him holding your hand; right? You didn't tell us anything about that.

A Yes. But you asked if that was the first time and I wanted to be truthful, so like I'm just trying to answer your question honestly because you said that was the first time, so I'm being — telling you the first time. I'm answering your questions. Sorry.

Q No, but just be clear, you were asked a lot of questions about everything that happened that day; right?

So my question about the first time that Mr. Deuling touched you that day was based on the evidence you provided the other day. You understand that?

A Yes, I'm trying to understand this.

Q Right. You were asked an extensive number of questions about this running incident in September of 1986, and you described in detail everything that happened; right?

A Yes.

Q Have I got that correct?

A Yes.

Q And based on everything that you told us the other day, the only time he touched you before the sexual incident was when, according to you, he grabbed your arm. That's the evidence you gave the other day; right?

A Yes.

Q And now, as I understand it, you've added to that and said he held your hand and you looked at the view

A Yes.

[300] Despite being interviewed at length by police, and providing detailed evidence in direct examination, prior to cross-examination, D.M. had not explained an earlier incident where Mr. Deuling held her hand when admiring a view. This took place at some point before the sexual assault. This is a significant inconsistency in the timeline of events before the alleged sexual assault. This inconsistency raises a further issue as to the accuracy and reliability of D.M.'s recollections of the interactions with Mr. Deuling.

[301] A further issue arises with respect to the immediate aftermath of the alleged sexual assault. D.M. testified:

A And he yanked my pants up and he goes — slapped me on the ass, pardon my language, Mr. Judge. And he goes — he goes, “Good girl”.

And like a good girl, I frigging ran out of there and we just — “Okay, goodbye”, he says. “See you for the next training” or something like that. I can’t even remember what he said. I just remember I had to get out of there, and I ran down to my dad’s house. And he went off in his truck.

[Transcript, page 56 lines 26 to 32, September 12, 2022]

[302] And as well:

Q How long would you estimate you were on the ground underneath Mr. Deuling?

A I would say under five minutes.

Q And how was it that you parted ways that day?

A I remember just walking back to his truck.

Q How long was that walk in time or distance?

A It wasn’t very long because we were not that far in the bush off where he — when he pointed and he said, “Let’s go in there” and I ran in, I didn’t get that far before I got yanked backwards, so we weren’t that far in. It wasn’t a big truck and then I don’t remember who followed who out. I just — I was on like — like a robot mode, I guess. I just was very quiet and I went out. We walked out.

And then he said, “Okay. See you for the next — we’ll train next time”, something, something, and I don’t even remember. And I just ran back to my dad’s house.

[Transcript page 58, lines 25 to 33, September 12, 2022]

[303] D.M.’s evidence appears to be internally inconsistent as to whether the aftermath of the alleged sexual assault saw her immediately run out of the woods and away from

Mr. Deuling, or whether she walked with Mr. Deuling back to his truck through the woods and then ran home. The apparent inconsistency raises a concern as to the reliability of her recollections as to the aftermath of the alleged sexual assault.

[304] Considering all of the evidence with respect to this allegation, I find that D.M.'s recollection of the context surrounding the alleged sexual assault by Mr. Deuling while running, both before and after the alleged incident, was incomplete and materially inconsistent.

[305] The inconsistencies and unreliability in that context raise concerns as to the reliability of D.M.'s recollections of the sexual assault itself and in particular, the specific physical interaction that allegedly took place with Mr. Deuling.

[306] In coming to this conclusion, I have, of course, taken into consideration the reliability challenges in this area of D.M.'s evidence which obviously reflect the reality of attempting to recall events and circumstances objectively and accurately after the long passage of time, and from D.M.'s position as a young teenager.

[307] However, in considering all of the evidence I find that D.M. was not a reliable witness demonstrating the ability to accurately observe, recall and testify to the material details of circumstances alleged to have taken place while running with Mr. Deuling.

[308] Considering all of the evidence, I am able to find that D.M. and Mr. Deuling engaged in running practices in the late summer and early fall of 1986.

[309] However, beyond this, I am unable to, beyond a reasonable doubt, make any further findings of fact on this Count, as a result of the inconsistent and unreliable evidence that is before the Court.

[310] Considering all of the evidence, I am not satisfied that the Crown has proven all of the facts relevant to Count #3 beyond a reasonable doubt, including the *actus reus* of the offence.

[311] In particular, I am unable to make any findings of fact with respect to the allegation that Mr. Deuling committed an act of sexual assault, or any assault, on D.M. on or between the 1<sup>st</sup> day of June in the year 1986 and the 30<sup>th</sup> day of September in the year 1986 at or near the City of Whitehorse in the Yukon Territory.

[312] I therefore find Mr. Deuling not guilty of Count #3.

#### *Count #4*

[313] Count #4 as alleged against Mr. Deuling is as follows:

Count #4 - On or between the 1<sup>st</sup> day of October in the year 1986 and the 31<sup>st</sup> day of October in the year 1986 in the Yukon Territory, did commit a sexual assault on D.M. contrary to Section 246.1 of the Criminal Code.

[314] The essence of Count # 4 relates to a sexual assault allegation arising during a camping trip involving Mr. Deuling and D.M.

[315] D.M.'s testimony concerning this Count began with a description of her activities in the summer and fall of 1986. This included D.M.'s attendance at F.H. Collins High School to begin grade 12 studies.



[316] D.M. explained that as she prepared to return to school:

A I kind of went into that year, after what happened in the summer, like in a daze. And I couldn't concentrate on very much. I was depressed. I wasn't—I didn't feel stable."

[Transcript page 2, lines 35 to 37, September 13, 2022]

[317] During that summer, D.M. acknowledged that she had been in contact with Mr. Deuling, who was still teaching at that time, but not at her high school. D.M. explained:

A He would tell me when to phone him. There no cellphones or texting or anything like that, obviously, back then. So it was he would tell me to call him, and I would call him. And he asked me if I wanted to go away on a trip.

Q Do you remember how far into your school year that telephone conversation in particular occurred?

A It would have been late September.

[Transcript page 3, lines 2 to 8, September 13, 2022]

[318] D.M. further explained when asked about the nature of the trip proposed by Mr. Deuling that it was a basketball camp where she could learn skills. When asked about the location of the camp, D.M. confirmed that she did not recall what she had been told. She did confirm her belief that other "kids" would be at the camp.

[319] D.M. did recall that she told her father about the camp and then packed up what she described as sporting outfits along with her sleeping bag. D.M. recalled the black and red high tops she planned to take with her along with the Concordia College jacket brought back from her year in Edmonton.

[320] D.M. was not aware of any conversation between her father and Mr. Deuling concerning the trip, nor was she aware of any permission slips relating to the camp. However, she did recall that on the date of the planned trip, her father drove her to Porter Creek Junior Secondary at approximately 8:00 in the morning to meet Mr. Deuling who was alleged to be waiting in the school parking lot next to his “old blue truck.”

[321] No other students were waiting in the parking lot according to D.M. However, after a brief exchange with Mr. Deuling, D.M.’s father left her in his care. D.M. described Mr. Deuling as “super excited” as they left to drive down the Alaska Highway. During the drive, D.M. reported that Mr. Deuling engaged in a discussion “ about his wife and personal things.”

[322] In terms of the planned destination for the trip, D.M. claims to have had no idea where she was going to play basketball. She also reported that the absence of other students travelling with them to the ultimate destination did not cause her concern. D.M. both described her expected activity as either a basketball or sports camp.

[323] D.M. testified that she and Mr. Deuling were driving down the Dempster Highway, which she recognized as her great auntie and uncle had lived in that area. However, after an unspecified period of time, Mr. Deuling was reported to have turned off the highway to a clearing.

[324] D.M. testified that there was no basketball or sporting camp at that site. It was apparently early morning and very cold, between minus 10 and minus 20 degrees. No other persons were in the area; the two were alone in the woods.

[325] D.M. also reported that she had not dressed for winter outside expecting to have been inside at a basketball or sport camp and was not dressed properly for the cold at the camp. She also expressed the view that she felt “apprehensive and scared” while Mr. Deuling seemed “super excited”.

[326] After exiting the truck, D.M. explained that Mr. Deuling had told her that they were going to set up a tent in the clearing. Although claiming to lack outdoors experience, D.M. confirmed that she followed Mr. Deuling’s instructions to help put up the tent. Mr. Deuling was reported to have other equipment to unload, including a gun and camera.

[327] D.M. was not clear on what had taken place after the tent was set up. However, D.M. did report that as night fell, it was getting much colder. Mr. Deuling told her that they would have to get inside the tent to get warm, and so she went in.

[328] Although she had entered the tent, it appears that D.M. remained very cold. She reported that she followed directions from Mr. Deuling in the tent that ultimately led to the alleged sexual assault:

A He said that if — because it was getting so cold, we would have to go inside that tent. And then we got inside the tent. I was really very cold because I wasn’t dressed for winter at all. I was dressed for maybe weather like it is today, like — just like a fall.

So I got in. I did what was I told. I got inside that tent. And then he said, “Oh, we should zipper up our sleeping bags together because then you’ll be warmer,” because I was just shivering and shivering by that point. And . . .

Q Is that what you did?

A I did not because I don’t have those skills. My teacher Mr. Deuling

zippered the sleeping bags together. And then he told me, “Okay, crawl inside.” And I did what I was told. I crawled inside the bigger sleeping bag. And then he crawled inside as well.

Q At that point, what were you feeling?

A I was feeling pretty sick to my stomach because I didn’t want to get assaulted again, and I didn’t want to go through that again. But I was thinking, Well, maybe it won’t happen, because I mean, he was my teacher and he was my friend and he was somebody that I wanted at one point to be my dad. So I thought, Oh, maybe it’ll be okay; we’re just going to stay warm.

And he told me, “Come snuggle in closer. Oh, come here.” And he was laughing. And he was having so much fun about it. And so I tried to feel that instead of what I was feeling. And he said, “Come closer.”

And then he told me, “Oh, you know, people take off their clothes and they cuddle up to survive, because if it’s too cold, you could die. You could die like that.” And I didn’t want to die. And I did feel like I could possibly die. I’m freezing. I didn’t want to freeze in the bushes in the middle of nowhere.

I wanted to play basketball. I wanted to be with some other kids my own age, maybe meet some cute boys, maybe talk to some nice girls. I certainly didn’t want to be freezing in the bush by myself.

Q What did you believe your options to be?

A To do what I was told because that’s what I learned. Do what you’re told and beatings are less.

And my sister was a pretty yappy person. She was always mouthing off. She got the shit kicked out of her — sorry, Your Honour.

So I did what I was told. “Take off your clothes.” I took off my clothes. And it was so hard, because I’m not — I’m not the kind of person that walks around nude or — I’m just not that person. So being naked was horrible. Being naked with my teacher Mr. Deuling was even more horrible. I would rather have been dead than do that. But he’s saying, Oh, you’re going to die because you’re going to freeze to death.” In the inside of my head, I was wishing I was dead.

Q What was Mr. Deuling at this point doing when your clothes were off in the sleeping bag?

A He was touching me. He was very excited. He got on top of me. It was very quick again. It was like just jumped on top of me inside of that sleeping bag. He made a bunch of disgusting sounds. And I just

remember a lot of pain. I tried to keep my legs together again and he just moved my hands, pushed his way in there.

Q Where were you in pain?

A In my vagina.

Q And how did he move your hands? Where were your hands?

A Just with his hands, like just pushed my legs apart with his hands. And I kept pushing them back together, trying to get away. He just kept pulling them open, and he just jumped on me and that was it. It was just fast and aggressive.

I didn't have any preparation or thinking or thoughts on how to get out of that.

Q And what was giving you pain in your vagina?

A Sorry?

Q What was giving you pain in your vagina?

A Because he forced himself inside of me with his penis.

Q Did Mr. Deuling say anything to you during this event?

A No. He just made a bunch of disgusting sounds . . . like an animal.

[Transcript, page 10 lines 7 to 47, page 11 lines 1 to 24, September 13, 2022]

[329] D.M. described her emotional state of wellbeing at this point as follows:

Q And how were you feeling emotionally during this event?

A I'd learned to dissociate, and I just pretended I was up in the spruce trees and looking at the stars and . . . asked God why. Why would my teacher do that to me?

Q Do you have any idea how long Mr. Deuling was on top of you for?

A Couple of minutes. It was very fast again.

Q During those couple minutes, do you know how long his penis was inside of your vagina?

A I'd say under five minutes.

Q And how did that event end?

A He just rolled off of me. He was so excited and happy and hugged me. And it was confusing, because it was like, How could you do something that revolting and then be all happy about it and hug somebody after?

Q How were you feeling physically after?

A It hurt so bad, it hurt into my stomach. And I wanted to die. I just . . . didn't want to be there.

[Transcript page 11, lines 30 to 45, September 13, 2022]

[330] After the alleged sexual assault took place, D.M. reports that she and Mr. Deuling had a bit of food. However, she also had to go to the bathroom and outside it was dark and very cold:

And I had to go to the bathroom. But it was dark, and I was scared to go out in the dark and go to the bathroom. And so he said he would come with me. But I wanted privacy to go to the bathroom. So I kind of wandered off a little bit to go to the bathroom. And I remember he had had a roll of toilet paper. And he bundled up like, pshew, pshew (ph), Kleenex, and he handed it to me. "Go over there," he said.

Q Just to stop you for a second, there was a physical motion of you winding something around your hand.

A Yeah, the toilet paper.

Q Sorry to interrupt. Please continue.

A "Go over there." So I went off a little bit into the bushes to go to the bathroom. And I was having a hard time walking. So I walked as far as I could, and I didn't get very far, but I wanted to be private to go to the bathroom. And I squatted, and all this blood and all of his disgusting man stuff came out of me. And it was so awful. And I remember it hitting the snow, and it was just like so much red. I was embarrassed. I didn't want anybody to see. I kind of — I thought, "Oh, my god, what's coming out of me? All this, it's disgusting." And it hurt. And then I wiped.

And I heard a shot. And it scared me so bad. I was like, What the heck is that noise? And it was like a big shot. And I pulled up my pants really fast. And this —

Q What — sorry, please go ahead.

A And he come running back. “Oh, my god,” he says. “I shot a bear.”

[Transcript page 12, lines 2 to 23, September 13, 2022]

[331] The aftermath of the bear shooting was outlined in some detail by D.M. This included locating the bear by flashlight and assisting Mr. Deuling as he worked to skin the animal. D.M. reported that it was several hours later that she and Mr. Deuling returned to the tent. D.M. reported that she lay awake all night shivering.

[332] In the morning , D.M. detailed what happened next with Mr. Deuling:

And then in the morning, got up, went out to go to the bathroom again, was still bleeding, got back in the tent.

Q Was the sun up?

A Yeah. And I was told to sleep naked again because we would die. So I had to put my clothes on to go to the bathroom. Go back in the tent, and he said to me, “Oh, come in here,” because I was shivering. And he goes — he goes, “Oh, I didn’t get enough of you.”

Q What did you take that to mean?

A I took that to mean that I was going to get raped.

Q What happened next?

A He did the same thing. He rolled over onto me and put his penis inside of me again.

Q What part of your body?

A My vagina.

Q How long did that event last?

A Again, it was like under five minutes. It hurt worse because of what happened the night before. I didn’t even bother trying to fight. I just laid there because I saw what happened to that bear, and I just thought, I’m just going to — I’m just going to lay here so I don’t die or get shot or get left for dead down by some river. So I gave up.

[Transcript page 14, lines 7 to 26, September 13, 2022]

[333] D.M. acknowledges that she does not recall much of what happened the remainder of that morning. However, at some point the camp was struck and the bear skin packed into the canopy of Mr. Deuling's truck.

[334] D.M. described a pensive drive back to Whitehorse as Mr. Deuling talked to her about his excitement at having shot the bear.

[335] D.M. provided a very detailed description of the interior of the truck and reported that at some point another teacher, Mr. Hall, had flagged them down to talk to Mr. Deuling. She also reported being told to hide on the floor of the truck under old items and garbage while Mr. Deuling stopped to talk to his friend.

[336] On returning home, D.M. cannot recall who was there, but that she was very relieved to be home. D.M. testified that she felt pain and experienced continued bleeding even after returning home.

[337] The aftermath of the alleged encounter D.M. was described by D.M. as follows:

Q How did you do in the remainder of that semester at school?

A I missed a lot more school after that happened. My depression was getting bad. I was very sad. I was thinking — I don't think I was mentally stable. I was thinking a lot about not being here.

Q What do you mean?

A Like suicide and just didn't want to be here anymore.

Q And how often would you be absent from school?

A I was missing a lot of school. I was missing more school than I was attending school.



Q And what was the result of missing so much school?

A Very poor grades and my dad and [redacted] were getting upset with me.

[338] On cross-examination D.M. was largely unshaken. She did acknowledge, that she may have inaccurately described the road taken to the camping site as the Dempster. D.M. also confirmed that with the passage of time, her memory of those details may well have been incorrect.

[339] D.M. also fluctuated between describing the purported purpose of the trip with Mr. Deuling as a trip to a basketball camp or sports camp.

[340] One area of concern with respect to D.M.'s credibility arose on cross-examination with respect to her assertion that the purpose of the trip was to attend the basketball or sports camp. It is clear that D.M. had no recollection of the location of the purported camp, the details of the camp or circumstances under which her stay would be accommodated.

[341] Furthermore, D.M. did not appear concerned at all about the absence of any other students who would have been travelling to the purported camp waiting at the Porter Creek school.

[342] The issue that arises is whether or not the expressed purpose of the trip was a ruse to explain a camping weekend with Mr. Deuling, or a genuine belief in a sports training outing.

[343] Overall, on the purpose of the trip, I am left with concerns as to the reliability of D.M.'s evidence. However, I am mindful that my concerns in this regard may well be

explained by D.M.'s age at the time the trip took place. It may well have been that the details now of concern in this trial were simply not a priority for a young teenager, excited about a weekend outing, thereby affecting the reliability of her recollections.

[344] On balance I find that the evidence on the purpose of the trip was equivocal. I am simply unable to conclude whether the sports camp trip was a ruse to cover a trip with Mr. Deuling for the benefit of D.M.'s parents, or whether the camping outcome was a genuine surprise to D.M.

[345] Another issue raised in cross-examination related to how D.M. referred to Mr. Deuling. Her evidence throughout her testimony was that she always referred to "her teacher" as Mr. Deuling, not "Paul".

[346] I have accepted the evidence of other witnesses in these proceedings as credible and reliable that puts in issue D.M.'s testimony on this issue. I am satisfied that in fact D.M. was referring to Mr. Deuling as "Paul" on occasion from the fall of 1986 onwards. D.M.'s evidence to the contrary raises a concern as to the reliability of her recollections on that point.

[347] On the question of how many sexual assaults took place while at the campsite, D.M.'s evidence in direct was clear, that there were two sexual assaults: one in the evening and one in the morning.

[348] When challenged on that evidence, D.M.'s earlier statements to police were raised. The suggestion made to D.M. was that she had simply told the police about a single sexual assault.

[349] However, in reviewing the portions of the police statement put to D.M., and her responses to the same, the question of D.M.'s inconsistency as to the number of assaults that took place is unclear.

[350] It appears that the single assault descriptions provided by D.M. to police may have been in response to the acts of Mr. Deuling before the bear was shot. The question of the second morning sexual assault allegation does not appear to have been directly dealt with in the police interview as D.M. appears to have misunderstood the focus of the questions posed by police.

[351] As such, considering the totality of the evidence, I am not satisfied that D.M. was in fact inconsistent on the number of sexual assaults that took place at the wilderness campsite.

[352] An issue was raised in cross-examination as to whether or not D.M. took pictures of Mr. Deuling with the bear that had been shot. D.M. did not recall having done so. The photograph shown to D.M. during cross-examination appears to be that of a younger Mr. Deuling with a large bear laying on the ground.

[353] I am not satisfied that the photograph is proof of anything material. Furthermore, D.M.'s evidence was that the bear that had been shot was skinned by Mr. Deuling before morning. The photograph with Mr. Deuling and the bear appears to show an unskinned animal in daylight. As such, it appears that the issue of the photograph is not relevant to the question of D.M.'s credibility or reliability.

[354] Also raised in cross-examination were the clothing items worn by D.M. It was suggested in argument that the evidence of her holding a flashlight outside the tent for hours to facilitate Mr. Deuling skinning the shot bear was improbable given the non-winter clothing described. D.M. denied that she had dressed appropriately for a camping trip testifying that she had planned to attend a sports or basketball camp. She was, however, unshaken on her clothing and activities that night.

[355] Another line of questioning relevant to this count concerned the commencement of collateral civil proceedings against Mr. Deuling and others relevant to D.M.'s allegations of sexual assault. The implication is that D.M. had a motive to testify in a manner that supports the civil claim which seeks a financial benefit for D.M.

[356] As noted above in my review of matters raised as a general issue on D.M.'s credibility and reliability, it is apparent that D.M. was guarded in her responses on cross-examination with respect to the civil claim. It is also apparent that one view may be that she was evasive in acknowledging that she was in fact seeking financial compensation for the alleged acts of sexual assault by Mr. Deuling.

[357] As I have concluded earlier, however, such possible evasiveness could also be consistent with D.M.'s uncertainty and unfamiliarity as to the nature of a civil claim process. As such, I am not satisfied that her responses on this issue affect her credibility or reliability on the facts relating to Count #4.

[358] Finally, it was put to D.M. that the sexual acts that took place with Mr. Deuling during the camping trip were consensual. D.M. unequivocally denied such was the case.

[359] While there are issues surrounding the planned purpose of the trip with Mr. Deuling, I am satisfied that any such issues have only collateral relevance to D.M.'s evidence of the sexual assaults that took place during the camping trip with Mr. Deuling.

[360] The objective detail provided by D.M. on all other facts related to this Count far outweighs the significance of any issues arising from the evidence concerning the genesis of the trip's purpose.

[361] In summary, D.M.'s evidence with respect to this count was very detailed and specific, in terms of the circumstances leading up to the sexual assaults alleged against Mr. Deuling, the assaults themselves and D.M.'s unequivocal lack of consent to the sexual assaults.

[362] Where D.M. could not recall detail, she was frank in acknowledging the same. Although uncertain on a limited number of issues on cross-examination, D.M. was unshaken on the key details surrounding the sexual assaults, the details of the assaults themselves and her lack of consent.

[363] With respect to the facts relevant to this count, I find that D.M. demonstrated a clear ability to observe, recall and to report the details of her interactions with Mr. Deuling and specifically, the sexual assaults, that took place at the wilderness campsite in October 1986. D.M.'s evidence was not unreasonable nor implausible given the circumstances of the assaults.

[364] I find that D.M.'s evidence on this count was both credible and reliable given the extensive detail provided in both direct and cross-examination, and fundamentally unshaken on cross-examination with respect to these specific allegations.

[365] Considering all of the evidence, I find that I am satisfied beyond a reasonable doubt that between October 1 and 31, 1986:

- (a) D.M., a female, accompanied Mr. Deuling driving to a remote campsite chosen by Mr. Deuling;
- (b) The parties arrived in Mr. Deuling's truck in the morning. The campsite was a clearing with no other parties present;
- (c) D.M. had taken with her a light sports pant, sweatshirt, a Concordia High School jacket and a sleeping bag;
- (d) At the campsite, there was snow on the ground with temperatures ranging between minus 10 and minus 20 degrees Celsius;
- (e) On arrival at the campsite, D.M. followed Mr. Deuling's directions in setting up a single tent and unloading other equipment, including a gun and camera;
- (f) As darkness set in, and the temperature continued to drop, D.M. was shivering and experiencing severe concerns as to her exposure to the environment given her light clothing;
- (g) Mr. Deuling encouraged D.M. to move inside the tent;

- (h) Once inside the tent, Mr. Deuling told D.M. that to stay warm her sleeping bag and his should be zipped together. Mr. Deuling then took the two sleeping bags and zipped them together forming a single sleeping envelope for both parties;
- (i) Mr. Deuling next directed D.M. to crawl inside the combined sleeping bag. D.M. complied followed by Mr. Deuling;
- (j) Mr. Deuling next told D.M. to snuggle closer, which she did;
- (k) Mr. Deuling next told D.M. that people take their clothes off to stay warm and survive, because if it's too cold, they could die;
- (l) D.M. felt she had no options at that point and complied removing her clothes and moving close to Mr. Deuling;
- (m) Mr. Deuling intentionally applied force to D.M. while camped in his tent. I find that Mr. Deuling did so by intentionally inserting his penis into D.M.'s vagina once in the first evening in camp, and again in the morning of the next day. I further find that on both occasions these intentional assaults by Mr. Deuling were for sexual purpose as the nature of the assault was touching D.M.'s vagina with Mr. Deuling's penis;
- (n) I further find on the same basis that D.M. did not consent to either sexual assault. I have come to that conclusion accepting the evidence of D.M. that at the time the assaults took place;

- (o) D.M. was a high school student in the company of a teacher from her hometown more than 20 years her age. I am satisfied that D.M. trusted Mr. Deuling and deferred to him as a trusted person in her life;
- (p) At the camp, D.M. was alone with Mr. Deuling in a remote, cold, and unknown location. D.M.'s vulnerability was increased by her lack of adequate clothing and complete dependence on Mr. Deuling for food and the use of his tent for protection during the night;
  - (i) D.M. was a person unfamiliar with wilderness survival and lacked options to protect herself. I am satisfied that D.M. did not feel she had any options for self-preservation beyond joining Mr. Deuling in his tent and sleeping bag given the deepening cold of the nighttime wilderness campsite; and
  - (ii) D.M. attempted to keep her legs together, and pushing away Mr. Deuling's hands during the sexual assault. However, given Mr. Deuling's much larger size, D.M. was ultimately unable to protect herself;

[366] The law is clear that mere submission to a sexual assault will not be equated with consent: *R. v. Pappajohn*, (1980), 52 C.C.C. (2d) 481 (S.C.C.), at p. 499, per Dickson J.; *Ewanchuk*, at para. 51. As such any submission by D.M. to either sexual assault at the campsite cannot be considered consent to such assaults.



[367] I find, therefore, considering all of the evidence, that the Crown has proven beyond a reasonable doubt the *actus reus* of two sexual assaults on D.M., a female, by Mr. Deuling in a remote campsite outside Whitehorse, Yukon Territory at some point during the month of October 1986.

[368] The next matter is to consider the *mens rea* of Mr. Deuling with respect to these assaults in the campsite.

[369] Considering all of the evidence, I find that Mr. Deuling knew that D.M. was:

- (a) A former student of his, and still in high school, living in a small community in which he taught at a high school; and
- (b) In a vulnerable position as a result of:
  - (i) Her long position of trust relationship with Mr. Deuling acting as a teacher, coach, running partner and de facto mentor; and
  - (ii) Her transfer to a remote wilderness campsite by Mr. Deuling, in extreme cold, with no other persons nearby and no real options to care for herself, except under Mr. Deuling's influence, control and direction.

[370] Considering all of the evidence, I find that Mr. Deuling was in a position of trust with respect to D.M. given her continuing status as a student, and Mr. Deuling's

extensive history of dealings with her as a teacher, coach and de facto mentor: *Norberg*, at para. 36, 38, 39, 40, and 41; *Audet*, at para. 10 and 12.

[371] Having considered all of the evidence and the tests set out in *Ewanchuk*, I am satisfied beyond a reasonable doubt that Mr. Deuling intentionally sexually assaulted D.M. and was reckless as to whether or not she was in fact consenting to his sexual acts.

[372] I specifically find that Mr. Deuling was reckless in that he knew that his conduct in relation to D.M., a vulnerable person completely subject to Mr. Deuling's influence and control in the remote woods, may have resulted in criminal responsibility, but went ahead and acted anyway.

[373] I have come to that conclusion by finding that Mr. Deuling continued to press D.M. to succumb to sexual intercourse while knowing all of the factors that placed him in a position of trust, yet proceeded reckless as to his potential for criminal liability for those acts.

[374] At no point did Mr. Deuling ever seek D.M.'s consent to sex and conducted himself recklessly in the absence of such consent by directing or controlling her actions while in his tent, ultimately leading to two sexual assaults.

[375] I am satisfied beyond a reasonable doubt that Mr. Deuling's actions in sexually assaulting D.M. without her consent, in the circumstances existing in the wilderness camp described above, were intentional and a clear breach of his responsibilities as a person in a position of trust.

[376] I therefore find that with respect to Count #4, the Crown has proven all elements of the offence alleged against Mr. Deuling beyond a reasonable doubt. As a result, I find that he is guilty of that charge.

*Count #5*

[377] Count #5 as alleged against Mr. Deuling is as follows:

Count #5 - On or between the 1<sup>st</sup> day of November in the year 1986 and the 31<sup>st</sup> day of December in the year 1988 at or near the City of Whitehorse in the Yukon Territory, did commit a sexual assault on D.M., contrary to Section 246.1 of the Criminal Code.

[378] The time frame of the allegations set out in Count #5 covers the period of time after D.M. had returned to Whitehorse from the wilderness camp, during the remaining term of her pregnancy and subsequent to the birth of her daughter.

[379] Crown submissions on this Count maintain that D.M. had sexual intercourse with Mr. Deuling on a number of occasions during portions of the period of time covered by Count #5. Crown also submits that the intentional application of force for sexual intercourse is an obvious conclusion from the available evidence. The remaining issue, as defined by Crown submissions, is the question of D.M.'s consent.

[380] Crown submits that D.M. testified under oath on direct and cross-examination that none of these numerous incidents of sexual intercourse were consensual.

Specifically, it is submitted that in D.M.'s subjective state of mind, she did what Mr. Deuling told her to do testifying that:

He told me call him at certain times, see if he was available. If he was, he would tell me to come over. I would go over.

[381] Crown submits that D.M.'s subjective state of mind, simply meant that she was not being able to say no to someone who she had held in such regard at that stage in her life. Crown further submits that the evidence available confirms that D.M. was vulnerable during this period of time, floundering at school, pregnant and lacking support.

[382] It is Crown's submission that D.M. did not consent to sex with Mr. Deuling and that if there was reasonable doubt on that point, any consent anticipated by Mr. Deuling was vitiated either by his exercise of authority over D.M., or the breach of his position of trust obligations with respect to D.M.

[383] Defence submissions on this Count do not take issue with the Crown assertion that Mr. Deuling and D.M. engaged in regular sexual intercourse throughout the specific time period.

[384] The specific submission, however, is based on the position that throughout December 1986, to some point in 1988, D.M. and Mr. Deuling were in a relationship and engaged in consensual sexual activity. As part of that relationship, it is submitted that Mr. Deuling assisted D.M. in babysitting her child on occasion and provided ad hoc transportation, but did not provide direct financial or material support as those matters were dealt with by D.M.'s stepmother, V.K.

[385] Counsel for Mr. Deuling submits that it is unreasonable to conclude that D.M. engaged in sexual activity without consent as a result of any exercise of authority or form of compulsion by Mr. Deuling. Specifically, it is submitted that this is the case

Mr. Deuling had no power or control over D.M. in his role as a teacher, nor did he exercise any authority over D.M.

[386] Furthermore, it is submitted that Mr. Deuling did not bear the responsibilities of a person in a position of trust in relation to D.M.

[387] Counsel for Mr. Deuling submits that D.M. was not a credible nor reliable witness, particularly as related to her claimed vulnerability.

[388] Counsel submits that contrary to D.M.'s claims, she was not a person living with a former abuser, nor was she without support, or indeed options, for the care and support of herself and her child.

[389] I have considered all of the evidence and am satisfied that there are issues of credibility and reliability with respect to the evidence of D.M. on the question of consent in relation to Count #5.

[390] Although the evidence of D.M. contains several details relevant to the allegations of non-consensual sexual intercourse with Mr. Deuling, it is clear that her personal circumstances in December 1986 and through to December 1988 were complex.

[391] The specific issues with the credibility and reliability of D.M.'s evidence with respect to Count #5 are as follows:

- (a) D.M. testified that she had initially returned from the wilderness camp with Mr. Deuling to live with her parents. D.M. further testified that once she had medical confirmation of her pregnancy, she found

circumstances too uncomfortable at home and so accepted an offer from V.K. to reside with her.;

- (b) This evidence is at odds with that of other witnesses that confirm a move from the family home to an upstairs apartment owned by the M. family. There were reportedly two suites, one upstairs occupied by D.M. and another downstairs occupied by her sister T.M.;
- (c) D.M.'s uncertainty on this matter raises a reliability concern. However, it also raises a credibility issue. D.M. testified that she had moved to live with V.K. because she had no other choices available to her;
- (d) It is not apparent from the evidence which I have accepted, that D.M. no longer had the option of continuing to live at home in December of 1986. Leaving appears to have been D.M.'s choice. Nor is there any evidence that D.M. was unable to occupy the family apartment above her sister, independent from the family home;
- (e) A further credibility issue arises with D.M.'s assertion as follows:

A I was- I was homeless. I was turned away by the welfare department I had nowhere to live. And if I was in a relationship, why was I homeless? Why didn't he buy diapers? Why didn't he buy formula? Why did he let me be living with my abuser? He knew that was my abuser

Q Well, I'm going to suggest to you that, in fact, [redacted] didn't abuse you and that you went to live with — you went to live with [redacted] by choice. Nobody forced you to go there. Isn't that correct?

A I had no choices. The welfare department told me that I was a child under the law. In the Yukon at the time, anybody 19 and under was considered a child and I was not allowed to have welfare. I had no way to support myself. I was homeless.

I had no ideas of how to be an adult. I didn't even know how to breastfeed, and I was breastfeeding. I was doing the best I could as a teenager, single mother. I had no friends.

This person decimated my life. I had no friends, I had no family.

Q You went to live with her, didn't you —

A And I went to live with —

Q — [indiscernible - cross talk].

A I went to live with my abuser —

Q I'm going to suggest to you —

A — not by choice.

Q All right.

And I'm going to suggest to you that [redacted] was pregnant at the same time as you; correct?

A Correct.

Q She gave birth, in fact, I believe a day after you; right?

A Correct.

Q And you lived with [redacted] for many months; right?

A Correct.

Q Right. And in fact, you ultimately went to live in a trailer at, I believe it was — well, maybe you remember the name of the trailer.

Do you remember where the trailer was that you went to live in?

A Yes.

Q It was the [redacted]; right?

A Correct.

Q And [redacted] purchased the trailer for you and paid for the pad; right?

A Correct.

- (f) On the issue of being forced to live with her abuser, I am not satisfied that the evidence supports the assertion made by D.M. that V.K. was ever her abuser. There is a clear conflict on the evidence between D.M. and V.K. on the issue of abuse, and also as to the supports in place for D.M. throughout the time frame of Count #5. I have resolved the conflict in this evidence by rejecting D.M.'s characterization of V.K. as her abuser. V.K. was a credible and reliable witness and I accept her evidence on these matters in preference to that of D.M which was exaggerated and unreliable;
- (g) Evidence from D.M. that she acceded to Mr. Deuling's invitations to attend his residence " *to escape her abuser*" are also not credible. As noted above, I am not satisfied beyond reasonable doubt that V.K. ever abused D.M. at any point. As such, I cannot find that D.M. attended Mr. Deuling's residence as she has characterized it, as her only escape from her abuser;
- (h) On the issue of support, D.M.'s assertion noted above that "I had no way to support myself" conflicts with her own evidence on September 20, 2022, at page 32 of the Transcript, lines 8 to 12, that she was, in



fact, working at [redacted]. Although I accept that D.M. did not work [redacted] after delivering her daughter in late April 1987, there is a material inconsistency in D.M.'s evidence of her ability to support herself.

- (i) D.M.'s evidence of a lack of options on the issue of support also appears to conflict with her own evidence, and that of her stepmother B.K., that the family provided food and support to the children while in the family home;
- (j) As such, the claims by D.M. that she was, in essence, homeless and forced to reside with her former abuser without support are very much in issue, thereby affecting the credibility of such testimony and any conclusion that D.M.'s evidence on these points was reliable;
- (k) Another issue that relates to the reliability of D.M.'s evidence on Count #5 is her description of being directed by Mr. Deuling to have sex on the floor to avoid getting blood on his bedsheets. D.M. acknowledged at page 26, lines 43 to 47 of the Transcript of September 20, 2022, that her initial statement to police did not make reference to this direction allegedly made by Mr. Deuling. This omission raises a further question as to the reliability of D.M.'s evidence concerning the sexual intercourse that took place with Mr. Deuling; and
- (l) Finally, on the issue of reliability and the allegations set out in Count #5, D.M. confirmed that she could not recall many of her

dealings with Mr. Gresley Jones and his wife. Again, that inability to recall material details raises a concern as to the reliability of D.M.'s recollection of her interactions with Mr. Deuling while he resided with Mr. Gresley Jones, even taking into consideration her age and the time elapsed since these events took place.

[392] Considering all of the evidence, I am not satisfied that D.M. has demonstrated a clear and consistent ability to accurately observe, recollect and report on the circumstances of her relationship with Mr. Deuling between December 1, 1986, and December 31, 1988.

[393] Furthermore, on the issue of D.M.'s homelessness, lack of support and implicitly forced decision to take up residence with her alleged abuser V.K., I do not find D.M.'s evidence on those issues as they relate to Count #5 to be credible or trustworthy.

[394] Considering all of the evidence, I find that with respect to the circumstances relevant to Count #5:

- (a) In early December of 1986, D.M. was enrolled as a student in the first term of her grade 12 year at F.H. Collins Senior Secondary school in Whitehorse. She was pregnant with a child ultimately born in May 1987. Mr. Deuling was not the father of that child;
- (b) In early December 1986, D.M. was residing with her father and stepmother at the family home on [redacted] in Whitehorse;

- (c) In the fall of 1986, D.M. had missed many days of school. As a result, a meeting was convened with Mr. Seipp, Vice Principal of F.H. Collins, D.M., and B.K., D.M.'s stepmother on December 16, 1986;
- (d) D.M. was removed from the roll of students at F.H. Collins Senior Secondary December 16, 1986, as a result of discussions between Mr. Seipp, D.M. and her stepmother B.K.
- (e) In January 1987, D.M. was given permission to write two examinations related to her Grade 12 studies, however, she did not ultimately attend for those exams, or any other schooling in December 1986 or 1987;
- (f) In December 1986, Mr. Deuling left his wife and moved into the basement of the home owned by Mr. Gresley-Jones, a fellow teacher. Mr. Deuling continued to teach at F.H. Collins school, however, had not been a teacher or school coach of D.M. for over two and one-half years at that point;
- (g) It is unclear when, or if, D.M. resided with her sister T.M. during the period of time covered by Count #5. However, in mid-December 1986, I find that D.M. accepted an invitation to move into the home of her former stepmother, V.K. V.K.'s home was located within two blocks of the suite occupied by Mr. Deuling on [redacted] in Whitehorse;

- (h) Throughout the time Mr. Deuling lived in the basement of Mr. Gresley Jones's home, D.M. was a regular visitor, including visits with her new child; and
- (i) D.M. and Mr. Deuling engaged in sexual intercourse on multiple occasions between mid-December 1986 and throughout 1987. The sexual intercourse between the parties took place in the basement suite occupied by Mr. Deuling on average at least once per week.

[395] The remaining issue is, again, the consent of D.M. to the sexual intercourse that took place with Mr. Deuling within the time frame alleged under Count #5.

[396] In examining the issue of consent with respect to the allegations in Count #5, I have taken into consideration my findings with respect to the credibility and reliability of D.M.'s evidence relating to that count. In doing so, I have considered all of the evidence, and find that I am left with a reasonable doubt that the sexual intercourse and acts that took place between D.M. and Mr. Deuling between the first of November 1986, and December 31, 1988, did so without the consent of D.M.

[397] Although I have found that there is a reasonable doubt as to whether or not the sexual intercourse and acts alleged in Count #5 took place without the consent of D.M., I must now consider whether or not any possible consent to the sexual intercourse that took place between D.M. and Mr. Deuling was vitiated by illegal circumstances.

[398] There is, of course, no consent in law if D.M. ostensibly submitted or participated in sexual intercourse with Mr. Deuling by virtue of a breach of trust by Mr. Deuling, or as

a result of the factors set out in s. 246.1(3) of the *Criminal Code*. Such circumstances, if proven beyond a reasonable doubt, would result in illegally obtained consent from D.M.

[399] Section 244(3) of the *Criminal Code* was in effect at the time of the matters covered by Counts #1 to #5. It provided that certain de-facto consents are insufficient in law to excuse the accused from liability otherwise proven provided. The subsection provided as follows:

- (3) For the purposes of this section, so consent is obtained where the complainant submits or does not resist by reason of
  - (a) The application of force to the complainant or to a person other than the complainant;
  - (b) Threats or fear of the application of force to the complainant to a person other than the complainant;
  - (c) Fraud; or
  - (d) The exercise of authority.

[400] In the British Columbia Supreme Court decision *R. v A.D.*, 2017 BCSC 2496, the Court considered the law related to the exercise of authority at paras. 36 and 37:

36 In *R. v. Audet*, [1996] 2 S.C.R. 171, Mr. Justice La Forest, writing for the majority, considered the meaning and scope of the expressions "position of authority" and "position of trust" commencing at para. 33. The Court ultimately decided that the words "authority" and "trust" must be interpreted in accordance with their ordinary meaning and must not be restricted to cases in which the relationship of authority stems from a role of the accused, but must extend to any relationship in which the accused actually exercises such a power.

37 The Court went on to explain that because the concepts of "position of trust" and "position of authority" are difficult to define in the abstract, it would be inappropriate to try and delineate its limits in a factual vacuum, and therefore held at para. 38:

[38] It will be up to the trial judge to determine, on the basis of all the factual circumstances relevant to the characterization of the relationship between a young person and an accused, whether the accused was in a position of trust or authority towards the young person or whether the young person was in a relationship of dependency with the accused at the time of the alleged offence. One of the difficulties that will undoubtedly arise in some cases concerns the determination of the times when the “position” or “relationship” in question begins and ends. It would be inappropriate to try to set out an exhaustive list of the factors to be considered by the trier of fact. The age difference between the accused and the young person, the evolution of their relationship, and above all the status of the accused in relation to the young person will of course be relevant in many cases.

[401] Further on the issue of consent, the Supreme Court of Canada decision of *Norberg*, decided as follows at paras. 37 to 40:

37 ...Lyth v. Dagg (1988), 46 C.C.L.T. 25 (B.C.S.C.), is another lower court decision in which the defence of consent was rejected even though there was no evidence of force or threat of force and the plaintiff did not actively resist the sexual advances. This case involved a sexual relationship between a teacher and a 15-year-old student. In reaching his decision, Trainor J., at pp. 31-32, considered the following factors:

Sexual abuse is merely one particular way in which one person can assault another. It demands careful examination of the relationship between the parties to appreciate whether both had capacity to consent, understanding the nature and consequences of the conduct, and also whether one of the parties had such a greater amount of power or control over the other as to be in a position to force compliance. This is an examination to determine whether, in all the circumstances, force was applied by one person to another and whether any consent apparently given was genuine. [Emphasis added.]

Trainor J. concluded that no genuine consent was given to the first sexual contact between the parties. The defendant "dominated and influenced" the plaintiff.

38 The respondent contends that Lyth v. Dagg is distinguishable from the present case in that it involved the sexual exploitation of a child by a

teacher. I do not agree. In my view, it was the ability of the defendant to "dominate and influence" the plaintiff that was the important element in the Lyth v. Dagg case. This is borne out by Trainor J.'s assessment that this was more than a student-teacher relationship. He stated, at p. 32:

...Dagg rose in importance and stature in the eyes of his young student. Lyth wanted to be accepted in the performing arts group which drank and smoked marijuana. He had talents in that field and was ambitious to further himself. Dagg is an intelligent person and must have perceived Lyth's devotion to his schoolwork and a keen desire to be accepted by Dagg. In those circumstances, Dagg became much more than the teacher in a student-teacher relationship. He dominated and influenced the 15-year-old Lyth, who did not want to offend Dagg or do anything which would disrupt their relationship [Emphasis added.]

39 An ability to "dominate and influence" is not restricted to the student-teacher relationship. Professor Coleman outlines a number of situations which she calls "power dependency" relationships: see Coleman, "Sex in Power Dependency Relationships: Taking Unfair Advantage of the 'Fair Sex'" (1988), 53 Alb. L. Rev. 95. Included in these relationships are parent-child, psychotherapist-patient, physician-patient, clergy-penitent, professor-student, attorney-client, and employer-employee. She asserts that "consent" to a sexual relationship in such relationships is inherently suspect. She notes, at p. 96:

The common element in power dependency relationships is an underlying personal or professional association which creates a significant power imbalance between the parties... .

Exploitation occurs when the "powerful" person abuses the position of authority by inducing the "dependent" person into a sexual relationship, thereby causing harm.

While the existence of one of these special relationships is not necessarily determinative of an overwhelming power imbalance, it will, at least in the ordinary case, be required.

[402] Taking into consideration all of the evidence and the tests set out above, I find that:

- (a) Between January 1980 to June 1980, Mr. Deuling served as teacher for the last half of D.M.'s grade 5 year when she was 10 and 11 years of age;
- (b) Mr. Deuling last taught D.M. from September 1983 to May of 1984, her grade 9 year, when she was 14 and 15 years of age;
- (c) Mr. Deuling also coached D.M. in extra-curricular activities during the same period of time;
- (d) Mr. Deuling had a long relationship with D.M. as a recreational runner through her teens and into at least 1986;
- (e) The age difference between D.M. and Mr. Deuling was approximately 20 years;
- (f) Mr. Deuling had non-consensual sex with D.M. twice in October 1986 during a wilderness camping trip;
- (g) D.M. was pregnant in the fall of 1986 and was missing significant days at school in her grade 12 year. There were tensions at home with her father and stepmother concerning her absences from school and pregnancy;
- (h) In 1986 D.M. was not engaged in school extracurricular activities and experiencing a high degree of social isolation. This was a marked departure from her former role as Junior High School Student Council



President and member of several school sports teams in junior schools;

- (i) D.M. was removed from high school records as a student as of mid-December 1986. At that point, Mr. Deuling had not taught D.M. for over two and one-half years;
- (j) Although D.M. was working at [redacted] and living at home after leaving school, she was uncomfortable enough with those circumstances to make the decision to move, ultimately residing with her former stepmother V.K.; and
- (k) V.K. provided the home supports for D.M. during her pregnancy, after the delivery of D.M.s daughter in May 1987, and ultimately assisted D.M. by arranging for a move to a trailer where D.M. could reside on her own.

[403] The existence of a student teacher relationship between D.M. and Mr. Deuling existed from the spring of 1980 through to the fall of 1986. Mr. Deuling either taught D.M., coached her extracurricular activities or ran with her, implicitly acting as a mentor and coach, after D.M. ceased participating in school teams.

[404] Considering all of the evidence, I am satisfied that in late 1986 the relationship between D.M. and Mr. Deuling evolved from traditional student-teacher, to that between a teenager and a much older adult.

[405] In reviewing the tests set out above and considering all of the evidence, there may have been a power imbalance between D.M. and Mr. Deuling during the time frame of Count #5. Mr. Deuling was either a teacher in a position of authority dealing with a much younger student, or an established much older adult dealing with a vulnerable former student who was meeting the challenges of a teenage pregnancy and motherhood.

[406] However, in terms of Mr. Deuling's exploitation of, or ability to dominate and influence D.M. during the time frame set out in Count #5 as a result of any possible power imbalance, or exercise of Mr. Deuling's possible position of authority, I am not satisfied that such proof has been established beyond a reasonable doubt.

[407] Specifically, I am not satisfied beyond a reasonable doubt that D.M. attended at Mr. Deuling's home to engage in sexual intercourse as a result of implicit or express directions to do so given by Mr. Deuling, or to "escape her abuser", alleged to be V.K.

[408] As noted above, D.M.'s evidence was that Mr. Deuling had been her teacher, and that she always did what he said to do. I find that considering all of the evidence, I am not satisfied beyond a reasonable doubt that D.M. attended at Mr. Deuling's residence during the period specified in Count #5 and engaged in sexual intercourse as a result of any exercise of authority or exploitation, power imbalance or undue influence over D.M. by Mr. Deuling. I make that finding for the following reasons:

- (a) D.M. was no longer a registered student as of mid-December 1986;
- (b) During the time frame set out in Count #5, Mr. Deuling had no control or influence over D.M.s role as a student in any manner, nor did he have any role or influence in terms of support or control of any other aspect of her life;
- (c) Furthermore, D.M. was making her own decisions concerning her housing, employment, support and pregnancy, all without direction, control of influence from Mr. Deuling;
- (d) Attendances at Mr. Deuling's home, or other meetings and social outings with him, were made at Mr. Deuling's invitation, not compulsion, direction or order. There is no proof beyond a reasonable doubt that D.M. attended Mr. Deuling's residence or participated in sexual intercourse with him as a result of any implicit or express improper coercion, influence of, or domination by, Mr. Deuling in any other manner;
- (e) Unlike the circumstances of the remote campsite in Count #4, in Whitehorse Mr. Deuling had no control over any aspect of D.M.'s life and in particular no role in D.M.s safety, protection from the elements, food, transportation and contact with other persons during the time frame of Count #5; and

- (f) In attending at Mr. Deuling's home, D.M. made a series of decisions having her own control over all of those elements in her life.

[409] Taking into consideration all of the evidence, I am not satisfied beyond a reasonable doubt that the sexual intercourse that took place between Mr. Deuling and D.M. as alleged in Count #5 was the result of an "exercise of authority" or "breach of fiduciary duty or trust" by Mr. Deuling owed to D.M. I find that during that period of time, Mr. Deuling had no authority to exercise over D.M. in any aspect of her life. As such, any possible inherent power imbalance between the parties has not been proven beyond a reasonable doubt.

[410] I further find, therefore, that I am satisfied beyond a reasonable doubt that:

- (a) D.M.'s consent to sexual intercourse with Mr. Deuling during the period set out in Count #5 was not vitiated by any of the factors in s. 244(3) of the *Criminal Code* nor by any breach of trust; and
- (b) Mr. Deuling did not engage in sexual intercourse with D.M. during the period set out in Count #5 with actual knowledge of any lack of consent by D.M., nor reckless or willfully blind to any lack of consent from D.M. that may have existed at that time.

[411] Considering all of the evidence, I find the Crown has not proven the offences alleged in Count #5 beyond a reasonable doubt and accordingly, Mr. Deuling is not guilty of Count #5.

**Disposition**

[412] I will adjourn proceedings to hear submissions on the issue of sentence with respect to Count #4.

[413] For the purposes of scheduling that hearing, this case is adjourned to docket court on December 16, 2022, at 9:30 a.m.

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NEAL T.C.J.