IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *R.* v. *Arntzen*, 2005 YKSC 29 Date: 20050513
Docket No.: S.C. No. 04-01534
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

And

HAAKON ARNTZEN

Before: Mr. Justice L.F. Gower

Appearances:
John W. Phelps For the Crown
Edward J. Horembala, Q.C. For the Defence

REASONS FOR JUDGMENT

[1] GOWER J. (Oral):

INTRODUCTION

[2] Haakon Arntzen is charged with three counts of indecent assault upon his step-daughter, L.S. during three separate periods of time between 1972 and 1980. He is also charged with an indecent assault upon L.M., referred to at trial as L.P., who was the former wife of his step son, H.J. That is alleged to have occurred between 1975 and 1977. All the offences are alleged to have occurred in Whitehorse.

[3] First, I will talk briefly about the law. Second, I will discuss the alleged indecent assault upon L.S. in Haines Junction. Third, I will make some remarks about the evidence of the accused generally. Fourth, I will talk about the allegations of L.P. Lastly,

I will return to the allegations of L.S. relating to the time she lived with her family in the Crestview subdivision of Whitehorse and later in a residence on 11th Avenue.

THE LAW

[4] An indecent assault is an intentional application of force in indecent, and usually sexual, circumstances. Where the complainant is under the age of 14, her consent, if given, is no defence to the charge. Nor is it a defence if her consent was obtained by a false and fraudulent representation as to the nature and the quality of the indecent assault.

[5] Mr. Arntzen is presumed innocent of these offences unless and until the Crown has proves them beyond a reasonable doubt. This case turns largely on the credibility of the parties. In such cases, I must not reach conclusions simply by choosing between the evidence of the complainants and the accused. While I may accept all, some or none of a witness' testimony, I must not do so arbitrarily. In considering the issue of credibility, I must also instruct myself that :

1. if I believe the evidence of the accused, I must acquit;
2. if I do not believe the evidence of the accused, but I am left in a reasonable doubt by it, then I must acquit;
3. If I do not believe the evidence of the accused and I am not left in a reasonable doubt by that evidence, I must still consider whether, on the basis of the evidence which I do accept, I am convinced beyond a reasonable doubt of the accused's guilt.

[6] A reasonable doubt is not a doubt based on sympathy or prejudice, rather it is based upon reason and common sense and is logically derived from the evidence or the

absence of evidence. I am required to consider the evidence as a whole and not apply the standard of proof beyond a reasonable doubt to individual items or categories of evidence.

THE HAINES JUNCTION INCIDENT

[7] L.S. alleged an indecent assault upon her in Haines Junction when she was in grade 3 or 4. L.S.'s mother C.A., gave unchallenged testimony was that the family lived in the Anglican church house in Haines Junction from the spring of 1972 to the summer of 1973. As L.S.' date of birth is June 4, 1963, that means that she would have been 9 or 10 years old at that time. She made the following allegations. There was a party involving some 5 or 10 people at the house that evening. There was drinking going on and she was afraid that the accused would come looking for her. She was initially in her bedroom, but moved to the basement to hide. She said "I'm not sure what my thinking was", but she was afraid because there was drinking going on and she thought it would be less likely she would be found by the accused if she was in the basement rather than in her bed. Although the basement was unfinished and open, there was a furnace, some laundry machines and some boxes there. She said she was attempting to hide behind the boxes. The accused then came downstairs and found her in a corner and tried to remove her nightgown and had it up around her neck. She struggled with him for several minutes while his hands were all over her - between her legs, and on her chest, her neck and her back. She said that it happened fairly fast. She said that she did not scream out because there would be no point as there was loud music playing and no one upstairs would have heard her. She said her mother came partway down the stairs and asked what was going on. At that time, her clothing was still around her neck. L.S.

acknowledged that is was possible that her mother could have seen her in that state at that point. The accused said to C.A. that L.S. had been sleepwalking. Although L.S. acknowledged that she was prone to sleepwalking periodically at that time and throughout her childhood, she denied that she was sleepwalking on that occasion.

[8] Although the accused denied L.S.' version of what happened, he acknowledged that there were times when there were social gatherings in the home. The accused also acknowledged that L.S. had a sleepwalking problem at that time and that periodically either he or C.A. would have to get out of bed and retrieve her. Sometimes they would find L.S. in the basement.

[9] In all the circumstances, I am left with a reasonable doubt about the accused's guilt on this count. I agree with defence counsel that it is improbable that the accused would have picked that particular occasion during a social gathering to indecently assault L.S. That is especially so given that there was a significant risk of being detected in the open basement. I inferred that one would only have to come partway down the stairs to have a full view of the basement and any one could have come down at any time. Indeed, L.S. herself said that her nightgown was up around her neck at the point when her mother came partway down the stairs to find out was going on. C.A., however, gave no evidence about this incident and one would expect she *would* have, if she had noticed L.S. in that state. I am also concerned that L.S. said this all happened fairly fast. Although she denied she was sleepwalking, I cannot dismiss the possibility that she might have been retrieved by the accused in that state and subsequently recalled the incident inaccurately. Therefore, I find the accused not guilty on count #1.

THE EVIDENCE OF THE ACCUSED

[10] For the reasons which follow, I do not believe Mr. Arntzen's evidence on the remaining counts nor am I left with a reasonable doubt by it:

1. Mr. Arntzen was internally inconsistent in his evidence about the frequency with which he would wake up L.S. in the mornings while she was a child and teenager growing up in the family home. In cross-examination, he was asked about the period of time when the family lived in Crestview, from 1975 to 1979, and the number of times he woke L.S. up for school. He said that probably happened on occasion, "not many times, … occasionally". He was also asked how often he did this ***prior*** to the family living in Crestview, he said that he did not usually wake up L.S. - that "it was not on a regular basis, but on occasion". Further, that he only did so "once in a while". He went on to say that he did so a "lesser" number of times in Crestview and couldn't recall ever doing it regularly. He agreed with Crown counsel that throughout the duration that L.S. lived in the home, he only woke her up "from time to time". However, those answers differed significantly from what Mr. Arntzen told the police when he gave his statement on April 23, 2004, the day he first learned of the allegations by the complainants. The police had put those allegations to him and had asked him for his response. When asked about waking L.S. up for school, he said "there were lots of times, oh, lots of time, it depends on who happened to be up… I mean I woke her up many, many mornings…" When challenged by the Crown that this was not what he said in his earlier

testimony in the trial, Mr. Arntzen tried to explain that he thought the Crown had earlier been asking about the period at Crestview. However, it is obvious from what I have just said that the Crown was asking about the frequency with which this happened, both before and during the family's time at Crestview, indeed throughout the duration of L.S.'s time with the family.

I agree with the Crown's submission that Mr. Arntzen did not attempt to qualify those answers to the police. Rather, he was quite firm in stating that there were "lots of times" indeed "many, many mornings" when he woke up L.S. I also agree that Mr. Arntzen would be expected to recall this, because it was more or less a daily routine and not an isolated incident. Indeed, it would appear that Mr. Arntzen may have realized that his earlier statement to the police was potentially corroborative of the evidence of L.S., who said that she was woken by the accused in an indecent manner virtually on a daily basis, and that he attempted to tailor his evidence *at the trial* to more directly contradict L.S.

Thus, not only was Mr. Arntzen internally inconsistent, his testimony at trial was also externally inconsistent with the evidence of L.S. I find these inconsistencies significantly detract from his credibility generally.

2. In discussing the extent to which he applied discipline in the home, the accused generally denied applying physical force. He did acknowledge that he may have yelled at the children on an irregular basis "every once in a while". Further, when asked about physical violence between he and

C.A., he allowed that this may have happened on occasion, and was sometimes caused by him, but that the confrontations were not common and only occurred “from time to time”. My finding that the accused was inconsistent and not credible in his evidence about the number of times he acknowledged waking L.S. up in the morning, causes me to also question whether the accused has minimized the frequency with which he administered physical discipline upon the children and was involved in violent confrontations with C.A.

3. Mr. Arntzen attempted to establish that he did not have the opportunity to wake up L.S. in the mornings during the years that the family lived at Crestview, as he was employed under contract at the Whitehorse Airport refuelling airplanes. He claimed that this work often started early in the morning and required him to leave the home by about 6 a.m. in the summer months and about 6:30 a.m. in the winter months. Since the children got up for school at around 7 a.m., Mr. Arntzen would have the Court believe that he simply wasn’t present to wake up L.S. as she alleges.

On the other hand, Mr. Arntzen himself also said that he started perhaps an hour later in the winter months and that the “suggested” hours of this contract were twelve hours a day from 7 a.m. to 7 p.m. He said that he was “generally” there at those times. Mr. Arntzen also conceded that he had one employee through those years and in addition to that, he periodically employed his step-son, H.J. H.J. recalled refuelling the aircraft

earlier than 7:30 a.m., however, he did not specifically recall starting work at 6:30 a.m., other than remembering that he was there at 6:30 “some mornings”.

Mr. Arntzen’s ex-wife, C.A., said that she recalled Mr. Arntzen’s job at the airport during those years. She said that his summertime hours were longer than the wintertime hours and that in the winter he worked a normal work day of 9 to 5. Defence counsel did not cross-examine C.A., leaving this evidence unchallenged.

Additionally, Mr. Arntzen conceded on cross-examination that for approximately the first two months while the family lived in Crestview, he was driving trucks on a shift-work basis, prior to obtaining the contract at the airport. As well, he acknowledged that in 1977 he was injured for a period of time and was staying at home, while H.J. and two others filled in for him at the airport.

I find that Mr. Arntzen attempted to created the impression that he simply didn’t have the opportunity to wake up L.S. in the mornings, as she alleged, and that when this is compared with his further evidence on cross-examination and with the evidence of C.A. and H.J., that is not the case. This also contributes to my inability to accept Mr. Arntzen’s evidence generally.

4. Mr. Arntzen said that L.S. never told him to get away from her. He allowed that she may have cursed at him but could not ever recall L.S. telling him to “Fuck off”. He said that in *both* his direct examination *and* his cross-

examination. He also denied making any inappropriate comments on her physical development.

This is externally inconsistent with the evidence of C.A. who said that she often heard L.S. saying to the accused “Don’t do that” or “Get away from me”. Again, that evidence was unchallenged by Mr. Arntzen on cross-examination.

Further, the accused’s evidence on this point is contradicted by the evidence of L.P. who, in describing the incident in the basement in Crestview, ***twice*** heard L.S. tell the accused to leave her alone and “Fuck off”. L.P. also said, in describing what she witnessed of the relationship between L.S. and the accused, that she observed L.S. saying to him at other times when the accused was bothering her, “Get away from me”, “Fuck off” and calling him a “Pig”. L.P. also said he constantly made rude comments to L.S.

L.S. herself said that she frequently told the accused to get lost and to leave her alone. That evidence is corroborated by both C.A. and L.P.

Thus, the evidence of L.S., C.A. and L.P. in combination contradicts that of the accused. Further, I infer from the denial of the accused that L.S. told him to “Fuck Off” and get away from her that he was trying to minimize her dislike for him, because that dislike in turn is consistent with the truth of her allegations.

5. On cross-examination, Mr. Arntzen denied the possibility that he would have rubbed his body against L.S. while passing her in the house. That seemed a strange denial, given that it would be expected and normal to have such innocent contact in a busy household with two parents and four children from time to time, as the accused and L.S. passed each other in hallways, doorways and other tight spaces. It is also externally inconsistent with the evidence of L.P. who specifically said that she sometimes witnessed the accused press up against L.S. if she “was doing dishes or something”. Again, I find this inconsistency tends to undermine the accused’s credibility generally.

6. With respect to the allegations about L.P., she said that she had been babysitting for Mr. and Mrs. Arntzen when she was about 16 at their home in Crestview. Mr. and Mrs. Arntzen came home late and L.P. decided to sleepover that night. She and L.S. went to bed in the basement in the area where L.S.’s brother H. normally slept. She claimed to have been awoken by Mr. Arntzen touching her inappropriately. She heard L.S. wake up and say to the accused: “What are you doing? Get out of here or I’ll wake her up. Fuck off.” When the accused failed to leave immediately, L.P. said that L.S. told him again to leave her alone and “Fuck off”.

   When asked about these allegations, the accused simply denied them. He did not offer any alternative explanation or admit to being in the basement on that occasion for some innocent purpose such as checking on the girls, as was argued by his counsel. This is a notable distinction from his

response to the other allegations of L.S., where he at least admitted that there were opportunities for him to commit the offences. Here he gave no evidence of such an opportunity.

For reasons which I will state shortly, I believe the evidence of L.P. and L.S. about this incident. L.S. corroborated L.P.'s testimony about what happened. Therefore, I find the absolute denial by the accused of even being present in the basement on or about that occasion is not believable and this detracts from his credibility generally.

7. The accused said that he did not hug L.S. every day, but in the next breath he acknowledged that he hugged or kissed her good night every night throughout the time that she lived at home. This evidence also seems internally inconsistent.

8. The accused said that L.S. attended the Jack Hulland School for only a short time, perhaps only a semester after the family moved into the home in Crestview. He said that she then went to F.H. Collins in 1975 or 1976. That was contradicted by L.S. who said that she attended Jack Hulland for grade 6, grade 7 and part of grade 8, which would have been from the ages of 11 to 13, and almost a period of three years in total. After that time, L.S. said that she went to F.H. Collins High School. Whether the accused's evidence on this point was another attempt to minimize his opportunity to have woken up L.S. for school the number of times she alleged, or whether he was simply inaccurate about his recollection of the

dates and years, I cannot say. However, it causes me to question the overall accuracy of his testimony.

9. While there is clearly no onus on the accused to establish a motive for the allegations of the complainants, he nevertheless testified in cross-examination that his first response, when he learned of the allegations from the RCMP, was to believe this was a result of his divorce from C.A. in 1999 and that she was “out to get” him. He also said that he still believes this today. The only reason I raise this point at all is to highlight that it is inconsistent with C.A’s evidence. She did not appear at all to have a bias against the accused. Indeed, her evidence of what she witnessed between the accused and L.S., though probative as far as it went, was remarkably limited. I will return to C.A.’s evidence shortly, but for now I only wish to emphasize that if she was truly out to get the accused, as he believes, then one would have expected her evidence to be more embellished than it was.

L.P.’S ALLEGATIONS

[11] Having decided that I do not believe Mr. Arntzen and that his evidence does not leave me with a reasonable doubt, I must still decide whether, on the basis of the evidence I do accept, his guilt is proven beyond a reasonable doubt on the remaining counts. Here, I will deal first with the allegations of L.P. I agree with Crown counsel that she was largely unshaken on cross-examination. Defence counsel focused that cross-

examination on the issue of her collusion with L.S. and L.P.'s evidence of her "body memory" about the incident.

[12] As for the suggestion of collusion, I note that defence counsel spent a good deal of time during the trial exploring this issue. Both complainants were rather extensively cross-examined about it, as were the victim services workers associated with each complainant. The defence concern was that the complainants and their victim services workers had met on three occasions in March and April 2003, purportedly to assist the complainants with their validation and healing. These meetings were all held prior to the complainants providing their statements to the RCMP setting out the current allegations. However, both of the complainants and their respective victim services workers repeatedly testified that the complainants had been specifically warned not to discuss the facts or circumstances of their complaints with each other, in order not to taint their testimony should the matter proceed to trial. As defence counsel made no arguments whatsoever about this point in his closing submissions, I assume he abandoned the possibility of collusion as a defence. In any event, while these arrangements in retrospect were perhaps unwise and unnecessarily risked adversely affecting the trial process, I am satisfied that there is no evidence of any discussion between the complainants about their respective allegations and that there was no collusion.

[13] With respect to the body memory issue, L.P. acknowledged in cross-examination that she could clearly remember what happened between her and Mr. Arntzen because she had stored that information in her body memory. She said memory can be intellectual or based on smell, emotions, or the body. In this case, she said that she stored the memory of the incident in her pancreas and groin area. Defence counsel

seemed to suggest in his closing submissions that this evidence alone is reason for me to question her credibility and be left with a reasonable doubt. As I understood his argument, defence counsel said that all memory must come from the mind, that is the brain, and therefore it is non-sensical to speak about a “body memory” or storing and retrieving a particular incident from a body part or organ, such as the groin or pancreas.

[14] No expert evidence was called on the point by either the Crown or the defence. I conclude that, as a matter of common sense, and to some extent through judicial notice, that memory is a complex phenomenon. It does not strike me as unusual that someone such as L.P., who was allegedly traumatized by an improper touching of her skin in the area below her belly button, would associate the incident with her groin or even her pancreas. It is not uncommon for people to use memory cues to store memories for later retrieval. Indeed, that is a standard technique used by persons teaching memory enhancement skills. Further, I did not infer from L.P.’s evidence that the memory comes from her body without involving her brain. It would seem obvious that all memory must necessarily come from the brain, being the organ which serves as the neurological headquarters for the body. However, that does not mean that one cannot associate memories with various body parts or have a sense of a memory as emanating from the body. I understand this to be relatively common place, for example, among dancers, martial artists and athletes, where the memory relates to body movement or positioning. In short I am not prepared to discount the credibility of L.P. solely because she made reference to her body memory.

[15] The balance of L.P.’s evidence was consistent and credible both internally and externally. She said that this occurred in the family’s Crestview home and that she and

L.S. were asleep in the basement in the area where H.J. normally slept. L.P. described brick walls and other details about the features of the basement. She described the area as being partitioned with blankets and that the basement walls were lined with blankets. There was only a single room partitioned in that fashion. She said that the incident happened just before or just after her 16th birthday, which would have been on July 23, 1975. That was consistent with the evidence of the accused that the basement in the Crestview home was not renovated until some time in the approximately early 1977. Her evidence that she slept over that particular night while babysitting is also consistent with the evidence of the accused, who agreed that she probably did so on occasion and would sleep with L.S. in the basement when that happened.

[16] L.P. said that she was awoken knowing something was not right. She felt something on her breasts and opened her eyes. She saw the accused's face and made particular note of his jeans and the fact that he had a wide belt buckle and wore a t-shirt. She tried to pretend that she was still asleep and rolled over or moved in some fashion. However, she noted that Mr. Arntzen moved his hands from her breasts down her belly to below her belly button where her panties started. His hands were under the blankets. She felt his hand on her skin in her belly button area because her t-shirt did not go all the way down to her panties. She said that L.S. was on the bed beside her on her right hand side. She said that she heard L.S. say "What are you doing? Get out of here or I'll wake her up. Fuck off". In response, she heard the accused say "It's okay, it's okay". L.P. then heard L.S. say again to the accused "What are you doing? Leave her alone. Fuck off". The accused said for a second time "It's okay, it's okay," but eventually he

left. L.P. said that L.S. asked if she was okay. The two of them cried briefly, but did not subsequently discuss the incident.

[17] That evidence was corroborated by L.S. in several important respects. Although L.S. acknowledged in cross-examination that she did not know exactly what happened or what the accused was doing to L.P., she did remember waking up and noticing the accused in the room and “he was after L.P.”. L.S. said that she was half asleep, but she thought the accused was trying to grab L.P. under the covers. She did not discuss the incident with L.P. at any time subsequently. Thus, L.S.’s evidence places the accused in the make-shift bedroom where the two girls were sleeping at the time. That directly contradicts the accused’s evidence in which he simply denied that it happened at all, meaning he was not even present in the room. He did not say that he was checking the girls or had any other innocent reason to be present.

[18] In summary, L.S. corroborates the following particulars of L.P.’s evidence:

- that L.P. was staying overnight on the occasion;
- that the two girls were in the basement;
- that the accused was in the room;
- that L.S. was awoken by what the accused was doing to L.P.;
- that L.S. was approximately 11 to 13 years old at the time, which would have meant that the incident occurred between 1974 and 1976, and is consistent with L.P.’s evidence that it happened just before or after her 16th birthday, on July 23, 1975;
- that L.S. told the accused to “get the fuck out” of the room, which is consistent with what L.P. heard L.S. say;

- that L.S. turned on the light, which is consistent with L.P.'s evidence that she could see the accused's face and what he was wearing.

[19] Further, L.P. has no reason to be biased against the accused. She divorced H.J. in approximately 1992 and her remaining connection with the Arntzen family has been limited since then. According to C.A., there has been "sporadic contact" by L.P. since she and H.J. separated. For example, C.A. said they might have had contact in relation to L.P.'s children, who are also C.A.'s grandchildren. In addition, as I understood the evidence of the accused, he too admitted that there has been no relationship between he and L.P. since her divorce from H.J. Therefore, she has no interest in making a false accusation against the accused.

[20] Accordingly, I find the accused guilty on count #5.

THE CRESTVIEW INCIDENTS

[21] Next I will deal with the allegations of indecent assaults occurring in the Crestview home while L.S. was between 11 and 16 years old. Here she said the accused did a lot of "daily stuff". He would wake her up by lying on top of her in her bedroom in the basement. He would be tickling her saying that it was time to get up, he would often pin her to the bed grinding himself against her with his groin, while wearing his housecoat or underwear. These incidents would start while L.S. was asleep. She would be in her pyjamas at the time. She would try to get out from under the accused and would tell him to get lost and leave her alone. She said this happened a number of times "too often to count", both in the Crestview home and in other homes the family lived in.

[22] She also said that C.A. would insist that she kissed the accused goodnight and when she did so, he would sometimes stick his tongue in her mouth. She said that he sometimes did this in front of her mom and other people, but that it would not be prolonged kisses in front of her mother.

[23] She also said that the accused would have her sit on his lap and rub his groin against her. This also happened in front of her mother and other people.

[24] Finally, L.S. testified that the accused was constantly commenting on her physical development and her appearance and that he “sexualized” everything in some way.

[25] She said that she did say “stop it” to the accused in those circumstances, but that her mother and other people did not say anything when she did so. While she did not specifically complain to her mother about the manner in which the accused was waking her up in the mornings, she said that she did ask her mother to keep him away from her. She said that she felt like she was woken that way almost every morning. It would happen both during the school year and during the summer vacation.

[26] L.S. said that she did not tell her mother about these incidents until much later on when she was in her 20’s. However, she did give evidence of having told others about the accused’s improper behaviour on earlier occasions. One of the first apparently being in 1981, to her aunt J.M.

[27] L.S. explained that she did not report these incidents to the authorities because at the time she really did not know what she could do. She said that this type of thing was not really talked about then, as it is now, and she didn’t think anybody would believe her. She acknowledged that she was fairly ignorant about what she could

actually do about it and really didn't think that going to the police was an option. Indeed, it appears that she was ultimately prompted to go to the police in 2003 because she became uncomfortable with the fact that the accused had recently begun working in the same building as L.S.

[28] I do not find that L.S. was seriously challenged on the cross-examination about these allegations. Defence counsel argued that I should have a reasonable doubt about the Crestview incidents because of:

1. Mr. Arntzen's evidence about his work hours at that time.
2. The absence of evidence from C.A. about any improper acts by Mr. Arntzen at that time.
3. Mr. Arntzen's explanation for his answers to the police that he woke up L.S. many, many times.

[29] I have already commented upon Mr. Arntzen's evidence regarding his work hours and I find that he gave that evidence in a fashion which was designed to create the impression that he had virtually no opportunity to wake up L.S., as she alleged. This is contrary to the fact that he did not start the Airport contract for about 2 months after moving into the Crestview home. It is also contrary to the fact that he was injured and at home for a period of time while the family lived in Crestview. It is inconsistent with the evidence of C.A. that the accused worked approximately 9 to 5 during the winter months. It is inconsistent with M.J.'s evidence that they only occasionally started work at the Airport at 6:30 a.m. It is inconsistent with the fact that the accused had one and sometimes two employees who could go in early for him if need be. It is also inconsistent with the evidence that Mr. Arntzen gave to the police that he woke up L.S.

“lots of times” and indeed “many, many times” over the years, which would of course include the period while the family lived in Crestview.

[30] As for the absence of evidence from C.A. about the french kissing and the lap grinding, this is not something that would necessarily be noticed by C.A. or anyone else, unless they were particularly looking for it. I agree with Crown counsel that if the accused quickly slipped his tongue in L.S.’s mouth while she was kissing him goodnight, he could do so in seconds or less, which would be difficult to detect, especially at any distance. Further, the apparently innocent act of having a child or even a teenager sitting on one’s lap would not seem obviously unusual. It would be logical that L.S. would be the one who would feel the grinding or pelvic thrusting motion of the accused, without that pressure or motion being necessarily obvious to anyone else in the room. What is noteworthy is that L.S. said quite clearly that she did tell the accused to “stop it” in those circumstances, including times when her mother was present. And, that evidence was corroborated by C.A. She did witness L.S. often saying to the accused “don’t’ do that” or “get away from me”. She further corroborated L.S. by saying that she observed him touching her behind a couple of times when she was going up the stairs from the basement and she also remembered the accused making lewd remarks about her clothing. Therefore, rather than finding that the absence of additional evidence from C.A. creates a reasonable doubt, I find that her evidence supports that of L.S.

[31] I have already commented on my finding that the statement that Mr. Arntzen gave to the police was inconsistent with his evidence in this trial about the frequency with which he awoke L.S. in the mornings for school and otherwise, while she lived in the home. Therefore, I do not find that his Counsel’s explanation, that he had just

learned of the allegations before giving the statement and has since been able to recall the facts more accurately, leaves me with a reasonable doubt.

THE 11TH AVENUE INCIDENTS

[32] The next count deals with the allegations of indecent assaults upon L.S. while the family briefly rented a residence on 11th Avenue. According to the unchallenged evidence of C.A., this was approximately from May or June until November 1980. L.S. said that during that time, the accused continued to french kiss her and have her sit on his lap while he rubbed himself against her. In that respect, there was no significant change from the allegations of L.S. during the time that the family lived in Crestview, other than the fact that L.S. was 16 or 17 years old when the family lived on 11th Avenue.

[33] The most significant incident during this period was alleged to have occurred during the summer. L.S. said she was sun tanning on an area of the roof of the residence, which was commonly used by the family for that purpose. She was wearing shorts and a tank top. No one else was home. She said the accused came up onto the roof and put his hands on her “butt”. She said the accused told her how beautiful she was and she got up quickly and said she had to go. She went into her bedroom to change. She said that she had put a t-shirt over her halter top and had her pants about ½ way up when the accused entered her bedroom. She said the accused positioned himself so that she was against the wall. He told her that she was beautiful and that she should listen because his bedroom was above hers and when he was having sex with C.A., he was pretending that it was L.S. She said that he pinned her against the wall rubbing his groin into her while she squirmed to get away. She said that she managed

to duck out under his arm and ran out of the house and down the street. She said that the accused came after her with his car and was able to catch up to her. She said that he twisted her arm behind her back and shoved her into the car and held her while the two of them drove towards downtown Whitehorse. She said that the accused told her to shut up and that she better not say anything to anyone about what had just happened.

[34] Here, defence counsel once more stressed the fact that there was an absence of evidence from C.A. about what the accused was allegedly doing to L.S. However, I also find on this count that although C.A.'s evidence was limited, it nevertheless did corroborate L.S. in several important respects – L.S. often telling the accused to stop and get away from her, as well as the accused touching her behind and making lewd remarks about her clothing.

[35] Defence counsel also made particular note of L.P.'s evidence that there was a family meeting arising from her allegations. According to L.P., she told her then boyfriend, H.J., about the accused's improper touching of her in the basement of the Crestview home. She understood that H.J. then confronted the accused with that information and that led to a family meeting where L.P. was present. That apparently occurred at the Crestview home and therefore would have been between 1975 and 1979. L.P. said that the accused denied all of the allegations at that meeting. L.P. also said that C.A. asked L.P. what was she was trying to prove and why would L.P. lie about such a thing. C.A. allegedly said that L.P. was trying to take C.A.'s husband away from her and break up the family. Eventually, C.A. told L.P. that she was not welcome in their home again. However, after some period of time, L.P. did start coming back into the home and she continued her relationship with H.J. Defence counsel correctly

pointed out that C.A. was not asked about this family meeting in her direct examination. Therefore, assuming L.P.'s evidence about the meeting is correct, defence counsel surmised one of three explanations:

1. C.A. ignored the accused's behaviour or did not notice it;
2. C.A. knew about the accused's behaviour, but chose to remain silent about it; or
3. C.A. had no concerns about the accused's behaviour, because there was nothing to be concerned about.

[36] However, it is important to remember that this meeting took place in relation to the allegations of L.P., and not those of L.S. Further, it is also apparent from L.P.'s description of the meeting that C.A., at that time, was not prepared to accept that her husband was capable of any wrong doing in that regard. Logically then, she would presumably have had the same attitude with respect to L.S. and would have had no particular reason to believe that Mr. Arntzen was doing anything improper towards L.S. This helps me understand why C.A.'s evidence was as limited as it was and I am not left with a reasonable doubt about the truth of L.S.' allegations as a result of that evidence.

THE CONTINUING CONTACT BETWEEN L.S. AND THE ACCUSED

[37] L.S. spoke of her relationship with the accused. She said it was always difficult and that she was afraid from the time she was little. She said that the accused was angry and she was afraid of him. She also said there was a lot of violence and anger in the home and that the accused drank a lot. She testified that he was violent and angry towards her, her mother and her brother. She described the accused twisting arms and fighting with her brother and giving her mom a black eye more than once. She said the

accused would shake her and leave handprints or bruises on her arm. She said it was not long after the incident on the roof at the 11th Avenue residence that she moved out of the family home for good at about the age of 17. She acknowledged that she was fearful of the accused and wanted out of the house.

[38] After L.P. disclosed her incident to H.J., she said that he felt like he wanted to kill the accused. That evidence was corroborated by the accused who testified that he had a physical fight with H.J. once while the family lived in Crestview. He recalled that H.J. was very angry because he had been told by L.P. that the accused had made some sexual comment to L.P. and H.J. was confronting the accused about that. That is also consistent with the evidence of H.J. that he had a physical fight with the accused around the time when the family lived at Crestview. The accused himself also admitted to periodic violence between he and C.A. That evidence in turn cumulatively supports the evidence of L.S. that she recalled the violence and is consistent with her fear of the accused.

[39] The accused acknowledged that, while L.S. was a teen-ager, they had a "turbulent" relationship, but it then turned into one which was "pretty good". He spoke favourably about his relationship with L.S. after she moved out of the home. In particular, he said that the relationship was "way better" when L.S. was in her early 20's and that the relationship continued in that fashion until the accused's divorce from C.A.

[40] That is contradicted by the evidence of the accused's daughter, J.A., who was also not challenged on cross examination. She said that after L.S. moved out of the home, her relationship with the accused was not close and "if anything, it seemed strained". C.A. also contradicted the accused's evidence in this regard. She said that

after L.S. left home she did not really have a relationship with the accused and that to the best of her knowledge the accused continued to be “insensitive” towards L.S.

[41] With respect to both the Crestview and the 11th Avenue allegations, defence counsel said that they are “at odds” with the accused’s evidence of his continuing relationship with L.S. after she left home while she was well into her 20’s.

[42] The accused said that he lived with L.S. alone in her apartment in Vancouver for a brief period of at least a week, while she was making the transition from that apartment to another, where she planned to live with her boyfriend. However, that evidence was contradicted by L.S. who said that she never lived alone with the accused in the Vancouver apartment and either her former roommate or her boyfriend were present at that time. She did, however, allow that it was possible she was in the apartment alone with the accused from time to time.

[43] The accused also said that there were a number of occasions in which he had social contact with L.S. in Vancouver and even gave her rides to work. L.S. was not cross-examined about the issue of the rides to work, but did acknowledge that on occasion she had dinner with the accused alone. When asked why she maintained contact with him, if she was still fearful of him and nervous, she said “He was still my father. He was married to my mother and was the father to my sisters”.

[44] The accused said that L.S. stayed with him in his room at the Tuktoyaktuk base during the time when both he and L.S. were employed by Beaudrill in the 1980’s. He said that this happened on at least two occasions. That was contradicted by L.S., who said that she had no memory of staying overnight in Tuktoyaktuk. Although she allowed on cross-examination that it was possible she had done so, she said that it would be

highly unlikely because there were more than enough rooms at the base and that she would easily have been able to obtain a room for herself.

[45] Even if I were to accept the accused's evidence of his continuing contact with L.S., that would not necessarily be inconsistent with her allegations. One must be very careful to avoid making stereotypical assumptions about the behaviour of children who are sexually abused by members of their family. For example, the Supreme Court of Canada has cautioned against drawing automatic adverse inferences from delayed disclosure of such complaints. Major J. in *R.* v. *D.D.* 2000 S.C.C. 43 said at paragraph 63:

> i. "the significance of the complainant's failure to make a timely complaint must not be the subject of any presumptive adverse inference based upon **now rejected stereotypical assumptions of how persons (particularly children) react to acts of sexual abuse …**" (Emphasis added)

[46] Further, La Forest J. in *M.(K.)* v. *M.(H.)* [K.M. v. H.M.] [1992] 3 S.C.R. 6, at paragraph 31, spoke of the "accommodation syndrome" or "post-incest syndrome" suffered by adult survivors of incest, which can often result in the victim having "misplaced feelings of loyalty towards an incestuous parent".

[47] Finally, the Alberta Court of Appeal in *J.N.* v. *K.J.K.* 2004 A.B.C.A. 394, spoke of the discoverability rule in the context of a civil action arising from an historical sexual assault. At paragraph 11, the court cited *M. (K.).* v. *M.(H.)* and said "Appreciation of the nature of the wrong done to [the claimant] requires an understanding of the [accused's] blameworthiness for the act or acts in question …".

[48] In any event, I understood defence counsel to concede that it might be stereotypical to expect that some form of a relationship between the accused and L.S.

could not be maintained after she moved out of the home. To the extent that L.S. had any contact with the accused, it could well have been the result of some feeling of misplaced loyalty to him as the father figure in the family However, defence counsel went on to say that the existence of the relationship, as described by the accused in any event, is also consistent with the absence of any improper conduct on the part of the accused towards L.S. While I agree with that general proposition, it does not go so far as to raise a reasonable doubt in my mind about the truth of L.S.'s allegations. Further, that proposition is countered by the evidence of C.A., H.J. and J.A., who all support L.S.'s testimony that she had a negative relationship with the accused right up until he separated and divorced from C.A. in 1999. Since then, she has had no contact with him whatsoever.

[49] Accordingly, I find the accused guilty of counts #2 and #3.

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GOWER J.