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R. v. W.O., 2025 ONCJ 102

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W A R N I N G

The court hearing this matter directs that the following notice be attached to the file:

A non-publication and non-broadcast order in this proceeding has been issued under subsection 486.4(1) of the *Criminal Code.* This subsection and subsection 486.6(1) of the *Criminal Code,* which is concerned with the consequence of failure to comply with an order made under subsection 486.4(1), read as follows:

> **486.4 Order restricting publication — sexual offences.** — (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of
>
> (*a*) any of the following offences:
>
> (i) an offence under section 151, 152, 153, 153.1, 155, 160, 162, 162.1, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or
>
> (ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or
>
> (*b*) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph *(a)*.
>
> (2) **MANDATORY ORDER ON APPLICATION** — In proceedings in respect of the offences referred to in paragraph (1)(*a*) or (*b*), the presiding judge or justice shall
>
> (*a*) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and
>
> (*b*) on application made by the victim, the prosecutor or any such witness, make the order.
>
> . . .
>
> **486.6 OFFENCE** — (1) Every person who fails to comply with an order made under any of subsections 486.4(1) to (3) or subsection 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

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CITATION: *R. v. W.O.*, 2025 ONCJ 102
DATE: February 24, 2025
COURT FILE No: 23-37100935

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O N T A R I O C O U R T O F J U S T I C E

B E T W E E N :

HIS MAJESTY THE KING

-AND-

W.O.

Before Justice M. G. March
Heard on May 27, September 10, 11, 23, October 22, November 18, December 16, 2024, and January 16, 2025
Reasons for Judgment released on February 24, 2025

Ms. Lori Crewe……...……...Counsel for the Provincial Crown
Mr. Mark Huckabone……..……..Counsel for W.O.

March, M.G., J. :

Introduction

1. The accused, W.O., stands charged that between:

   a) June 1 and July 31, 2016,

   b) October 1, 2016, and March 1, 2017,

   c) July 15 and August 31, 2019, and

d) on or about June 21, 2020,

he committed sexual assaults on M.O. contrary to section 271 of the *Criminal Code of Canada* (the "*Code*").

2. He further stands charged that on August 1, 2021, he committed an assault upon M.O. contrary to section 266 of the *Code*.

3. W.O. and the complainant, M.O., who prefers now to go by her maiden name, M., were married for some 25 years. They were both members of the Canadian military. They had three sons together, who are presently all adults.

4. The marriage took a turn for the worst in 2019 when W.O. learned of M.M.'s infidelity through the spouse of the man with whom she had had an affair. Things between W.O. and M.M. went terribly thereafter.

5. As with so many criminal trials, the outcome of this one will turn on an assessment of the credibility and reliability of the accounts given by the witnesses called to give evidence in a largely classic, 'he says, she says' case.

The Relevant Evidence

M.M. :

6. When M.M. began giving her evidence on May 27, 2024, she recounted that W.O. and she became a couple in August 1993. They met in Chilliwack, B.C. and moved to Petawawa, ON in January 1994. They married on November 17, 1995, and spent most of their time together near the military base located there raising their three sons as they came along.

7. M.M. enlisted in 2002 in the military when W.O. had already been a member for several years.

8. Many years later, she was posted to Ottawa in 2013 where she remained employed for six or so years. Neither W.O. nor her children wished to move to Ottawa to be with her.

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M.M. and W.O. would travel back and forth between Ottawa and Petawawa to maintain contact with her doing most of the driving.

9. M.M. overall felt that W.O. and she were getting along well despite the physical distance between them.

10. Earlier, on November 28, 2012, she had suffered a severe heart attack. She learned that she was taken to hospital in Pembroke by ambulance. She believed a defibrillator was used upon her seven or eight times along the way on the drive to hospital from her home in Petawawa. She was then flown by air ambulance from Pembroke to Ottawa. She did not regain consciousness until December 2, 2012.

11. She remained in hospital until December 11, 2012. She was soon after diagnosed with depression and anxiety, and in 2018, posttraumatic stress disorder ("PTSD").

12. She explained that her heart attack caused her to suffer short-term memory loss. Her ongoing memory issues led to her forgetting where she placed items, and things of that nature.

13. She added that she was generally "good" nevertheless in recalling the context of conversations in which she engaged, but at times she would have to write things down to remember them, and on occasion, needed something to help her remember.

14. M.M. lamented that over the years thereafter, the relationship between W.O. and her broke down. September 15, 2020, was their official date of separation.

The Crown's Seaboyer and the Defence's s. 276 Applications:

15. At the conclusion of the first abbreviated day of trial for W.O., Crown counsel wisely asked for an adjournment to allow her time to bring a *Seaboyer*[1] application, so as to permit questions to be posed to M.M. about her prior sexual history, which were not the subject matter of the charges before the Court. Defence counsel agreed and decided, also wisely, to bring his own section 276 application under the *Code* to seek leave to cross-examine M.M. along the same vein as Crown counsel, both counsel recognizing

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they would have to delve into M.M.'s past, to a limited extent, to give context and clarity to her testimony.

16. By way of an Agreed Statement of Facts read into the record on June 17, 2024, Crown and defence counsel persuaded me to allow examination-in-chief and cross-examination of M.M. regarding extramarital affairs she had while she was a member of the military in Ottawa. Both counsel agreed as well that I, as the trial judge, should have some awareness of the affairs, and more importantly, W.O.'s discovery of them, as they were essential to the ongoing narrative M.M. wished to provide to the Court about their marriage, and would likely be unavoidable for M.M. and W.O. to mention when they gave their anticipated evidence.

17. Essentially, I found that the proposed evidence did not offend the 'twin myths'[2] and rebutted all other presumptions set out in the *Code,* which would otherwise make such testimony inadmissible.

The First Alleged Sexual Assault:

18. When M.M. resumed her examination-in-chief on September 10, 2024, she spoke of an incident which occurred in June or July 2016, when W.O. and she were at Black Bear Beach campground near Petawawa and staying at their trailer. They were visited there by their friends, K.J. and P.K.

19. P.K. drove to the site in his truck with a camper on the back accompanied by his partner, K.J., to spend a weekend with M.M. and W.O.

20. M.M. described the event as "a good time" where the four of them shared meals, alcoholic beverages, walks and conversation.

21. M.M. denied that she was intoxicated either the Friday or the Saturday night of their stay. She adjudged herself to be capable of driving a vehicle.

22. During one of the evenings, M.M. indicated that she and the others were sitting around and chatting until it was time for bed around midnight. K.J. and P.K. retired to their camper first.

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23. When W.O. and she entered their trailer, he suggested they should have sex, but she did not want to. He approached her while they were lying in bed. He cuddled into her, but she could not recall what, if anything, he said. She surmised that he would have asked her, “Do you want to have sex?”. However, she had no distinct recollection of the exact words he used.

24. She was on her back. She believed she would have been wearing a nighty because that was her “common practice”.

25. He proceeded to take off her underwear and have sex with her by penetrating her vagina with his penis. The act of intercourse lasted for five minutes. He ejaculated and then got off her. She could not recall any conversation they had afterwards. They then went to sleep.

26. The next day she told her friend, K.J., about what had happened.

27. Under cross-examination, M.M. confirmed that she gave statements to military police on August 1 and 9, 2021.

28. She reiterated her problems with her memory, which were associated to her health condition. She offered that she was taking several prescription medications, but she was sure that alcohol consumption was not contraindicated for any of them.

29. She added that she had difficulty with remembering things from today, yesterday and years ago. She did not keep a diary of the incidents which brought her to Court. She was just remembering them as best she could.

30. She specified that she was released from the military because of her PTSD, which she recalled was diagnosed on June 6, 2018 by her therapist at the Montfort Hospital in Ottawa.

31. She conceded that although she believed the first occasion upon which she was sexually assaulted by W.O. occurred in June or July 2016, a photo shown to her in Court suggested it actually occurred in August of that year.

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32. Furthermore, although she testified that W.O. and she went to bed around midnight, she told police she could not remember when they went inside the trailer. She felt like they went to bed around the same time.

33. When the question was put to her by defence counsel that W.O. approached and "cuddled" her in bed before asking to have sex, she denied that he cuddled her. However, she added that she did not know if it was immediately after they went to bed. She thought it happened as she was trying to go to sleep.

34. Defence counsel reminded her that she told police on August 9, 2021, "I almost feel like we had slept a bit . . . he woke me up probably." She then explained that three and a half years had elapsed since the incident, and she could not specifically remember the prelude or what was said.

35. Her memory was then refreshed by defence counsel that she had said to police, " . . . [he] wanted to have intercourse. And I said no. And he just basically said he was going to have it."

36. She confirmed that she did not remember the weather that night or any discussion specifically had amongst the four of them around the fire. She also agreed that she told Crown counsel during her examination in-chief that the intercourse lasted five minutes, whereas she told the police it was ten minutes.

37. She acknowledged that no physical marks were left on her due to the unwanted sexual activity, nor any bruising, because she did not resist.

38. Regarding how the incident ended, she testified that she rolled over and went back to sleep. She did not remember if he left the bed after the intercourse was over.

39. In respect of her conversation with K.J. the next day, M.M. stated that she gave her friend some details. K.J. reacted, but M.M. did not remember what K.J. said.

40. M.M. was nevertheless clear that she told K.J. that W.O. had sex with her (M.M.) when she (M.M.) did not want to.

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41. M.M. expressed no concern with the prospect of K.J. coming to Court later in the trial to say that no such conversation about nonconsensual sex occurred between the two women. M.M. confirmed that K.J. was the only person she (M.M.) had told about what had happened.

42. When confronted by defence counsel that he expected K.J. to testify and say under oath that the women discussed how W.O. and M.M. had sex, and it was fine, M.M. responded, "If she can live with that . . ."

43. M.M. denied that she was frightened by W.O. remaining in the trailer with her after forcing himself upon her, yet she was not comfortable with it. She added that he was in and out of the bed. She reaffirmed that she was not sure if he remained in bed with her immediately after the sexual intercourse.

The Second Alleged Sexual Assault:

44. M.M. recalled another incident from 2017 during a period when she was living in a hotel in Ottawa four to five days of the work week. One Friday, she headed home to Petawawa. She later fell asleep there in her bed and woke up to someone over top of her. She "freaked out" and tried to push him off.

45. While testifying about this incident, M.M. made a gesture of extending her two arms and hands outward from beside her chest to their full extent with palms open.

46. M.M. explained that this event occurred in the bedroom she shared with W.O. in their family home. She placed it at a point in time going from fall to winter.

47. She had no recollection of what she was doing the evening prior to going to bed. When she woke up, she was on her back. Initially, she was thinking she was in her bed in Ottawa, and no one should be with her. At some point, she realized it was W.O. on top of her. He got up and said, "Who did you think I was?"

48. M.M. went on to explain that W.O. was trying to penetrate her with his penis. Normally, she went to bed with her nighty on. She still had it on. It was just pulled up.

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She reckoned that if she had been wearing undergarments, they must have been taken off her.

49. When she succeeded in pushing him off, she remembered him being at the side of the bed. He then asked her, “Did you think I was one of your boyfriends?”

50. She believed that that was the end of this incident. She thought he may have gone to sleep elsewhere. She had told him on other occasions, “He can’t just do that.”

51. She had no further memory of the event.

52. Under cross-examination, she indicated that she initially believed she was in her apartment/hotel room in Ottawa being attacked by a stranger. She did not know whether W.O. and she had been drinking alcohol earlier in the evening.

53. She stated that she was not drunk, nor high, when she went to bed. She was nevertheless coming out of a deep sleep, and was unable to immediately identify the person above her. She was trying to feel his face to determine who he was.

54. She added that she has woken up on other occasions looking for her weapon thinking that she was still in Afghanistan, even though she was home on leave.

55. She admitted that she was incorrect about her original belief that a stranger had come into her apartment, but she explained that if you are used to sleeping in a certain place, confusion of the nature she was experiencing can happen. For example, similar incidents have occurred when she was visiting her mother.

56. She realized it was W.O. when she felt his head[3] , and he said something to her.

57. She agreed that when she testified in answer to questions put to her by Crown counsel, she stated that he was “trying” to penetrate her. She confirmed that that was accurate. She added that he may have gotten the tip of his penis inside her.

58. She conceded that that was different from what she had told the police, which was that he was inside her. She was wrong about that. She did not think he was able to get inside

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her. She allowed that she ought to have told police that he was trying, but he did not penetrate her.

59. She was reminded by defence counsel that she told police on August 9, 2021, "When I woke up, he was penetrating me."

60. Further into her police interview, she repeated, "And I woke up with someone on top of me, penetrating me. It scared the hell out of me . . .".

61. She maintained that she was only "slightly" penetrated.

62. She did not remember exactly when the incident occurred. She did not believe it was during the summer when W.O. and she tended to stay at their trailer.

63. She confirmed that she told police and had earlier testified that he had asked her if she believed she was with one of her other boyfriends. She agreed that she had attributed that to W.O. during this incident.

64. Defence counsel then confronted her that W.O. would not have known she had other boyfriends because he did not learn of the extramarital affairs until 2019. She maintained nevertheless that that was what he said.

65. She added that she told him as well that he scared the hell out of her. She knew she would have just said something to the effect of, as well, "You don't do that."

66. She remembered W.O. standing in front of the window in their bedroom afterwards while she stayed in the bed. Eventually she was able to go back to sleep.

67. She did not ask him to go to sleep on the couch. She lamented, "This was my life; I'm used to it."

68. She stated that she told her friend, D.G., about the sexual assaults as well. When confronted by defence counsel that he expected D.G. to come to Court and to testify that there was no discussion between M.M. and her about W.O. having nonconsensual

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sex with her, M.M. responded, “It was up to [D.G.] if she comes to Court and says we didn’t discuss it.”

The Third Alleged Sexual Assault:

69. When M.M. testified on September 10, 2024, she hearkened back to an incident which occurred at Black Bear Beach campground in the late summer of 2019. She was clear that by this point, W.O. had already become aware of the affair she had had. Indeed, he apparently did not permit her to return to the family home in Petawawa after he learned of it.

70. When he did allow her finally to come back to the Petawawa area, they were together at their trailer. M.M. described it as “not a comfortable situation because of what happened.”

71. M.M. and W.O. spent their day together discussing what had occurred, going to the beach, visiting friends at nearby campsites, sitting around the fire, eating, and having drinks, but not to the point of intoxication.

72. She recalled that at one point, after they had gone to bed, he decided he would like to have sexual intercourse. She did not want to. W.O. was not pleased at her unwillingness.

73. He told her, “You spread your legs for someone else.” He positioned himself over her. As M.M. then put it, “He was going to take what he wanted”.

74. He penetrated her vagina with his penis. She was crying the whole time the intercourse was taking place. He called her names such as “whore” and “slut”. He asked her, “Is that how you like it?”

75. M.M. continued crying looking out the bedroom window of their trailer until the act ended when W.O. ejaculated and got off her.

76. He continued to call her names. She just curled up and went to sleep. She stayed in their bed. She was not sure if W.O. went into the back room of the trailer afterwards. Again,

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she was explaining to him that he could not simply have sex with her when he wanted irrespective of her wishes.

77. Under cross-examination, M.M. confirmed that by the summer of 2019, she had formerly been diagnosed with PTSD. She had also been charged with a "DUI", and was in a fair bit of debt.

78. She added that W.O. had found out about more than just one affair she had had.

79. She agreed that her recollection of when the incident occurred was not clear. She told police that she felt as though it happened in the fall when she gave her statement. She pointed out again that she was "just not very good with remembering dates". She settled upon the incident as having occurred somewhere in the August to September 2019 timeframe.

80. She acknowledged that she told police that her "brain was not functioning" and that she was "changing dates". She offered that she needed a reference, in other words, things to help her remember. Her niece got married the third week of August that year. W.O. accompanied her to B.C. for it.

81. She explained that W.O. typically went to the trailer on the Friday evening at the beginning of the weekend. She agreed that when she spoke to the police, she only had a memory of having gone to the beach, nothing else. She allowed for the possibility that they may have taken the dog to the beach and gone for a boat ride as well. She knew that they took the dog to the beach because that is their routine. Other than that, she agreed she had no other specific memories of the day.

82. For the most time while she was with her husband that weekend at Black Bear Beach campground, she felt like she was being punished and frozen out. He was treating her like she was "not really there".

83. Regarding the duration of the sexual intercourse forced upon her, she confirmed that she told police it lasted 10 minutes. She agreed that that is also what she said to police as to

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the duration for first time it was forced upon her as well in the summer of 2016 when she told K.J. what had occurred.

84. On the issue of their alcohol consumption, M.M. confirmed that W.O. and she were drinking together that day. However, she did not get to the point that he did. She thought that she was probably drinking wine.

85. She did not recall her children raising her drinking with her at that point in time. She agreed that her eldest son had cautioned her about mixing alcohol and her prescription medications, and that he was expressing his concern. In response, she worked on drinking less and took a course, an intense outpatient program, to reduce her consumption. She stated that she was still in aftercare.

86. At the root, she explained, W.O. was upset with her that evening because of the cheating. She understood. After he discovered it, she suffered mostly only name calling from him, but she felt that there was never any trust in their marriage anyway.

87. She could not recall if prior to engaging in intercourse with her, he told her, “I’m going to do it”, or if he just did it. In describing the mechanics, she said he spread her legs, had sex, ejaculated, got off her and the incident lasted 10 minutes, but not necessarily the act of intercourse itself.

88. She did not know where W.O. went afterwards. He definitely got out of bed. She was uncertain as to whether he had come back. They did not discuss the incident itself afterwards.

89. The next morning, she did not remember any interaction that she had with W.O. She stayed quiet. As she explained it, she tended to be quiet in that situation when she is “broken”. She was sure there was no discussion that day about what had occurred.

90. She did not know if she returned to the trailer with W.O. the following week in August or September 2019.

91. When confronted by defence counsel that the story she was telling the Court was easy to make up, she retorted, “That’s not true.”

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The Fourth Alleged Sexual Assault:

92. M.M. was able to remember that the fourth time she was sexually assaulted by W.O. happened during Father's Day weekend in 2020. She explained that they continued to work on their relationship after she disclosed the affairs to him. She was back living at their family home in Petawawa as of November 2019.

93. They had planned to spend the Father's Day weekend at the trailer. M.M. had everything prepared. However, W.O. found himself in a foul mood prior to heading to the Black Bear Beach campground.

94. He began speaking about splitting their finances and spending his own money on himself. He began the name calling again. He told her she was "a bitch" and "a hag". He added that "the kids don't like you" and "no one does."

95. M.M. began holding back tears. He continued to speak about separating. She decided to go to their trailer alone.

96. W.O. eventually joined her there, but he told her he was not staying – not after the text she sent to him. In the text, M.M. had typed, "Okay. Let's separate."

97. M.M. spoke to her therapist and a mutual friend, C.H. She spent the Friday evening at the trailer by herself. She exclaimed, "I just felt like I wanted to hang from a tree."

98. W.O. and her sons came the next day to the trailer, the Saturday. M.M. prepared the food and served them, but she did not sit with them. She "pretty much stayed away from everyone". She took some photos, but mainly secluded herself in the trailer and cried.

99. After the kids left, it was only W.O. and her who remained at the trailer. M.M. described it as "not a good evening".

100. She went to sleep in the bed. W.O. joined her there. As M.M. put it, "He proceeded to want to have sex . . . through the night".

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101. M.M. did not want to, although she could not remember exactly what she said to express her lack of desire. She was pushing him away. Nevertheless, he got on top of her.

102. He mounted her while she was still awake. She was not participating at all. She thought she may have just looked away. His penis penetrated her vagina. She felt "shitty", "sad" and "emotional". She did not understand after the way he had treated her over the last two days.

103. She specified that she would have been on her side as usual. She ended up on her back.

104. She explained that she typically would go to bed with a nighty on. She would wear undergarments, but she remembered he took them off.

105. The sexual intercourse ended after he ejaculated and got off her. He left the bedroom and she thought he went outside. She stayed in the bed.

106. She had no other memories or details from that event to offer to the Court.

107. Under cross-examination, M.M. confirmed that W.O. and she still had not separated by Father's Day 2020. They were living together at the family home in Petawawa. Their plan for that weekend was to go to the trailer.

108. After he returned from purchasing a door, his mood soured. There were things she was expecting "to get done around the house that wouldn't get done." He left seemingly happy, but when he returned, he began speaking of separation.

109. He became surly, telling her that the kids hated her. Others did too. At that point, she left for the trailer on her own.

110. She saw him later that night. She asked W.O. if he was staying with her. He told her no.

111. She elaborated that in the text she sent to him, she had said words to the effect of:

"If I'm not making you happy, I guess we should separate."

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112. She ended up spending the night alone in the trailer with her dogs. She only spoke to her therapist and her friend that evening.

113. The next morning, she got up and had coffee. She knew she did so because that was "typical" for her.

114. She explained that when W.O. and their children arrived the next day, the Saturday, it was an unhappy night for all. She did not go near her kids because she knew she would not be able to stop crying. She was far too emotional. She did not want to show them her upset. She carried on as if everything was "okay".

115. According to M.M., it was not until after the incident which occurred on Father's Day 2020 that W.O. began "filling their kids' heads". She denied however that she ever went to speak to her sons directly to verify whether they did not like her or hated her on Father's Day 2020. She did not challenge them on what W.O. told her were their feelings toward her. She acted like everything was "okay".

116. Defence counsel confronted M.M. that she told Crown counsel during her examination-in-chief that the sexual assault happened during the night. By contrast, she told police in her statement that it happened in the morning.

117. She may have been confusing the date, but the sexual assault which occurred on Father's Day 2020 happened indeed in the morning. She added, "I'm sorry. I don't know why I made that error."

118. She confirmed that at the end of the incident, he did not stay in bed with her. He went to make coffee. She got herself ready and went home.

119. She agreed that it would have been light outside if the assault had occurred in the morning. She denied that she was drinking after the children left on Father's Day. She had not been drinking very much on the Saturday in any event. When questioned about what alcohol specifically she would have been consuming, she stated it would have been wine. That is what she drinks.

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120. When challenged by defence counsel that she did not go home following the incident, but rather stayed and went out boating, she confirmed that that was possible. W.O. and she may have gone fishing together. She had no recollection of taking their children waterskiing and tubing.

121. When further confronted by defence counsel that all the alleged sexual assaults followed a similar pattern, namely:

    a) W.O. would express a desire to have sex with her,
    b) she would say no,
    c) he would ignore her and spread her legs,
    d) she would offer no real resistance,
    e) she would suffer no injury, and
    f) each time it would last approximately 10 minutes,

    M.M. denied that this was any strategy she was employing to make herself consistent, and thus credible before the Court.

122. Further, she retorted, "I was crying; he was having sex." Only over time did she develop the strength to say, after they had discussed his unwillingness to stop, "No means no."

123. She agreed nevertheless that when police asked her about discussions W.O. and she would have the next day following the alleged sexual assaults, she could not remember what those conversations were.

124. On the Saturday of the Father's Day weekend of 2020, she acknowledged that she did not remember what she had prepared for dinner. Nor did she recall if she was even consuming alcohol while her children were present.

125. She also stated that she was very confused between June and September 2020. She was not sure whether they were going to stay together. There were a lot of mixed messages he was sending.

The Assault:

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126. On the Sunday of the August long weekend in 2021, M.M. got up early to go to the trailer. She did not want to see anyone. By that point, W.O. and she had separated.

127. She estimated that she arrived at the campsite at 6:45 AM. She went there to retrieve a patio umbrella. Once there, she saw a truck that did not appear to belong to W.O. Its licence plate was different.

128. She noticed that the trailer was open. She went inside to discover W.O. passed out in the bedroom.

129. She stated that by mutual agreement, neither W.O. nor she were supposed to be at the trailer. She told him so and grabbed his truck keys.

130. She had her own set of keys to the trailer. Her plan was to take W.O.'s trailer keys, which she believed he may have left in his truck.

131. W.O. followed her outside. He grabbed her hands just as she was exiting the truck. He was trying to pry the keys out of her left hand, in which she held both his truck and trailer keys. A key ring was looped around her middle, left finger.

132. She recalled having some conversation with him. After grabbing her hands, she ended up on the ground. She told him he was going to break her finger.

133. He was wrestling to get her hands open using both of his hands. Her keys went flying. She had to "dig them out of the bush".

134. She surmised that she may have had her keys in her left and his in her right. She was willing to give him his truck keys, but not the set for the trailer. She thought that her trailer keys may have been in her left hand.

135. He was grabbing at her while she still had both sets. He managed to regain possession of his truck keys.

136. She suffered injuries to her hands. She had a cut on her right hand as well as scratches. Her knuckles were "a little swollen".

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137. M.M. was shown a photograph by Crown counsel depicting an injury to the middle finger of her left hand. It was apparent from the photograph that her finger was scratched and cut. The knuckle was swollen. She explained that the police who attended after she called them to the campsite took the photograph. This was the first time she had ever called for police assistance in her dealings with W.O.

138. The photos taken by police were marked as Exhibit 1 on the trial. M.M. confirmed that they accurately depicted the injuries she suffered to her hands.

139. M.M. also took her own series of photos. One was taken from across the way from their campsite. She had taken it right after she had called the military police while she was in her car after W.O. had "attacked" her.

140. She also took photos of her hands from within her vehicle as evidence of the injuries inflicted upon her by W.O. Later, she took some at home as well after she had cleaned herself up. All such photos were marked as Exhibit 2 on the trial.

141. Before she went home, she explained that she attended at the officers' request on base to give a statement at the military police detachment. She was taken into a room and asked questions by the officers. She wrote down her responses to them as they had asked.

142. M.M. went on to testify that a series of questions were put to her about her relationship with W.O. in the marriage they had shared. She indicated that she tends to go back to the beginning when providing such an account. She said the relationship was volatile. There were times when they argued and fought.

143. She then made additional disclosures of a sexual nature. She spoke of times when their sexual activity was nonconsensual. Due to the nature of the crimes alleged by M.M., military police officers told her that aspect of their investigation would have to be turned over to their National Investigative Service ("NIS") branch.

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144. Soon afterward, M.M. was contacted by a member of the NIS and she gave a formal, audio-visual recorded statement to police regarding the alleged sexual assaults perpetrated upon her by W.O.

145. Under cross-examination, M.M. clarified that she wanted W.O.'s trailer keys because neither of them were supposed to use it. Only after she went inside the trailer did she see W.O.

146. Their verbal exchange was then heated. She asked him what he was doing there. She next told him, "Get out of my fucking trailer!" He responded, "Oh, your trailer?" She replied, "Yeah, because you owe me that money." He then said, "Fuck off."

147. While M.M. was testifying on September 11, 2024, it came to light that she had made a video recording of part of her exchange with W.O. the Sunday morning of the August long weekend, 2021.

148. She estimated that the video was between 20 and 30 seconds long. It did not record any of the yelling engaged in by W.O. and her which their neighbours may have overheard. Nor did it capture any of the physical interaction between W.O. and her.

149. M.M. vehemently denied editing out a portion of the video. She stated that she did not have the technical knowledge to do so.

150. When challenged by defence counsel that she was estranged from her children because of her extra-marital affairs, M.M. corrected counsel to specify that she was estranged from her children because of what W.O. had told them.

151. She was adamant as well that she did not expect to find W.O. at the campground. She did not recognize the new plate on his truck. She also could not see a distinctive Newfoundland map on the back window of the truck.

152. She agreed that she did not ask for permission to take W.O.'s trailer and truck keys. She explained that she wanted all the trailer keys. If she was forbidden from using it, so should W.O. be.

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153. It was when he caught up to her and approached her outside as she was exiting his truck that he grabbed both her hands. He then tried to open them to get his keys back. He put her to the ground in so doing.

154. She added that he did get the trailer keys back. She was able to put them in her car. However, she did give him his truck keys. She must have let them go during the struggle.

155. He said to her repeatedly, "Give me my fucking keys." He was yelling. She could not remember anything else he said.

156. She confirmed that none of her clothing was torn. It was not raining outside that day.

157. When the police arrived, W.O. had his truck keys back in his possession. She had his trailer keys and her car keys.

158. Under re-examination, M.M. stated that she was prepared to work on repairing her relationship with W.O. until the incident which occurred on the Sunday of the August long weekend in 2021.

159. She clarified that he moved out of the family home in Petawawa near the end of March to the middle of April 2021. Her relationship with her sons "started going really bad," because W.O. was "telling the kids things." Her oldest and middle son would yell at her. W.O. was "hijacking" all the youngest son's time as well.

Disclosure to the Authorities:

160. M.M. repeated on several occasions how disclosure of the nonconsensual sexual activity between W.O. and her was not what she intended to tell the military police about. She did not want her children to know. Nor did she want any of her colleagues in the military to know. She did not want her chain of command or anyone knowing about her private life.

161. When she raised it with police during her first interview however, she knew the "dynamics changed."

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162. The Petawawa military police explained to her that the NIS out of Ottawa did “the more serious stuff”. Indeed, an NIS investigator then came from Ottawa to Petawawa to interview her.

163. It was not her intention to report the sexual assaults due to shame and embarrassment. As M.M. put it, “No one wants anyone to know in a marriage the way you’ve been treated.”

164. She complained that W.O. had been harassing her since he moved out. Then, when the physical assault happened at the Black Bear Beach campground, she reported the sexual assaults.

165. She explained that she asked the military police for a chance to go home and rest up before speaking about them.

166. When pressed under cross-examination, M.M. repeated that she never went to the police with the intention of speaking of the sexual assaults.

167. She stated that W.O. did these things to her and she was standing up for herself. He was telling their children that she was keeping stuff. She had everything; he had nothing. She did not know the extent of everything he told them.

168. She was crushed when he told her that the kids hated her. Her heart was broken by what he had said. In retrospect, she was glad that she had left the marriage.

169. She was ready to leave him in 1998, but she found out she was pregnant with their middle child.

170. She added, “There isn’t anything I wouldn’t do for my kids. Now they know the truth.”

171. She maintained that she went to Court and testified as she did because of the way W.O. treated her.

W.O.:

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172. When W.O. began providing his testimony on November 18, 2024, he was 55 years of age. He was born in Port aux Basques, Newfoundland and joined the military at a relatively young age. He spent 23 years in the Canadian Forces, serving mostly in his trade as a heavy equipment supervisor. He had seven deployments overseas.

173. After a one-year courtship, he married M.M. on November 17, 1995. Together they raised three sons aged 28, 25 and 24 respectively at the time he gave his evidence.

174. He recalled that M.M. "may have had a heart attack" some years ago. The paramedics attended at their home in Petawawa, but could not discern a definitive cause for her collapse. He attributed her medical crisis to her smoking. She did not have a cardiac episode that he was aware of since.

175. He did not have any knowledge of a brain injury which M.M. may have suffered, or any other medical diagnosis she may have received. He added that he had never seen a confirmatory document for her supposed PTSD. Nor had he spoken to a doctor or anyone else who could confirm such a condition for her.

176. He conceded that she did tell him about her diagnosis.

177. Regarding her memory, W.O. described it as normal when they first met, but over time, it became "more skewed". The heart attack did not help.

178. He observed as well that she was taking an array of medications - upwards of ten pills per day. He remarked that he saw some of her pill bottles where alcohol consumption was contraindicated when using certain prescription drugs. Nevertheless, she drank regularly, and, at times, to excess.

179. On occasion, she would stumble and hurt herself. W.O. went so far as to ask her not to walk in front of the stairs. He saw her once crash in the kitchen and end up with her head in a twisted position with her torso across the kitchen counter. Her falls resulted in broken ribs and missing teeth.

180. W.O. recalled that M.M. had a group of friends C.T., K.J. and D.G. with whom she would frequently socialize. They would go out to bars together and various other

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events. To him, it appeared as though they were four women having a good time. However, over time, M.M. would eventually fall out with them and her relationships with them would end.

181. Under cross-examination, W.O. conceded that although he did not see anything to confirm that PTSD diagnosis, he believed that that was the reason for M.M.'s release from the military. Indeed, the existence of a such condition would be a prerequisite to a 'medical release'.

182. He also stated that he was not looking for any signs or symptoms of PTSD in M.M.

183. Prior to the end of her military career, M.M. went through a long grievance process dating back to roughly 2017. She stayed in Ottawa and disputed the loss of her financial entitlements, when she was no longer classified as having "imposed restrictions". It was during her time in Ottawa that she met K.J., D.G. and C.T. It was also where the affairs occurred.

184. W.O. reckoned that by 2018, M.M.'s relationship with K.J. had ended. The same occurred over time with C.T. and D.G. He elaborated that M.M. frequently has "different memories" of things that occur and falls out of friendships in consequence thereof.

185. On one occasion, while they were speaking over the phone, M.M. told him that she had sex with all his friends. He knew this was not true. He believed she was just trying to get "a rise" out of him.

186. He believed that telephone conversation occurred within 30 days of her going to the police. He confirmed that there was only one such conversation between them.

187. When W.O.'s cross-examination resumed on December 16, 2024, there was an agreed statement of facts that there was a further telephone conversation between M.M. and him, which occurred in April 2021, and the allegations before this Court were discussed by them.

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188. W.O. also did not remember having described M.M.'s memory as "skewed" when he had testified roughly a month earlier, although he allowed that he could have described it that way.

189. He denied that he used "anchor points" to help him situate in his mind when events occurred. When challenged further about why then he would have taken a photograph of the bear at a neighbouring property to their Black Bear Beach trailer site, he maintained he did not use it to jog his memory. He then acknowledged that there was no real purpose to the photo in that case.

190. Regarding his relationship history with M.M., W.O. settled upon the month of September 2020 as when they had separated, but he did not leave the matrimonial home until March 2021. In other words, they had not been living together up until their physical confrontation in August 2021. Rather, they had reduced contact. There were face-to-face meetings a couple of times when he would go to collect things from the home.

The First Alleged Sexual Assault Revisited:

191. W.O. remembered an incident where M.M. and he were visited by K.J. and her partner, P.K., at their campsite near Black Bear Beach, W.O. believed, in 2016. K.J. and P.K. were their guests. They had an enjoyable day and evening.

192. As W.O. put it, "He felt it was a Friday." M.M. and K.J. were friends. W.O. was not particularly close to either K.J. or P.K.

193. Nevertheless, the two couples ate together, joked and drank. No one had plans to drive a car. Everyone was drinking roughly the same amount of alcohol.

194. W.O. testified that he does not remember having sex with M.M. at all during the visit they received from K.J. and P.K. He certainly did not discuss with them any such activity.

195. He was, of course, aware of M.M.'s evidence as to what he had allegedly done to her that weekend. He denied that he sexually assaulted her. He did not hold her down, nor

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penetrate her vagina with his penis without her consent. Nor was there any digital penetration by him of her. Indeed, he stated that there was nothing nonconsensual in their sexual relations.

196. If M.M. did not want to engage in sexual activity, he would ask why. She would give him a reason and he would not persist.

197. M.M. never told him to stop. She did not just lay there, roll over and cry. Simply put, according to him, the incident as M.M. described it never happened.

198. All he could recall was a weekend of sunning themselves and having a good time. He did not believe that they used any marijuana. M.M.'s and his recreational use was commenced after marijuana was legalized, and both M.M. and he enjoyed it together. He preferred edibles.

199. Under cross-examination, W.O. conceded that he had no clear recollection of the activities he engaged in with M.M., K.J. and P.K. when the latter two visited one weekend in 2016.

200. Those evenings blended into one of many he had spent with M.M. and friends over the years at the Black Bear Beach campground. He explained that nothing "important" happened. They spent their time doing routine things. He could not specifically recall what M.M. and he did around bedtime.

201. As a result, he could not remember if M.M. and he had sex one of the nights while K.J. and P.K. were visiting.

The Second Alleged Sexual Assault Revisited:

202. W.O. recollected that in 2017, M.M. had an apartment in Ottawa while she was on "imposed restrictions" during her military career. That was how she was "classified".

203. She had the same apartment when K.J. and P.K. visited roughly a year earlier in 2016.

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204. W.O. testified that he did not remember an incident of M.M. waking up thinking she was still in Ottawa. Of course, he recalled her evidence about how she awoke on one occasion to him attempting to penetrate her vagina with his penis.

205. W.O. adamantly denied that there was ever a time when they were having sex that she thought she was in Ottawa, or she believed that she was being attacked by a stranger. She never told him she thought she was. No such incident ever occurred. To his knowledge, his wife did not suffer from nightmares.

206. Again, he emphasized that there was never any discussion between them regarding her lack of consent to sexual activity in which they engaged.

207. W.O. added that there was no time when she stopped drinking alcohol in 2017. She "carried booze" with her everywhere. There would be a bag of wine in her purse. As he put it, when she came home to Petawawa, it was "like the LCBO[4] was coming with her".

208. He raised his concern with her about her alcohol consumption, as did their sons. Her issues with alcohol persisted into 2019 and 2020.

209. He did not know of an occasion when as a result of alcohol consumption, she was confused as to her surroundings demanding who he was, or asking him to stop, during sexual intercourse.

210. However, on one occasion in 2020, she did accuse him of having "raped [her] twice", but this was immediately before she contacted the police, he believed, and after their marriage had irreparably broken down.

211. He denied further that he ever asked her if she thought he was one of her boyfriends. He could not have known that she had any in 2017. She did not disclose her affairs to him until 2019.

212. Under cross-examination, he confirmed that he simply could not remember an event where M.M. would have woken up to him attempting to penetrate her vagina with his penis.

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The Third Alleged Sexual Assault Revisited:

213. In 2019, when W.O. discovered M.M.'s infidelity, he visited her at their trailer, so they could talk about it. She was alone there. They did not want to have company. However, W.O. maintained that she was still being "untruthful".

214. He explained that he was asking her challenging questions based on information he received from the wife of the man with whom M.M. was having the affair.

215. He believed that they did sleep together, but they did not have sex. He was "very confident" about the fact. He had told her to stay in Ottawa and not to come back to Petawawa. He also wanted to have himself checked for sexually transmitted diseases.

216. He emphasized that he did not want to have sex with her at all that night.

217. Her account of how they had sexual intercourse lasting for 10 minutes, and that she turned away and cried afterwards, was not true.

218. W.O. imagined that he was not particularly chatty with M.M. He did tell her more than once that he wanted to separate.

219. Under cross-examination, he confirmed that he really could not clearly remember whether they did or did not have sex the night he visited M.M. at the trailer to discuss her infidelity.

220. He could recall neither any other details about their meeting, only that it was not a good weekend.

The Fourth Alleged Sexual Assault Revisited:

221. On Father's Day 2020, W.O. confirmed that his marriage with M.M. was still in a "broken state". He reckoned also that it may have been around the time that they had engaged in marriage counselling. He offered that he did not intend to stay in the relationship; however, he wanted to end it amicably. Reconciliation was not what he wanted.

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222. Although he allowed for the possibility that they could have had sexual intercourse that weekend, he did not think it had occurred. The weekend did not get off to a good start. At no point in time did he recall M.M. saying to him that she did not want to have sex.

223. W.O. repeated that whenever they did, he always had her consent. There was never a time when she appeared unwilling or unhappy when they engaged in sexual activity. As he put it, "She's the type to express it; she's very vocal."

224. He was certain during the Father's Day weekend of 2020 that there were no arguments they had in bed where she was crying or upset. There was never any conversation about "consent". There was simply no discussion to that effect.

225. Pictures were shown to W.O. taken during the Father's Day weekend of 2020. He indicated that he was the photographer using a selfie stick. In one of the photos, both M.M. and he appeared both pleasant and amicable toward one another.

226. He denied that there was ever any physical confrontation or argument that he witnessed between his sons and their mother. He conceded that M.M. and their sons are still estranged from each other. He was adamant that he did not poison their minds against her, but he did tell them about her infidelity. Nevertheless, he believed that their estrangement from her was unrelated to that fact.

227. He emphasized that during the Father's Day weekend of 2020, there was no time when he proceeded to have sex with M.M. when she said "no". She never expressed a lack of interest in it to him. She did not verbalize, nor use body language, to convey to him that she was not desirous of any form of sexual interaction. She did not cry or react in any way that led him to believe she was "unhappy".

228. Under cross-examination, W.O. professed that his powers of recall for that weekend were better because it was an actual event, not a "theoretical" one. He knew he did not sexually assault her. He did not believe there was any sexual activity between them that weekend.

229. He later conceded they may have had sex, but he just did not recall.

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230. He emphasized that notwithstanding, there was never a situation where M.M. objected to the sex in which they engaged. He stated, “I tell you wholeheartedly I didn’t have sex with her without her consent.”

231. He concluded that M.M. was in love with being in a relationship but was not in love with him.

The Assault Revisited:

232. During the August long weekend of 2021, W.O. confirmed that there was an agreement in place between M.M. and him that neither would use the trailer until it was sold, or otherwise liquidated somehow. She wanted it opened for their son to use, who was working at the Black Bear Beach campground that summer. W.O. did not. He wished to leave it closed until it was sold or jointly agreed upon that one or the other would take possession of it.

233. Their trailer had not been used that summer neither by M.M. nor him. He elaborated that he had purchased a home in Chalk River and thus had his own alternative accommodation by that point.

234. Nevertheless, during the August long weekend of 2021, he was helping a friend build a fence at the campground. The friend had young children. W.O. estimated that he had stayed with the friend at his trailer some 10 to 15 times over the course of the summer.

235. The August 2021 long weekend while at the campground, he was trying to give his friend some family time. He was away from their trailer for a while and had noticed that they had all gone to bed. He decided to slip into his own trailer so as not to bother them.

236. He lifted the cover over his trailer, entered it contrary to the agreement he had with M.M., and went inside to sleep.

237. In the morning, he woke up to the trailer door opening. M.M. entered with her phone out recording what she was observing.

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238. There was some “back and forth” conversation between them. She was asking what he was doing there. He estimated that their discussion lasted some five to seven minutes.

239. She then left with all the keys he had sitting on the counter close to the kitchen sink. She grabbed them and exited with both sets of his keys for the trailer and the truck.

240. W.O. got himself dressed and proceeded out the door after M.M. Outside, he asked for his keys back. He thought he did so at least three times. She was “indifferent” and yelling at him.

241. He explained that there was no physical contact between them inside the trailer. Once outside, he could see that she was inside his truck and standing at the driver door. He thought she was looking for the keys to his all-terrain vehicle as well. He ventured that she was trying to sell it without his permission. It was “a sticking point” between them as to how to dispose of it. He had noticed that she had advertised it on Facebook marketplace.

242. As he approached her, she had her left hand on the truck roof with the driver door open. Her right hand was reaching toward the centre console.

243. He specified that he was able to see the Dodge fob for his truck protruding from her hand. He reached forward and pulled on it without much effort. Those keys then fell to the ground.

244. He denied that he ever twisted M.M.’s hand, swung her around or put her to the ground. Nor did she yell that he was being physical with her.

245. He reached down and grabbed his truck keys from the ground. She told him she was going to call “the cops”. He said, “Go ahead.”

246. He was almost certain that he used his right hand to grab the fob. He is right-handed. He likely told her while reaching for it to “give [him his] fucking keys”. He denied that she ever said to him, “You’re going to break my finger.” Nor did she mention to him that he had hurt her finger.

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247. He stated he did not know how the injuries to her hand were caused. He speculated that she may have cut herself while trying to get into their trailer.

248. He went on to explain that he had had the same truck for 12 years. There was a big Newfoundland flag on the back window as well as an ornament, specifically miniature boxing gloves, dangling from the rearview mirror. He offered that he had changed the licence plate, but denied vehemently that M.M. would have had any difficulty identifying that vehicle as his truck.

249. He had no knowledge of whether M.M. had already retrieved an umbrella and had already brought it to her vehicle before entering their trailer that morning.

250. He believed that the confrontation from beginning to end when M.M. went inside the trailer, until he dispossessed her of his keys, was of roughly ten minutes duration. Once he obtained them, he had no further interaction with her.

251. He stated that everybody around them woke up because they could hear her screaming. Her scream is “very audible” and “high-pitched”. He opined that the video she took of the incident was “very doctored”. He noticed she was recording while she was screaming loudly, but he does not know what happened to that portion of the video.

252. He waited for police to arrive that morning and spoke to them. He estimated that it took the police half an hour to arrive on scene. He was arrested the following day.

253. He conceded that he was technically in the wrong by being in the trailer, but it was clear to him that she was obviously using it for storage as well.

254. Under cross-examination, W.O. agreed that there was much conversation shared between M.M. and him about whether one or the other would acquire ownership of the trailer exclusively, or whether the trailer would be sold. However, they mutually came to the verbal agreement that neither would use it.

255. He conceded that when he did use it that night contrary to the agreement, it was not visible that someone may be inside. If he himself had noticed a disturbance to the tarp

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covering the trailer, he would have investigated inside as well. However, he would not do so with his phone out and camera on.

256. He claimed he had seen an earlier video where he was filmed in bed sleeping, but that the portion of the video was altered and cut out. For this reason, he was 100% sure that M.M. "doctored" the recording.

257. He confirmed that when he confronted her while she was at his truck, she had her left hand on the frame and her right on the window ledge of the motor vehicle. Even though it was prior to 7 AM in the morning, she was screaming and yelling. He was not.

258. He noticed his truck fob in her right hand which was clenched in a fist. It was protruding upward. He pulled at the fob toward himself. She resisted. It was then that the other keys in her hand fell too.

259. He insisted that all keys then went to the ground.

260. When shown photographs of her hands the morning of their physical altercation during the long weekend in August 2021, he agreed there was blood on one of them. She had a "skinned knuckle". He offered that she may have already had those injuries when she retrieved the umbrella or let herself into the trailer.

261. He conceded that he was able to gain entry to the trailer without injuring himself.

262. He categorically denied that the injuries were a result of what he did trying to remove the fob from her hand. He added that M.M. bleeds and bruises easily because of the blood thinning medications she takes.

263. He disagreed that he wrestled with her to get the keys. He denied ever seeing the umbrella that day.

264. He confirmed that he swore while demanding, "Give me my fucking keys." He affirmed that he was near certain, "9 out of 10 for sure", that he used his right hand to remove the keys from both of hers, because he is right hand dominant.

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265. Ultimately, he agreed that he had no idea how she received the injuries to her left hand.

266. He conceded that the rust pattern on his vehicle likely increased during the time of their separation from April to August 2021. This licence plate was, of course, different as well.

267. Lastly, when shown a photo of the rear of his vehicle taken the morning of the physical altercation he had with M.M., he agreed he could not see the map of Newfoundland on the back window of his truck.

D.G.:

268. When D.G. testified on December 16, 2024, she indicated that she knew W.O. and M.M. through a friend. D.G. met them when they were a couple in 2014. D.G. first got to know M.M. She was closer to her.

269. The friendship D.G. and M.M. shared lasted for a few years until they drifted apart.

270. D.G.'s acquaintance with W.O. was different. They did not speak of personal things.

271. D.G. had no recollection of discussing anything with M.M. about her sex life with W.O., but she did regarding other men.[5]

272. M.M. never told D.G. that W.O. had forced himself on her. Nor did M.M. tell D.G. that W.O. did anything of a non-consensual sexual nature with her. M.M. never said to D.G. that W.O. did anything inappropriate to her.

273. D.G. reckoned that her relationship with M.M. petered out when her classification of "imposed restrictions" ended. Their friendship did not last. They had a falling out.

274. Crown counsel declined the opportunity to cross-examine D.G.

K.J.:

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275. When K.J. testified on December 16, 2024, she recalled how she met W.O. and M.M. in Ottawa. M.M. and she were both clerks in the military. She described M.M. as a close friend of hers and part of her inner circle.

276. K.J. included within this core of friends D.G., C.T., M.M. and her. The four women would go out, drink and party together occasionally.

277. K.J. specifically recalled visiting W.O. and M.M. on a camping trip in 2016. K.G. and her partner drove to the Pembroke/Petawawa area or in their camper. K.J. and M.M. intended for their men to meet one another.

278. K.J. remembered that they all had many drinks of alcohol during the two nights they stayed. She denied that M.M. ever told her about any nonconsensual sex W.O. had with her during the visit. To the contrary, M.M. told K.J. that they had sex but it was consensual. He did not force her.

279. In terms of her demeanour and attitude, M.M. seemed quite normal when the women spoke. K.J. was aware of M.M.'s infidelity. K.J. thought it was "great" that M.M. and W.O. had had sex. K.J. thought M.M. and W.O. were possibly going to repair their relationship and get back together.

280. By this point, K.J. and M.M. had been friends for well over a year. At the time of the camping trip, K.J. considered M.M. to be one of her closest friends.

281. K.J. clarified that it was the only Black Bear Beach campground trip that M.M. and she had gone on together.

282. Under cross-examination, K.J. stated that she also suffers from PTSD. The condition causes her to have "timeline issues".

283. She elaborated that she does not have any difficulty remembering events, but times can be problematic for her. She did mention that fact to the military police when they interviewed her.

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284. When specifically asked to remember what specifically M.M. said to her, K.J. attributed to M.M. that W.O. and she (M.M.) had sex the previous night. K.J. thought this was odd because she knew of M.M.'s infidelities.

285. K.J. went on to explain that she was hoping that W.O. and M.M. would get back together.

286. K.J. thought there was nothing "odd" about what M.M. was telling her.

Crown Position

287. Crown counsel submitted that the case before the Court was a classic '*W.(D.)*'[6] case. She submitted that the W.D. steps are seemingly simple in their formulation, but viciously complex in their application. In many instances, I agree.

288. The Crown argued that M.M. was internally consistent in the evidence that she gave. She was entirely candid about the issues she had with her memory. She readily conceded when she was unclear. Indeed, she had a tendency to cast herself in a negative light.

289. M.M. explained the reasons why she was devastated over the end of her relationship with W.O. He told her that their kids hated her. Granted it may have caused her to harbour some animus toward W.O. Parents, as we know, will go to great ends to shield their children in caring for them. However, what W.O. attributed to his children having said about her was not a motive for M.M. to fabricate everything she said W.O. did to her.

290. When M.M. made her initial complaint to police, it had nothing to do with sexual assault. She was upset over W.O.'s use of their trailer. It was the catalyst for her disclosing to police all abuse that she suffered at the hands of W.O.

291. She did not even want confrontation during that August long weekend in 2021. She went to the campground very early in the morning, so that she would not see anyone. All she wanted to do was retrieve the patio umbrella until she saw that someone may be in the trailer.

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292. She did not see a familiar licence plate on the red truck located near the trailer, nor the telltale Newfoundland map on the back window. She honestly believed it was not W.O.'s vehicle.

293. All M.M. wanted to do was take the trailer keys back from W.O. once she went inside and saw him there. He imposed the no trailer use rule. Then he, behind her back, breached their agreement.

294. M.M. gave a report on scene to the police of what the physical confrontation between W.O. and her entailed. It was not until the police reached the questions posed when filling out their standard report on domestic violence matters that the sexual assaults came to light. It was never M.M.'s intention to go down that path.

295. However, the past incidents of domestic violence led to the NIS becoming involved.

296. M.M. was cross-examined extensively about all four instances of sexual assault and the common assault at the trailer. She was unshaken.

297. Crown counsel argued that it is not unusual for a person to awake from sleep and to believe one is elsewhere. This does not detract from the reliability of her recollection.

298. She lamented that it was "just her life" to be sexually abused by W.O.

299. The Crown submitted that the evidence of D.G. and K.J. was not damning to M.M.'s credibility. Both D.G. and K.J. were asked some six to eight years after the fact to remember the conversations they shared with M.M. about sexual experiences she had with her then husband, W.O.

300. Crown counsel questioned whether any such conversation M.M. would have had with either woman would have stuck with them. That M.M. would have had sex with her husband would be mundane. It is not something likely to be committed to memory.

301. The Crown asked the Court to reject W.O.'s evidence outright for its lack of credibility. He claimed he was unaware of M.M.'s PTSD diagnosis, but under cross-examination, reconsidered and admitted that he was aware.

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302. Further he conceded there were significant differences in the vehicle as it appeared the morning of the August long weekend when M.M. went to the trailer to collect the umbrella. He could not himself point out in the photo taken of the back of his truck the Newfoundland map on the back window of his vehicle. He agreed as well that the rust pattern would have changed over time since she last saw his truck.

303. He went so far as to speculate that the injuries observed to her hand was caused by her entering the trailer. Meanwhile, he agreed that he was able to enter the trailer himself under the influence of alcohol late at night without injuring himself.

304. There was also the disconnect between K.J.'s and M.M.'s account that there was sexual activity between W.O. and M.M. during the 2016 visit - the only visit K.J. ever made to the Black Bear Beach campsite. To the contrary, W.O. claimed he did not have sex with M.M. that weekend.

305. Overall, W.O.'s credibility and reliability was lacking. He had no recall of going to bed with M.M. during K.J.'s and her partner's visit in 2016. He had no evidence to offer at all of their interactions at bedtime.

306. By contrast, M.M. was clear. She did not communicate any consent to sexual intercourse with him. She told him no. She did not wish for him to proceed, but he did anyway. She was specific as to how he removed her underwear. He ejaculated and rolled off her. She was clear that she was distraught and did not leave her bed.

307. During the 2019 encounter after W.O. learned of M.M.'s infidelity, W.O. claimed he did not have sex with M.M. that weekend. It was not a good time and he had a heavy mood. No hope for reconciliation between them existed according to him.

308. On the other hand, M.M.'s evidence was far more elaborate. Although she may have been inconsistent about whether the nonconsensual sex occurred during the night or in the morning, it must be remembered that she testified over multiple days. The Court must make allowance for any confusion she suffered as a result.

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309. Of course, the Court must use the same lens to assess the accused's and the complainant's credibility and reliability. W.O. made bold assertions and denials. He had no specific memories. That is where he clearly faltered when tested under cross-examination.

310. Even the instances where he acknowledged sexual activity between M.M. and him occurred, he cannot say what he did to secure consent. As a matter of law, consent must be communicated at each stage and be unequivocally obtained by one partner from the other. W.O. could not articulate any such steps being taken.

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Defence Position

311. Defence counsel agreed that this was a *W.(D.)* case where credibility and reliability would have to be carefully assessed for all witnesses' evidence called at the trial.

312. The defence went on to describe M.M. as both physically and mentally challenged. She was also someone who struggled with alcohol consumption. She sought to ground her recollections in pictures she had taken. However, there was no clarity to the events which she attempted to summon from memory, nor with respect to their dates.

313. Her testimony tended to be couched in language such as "I would have done this or that." She was clearly relying on habit and past experience, not actual recollections of what had occurred. She relied on presumptions based on how she would have thought or acted.

314. It was also clear that M.M. wanted to continue the relationship with W.O., whereas he did not. She was destroyed by his unwillingness. She wanted to "hang from a tree". She was devastated.

315. Only when she knew there was no hope for reconciliation did she go to the police.

316. Regarding when the police were called to the campground, it was clear that M.M. was not pleased to find W.O. inside the trailer. The defence questioned why a person would go to retrieve an umbrella at 6:30 AM. More likely, M.M. chose this time to catch W.O. in the act of breaching the agreement that neither was to use the trailer.

317. She entered recording what was about to transpire with her cellular phone. She already had the umbrella. She could have left. Instead, she wanted confrontation.

318. She took both sets of W.O.'s keys and ran. The video recording then stops. According to W.O., she altered and shortened it when it would have potentially captured the entirety of the alleged assault she says she suffered at the hands of W.O.

319. He wanted his keys back. She steadfastly refused to hand them over. He twisted them out of her hand as a self-help remedy. She claimed she fell to the ground but was not hurt as a result. The only injury she suffered was a minor one to her finger, which required no medical attention.

320. As soon as W.O. regained possession of his truck keys, the altercation ended.

321. When she gave her evidence, she claimed the video supported her version of events. However, what she handed it over to police during the trial was only an excerpt of approximately 20 seconds selected from the beginning of their confrontation and nothing else.

322. Regarding the first alleged sexual assault, M.M. had little to offer to the Court about what led up to their decision to go to bed together, and what happened in its aftermath.

323. She was nevertheless clear that she told K.J. what W.O. did to her, and that he forced himself upon her.

324. Very much to the contrary, K.J. recalled a conversation along the lines of M.M. having had sex with her husband, but that it was normal and M.M. was quite happy about it. M.M. did not appear upset. Indeed, K.J. thought that they were on the path to reconciliation in their marriage.

325. By this point, K.J. and M.M. were well acquainted. There was no reason for M.M. to be less than candid with K.J. about what occurred between W.O. and her as spouses.

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326. Regarding the second alleged sexual assault, M.M. testified that she believed she went to sleep in Ottawa, and she woke up to being penetrated. That is what she told the investigator from NIS.

327. Her evidence changed when she testified in answer to the Crown's questions. Then, she spoke of how W.O. was trying to penetrate her. That is a core detail, defence counsel argued, not a peripheral one.

328. Of course, W.O. denied that anything of that nature happened over the course of the relationship he shared with M.M.

329. M.M.'s comment that W.O. questioned her about whether she thought it was one of her boyfriends who was having sex with her made no sense. Under cross-examination, M.M. conceded that, in 2017, W.O. would not have known anything about her infidelity.

330. Regarding the third alleged sexual assault in July or August 2019, W.O. had by then learned of M.M.'s infidelity. He specifically went to see her at their trailer to discuss their respective positions of what was to happen in its wake.

331. The defence submitted that W.O.'s testimony was far more credible. He was not in the mood to have sex with M.M. shortly after he learned that she had been unfaithful.

332. On the other hand, M.M.'s account took a similar tack as with the other alleged sexual assaults. She said she told him "no" at bedtime. He did not accept the answer. He then forced himself upon her and had sex with her.

333. Regarding the fourth alleged sexual assault during Father's Day weekend of 2020, M.M. was inconsistent about when this incident of nonconsensual sex occurred. When questioned by Crown counsel, M.M. said it happened at night, whereas she told police it happened in the morning.

334. Again, defence counsel argued, this was not a peripheral detail. It was core to her allegation.

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335. M.M. further testified during her examination-in-chief that she was sad, depressed and upset the following day. However, the photographic evidence put to her showed as carrying on normally, content in the company of her husband and apparently happy in enjoying her day of boating on the Ottawa River.

336. Defence counsel asked this Court to examine carefully the pattern employed by M.M. in articulating how the sexual assaults were allegedly perpetrated upon her. She was vague. That was a chosen strategy on her part. The duration of the acts were always five to ten minutes. She would tell him "no". He would not listen and force himself upon her. He would then proceed to have sex with her against her will.

337. The defence also questioned whether M.M.'s animus toward W.O., after the latter had told her their children hated her, led to a motive to fabricate on her part. W.O. admitted to having told their sons about her infidelity. The Court should be left with a reasonable doubt as to whether M.M. conjured up the sexual allegations as a means to level the playing field.

338. Defence counsel argued that timing was important. M.M. only went forward with her allegations at a point when she knows there was absolutely no hope for reconciliation. She had lost her relationship with her children as well. She wished to wreak revenge upon W.O.

339. Alternatively, the defence submitted that there was "too much muddiness" to the accounts given by M.M. The Court simply cannot rely upon her evidence, nor believe it beyond a reasonable doubt.

The Issues

340. I must apply a *W.(D.)* analysis to the evidence adduced at W.O.'s trial. Clearly, the credibility of both W.O. and M.M. must be carefully assessed. Their reliability as historians for significant past events must be closely considered as well.

341. Essentially, in applying the law, I must acquit W.O. if I believe his testimony regarding the incidents in question, after I assess the evidence as a whole.

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342. If I do not believe him, but his evidence raises a reasonable doubt upon my assessment of the evidence in its totality, I must also find him not guilty.

343. Even if I do not accept the evidence of W.O., nor does it raise a reasonable doubt, I must still be satisfied of his guilt beyond a reasonable doubt based on the evidence which I do accept, if I am to convict him of any offence with which he stands charged.

The Law

344. In a very recent decision I rendered, *R. v. J.C.* 2024 ONCJ 347, I reviewed the governing law as follows:

> *Assessing Credibility and Reliability:*
>
> 400. A couple of months ago, in *R. v. R.P*. 2024 ONCJ 240, I commented on how greatly assisted I was by the decision of the Supreme Court of Canada in *R. v. Kruk*, 2024 SCC 7 as follows:
>
> 551. Recently, the Supreme Court of Canada hearkened back to the fundamental principles of law to be applied in every criminal trial in *Kruk*. The Court held:
>
> [59] The overarching principle of the presumption of innocence, enshrined in s. 11(d) of the *Charter*, and the correlative principle of the Crown's burden of proof, must always govern the fact-finding process. The presumption of innocence — a "hallowed principle lying at the very heart of criminal law" (*R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103, at p. 119) — requires the Crown to bear the onus of proving all essential elements of the offence charged, beyond a reasonable doubt, before a conviction may be entered (Osolin). Closely related to the presumption of innocence is the accused's right to silence as enshrined in s. 11(c) of the *Charter*, which safeguards human dignity and privacy against processes or reasoning that would compel an accused person to incriminate themselves with their own words (*R. v. Noble*, 1997 CanLII 388 (SCC), [1997] 1 S.C.R. 874, at paras. 69-78).
>
> [60] Various protections relating to the assessment and weighing of evidence flow from the presumption of innocence and the right to silence. Notably, an accused's silence at trial may not be treated as evidence of guilt, as such reasoning would violate both principles (*Noble*, at para. 72). Likewise, it is improper to discount the

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credibility of accused persons on the basis that, because they face criminal penalties, they will say anything to protect themselves. Though considering the possibility that the accused may have a motive to lie will not necessarily offend this rule, courts should be wary of going further and drawing the "impermissible assumption" that they will do so in all cases (*R. v. Laboucan*, 2010 SCC 12, [2010] 1 S.C.R. 397, at para. 14). Such reasoning is premised on a supposition of guilt and therefore offends the presumption of innocence (para. 12).

[61] The presumption of innocence also restricts how credibility is assessed in cases of conflicting testimony between defence and Crown witnesses. The analysis of testimony must never be treated as a contest of credibility, and triers of fact need not accept the defence's evidence or version of events in order to acquit (*R. v. Van*, 2009 SCC 22, [2009] 1 S.C.R. 716, at para. 23; *R. v. W. (D.)*, 1991 CanLII 93 (SCC), [1991] 1 S.C.R. 742, at p. 757). The burden never shifts to the accused to establish their own innocence, and the onus always lies with the Crown to prove every essential element (*R. v. J.H.S.*, 2008 SCC 30, [2008] 2 S.C.R. 152, at para. 13).

[62] Reasonable doubt applies to credibility assessments such that if the evidence the Crown adduced does not rise to the level required of a criminal conviction, an accused cannot be found guilty simply because they are disbelieved (see *W. (D.)*). Some elements of the totality of the evidence may give rise to a reasonable doubt, even where much — or all — of the accused's evidence is disbelieved. Any aspect of the accepted evidence, or the absence of evidence, may ground a reasonable doubt. Moreover, where the trier of fact does not know whether to believe the accused's testimony, or does not know who to believe, the accused is entitled to an acquittal (*J.H.S.*, at paras. 9-13; *R. v. H. (C.W.)* (1991), 1991 CanLII 3956 (BC CA), 68 C.C.C. (3d) 146 (B.C.C.A.); *R. v. S. (W.D.)*, 1994 CanLII 76 (SCC), [1994] 3 S.C.R. 521, at p. 533; *R. v. Avetysan*, 2000 SCC 56, [2000] 2 S.C.R. 745, at para. 19).

552. Later, the Court reminded trial judges of their roles in assessing the credibility and reliability of witnesses in the following passages:

[72] It is widely recognized that testimonial assessment requires triers of fact to rely on common-sense assumptions about the evidence. *In R. v. Delmas*, 2020 ABCA 152, 452 D.L.R. (4th) 375, at para. 31, aff'd 2020 SCC 39, [2020] 3 S.C.R. 780, the Alberta Court of Appeal observed that triers of fact may rely on reason and common sense, life experience, and logic in assessing credibility. In *R. v. R.R.*, 2018 ABCA 287, 366 C.C.C. (3d)

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293, the same court held that triers of fact "must invariably fall back on their common sense, and their acquired knowledge about human behaviour in assessing the credibility and reliability of witnesses" (para. 6). Finally, in *R. v. S. (R.D.)*, 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484, this Court considered that the life experience of trial judges — though of course not a substitute for evidence, and subject to appropriately circumscribed limits — "is an important ingredient in the ability to understand human behaviour, to weigh the evidence, and to determine credibility", and assists with a "myriad of decisions arising during the course of most trials" (para. 13). Reasoning about how people *generally* tend to behave, and how things tend to happen, is not only permissible, it is often a necessary component of a complete testimonial assessment.

[73] In turn, common-sense assumptions necessarily underlie all credibility and reliability assessments. Credibility can only be assessed against a general understanding of "the way things can and do happen"; it is by applying common sense and generalizing based on their accumulated knowledge about human behaviour that trial judges assess whether a narrative is plausible or "inherently improbable" (*R. v. Kiss*, 2018 ONCA 184, at para. 31 (CanLII); *R. v. Adebogun*, 2021 SKCA 136, [2022] 1 W.W.R. 187, at para. 24; *R. v. Kontzamanis*, 2011 BCCA 184, at para. 38 (CanLII)). Common sense underpins well-established principles guiding credibility assessment — including the now-universal idea that witnesses who are inconsistent are less likely to be telling the truth — and assists in assessing the scope and impact of particular inconsistencies. Reliability also requires reference to common-sense assumptions about how witnesses perceive, remember, and relay information, invoking generalizations about how individuals tend to present information that they are remembering accurately and completely, as opposed to matters about which they are unsure or mistaken. A trial judge may, for example, infer that a witness was credible yet unreliable because they appeared sincere but displayed indicia that tend to suggest an unclear or uncertain memory (e.g., equivocation, phrases such as "hmm . . . let me see", long pauses, or failure to provide much detail).

[81] Assessments of credibility and reliability can be the most important judicial determinations in a criminal trial. They are certainly among the most difficult. This is especially so in sexual assault cases, which often involve acts that allegedly occurred in private and hinge on the contradictory testimony of two witnesses. The trial judge, while remaining grounded in the totality of the evidence, is obliged to evaluate the testimony of each witness and to make determinations that are entirely personal and particular to that individual. Credibility and reliability assessments are also context-

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specific and multifactorial: they do not operate along fixed lines and are "more of an 'art than a science'" (*S. (R.D.)*, at para. 128; *R. v. Gagnon*, 2006 SCC 17, [2006] 1 S.C.R. 621). With respect to credibility in particular, while coherent reasons are crucial, it is often difficult for trial judges to precisely articulate the reasons why they believed or disbelieved a witness due to "the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events" (*Gagnon*, at para. 20; see also *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3, at para. 28; *R. v. G.F.*, 2021 SCC 20, [2021] 1 S.C.R. 801, at para. 81). The task is further complicated by the trial judge's ability to accept some, all, or none of a witness's testimony.

553. In presiding over criminal trials over the past several years, I can observe and comment with the utmost confidence that the above three paragraphs of *Kruk* encapsulate and do justice to the arduous task faced by trial judges in criminal courts across Canada day in, day out. Truer words could not have been spoken by the highest court of our land.

401. In *R. v. A.M.* 2014 ONCA 769, the Court of Appeal for Ontario offered general guidance to trial judges tasked with assessing the credibility and reliability of witnesses' evidence as follows:

[8] Several basic principles inform our decision regarding the trial judge's reasons for judgment.

[9] First, every witness, irrespective of age, is an individual whose credibility and evidence should be assessed according to criteria appropriate to his or her mental development, understanding and ability to communicate: *R. v. W. (R.)*, 1992 CanLII 56 (SCC), [1992] 2 S.C.R. 122, [1992] S.C.J. No. 56, at p. 134 S.C.R.

[10] Second, no inflexible rules mandate when a witness' evidence should be evaluated according to "adult" or "child" standards. Indeed, in its provisions regarding testimonial capacity, the *Canada Evidence Act, R.S.C., 1985, c. C-5* eschews any reference to "adult" or "child", preferring the terms "14 years or older" and "under 14 years of age". An inflexible, category-based system would resurrect stereotypes as rigid and unyielding as those rejected by the recent developments in our approach to children's evidence: *W. (R.)*, at p. 134 S.C.R.

[11] Third, despite this flexibility, there are some guiding principles. Generally, where an adult testifies about events that occurred when she was a child, her credibility should be assessed according to the criteria applicable to adult witnesses. However, the presence of inconsistencies, especially on peripheral matters such as time and

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location, should be considered in the context of her age at the time the events about which she is testifying occurred: *W. (R.)*, at p. 134 S.C.R. See, also, *R. v. Kendall*, 1962 CanLII 7 (SCC), [1962] S.C.R. 469, [1962] S.C.J. No. 27.

[12] Fourth, one of the most valuable means of assessing witness credibility is to examine the consistency between what the witness said in the witness box and what she has said on other occasions, whether or not under oath: *R. v. G. (M.)*, 1994 CanLII 8733 (ON CA), [1994] O.J. No. 2086, 93 C.C.C. (3d) 347 (C.A.), at p. 354 C.C.C., leave to appeal to S.C.C. refused [1994] S.C.C.A. No. 390. Inconsistencies may emerge in a witness' testimony at trial, or between their trial testimony and statements previously given. Inconsistencies [page 540] may also emerge from things said differently at different times, or from omitting to refer to certain events at one time while referring to them on other occasions.

[13] Inconsistencies vary in their nature and importance. Some are minor, others are not. Some concern material issues, others peripheral subjects. Where an inconsistency involves something material about which an honest witness is unlikely to be mistaken, the inconsistency may demonstrate a carelessness with the truth about which the trier of fact should be concerned: *G. (M.)*, at p. 354 C.C.C.

[14] Fifth, a trial judge giving reasons for judgment is neither under the obligation to review and resolve every inconsistency in a witness' evidence, nor respond to every argument advanced by counsel: *R. v. M. (R.E.)*, [2008] 3 S.C.R. 3, [2008] S.C.J. No. 52, 2008 SCC 51, at para. 64. That said, a trial judge should address and explain how she or he has resolved major inconsistencies in the evidence of material witnesses: *G. (M.)*, at p. 356 C.C.C.; *R. v. Dinardo*, [2008] 1 S.C.R. 788, [2008] S.C.J. No, 24, 2008 SCC 24, at para. 31.

[15] Sixth, prior consistent statements of a witness are not admissible for their truth: *R. v. Stirling*, [2008] 1 S.C.R. 272, [2008] S.C.J. No. 10, 2008 SCC 10, at para. 7. Mere repetition of a story on a prior occasion does not make the in-court description of the events any more credible or reliable: *R. v. Curto*, [2008] O.J. No. 889, 2008 ONCA 161, 230 C.C.C. (3d) 145, at paras. 32, 35; *R. v. Ay*, 1994 CanLII 8749 (BC CA), [1994] B.C.J. No. 2024, 93 C.C.C. (3d) 456 (C.A.), at p. 471 C.C.C.

The Meaning of Proof beyond a Reasonable Doubt:

402. In a very recent case I decided, *R. v. McLaren* 2023 ONCJ 92 (CanLII), I adverted, as I must, to the meaning of "reasonable doubt". I had the following to say:

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181. The standard of proof beyond a reasonable doubt is an age-old principle of criminal law in Canada and virtually every other common law jurisdiction. Triers of fact must be ever conscious of the high burden of proof placed upon the Crown, if ever the accused's right to be presumed innocent is to be rebutted.

182. Recently, my colleague, Brochu J., in *R. v. Hawryluk*, (unreported), offered these helpful commentaries on the meaning of reasonable doubt:

[39] Like every person accused of a criminal offence, Mr. Hawryluk begins this trial presumed to be innocent of the offence with which he is charged. That presumption remains intact unless and until the Crown proves beyond a reasonable doubt that he is guilty. It is the Crown that bears the onus of proving the essential elements of the offence beyond a reasonable doubt. That onus never shifts to the accused.

[40] Intermingled with the presumption of innocence is the standard of proof required to displace that presumption. To secure a conviction in a criminal case, the Crown must establish each essential element of the charge against the accused beyond reasonable doubt. This standard of proof is very stringent. It is a standard far beyond the civil threshold of proof on a balance of probabilities.

[41] The expression "proof beyond a reasonable doubt" has no precise definition, but it is well understood. The Supreme Court of Canada outlined a suggested model jury charge in *R. v. Lifchus*, 1997 CanLII 319 (SCC), [1997] 3 S.C.R. 320. This is the definitive guide for criminal trial courts in Canada. It is worth setting out here verbatim:

* The term "beyond a reasonable doubt" has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning.

* A reasonable doubt is not an imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.

* Even if you believe the accused is probably guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the Crown has failed to satisfy you of the guilt of the accused beyond a reasonable doubt.

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> * On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the Crown is not required to do so. Such a standard of proof is impossibly high.
>
> * In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilt beyond a reasonable doubt.
>
> [42] Three years later, in *R. v. Avetysan*, 2000 SCC 56 (CanLII), [2000] 2 S.C.R. 745, the Supreme Court of Canada clarified at para. 13 that:
>
> In situating the criminal standard of proof, "it falls much closer to absolute certainty than to proof on a balance of probabilities": Starr, at para. 242, per Iacobucci J.

345. The principles of law addressed above apply equally in their entirety to this case.

346. In *R. v. Barton* 2019 SCC 33, Moldaver J. set out the elements of the offence of sexual assault. He also addressed squarely the legal meaning of consent in an intimate partners context. He wrote:

> [87] A conviction for sexual assault, like any other true crime, requires that the Crown prove beyond a reasonable doubt that the accused committed the *actus* reus and had the necessary *mens rea*. A person commits the *actus reus* of sexual assault "if he touches another person in a sexual way without her consent" (*R. v. J.A.*, 2011 SCC 28, [2011] 2 S.C.R. 440, at para. 23). The *mens rea* consists of the "intention to touch and knowing of, or being reckless of or wilfully blind to, a lack of consent on the part of the person touched" (*R. v. Ewanchuk*, 1999 CanLII 711 (SCC), [1999] 1 S.C.R. 330, at para. 42).
>
> [88] "Consent" is defined in s. 273.1(1) of the *Code* as "the voluntary agreement of the complainant to engage in the sexual activity in question". It is the "conscious agreement of the complainant to engage in every sexual act in a particular encounter" (*J.A.*, at para. 31), and it must be freely given (see *Ewanchuk*, at para. 36). This consent must exist at the time the sexual activity in question occurs (*J.A.*, at para. 34, citing *Ewanchuk*, at para. 26), and it can be revoked at any time (see *Code*, s. 273.1(2)(e); *J.A.*, at paras. 40 and 43). Further, as s. 273.1(1) makes clear, "consent" is not considered in the abstract. Rather, it must be linked to the "sexual activity in question", which encompasses "the specific physical sex

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> act", "the sexual nature of the activity", and "the identity of the partner", though it does not include "conditions or qualities of the physical act, such as birth control measures or the presence of sexually transmitted diseases" (*R. v. Hutchinson*, 2014 SCC 19, [2014] 1 S.C.R. 346, at paras. 55 and 57).
>
> [89] Consent is treated differently at each stage of the analysis. For purposes of the *actus reus*, "consent" means "that the complainant in her mind wanted the sexual touching to take place" (*Ewanchuk*, at para. 48). Thus, at this stage, the focus is placed squarely on the complainant's state of mind, and the accused's perception of that state of mind is irrelevant. Accordingly**, if the complainant testifies that she did not consent, and the trier of fact accepts this evidence, then there was no consent — plain and simple (see *Ewanchuk*, at para. 31). At this point, the *actus reus* is complete. The complainant need not *express* her lack of consent, or revocation of consent, for the *actus reus* to be established (see *J.A.*, at para. 37**).
>
> [90] **For purposes of the *mens rea***, and specifically for purposes of the defence of honest but mistaken belief in communicated consent, **"consent" means "that the complainant had affirmatively communicated by words or conduct her agreement to engage in [the] sexual activity with the** accused**" (*Ewanchuk*, at para. 49). Hence, the focus at this stage shifts to the mental state of the accused, and the question becomes whether the accused** honestly **believed "the complainant effectively said 'yes' through her words and/or actions" (*ibid.*, at para. 47).**

Analysis

Do I believe W.O.?

347. I do not wholly accept the evidence of W.O. There are several reasons why I do not. I shall articulate them below.

348. Firstly, he could not even bring himself to concede that there was legitimacy to M.M.'s serious medical condition and related cognitive impairment, even though he was witness to her being taken by ground ambulance to hospital in Pembroke from their family home, and later flown by air ambulance to Ottawa. She then spent the next several days in hospital.

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349. Subsequently, she was placed on “imposed restrictions”, for good reason, by their employer, the Canadian military. She had to retrain. Nevertheless, W.O. seemed to believe as though she needed documentary proof to produce to the Court to demonstrate that she had been diagnosed with a heart attack and later PTSD. She certainly did not.

350. Secondly, W.O., in the general tenor of his testimony, was dismissive of M.M.’s many character flaws as he saw them. He described her as having “different memories”, in other words, recollections that were “skewed”, suggesting a tendency on her part to inaccurately perceive interactions she had with him or past friends.

351. She also tried to toy with his emotions to incite anger and jealousy in him, such as telling him she slept with all his friends. I suspect if she said anything to him along those lines, it was a frustrated response to his repeated accusations.

352. Thirdly and ironically, his criticism of M.M.’s memory as “skewed” was misplaced. His powers of recall mirrored hers. Events of significance rested with them. Otherwise, the mundane, every day, usual practices and habits he routinely engaged in were not etched forever with great precision in his memory either. For example, he reluctantly conceded he could not remember what M.M. and he did before they went to bed the nights the sexual assaults were alleged to have occurred, and whether he even had sex with her on two of those nights.

353. Fourthly, he was quick to disparage M.M.’s struggles with alcohol. He had no insight as to the causes or reasons for her unhappiness in life, in general. He had zero appreciation for its potential link to him and his like for drink as well. Alcohol was exclusively her problem, he thought. Accordingly, he regarded her as a travelling LCBO.

354. Fifthly, I disbelieve W.O.’s account as to what occurred when M.M. found him at their trailer on or about August 1, 2021. She entered unannounced and woke him. She was accusatory and argumentative with him. She then took his keys from him.

355. I find that W.O. responded angrily to having been caught in the act of using the trailer when it was he who had insisted neither M.M. nor he should. He was more than

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"technically" in the wrong. He was categorically so. Furthermore, little was going to stop him from retrieving his keys.

356. To achieve this end, he grabbed her hands and squeezed them while she was at his truck. Consequently, all the keys she had in her hands fell to the ground.

357. The force used by W.O. in doing so was intentional. M.M. did not consent to his application of force to her. In turn, he caused the middle finger of her left hand to bleed. She suffered a minor laceration and some swelling to her knuckles, none of which required medical attention.

358. It was pure speculation and it bordered on the ridiculous that he would suggest she may have cut herself while entering the trailer that morning. The trailer was a vehicle M.M. was quite familiar with. He himself had been able to get into it the night before without any issue.

359. It was equally conjecture on his part that she may have "skinned her knuckle" retrieving the patio umbrella before she entered the trailer.

360. I conclude that, what W.O. did to M.M. the morning in question, constituted a minor assault upon her at a time when W.O.'s temper flared, and before he allowed any time for his passions to cool. He squeezed her hand causing her middle-left finger to bleed. It matters not that her medications may have caused her to bleed or to bruise easier.

361. I wholeheartedly reject his denial that he did not know how her hand was hurt.

Does W.O.'s evidence raise a reasonable doubt?

362. Yes. I entertain a more than healthy dose of reasonable doubt that W.O. would not have been sexually interested in M.M. after his discovery of her affairs in 2019. He testified he wanted to be tested for sexually transmitted diseases. I sensed W.O. was truthful in giving this reason for his anger for her and his resentment toward M.M. It could reasonably be true that he did not want any form of sexual activity with her in the wake of what he had just learned.

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363. I accept that he was “very confident” they did not have sex at all when he visited her at the trailer alone to confront her, and to ask the challenging questions he had for her, once he learned of an affair from the wife of the man with whom M.M. had been unfaithful. His desire for her was likely nonexistent at that moment in time. He wanted to separate.

364. I appreciate that he was somewhat shaken under cross-examination about whether he could clearly remember if there was sex or not when he visited M.M. at the trailer in 2019 to confront her, but it does not leave me at all unsettled after hearing his complete explanation as to his mindset. Relying on common sense, as much as I am permitted to do so in the context of a sexual assault type, criminal trial, I have tremendous doubt that W.O. was feeling even the slightest bit amorous towards M.M. when the news of the affair was so fresh for him.

365. Accordingly, I must find him not guilty in respect of the count of sexual assault alleged to have occurred between July 15 and August 31, 2019.

On the basis of the evidence which I accept, am I satisfied beyond a reasonable doubt in the guilt of W.O.?

366. As explained above, I have rejected any justification or alternative cause for how M.M. suffered a minor injury to her left hand the morning of August 1, 2021. I accept her testimony about how he grabbed her hands, squeezed them and forced her to relinquish his keys.

367. Backing up a step, when M.M. went to the trailer to retrieve the patio umbrella, I am not at all convinced that that was her only purpose. I suspect she was looking to catch W.O. in the act of using the trailer himself, while prohibiting their son and her from enjoying it. Indeed, she was successful in her quest.

368. She was absolutely incensed as a result and was going to take whatever steps she needed in order to prevent him from utilizing the trailer in future. She wanted his keys for that very reason. She took them and kept them. She had no right to do so, but she did.

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369. The incident could have been avoided if W.O. had called the police first. He did not and chose to use force to regain possession of his keys. Two wrongs do not make a right.

370. He was angry. He was swearing at M.M. while commanding her to return his keys. She only let them go after he hurt her.

371. He is therefore guilty of assaulting her.

372. M.M.'s accounts of the alleged sexual assaults are another matter. I find that her credibility was at points called seriously into question in recounting them. Further, her reliability, in general, as a historian was quite lacking. Let me explain.

373. Regarding the first alleged sexual assault said to have been committed in 2016, while it is true that she was attempting to summon from her memory an instance which she says occurred some eight years previous, her ability to maintain consistency in her account of it was weak. For example, she was uncertain during the camping trip,

    a) when exactly they were visited that one time by K.J. and P.K.,
    b) when it was that W.O. and she went to bed,
    c) if they did so together, whether she was awoken by him before trying to engage her in sexual activity,
    d) whether any "cuddling" proceeded the act of intercourse,
    e) what the actual duration of it was, and
    f) whether W.O. remained in bed with her afterwards.

374. There was also a significant conflict in the evidence offered by M.M. and K.J. about what the former told the latter regarding the previous night's events the following day when the women discussed it. M.M. was clear in her testimony that she communicated to K.J. that the sexual activity was nonconsensual.

375. To the contrary, K.J. indicated that her impression was that the sexual encounter M.M. had with W.O. that night was entirely consensual and a harbinger of good things to come. M.M. seemed to be happy to her close friend, K.J. Indeed, K.J. thought that

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M.M. and W.O. were on a path to reconciliation and were getting over their relationship woes.

376. Consequently, I cannot be sure that W.O. sexually assaulted M.M. during the summer of 2016.

377. With respect to the second, alleged sexual assault, although defence counsel argued vehemently that the purported inconsistency between being "penetrated", which M.M. told police she had been, and "trying to penetrate", which she told Crown counsel during her examination-in-chief, was a core detail about which M.M. was inconsistent. I am not at all persuaded that it was such a material inconsistency.

378. M.M.'s account was that she was sleeping. She awoke in an understandably dazed and confused state. She believed she was elsewhere - Ottawa, not Petawawa. She sensed her vagina was being penetrated, or attempting to be penetrated, by a man's penis. The man had positioned himself on top of her. He may have gotten the tip inside her. I fail to see any stark difference as between the account she gave to police, or during examination in-chief, or cross-examination.

379. Where her credibility irretrievably falters is in the statement she attributed to W.O. at the moment of, or soon after the attempted or actual penetration. She testified that he asked her if she originally thought when she awoke if it was one of her boyfriends who was trying to penetrate her, not him (W.O.). She agreed that when this event occurred, he could not have known about her extramarital affairs. However, she maintained that this is what he asked her.

380. To my mind, this makes no sense. W.O. would not have known of M.M.'s extramarital affairs in 2017. He only learned of them in 2019. M.M. gave no evidence that he had so much as a sneaking suspicion of them in 2017.

381. There is also a conflict in the evidence of M.M. and D.G. about whether M.M. ever told D.G. about this incident. M.M. maintained that she had. D.G. testified that M.M. did not.

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382. I find that if M.M. had told her friend D.G. about such an incident, it would be something D.G. would not forget.

383. I am left with a grave doubt about whether M.M. thought by telling police she had told others, her then close friends, K.J. and D.G., about instances of nonconsensual sex W.O. had had with her, her credibility would be bolstered. This belief likely entertained by M.M. totally backfired.

384. Both K.J. and D.G. came to Court denying any knowledge of being told by M.M. about W.O. forcing nonconsensual sex upon her. I am sure that K.J. and D.G. would have remembered any such conversation with M.M. if she had indeed confided in them. In my view, K.J. and D.G. negated any prospect for believability to M.M.'s accounts of what she said W.O. did to her in 2016 and 2017.

385. As a result, I will find W.O. not guilty for sexually assaulting M.M. between October 2016 and March 2017.

386. Regarding the third sexual assault alleged to have been committed by W.O. upon M.M., I could not find anything internally inconsistent in her account of what she said W.O. did to her. For the most part, she was unshaken in cross-examination in respect of this incident.

387. However, as earlier explained, I have also found W.O.'s version of events credible. He had just learned of the affairs. He was not feeling particularly amorous toward M.M. at that point in time. He was worried about contracting a sexually transmitted disease. I seriously doubt that he would even have entertained the notion of having sex with M.M. during his visit to the trailer to discuss her infidelity.

388. In respect of the fourth alleged sexual assault, I find that M.M. was inconsistent in recounting this incident on a core detail. She testified in answer to Crown counsel's questions that this incident occurred "through the night". By contrast, she told police that this event happened in the morning. She agreed that it is light outside in summer in the morning, yet she conceded she was clear that the sex was forced upon her when it was dark.

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389. She may have been confused, but ultimately, she did not know why she was in error about whether it was morning or night. As a trier of fact, I am left to reasonably doubt whether this incident actually occurred.

390. Furthermore, I have also observed that the first, third and fourth alleged sexual assaults all followed a similar pattern. It could be that that was the 'modus operandi' of W.O. It could equally be the pattern M.M. conjured for ease of recall. In sum, I cannot be sure.

391. I place no great weight on M.M.'s decision to go boating and fishing with W.O. after the alleged sexual assault of Father's Day weekend, 2020. Even if I had been persuaded that she had been violated by W.O. during one of those nights, I cannot mythically think about how she would have behaved the next day, presumably by avoiding spending any time with W.O. at all as an expression of her anger at him and disgust for him.

392. I am unsettled as well at the possible animus M.M. entertained for W.O. when he told her that their children hated her. My impression of her as a witness was that she resented deeply what W.O. had told her children about her infidelity. She did strike me as someone capable of vengeance and desirous of evening the score. Consequently, all these horrible things she said W.O. did to her sexually without her consent could have happened, but I am not at all sure that they did.

393. For his part, I do not understand why W.O. felt it was incumbent upon him to tell his sons about how their mother had been unfaithful to him. I cannot fathom what purpose that possibly could have served for him, but to alienate the children from her. Drawing on human experience, I can comment in passing that rarely do spouses have affairs without some reason – good or bad. I highly doubt W.O. was always a great husband to M.M., but all of this is beside the point. Their kids did not need to know.

394. Recently, my colleague, Richardson J. observed quite aptly in *R. v. G.S.*, 2024 ONCJ 224:

> [2] In family law, much has been written about the challenge of dealing with parties who are caught in the trap of an acrimonious separation. The initial hurt and anger that is the product of the breakdown of a relationship – particularly where there are allegations of

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> infidelity and abusive behaviour – is understandable. That said, it never ceases to amaze me how two people, who at one time professed great love for one another, who by all accounts successfully enjoyed a long-term relationship and who made the decision to bring a child into the world, can ultimately behave in such a vile way toward each other when their relationship comes to an end.

395. M.M. could have been telling me the truth from beginning to end in providing me with her testimony. However, a possibility that an accused could have done what a complainant says the accused did is an entirely insufficient basis upon which to conclude a criminal act has been committed. A possibility, or even a probability, that the accused did what the complainant said comes nowhere close to the high standard of proof beyond a reasonable doubt which the Crown has the onus to meet before a finding of guilt can ensue.

Conclusion

396. For all the above reasons, I must find W.O. not guilty of sexually assaulting M.M., but I will find him guilty of a minor assault upon M.M., which occurred the morning of August 1, 2021.

DATED: February 24, 2025

March, M.G., J.

Endnotes:

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[1] See *R. v. Seaboyer*, 1991 CanLII 76 (SCC); *R. v. Barton*, 2019 SCC 33 at para. 80

[2] See *Seaboyer*, *supra* where McLachlin J., as she then was, explained:

> "The common law permitted questioning on the prior sexual conduct of a complainant without proof of relevance to a specific issue in the trial. Evidence that the complainant had relations with the accused and others was routinely presented (and accepted by judges and juries) as tending to make it more likely that the complainant had consented to the alleged assault and as undermining her credibility generally. These inferences were based not on facts, but on the myths that unchaste women were more likely to consent to intercourse and in any event, were less worthy of belief. These 'twin myths' are now discredited."

[3] W.O. is a bald man, who I could see customarily shaves his head.

[4] The Liquor Control Board of Ontario is the principal Crown agency for the distribution and sale of alcohol in Ontario.

[5] Crown and defence counsel agreed that the twin myths were not engaged when I expressed my unease to them about this line of questioning.

[6] *R. v. W.(D.)*, [1991] 1 SCR 742 (see page 758)
A trial judge might well instruct the jury on the question of credibility along these lines:

> First, if you believe the evidence of the accused, obviously you must acquit.
>
> Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
>
> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

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