

**PROVINCIAL COURT OF NOVA SCOTIA**

**Citation:** *R. v. Coburn*, 2019 NSPC 49

**Date:** 2019-10-02

**Docket:** 8268696, 8268697, 8268698, 8268699, 8268700

**Registry:** Halifax

**Between:**

HER MAJESTY THE QUEEN

v.

PAUL CHRISTOPHER COBURN

**Restriction on Publication:**

**s. 486.4:** Ban under this section directs that any information that will identify the complainant shall not be published in any document or broadcast or transmitted in any way

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**DECISION TRIAL**

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**Judge:** The Honourable Judge Elizabeth Buckle

**Heard:** April 23 – 26 & 29, and July 17, 2019, in Halifax, Nova Scotia

**Decision:** October 2, 2019  
October 16, 2019 (Written Reasons)

**Charges:** Sections 151, 152, 271, 286.1(1) & 286.1(2), *Criminal Code*

**Counsel:** Carla Ball and Brandon Trask, for the Crown  
Joel Pink, Q.C. and George Franklin, for the Defendant

**By the Court:**

**Introduction**

[1] Paul Coburn has been charged with the following offences:

Count 1 - Touching a person under the age of sixteen for a sexual purpose, contrary to s. 151 of the *Criminal Code*;

Count 2 - Inviting a person under the age of sixteen to touch him sexually, contrary to s. 152 of the *Criminal Code*;

Count 3 - Sexual assault of C.C., contrary to s. 271 of the *Criminal Code*;

Count 4 - Obtaining or communicating for the purpose of obtaining sexual services for consideration from a person under the age of 18 years, contrary to s. 286.1(2) of the *Criminal Code*; and,

Count 5 - Obtaining or communicating for the purpose of obtaining sexual services for consideration, contrary to s. 286.1(1) of the *Criminal Code*.

[2] On the evening of February 21, 2017, Mr. Coburn was in Halifax on business, staying at a hotel. He responded to an ad in the ‘therapeutic services’ section of Craigslist and arranged by text communication for a person to come to his hotel room. About an hour later, a young woman, C.C., arrived. Unbeknownst to Mr. Coburn, the person he had been communicating with was a man named Leeathon Oliver who brought her to the hotel.

[3] Ms. C. was 15 years old at the time. She testified that she believed she was going to the hotel to collect money for Mr. Oliver, that Mr. Coburn sexually assaulted her and then gave her money.

[4] Mr. Coburn testified that he was seeking a massage, paid for a massage and received one. He acknowledges there was very brief sexual contact at the end of the massage but says it was initiated by Ms. C. and he believed she was at least 20 years old.

### **Positions of the Parties and Issues**

[5] Many of the elements of the offences are not disputed. The defence concedes that Mr. Coburn 'communicated' and those communications are contained in the extracts from Mr. Oliver's phone that were admitted at trial. The defence also admits that Ms. C. came to Mr. Coburn's room as a result of those communications, Mr. Coburn gave her money, and there was sexual contact between them. The defence does not dispute that Ms. C. was 15 years old at the time so was legally incapable of consenting to sexual activity and below the age specified in ss. 151 and 286.1(2). The Crown concedes that the charge of 'invitation to touch', contrary to s. 152, has not been proven and invites an acquittal on that charge.

[6] The defence submits that Mr. Coburn's evidence is credible and should be believed or raise a reasonable doubt. The defence argues that even if I were to reject his evidence, the Crown has failed to prove that his purpose in communicating was to obtain sexual services or that the money he gave Ms. C. was for sexual services. The defence also seeks to argue that Mr. Coburn did not have the criminal intent to engage in sexual activity with a minor and only did so by reason of a mistake of fact as to her age. Finally, the defence argues Mr. Coburn's mistake about her age permits him to rely on consent, which the Crown has not disproven. The defence relies on the evidence of Mr. Coburn and submits that Ms. C. is not a credible witness. In making that submission, the defence argues that Ms. C. told elaborate lies in her statements to

police, there are other significant inconsistencies between her statements and her testimony, portions of her testimony are implausible, and there were unexplained gaps in her memory of events.

[7] The Crown submits that Mr. Coburn's testimony is not credible and should be rejected because it is implausible and, despite giving police a lengthy statement, he failed to tell them things that he now relies on. The Crown argues that the evidence establishes that Mr. Coburn was seeking sexual services, obtained those services and paid for them. The Crown further argues that Mr. Coburn's defence that he believed Ms. C. was of legal age must be rejected because he did not take all reasonable steps to ascertain her age. As a result, the Crown has proven that he intended to engage in sexual activity with someone under the ages specified in ss. 151 and 286.1(2) and cannot rely on consent as a defence. Alternatively, the Crown argues that even if Mr. Coburn believed Ms. C. was at least 16 years old, he should be convicted of sexual assault because she did not consent, he was reckless or willfully blind about whether she was consenting and did not take reasonable steps to ascertain whether she was consenting. The Crown argues that Ms. C.'s testimony is credible. In doing so, the Crown acknowledges that she lied to police in portions of her statements and there are inconsistencies between her statements and her testimony but argues that her explanations for this are reasonable and the truthfulness of her testimony is supported in various ways.

### **General Principles**

[8] The credibility of Mr. Coburn and Ms. C. will be central to my analysis of these issues. I am entitled to accept all, some or none of the testimony of any witness. In light of the

presumption of innocence and the requirement that the Crown prove the case beyond a reasonable doubt, it is important to keep in mind that a criminal trial is not about simply choosing whether I prefer the complainant's or the accused's version of events. Doing that would undermine the presumption of innocence. I must consider Mr. Coburn's evidence within the context of the other evidence. Where his testimony is inconsistent with guilt, if I believe it or find that it raises a reasonable doubt, I must acquit. Even if I reject his testimony, I have to examine the remaining evidence that I do accept and only convict if the Crown has proven guilt beyond a reasonable doubt (*W.(D.)*, [1991] 1 S.C.R. 742; *R. v. Dinardo*, 2008 SCC 24).

[9] There are general principles that apply to every criminal trial. Mr. Coburn is presumed to be innocent of these charges. The Crown bears the burden of proving each and every element of the offences beyond a reasonable doubt. Proof beyond a reasonable doubt is a high standard. It is more than suspicion of guilt or probable guilt. It is not proof to an absolute certainty but falls much closer to absolute certainty than to proof on a balance of probabilities. It is not proof beyond any doubt nor is it an imaginary or frivolous doubt. It is based on reason and common sense, and not on sympathy or prejudice. (*R. v. Starr*, [2000] S.C.J. No. 40; *R. v. Lifchus*, [1997] 3 S.C.R. 320.). The charges can be proven through direct or circumstantial evidence. The burden on the Crown in a circumstantial case is to prove beyond a reasonable doubt that guilt is the only reasonable inference to be drawn from the evidence (*R. v. Griffen*, [2009] S.C.J. No. 28, paragraph 34). There is no burden on the defence to persuade me that there are other more reasonable or even equally reasonable inferences that can be drawn. A reasonable doubt may be logically based on a lack of evidence (*R. v. Vilaroman*, 2016 SCC 33, at para. 36). The question is “whether the circumstantial evidence, viewed logically and in light of human experience, is

reasonably capable of supporting an inference other than that the accused is guilty” (*Vilaroman*, at para. 38). If so, then the accused must be acquitted.

[10] Ultimately, I have to decide whether the Crown has proven all elements of each of the charges beyond a reasonable doubt. However, because of the concessions and focussed arguments of counsel, the real issues have been narrowed to the following:

1. Has the Crown proven that Mr. Coburn’s purpose in communicating was to obtain sexual services and/or that he paid Ms. C. for sexual services?
2. Can Mr. Coburn rely on the ‘mistaken belief in age’ defence, and, if so, has the Crown disproven it?
3. If Mr. Coburn did have an honest but mistaken belief in Ms. C.’s age, has the Crown proven that Ms. C. did not consent to the sexual activity?

### **Legal Framework**

[11] I accept the Crown’s concession on Count 2 so I will not address s. 152. The remaining offences are as follows:

s. 151 Every person who, for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of a person who is under the age 16 ... commits an offence

s. 271 Everyone who commits a sexual assault is guilty of ... an offence

s. 265(1) (a) defines “assault” as an intentional application of force without the consent of the other person.

s. 273.1(1) defines “consent” for purposes of a charge under s. 271 as the voluntary agreement to engage in the sexual activity in question.

s. 286.1 (1) Everyone who, in any place, obtains for consideration, or communicates with anyone for the purpose of obtaining for consideration, the sexual services of a person is guilty of ... an offence

s. 286.1 (2) Everyone who, in any place, obtains for consideration, or communicates with anyone for the purpose of obtaining for consideration, the sexual services of a person under the age of 18 years is guilty of ... an assault.

[12] Ms. C.'s age is relevant to three of these charges. For the charges under ss. 151 and 286.1(2), proof of age is an element of the offence. For the charges under ss. 151 and 271, proof of age could prevent Mr. Coburn from relying on consent as a defence (s. 150.1(1)).

[13] Ms. C.'s age is conceded. However, for criminal offences, the Crown must also prove that the accused had criminal intent. An honest mistake of fact, including about age, can negate criminal intent. Parliament has limited the circumstances where mistake of fact about age ('mistaken belief in age') can be considered. Section 150.1 (4) and (5) provide that "it is not a defence" to charges under ss. 151, 271 or s. 286.1(2), that the accused believed that the complainant was 16 years of age/18 years of age or more "unless the accused took all reasonable steps to ascertain the age of the complainant".

[14] Even if the 'mistake of age' defence is successful, the Crown could still obtain a conviction for sexual assault, if it proves that the complainant, irrespective of her inability to legally consent due to age, did not consent to the sexual activity.

## **Evidence**

### Ms. C. – Background

[15] The crucial events took place on February 21, 2017 between 5:40 p.m. and 11:40 p.m. However, I permitted Ms. C. to testify about earlier events to provide context necessary for me to properly assess her credibility and understand the sequence of events. She testified that in February of 2017, she was living in New Glasgow. She was staying temporarily with her aunt. She got to know Leeathon Oliver through snapchat and thought he was 18 years old. On February 21<sup>st</sup>, he came to New Glasgow and she met him in person for the first time and realized

he was older than 18. She could not recall how that meeting came about but recalled that she met him at McDonalds between 3 p.m. and 4 p.m. She got into a vehicle with him and a driver. She testified that she thought they were just going to 'hang out' but they started to drive, and she didn't know where they were going. In cross-examination she admitted that she had a bag with her that contained all her belongings. It was suggested to her that she was planning to leave town and knew she was going to Halifax. She denied this and said she said she took her belongings because she was not planning to stay at her aunt's long-term.

[16] She recalled a couple of brief stops during the drive but could not recall any conversation. About two hours after they left New Glasgow, they arrived at a residence in the Pockwock Road area of HRM. She assumed the residence was Mr. Oliver's. He took her to the basement. She could not remember much of what happened that evening or what, if anything was discussed. She did recall that not long after they arrived, Mr. Oliver told her that she was going to make him lots of money. She testified that she believed that meant she would not be going home and that he owned her. In cross-examination, she said that she did not know how she would be making money for him and did not ask. She testified that Mr. Oliver was drinking and spent a lot of time on the phone and computer. At some point he took her phone from her. A few hours after they arrived at the residence, another girl came, gave Mr. Oliver money and then left again. Some time later, Mr. Oliver told Ms. C. that she was going to get him money. She testified that she thought he meant that she was simply going to collect money for him. She didn't know what the money was for or how much she was to collect and did not ask. In cross-examination, she admitted that Mr. Oliver told her to "make herself look pretty" and she took her braids out and



fixed her make-up. In re-direct, she was asked what she thought this meant and said that she didn't think anything of it as she always wears makeup.

[17] Eventually, she was driven to the Marriott hotel by the same driver who had picked her up in New Glasgow. Mr. Oliver gave her a room number, #509, and told her to go there and meet "Paul".

#### Mr. Coburn – Pre-Hotel Events

[18] At the time, Mr. Coburn was 45 years old. He was employed in the banking industry and separated from his wife with whom he had two children, aged 14 and 11. He had no previous criminal record.

[19] On February 21, 2017, he came to Halifax for meetings, arriving in the late afternoon. He checked into the Marriott hotel and was assigned room #509. He went to his room, checked emails and made some calls. The surveillance footage from the Marriott (Exhibit 9) confirms that he checked in at 5:49 p.m.

[20] He said he has had back problems for years and, at the time, also had tendonitis in his neck. He testified that shortly after checking in and again later in the evening, he queried Craigslist for therapeutic massage. Excerpts from his cell phone's web history (Exhibit 4, Tab 2) show that these queries were made between 5:40 p.m. and 5:43 p.m., before he checked in, and then between 9:42 p.m. and 9:43 p.m. He testified that he believed Craigslist to be a place to buy or sell items and services and was searching for therapeutic massages in the "services" section of Craigslist, under "therapeutic". The "url" displayed in the excerpts from his cell phone analysis includes the letters "ths" (Exhibit 4, Tab 2). His uncontradicted testimony is that "ths" is an

abbreviation for “therapeutic services” and confirms that he was searching in that area of Craigslist. An agreed statement of fact filed at trial (Exhibit 18) describes Craigslist as an online website where people can post ads for goods or services, including therapeutic massages and personal ads. There is no separate area in Craigslist for sexual services and ads for sexual services often use language that is not explicit.

[21] Mr. Coburn testified that he believed that when a person posted an ad on Craigslist, a ‘popup’ requires you to agree that you are at least 18 years old. The agreed statement of fact (Exhibit 18) confirms that to post an ad, a person must have an account. To open an account, a user is required to click a box saying that he/she is at least 18 years old, however, at the time, Craigslist did not confirm identification.

[22] He testified that after he got settled in his room and made some calls, he went to the hotel spa to ask about massage but was told that there was no availability. He then met a colleague for dinner in the hotel dining room and made more Craigslist queries after he returned to his room.

[23] In cross-examination, Mr. Coburn confirmed that throughout the day, he’d been texting with his girlfriend, but had not mentioned he was having back pain or neck issues. He said she was going through a stressful time and it would not be usual for him to burden her with his issues. He also confirmed that he knew he was going to the Marriott and knew his back problems were exacerbated by travel but did not check in advance to see if they had a spa and didn’t pre-book a massage in Halifax. He said the attendant at the Marriott spa suggested he look on the internet. She did not suggest Craigslist. He agreed that the extract from his work phone does not show that he checked the internet more generally for massage or spas, but said

that he might have used his iPad, computer or personal phone to do that. He also agreed that he looked on Craigslist before learning that the Marriott spa did not have availability.

[24] He agreed that some of the ‘titles’ in his searches, such as “vanilla flavour female here”, do not relate to massage and some, such as “morning rubs”, have a sexual connotation. He noted that their presence in his search history indicated only that he had opened the ad, not that he had replied to it. These ads were in the therapeutic massage section of Craigslist. He acknowledged that it did occur to him that some of the ads might have a sex worker on the other end but said that he did not contact those ads. He testified that he thought the area he was in on Craigslist was a “safe spot”. During his interview with police and testimony, he was shown an ad from Backpages (an online website where people post ads, primarily for sexual services – Exhibit 18). He denied that he’d seen that ad, other than during the police interview, and denied that he’d responded to it. The extracts from his phone’s browser history do not show that he accessed ads on Backpages during the relevant period (Exhibit 4, Tabs 1 & 2).

[25] In cross-examination, he said he had used Craigslist in the past to sell things but could not recall using it to search for goods or services in other cities. He was shown an extraction report relating to other therapeutic massage searches on Craigslist from July of 2017, including searches of Craigslist in New York, Washington, Hamilton, Tampa etc. He could not recall conducting those searches.

[26] He described that when one opens an ad on Craigslist, there is a “reply” button which allows you to respond to the ad or ask questions. He said he replied to a few of the massage ads but some were not available and others were not the right description. He could not recall which

ads he sent inquiries to or which ad ultimately led to Ms. C. coming to his hotel but said there was no sexual content in the ad he did contact. He did get a positive response from an ad that seemed to be appropriate and then had a short text exchange.

[27] That text communication was recovered from Mr. Oliver's phone and is included in the excerpts in Exhibit 4, at tabs 4 and 6. Mr. Coburn testified that he did not know he was communicating with a third party and believed he was communicating with the masseuse. Mr. Oliver was apparently involved in multiple text conversations so the messages from Mr. Coburn and the responses are not sequential. In direct and cross-examination, Mr. Coburn was shown the excerpts in these tabs and asked to identify those parts he remembered as being part of his conversation or those that he did not dispute were part of the conversation (Tab 4):

387: 10:09: Coburn – Hi

386: 10:09: Oliver – How are you

385: 10:09: Coburn – Hi I was wondering whut ur rates are?

384: 10:09: Oliver - \$200hr \$100hh non rushed

382: 10:09: Coburn – Free tonight?

381: 10:09: Oliver – Yes I am love

380: 10:10: Oliver – Where are you located

379: 10:10: Coburn – Marriot

374: 10:11: Coburn – How do your services work

373: 10:13: Oliver – All I would need is your hotel room number and I'll call to confirm with you and I'm on my way to do whatever you want

372: 10:13: Coburn – Room 509

371: 10:14: Oliver – What's the name of the under because they will ask me for a last name

370: 10:15: Oliver – Which Marriott are you staying in?

369: 10:16: Coburn – Harbourfront

368: 10:16: Coburn – Coburn

367: 10:16: Coburn – Paul

[28] Mr. Coburn testified that he asked if the person wanted something to drink on arrival.

There is no text containing that question. Gilles Marchand, a civilian member of the RCMP who was qualified as an expert in relation to the forensic analysis of electronic devices testified. He acknowledged that items might be missing from the report if they had been deleted and overwritten. The following text exchange appears to be responsive to a question about a drink:

353: 10:33: Oliver – rum or vodka

351: 10:35: Coburn – vodka rocks?

350: 10:35: Coburn – sofa? (Mr. Coburn testified this should have said “soda”)

[29] Mr. Coburn testified he was concerned that it was taking a long time for the masseuse to arrive, so communicated about the delay:

363: 10:27: Oliver – Hey sweetie just waiting on my cab

345: 10:49: Oliver – Hey love in the cab

344: 10:49: Coburn – close?

343: 10:49: Coburn – Still?

342: 10:49: Oliver – It just got here

341: 10:50: Coburn – 10 mins?

340: 10:50: Oliver – 15

339: 10:50: Coburn - K

336: 11:07: Oliver – Room509 right

332: 11:12: Coburn – sure u r coming?

330: 11:13: Oliver – Im downstairs

326: 11:15: Coburn – Coming up?

[30] He testified that he did not perceive any sexually suggestive content in the text communication. In cross-examination, he denied that use of the word “sweetie”, “love” or the phrase “do whatever you want” caused him concern about professionalism or sexual content. He

said he still believed the person was a professional masseuse. The use of the term “love” reminded him of what a waitress in a diner or an older woman might say. He testified that he thought “whatever you want” referred to varieties of massage and the request for rum or vodka did not surprise him, given the time of night.

[31] In cross-examination, he agreed that there was no text communication about the masseuse’s qualifications or his back issues.

[32] Mr. Coburn testified that before the woman arrived, he went to the bar to get a drink for her. He was referred to the guest folio for his visit which included a list of charges (Exhibit 8). That document lists four charges for “hrbstone”, an abbreviation for Harbourstone, the hotel restaurant. Mr. Coburn could not recall what each charge was for. In his direct examination, he said he believed the \$14.50 was probably for the drink and two bottles of water. However, in cross-examination it was brought to his attention that the \$14.50 charge was entered on February 22, which would not accord with his evidence that the drink was purchased before the woman arrived on the evening of February 21<sup>st</sup>. He agreed and testified that the earlier charge, \$21.98, was probably for the drink and water.

#### Events at the Hotel

[33] Ms. C. initially testified that she believed she went to the hotel between 1 and 2 a.m., however, she acknowledged after seeing the images taken from video surveillance (Exhibit 12) that she was mistaken about the time of arrival. The surveillance footage from the Marriott (Exhibit 10) confirms that at 11:14 p.m. on February 21, 2017, she arrived at the hotel in a black

SUV. She got out of the back seat and entered the hotel alone. She said Mr. Oliver simply told her that he wanted her to go get his money and gave her a room number.

[34] She testified that she was wearing a t-shirt, leggings, a coat and winter boots and carrying a pink purse. She entered the hotel, asked at the front desk where the room was and took the elevator. This testimony is supported by the video surveillance footage in Exhibit 10.

[35] She went to room #509 and the door was answered by the accused. She recalled that he said "hi" when she arrived but could not recall if he said anything else. In cross-examination, she testified that she did not know if she asked him for the money that she was supposed to collect. She testified that he told her to get undressed and lay down, so she lay down on the bed on her back. Then he leaned over her and put his penis down her throat and kept doing it. He was also touching her vagina with his hand. He then got on top of her and had intercourse with her until he saw that she was bleeding. On February 23<sup>rd</sup>, Ms. C. was examined by a Sexual Assault Nurse Examiner. During the vaginal exam, bleeding was discovered from the opening of her cervix, but no injuries were seen. According to the nurse, the most likely cause of the bleeding was menstrual or a hormonal imbalance (Exhibit 11). In his statement to police and his testimony, Mr. Coburn confirms that he saw blood and believed it to be menstrual blood.

[36] Ms. C. testified that after he saw the blood, he got up and went into the bathroom. She got up, got dressed and he gave her money. She could not recall how much money he gave her or whether he said anything to her during the sexual activity or after. She then took the elevator to the lobby and walked back to the same vehicle. Mr. Oliver and the driver were in the vehicle.

She could not recall how long she'd been in the room, but surveillance footage (Exhibit 10) confirms that she left the hotel at 11:49 p.m.

[37] She testified that she did not make the arrangements to go to the hotel and had not posted any ads on that date from her phone. She said she'd had no alcohol or drugs before she went to the hotel and didn't consume any while there but believed that Paul had a glass of something clear.

[38] She was shown photos of herself taken after the event (Exhibit 11, Appendix A). She identified marks on the left side of her neck in one photo and testified that they had been caused by Paul grabbing her throat. In cross-examination, she acknowledged Mr. Oliver was grabbing at her later but denied that he caused the mark. She could not identify any marks in the other photo, but the agreed statement (Exhibit 11) confirms that a nurse saw a bruise on her right arm during the examination on February 23<sup>rd</sup>. In cross-examination she acknowledged that she'd told police that Mr. Oliver had grabbed her arm, causing a mark.

[39] Ms. C. provided three statements to police: the first to Cst. Thibideau, at 3:04 a.m. on February 23<sup>rd</sup>; the second to D/Cst. Loeb, at approximately 9:30 a.m. on February 23<sup>rd</sup>; and, the third, at approximately 5:40 p.m. on February 23<sup>rd</sup>. She could not recall saying much of what was attributed to her in those statements but acknowledged that she might have said it and if it was in the transcript, she had said it. She acknowledged that some of the information she gave in those statements was different than what she testified to. In her first statement, to Cst. Thibideau, she'd said that:



- Mr. Oliver had accompanied her to the hotel room;
- Mr. Oliver had gone to the front desk to ask where the room was;
- Mr. Oliver “had two guys come in and they had sex with me”;
- Mr. Oliver was present in the room and received the money;
- After Mr. Oliver got the money, they went back to his house and he got pictures of her;
- Mr. Oliver had asked her if she wanted a drink, got her a drink and then told her that some people were going to stop by – she explained that when she was offered the drink, she thought he meant water, but he got vodka or something;
- The officer asked her how many drinks she’d had, and she told him “one”;
- Two guys came to the hotel room, one black and one white;
- The black man was tall and skinny, and the white guy was short and chubby; and,
- Mr. Oliver told her to get undressed and the black guy told her to lay down and then the black man just stood and watched.

[40] She also acknowledged that Mr. Oliver had told her to shower or clean herself up when she was done. Initially, she explained that she’d meant that this happened after they left the hotel. However, she then acknowledged that Cst. Thibideau had said, “so you showered in the hotel?” and that she had responded “yes, I showered, I put my clothes back on and we left”. In her testimony, she maintained that Mr. Oliver had told her to clean herself up and she had showered but it happened after the hotel.

[41] In her second statement, given to D/Cst. Tammy Loeb, at approximately 9:30 a.m. on February 23<sup>rd</sup>, she’d said:

- Mr. Oliver had gone with her to the 5<sup>th</sup> or 6<sup>th</sup> floor of the hotel;
- Mr. Oliver had a key to enter the hotel room;
- There was a black guy and a white guy;

- The black guy told her to lay on the bed;
- She could not remember if Mr. Oliver remained but the other black guy watched;
- The men gave Mr. Oliver money and then left the hotel room; and,
- Mr. Oliver told her to clean herself up, she went and took a shower – she again testified that this happened back at the house.

[42] Her third statement was given at 5:40 p.m. on February 23<sup>rd</sup> to D/Cst. Loeb. In that statement, she said:

- There was a black man in the room watching her with Mr. Coburn; and,
- The black man gave her \$100 and another \$80 for transportation and the white man gave her \$260, for a total of \$440.

[43] She acknowledged that much of this was not true. She said she was exhausted, scared, only 15 years old and did not think she would be believed. In re-direct, she said she thought that if she told police she went into the hotel room by herself, they would think she'd done it to herself and no one would believe her.

[44] She also acknowledged that she did not tell Cst. Thibideau or D/Cst. Loeb that there had been oral sex with any of the men. She testified that she did not want to say everything that had happened to her because she did not want her mother and the media to find out. She also agreed that she hadn't told either officer that she'd gone to the hotel to collect money. She said that she was trying to tell the officers everything but was scared, anxious and the second statement was taken right after she'd had the rape kit done.

[45] In cross-examination, she maintained that she could not remember having any conversation with "Paul" before they had sex. However, she agreed that in her second statement to police, she had probably told the officer that there had been a conversation about why it had

taken so long to get there and that she'd been offered a drink. In re-direct, she said she remembered Paul asking her if she wanted a drink, couldn't recall any conversation about whether she'd had a busy day and was adamant that she did not tell him she was in college.

[46] Mr. Coburn testified that when Ms. C. entered the room, she put her bags down and they had a conversation. He testified that she had two bags with her; a purse and a larger bag.

[47] He testified that he asked her if she'd come far. She talked about living across the bridge. He asked how long she'd been doing massage, she said approximately 2 years. He asked what else she did, she said she went to college and lived with a roommate. They also discussed payment. She asked for \$80 and requested it be payed up front. She asked what kind of massage he wanted – hard, medium or soft. He said that there was no discussion of any sexual services.

[48] In cross-examination, he acknowledged that in his interview with police, he had not told the officer that she'd said she was in college, even when asked why he believed she was over 18. He had told the officer that he asked her where she lived and said they'd had "no meaningful conversation". He testified that when he said, "no meaningful conversation", he'd meant no discussion about family, personal life or personality. He acknowledged that he did not ask her age and did not ask her for ID. He said he'd asked her if she went to school for massage and she said no but that she had a massage certificate.

[49] He testified that after their brief discussion, she asked him to get undressed, lay down on the bed and cover himself with a sheet. She asked to use the washroom to wash hands. She went into the washroom and he lay down on the bed. She came out and began to massage him. He was face down on the right side of the bed and she was standing on the right side. She massaged

his back, using an oil or lotion which he believed she had brought with her. She massaged him for about 10 minutes and then asked him to roll over. He asked her to continue massaging his back for a little longer and she continued for approximately 10 more minutes. He said the massage was average.

[50] He testified that when he turned over, he saw that she had removed her bottom clothing. She pulled back the sheet and straddled him. His penis was partially erect and there was partial penetration. She then rolled onto her back and said, “fuck me”. He rolled onto his elbow, facing her. He then saw blood on the sheet, got off the bed, got dressed and asked her to get dressed.

[51] Mr. Coburn denied telling Ms. C. to get undressed, denied that there was oral sex and denied that he’d touched her vagina prior to intercourse. He was shown the photographs taken by the nurse on the 23<sup>rd</sup> (Exhibit 11) and denied that any marks were caused by him.

[52] He said the sexual contact happened quickly and he did not see her take her clothes off. When she asked him to roll over, he thought this was still a normal part of massage. He acknowledged that he’d told police that she put a condom on him before straddling him but said that he’d thought about it and could not now recall there being a condom. He denied that the \$6.96 gift shop charge in Exhibit 8 was for condoms. He denied that she asked him to stop because she was sore or that she asked him to get off her. He agreed that she had said she was sore at some point during the massage but testified that the comment was not made in relation to the sexual activity. He said he went into the bathroom to dress and when he came out, she was dressed. He asked her to leave. Their interaction was polite and quiet. She left. About 10

minutes later, he got a text which he assumed was from her demanding more money. He did not respond to that text.

[53] He testified that he learned she was 15 years old when he was arrested and up to that point, he believed she was at least 20 years old. His belief was based on the following:

- His queries were on Craigslist where he believed you have to be at least 18 to post an ad;
- The text communication seemed mature and targeted;
- The circumstances, including that she came to his room in response to an ad and was able to come at that time of night on a weekday;
- She requested alcohol, a mature drink;
- In the text communication she called him “love” which he associated with mature women;
- Her demeanour was mature and confident;
- She looked mature – she was dressed casually but neat and not provocatively; her makeup was minimal, mature and not overdone; she looked like a professional person coming to do a professional service; and, she was physically developed/busty; and,
- The content of the conversation he had with her when she arrived – she said she’d been doing massage for 2 years, was in college and lived with a roommate.

[54] He testified that the circumstances did not cause him to give any consideration to her age.

[55] He also testified that, up until he saw that Ms. C. had removed her clothing, the circumstances were consistent with obtaining a massage:

- There was nothing sexually suggestive about the communication;
- She asked him what kind of massage he wanted;
- He believed she had brought massage oil / lotion with her; and,
- Her request to him to get undressed and get under the sheet while she washed her hands was typical of a massage.

[56] He was cross-examined on various aspects of his stated belief that Ms. C. was in her 20s. He could not recall how tall she was but said he would recall if she was really short or taller than him, 5'10". She testified that she was 5'3". He agreed she had a roundish face. He agreed that he had told police that he could not recall what she'd been wearing. He maintained that there was nothing about her clothing that suggested she was young. He acknowledged that, because he has a teenage child and attends events teens of all ages, he is familiar with how they appear and agreed that it is difficult to determine age by physical development as some mature faster than others. He said that he wouldn't expect someone posting on Craigslist to be under 18 but acknowledged that people can pretend to be someone else on the internet. In cross-examination he was asked about Ms. C.'s testimony about her experiences with Mr. Oliver. The Crown did not suggest that Mr. Coburn would have been aware of this at the time. He said he was surprised to hear that human trafficking existed in a town like Halifax and had not previously imagined that 15-year-olds would be in such situations.

#### Events after the Hotel

[57] Ms. C. testified that after she left the hotel, she and Mr. Oliver went back to his house where she gave him the money. They went out to get liquor for Mr. Oliver and went back to the house. She said Mr. Oliver had taken her phone and wouldn't return it to her. She repeatedly asked him to take her home and he refused. Mr. Oliver began to drink and was grabbing at her, trying to force her to have sex with him. Eventually, he passed out and she was able to use her phone to message a friend to get help. Then she was able to leave the residence.

[58] She was cross-examined extensively about possession of her phone from February 21 – 22, 2017. She testified that Mr. Oliver had it a few times when she first got to his house, she could not recall if she had it with her when she went to the hotel, and that he had it again for periods after she got back to his residence. She was shown an extraction report for her phone showing the web history between February 19, 2017 at 1:40 a.m. and February 22, 2017 at 11:37 p.m. (Exhibit 5). She eventually agreed that she used her phone in the early morning hours of February 22<sup>nd</sup> to search for sneakers or shoes between 4:06 a.m. and 4:12 a.m., bags and clothing from 4:12 – 4:18 a.m., and tattoos from 5:04 – 5:42 a.m. In re-direct, she confirmed that during the relevant time period, she did not post any ads on Craigslist or any other personals website and did not use google to search any such site.

[59] Her friend called 911 on February 23, 2017 (Exhibit 1). As a result of that call, police were dispatched to a residence on Pockwock Road and Cst. Thibideau responded. He testified that he found Ms. C. walking on the side of the road around 2:30 a.m. on February 23, 2017. This would have been more than 24 hours after Ms. C. left the Marriott hotel. He said it was cold out and she was very upset. He took her back to the detachment and took a brief statement. She was then taken to the IWK hospital where she was examined by a Sexual Assault Nurse Examiner. Two further statements were taken by D/Cst. Loeb, one at around 9:30 a.m. and one at around 5:40 p.m. on February 23, 2017.

[60] As a result of information from Ms. C. police arrested Leeathon Oliver. He eventually pleaded guilty that between February 20 and February 24, 2017, he committed offences contrary to ss. 151, and 279.011 (human trafficking of a person under 18 years) and between January 1

and February 28, 2017, he committed offences contrary to ss. 271, 279.02 and 163.1(2) (Certificate of Conviction, Exhibit 19).

#### Mr. Coburn's Statement to Police

[61] Following his arrest, Mr. Coburn provided a voluntary statement to police (Exhibit 17). In it, Mr. Coburn said he had problems with his back and arranged for a massage, he believed that Ms. C. was at least 20 years old and thought she was closer to 25 or 26. He repeated throughout that he had no idea she was underage and that everything that had happened was consensual. He did not initially admit that there was sexual activity but did not deny it and eventually, he admitted there was sexual contact. There were some inconsistencies between his statement and his testimony. The Crown focused on his failure to tell police details about his conversation with Ms. C. and the fact that he'd told police that she had put a condom on him.

[62] Two character witnesses testified on behalf of the defence, Mary Barrett and David Croskery. Ms. Barrett had known Mr. Coburn for 11 years in their neighbourhood community and as a friend of her husband. She testified that his general reputation in that community was as an honest person of integrity. Mr. Croskery had known him for 17 years and described Mr. Coburn as his closest friend. He is Mr. Coburn's vet; they travel and play sports together. He also testified that his general reputation is as an honest person of integrity.

#### **Analysis**

##### Credibility

[63] As I said at the beginning, credibility is central to my analysis. Despite that neither Mr. Coburn nor Ms. C. admit that she was in his room to provide sexual services for money, sexual



activity occurred, and she was paid. At least one of them must have thought that was why she was there. Their evidence about who initiated the sexual activity, its context and extent cannot be reconciled.

[64] I am going to address Ms. C's evidence first because I have concluded that I cannot rely on her testimony, except where it is supported by independent evidence. I have come to that conclusion primarily because Ms. C. has admitted that important aspects of her statements to police were a relatively elaborate lie. However, I am also troubled by other inconsistencies between her statements and testimony and by some aspects of her testimony that I find to be implausible.

[65] The Crown urges me to accept Ms. C.'s explanations for lying to police and other inconsistencies and conclude that she is being truthful in court. Her explanations include that she was only 15 years old at the time of the events, had been through a very traumatic ordeal, was emotional and exhausted, and thought that if she told police she went to the hotel room alone, they would blame her for what happened or not believe her.

[66] Ms. C. admits that she concocted a story that Mr. Oliver had gone with her to the hotel room and another black man was there watching her have sex with the white man. I accept that her motive for doing this may have been concern that if she told police the truth, they might hold her responsible for what happened, might not believe that Mr. Oliver was controlling or coercing her or not believe that she was a victim. The difficulty is that this demonstrates that she is willing to lie in serious circumstances in order to influence others' perceptions of her. This may

continue to her testimony at trial. She may still be motivated to deny things that she perceives would make others see her in a negative light and still willing to lie as a result.

[67] She also said that she did not tell police that she had been forced to perform oral sex because she did not want her mother and the media to know everything that had happened to her. I accept that a victim of sexual assault might not want people close to them or the public to know everything that had happened to them and this might explain some withholding of information or incremental disclosure. That explanation is less believable here because she did report being taken to a hotel room and forced to have intercourse while another man watched and withheld only that the sexual activity had included oral sex. Even if that was the motive for withholding information from police, again it may continue and could have influenced her testimony.

[68] There are important parts of her testimony that in my opinion are particularly vulnerable to the possibility that she may still not want to admit things that she thinks would cause people to perceive her negatively or judge her actions. For, example, the possibility that she knew she was going to the hotel to provide sexual services for money or was a willing participant in the sexual activity.

[69] I accept that her age, trauma and exhaustion could explain some level of inconsistency and confusion about detail. However, even setting aside the part of her statements where she says that Mr. Oliver and another black man were present, what remains contains significant inconsistencies or omitted details: whether the lights were on or off; whether there was conversation; whether she had a drink; whether there was oral sex; how much money she was

paid; whether she showered at the hotel; and, whether she thought she was going to the room to collect money.

[70] There are also some aspects of her testimony that I find implausible in the circumstances. For example, her evidence that she went to the hotel room merely to collect money but wasn't told and didn't ask how much she was supposed to collect, didn't ask or doesn't recall asking Mr. Coburn for the money when she arrived at the room, and didn't say anything like, "I'm only here to collect money" when Mr. Coburn told her to take off her clothes.

[71] The defence also argues that her inability to recall or lack of detail in areas is also of concern. I agree that she seemed to have difficulty remembering things and her testimony lacked detail. This may impact the reliability of her testimony but I am not satisfied that it impacts her credibility.

[72] The Crown argues that her credibility is supported because some of her testimony is corroborated by independent evidence. I agree that her testimony is supported in some respects. For example, independent evidence confirms that Mr. Oliver assaulted and trafficked her, her description of the hotel and the hotel room, her testimony about how she got to the room, her testimony about vaginal bleeding, and her identification of Mr. Coburn. However, this evidence is equally consistent with her evidence and Mr. Coburn's, does not address the core allegations against Mr. Coburn or the areas of dispute between them and does not respond to the concerns about her potential motives to lie. The Crown also argues that her emotional state after the events is corroborative of her testimony that she was sexually assaulted. Cst. Thibideau said she was distraught when he found her. I observed her to be very emotional both in the interview

when she identified Mr. Coburn in a line-up and on the stand. However, irrespective of what happened in the room with Mr. Colburn, she has testified that Mr. Oliver brought her to Halifax against her will or under false pretenses, restricted her ability to communicate with the outside world, forced or coerced her into going to a hotel room to meet a stranger, continued to hold her in a basement for over 24 hours, physically assaulted her and tried to sexually assault her, and she escaped in the middle of a cold night. This would equally explain her emotional state.

[73] Ms. C. made a conscious decision to lie to police to influence their perception of her, the lie was detailed and relatively elaborate, she repeated the lie in more than one statement, she would have known that giving a statement to police in these circumstances was serious, and her lie was motivated by concerns that may still exist at the time she testified. In these circumstances, it would be dangerous to rely on her testimony.

[74] Having decided that I cannot rely on much of Ms. C.'s testimony, I still have to assess Mr. Coburn's testimony and the remaining evidence and decide if the charges have been proven beyond a reasonable doubt.

[75] The Crown submits that Mr. Coburn's testimony should not be believed or raise a reasonable doubt. In support of that submission, the Crown says that his testimony about his purpose in accessing Craigslist and responding to the ad is implausible, his testimony (e.g. about his conversation with Ms. C. when she arrived, description of her clothing) included information that was either not provided to police or was inconsistent with his statement and was fabricated to support his belief in her age, his testimony that she had a purse and another bag containing massage oils was inconsistent with the surveillance video, his recollection that there was no

condom used was inconsistent with his police statement where he said she had put a condom on him, and his belief in her age is not credible given her physical appearance and other circumstances.

[76] The defence argues that Mr. Coburn's credibility is supported by the character evidence, his evidence was given in a straightforward manner, he was not shaken in cross-examination, he had a good recollection of events, there were minimal inconsistencies between his testimony and police statement, and his testimony is supported by independent evidence.

[77] I agree with the Crown that there are aspects of Mr. Coburn's testimony that are implausible. I will address those specifics when I discuss the individual charges. I also agree that there are some areas where his testimony is inconsistent. His testimony about the condom is troubling. In his statement he said Ms. C. put a condom on him. In his testimony he says, upon reflection, he no longer believes that she did. The presence or absence of a condom is something I would expect him to remember and is significant to his description of how events unfolded. I cannot say that Mr. Coburn's testimony about how many bags Ms. C. had with her is clearly inconsistent with the surveillance video or with Ms. C.'s testimony. Both Ms. C. and Mr. Coburn testified about how many bags she brought to the room. In some respects, this issue has been confused because neither was asked what they meant by "bag" vs. "purse". In the surveillance footage (Exhibit 10), Ms. C. can be seen carrying a medium size pink bag/purse and something smaller can be seen in her hand – perhaps a small purse, wallet or phone. Ms. C. testified that she was carrying her pink purse when she went to the hotel. In cross-examination, she said she thought she just had a purse, not the bag with her clothes that she had brought from

New Glasgow. She was asked about her 3<sup>rd</sup> statement to police, where she said she had her “bag and little purse”. In response she said, she didn’t remember taking her “bag” with her, just her purse and wallet. I interpret this as meaning that she did not take her bag with her clothing. Mr. Coburn said she arrived and put her “bags” down, that she had a couple of bags with her – a purse and an additional bag, and that he believed she had come with lotion or oil in the bag. I do not believe she had her clothing bag with her, but she may very well have had two “bags” – the medium size pink bag/purse and a smaller hand-held purse/wallet. Mr. Coburn did not tell police that she said she was in college, lived with a roommate or had a massage certificate, despite being asked why he thought she was older and despite telling them other parts of their conversation. I agree with the Crown that this is concerning, especially given the importance of the information to his belief. He testified that he was in shock when he spoke to police, tried to cooperate but did not tell them everything. His credibility in this regard is also assisted by the fact that he candidly acknowledged that he did not ask Ms. C. her age.

[78] I do not believe all of Mr. Coburn’s testimony. There are parts that I believe, parts that I absolutely reject and parts that leave me with a reasonable doubt.

#### Application of Law to the Evidence

[79] The charges each have their own distinctive elements that must be proven beyond a reasonable doubt.

#### *Communicating / Obtaining Sexual Services for Consideration – s. 286.2(1)*

[80] The two offences under s. 286.1 are identical except for the added requirement in s. 286.1(2) that the Crown prove the complainant was under 18 years old. There are alternate routes

to liability for these offences. The Crown can prove either that Mr. Coburn's communication was for the purpose of obtaining sexual services for consideration or that he did obtain sexual services for consideration. He has testified that his purpose in communicating was not to obtain sexual services and that the money he paid her was not for those services. If his evidence is believed or raises a reasonable doubt, he must be acquitted. Even if I reject his evidence, he cannot be convicted unless the remaining evidence proves his guilt beyond a reasonable doubt. That evidence is largely circumstantial, so to convict Mr. Coburn I would have to be convinced that the only reasonable inference available from the facts is that his purpose was to obtain sexual services for consideration or that he obtained those services for consideration.

[81] I do not believe Mr. Coburn's evidence that he was seeking a massage and paid for a massage. His evidence on this does not raise a reasonable doubt and I am convinced beyond a reasonable doubt on all the evidence that his communication was for the purpose of obtaining sexual services for consideration. My reasons for saying this include the context and circumstances, the nature of the ads and the content of the communication. I do not believe that an educated, experienced and well travelled man such as Mr. Coburn would resort to Craigslist to find a therapeutic massage, especially at 5:40 p.m. when other options might have been available. Common sense tells me that someone looking for a massage would first check the internet for spas or therapeutic massage in Halifax or would contact the hotel to see if they had a spa with an opening. According to his testimony, Mr. Coburn did not check the hotel spa until after he checked in and after he'd already looked on Craigslist. He did testify that he might have used his iPad, computer or personal phone to conduct those searches but did not recall. I do not believe that he made those inquiries as, if he had, he would have remembered he did. I do not

believe that at 9:40 p.m., he expected to find a professional masseuse who would do a “house call” to a hotel room. Some of the ads in his web history (Exhibit 4, Tab 2) have sexually suggestive titles: “vanilla flavour female here”; “feels good and taste even better”; and; “morning rubs” and he considered the possibility that some might relate to sexual services. I do not believe his evidence that he thought it was normal for a professional masseuse to use language like “sweetie” and “love”, to ask for an alcoholic drink while working, or offer to “do whatever you want”. I am satisfied beyond a reasonable doubt that he went to Craigslist because he was seeking sexual services and then communicated by text for the purpose of obtaining those services.

[82] Once Ms. C. was in the hotel room, he paid her and there was sexual contact. Even if I accept his evidence that he paid her before the sexual contact, I am satisfied beyond a reasonable doubt that he gave her the money in anticipation of her providing sexual services. That conclusion is obviously impacted by the fact that I have concluded that he brought her there for the purpose of obtaining sexual services but is bolstered by my assessment of the circumstances in light of common sense. Mr. Coburn testified that there was no discussion of sexual services when she arrived and has, in effect, said that he was surprised when she took off her clothes and straddled him because he thought she was there to provide a massage. I reject that evidence. The inconsistency in his evidence concerning the condom contributes to that conclusion because if he were telling the truth about how the sexual activity came about, he would remember whether she put a condom on him. However, the main reason I reject it is that it does not accord with common sense. To accept his testimony on this point, I would have to believe that he gave her \$80 for a massage, they agreed that she would give him a massage, and then Ms. C. decided



to provide him with vaginal sexual intercourse. It is simply not believable. If, even unbeknownst to him, she was a sex worker, she would have inquired as to what sexual service he wanted and would not have provided any sexual service if she thought that for the same fee he would be satisfied with a massage. If she was not a sex worker and was simply there to provide a massage, his version is even more incredible.

[83] I have decided that I cannot rely on Ms. C.'s evidence about what happened in the hotel room and I reject Mr. Coburn's testimony about the details of how the sexual act came about. So, I am left with what inferences I can draw from the circumstantial evidence and the facts that Mr. Coburn admits.

[84] The only reasonable inference from the evidence, including the web history, the text communication and Mr. Coburn's admissions, is that he paid Ms. C. for sexual services. Therefore, I am satisfied that the Crown has met its burden on both routes to conviction under s. 286.1(1) and find him guilty of Count 5. Because Count 4 is impacted by my analysis of his 'mistaken belief in age' defence, I will address it when I deal with that defence.

*Sexual Touching under ss. 151 and 271*

[85] To convict for either 'touching for a sexual purpose', contrary to s. 151 or 'sexual assault', contrary to s. 271, the Crown must prove that Mr. Coburn voluntarily and intentionally touched Ms. C. Under s. 151, the Crown must prove he touched her for a sexual purpose and under s. 271, the Crown must prove that, from her perspective, the touching was of a sexual nature (*R. v. Ewanchuk* ([1999] 1 S.C.R. 330)). The defence does not dispute that this element of the two offences has been satisfied. On Ms. C.'s testimony, it clearly has. Mr. Coburn says the

sexual activity was initiated by her but has not argued that he did not consent or that his involvement was involuntary or unintentional. Therefore, I am satisfied that, even on Mr. Coburn's evidence, this element of the two offences has been proven.

*Mistaken Belief in Age for charges under ss. 286.1(2), 271 and 151*

[86] Proof of the offences under ss. 286.1(2), 151 and 271 are all impacted by the fact that Ms. C. was 15 years old at the time of the events. Mr. Coburn has testified that he believed she was at least 20 years old. This requires me to consider the 'mistaken belief in age' defence.

[87] The first question is whether there is an "air of reality" to the defence. Mr. Coburn bears the evidentiary burden of pointing to some evidence from which it may be found that he took reasonable steps and honestly believed the other person was of legal age (*R. v. Morrison*, 2019 SCC 15). If he can demonstrate an 'air of reality', the Crown then has the persuasive burden to disprove the defence beyond a reasonable doubt.

[88] There are two alternate ways the Crown can disprove the mistake of age defence: by proving that Mr. Coburn did not honestly believe Ms. C. was at least 16 (or 18 for the offence under s. 286.1(2)); or, by proving that he did not take "all reasonable steps" to ascertain the complainant's age (*R. v. George*, 2017 SCC 38, at para. 8; and, *Morrison*, at paras. 86 – 88).

[89] If the Crown does not negate the 'mistake of age' defence, then Mr. Coburn is entitled to an acquittal of the charge under s. 286.1(2) and could rely on the defence of consent to the charges under ss. 151 and 271.

Step 1 – Air of Reality to Mistaken Belief in Age Defence

[90] A defence will have an ‘air of reality’ where there is “evidence on the record upon which a properly instructed jury acting reasonably, could acquit” (*R. v. Cinous*, 2002 SCC 29, at para. 39). In applying this test, I must consider “the totality of the evidence” and assume “the evidence relied upon by the accused to be true” (*Cinous*, at para. 39). To meet the evidentiary burden to demonstrate an air of reality to the defence, the defence must point to evidence capable of supporting findings that Mr. Coburn honestly believed Ms. C. was of legal age and that he took all reasonable steps to ascertain her age (*Morrison*, at para. 118 – 119).

[91] I am satisfied that there is evidence before me which is capable of supporting the required findings, so I conclude that the defence has demonstrated an air of reality to the defence.

#### Step 2 – Honest Belief and “All Reasonable Steps”

[92] Once an ‘air of reality’ has been demonstrated, the Crown must disprove the defence beyond a reasonable doubt.

[93] The first requirement of the ‘mistake of age’ defence is subjective, whether Mr. Coburn honestly believed that Ms. C. was at least 16 or 18. That requires me to decide on all the evidence, but particularly Mr. Coburn’s, whether I have a reasonable doubt that he had the required honest belief.

[94] The second requirement, that an accused take “all reasonable steps”, is objective. It has been interpreted as requiring an accused to take all steps that a reasonable person would take in the circumstances known to him at the time (*George*, at para. 9). An accused is not required to take all possible steps (*R. v. Osborne*, [1992] 102 Nfld. & P.E.I.R. 194 (NLCA)).

[95] The ‘all reasonable steps’ inquiry has been described as a “highly contextual, fact-specific exercise” (*George*, at para. 9). In *Morrison*, Moldaver, J. provided guidance, albeit in the internet context, on how to interpret the “reasonable steps” requirement:

1. Reasonable steps must be “meaningful” in that they must provide information reasonably capable of supporting the accused's belief that the other person was of legal age (para. 106);
2. Both the steps taken and the information received will be relevant (para. 107);
3. The accused has an ongoing requirement to re-assess, particularly if there are “red flags” raised that impact the accused belief (para. 108);
4. Reasonable steps need not be “active” in that the receipt and consideration of unsolicited information could provide information reasonably capable of supporting the belief that the other person was of legal age (para. 109); and,
5. Trial judges should adopt a practical, common sense approach to the reasonable steps requirement, bearing in mind its overarching purpose: to bar an accused from raising a defence based on an asserted belief that is “entirely devoid of an objective evidentiary basis” (*Levigne*, at para. 31) (para. 111).

[96] In *George*, the Supreme Court said, “the more reasonable an accused's perception of the complainant's age, the fewer steps reasonably required of them” (at para. 9). In *Osborne*, the Newfoundland Court of Appeal said, there must be an “earnest enquiry or some other compelling factor that obviates the need for an enquiry” (at p. 11). In *P. (L.T.)*, the British Columbia Court of Appeal said, based on the available indicia of age known to the accused, would a reasonable

person accept the complainant's age without further inquiry? (*R. v. P. (L.T.)*, (1997), 113 C.C.C. (3d) 42, at paras. 20 and 27).

[97] In deciding whether the Crown has proven that Mr. Coburn did not take all reasonable steps, I have to consider all the circumstances known to him in their totality and cumulatively. However, it is helpful to examine the indicia individually to determine whether each is meaningful:

- (1) His queries were on Craigslist and he believed a person had to be at least 18 to post an ad there;
- (2) The text communication, which he believed was with the complainant, seemed mature – it was focussed, the person requested vodka, a mature drink, the person called him “love” which he associated with mature women;
- (3) The context of their interaction, including the fact that she was able to come at that time of night on a weekday and was responding to an ad for massage;
- (4) Her demeanour when she arrived was mature and confident;
- (5) She looked mature – she was dressed casually but neat and not provocatively; her makeup was minimal, mature and not overdone; she looked like a professional person coming to do a professional service; she was physically developed; and,
- (6) The content of the conversation when she arrived – she said she’d been doing massage for 2 years, was in college and lived with a roommate.

[98] The Crown has addressed many of these indicia:

- (1) Craigslist: at that time, the website did not confirm or verify the age of people who opened accounts; Mr. Coburn has acknowledged that people can pretend to be something they’re not online; and, Moldaver, J., in *Morrison* said that “deception and deliberate misrepresentations are commonplace on the Internet”;
- (2) Content of the text communication: in *Morrison*, Moldaver, J. adopted statements that there is “no expectation that representations made during internet conversations about sexual matters will be accurate or that a participation will be honest about his or her personal attributes, including age...”; Mr. Coburn did nothing to confirm that the person who posted the ad, had the conversation with him and came to his door were the same person; it is

common for people under 19 to request alcohol; the accused evidence about his perception of the use of the term “love” should be rejected;

(3) Context of the interaction: even if Ms. C. was a willing and knowing participant in the sex trade, this would not in and of itself satisfy the reasonable steps requirement (*R. v. Gashikanyi*, 2015 ABCA 1, at para. 15);

(5) Ms. C.’s appearance: her makeup and clothing were not out of the ordinary for a teenager and not suggestive of maturity; the Crown points out that when he gave his statement to police, Mr. Coburn could not recall what Ms. C. was wearing and argues that he has “fabricated” his testimony based on what he observed in the video; her level of physical development was at best neutral as Mr. Coburn acknowledged that teens develop at different rates; Ms. C.’s face was “roundish and full”, a “baby face”; Ms. C. did not bring any massage equipment with her and there was nothing about her belongings that would suggest a mature professional; and,

(6) The conversation in the room: the Crown points to the fact that Mr. Coburn did not tell police that he’d asked her what else she did and how long she’d been in massage and her answers that she’d been in massage for 2 years, was in college and had a room mate, despite being asked about his conversation with her and submits that he fabricated this testimony; the Crown points out that Mr. Coburn did not ask her age or ask her for identification.

[99] The Crown also points to other factors that it suggests undermine the accused’s belief in age/reasonable steps:

(1) Length of time Mr. Coburn spent with Ms. C.: they were together for less than 30 minutes which was insufficient for him to ascertain a meaningful understanding of her age; and,

(2) Age difference between them: Mr. Coburn was 45 years old and Ms. C. was 15 years old. The caselaw suggests that the greater the disparity in age, the greater the level of inquiry required (*R. v. R.A.K.*, [1996] N.B.J. No. 104 (NBCA)).

[100] I accept Mr. Coburn’s evidence that he believed that a person posting an ad on Craigslist would be at least 18 years old. However, given the realities of the internet, it would not be reasonable to rely exclusively on that belief.

[101] His evidence is essentially that nothing that happened after he initially looked at the ad created any “red flags” about Ms. C.’s age. After replying to the ad, he had text communication which he believed was with the person in the ad. I agree that there are no red flags about age in

the communication. I also accept that the person's request for an alcoholic drink would be suggestive of someone who was at least 19 years old. It is common for younger people to drink but less common for them to be open about it, especially with strangers.

[102] In looking at the context of their interaction, I agree with the Crown that the mere fact that a person may be engaged in the sex trade would not remove the need for further inquiry. However, I accept Mr. Coburn's evidence about his limited understanding of the realities of human trafficking. It is not unreasonable that someone in his circumstance would believe that having an ad on Craigslist and coming to a hotel by cab at 11:00 p.m. was suggestive of someone older.

[103] In considering Ms. C.'s appearance, the Crown says I should not rely on Mr. Coburn's description of her clothing as contributing to his belief because he told police he couldn't remember what she was wearing. I agree, however, he did see her clothing that night and has testified that nothing about her appearance caused him concern about her age. The Crown says her clothing was typical of what a teenager would wear. I would say that her clothing, t-shirt, leggings, winter coat and boots, was typical of what people of almost any age would wear and is neither suggestive of maturity or immaturity. In *R. v. L.T.P.*, the Court said that sometimes physical appearance alone may be sufficient to remove the need for further inquiry (at para. 20). Other cases suggest that this would be rare, but appearance is generally recognized as an important indicator of age (see: *R.A.K.*, where the Court expressed some doubt that visual observation alone would suffice but recognized that each case must be determined on its own facts). In this case, I had the opportunity to observe Ms. C. in the surveillance footage from the

hotel, in the video-taped interview when she was shown the photo lineup and, in court when she was two years older. None of these were ideal and it is unfortunate that no photograph was taken of the complainant at the time of the investigation. It was difficult to see her clearly in the videos. Based on my observations, she did not look significantly younger in the videos than when she testified in court. I would conclude that her physical appearance alone would not be sufficient to obviate the need for further inquiry, but it would also not cause “red flags” if other circumstances indicated she was 18 years or older.

[104] In my view, the conversation with Ms. C. when she arrived is very important. If she said she had been doing massage for 2 years, had a massage certificate, was in college and living independently with a room mate, this would be highly suggestive of a person who was at least 18 years old. I acknowledge that it is concerning that Mr. Coburn did not mention this to police, but I accept that he was in shock and conclude that his failure to tell the police is not fatal to his credibility on this point. I accept that he and Ms. C. had a conversation and he received this information from her.

[105] The Crown argues that the further steps that would have been reasonable in the circumstances would have been for Mr. Coburn to:

- Ask the complainant’s age, either while communicating online or when he saw her;
- Use a website that confirms or verifies age;
- Ask the complainant for her identification; and,
- Ask the complainant if she was the person in the advertisement.



[106] There are decisions that suggest that asking a person's age is a minimal reasonable step to satisfy the requirements of this defence. However, in *George*, the Supreme Court of Canada said, "In some cases, it may be reasonable to ask a partner's age. It would be an error, however, to insist that a reasonable person would ask a partner's age in every case (see e.g. *R. v. Tannas*, 2015 SKCA 61, 21 C.R. (7th) 166, at para. 27" (at para. 9).

[107] This case is very close to the line. However, when I consider the circumstances known to Mr. Coburn cumulatively, I cannot say that his perception that Ms. C. was at least 18 was unreasonable and I conclude that the Crown has not proven beyond a reasonable doubt that he failed to take all reasonable steps to ascertain her age. Further, despite my conclusion that Mr. Coburn has not been truthful in some of his testimony, I accept that he honestly believed Ms. C. was at least 18. Therefore, the Crown has not negated the mistake of age defence.

*Consent and Honest Belief in Communicated Consent*

[108] The Crown argues that irrespective of age, Ms. C. did not consent to sexual activity or, in the alternative, that Mr. Coburn cannot rely on the defence of 'honest but mistaken belief in communicated consent'. If I had accepted Ms. C.'s testimony, I would have found that she did not consent and there was no basis upon which Mr. Coburn could rely on a mistaken belief in her consent. However, I have concluded that I cannot rely on her testimony. In the absence of age as a barrier to the defence of consent, the Crown has the burden of proving absence of consent beyond a reasonable doubt. They have not done so, so there is no need to consider the defence of honest belief in communicated consent.

**Conclusion**

[109] I am convinced beyond a reasonable doubt that Mr. Coburn communicated for the purpose of obtaining sexual services for consideration and then obtained those services.

Therefore, I find him guilty of the offence contrary to s. 286.1(1) of the *Criminal Code* (Count 5).

[110] The Crown has not alleged that Mr. Coburn was seeking an under-age person and there is no evidence to suggest that he was. However, the person who came to his room was under the age specified in the remaining charges and too young to legally consent to sexual activity with him. I accept that he believed she was of legal age and am not persuaded beyond a reasonable doubt that he failed to take reasonable steps to ascertain her age. As a result, Mr. Coburn can rely on his mistaken belief in her age as a defence. I conclude that the Crown has not proven that he had the criminal intent to engage in sexual activity with an underage person and has not proven absence of consent. Therefore, I find him not guilty of the remaining charges (Counts 1 – 4).

Elizabeth Buckle, JPC.