

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Huybers*, 2021 NSPC 33

Date: 20210618

Docket: 8245293, 8270592, 8270600, 8270603, 8270604, 8270605, 8270606,
8323801, 8323802. 8333804

Registry: Shubenacadie

Between:

Here Majesty the Queen

v.

Martin Rene Huybers

Judge:	The Honourable Judge Catherine M. Benton, JPC
Heard:	November 7, 2019, November 14, 2019, September 14, 2020, December 3, 2020, December 7, 2020, December 10, 2020, December 17, 2020, January 4, 2021, January 29, 2021, March 5, 2021, in Shubenacadie, Nova Scotia
Decision	June 18, 2021
Charge:	Ten counts of Section 271 of the Criminal Code of Canada
Counsel:	Alicia Kennedy, Crown Attorney Mark Knox, Defence Attorney
Publication Ban:	Section 486.4 Criminal Code of Canada

By the Court:

[1] Martin Huybers is before the Court on eight separate Informations alleging ten allegations of offences contrary to Section 271 of the Criminal Code with eight separate complainants.

[2] Martin Huybers was employed as a Registered Massage Therapist (RMT) at the Strides Spa and Wellness Centre (Strides) in Elmsdale, Nova Scotia from 2014 until 2018. Each of the sexual assault allegations occur in the context of each of the complainants receiving a massage from Mr. Huybers while attending this establishment.

Crown's Position:

[3] The Crown's position is that Mr. Huybers denial of the incidents should be rejected. Testimony as to what he would have done rather than an account of what he actually did is not reliable.

[4] The Crown submits that each of the complainants provided clear, cogent and reliable evidence of inappropriate touching sexual in nature, that was not shaken in cross-examination. The Crown further submits that all the allegations of sexual assault have been proven beyond a reasonable doubt.

Defence Position:

[5] The Defence's position is that Mr. Huybers testified in a truthful manner and his evidence was not significantly challenged in cross-examination.

[6] The Defence further submits that although the complainants provide evidence of touching in the context of providing a massage, the evidence falls short of establishing touching of a sexual nature beyond a reasonable doubt.

General Principles:

[7] The burden of proof in a criminal trial rests with the Crown and never shifts to the accused. The Crown must prove each of the essential elements of the offences before the Court beyond a reasonable doubt. The accused is presumed innocent until the Crown discharges the burden.

[8] In **R v. Lifchus**, 1997 3SCR 320, at paragraph 36, the Court provided a definition of reasonable doubt:

Perhaps a brief summary of what the definition should and should not contain may be helpful. It should be explained that:

- the standard of proof beyond a reasonable doubt is inextricably intertwined with that principle fundamental to all criminal trials, the presumption of innocence;
- the burden of proof rests on the prosecution throughout the trial and never shifts to the accused;

- a reasonable doubt is not doubt based upon sympathy or prejudice;
- rather, it is based upon reason and common sense;
- it is logically connected to the evidence or absence of evidence;
- it does not involve proof to an absolute certainty; it is not proof beyond any doubt nor is it an imaginary or frivolous doubt; and
- more is required than proof that the accused is probably guilty – a jury which concludes only that the accused is probably guilty must acquit.

[9] **R v. Starr**, [2000] 2 SCR 144, the Court held at paragraph 242:

In my view, an effective way to define the reasonable doubt standard for a jury is to explain that it falls much closer to absolute certainty than to proof on a balance of probabilities.

[10] There is a general rule that the accused may not be tried concurrently on separate Informations unless the accused expressly consents, which was done in this case. Nevertheless, I must not use evidence heard with respect to one allegation in one Information to infer that the accused is a person whose character or disposition is such that he is likely to have committed the offences alleged in the other Informations before the Court. Accordingly, I must consider and assess each allegation individually on its own merits.

[11] Mr. Huybers chose to testify in his own defence. His evidence essentially denies any sexual touching with any of the complainants. Accordingly, I am guided by the Supreme Court of Canada direction in **R v. W.D.**, [1994] 3 SCR 521:

1. If I believe the accused's evidence, then the accused is entitled to be acquitted.
2. Even if I do not believe the accused's evidence, if it still serves to raise a reasonable doubt, then he or she is entitled to be acquitted.
3. Even where I do not believe the accused's evidence and his or her evidence does not raise a doubt, I must still consider on all the evidence I do accept, whether the Crown has proved the elements of the offences beyond a reasonable doubt.

Sexual Assaults:

[12] Major, J. in **R v. Ewanchuck**, [1999] 1 SCR 330 at paragraph 24 noted:

The crime of sexual assault is only indirectly defined in the Criminal Code RSC 1984, see chapter 46. The offences comprised of an assault within any one of the definitions in Section 265(1) of the Criminal Code, which is committed in the circumstances of a sexual nature, such that the sexual integrity of the victim is violated, see *R v. (P.L.)*, 1991 1 SCR 909 SCC section 265 provide that:

Section 265(1), a person commits an assault when:

- (a) without the consent of another person, he applies force intentionally to that other person directly or indirectly;

(b) he attempts or threatens, by any act or gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, the present ability to affect his purpose; or

(c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person, or begs.

Subsection (2), this section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm or aggravated assault.

[13] The Supreme Court of Canada went further to define the essential elements of the offence of sexual assault in **R v. Ewanchuk**, at paragraph 23:

A conviction for sexual assault requires proof beyond reasonable doubt of two basic elements, that the accused committed the actus reus and that he had the necessary mens rea. The actus reus of assault is unwanted sexual touching. The mens rea is the intention to touch, knowing of, or being reckless of or wilfully blind to, a lack of consent, either by words or actions, from the person being touched.

Paragraph 25:

The *actus reus* of sexual assault is established by proof of three elements: (i) touching; (ii) the sexual nature of the contact; (iii) the absence of consent. The first two of these elements are objective. It is sufficient for the Crown to prove the accused's actions were voluntarily. The sexual nature of the assault is determined objectively; the Crown need not prove that the accused had any mens rea with respect to the sexual nature of his or her behaviour; see *R v. Litchfield*, 1993 4 SCR 333, and *R v. Chase*, 1987 2 SCR 293.

[14] Therefore, in reviewing the evidence, I am to consider three factors:

1. Whether there was an intentional application of force:

- a) The application of force may be direct by the accused using a part of his body, such as his hand or his penis. It may also be indirect if the accused

uses an object or instrument. This element refers to the state of mind of the accused when he applies the force.

- b) Sexual assault is a crime of general intent. Therefore, the Crown does not have to prove a specific intent with respect to the sexual nature of the assault. The Crown may establish the accused knew what he was doing or that he was wilfully blind or reckless as to what he was doing.
- c) Intentionally means on purpose and not by accident. An accidental touching is not intentional application of force. To determine if the accused's actions were intentional, the Court must consider all of the circumstances surrounding the application of force, particularly taking into account the nature of the contact and the words/gestures that may have accompanied the contact.

2. Whether the touching was of a sexual nature:

- a) An assault is sexual in nature when the sexual integrity of the victim is violated. The Court is required to apply an objective test as to whether a sexual context to the assault is visible to the reasonable observer.

b) To determine if the assault is of a sexual nature, the Court looks for the presence or absence of sexual gratification while considering the surrounding circumstances:

- (i) the part of the body touched;
- (ii) the nature of the contact;
- (iii) the situation in which the contact occurred;
- (iv) the words/gestures accompanying the contact;
- (v) the purpose of the application of force/touching;

See **Chase**, *supra* and **Ewanchuk** *supra*.

3. Absence of consent:

a) Specific to this case, there is consent by all of the complainants to be touched therapeutically in the context of a massage. However, none of the complainants consented to touching of a sexual nature by the accused. As the accused's position is that he did not touch any of the complainants in a sexual manner, I do not have to further consider the issue of consent.

Complainants' evidence:

[15] As there was a ban on publication pursuant to Section 486.4 of the Criminal Code, I will refer to each of the complainants by their initials and remove any identifying information.

S.T.:

[16] S.T. attended Strides for a massage on January 2, 2017, as she threw out her back and she was in pain.

[17] She disrobed, removing her shirt, bra and pants, leaving her panties on. She lay face down on the body pillow on the massage table with her face in the cradle. The sheet was covering her. Her arms were laying flat behind her, pointing towards her feet. She was unsure what direction her palms were facing. She did not say whether her arms and hands were above or below the covering sheet.

[18] Mr. Huybers worked on her left side first and then her right side. When Mr. Huybers was working on her left side, nothing inappropriate occurred.

[19] When Mr. Huybers was working on her right side, her right hand was laying near the edge of the table. His crotch/genital area rubbed against her right hand. She estimated that Mr. Huybers was intentionally touching her right hand between three to five minutes. She described feeling that his penis was firm, more erect than flaccid. Her best approximation was his penis intermittently pressed her right

hand about ten to twelve times at thirty to forty seconds per occurrence. She then qualified that saying that it may be too long because it was intermittent.

[20] S.T. testified she kept trying to move her hand away from the edge of the table. But she was unable to move her hand because of where the pillow was situated. She also tried to reposition herself.

[21] Neither said anything. It seemed confusing and unreal to her. She was trying to process what was going on.

[22] She flipped over on her back so that he could work on her neck. Everything else in the massage was appropriate.

[23] She rebooked another massage with Mr. Huybers and in fact, had about fifteen massages with him in all. She also attended a session with Mr. Huybers when he left Strides and went to the Cup of Soul. S.T. did not express any other concerns and there was nothing else unusual in any of the other sessions.

[24] She did not report this incident to the Police until June or July of 2018 because she wanted it to be accidental and not on purpose. As well, nothing inappropriate had occurred during any of the other massages so she convinced herself that it was just an accident. Her partner saw on the news a report of

allegations against Mr. Huybers and asked her if this was the same therapist. She provided a statement to the Police on July 24, 2018.

K.C.:

[25] K.C. attended Strides on May 18, 2016 and May 25, 2016 for a pinched nerve. She received massages from Mr. Huybers both times. She provided a statement to the Police on June 10th or 13th of 2018.

[26] On her first visit on May 18, 2016, K.C. removed all of her clothes except her panties. She was laying face down and was covered with a sheet. When he entered the room, he pulled the sheet down to her hips. He started working on her neck and shoulder and then down her back.

[27] Half-way through the massage, while standing at her head, K.C. described his hands cupped in a “c” shape and dragging up and down her side of her stomach area to her panty line. His hands, still in a cupped motion, went under her body and over her breasts.

[28] She acknowledges that as she was laying on her stomach, her breasts were out or squished to the side. And a touch on the side of her breasts would be expected but she did not agree this is what Mr. Huybers did. She stiffened and felt this was not an accident. He definitely touched her nipples. She cannot say the

exact number of times he did this. She reinforced again that she did not believe this was an accident as it was more than a little graze and was not just once.

[29] K.C. then indicated that when she rolled over on her back, the sheet covered her breasts but his hands went under the sheet and touched her nipples. Mr. Huybers was moving his hands very slowly.

[30] She did not say anything to him at the time and booked another appointment. K.C. went home and continued to feel uncomfortable about the session so she called Strides later and said she still wanted an appointment but requested a woman therapist this time.

[31] On her second visit on May 25, 2016, instead of another therapist, Mr. Huybers came out to get her for the massage. She went in thinking perhaps she imagined what had happened the first time and was second guessing herself.

[32] She again laid in a prone position face down as he worked on her neck and shoulders. She said he cupped her breasts. And the massage occurred in the same way except she felt that he was leaning harder. She could feel his erection. His penis was pushing against her neck.

[33] She turned on her back and near the end of the session, there was time left so Mr. Huybers offered a leg massage, which she consented to. One leg at a time was

covered and the other is fully exposed. The sheet covered her panties. Mr. Huybers was standing beside her and focused on her inner thigh. His fingers were at her panty lines – she indicated grazing her panty line. She could feel the panties shift between her legs.

[34] K.C. made a complaint about Mr. Huybers shortly after the second appointment to Leslie Wilbur-Campbell, the owner and operator of Strides. She told Ms. Wilbur-Campbell that Mr. Huybers had touched her breasts intentionally. She further indicated that she did not provide everything in detail but spoke to Ms. Wilbur-Campbell for roughly an hour. She said she was made to feel like she made it up and she felt deflated.

[35] She continued to feel upset and uncomfortable about what happened, so she called Ms. Wilbur-Campbell again in tears. She outlined to Ms. Wilbur-Campbell what had happened, and Ms. Wilbur-Campbell wrote it down and emailed her a copy to review. She later went in to Strides and signed a copy.

[36] She had asked Ms. Wilbur-Campbell to document her complaint to ensure it was on file that Mr. Huybers was inappropriate with her. K.C. reviewed the document that had been prepared on the basis of what she said happened. She received it by email on August 19, 2016. She acknowledged that she did not make any changes to the document and did not say anything was wrong with it.

[37] The document that Ms. Wilbur-Campbell prepared does not mention the touching of her inner thigh or the presence of an erection. When asked about that, she said that she indicated same in the second call to Ms. Wilbur-Campbell. It was difficult to understand from her evidence what exactly she acknowledges disclosing to Ms. Wilbur-Campbell in the phone calls. She indicated she told Ms. Wilbur-Campbell everything in the phone call but I am unsure which one. She then said she did not go into detail, she just wanted it on file that Mr. Huybers was inappropriate.

[38] K.C. agrees that all of Mr. Huybers' contact, both times, that she attended for the massage was equally inappropriate. She was asked by Defence Counsel if she told Ms. Wilbur-Campbell, either the first or the second time, that Mr. Huybers had an erection. Her response was "no, not before this document".

[39] K.C. was referred to her videorecorded statement. She had previously reviewed the transcript of this statement. She was asked, "did you say he had an erection?" Her response was, "yes, when I felt him press up against me". She did not actually say the word erection but that was what she meant when she said he was pressing into her. It is a sensitive subject for her and she had not been through this before.

[40] She further indicated that maybe in meeting with Crown Attorney and Police after she did say erection. However, there is a further admission between both Crown and Defence that in those later meetings, she did not say erection.

[41] K.C. also contacted the Massage Therapy Association but I am unsure as to when. She was told she would have to file a Police Report, so she did, but that appears to be two years later after the incidents.

[42] She also found out that Mr. Huybers had left Strides and went to another organization. She called the owner of that organization to advise she had made a police complaint against Mr. Huybers.

M.H.:

[43] M.H., sometime between April 31, 2016 and August 2016, attended for a massage session with Mr. Huybers. She cannot recall the specific date. She previously injured her right shoulder and so would go in for a massage to have some work done on her shoulder, lower back and neck.

[44] M.H. recalls that she was on her stomach with her face in the cradle on the massage table. Her hands were positioned above her head that was in the cradle, with her elbows pointing out. She indicated that approximately half-way through the massage, Mr. Huybers massaged her lower back moving up the side of her

stomach, ribs and to the shoulder, using the palms of his hands. His right hand proceeded up under the rib and touched and cupped the side of her breast. She indicated that Mr. Huybers then gave the breast a squeeze for two or three seconds and then continued massaging. She recalls him using his right hand to squeeze her breast but does not recall what side he was standing on when this occurred. She does not actually say what breast was touched but from the rest of the evidence, it appears that it was her left breast.

[45] She advised neither she nor Mr. Huybers said anything. She was simply processing what happened and she described being weirded out, scared, in shock and uncomfortable. Mr. Huybers continued on with the massage as if nothing happened.

[46] M.H. did not say anything to anyone at Strides. And she did not report the incident to the Police as she wanted to take time to process what happened. However, she never wondered if it was accidental.

[47] Only one breast was touched, and it was the side of the breast. M.H. described a full grab, but that he did not touch her nipple. She then further clarified that hand might not be the best term. His fingers went under her breast, not on top. His fingers then stopped for a second, gave the breast a little squeeze then continued on. It occurred quite fast. She acknowledged that because her

breasts were pushed out or squished out, his hand was able to get under her breast; she then describes it as only one swipe that sticks out in her mind.

[48] In July of 2018, she came forward because she heard a news report on the radio. Someone else had complained so she felt she had to report this incident. She subsequently provided a statement to the Police on July 20 of 2018.

J.F.:

[49] J.F. testified that she received six massages from Mr. Huybers from April 2015 to the spring of 2016. The last session was on May 7, 2016. At that time she was seven months pregnant, so she had to lay on her side to receive the massage. She went in for back pain in general.

[50] She removed all of her clothing with the exception of her panties. She does not recall the position she was in when Mr. Huybers started the massage. At one point, he was standing by the massage table facing her back. She recalls that she was laying on her left side when she felt uncomfortable. The sheet was covering the side of her body, legs and bottom up to her armpit, so only her back was exposed.

[51] While massaging her upper back, she felt Mr. Huybers hand, or four fingers going closer to the right side of her right breast with his thumb remaining on her

back. It was more of a rubbing or pressure than massaging the side of her breast.

He did not touch her nipples. This occurred more than once but she is not sure the amount of times. It probably lasted between ten to twenty seconds each time.

[52] In trying to determine when this unwanted touching occurred, she indicated that she was on her left side first then rolled onto her right side and that is when the incident occurred.

[53] In cross-examination, J.F. testified that Mr. Huybers did not massage her belly, but rather put his hand on her belly two times, making a circular motion while she laid on her side. This also occurred while she was on her back.

[54] Further, Mr. Huybers fingers went below her panty a little bit on the right side. She doesn't know how to describe it. But he would have had to touch her panties to put his fingers under. This was on the right, front side of the pelvis, lower than a bikini line. This occurred three times, maybe a few seconds at the time. When he touched the pelvic area, he did not need to move the sheet. He almost incorporated the movements into the massage. They were gradual, every now and then and it made it seem like it was part of the massage.

[55] When she went to roll on her back, Mr. Huybers held the blanket up for her. He then placed it on her, barely covering her nipples. One nipple did actually

become exposed. Usually, the blanket or sheet covers her up to the collarbone. During the massage she did not say anything to Mr. Huybers. She kept her eyes closed and waited for the massage to be completed.

[56] J.F. did not report the incident to Strides or the Police at the time. She indicated that she wanted to forget and she felt degraded. Later, she was visiting friends and the topic of massages came up. As a result of the conversation, she eventually went to the Police and provided a statement on February 22, 2019.

J.A.:

[57] Ms. A. testified that she attended Strides on a regular basis for a number of years, stopping in June of 2016. She was involved in a previous vehicle accident and as a result she often has a massage for her neck, back and some other ailments. She first saw Ms. Wilbur-Campbell, then was transferred to Mr. Huybers. She was treated by Mr. Huybers more than five times.

[58] J.A. last attended Strides for a massage with Mr. Huybers between the dates of June 1, 2016 and June 17, 2016. The massage proceeded normally, or as expected at first, she had removed all of her clothing except for her panties. Ms. A. was laying in a prone position while Mr. Huybers worked on her neck and back. She then turned over to lay on her back for the rest of the massage. In about the

last fifteen minutes of the session, he touched her stomach area twice. Each time she put her arms up under her breasts to block him because she thought he was going to touch her breasts.

[59] She was covered with a blanket tucked under her body from her neck to her feet. She advised that Mr. Huybers lifted the sheet and his hand touched her stomach underneath the sheet. He then moved his hand across her stomach, palm facing down, moving inside to out. This was between the belly button and the bottom of the rib cage/chest area.

[60] He then walked around to the left side and made the same motion. She noted that he had never touched this area in prior massages. She does not recall him looking at her body when he lifted the sheet each time. She also further advised that there had been no prior discussion about touching her stomach.

[61] She was shocked and upset but did not say anything and neither did Mr. Huybers. She just wanted to leave.

[62] Ms. A. called Ms. Wilbur-Campbell the next day and Mr. Huybers sent an apology email dated June 17, 2016, in exhibit four. She notes that when she first saw Ms. Wilbur-Campbell for massages, Ms. Wilbur-Campbell would explain

what she was doing during the massage. She did not find that Mr. Huybers did so as much.

[63] She decided to go to the Police as she was prompted by Ms. Wilbur-Campbell. She was asked if she had seen the media report or coverage by them. She thinks she went to the Police and provided her statement on July 13, 2018, before she heard the new reports.

K.H.:

[64] K.H., testified that she had attended Strides on July 3, 2014. She was laying in a prone position on the massage table and cannot recall where her hands were positioned. Mr. Huybers was massaging her neck and shoulder area. She testified that Mr. Huybers' pelvis area was rubbing against her left butt cheek. His pelvis was thrusting forward and back repeatedly. She described it as rubbing and grinding back and forth against her. It was hard to judge time, but a rough guess was for about five minutes.

[65] She acknowledged that she would not be able to say that she felt an erection. She also was not able to say for sure that it was his penis that was touching her butt cheek. She indicated that there was nothing else to suggest sexual activity or a high level of excitement from Mr. Huybers.

[66] She was dumbfounded and was questioning whether this was really happening. She was overwhelmed with feelings. She does not think that Mr. Huybers said anything. This all occurred during the first part of the massage and then the massage proceeded in a normal way. When she went home for dinner, she had her adult children come over and told them about the massage. She advised them not to go to Strides.

[67] Initially she thought it was an accident but as it continued, she thought no way was it an accident. Although, she did not report the incident as she thought it was minor at the time.

[68] She indicated that she did not go back to Mr. Huybers again as a result of this experience. However, as a result of a third-party records application, we determined the date of service was actually July 19, 2014 and not July 3, 2014. Accordingly, the Information was amended in accordance with the evidence. She then acknowledged that there were two visits but only one stuck in her mind because he acted inappropriately then so it must have been the last visit.

[69] In 2018 she heard a news report on the radio that Police were requesting further information, so she contacted the Police. She subsequently provided a statement to the Police on July 24, 2018.

C.L.:

[70] The Information was amended from May of 2018 to May 2016. C.L. started attending Strides in 2015. She had previously received eight to ten massages from Mr. Huybers before this incident.

[71] On May 6, 2016 she was laying in a prone position with her head in the cradle and her arms wrapped around the head piece so that they were above her head. About half-way through the massage, she felt something rubbing against her arm. It took a second to realize. Mr. Huybers was pushing against her mid forearm to her wrist on the outside of her hand. She put her head up and saw the erection. She noted a bulge in his pants pointing up to the right.

[72] She indicated that she was shocked and not sure at first but jumped up which startled him and he jumped back and said “okay, we can move on”.

[73] She flipped over on her back. In doing so, she exposed her breasts. He fitted the blanket on her. She laid with her eyes closed. She again felt the bulge rubbing against her right forearm and hand. She described it as rubbing into her hand like he was trying to put it in her hand. She looked again and there was an erection. He was facing her going up the right side. He again looked startled, jumped back. There was no discussion between the two of them.

[74] When she left the massage, she told the receptionist that Mr. Huybers had gotten a hard-on and rubbed it against her. She indicated the receptionist told her she was probably mistaken. She played it over and over in her mind. She was confused and was questioning herself whether she was mistaken.

[75] C.L. went back for a second visit on May 8th or 9th of 2018. She went in nervous, not sure if the previous experience had happened or if it was in her mind.

[76] However, about half way or three quarters of the way through the massage, she felt the erection again. Her eyes were closed, she was laying flat on her back and she felt the erection against her head when he worked on her shoulders while at the head of the bed. It was pressing on her arm and then it felt like he was trying to put it in her hand again.

[77] C.L. became emotional because she had put herself in this situation again. She wanted it to end so she jumped up saying she had to poop. She knew exactly what it was. She then said she was face down and he was almost leaning on her right hand, pushing into her right hand.

[78] When she left, she told the receptionist that she was not mistaken, and that he had rubbed her with his penis.

[79] She acknowledged that she would frequently fall asleep during the massages and wake up to a snore. However, she can not imagine that she would fall asleep during the last session because she was too nervous.

[80] C.L. did not report this to the Police as she felt she had put herself in the position the second time and it was time to move on. She was with her father when they saw the news report. She did not provide a statement until July 28, 2018.

C.H.:

[81] C.H. testified that she started attending Strides in early 2016. She had been for massages with Mr. Huybers for a total of eight sessions, two or three times before this incident. She attends for massages for upper back and neck pain. Although those area are focused on, she typically gets a fully body massage.

[82] On December 3, 2016, when she attended Strides for a session with Mr. Huybers, C.H. was five months pregnant at the time. She removed all of her clothing and thinks that includes her panties as well. She laid in a prone position with the proper supports and covered herself with the sheet. Mr. Huybers worked on her upper back and shoulders and she turned over on her back and he finished with her neck.

[83] While she was still laying on her back, he continued on with the full body massage, which included her legs. Mr. Huybers used lotion while massaging her legs. Both legs were massaged but she was unable to recall which one was done first.

[84] While massaging her right upper thigh, Mr. Huybers was standing on the left side. He was massaging up and down her right thigh with both hands. His left hand came up and touched her vagina with the tips of his fingers. The touch lasted a split second and she thinks she went rigid as it was so surprising and shocking.

[85] C.H. indicates that she honestly thought it was a mistake and that Mr. Huybers was unaware of what he had done. Nothing was said by either her or Mr. Huybers. Mr. Huybers continued on with the massage.

[86] C.H. left and did not tell anyone at Strides. About a month before she saw the news in the fall of 2017, she told her sister-in-law and husband about the incident. After she saw the news, she then called the Police and provided a statement on July 23, 2018.

[87] C.H. had given Mr. Huybers the benefit of the doubt but once she heard there was another complaint, she knew in her gut that it was not an accident.

Leslie Wilbur-Campbell:

[88] Ms. Wilbur-Campbell is a RMT since 2000. She completed a two-year diploma and participates in continuing education every two years, which must be filed with the Massage Therapy Association. She owns and operates Strides Spa and Wellness Centre, Elmsdale, since June 2014.

[89] Mr. Huybers was a client of hers before and they also worked together in another establishment prior to June of 2014 when he joined her at Strides. Mr. Huybers was not an employee of hers but rather a tenant, a therapist renting a room or a contractor. Four exhibits were filed outlining the landlord tenant relationship. Exhibit five, 2014 Lease Agreement with floor plan. Exhibit six, 2015 Lease Agreement. Exhibit seven, 2016 Lease Agreement. Exhibit eight, 2017, Massage Therapy Agreement (similar to the lease agreement).

[90] The massage therapists had their own rooms and there is a common reception area that contains client files. However, technically, given Mr. Huybers was a tenant and not an employee, the records were his.

[91] The therapist should never provide just a general massage. Specific areas have to be agreed to. Consent requires going through the protocol, draping, the benefits and that the client can ask the massage therapist to stop any time. There is constant communication with the client, check-ins as to how they are doing during the massage.

[92] You would only massage a breast if treating for a lumpectomy scar. The therapist must always drape appropriately, never exposing the nipple and obtain a further in-depth consent. You would never massage the genitals.

[93] J.A. was a previous client of hers and she eventually referred her to Mr. Huybers as she was reducing her number of clients. J.A. had contacted her in June of 2016 indicating that she was uncomfortable with Mr. Huybers. She asked J.A. if she was making a formal complaint. J.A. was not sure at that time and said she would get back to her, and she eventually did.

[94] She had Mr. Huybers meet her at the house to discuss the complaint from J.A. as it was a sensitive topic. She advised Mr. Huybers of the complaint. He was shocked at first, nervous, red in the face. He indicated that he got it and learned his lesson. He admitted he rubbed her stomach to relax her but did not get further consent.

[95] This is the first time receiving a complaint and as it is her business, she contacted a lawyer. The lawyer helped her create a letter of apology to J.A. from Mr. Huybers. Exhibit four is a letter of the apology. She advises that Mr. Huybers did want a portion of the content changed as it indicated an acknowledgement of wrongdoing. Mr. Huybers indicated he did nothing wrong. She did not pressure

Mr. Huybers to sign and he did not say that he did not want to send the letter.

After the letter was sent, she had no further contact with J.A.

[96] In August of 2016, she received a telephone call from K.C., who was distraught, emotional and angry. Ms. Wilbur-Campbell took a statement from her over the phone, asking K.C. to be detailed. She did not audio record K.C.'s comments but tried to write word for word capturing K.C.'s complaint.

[97] She then subsequently had a conversation with Mr. Huybers regarding K.C.'s complaint in his treatment room. She described Mr. Huybers looking on edge and she did not recall if he said anything. She was subsequently referred to her statement given to the Police where she indicated he had actually apologised. He said he learned his lesson and would not do it again.

[98] Exhibit three details in point form the complaint that she took from K.C.'s conversation, which lasted approximately a half hour with her on August 19, 2016. She does not have the actual notes she took at the time from which she then prepared this point form version. Exhibit ten is the signed complaint dated August 25, 2016.

[99] Exhibit eight is the Therapists Agreement Lease dated June 1, 2017. The complainants are noted in the agreement and there is an extra clause that if there is

a third complaint, she will terminate the lease agreement. Exhibit nine is a grievance letter to the Therapist's Association Mr. Huybers belonged to dated July 18, 2018.

[100] Ms. Wilbur-Campbell did not renew the lease. There were two formal complaints and several informal complaints. Exhibit eleven is a letter giving thirty days' notice that the lease would not be renewed.

[101] She advised that Mr. Huybers just said okay and moved his possessions out on May 31, 2018.

Alicia Stacey:

[102] Ms. Stacey has been a massage therapist for ten years. She is currently the president of the Massage Therapist's Association. There is a registry of massage therapists.

[103] Prior to January 2020, the Association prepared lists for insurance, standards of practice, code of ethics and dealt with complaints. However, before this date, someone could present themselves as a massage therapist without the requisite training. After January of 2020, a diploma, criminal record check, proof of liability insurance, first aid and C.P.R. is required.

[104] The code of ethics is similar to what they were taught at school. Informed consent was a big part of the training. There is actually a script provided for RMTs to use. The RMTs are to advise what the treatment would consist of, what areas would be worked on and that the client can ask them to stop or modify the work any time.

[105] Each massage therapist has to agree to the code of ethics when they sign up for the Association.

[106] The Association received Ms. Wilbur-Campbell's grievance form concerning Mr. Huybers on July 8, 2018, in exhibit nine. She indicates the Association did not investigate any further because the Police were involved. Accordingly, the complaint is on hold until the court proceedings are completed.

[107] She was advised by the Police that as a result of the charges, Mr. Huybers could only treat male clients alone and females with a chaperone. Consequently, she wrote out a partial suspension, including those conditions.

DEFENCE EVIDENCE

Amy Boutilier:

[108] Ms. Boutilier is a RMT at Strides. She worked with Mr. Huybers from 2014 to 2018. On exhibit five, a diagram of the layout of Strides, she was able to show that her room was across from Mr. Huybers' room.

[109] RMTs provide two types of massages, therapeutic and relaxation.

Therapeutic massages are used when they are trying to alleviate an issue, it is a deep tissue massage. A relaxation massage involves the use of oils, not as much pressure and is used to unwind. RMTs have different massage techniques or styles. Some provide more of a flow massage and others focus on the trigger areas and around the specific area. A massage therapist would typically use their hands, forearms, knuckles and elbows. They would often lean against the massage table to exert more pressure on the client.

[110] Ms. Boutilier advised that being a massage therapist is hard on the body. Accordingly, Mr. Huybers had provided her with twenty to twenty-five massages. She was shown exhibit one and advised that it was Mr. Huybers' massage table, a table that she had been given massages on.

[111] Typically, the RMT suggests what clothing the client should be removing for the massage. If working in the hip area, it is easier to work if the client is not wearing underwear. Otherwise, the underwear is typically on. There is no difference between male and females in how the therapists drape the client. The

goal is to give the client some privacy and make them feel comfortable while leaving the area they intend to work on exposed.

[112] She further advised the client is typically placed in the middle of the table so that the therapist can work from both sides. She would explain to the client where and when she was going to touch the client. Check-ins are an important piece of the session. The RMT wants to ensure that the client is comfortable, the pressure is okay and if they are using a new technique, to receive feedback from the client.

[113] When Mr. Huybers would provide her with massages, he would check in with her frequently. Although she could not see into his room, she could hear him communicating with the clients and she heard check-ins.

[114] Ms. Boutilier testified draping is utilized to ensure the client's privacy. However, it has happened in her practice that something has been accidentally exposed. It has also happened in her practice that there has been accidentally touching of a prohibited area. For example, if a client is large chested and laying flat on her stomach, there could easily be an accidentally grazing of the side of the breast. Touching accidentally of the prohibited area by the wrist or hand could happen. However, not the cupping the breast and never accidentally touching the genitals.

[115] If there was an accidental touching, she would, in her practice, discuss this with the client right away.

[116] She does recall Mr. Huybers coming to her about something happening where a client had made him uncomfortable, that was about five or six years ago. She does not recall the month but it was in 2016 or 2017.

Martin Huybers:

[117] Mr. Huybers is fifty-four years of age and has been married for thirty-five years, has two children and two grandchildren. He was mostly employed in retail sales before he became a RMT. At his last employment, Baxter Foods, he injured his back, which lead him to sessions with a massage therapist. He was intrigued that the RMT could relieve the pain and help restore the body to proper functioning. He completed the requisite education and became a R.M.T. in June of 2013. He subsequently rented a space at Strides, when it opened in June of 2014, where he stayed until 2018. Leslie Wilbur-Campbell was the massage therapist that treated him for his back injury and subsequently became his landlord at Strides.

[118] At first his business was slow but into his third year he had a good client base and by 2015 he treated in the range of twenty to twenty-five clients, on

average, a week. He would estimate treating a little over one thousand clients in a year and in the neighbourhood of five thousand clients overall from when he commenced his business.

[119] There are different styles used by RMTs. He indicated he uses a fair amount of pressure, which has helped him maintain his client base. Within that, he does a fair amount of trigger work combined with a fair amount of flow. He uses the flow style to minimize the discomfort associated with the trigger work. He takes a more global approach. For example, if a client presents with a shoulder issue, he will also treat some of the neck or back as well. His dominant hand, the right, would exert the pressure on the trigger points and his left hand, using lighter techniques, would focus on the surrounding, undraped areas. On occasion, he uses his forearms, elbows and knuckles but he has the advantage of being able to create enough pressure with his hands.

[120] Mr. Huybers advises he maintains thorough records. His records include a file for each client with their health history form, his notes, a treatment plan and notes for the insurance company to direct bill. If the client co-pays, or has no insurance, he also provides a receipt for which a copy is included in the file.

[121] Mostly, his massage treatments are sixty minutes long although, some are for ninety or thirty minutes and rarely forty-five minutes long. On the first

appointment, he usually spends the first fifteen minutes going over the health history, discussing the issues, what areas will be worked on and the protocol such as draping of non-treatment areas. On subsequent appointments, he would refresh what they had previously worked on and how that felt and whether it had resolved some of the issue.

[122] Although there is less communication in subsequent appointments, taking the cue from the client, he is constantly asking for feedback on what is being done, hence performing these check-ins. It becomes automatic to perform these check-ins. It can become apparent to him that the pressure is hurting the client if the client tenses, shifts their body or verbalizes that it hurts.

[123] Mr. Huybers advised there had only been a few occasions in his years of practice that he had an erection during a session. He made every effort at that time not to let the client become aware of it. He would not make contact with a client with his pelvis area.

[124] In cases of therapeutic massages, it would not be uncommon for his hip to be resting or leaning on the side of the massage table as these massages are physically demanding. If the massage is a relaxation massage, he would usually position himself at the head of the massage table.

[125] When referring to breast tissue, Mr. Huybers described this as being below the arm pit along the side of the rib cage.

[126] Exhibit number one is a photograph of the massage table that he used for clients while at Strides. He describes it as a higher quality table, which is wider and may be a little longer than the average massage table. It offers more comfort to the client.

Complainant K.H.:

[127] Mr. Huybers testified that he had seen K.H. in the community before but did not know her until she came to Strides. He provided her with two sessions.

Exhibit number two is a record of her session on July 19, 2019. He did not have a lot of recall of K.H. but did remember that at the initial visit she seemed uneasy and nervous. However, nothing stands out about her treatment.

[128] He further advises that he had no recollection of humping her left butt cheek. Ninety-nine-point nine percent of the time, the client is positioned in the centre of the table. His massage table has a number of settings with respect to height. He and his wife attempted to re-enact this scenario from the lowest to the highest setting, stating that if it happened, he would have had to have been laying on K.H. However, he acknowledged that if he was anchoring the table with his hip, it is

possible he could touch the buttock or torso area of the client. It is possible he said, but he does not recall it happening with K.H.

Complainant C.L.:

[129] Mr. Huybers advised that he did not know her before she came in for treatments. However, he does recall her and although she said she had had two visits with him, he indicated he gave her more than two treatments. He recalls her having back issues with little of the neck and shoulder area.

[130] He recalls in her testimony that she described him as wearing a lime shirt when he gave her a massage. He denies that he has a shirt this colour and the owner of Strides had all of the therapists dressed in black pants with a grey or black shirt.

[131] He advises that he certainly did not thrust his penis on her wrist or forearm.

[132] He recalls that at the end of one treatment, but he was not sure which one, in the last ten minutes when C.L. was facing up, or laying supine, he was finishing with her neck and shoulders while seated on the stool. The drape came down considerably and her breasts were visible. He immediately brought the drape back up, covering her breasts. When he resumed with her shoulders, she made a moaning noise which creeped him out. So, he ended the treatment. He further

advises he told his colleague across the hall, Amy Boutilier, and the receptionist because he wanted it noted that he was uncomfortable with what had happened.

[133] He does recall C.L. saying on one occasion that she had to poop. That has happened about three or four times in his experience as a massage therapist.

However, he did find it unusual that she did not want to resume the massage after she went to the washroom. She advised something had come up and had to go. He was not aware that she had made a complaint.

Complainant K.C.:

[134] Mr. Huybers recalls providing her service on two occasions. He recalls that she was chatty and sort of takes his cue from the client as to how much they want to talk through the massage. On the first visit, he thought he could smell alcohol from her, but she was not impaired.

[135] K.C. was in for a therapeutic massage on her shoulder. She was laying in a prone position when he provided the massage. He said he certainly did not believe that he cupped her breast area or nipple.

[136] He further advised that while working on a client face down, even with the proper draping, there would still be some breast tissue under the left or right armpit

that would be touched. If he did not work on those areas as well, he would not be doing a thorough job. He probably did touch her breast tissue below the armpit.

[137] Mr. Huybers denied that he touched her private area below her panty line. He indicated it did not make sense since he was treating her only for her shoulder issue. Unless there had been a request from the client, he would have no reason to treat the lower body.

[138] Although he does not have a total recall of what happened during the treatment, he has absolutely no recollection of having an erection.

[139] When he went out to get K.C. for the second session, he recalls her saying that she thought she had another therapist that day. However, he did not notice anything wrong and feels that he would have picked up on it if K.C. was uncomfortable.

[140] Ms. Wilbur-Campbell spoke to him about the complaint by K.C. Ms. Wilbur-Campbell showed him some handwritten notes of the complaint. He did not note that she was complaining about anything happening to her lower body. He was never asked to apologise to her. The complaint did not make sense and he did not believe that he did anything that the complaint said. He does not recall receiving a copy of exhibit three, K.C.'s unsigned complaint.

[141] Exhibit number ten, K.C.'s signed complaint, was reviewed with him by Ms. Wilbur-Campbell. He had disagreed, indicating that he had no recollection of asking her to lift her hips or scooping her breasts. He further advised that he went back from the shoulder to the belt line and quickly then returned to the shoulder, the primary area of the complaint. He did not cup her breast. He only touched the side of the torso and would not go into the front chest area.

[142] It was noted on cross-examination that he was now acknowledging that he probably touched K.C.'s breast tissue. Whereas in his statement provided to the Police Officer, he flat out denied touching K.C.'s breast.

[143] I accept that when Mr. Huybers denied touching K.C.'s breast that he was referring to what most of us would think of as the breast and this would include the nipples. Therefore, I do not find that his information was inconsistent when he advises of the possibility of touching K.C.'s breast tissue.

Complainant C.H.:

[144] Mr. Huybers acknowledged that he treated her a few times. She had been pregnant for some of the sessions. She usually had a full body massage treatment, including the glutes and buttock. If she asked for an upper leg massage, that would make sense.

[145] He indicates that nothing stands out in his recall about C.H.'s treatments and did not notice her reacting oddly at all.

[146] He indicated that he did not recall touching C.H.'s vagina. In terms of the upper leg massage, he would undrape one leg at a time. The genital area remains covered with the sheet. If wearing underwear, the sheet is tucked into the underwear, if not, he uses the towel to secure the sheet.

Complainant M.H.:

[147] He advises that he has no recollection of treating M.H. He went through all of his records, receipts and verified with the insurance records as well. He did not have a file. He advises that he did not recognize her when she came into court.

Complainant S.T.:

[148] Mr. Huybers acknowledged that he had treated her on many occasions. She would have been on her stomach prone position for most of the treatment. In the prone position, it is typical for the palms of the hands to be facing up. She is petite and would have been in the centre of the table and her hands thus would not be near the edge.

[149] He denied rubbing his penis against her hand or arm.

Complainant J.A.:

[150] Mr. Huybers acknowledges treating her on a number of occasions. He indicated he would focus on her neck, back and shoulders__ the right shoulder specifically. He is unsure why in her testimony that she omitted saying that he had worked on her shoulders as well.

[151] A couple weeks after J.A.'s last session, Ms. Wilbur-Campbell advised that she had made a complaint so that he has more recollection of the session. He acknowledges authoring exhibit number four, an apology email.

[152] He recalls that she was laying in a prone position and the issue was her right shoulder. As a result of not getting much success or relief by only focusing on the back, he tried another technique. He placed his hand on her stomach in the area of the diaphragm, as it is known to be a trigger point to the shoulder to the same side. With a special draping for this technique, he provided her with a towel to hold over her breast area. He would have used her arm as a guide.

Complainant J.F.:

[153] Mr. Huybers acknowledges he treated her four or five times. The last session was when she was six to seven months pregnant. He treated her for the usual back and mid-low back issues and also focused more on the hips and glutes.

J.F. was worked in a sideline position due to her pregnancy. The drape covered the front of her and her back was fully exposed tucking the sheet into her buttlne.

[154] He does not recall touching her breast tissue. When she was on her back, she said that the draping was not appropriate but he does not recall this at all as this is why there are draping protocols that he follows. Everything below the collarbone would be draped.

ANALYSIS:

[155] It goes without saying that it is essential that the creditability and reliability of the complainants' evidence be tested in light of all the other evidence, particularly when the Crown's case, as is in this case, is dependant solely on the evidence of the complainants.

[156] There is a difference between creditability and reliability. The fact that a witness may be found credible does not answer the question whether the evidence is reliable. A credible witness can provide unreliable evidence. Credibility involves the veracity or truthfulness of the witness. Reliability involves the accuracy of the witness's testimony. In other words, the ability of the witness to observe and recall the evidence.

[157] Often the consistency between a witness's testimony and his or her statements on other occasions is the most valuable means of assessing reliability. I am entitled to accept all, none or some of the witness's evidence. It is important to keep in mind that a criminal trial is not about simply choosing whether I prefer the complainants' or accused's version of events. The ultimate question remains, have the charges before the Court been proven beyond a reasonable doubt?

[158] When assessing the evidence before the Court, it is important to place it in context before determining what inference to draw from it. I must scrutinize and carefully consider any circumstances that could affect the reliability of the evidence.

[159] Ms. Stacy, president of the Massage Therapist Association, noted that all RMT's are required to agree and adhere to a code of ethics which requires the RMT to always obtain informed consent before touching any part of the client's body.

[160] Both Ms. Boutilier and Ms. Wilbur-Campbell emphasized the necessity of continuing to check in with the client throughout the therapy session to ensure they are comfortable with the techniques and where they are being touched. Both confirmed that during a regular therapy session, the RMT would never expose or

touch the nipple or cup the breast. Neither would there be any reason to touch the genital area.

[161] Ms. Boutilier testified that the goal of draping a client is to ensure the client's privacy and to make them more comfortable during the session.

Nevertheless, it has happened in her practice that a prohibited area was exposed or touched accidentally. She would then discuss same immediately with the client.

[162] A RMT, in my view, must be accountable for maintaining the appropriate boundaries when providing massage therapy services to a client. It is important to keep in mind the position of vulnerability these clients find themselves in while receiving a massage. The therapist should constantly be aware of those boundaries and make the necessary changes or alterations to the method of service to ensure that those personal boundaries are not violated in any manner. Having said that, I acknowledge that given the nature of massage therapy and the close proximity of the parties, it would be unreasonable to expect that a therapist's body would not come in contact with the client on occasion.

[163] With the exception of J.A. and K.C., none of the complainants made a formal complaint to Strides at the time of the alleged incidents. J.A. and K.C. were also among the first to report and provide a statement to the Police concerning

these alleged incidents. There was a considerable amount of time between the alleged incidents and the subsequent reports to the Police.

[164] I am cognizant that there is no presumptive adverse inference when a complainant delays in disclosing an allegation of sexual assault to a later date, rather than at the time of the alleged incident. Each of the complainants in these matters articulated, in my view, very reasonable and credible reasons for not disclosing the allegation at the time of the alleged incidents.

[165] Complainants C.H., C.L., K.H., M.H. and S.T. all reported the alleged incidents and provided statements to the Police after hearing a media report of allegations against the accused. J.F. advised that she decided to come forward after having a discussion with friends about massages.

[166] Other than C.L. and M.H., none of the other complainants knew each other. C.L. and M.H. know each other from previous employment but were unaware of each other's complaint. There is no evidence before the Court that would suggest collusion between the complainants.

[167] The Crown submits that there is no evidence that suggests that the complainants who disclosed allegations after hearing the media reports were influenced in any way. I must respectfully disagree.

[168] As noted, six of these complainants did not consider making a complaint to the Police until they had heard that someone else had made a complaint through these media reports. In fact, many even thought up until that point, that perhaps the incident was an accident, they convinced themselves it was an accident, it was minor and had put matters behind them.

S.T.:

[169] S.T. testified that Mr. Huybers worked on both her right and left side of her body which required him to be on each side of her when working on that respective side. Nothing inappropriate occurred when he was working on her left side.

[170] However, while on her right side, she testified that his firm penis touched her right hand intermittently, she estimated approximately ten to twelve times, while he was massaging her.

[171] S.T. indicated that she was unable to say what direction her palms were facing so she is unable to indicate whether his penis touched the outside or the palm of her hand. She also did not indicate in her testimony as to whether her arms and hands were above or below the covering sheet.

[172] S.T. testified that nothing was said between her and Mr. Huybers about this incident and nothing else inappropriate occurred during that session or any further sessions.

[173] Mr. Huybers specifically denied rubbing his penis against S.T.'s hand or arm. He noted her petite stature and that she would have been positioned in the middle of the table. Ms. Boutilier confirmed that the client is typically positioned in the middle of the table so that the therapist can work from both sides of the client. Normally the palms of the hands are facing up.

[174] S.T. did not report this incident to Strides or the Police because she wanted it to be an accident and nothing else inappropriate occurred again, even though she attended upwards to fifteen future massages. She was convinced it was an accident until she heard about the media reports.

[175] I do not accept Mr. Huybers' evidence and do not find that it served to raise a doubt. This matter goes back to January of 2017 and S.T. has received a considerable number of massages from Mr. Huybers. It is difficult to accept that Mr. Huybers, upon hearing the allegation was able to recall that particular session alluded to by S.T. Mr. Huybers did not even suggest that there could have been an inadvertent touching given the close proximity of the parties during the session.

[176] I accept S.T.'s evidence that Mr. Huybers' genital area rubbed against her right hand while he treated her right side of the body, although I note that it only occurred on her right side and not her left side during the massage. Nothing was said during when this occurred. S.T. had attended for a significant number of massage sessions, approximately fifteen, where nothing else inappropriate or specifically something similar to what she experienced ever occurred again. This leads me to believe that perhaps this was an accidental rather than intentional touching. Consequently, I am unable to say that the charge of sexual assault has been proven beyond a reasonable doubt. Therefore, I find Mr. Huybers not guilty of the offence.

K.C.:

[177] K.C.'s testimony at trial concerning both massage therapy sessions advised of feeling Mr. Huybers' erect penis pressing against her neck and shoulder area.

[178] In her videotaped statement to the Police almost two years later, she used the words that he had pressed up against her, meaning she had felt an erection. She explained that she had not been through this before and perhaps had not used the appropriate words. This is reasonable and I accept that she meant she felt an erection.

[179] However, she further testified in court that in a meeting with the Crown Attorney and Police after this videotaped statement and before the trial, she did specifically say that Mr. Huybers had an erection. This was not confirmed in an admission from both the Crown and Defence.

[180] With respect to this allegation, the Court also has the benefit of exhibit number three, an email dated August 19, 2016, that was prepared by Ms. Wilbur-Campbell.

[181] Ms. Wilbur-Campbell prepared this email according to the information she was provided by K.C. concerning her complaint against Mr. Huybers. Ms. Wilbur-Campbell indicated in her evidence that she attempted to ensure that she captured all the information that had been provided by K.C. concerning her complaint.

[182] This email was reviewed and signed by K.C. without any changes or alterations. It was prepared within three months of the alleged incidents and presumably when the allegation was fresh and clear in K.C.'s mind.

[183] As noted, there is no mention of Mr. Huybers' erect penis making contact with K.C.'s shoulder or neck area.

[184] Mr. Huybers had no recollection of having an erection.

[185] With respect to the allegation that Mr. Huybers touched her breasts inappropriately, K.C. testified at trial that in both massage sessions his hands touched her nipples.

[186] Mr. Huybers did not believe that he cupped her breast or nipple.

[187] K.C. advised she was in a prone position while Mr. Huybers was working on her neck and shoulder area. Mr. Huybers was at the head of the table. She described his hands as being cupped in a “c” shape and moving up and down the side of her stomach area, going under her body and touching her nipples. She further described it as more than a graze, it occurred more than once and it definitely was not an accident in her mind.

[188] Additionally in the first session, May 18, 2016, specifically, she advises that when she rolled onto her back, Mr. Huybers’ hands went under the sheet and touched her nipples.

[189] In the first session, May 18, 2016, the email dated August 19, 2016, marked as exhibit number three, unsigned, and exhibit ten, signed, provided K.C.’s complaint as follows:

- Prone: Martin was standing at the head of the table and was massaging K.C.'s back, he cupped his hands around her ribs and breasts in a pulling motion.
- She wondered if this was a normal technique.

[190] In the second session, May 25, 2016, the same email provided the following:

- Martin asked K.C. to lift her hips and he leaned over the top around her neck and shoulders, scooped under her body by her pelvic bone and up to her breasts, touching her areola.

[191] Mr. Huybers faces two allegations of sexual assault with respect to this matter.

[192] Mr. Huybers had testified he had no recollection of having an erection and did not believe that he cupped her breasts or nipples. In my view, having no recollection or believing something did not happen does not answer the question as to whether or not the incident occurred. As a result, I am unable to determine whether I accept his evidence or his evidence serves to raise a doubt. I am unable to ascertain whether he means he cannot recall the session as a result of the passage of time and the considerable numbers of client he has provided service to throughout the years or to his knowledge, did not touch K.C. inappropriately.

[193] I do not accept his evidence with respect to having an erection or touching K.C.'s nipples and his evidence does not serve to raise a doubt.

[194] He did acknowledge, and I do accept, that even with proper draping he would touch breast tissue on the side below the armpit. He would not be doing a thorough massage if he did not do same.

[195] And although he does not have any recall of asking her to lift her hips or touching her in the area of her panty line, this would not make sense to be in that area where he was only treating her for a shoulder issue.

[196] Accordingly, I must review the evidence I do accept to determine whether the charges of sexual assault have been proven beyond a reasonable doubt.

[197] First dealing with the cupping of the breasts and touching her nipples. K.C. described Mr. Huybers' hands in a 'c' shape moving up and down the side of her stomach area and actually moving under her body so that his hands touched her nipples.

[198] She acknowledged that while lying in a prone position on the massage table, her breasts squished out from underneath her. Given her evidence that Mr. Huybers moved his hands underneath her body when touching her nipples, I am able to infer that her nipples were not exposed or squished out, to use her term.

[199] I accept that he would have touched the side of her breasts while performing the massage. However, I am not convinced that he was able to touch her nipples in that particular position.

[200] She also testified that in this session that Mr. Huybers, moving very slowly, went under the sheet and touched her nipples when she had rolled over onto her back. I am mindful that in her complaint to Ms. Wilbur-Campbell, almost three months after the incident, K.C. does not disclose an allegation of touching her nipples during the first session.

[201] In any event, I have difficulties accepting that the action of touching the sides of the breast in the context of a massage, while a client lays prone on the massage table, would be an intentional application of force without consent and that the touching would be construed as sexual in nature.

[202] In the second session, the complaint to Ms. Wilbur-Campbell does disclose Mr. Huybers asking her to lift her hips, which enabled him to scoop under her body from her pelvic area up to and over the nipples. I am not convinced that Mr. Huybers would even be able to place his hands under her body, touching her nipples in that position. I also make note that K.C. does not indicate that this occurred in her testimony. Rather, she advised that the massage occurred in the same manner as the first session.

[203] Dealing with the presence of an erection, I note that in her complaint to Ms. Wilbur-Campbell there is no mention of an erection pressing against her neck. Significantly, Ms. Wilbur-Campbell testified that she was attempting to take this complaint word for word. K.C. had an opportunity to review the complaint and signed same without making any changes or additions.

[204] K.C. was confusing in her testimony as to what she actually disclosed in her phone calls to Ms. Wilbur-Campbell. She first indicated that she did disclose the erection but later contradicted herself by indicating that she did not before the complaint document was prepared.

[205] Given the aforementioned discrepancies, I am of the view that it would be unsafe to enter a conviction. Accordingly, I find him not guilty of both charges.

M.H.:

[206] M.H. testified that when this incident occurred, she was laying in a prone position with her face in the cradle and her hands above her head with her elbows pointing out. Mr. Huybers was massaging her lower back, up the side of her stomach, up to the rib area and then the shoulder area. It was then that Mr. Huybers cupped the side of her right breast. He squeezed it a second to three seconds and continued massaging.

[207] M.H. indicates she only recalls one, as she describes, swipe on one side of her breast, under the breast, not the top of the breast and her nipple was not touched.

[208] She further advised in her testimony that she never wondered if this action was accidental but did not report it to the Police until she had heard that somebody else had made a complaint.

[209] Mr. Huybers testified that he did not have any recall of ever treating M.H. He additionally did not recognize her when she testified in court. He checked his records, receipts and with the insurance company and there was no record that he could find that would suggest he treated her.

[210] I acknowledge that there is a possibility that this information may have been missing in his records. I am not able to fully accept his evidence but given he did not even recognize M.H. when she testified, I am left in doubt as to whether this incident occurred.

[211] In any event, I would have difficulties finding that one swipe on the side of the breast, in the context of the massage, would be construed as a touching, sexual in nature. Accordingly, I find him not guilty.

J.F.:

[212] J.F. testified that she had six massage sessions from Mr. Huybers before anything inappropriate occurred. On the last session she had to lay on her side to receive a massage, as she was seven months pregnant at the time. Her back was exposed and Mr. Huybers was facing her back.

[213] While Mr. Huybers was massaging her upper back, she felt four of his fingers moving closer to the right side of her breast in a manner she described as more of a rubbing than a massaging action. However, she indicated he did not touch her nipple.

[214] She further testified that Mr. Huybers, in performing this massage, moved his hands below her panty line on her right side, further describing that he had to move the panty when doing so, but not the sheet.

[215] J.F. also testified in cross-examination that he put his hands on her belly, moving in a circular motion. She felt the movement was gradual and slow and seemed like part of the massage. J.F. also advised that when she rolled on to her back, he placed the blanket on her, barely covering her breasts.

[216] Mr. Huybers advised he did not recall draping J.F. inappropriately. He testified that he follows all draping protocols and thus everything below the collar bone would have been draped. He did not recall touching the sides of the breast.

[217] Despite saying earlier in her testimony that the inappropriate touching occurred when she was laying on her left side, J.F. later testified that she was actually on her left side first and nothing inappropriate occurred. She then turned on her right side and that is when the inappropriate touching occurred.

[218] I accept Mr. Huybers' evidence that he normally follows all draping protocols and that he did not recall draping J.F. inappropriately. Although he did not specifically deny this action, he does not recall touching her breast in the manner as described by J.F.

[219] Again with Mr. Huybers testifying to no recollection of the events, I am unable to accept Mr. Huybers' evidence and it does not, in my view, serve to raise a doubt. I must now consider the evidence that I do accept to determine whether the offence of sexual assault has been proven beyond a reasonable doubt.

[220] I accept J.F.'s evidence that during the massage she felt Mr. Huybers' fingers move closer to the side of her breast than she felt comfortable with and that it occurred more than once. Her nipple was not touched by Mr. Huybers. J.F. had received six massages prior to this particular session and had not previously felt uncomfortable.

[221] I note that J.F. indicated that any inappropriate touching occurred while she was on her side and not when she was on her back. I take from her evidence that she did not regard the placing of his hand on her belly as inappropriate touching.

[222] I do have two specific concerns with J.F.'s evidence. Although I accept that Mr. Huybers made contact with the side of her breast in a manner that she was uncomfortable with, I am not convinced that he intentionally did so. This only occurred at one session and on one side of her body. The action was described as closer to the side of her breast and not touching her nipple.

[223] Additionally, during her testimony she contradicted herself as to which side she was on when the inappropriate touching occurred. Therefore, I am not satisfied that the charge of sexual assault has been proven beyond a reasonable doubt and thus find him not guilty of this charge.

J.A.:

[224] J.A. testified that she attended for more than five massages with Mr. Huybers. It was only on the last occasion where everything proceeded in the same fashion until the last fifteen minutes when she was laying in a supine position. At that time, Mr. Huybers lifted the sheet and touched her stomach twice. Each time

she moved her arm up under her breast to block him from going any further. This action was never done in any other massages with Mr. Huybers.

[225] She subsequently made a complaint to Ms. Wilbur-Campbell the next day. Mr. Huybers sent an apology email dated June 17, 2016, marked as exhibit four. She advises she went to Police because she was prompted by Ms. Wilbur-Campbell. However, I note that the statement she provided to the Police was not until July 13, 2018, two years later.

[226] Ms. Wilbur-Campbell testified that she spoke to Mr. Huybers concerning the complaint from J.A. At that time, Mr. Huybers admitted to Ms. Wilbur-Campbell that he had rubbed her stomach to relax her and that he did not obtain further consent to do so. He was prepared to send the letter of apology but did not admit any wrong-doing to Ms. Wilbur-Campbell.

[227] Out of all the allegations, Mr. Huybers advised he had more recall of J.A.'s therapy session because of being advised of the complaint a couple weeks after the session.

[228] Mr. Huybers, in his testimony, acknowledged he had placed his hand on J.A.'s stomach in the area of the diaphragm. He informed that he was attempting a new treatment as the previous sessions did not resolve her issues.

[229] Both J.A. and Mr. Huybers provide consistent versions of events. I further accept Mr. Huybers' evidence that he placed his hand twice on J.A.'s stomach in the area of her diaphragm. This was for the sole purpose of attempting a new treatment that might help resolve her issues. There is nothing before, during or after these actions that would suggest a sexual component.

[230] Although, J.A. indicated that she felt he might touch her breasts this did not occur and without something more I am unable to find that his intention was to do so. Consequently, the charge of sexual assault is not proven beyond a reasonable doubt.

[231] However, given the facts before the Court I must consider the included offence of assault. J.A. testified that she had approximately five massage sessions with Mr. Huybers. This particular action was never performed in the prior sessions and there was no discussion between the parties about this new treatment. I accept Ms. Wilbur-Campbell's testimony that when Mr. Huybers was confronted with J.A.'s complaint, he acknowledged he performed this treatment without first obtaining J.A.'s consent.

[232] This action meets the definition of assault as defined in section 265. There was an intentional application of force without the consent of the other party.

[233] Accordingly, I find Mr. Huybers guilty of the included offence of assault.

K.H.:

[234] K.H. testified that she was face down on the massage table as Mr. Huybers was massaging her neck and shoulder area. As he was engaged in this activity, she described his pelvis area was moving in a thrusting back and forth motion against her left butt cheek.

[235] Mr. Huybers advised he has no recollection of humping K.H.'s left butt cheek. In fact, he conducted an experiment with his wife on the massage table depicted in exhibit one. He suggested that the client is usually positioned in the middle of the table. Attempting to re-enact this scenario at various heights of the massage table, he testified if this occurred, he would have had to be laying on K.H.

[236] K.H. was forthright in acknowledging that she was unable to say for sure that it was Mr. Huybers' penis that made contact with her left butt cheek.

Everything else in the massage had occurred appropriately.

[237] I again am unable to determine whether no recollection is related to his numbers of clients, the passage of time or that Mr. Huybers specifically denies this allegation. In spite of this, when I consider his evidence by way of the re-enactment alongside K.H.'s testimony that she was unable to say for certain what

exactly made contact with her left butt cheek, his evidence does serve to raise a doubt as to whether there was an intentional touching of a sexual nature.

Accordingly, I find him not guilty of this charge.

C.L.:

[238] C.L. testified that she had received approximately eight to ten massages from Mr. Huybers before these alleged incidents. However, on the last two massage sessions, she advised that she felt something rubbing against her mid-forearm to her wrist on the outside of her hand. It was almost like Mr. Huybers was trying to put the bulge in her hand.

[239] On the first occasion, this happened both when she was laying in a prone and supine position with Mr. Huybers at the head of the table. On the second occasion, she indicates that she was lying in a supine position when she felt Mr. Huybers leaning or pressing into her right hand.

[240] Further, at the first massage therapy session, after feeling something press against her arm, she put her head up and saw a bulge in his pants pointing up to the right. Each time in that first massage therapy session, Mr. Huybers looked startled or shocked when she looked up. However, there was no discussion between the parties.

[241] Mr. Huybers specifically denied thrusting his penis on C.L.'s wrist or forearm. He does recall C.L.'s drape coming down where her breasts were visible. He re-draped C.L. but felt uncomfortable enough to advise the receptionist and his colleague Amy Boutilier of the incident. Ms. Boutilier, in her evidence, does recall Mr. Huybers coming to her after a massage therapy session in 2016 or 2017 indicating he was uncomfortable with a client.

[242] Mr. Huybers faces two allegations of sexual assault with respect to this matter.

[243] Mr. Huybers gave evidence denying that he pressed his penis against C.L.'s wrist and forearm. He seems to have a clear recall of both sessions, noting on the first occasion her breasts becoming visible and on the second occasion being seated at the head of the massage table working on C.L.'s shoulders before C.L. indicated she had to poop.

[244] The first occasion involves C.L. in both prone and supine positions. She describes feeling something press up against the area between her mid-forearm and her wrist on the outside of the hand. She does not advise as to whether Mr. Huybers was standing or sitting at the time. Although she advises she looked up and was able to observe a bulge in Mr. Huybers' pants pointing to the right, which suggests he was standing.

[245] Mr. Huybers' response on both situations was to jump back and move on with the massage. C.L. testified that he looked shocked each time. This, in my view, lends itself more to an accidental touching rather than intentional.

[246] Having reviewed Mr. Huybers' evidence in the context of all the evidence, I accept that he did not intentionally press his penis against C.L. I also accept C.L.'s evidence that something pressed against her but a description of a bulge pointing to the right does not conclusively mean it was his penis. In any event, with nothing else occurring in the session, I would not be able to say there was a sexual nature associated with this pressing in the context of a massage. Accordingly, I find him not guilty of the first count on the information.

[247] On the last occasion, C.L. testified that she was in a supine position with her eyes closed and Mr. Huybers positioned at the head of the massage table. She does not say whether Mr. Huybers was standing or sitting at the time. C.L. advised that she felt an erection against her head and then her arm and hand. She does not indicate that she looked up to see what was pressing against her. She then, in her later testimony, indicates that she was actually in a prone position when this occurred.

[248] Without C.L. being able to say that she saw what was pressing up against her on that particular occasion and the confusion as to the position she was in at the

time, I am unable to find that there was an intentional touching sexual in nature in the context of this massage. Accordingly, I find him not guilty of this count on the information.

C.H.:

[249] C.H. testified that she was lying in a supine position while Mr. Huybers was massaging her right upper thigh with lotion. She further described that the tips of his fingers on his left hand touched her vagina for a split second. She did not advise as to whether this occurred over or under the sheet.

[250] Mr. Huybers advised he does not recall touching the genital area of C.H. Regardless, he notes that when performing a leg massage, while one leg is undraped the genital area remains covered with a sheet.

[251] C.H. indicated in her testimony that she honestly thought it was a mistake and that Mr. Huybers was unaware of what he had done.

[252] Given Mr. Huybers advised that he does not recall this situation rather than indicating that he did not touch C.H.'s genital area, I find that I am unable to make a determination as to whether I accept his evidence or whether his evidence serves to raise a doubt. He perhaps truly cannot recall the sessions as he has provided services to a considerable number of clients over several years and the incident

date is from 2016. Or, in the alternative, when he indicates he has no recall, he meant he did not, to his knowledge, touch C.H.'s genital area.

[253] Accordingly, I am left with assessing C.H.'s evidence and whether her evidence, if I accept same, is capable of proving the charge of sexual assault beyond a reasonable doubt.

[254] I accept C.H.'s evidence that Mr. Huybers touched her vagina. Although having reviewed the evidence, noting that the touch lasted a split second and it appeared to her that Mr. Huybers was unaware of his action, I cannot find that there was intentional touching of a sexual nature. In fact, her first reaction was that she thought the action had been a mistake. In addition, both before and after this incident when she attended for massage sessions with Mr. Huybers nothing inappropriate occurred, suggesting even more that the incident was an accidental touching. Therefore, I find Mr. Huybers not guilty of this offence.

Catherine Benton, JPC