PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R v Wallace*, 2021 NSPC 65

Date: 20210720
Docket: 8313261-70, 8313273-5
Registry: Pictou

Between:

Her Majesty the Queen

v

Bryden Joshua David Wallace

VERDICT

Restriction on Publication: 486.4
Any information that will identify the complainants shall not be published in any document or broadcast or transmitted in any way.

Judge:	The Honourable Judge Del W Atwood
Heard:	2021: 19, 26, 27 January; 3 March; 19, 20 July in Pictou, Nova Scotia
Charge:	Sections 151, 271, 286.1(2) *Criminal Code of Canada*
Counsel:	Alicia Kennedy for the Nova Scotia Public Prosecution Service Carbo Kwan for Bryden Joshua David Wallace

Order restricting publication — sexual offences

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

> (i) an offence under section 151, 152, 153, 153.1, 155, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or
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> (ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

By the Court:

Summary

[1] Bryden Joshua David Wallace is being prosecuted indictably in information 783344 with thirteen counts alleging sexual offences against two female young persons, AC and SC; Mr Wallace elected to be tried in this court. There is a publication ban in effect in accordance with ¶ 486.4(1)(a)(i) of the *Criminal Code of Canada*.[1]

[2] The charges are that Mr Wallace:

- between 1-31 August 2018, sexually assaulted AC contrary to § 271 of the *Code* (case 8313261), touched AC, a person under the age of 16 years, for a sexual purpose contrary to § 151 of the *Code* (case 8313262), and obtained for consideration the sexual services of AC, a person under the age of 18 years, contrary to § 286.1(2) of the *Code* (case 8313263);
- between 1-30 September 2018, committed the same types of sexual-assault, sexual-touching, and obtaining-sexual-services offences against AC (cases 8313264-6);

[1] The Court deferred the publication of these reasons until after the conclusion of Mr Wallace's trial matters in another judicial centre.

- again, between 1-30 September 2018, committed the same types of sexual-assault, sexual-touching, and obtaining-sexual-services offences against AC (cases 8313267-9);

- on or about 20 November 2018, obtained for consideration the sexual services of AC (case 8313270); [2] and,

- on or about 20 November 2018, sexually assaulted SC contrary to § 271 of the *Criminal Code* (case 8313273), touched SC, a person under the age of 16 years, for a sexual purpose contrary to § 151 of the *Code* (case 8313274), and obtained for consideration the sexual services of SC, a person under the age of 18 years, contrary to § 286.1(2) of the *Code* (case 8313275).

[3] Cases 8313271-2 (allegations of sexual offences involving a young person, RMH) were stayed by the prosecution prior to the start of the trial.

[4] The evidence presented by the prosecution advances the theory that Mr Wallace had sexual contact with AC, from August 2018 until November 2018, which

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[2] Mr Wallace is not charged with sexually assaulting or sexually touching AC on this date, presumably as AC had turned 16 by then, so that her consent to sexual activity was legally valid and not vitiated by § 150.1(1) of the *Code*.

occurred at various locations in Pictou County. Their contact ended on 20 November 2018, when Mr Wallace had his last sexual encounter with AC, and had his first and only one with SC. The prosecution asserts that Mr Wallace obtained the sexual services of these young persons in exchange for promises of money or controlled substances. The prosecution contends that the evidence proves beyond a reasonable doubt that Mr Wallace failed to take all reasonable steps to ascertain the ages of AC (who was15-16 years of age during the span of the allegations) or SC (who was 13 years of age on 20 November 2018).

[5] Mr Wallace admits having sexual intercourse with AC, but on 20 November 2018 only, and denies any sexual contact with SC. He asserts that any money-for-sex discussions with AC were initiated by AC, and that he never paid her anything that day. He admits giving AC cigarettes and cannabis on 20 November 2018 after his sexual activity with her had ended; however, he characterises this as a gratuity or a gift, rather than an exchange or payment for services. Further, he thought AC was old enough to have consensual sex with him.

[6] For the following reasons, I find Mr Wallace guilty of case 8313270, by obtaining for consideration the sexual services of AC, a person under the age of 18 years, on 20 November 2018. Furthermore, I find Mr Wallace guilty of

communicating with AC to obtain the sexual services of SC, a person under the age of 18 years, on 20 November 2018, case 8313275, the wording of the count to be amended to conform to the evidence. I find Mr Wallace not guilty of all remaining counts, as I find the external acts unproven.

Procedural History

[7] Mr Wallace was arraigned on 13 February 2019 before a presiding justice of the peace. He was released on a recognizance, order 2156704, to appear in Provincial Court in Pictou on 27 May 2019.

[8] Between 27 May 2019 and 26 August 2019, Mr Wallace had his matters adjourned on a number of occasions in order to retain counsel.

[9] On 26 August 2019, Mr Wallace appeared with defence counsel (not Ms Kwan), elected trial in Provincial Court, pleaded not guilty and sought a trial in the English language. The court scheduled the trial to be heard 31 March and 2 April 2020.

[10] On 2 March 2020, Mr Wallace's former counsel applied to be removed as solicitor of record; the application was granted, and the court adjourned matters to 9 March 2020 to allow Mr Wallace to retain successor counsel.

[11] On 9 March 2020, Mr Wallace appeared with Ms Kwan, and trial dates were set for 27-30 October 2020.

[12] On 25 August 2020, the court called Mr Wallace's matters of its own motion. At that point in time, the Provincial Court was operating under an essential-services model due to the public-health emergency, and had resolved to hear only those trials for persons who had been denied bail. As Mr Wallace had been admitted to bail and was not in custody, the court adjourned his trial to 19, 20, 26, 27 January 2021.

[13] Mr Wallace's trial proceeded as scheduled. Closing argument was set to be heard 2 February 2021, but had to be adjourned to 3 March 2021 due to a storm.

[14] On 3 March 2021, I heard closing arguments and reserved verdict until 7 April 2021.

[15] On 7 April 2021, I reserved my decision again, this time until 28 June 2021 to allow counsel to make further submissions regarding § 660/662 of the *Code* (attempts and included offences).

On 28 June 2021, I reserved my decision to today to allow counsel to make further submissions arising from two decisions which I considered to be

pertinent: *R v Dindyal*, 2021 ONCA 234 [*Dindyal*] and *R v Iqbal*, 2021 ONCA 416 [*Iqbal*].

Relevant and material evidence/governing admissibility law

Exhibits

[16] Four exhibits were tendered by the prosecution with the consent of defence counsel:

- Exhibit No 1: An agreed statement of fact. Among other things, the agreed statement of fact informed the court that SC was 13 years of age on 20 November 2018; AC had just turned 16 years of age shortly before 20 November 2018. Formal admissions under § 655 of the *Criminal Code* are conclusive for the trier of fact: *R v Falconer*, 2016 NSCA 22 at ¶ 45.

- Exhibit No 2: A binder of photographs taken by Cpl K T Lugosi depicting the exterior and interior of a motor vehicle described in ¶ 9 of the agreed statement of fact as being owned by Mr Wallace. The binder included macro-level photography of some of the vehicle's contents. The photographs were authenticated through the testimony of Cpl Lugosi; additionally, Mr Wallace was examined and cross-examined about them, and

he acknowledged that the photographs depicted accurately the condition of his vehicle when police seized it.

- Exhibit No 3: A stapled set of photographs depicting screen shots of text messages exchanged between Mr Wallace and AC on 19-20 November 2018. Although ¶ 10 of the agreed statement of facts states that a cellphone seized by police from Mr Wallace was subject to a data-extraction procedure, the screen shots that form Exhibit No 3 were taken from the cellphone of AC. Defence counsel consented to the admission of this exhibit. I find the screen shots to have been authenticated sufficiently by the testimony of AC and Mr Wallace, as comprehended in § 31.1 of the *Canada Evidence Act*, RSC 1985, c C-5 [*CEA*]; see also *R v CB*, 2019 ONCA 380 [*CB*]: the exhibit is acknowledged by both counsel to be accurate copies of screen shots representing electronic data that had been stored on Mr Wallace's phone when he and AC were exchanging messages; the screen shots are electronic documents as defined in § 31.8 of the *CEA* as a "display, printout or other output of . . . data." Accordingly, there is evidence capable of supporting a finding that the copies of the screen shots are that which they are purported to be: *R v Farouk*, 2019 ONCA 662 at ¶ 60; *CB* at ¶ 68. *CB* described the authenticity threshold as "modest"—at ¶ 51. In *R v Martin*, 2021 NLCA 1 at ¶ 49, the majority of the panel held that

an electronic record may be considered as authentic without being found actually genuine:

> [A]uthentication does not mean the document is genuine. If the "evidence capable of supporting" a finding had to actually determine that the electronic document is in fact what it purports to be, a court would always be required to subject individual pieces of electronic evidence to the standard of beyond a reasonable doubt or the balance of probabilities at the admissibility stage. Such a requirement conflicts with general evidentiary principles respecting the admissibility of evidence. There is no requirement that individual pieces of evidence (in this case an electronic document) be subjected to the standard of proof of beyond a reasonable doubt or the balance of probabilities during the trial process. There is no requirement in criminal cases (*R. v Morin*, [1988] 2 SCR 345 (SCC) at 354; and *R v JMH*, 2011 SCC 45, [2011] 35 S.C.R. 197 (SCC) at para. 31). Neither am I aware of any evidentiary principle requiring that evidence be admitted only if it is proved to be actually true or reliable. The truth and reliability of individual pieces of evidence is left to the judge's weighing and evaluating in the context of all of the evidence in making the final determination. In short, a piece of electronic evidence does not have to meet an additional standard of proof like the balance of probabilities or beyond a reasonable doubt in order to be admitted into evidence. Individual pieces of evidence tendered in a trial are admitted on the basis of relevance to a fact in issue, subject to exclusionary rules and the prejudice versus probative value inquiry.

Mr Wallace's own testimony put him at the keypad for his part of the exchange, and so he was in possession of the texts at one point in time. Furthermore, there was no need for the sort of *voir dire* as described in *R v Ball*, 2019 BCCA 32 and *R v Evans*, [1993] 3 SCR 653 at 661, or more generally in *R v Greenwood*, 2014 NSCA 80 at ¶ 135 [*Greenwood*]: this was not a jury trial, it was not contested that the screen shots were an accurate and complete record of text exchanges between Mr Wallace and AC on 19-20 November, and both the prosecution and defence sought to benefit from the content of the messages reproduced in the exhibit. They are out-of-court

statements, and must be approached with caution—even when admitted by consent, evidence must be confined to its proper use. The text messages are electronically-stored data that have two components: (1) those authored by Mr Wallace, and (2) those authored by AC. The messages sent by Mr Wallace may be received as statements against interest or as admissions: *R v Evans*, [1993] SCJ No 115 at ¶ 24. What about AC's part of the dialogue? The court must not use AC's texts to prove the truth of what they assert, as that use would offend the hearsay rule; the court must not admit them as prior-consistent statements, in order to support the inference that AC's testimony is more likely to be true. However, they may be used to provide context to Mr Wallace's part of the conversation: *R v Tso*, 2020 BCCA 358 at ¶ 39. All of the texts may be received by the court as relevant to and probative of live issues at trial—specifically, to ascertain (1) whether there was communication between Mr Wallace and AC, and (2) the purpose of the communication: *R v Aslami*, 2021 ONCA 249 at ¶ 30. Admitting the text messages based on the documents-in-possession rule (*ie*, as non-hearsay, circumstantial evidence, received by a trier to help determine whether a person was complicit in an alleged criminal matter) assists the court in ascertaining if Mr Wallace, in his text messaging with AC, was seeking to obtain sexual services for consideration: *R v Bridgman*, 2017 ONCA 940 at

¶ 67-70. Additionally, the texts provide the court with context for Mr Wallace's plan to meet AC and SC: *R v Butcher*, 2018 NSSC 105 at ¶ 6-8, and 24; aff'd 2020 NSCA 50 at ¶ 69; leave to appeal dismissed, [2020] SCCA No 310. However, the texts cannot be used to verify AC or SC's testimonial version of events: *Greenwood* at ¶ 110.

- Exhibit No 4: a closed-circuit video recording covering a retail space of a service station in Blue Acres; the recording captures Mr Wallace purchasing what appears to be a tobacco product on 20 November 2018. Mr Wallace agreed it was he in the video, and so I find it authenticated sufficiently.

[17] The court must remain mindful of the fact that the admission in evidence of a party's exhibit with the consent of opposing counsel represents, without more, only an acknowledgment that the exhibit meets the threshold criteria for admissibility: authenticity, materiality, relevance, probative value that is not outweighed by prejudicial effect, and not barred by an exclusionary rule. A consent to admissibility does not foreclose opposing counsel from challenging the effect of the exhibit, the use a court might make of it, or the weight to be given to it.

Witness testimony

[18] I will summarize the witness testimony in the order I find most informative and pertinent to the live issues. The summary will be abbreviated, as I believe that it is more important for a court to analyse evidence, rather than engage in a lengthy recitation of it. Counsel may be assured that I have reviewed the record in detail.

Witness testimony—SC

[19] SC was the first witness for the prosecution. This was her evidence on direct examination:

- She was living at a group home in Pictou County on 20 November 2018.
- She was 13 years old on that date; this is admitted in ¶ 5 of the agreed statement of fact, Exhibit No 1.
- On that date, she and AC left the group home without permission.
- She and AC went to a nearby home of their friends, A and S.
- She and AC left their friends' home at some point, and walked a short distance to the Esso service station in Blue Acres.
- SC and AC were picked up in a car by an adult male.
- AC introduced the male to SC as Mr Wallace.

- SC had seen AC texting with someone prior to getting picked up; AC had told SC that she was texting with Mr Wallace.
- The person identified to SC as Mr Wallace was the driver; AC sat in the front passenger seat; SC got in back.
- SC described the car as a "limo . . . greyish, kind of brown."
- Mr Wallace drove away from the service station, and eventually turned off the main road onto a secondary road; after about 10-15 minutes, Mr Wallace pulled into what appeared to SC to be a car-pool spot.
- SC got out of the car while AC and Mr Wallace stayed inside.
- SC saw AC having sexual intercourse with Mr Wallace; the car was shaking.
- After about 10 minutes, SC got in the car and positioned herself in the front passenger seat; AC got in the back seat.
- AC told SC to have sex with Mr Wallace.
- Mr Wallace removed SC's pants, then removed his own pants; he hopped between SC's legs and placed his penis in her vagina.
- While this was happening, SC saw Mr Wallace reaching into the back-seat area and placing his fingers inside AC's vagina.

- Mr Wallace ejaculated inside SC's vagina; he was not wearing a condom.
- SC felt kind of scared and wanted to return to the group home.
- After a short period of time, the sexual activity stopped.
- AC returned to the front passenger seat.
- Mr Wallace then drove to Stellarton, and stopped at an NSLC store which was right next to a Sobeys store.
- While in the parking lot of the store, AC asked Mr Wallace to buy SC and AC vodka and weed "for the sex."
- Mr Wallace went into the NSLC and returned with vodka and weed that he passed to AC; AC passed the vodka to SC.
- AC then asked Mr Wallace for smokes.
- Mr Wallace drove SC and AC to an Irving service station; Mr Wallace went inside and returned with "Blue McDonalds" cigarettes which he passed to AC.
- Nobody talked about anyone's age.

[20] SC was shown photographs in Exhibit No 2; she identified the vehicle in the photography as the one driven by Mr Wallace on 20 November 2018; she also pointed out some of the vehicle contents which she stated she remembered from that day. The court was not informed whether SC had ever seen the photography prior to testifying in court. Further, the only photography shown to SC in court was Exhibit No 2. It would seem that, any time the identification of a thing by a witness is controversial—whether it be a face or a place—the reliability of the testimony will be diluted if the witness is shown only the pictures of the place or of the face that is the subject of the identification controversy. There was a live issue whether SC had ever been inside Mr Wallace's vehicle. The fact that the prosecution presented her on the witness stand with only the photographs of Mr Wallace's vehicle left SC with no choice about which images to pick or describe. This method of place identification is subject to the same risk of suggestion as faulty face-identification procedures well known in criminal proceedings, as when an eyewitness who saw somebody doing something is shown pictures of one suspect only, is presented with one live suspect in a show-up, or is asked to do a dock identification in court. I find SC's identification of the photography in Exhibit No 2 to be of very limited weight in determining whether SC was ever in the vehicle.

[21] SC was cross-examined by defence counsel; SC repeated much of what she had recounted on direct examination:

- SC was afraid of AC because of her use of offensive language.
- It was AC's idea to leave the group home.
- They took about 5-10 minutes to walk to the home of a friend, and arrived about 5-5:30 pm.
- After staying at the friend's house for about 15 minutes, AC said it was time to leave because Mr Wallace was on the way.
- SC had seen Mr Wallace's Facebook profile photo.
- SC and AC met Mr Wallace at a service station a short walk away from the friend's home.
- Mr Wallace drove AC and SC out to a wooded area.
- AC told SC to get out of the car.
- While waiting outside the car, SC had a smoke.
- SC was cross-examined about a statement she had given to police on 30 November 2018. The cross-examination did not reveal any significant inconsistencies with SC's testimony on direct examination.

- Mr Wallace did not use a condom.
- SC could see Mr Wallace's face and it matched his Facebook profile photo.
- Mr Wallace and AC talked about what was going to be bought.
- Mr Wallace drove AC and SC to an NSLC store in Stellarton. Mr Wallace went in the store and bought weed and vodka and passed it to AC.
- Mr Wallace then drove to a service station. AC told him to buy a pack of Blue McDonalds cigarettes.
- Mr Wallace went in the service station and returned with the cigarettes.
- There had never been a discussion about anyone's age.

[22] There was considerable cross-examination about SC's recollection regarding the contents of Mr Wallace's car, presumably to challenge SC's testimony that she had been inside it on 20 November 2018. This cross-examination was advanced by defence counsel repeatedly showing SC the photography in Exhibit No 2, and so I had some difficulty understanding the purpose of it. If a cross examiner is seeking to test the independent recollection of a witness about

the features of a place, presenting the witness with a photographic record which purports to depict the place may serve to compromise that project.

Witness testimony—AC

[23] AC was the fifth witness for the prosecution. This is a précis of her direct-examination evidence:

- She was 15 years old during the summer and early fall of 2018, and had turned 16 years of age by 20 November 2018; this is admitted in ¶ 4 of the agreed statement of fact, Exhibit No 1.
- AC had met Mr Wallace in February or March 2018 when she was living at a group home in Cape Breton.
- AC had told Mr Wallace she was 15; he didn't really care.
- AC moved to a group home in Pictou County in August 2018, and used to see Mr Wallace when she went out for walks.
- AC and Mr Wallace met for sex six or seven times in August and September 2018 at locations in Pictou County.
- AC's recollection of events was a little foggy as she had been high on drugs.

- AC identified the screen shots in Exhibit No 3 as text messages she had exchanged with Mr Wallace on 20 November 2018.
- As a result of the messages, AC and SC left the group home on 20 November 2018 to meet Mr Wallace at an agreed spot—a nearby service station.
- Mr Wallace pulled up in a black car.
- AC got in the front passenger seat; SC got in the back seat.
- Mr Wallace drove them to a location near a field.
- AC got in the back seat and had sex with Mr Wallace; "he put his penis in my vagina . . . I didn't really have a choice at that point."
- AC then watched Mr Wallace have sex with SC.
- Prior to 20 November 2018, AC had met with Mr Wallace for sex 6-7 times.
- AC was really high when it happened.
- Most of the time, Mr Wallace was driving an orange car; however, on one occasion they had sex in a trailer that was parked at the Sobeys store in Stellarton.
- AC was 15 or 16 when these encounters happened.

- Mr Wallace would give AC money for sex.

[24] AC was shown Exhibit No 2 and the photography of the interior of Mr Wallace's vehicle. As with the evidence of SC, I found this component of the direct examination to be of limited weight, as it was not clear whether AC had been shown the photographs prior to trial; further, the photos in Exhibit No 2 were the only ones shown to AC during the trial depicting the interior of a vehicle.

[25] AC was cross-examined extensively and very fairly by defence counsel. Many of the questions seemed to offer AC the opportunity to reinforce her direct-examination evidence, or to clarify and explain areas that direct examination had left unclear or imprecise.

[26] It is useful to recall the purpose of cross-examination, which is to weaken evidence given on direct—*R v Borden*, 2017 NSCA 45 at ¶ 115—rather than to afford an opponent's witness the opportunity to reiterate what was said on direct, or to seek answers to notional questions that direct examination might have left unanswered. An economical, closely focussed and restrained cross-examination may have a far stronger effect than one that is wide ranging.

[27] On cross, AC repeated and elaborated on much of her direct evidence.

- When they first met, AC had told Mr Wallace she was 15 years old; he kind of shrugged.
- AC was one hundred percent certain she had told Mr Wallace her age.
- AC denied telling Mr Wallace she was 17 going on 18.
- AC moved to the group home around 22 August 2018.
- Mr Wallace used to show up near the group home, and he "tried to come after me".
- They continually messaged on Facebook, but they were never Facebook friends
- AC and Mr Wallace would usually meet near the Esso.
- Mr Wallace would message her for sex, and usually pay her $100 in $20s.
- Most of the encounters happened out of town in an orange car.
- One encounter happened in a utility trailer or RV owned by Mr Wallace's boss. A friend of AC's, RMH, also had sex with Mr Wallace on this occasion. The trailer was parked beside Sobeys in Stellarton.
- AC's memory of August-September 2018 was foggy as she had been high on drugs when those encounters with Mr Wallace had taken place.

- On 20 November 2018, AC was sitting beside SC in SC's bedroom at the group home where they lived.
- AC was texting Mr Wallace about sex; SC was telling AC how to reply.
- It was SC's idea that both of them would have sex with Mr Wallace.
- AC and SC left the group home without the permission of staff.
- They met Mr Wallace as agreed at a nearby service station.
- AC got into the front of Mr Wallace's car; SC got in the middle or in the back.
- AC was high on "molly" that she had taken before leaving the group home.
- Mr Wallace drove about 10 minutes and stopped in an area surrounded by trees.
- SC got out of the car for a few minutes.
- AC and Mr Wallace had sex; then SC re-entered Mr Wallace's car and "all three of us did it."
- While SC and Mr Wallace were having sex, AC sat beside them.

- Mr Wallace touched AC's vagina as he had sex with SC.
- The sexual encounter lasted about 5 minutes.
- After it was over, AC and SC put their clothes on. AC got out of the car and moved to the front seat.
- Mr Wallace took them to the NSLC on the east side of New Glasgow; Mr Wallace went inside and returned with the bag of liquor.
- Next, Mr Wallace drove to a nearby service station where he bought cigarettes for AC.
- Mr Wallace dropped off AC and SC at a water tower; SC and AC walked back to the group home.

[28] AC was cross-examined extensively on a statement she had given to police on 30 January 2019.

[29] It is useful at this point to review the law regarding the cross-examination of witnesses on prior statements.

[30] A statement made by a witness prior to trial may be the subject of cross-examination under either § 10 or 11 of the *CEA*.

[31] Section 10 permits cross-examination on any written or recorded statement "relative to the subject matter of the case"; note that the statement need not be inconsistent with the testimony of the witness. However, the statement must have been written or recorded.

[32] Section 11 allows for cross-examination on *any* statement "inconsistent with . . . [the] present testimony" of the witness. The statement need not have been written or recorded.

[33] Neither provision is a memory-refreshing mechanism, and so not constrained by the requirements of, say, *R v Fliss*, 2002 SCC 16; an opponent's witness does not have to acknowledge being in need of memory refreshing as a condition precedent to counsel pursuing a § 10 or 11 *CEA* cross-examination. Quite apart from any supposed legal requirements, one might question whether it is ever useful to try to refresh the memory of an opponent's witness.

[34] Should a witness admit making an earlier statement inconsistent with in-court testimony, the earlier statement does not become proof of the truth of what was said unless the witness should go on to adopt the statement: *R v Livermore*, [1995] 4 SCR 123 at ¶ 54; *R v Mauger*, 2018 NSCA 41 at ¶ 29. A statement is considered to have been adopted only if the witness (1) admits making the statement, and (2) acknowledges its truth based on present memory:

R v Abdulle, 2020 ONCA 106 at ¶ 136; leave to appeal to SCC refused, [2020] SCCA No 156. If unadopted, the statement may be used to assess credibility only.

[35] Section 10 permits a judge to require counsel conducting a cross-examination to produce a statement when it is being used to contradict the testimony of a witness. However, regardless of whether § 10 or 11 of the *CEA* might govern, when a prior statement is used for cross-examination purposes, the statement is not put in as an exhibit, unless it has been the subject of extensive questioning: *R v Rowbotham*, [1988] OJ No 271 at ¶ 121; *R v Rodney*, 1988 CarswellBC 448 at ¶ 34 (CA), affirmed on unrelated grounds [1990] 2 SCR 687. The reason for not exhibiting a prior statement used in cross-examination is this: evidence is admissible if it is informative, relevant, material, not subject to an exclusionary rule, and of sufficient probative value as not to be outweighed by prejudicial effect. When a statement is the subject matter of extensive cross-examination as to credit, only that portion of the statement as is used for cross-examination purposes meets this test for admissibility (and even that proposition is qualified, as the probative value of an unadopted statement is not clear; further, if a prior statement should be adopted by the witness, then the testimony of the witness would render the prior

statement superfluous). In such a case, receiving an entire statement as an exhibit—when only a small fragment of it would be pertinent legally, and even then, for a limited purpose only—would be inefficient and render the statement prone to misuse.

[36] As a practical matter, it is important that, when embarking on a cross-examination of a witness on a prior statement, counsel make it clear to the witness precisely what it is that is being asked. In a cross-examination on a prior statement, witnesses are no longer being questioned about what happened; rather, they are being asked about what they might have said to somebody about what happened. This distinction might not be appreciated by persons who are not legally trained and who are already enduring the stress and anxiety of the courtroom. Absent a clear and instructive explanation from counsel, witnesses will get confused—as will the court. This confusion may be compounded by cycling back and forth between questions that deal with the prior statement and questions that deal with the what-happened piece.

[37] Further, it will be futile, in closing argument, to assert as a fact something said in an out-of-court statement when the witness was never called on to adopt it.

[38] Returning now to AC's statement to police: AC admitted on cross-examination never having mentioned to police that SC had gone with her and Mr Wallace on 20 November 2018. AC explained this omission by saying that she did not want to get SC involved in a police investigation. I shall review later the significance of this point.

Witness testimony—Kristen MacDonald-Hynes

[39] Kristen MacDonald-Hynes was the second witness for the prosecution. This is a précis of her evidence:

- On 20 November 2018, she was on duty as a youth counsellor at the group home where SC and AC were living in the care of the Department of Community Services.
- SC had moved to the group home about a month before 20 November 2018; AC had been there since the summer of 2018.
- She saw SC and AC leaving the group home without permission on 20 November 2018. She lost sight of them. This was late in the afternoon.
- The group home called the RCMP to try to locate SC and AC.

- SC and AC returned to the group home at around 8 pm on 20 November 2018; both appeared to be under the influence of impairing substances. AC was throwing up.

[40] Because of the use by Ms MacDonald-Hynes of the passive voice, I was left uncertain whether she was describing observations she had made herself, or was relating what other staff had told her. This uncertainty was reenforced by a very insightful cross-examination, as Ms MacDonald-Hynes testified she did not speak to AC at all after AC and SC had returned to the group home; further, she testified that she did not speak to SC until the next day.

Witness testimony—Cst Jason Bent

[41] Constable Jason Bent was the third witness for the prosecution. This is a précis of his evidence:

- At the request of the investigator assigned to the case, he met SC on 18 December 2018.

- He proceeded to record a video while he drove with SC, trying to retrace the route from 20 November 2021. They started in Blue Acres, then proceeded out to the MacLellan's Brook Road, onto the Brookville Road,

and finally entered the Sherbrook Highway. The video recording was not exhibited at trial.

- SC directed Cst Bent to an NSLC store at the Aberdeen Business Centre in New Glasgow as the one Mr Wallace had taken her and AC, not the one in Stellarton, as had been SC's testimony.

[42] There were no defence objections to Cst Bent's testimony. This does not give the court licence to receive that evidence for an inadmissible use. Presumably, the prosecution's purpose in putting the evidence before the court was to show that SC was mistaken when she had testified that she, AC and Mr Wallace had gone to the NSLC in Stellarton to buy weed after the sexual activity had ended. As was established by the evidence of Cst Bent, AC and Mr Wallace, the one cannabis-selling NSLC store in Pictou County is in New Glasgow at the Aberdeen Business Centre, not the NSLC outlet in Stellarton mentioned by SC. SC's giving of directions to Cst Bent, if offered as an implied assertion that Mr Wallace drove AC and SC to the NSLC in New Glasgow, not Stellarton, might be taken as implicating the hearsay rule—an out-of-court statement offered for the proof of the truth of its contents.

[43] A further problem is that, if the evidence of Cst Bent was intended to contradict the evidence of SC about where she had gone with AC and Mr

Wallace to buy weed, the provisions of § 9(2) of the *CEA* would seem to be engaged, and the prosecution should have sought to refresh SC's memory, after which SC might have been cross-examined.

[44] In the result, it is not necessary for the court to sort out these controversies. This is because Cst Bent's ride-along with SC took place almost a full month after 20 November 2018, and so I find his evidence to be of little probative value or weight.

Witness testimony—Cpl K T Lugosi

[45] Cpl K T Lugosi was the fourth witness for the prosecution. She took the photography in Exhibit No 2. Her evidence was not controversial. The witness was not questioned about whether she had shown the photography to AC or SC prior to the start of the trial.

Witness testimony—Mr Wallace

[46] After the close of the case for the prosecution, Mr Wallace testified in his defence. This is a précis of his evidence:

- He had been told by AC around May 2018 that she was "seventeen going on eighteen".

- He admitted having contact with AC by social media between May-November 2018.
- He acknowledged exchanging text messages with AC on 20 November 2018 as depicted in the screen shots in Exhibit No 3.
- As a result of the messaging with AC, he drove to a service station and picked up AC.
- No one else was with AC.
- He drove AC to MacLellan's Brook.
- He acknowledged having sexual intercourse with AC.
- AC asked him afterward if "I could get her weed and cigarettes."
- He drove AC to the cannabis outlet at the Aberdeen Business Centre NSLC store to buy cannabis, then to a service station to buy cigarettes, because "I thought she didn't have any and wanted some".

[47] It was Mr Wallace's evidence that, when he arrived at the Esso on 20 November 2018 for the rendezvous as arranged with AC, it was AC and AC alone who met him. SC was not there.

[48] He denied meeting AC at any time between August-September 2018. He stated that he was away during those months in other parts of the Maritimes working at carnival sites.

[49] Mr Wallace made it clear that it was AC who initiated the texting on 20 November 2018, and that the cigarettes and cannabis he gave her were not meant as a payment for sex.

[50] Mr Wallace was cross-examined thoroughly by the prosecution on a number of matters.

- His criminal record.
- A statement he admitted making to a police investigator on 12 February 2019.
- His work schedule during August-September 2018.
- His contact with AC between August and October 2018.

[51] I will address the effect of the cross-examination of Mr Wallace later in this judgment.

Core factual and legal questions

[52] I find the core factual and legal questions in this trial to be:

1. Does the evidence prove beyond a reasonable doubt that Mr Wallace had sexual contact with AC between August-September 2018?
2. Does the evidence prove that Mr Wallace's admitted sexual contact with AC on 20 November 2018 was a service obtained for consideration?
3. If the answer to question No 2 is "yes", does the evidence prove beyond a reasonable doubt that Mr Wallace knew that AC was under 18 years of age at the time, or prove beyond a reasonable doubt that Mr Wallace failed to take all reasonable steps to ascertain the age of SC?
4. Does the evidence prove beyond a reasonable doubt that Mr Wallace had sexual contact with SC on 20 November 2018?
5. Even if the answer to question No 4 is "no", does the evidence prove beyond a reasonable doubt that Mr Wallace communicated with AC to obtain the sexual services of SC for consideration knowing SC was under 18 years of age?

Specific legal rules and provisions

Reasonable doubt

[53] A ritualist recital of the governing criminal-proof principles is inefficient as it is time consuming and offers no guarantee against a reversible verdict. What is more important than the rote-like repetition of the law is its application, which should be made evident in the court's reasoning process.

[54] However, there are certain specific legal principles that warrant special attention.

Sequence of analysis

[55] Various algorithms have been advanced in reported cases proposing best practices for the sequence to be used by trial courts in analyzing evidence. *R v W(D)*, [1991] 1 SCR 742 at 758 [*W(D)*] seems to invite a trier deliberating on a verdict to give priority to evidence coming from the accused; this leads sometimes to the argument on appeals from conviction that the accused's evidence was subjected to excessive and uneven scrutiny. Contrast *W(D)* to the approach found in *R v JCH*, 2011 NLCA 8 at ¶ 12-14, which held that the evidence of the prosecution should be considered first. When this sequence is followed, the objection then arises that the trial court allowed the evidence for the accused to get eclipsed by the evidence for the prosecution. In my view, it is not the sequence of the analysis of the evidence, but the thoroughness of it,

that matters; further, the court must avoid an approach that subjects the testimony of an accused person to uneven scrutiny, or that renders the trial a truth-telling contest: *R v Vuradin*, 2013 SCC 38 at ¶ 21.

Multiple counts

[56] In a trial involving multiple counts, the court must guard against propensity or bad-conduct reasoning. These terms describe a type of heuristic that would have a trier treat proof of one count as supporting convictions for other counts. The prosecution acknowledges that it is not seeking count-to-count reception of similar-fact evidence. Accordingly, the court must treat each count as a separate indictment: *R v RTH*, 2007 NSCA 18 at ¶ 93. Nevertheless, the court may apply credibility findings across all the counts, provided that the court explain why it is doing so: *R v PEC*, 2005 SCC 19 at ¶ 1; *R v RAG*, 2008 ONCA 829 at ¶ 13; *R v Wright*, 2019 BCCA 234 at ¶ 57-58.

Statement made by Mr Wallace to police, used by the prosecution for cross-examination

[57] The prosecution has a discretion whether to seek to have admitted into evidence a statement made by an accused person to someone in authority: *R v Edgar*, 2010 ONCA 529 at ¶ 24; David Watt, *Watt's Manual of Criminal Evidence 2020* (Markham: Carswell, 2020) at ¶ 37.06.

[58] The prosecution may exercise that discretion permissibly by not seeking admission of the statement during its case in chief; instead, it may hold off in order to use it for cross-examination of the accused, provided the choice to defer not serve as a camouflage for case splitting: *R v EA*, 2021 ONSC 1048 at ¶ 7; *R v Osborne*, 2019 ONSC 839 at ¶ 11; *R v King*, [1998] OJ No 662 at ¶ 28 (SCJ); *R v Brooks*, [1986] BCJ No 510 at ¶ 114 (CA). A statement held back by the prosecution for cross-examination as to credit must still be proven voluntary beyond a reasonable doubt: *R v BG*, [1999] 2 SCR 475 at ¶ 32. In this case, defence counsel admitted to the voluntariness of a statement given to police that was used by the prosecution in cross-examining Mr Wallace.

Motive to fabricate

[59] This is a trial in which the evidence of the complainants and the evidence of the accused are in direct contradiction in relation to most of essential elements inherent in the charges before the court. In trials of this nature, it is important that the court not impose upon an accused person a burden of proving why a complainant might fabricate an account of a sexual offence. This sort of burden shifting is inconsistent with the presumption of innocence: *R v Ignacio*, 2021 ONCA 69 at ¶ 37-60; *R v Riche*, [1996] NJ No 293 at ¶ 15 (CA). What must be avoided also is the suggestion that the absence of a motive to fabricate

establishes conclusively that a witness is telling the truth. A proven lack of motive can be a compelling factor in assessing credibility; however, the mere absence of any evidence of a motive to fabricate—which I find to be the circumstance prevailing in this trial in the evidence of SC and AC—is only one of many factors to be considered in a credibility assessment: *R v Dindyal*, 2021 ONCA 234 at ¶ 21-23; *R v Batte*, [2000] OJ No 2184 at ¶ 121; see also *R v Cooke*, 2020 NSCA 66.

Findings of the court

Does the evidence prove beyond a reasonable doubt that Mr Wallace had sexual contact with AC between August-September 2018?

[60] I shall begin the court's analysis of the evidence with the first-in-time charges: the allegations of Mr Wallace engaging in sexual activity with AC between August to September 2018, case numbers 8313261-9.

[61] Mr Wallace testified to his work schedule from August to September 2018. As was made evident in cross-examination, this was not evidence of an alibi, as Mr Wallace's presence at his various job sites in the Maritimes during those months would have made it merely difficult, but not impossible, to have met up with AC in Pictou County.

[62] Furthermore, the prosecutor's careful and thorough cross-examination of Mr Wallace on the statement he gave to police satisfies me that the court ought to be cautious about accepting the reliability and credibility of Mr Wallace's account of the allegations against him. In his statement to police, Mr Wallace started out by feigning denial of any sexual contact with AC whatsoever; he acknowledged only grudgingly meeting AC for sex on 20 November 2018, and this only after having been confronted by police with his text messages from that date. Mr Wallace admitted on cross that he made the statement, and adopted it, albeit with reluctance

[63] The text messages themselves are revealing, as they appear to demonstrate Mr Wallace's familiarity and facility with the money-for-sex topic in his communications with AC.

[64] Nevertheless, I find that Mr Wallace's evidence about his remote work sites—in combination with other evidence—leaves me in a state of reasonable doubt whether Mr Wallace had in-person contact with AC from August to September 2018, cases 8313261-9.

[65] I agree with defence counsel that AC's testimony about those alleged occurrences lacked the detail present in her account of the 20 November 2018 occurrence (although this argument was weakened somewhat by the cross-

examination of AC, which afforded AC the opportunity to elaborate on answers given on direct). Further, while there was evidence from a worker at the group home (Ms MacDonald-Hynes) about AC's unauthorized absence on 20 November 2018, there was no evidence of similar observations by group-home staff of AC's comings and goings from August to September 2018.

[66] Significantly, although Mr Wallace's phone was seized and subjected to a data-extraction procedure, no screen-shot evidence was presented to the court of text messages exchanged between Mr Wallace and AC during the months of August-September 2018 when, according to AC, their communication by smartphone was frequent. Nor were there any screen shots from AC's phone covering that period.

[67] Being left in a state of reasonable doubt regarding cases 8313261-9—particularly, whether Mr Wallace had any in-person contact with AC from August-September 2018—I find Mr Wallace not guilty of those counts.

Does the evidence prove that Mr Wallace's admitted sexual contact with AC on 20 November 2018 was a service obtained for consideration?

[68] Case 8313270 alleges that on 20 November 2018, Mr Wallace obtained for consideration the sexual services of AC, a person under the age of 18 years.

[69] Critical are the following facts which the court finds to have been proven conclusively based on Mr Wallace's own testimony and admissions:

- AC had told Mr Wallace around May 2018 that she was "seventeen going on eighteen".
- Mr Wallace exchanged texts with AC on 20 November 2018.
- AC put forward in her text a plan of AC and SC having sex with Mr Wallace for a payment of $60.
- AC and Mr Wallace arranged a time to meet.
- Mr Wallace urged secrecy: "An [*sic*] this stays between us right."
- AC asked Mr Wallace: "Yes how much would u do for both of us".
- Mr Wallace's reply: "I only have 80 on me".
- The text exchange ended with Mr Wallace informing AC that he would drive to the Esso right away.
- Mr Wallace picked up AC as agreed.
- Mr Wallace drove AC to a remote location where they had sexual intercourse.
- Mr Wallace bought AC cannabis, vodka and cigarettes afterward.

[70] In my view, this establishes entirely, to a proof-beyond-a-reasonable-standard, all of the elements of an offence under § 286.1(2) of the *Code*:

> (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 indictable offence . . . .

[71] The reference to "consideration" in the statute seems somewhat incongruous. It is the language of contract, which typically involves an agreement between competent parties about legally enforceable rights and duties. I would contrast elements of a lawful contract to the components of § 286.1 which describe the criminal commoditization of sexual activity, typically in exploitive relationships—if these are contracts, they are entirely illegal ones.

[72] In any event, I find that the elements of the offence are these:

- The person charged must be seeking to obtain the sexual services of a person known to be under 18 years of age.
- There are two means of committing the offence: (1) obtaining sexual services for consideration or (2) communicating with anyone for the purposes of obtaining sexual services for consideration.

- The person charged need not have initiated the bargaining or the communication.
- The person charged may be seeking the services for himself or for someone else.
- Something of value must be offered by the person charged—this is the gist of "consideration".
- The consideration must be offered as an exchange for the sexual services of a person under 18 years of age.
- The offer need not have been accepted.
- The bargaining or communication need not have been done with the under-18-year-old whose services are being sought; it may be done with an intermediary.
- The consideration need only be offered—it need not be paid after the services have been rendered; after all, Parliament could not have intended persons buying sex from adolescents to escape liability by running off without paying.

- Liability may arise on proof of communication only—sexual services need not actually get performed. Sting operations exemplify this: see *R v Veerasingam*, 2021 ONCA 350 [*Veerasingam*].

[73] Although the statute describes two means of committing the same offence—(1) obtaining for consideration, and (2) communicating in order to obtain for consideration—it would seem that the communicating mode is included in the obtaining mode: one cannot obtain without necessarily engaging in some form of communication. Although I sought submissions from counsel on the included-offences issue, I find it is not necessary to decide the point.

[74] The text messaging establishes conclusively that Mr Wallace agreed with AC to meet to have sex in exchange for the payment of money. There was an unmistakable sex-for-money connotation to the communication: see *R v Coburn*, 2021 NSCA 1 at ¶ 36; clearly, there was a commodification of the sexual services AC provided to Mr Wallace: *R v Rouse*, 2020 NSCA 8 at ¶ 11. This is the essence of obtaining sexual services for consideration. The fact that the money might never have gotten paid—or was substituted with cannabis and cigarettes— is immaterial. In fact, an eventual meeting and having sex is immaterial to a charge under § 286.1(2), as sting-operation prosecutions seem

to suggest—once the communication is complete, the offence is completed: *Veerasingam* at ¶ 14.

[75] The court finds that, on 20 November 2018, Mr Wallace obtained for consideration the sexual services of AC.

[76] What about Mr Wallace's knowledge of her age?

Does the evidence prove beyond a reasonable doubt that Mr Wallace knew that AC was under 18 years of age at the time, or prove beyond a reasonable doubt that Mr Wallace failed to take all reasonable steps to ascertain the age of AC?

[77] While § 150.1(1) of the *Code* provides that consent offers no defence in cases involving sexual contact with young persons, § 150.1(2)-(3) admit of a number sexual-exploration exemptions that excuse consensual sexual contact between young persons who are close in age. When none of those applies, an accused might still offer a defence of mistake of age, in this case under § 150.1(5). The criterion for invoking that defence requires proof that the accused "took all reasonable steps to ascertain the age of the complainant."

[78] AC testified that, when she first met Mr Wallace in the spring of 2018, she had told him she was 15 years old. Mr Wallace's own evidence was that he had been told by AC in May 2018 that she was "seventeen going on eighteen". Seventeen going on eighteen is seventeen. That, along with AC's very youthful

appearance and their obvious age difference, ought to have raised plenty of red flags, given their age difference. There is no evidence Mr Wallace made any inquiries after that. Accordingly, there is no air of reality to Mr Wallace's defence that he believed AC was eighteen years old. Even if it is Mr Wallace's argument that he thought AC might have reached eighteen years of age by November 2018, the evidence before the court negatives beyond a reasonable doubt any suggestion that Mr Wallace took all reasonable steps to ascertain AC's age. In fact, Mr Wallace was indifferent to the matter of age. This is borne out by the fact that Mr Wallace was quite willing to pay for the sexual services of SC when he was told by AC in her text message—albeit misleadingly—that SC was only seventeen years old. Mr Wallace wasn't concerned about the technicality of age; he wanted the sexual action. This is sufficient to negative beyond a reasonable doubt any residual mistake-of-fact defence that might lie under the common law. Even adopting the most favourable interpretation of the evidence—as required by *R v Cinous*, 2002 SCC 29 at ¶ 98 and 221—there is no air of reality to this defence.

[79] As the evidence proves all of the essential elements beyond a reasonable doubt, I find Mr Wallace guilty of case 8313270.

Does the evidence prove beyond a reasonable doubt that Mr Wallace had sexual contact with SC on 20 November 2018?

[80] I shall consider next the cases alleging that Mr Wallace sexually assaulted SC and touched her for a sexual purpose, cases 8313273-4.

[81] There was good agreement between the evidence of AC and SC about what led up to their alleged meeting with Mr Wallace on that day. They both described being picked up by Mr Wallace and then driven out into the county.

[82] It is correct to note, as defence counsel observed, that SC's evidence about going to the NSLC in Stellarton with Mr Wallace to pick up cannabis after the sexual encounter ended must be incorrect, as that outlet is not a cannabis store.

[83] Further, the there was some inconsistency between AC and SC about what happened after Mr Wallace had parked at the site where the sexual contact took place.

[84] SC testified that she stayed outside the car for ten minutes while Mr Wallace and AC remained inside and engaged in sexual activity. AC's evidence was that SC was outside only briefly, after which she, SC and Mr Wallace engaged in sexual activity at the same time.

[85] Finally—and, in my view, most significantly—AC acknowledged on cross-examination not telling police about SC having been with her and Mr Wallace

on 20 November 2018. AC explained this omission by saying that she had not wanted to get SC involved.

[86] Recall that a prior statement of a witness, one that is inconsistent with present testimony, is proof of the truth of its contents only if adopted by the witness. If unadopted, the prior statement is relevant for assessing credibility only. That is what the court is dealing with in the statement of AC: she admitted giving a statement to police in which she made no mention of the presence of SC when she met up with Mr Wallace on 20 November 2018; however, she did not adopt the statement. Rather, she explained in her testimony that she had not wanted to get SC involved in a police investigation.

[87] AC's explanation for not telling police about SC being with her and Mr Wallace on 20 November 2018 is plausible. It is also consistent with the way young people think about avoiding getting associates involved in things that spell trouble. Recognizing this element of adolescent testimony is consistent with the principles in *R v RW,* [1992] 2 SCR 122 at ¶ 132-4 [*RW*].

[88] However, unlike the testimonial vulnerabilities analysed by the Court in *RW*, this is not a case of AC being confused; rather, AC deliberately did not mention in her statement to police anything about SC being present with her and Mr Wallace. This is a significant matter for the court to reckon with in assessing

AC's credibility and reliability, particularly on the issue whether SC accompanied her when she went with Mr Wallace.

[89] To be sure, Ms MacDonald-Hynes placed AC and SC together when they departed the group home and returned on 20 November 2018.

[90] However, according to SC and AC, after leaving the group home, they went to a gathering of young people at a friend's home, and it was from there that they left to meet with Mr Wallace. No one named by SC and AC as having been at the gathering was called to testify about what happened at the friend's home, or to provide details about SC and AC's arrival and departure. Did they arrive together? Did they leave together? Were they at the friend's home at all?

[91] Mr Wallace denies that SC was with AC, and denies having any sexual contact with SC. While testimony of this nature is described often as "a bald denial" or "self-serving," it seems to me that it is testimony that must not be treated as automatically less worthy of credit. It is difficult for anyone to prove a negative: *R v AJS*, 2011 ONCA 566 at 17. A simple denial is, in fact, consistent with the presumption of innocence, and to reject it solely because it is self-serving would undermine that presumption: *R v Titong*, 2021 ABCA 75 at ¶ 9-10.

[92] It is true that Mr Wallace admitted saying in his statement to police that AC "did all the talking" when they were together on 20 November 2018, which might suggest that there another, quieter person with AC when Mr Wallace drove out to the county for sex; however, in my view, the response Mr Wallace gave to the investigator's question was ambiguous. Even when only two people are present during a conversation, it might be said by one that the other did all the talking.

[93] Taking these factors as a whole, not in isolation, the court is left in a state of reasonable doubt whether SC was with AC and Mr Wallace on 20 November 2018, and I find Mr Wallace not guilty of cases 8313273-4.

Does the evidence prove beyond a reasonable doubt that Mr Wallace communicated with AC to obtain the sexual services of SC for consideration knowing SC was under 18 years of age?

[94] Case number 8313275 alleges that on 20 November 2018, Mr Wallace obtained for consideration the sexual services of SC a person under the age of 18 years.

[95] While the court is in doubt about whether Mr Wallace actually had sexual contact with SC on 20 November 2018, there is no doubt whatsoever that Mr Wallace communicated with AC to arrange it and to pay for it. The text

conversation between AC and Mr Wallace—which was acknowledged by Mr Wallace as an accurate representation of the messages he and AC exchanged by smartphone on 20 November 2018—offers abundant evidence of that. The subject matter was clear:

- Mr Wallace accepted the offer from AC to have sex with SC and AC.
- He would pay money for it.
- He was fixed with knowledge that SC was under 18 years of age because AC told him that SC was 17 years old.
- He would pick up SC and AC in short order.

[96] In a trial of a § 286.1(2) count, the prosecution is not required to prove that the person charged with the offence initiated the bargaining for money in exchange for sex; nor must the prosecution prove that the money or other form of payment actually got tendered. The full rigours of offer and acceptance do not apply here, in any event, as the subject matter of the statute is an illegal contract.

[97] The text messages prove beyond any doubt that Mr Wallace communicated with AC to obtain, for money, the sexual services of SC, a person represented to him as under 18 years of age.

[98] In accordance with § 601(2) of the *Code*, I order and direct that case 8313275 be amended to read as follows:

> Bryden Joshua David Wallace, on or about the 20th day of November 2018, did communicate with AC, for the purpose of obtaining for consideration, the sexual services of SC, a person under the age of 18 years contrary to section 286.1(2) of the *Criminal Code*.

[99] In my view, this amendment works no prejudice to Mr Wallace. Subsection 286.1(2) describes alternative means of committing the same offence:

- obtaining sexual services for consideration;
- communicating for the purposes of obtaining sexual services for consideration.

[100] Further, the theory put forward by the prosecution was clear throughout; it alleged that:

- Mr Wallace communicated with AC to obtain the sexual services of SC for consideration, and SC was represented to him as being under 18 years of age;
- Mr Wallace obtained the sexual services of SC.

[101] Although the latter might not have been proven, the former was a live issue, and Mr Wallace cannot be said to have been taken by surprise by it: the fair-notice principles in *R v Groot*, [1998] OJ No 3674 (CA) at ¶ 25, aff'd [1993] 3 SCR 664, and *R v Pickton*, 2010 SCC 32 at ¶ 21 apply and are not violated by amending the count.

[102] If I were to be found wrong on this point, I would have found Mr Wallace guilty of attempting to commit the offence described in case 8313275. In fact, after closing off the text exchange with AC, Mr Wallace drove to the agreed upon service-station location, intending to meet up with AC and SC for a money-for-sex encounter. The mental element was present entirely. This was followed by a proximate series of acts by Mr Wallace intended to result cumulatively in the substantial crime of obtaining for consideration the sexual services of SC, a person represented to him as being under the age of 18 years.

[103] This went beyond a mere preparation as comprehended in § 24 of the *Code*. Mr Wallace entered into an agreement for consideration, and travelled to a location where he expected to meet SC and AC. The fact that the court might be in doubt whether SC actually got picked up by Mr Wallace does not diminish the fact that Mr Wallace had the full intent and his acts progressed well down the intended path: *R v Root*, 2008 ONCA 869 at ¶ 100; *United States*

v Dynar, [1997] SCJ No 64 at ¶ 73-4. The fact that Mr Wallace went ahead and had sexual intercourse with AC leads the court to infer that he would have done the same with SC had she been there. Beyond any doubt, Mr Wallace was headed toward the commission of the offence: *R v Quinton*, [1947] SCR 234 at 236.

[104] I find Mr Wallace guilty of case 8313275, amended to conform to the evidence.

Verdict summary

[105] The court records acquittals for:

- case numbers 8313261-9;
- case numbers 8313273-4.

[106] The court records findings of guilt for:

- case number 8313270;
- case number 8313275 as amended.

[107] Sentencing will be adjourned for the preparation of a presentence report.

[108] I wish to observe that both counsel made conscientious efforts to use plain and age-appropriate language when questioning the young complainants. This helped them understand what they were being called upon to answer, and helped put them at ease, in an environment that is often very stressful and trying. In *R v Osolin*, [1993] SCJ No 135 at ¶ 166, the majority cautioned against the sort of questioning that may render a complainant the victim of an insensitive judicial system. This caution looms large in cases involving vulnerable young people. What happened in this case is that AC and SC were treated with respect and sensitivity, which is a credit to the high level of professional responsibility demonstrated by Ms Kwan and Ms Kennedy.

JPC