

## WARNING

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

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

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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

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

(2) **MANDATORY ORDER ON APPLICATION** — In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and

(b) on application made by the victim, the prosecutor or any such witness, make the order.

. . .

**486.6 OFFENCE** — (1) Every person who fails to comply with an order made under any of subsections 486.4(1) to (3) or subsection 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

# ONTARIO COURT OF JUSTICE

DATE: February 24, 2023

**B E T W E E N :**

**HIS MAJESTY THE KING**

**— AND —**

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Before Justice M.L. Hogan  
Reasons for Judgment

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**Cara Sweeny ..... counsel for the Crown**  
**Geary Tomlinson ..... counsel for the defendant ██████████**

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**HOGAN J.:**

**[1]** This is the matter of ██████████ who on July 4, 2022 pleaded not guilty in front of me to the following charges: that between the 1<sup>st</sup> day of June, 2021 and the 1<sup>st</sup> day of August, 2021 he did commit a sexual assault on ██████████, contrary to s. 271 of the *Criminal Code*; that between the 1<sup>st</sup> day of June, 2021 and the 1<sup>st</sup> day of August 2021 he did with a part of his body, namely his hand for a sexual purpose directly or indirectly touch the body of a person under the age of 16 years; namely ██████████, contrary to s. 151 of the *Criminal Code*; and

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that between the 1<sup>st</sup> day of June 2021 and the 1<sup>st</sup> day of August 2021, he did for a sexual purpose counsel a person under the age of 16 years, namely, [REDACTED] [REDACTED] to directly or indirectly touch with a part of his body, namely his hand, the body of [REDACTED], contrary to s. 152 of the *Criminal Code*.

[2] Crown counsel Ms. Sweeny proceeded by indictment. A trial was held over many days, written submissions were received and final oral submissions were heard on January 10, 2023. On that date I adjourned the matter to today's date for judgment.

[3] Crown counsel called as witnesses [REDACTED], K [REDACTED] ([REDACTED]'s mother), [REDACTED] ([REDACTED]'s grandmother), Detective Constable [REDACTED], and [REDACTED] (CAS worker). Defence counsel, Mr. Tomlinson, called as witnesses [REDACTED] (CAS worker) and [REDACTED], the Defendant.

[4] The facts as alleged by the Crown are briefly as follows.

[5] K [REDACTED] and the Defendant [REDACTED] are the parents of [REDACTED]. During the period that these incidents took place the parents were separated and [REDACTED] spent time staying at each of their residences. Ms. [REDACTED] and Mr. [REDACTED] were engaged and continue to be engaged in divorce proceedings in the Superior Court where custody and access to [REDACTED] are an issue.

[6] In late July and early August 2021, ██████, who was ██████ years old at the time, disclosed to his mother that his father, the Defendant, had been touching him inappropriately including on his “privates” and would not stop. Ultimately, the police and the Children’s Aid Society (CAS) became involved. As a result, a statement was taken from ██████ by Detective Constable (DC) ██████ on August 9, 2021. DC ██████ was of the opinion following this statement that there was not sufficient evidence to charge Mr. ██████ with any offences. On August 11, 2021 ██████ met with Ms. ██████, a CAS worker, for the purpose of what she called “safety planning” as he was scheduled for a visit with his father. As a result of further and more serious disclosures made by ██████ to Ms. ██████ she asked that ██████ be interviewed again by DC ██████. He was then interviewed the same day, August 11, 2021, by DC ██████ and at that time made further and more serious allegations concerning his father touching him and his father asking ██████ to touch him inappropriately. As a result of these further disclosures by ██████, the present charges were laid against Mr. ██████.

[7] The Defendant vehemently denied that he had ever touched ██████ inappropriately or asked ██████ to touch him inappropriately.



## Evidence at Trial

[8] ██████ was the Crown's first witness. ██████ testified in a room separate from the courtroom and CCTV was utilized. Ms. ██████, a support person from BOOST and a support dog were present in the room with ██████ during his testimony. During his examination-in-chief his two video statements taken by DC ██████ on August 9 and 11, 2021 were played and introduced as Exhibits # 1 and 2 respectively. ██████ testified that he remembered the interviews with DC ██████ and stated that he was telling the truth in those videos.

[9] In the first interview with DC ██████, ██████ stated that his father touches him on his face and feet and on his privates. Following the touching they play the tickle feather game. He stated that when his father touches him, his (██████'s) clothes are on him. He also stated that he tickles his Dad on the same parts that he "tickles me". DC ██████ then asked "So you tickle Daddy's face and you tickle Daddy's feet right?" ██████ answers "Yeah". DC ██████ then asks "Do you tickle Daddy anywhere else?" and ██████ answers "No". He then repeats again, when asked by DC ██████ about him touching Dad, that Dad touches him. He then states that he feels "yucky" when his Dad is touching him but can't explain what "yucky" means.

[10] He also stated very near the beginning of the first interview with DC ██████ that his Mom told him that "He (referring to his father) needs to go to jail" and that his Mom told him that jail is where bad people go when they're

doing bad stuff. He also stated that his Mom said “Dad should not do a tickle feather”. When he was asked if anybody else is home when the touching occurs ██████ stated, “The neighbours come and I scream for help”. Later in the interview he was asked again about the neighbours. DC ██████ stated, “As you know when the - you said the neighbours came over”, ██████ answered “Yeah” and then DC ██████ asked if he knew their names and he said “no” but then said, “But their names are seven”. This was followed by, “There’s seven of men” which was repeated several times and then followed by, “Two of them are bad. Two of men is on the back. On the back of his house, the back of my Dad’s house”. Lastly when DC ██████ stated, “When you before said you cried for help and the neighbours came”, ██████ answered “No, I said I screamed for help”.

[11] He was also questioned by DC ██████ about what he and his grandma talk about. He immediately replied “about my Dad touching me”.

[12] In ██████’s second interview on August 11, with DC ██████ he was asked at the beginning of the interview, “Do you remember the most important thing when talking to a police officer – do you remember what that is, the rule? What is it?” ██████ immediately replied, “That my Dad touched me”. He then went on to state that his Dad touches his penis and makes it big and he keeps it in my bum and makes it hard. He stated at that point in the interview that when this happened his clothes were on but when his Dad touches his penis his Dad’s hand is inside his clothes. When asked by DC ██████ to demonstrate for him

what Daddy's hand does he can't do so and reverts to saying –"just touching". When asked for more detail he at first says he is sitting when the touching happens but then states that his Dad makes him lay down. DC [REDACTED] then tells him that last time he didn't say anything about "penis" and [REDACTED] answers that he did and then says his Mommy told him to tell about penis. It is in this second interview that he first refers to his Dad's house as a "bad house" because his Dad "touches me in there".

[13] [REDACTED] then states that "Mommy said it is time to go back (referring to attending for the second interview with DC [REDACTED]) and to talk about Dad touching him". At one point near the end of the interview DC [REDACTED] asks him again about touching his Dad and he replies that he doesn't know what he touches and, what his Dad makes him touch, aren't his privates so it is okay. Then, however after a further discussion about privates, [REDACTED] reverts to "Dad makes him touch Dad's privates". When asked what he sees after he touches Dad's privates he is unable to provide an answer.

[14] In [REDACTED]'s court testimony in addition to him confirming the truthfulness of the two videos with DC [REDACTED], he stated that his father had touched him four times and made [REDACTED] touch him also four times and this was always just before he went to soccer. He said it happened at "Blue Stairs and one time at Green Door". These were his names for the homes his father lived in or had lived in. He had never mentioned being touched four times until his court testimony. He stated that his father as well as touching him with his hands also



touched him with the feather on his penis and bum but then a few questions later he said he couldn't remember where he was tickled or where he tickled his father.

[15] In his court testimony he denied that the neighbours ever came over but did say that he screamed once but couldn't remember what was happening at the time and he didn't know why he had screamed.

[16] He reiterated that it was his mother who said his father had to go to jail for touching him and testified that his grandmother told him that bad people go to jail for doing bad things but she didn't mention his father. He testified that the conversation with his grandmother occurred when they were sitting on a couch at her place.

[17] He also stated that his mother had told him that they could only visit his grandmother and not stay there because his father would not let him go there. He also talked about going to soccer when at his Dad's not his Mom's because she would not give permission for him to go. Lastly, he testified that his mother told him to throw the feather that he brought home from his father's in the garbage and that she said it was a creepy feather.

[18] ██████████, ██████████'s mother, testified she was a U.S. citizen, and an ██████████ therapist licensed to practice in the U.S. but not in Canada. She testified that sometime in the Spring of 2021 ██████████ had brought home a feather from his father's residence. She stated that she didn't like feathers and in fact



found them to be gross as they came from animals. At some point after that on a Zoom call with extended family and a few friends, ██████ brought out the feather to show those on the call as he often did with other toys. His grandmother mentioned that it was a feather and ██████ corrected her and said it was a tickler and that was what his father called it. Apparently, this elicited some comments and some chuckling on the Zoom call. ██████ stated that she found Mr. ██████ referring to it as a tickler to be a “bizarrely sexualized way of referring to a feather with a ██████-year-old”. At some point the feather was put in the garbage although ██████ retrieved it.

[19] In July of 2021 Ms. ██████ went to the U.S. for a family visit and ██████ was with his father for those 2 weeks. Following her return, she was bathing ██████ and he told her about a feather game that he and his father would play. ██████ told her that he and his father would tickle each other with a feather and this took place in his father’s bed. ██████ stated that the tickling was on their cheeks and faces. There was no mention by ██████ of any touching on his privates. Ms. ██████ stated that she found this weird and she thought it bizarre. The following day they were on the boardwalk with ██████ on his scooter when ██████ started talking about how his Dad would touch him all over his body using his hands. She told ██████ that “it was not okay for anyone to touch you on your body when you don’t want to be touched”. She told him, “it was okay to say no, to say stop it’s my body, I don’t want to be touched. And that if they don’t stop it’s okay to engage in physical defence”. “So I told him to kick him in the face if

he tried to do it again, after saying no". Again there was no mention by [REDACTED] of touching on his privates. Ms. [REDACTED] testified that she was concerned and didn't like [REDACTED] not having control over his own body. Following the next visit to his father's and the handoff back to Ms. [REDACTED] she stated that [REDACTED] reported to her that he was very proud of himself because he had told his Dad to stop and that he didn't want to be touched and that his Dad didn't touch his privates that time. She understood this to mean that Mr. [REDACTED] had touched his privates other times. The next day she questioned [REDACTED] further and he said that his Dad touched him on his privates and he said that his dad touched him on his penis and then it made it get big. At some point after this she told [REDACTED] that he should yell for help. On the next date he returned from his father's he told Ms. [REDACTED] that he screamed for help and the neighbours came and knocked on the door. He said he did not see them. Following this [REDACTED] was at Mr. [REDACTED]'s from August 4<sup>th</sup> to 5<sup>th</sup> and [REDACTED] told his mother that his father did not touch him.

[20] [REDACTED] also testified that she had had conversations with her mother, [REDACTED]'s grandmother, about what [REDACTED] was saying about his father's touching. [REDACTED] testified that she had told [REDACTED] that it was okay for him to tell an adult that he trusted, about the touching. He said that he wanted to tell his grandmother. On August 5<sup>th</sup> Ms. [REDACTED] called his grandmother for him and he told her about what had been happening with his father. [REDACTED] stated that on August 7<sup>th</sup> her mother told her that she had contacted the

Children's Aid Society and the authorities. She stated that she did not provide her mother with the number to call.

[21] In cross-examination K [REDACTED] agreed that every time she told [REDACTED] what to do he would come back from his father's and tell her that he did it – for example, when K [REDACTED] told him to tell his father to stop touching him he returned from a visit and said he had done that and then subsequently she told him he should yell, and he came home that time and reported that he had yelled and the neighbours came.

[22] Ms. [REDACTED] denied ever telling [REDACTED] that his father should go to jail but did state that she had told [REDACTED] that what his Dad was doing was against the law and it was a crime.

[23] K [REDACTED] also testified to [REDACTED]'s problematic behaviour when he was with her. He would hit, throw things and at one point he choked her cat into unconsciousness. She testified that this behaviour had been exhibited by [REDACTED] for some time. She also stated that when she returned from her two-week U.S. visit without [REDACTED] he was particularly clingy. She agreed in cross-examination that [REDACTED] was not apprehensive nor unwilling to go to his father's house.



[24] P [REDACTED], K [REDACTED]'s mother, testified. She stated that at one point on a family Zoom call [REDACTED] had shown the feather to everyone. He told them it had come from his father's house. He was in the habit of showing toys to others when on Zoom calls. She stated there was some chuckling and comments made by the adults on the call about the feather, including calling it creepy, as [REDACTED] had called it a tickler. [REDACTED] did not say that his father had called it a tickler. She, like her daughter, testified that she didn't like feathers and that she too had called it creepy. She testified that not only had her daughter told her about [REDACTED]'s disclosures but he himself had told her about it on a phone call on August 5, 2021. She testified that on this phone call her daughter had said that [REDACTED] had something he wanted to talk to her about and then she gave the phone to [REDACTED]. She testified that she said "What's going on kiddo?" and "he launched right into telling her about his Dad touching him". She also testified that [REDACTED] had told her that the neighbours had come and two of them were male indicating to her that [REDACTED] has seen them. She testified that she felt Mr. [REDACTED] should be reported for his actions and ultimately was the one who called the Children's Aid. She testified that her daughter K [REDACTED] had looked up the number of CAS and provided it to her. She denied stating to [REDACTED] that his father should go to jail.

[25] Ms. [REDACTED] was the Children's Aid worker who interviewed [REDACTED] on August 11, 2021 following his first police statement on August 9, 2021. Her evidence was that her interview with [REDACTED] was neither videoed or recorded nor

was there anyone else observing. She made no verbatim record of either the questions she asked or the responses given [REDACTED]. The only record was a document with a picture of a house on it generally used for safety planning. This document was filed as Exhibit # 23 in the trial. She had written some notes on it but even they were written following the interview as she stated it would have been too difficult to speak to [REDACTED] and take notes at the same time. This safety plan involved there being a "Safety House". Ms. [REDACTED] testified that she conducted this interview initially for the purpose of safety planning as [REDACTED] was scheduled to go to his father's. She testified that it was in this interview that [REDACTED] made more serious allegations regarding the touching and as a result she asked that he be interviewed again by DC [REDACTED]. These allegations included Mr. [REDACTED] "touching through his clothes" which Ms. [REDACTED] understood to be under his clothes, his father touching his penis with his hand and making it big, his father touching his bum and making it hard, and his father making [REDACTED] touch his (father's) penis.

[26] As a result, of these further disclosures, DC [REDACTED] was notified and he conducted the second interview with [REDACTED] on that same day.

[27] Following the charges being laid against Mr. [REDACTED], an order was made by Justice S [REDACTED] of the Superior Court for Mr. [REDACTED] to have supervised access to [REDACTED] subject to conditions set out by Children's Aid. In a letter dated November 12, 2021 signed by both Ms. [REDACTED] and Mr. [REDACTED], her supervisor, and filed as Exhibit # 24, there were four recommendations made

that were to occur before this access should happen. These four conditions were as follows:

1. Psychosexual assessment of Mr. [REDACTED];
2. Resolution of the criminal charges;
3. Safety planning with the Society; and
4. An assessment by a qualified social worker or child's mental health professional (through the OCL or other qualified resource) of the appropriate level and type of access, once the above have occurred.

Ms. [REDACTED] agreed that Mr. [REDACTED] had been very co-operative with the Society following these disclosures including meeting with her. She also confirmed that CAMH would not perform the required psychosexual assessment of Mr. [REDACTED] while there were outstanding criminal charges and agreed that she knew when requiring this condition that it could not be met until the charges were resolved.

[28] Ms. [REDACTED] was cross-examined as to the possibility that [REDACTED] had either been coached or had simply made up these allegations. She responded that she did not believe either of these two scenarios were the case. Her belief, she testified, was due particularly to what she characterized as consistency in [REDACTED]'s allegations and that kids can't maintain stories that are so detailed if this is a coaching situation. She also testified that when statements are related to a "feeling", that also militates against coaching. She stated that in her interview with [REDACTED] that he was consistent, "he got into the allegations very directly" and he used the term "yucky" which was related to a feeling. She also



testified that it was her belief that K [REDACTED] had not coached [REDACTED] as Ms. [REDACTED] at first stated that she didn't know if [REDACTED]'s disclosures were true.

[29] DC [REDACTED] testified and confirmed that he was the officer who took the two video statements of [REDACTED]. He confirmed that after hearing from [REDACTED] in the first interview that he had screamed for help and that the neighbours had come, that he interviewed the neighbours at both Mr. [REDACTED]'s current address and at his last address. He testified that none of them had ever heard screaming coming from Mr. [REDACTED]'s apartment and that none of them had ever come to Mr. [REDACTED]'s apartment as a result of any screaming or anything else having to do with [REDACTED] nor had they ever had any concerns regarding Mr. [REDACTED] or [REDACTED].

[30] Ms. [REDACTED], also a Children's Aid worker, testified that she had been involved with the family prior to the disclosures being made by [REDACTED]. Her first visit was as a result of a police report regarding domestic violence and her second was as a result of a concern from a counsellor of K [REDACTED]'s as to post-separation effects on [REDACTED]. She testified that she had no issues with the parents in that they were both concerned with [REDACTED]'s well-being during this difficult and challenging time and were trying to do their best for [REDACTED]. It was her opinion that there was post-separation conflict which would have an emotional effect on [REDACTED]. She also testified that she had not been consulted by Ms. [REDACTED] regarding [REDACTED]'s disclosure as the agency maintains boundaries among workers dealing with different issues within a family.



[36] He testified that he felt Ms. [REDACTED] was “out to get him” and had previously had him charged with uttering a threat against him. After a trial he was acquitted on that charge. He believed that K [REDACTED] was responsible for [REDACTED] making up these allegations against him. He testified that he had no criminal record.

[37] He denied the statements made by Ms. [REDACTED] that he had refused to have [REDACTED] attend play therapy and testified that he had always wanted to have [REDACTED] assessed; but felt that prior to any therapy there should be an assessment to make sure that the therapy attended was appropriate for [REDACTED]'s needs as he believed that [REDACTED] could be harmed by the wrong therapy. His opinion was informed, he testified, by his own [REDACTED] background. He testified that play therapy for [REDACTED] had been a continuing issue in the Superior Court proceedings. He further testified that he tried but was unable to comply with the conditions set out in the November 12, 2021 letter – Exhibit # 24 – as it was CAMH which would do the required psychosexual assessment and they would not perform such an assessment so long as criminal charges were outstanding. He emphasized that he always had [REDACTED]'s best interests in mind in everything he did.

[38] I have reviewed the evidence of the witnesses in the trial, the exhibits filed, and the written and oral submissions of both counsel including the cases cited. It is my finding that the Defendant, Mr. [REDACTED], is not guilty on all counts.



[39] The following are the reasons for my decision.

[40] Defence counsel in his written submissions at paras. 4 and 6 set out a number of principles that govern when a court is determining guilt or innocence. First, the fundamental principle is that the Crown must prove guilt beyond a reasonable doubt and that the onus to do so is that of the Crown and it never shifts. Second, the Court must determine if the Crown, on the whole of the evidence, has proven each essential element of the charge to the standard required. Ultimately, the Court does not determine which side is telling the truth but rather, on all the evidence, whether the case has been proven to that standard.

[41] In regard to assessing the evidence of children, Defence counsel at paras. 7 - 15 of his written submissions submitted that the caselaw has set out the following principles;

“Judges have become increasingly sensitized to the fact that children, particularly very young children, do not talk about what happened in the same manner that adults do. Their recollections of dates, for example, and the order of events often do not have the degree of precision that is found in adult recollections. As a result, assessments of their evidence are particularly challenging.” (*R. v. K.A.* [2007] No. 4118 at para 11)

“Child witnesses, generally speaking, should not be held to an exacting standard on, for example, the timing of an alleged offence. That would be unrealistic and unnecessary.” (*R. v. D.B.*, [2003] O.J. No. 5567 at para. 29 citing *Regina v. M.B.P.* [1994] S.C.J. No. 27).

“The judiciary should take a common sense approach in assessing the testimony of children. Some contradictions in the

evidence of a child should not be given the same treatment as similar flaws in the testimony of an adult.” (*D.B.*, *supra* at para. 30)

“A flaw, such as a contradiction, in a child’s testimony, should not be given the same effect as a similar flaw in the testimony of an adult.” (*R. v. J.D.*, [2022] O.J. No. 1503)

“The standard of proof is the same in these cases as it is in all criminal trials. Though we may adjust the manner in which we assess children’s evidence, we must never adjust it such that we lower the standard of proof. The very fact that a crime against a child is so abhorrent also means that a wrongful conviction for such a crime is also horrendous. The standard of proof is extremely high – proof beyond a reasonable doubt: “protecting the liberty of the accused and guarding against the injustice of the conviction of an innocent person require a solid foundation for a verdict of guilt whether the complainant be an adult or a child”. (*K.A.*, *supra* at para. 12)

“Courts should take a common sense approach when dealing with the testimony of young children and not impose the same exacting standard on them as it does on adults. However, this is not to say that the Courts should not carefully assess the credibility of child witnesses. The standard of proof is not lowered when dealing with children.” (*J.D.*, *supra* at para. 12)

[42] I take no issue with and agree with Defence counsel’s summary of the principles enumerated in the caselaw when dealing with the evidence of children.

### **Testimony of the Defendant** [REDACTED]

[43] As stated above, Mr. [REDACTED] vehemently denied all of the allegations made by [REDACTED]. It was obvious from his demeanour while testifying that [REDACTED]’s allegations and these proceedings have taken a toll on him. I disagree with Crown counsel that he was, as she submitted at para. 49 of her written submissions, “argumentative and non-responsive to many questions”. I found him to be struggling and quite distraught when testifying. I find this is to be

expected given the serious nature of the accusations and the consequences of such on his relationship with his son. Despite that, I find that his testimony was forthright, clear and consistent.

[44] He agreed that he had tickled [REDACTED] with a feather on one occasion but that there was no inappropriate touching. He testified this feather was part of a craft kit he purchased to be used to make a turkey around the time of Thanksgiving and had no other purpose and he had never called it a tickler.

[45] He testified that he had been co-operative with both Ms. [REDACTED] and DC [REDACTED] as he wanted to understand what was happening with [REDACTED]. As confirmation of this he referenced a letter dated August 1, 2021 and filed as Exhibit # 26 in the trial that was sent by him by email to his lawyer giving him the CAS contact to forward to K [REDACTED]'s lawyer in order for her to contact the CAS to conduct an investigation. He testified that in order to comply with the recommendations set out in the November 12, 2021 letter from the CAS (Exhibit # 25) he had attempted to have the required psychosexual assessment done but learned that this was not possible so long as the charges were outstanding. He denied not wanting to have [REDACTED] engage in play therapy both prior to the allegations and after. Prior to the allegations it was his position that an assessment of [REDACTED] should be done first so that the most appropriate therapy could be found for [REDACTED] – a position that I find to be reasonable. The evidence was that following the allegations he had suggested within the time limit set by



Justice S [REDACTED] a specific play therapy programme and this was provided by his counsel in a letter to K [REDACTED]'s counsel.

[46] His co-operation with both the CAS and the police, his desire for an investigation as to why [REDACTED] was making these false allegations, his concern about play therapy without a prior assessment, and his attempt to obtain the psychosexual assessment, I find all speak to a concerned parent who is not hiding any inappropriate behaviour.

[47] In summary, I found his evidence to be credible and reliable.

#### **Inconsistencies and the Evolution of [REDACTED]'s Version of Events**

[48] [REDACTED]'s first disclosures were made following a period when he had been away from his mother for a period of approximately two weeks. The evidence of K [REDACTED] was that this was the longest period that he had been away from her and that during this period she had no contact with her son. She testified that she was in the United States visiting family during this period and that it was her practice not to interfere with Mr. [REDACTED]'s time with [REDACTED] by contacting him. She testified that when she returned [REDACTED] was particularly clingy with her. I find from her evidence that this was a particularly upsetting time for [REDACTED].

[49] It is very clear that [REDACTED]'s version of events evolved into something very different and more serious in the second police interview than in the first and this continued in his court testimony. The only circumstance that changed between

the two interviews was that his mother and Ms. [REDACTED] were told there wasn't sufficient evidence to charge Mr. [REDACTED] and he was subsequently interviewed by Ms. [REDACTED] of the Children's Aid Society on the same day and prior to DC [REDACTED] interviewing him the second time

[50] I also find that [REDACTED] seemed unusually fixated on telling about the touching to the exclusion of engaging in what for [REDACTED] year old children might be expected to be some conversation at least at first about other day-to-day matters. When he arrived for his second police interview and was asked at first by DC [REDACTED], "Do you know what is the most important thing when talking to a police officer. Do you remember what that is, the rule?" [REDACTED] replied, "That my dad touched me." DC [REDACTED] had been referring to the necessity of telling the truth not the touching. Similarly, on the phone with his grandmother on August 5, she testified she started the conversation by asking "What's going on kiddo?" and he, according to her, "immediately launched right into telling me what was going on with his dad." When questions were asked that were a little what I would term off script about the touching he was unable to answer them. For example, when DC [REDACTED] asked him to show with his hands how his father had touched him he was unable to do so – he was only able to say he had been touched. Even then he was inconsistent as to where he had been touched, where he had been told by his father to touch him, and whether it was outside or under his clothes.

[51] I find that one particular inconsistency in ██████'s version of events particularly stands out. That was the story that ██████ told to his mother, his grandmother, and DC ██████ about the neighbours coming to his father's apartment. He stated very clearly in the first interview that that had happened – even to the point, as I noted above at para. 10, of correcting DC ██████ when he used the word “cried” instead of “screamed”. He told his mother that the neighbours came when he screamed for help and told his grandmother that two of the neighbours who came were male indicating to her that he had seen them. Yet, in court his story changed and he said the neighbours never came. This is the one element of his story that could be independently verified as was done by DC ██████ who interviewed all the neighbours. They all stated that they had never heard screaming nor had they attended at his father's apartment as a result. So despite telling his mother, grandmother, and DC ██████ a story about neighbours attending it was shown to be false and even ██████ himself resiled from this version in his court testimony. The neighbours attending, a story ██████ maintained for some time, I find demonstrated that ██████ was quite capable of making up a story.

[52] I acknowledge that, as stated above at para. 41 in the principles enumerated for dealing with children's evidence that they should not be held to the same standard as adults and that they should not be expected to remember details in the same manner an adult might. In this case, however, I find that it was not just details but fundamental aspects of ██████'s story that changed and



evolved. First touching with a feather, then touching on privates, then touching under clothes, then touching of his penis and making it big, then his father putting his penis on his bum and making it hard, and then his father having [REDACTED] touch him.

[53] I find these are not details that kept changing but fundamental and important parts of his story including the story of the neighbours, that kept changing and this raises a reasonable doubt as to what version, if any, of [REDACTED]'s story is true.

#### **Role of Ms. [REDACTED]**

[54] I find Ms. [REDACTED]'s evidence to have been particularly concerning. It is not possible to establish with any certainty that during her interview with [REDACTED] that she did not ask leading questions or put thoughts into [REDACTED]'s mind. This concern is significant as it was as a result of what [REDACTED] disclosed to her that a second police interview was conducted and charges laid against Mr. [REDACTED]. Prior to this interview [REDACTED]'s only disclosure to DC [REDACTED] was of his father tickling him with a feather and touching him on his body, including on his "privates", over his clothes. I do recognize that his mother said he did use the word penis in one disclosure to her but this was not used in the first interview with DC [REDACTED]. In the interview with Ms. [REDACTED], as I have noted above, [REDACTED]'s story evolved into touching "through his clothes" which Ms. [REDACTED] understood to be under his clothes, his father touching his penis with his hand

and making it big, his father touching his bum and making it hard, and his father making him touch his own penis. Unfortunately, this interview with Ms. [REDACTED] was not recorded, videotaped or observed nor were notes made of the questions asked nor were verbatim notes taken of [REDACTED]'s responses. In addition, she testified that the notes that she did make on the Safety Plan document, filed as Exhibit # 23, were made after the interview with [REDACTED] not while he was speaking, as she testified it would have been too difficult to take notes and listen to him. I find that the failure by Ms. [REDACTED] to properly document this interview with [REDACTED] makes it impossible to determine whether what he stated in the second interview with DC [REDACTED] and ultimately in his testimony in court was in any way influenced by what Ms. [REDACTED] said to [REDACTED]. What we do know, is that he in the second interview, began to speak not only of more serious touching but also of bad houses. The concept of different types of houses had never been raised by [REDACTED] before. Ms. [REDACTED], however, testified that she had spoken of a Safety House with [REDACTED] and then we hear him equating his father's house with a bad house.

[55] Given the change in [REDACTED]'s allegations pre and post Ms. [REDACTED]'s interview with him, I find that what she said to him could well have been responsible for the change in his allegations and I find this, on its own, raises a reasonable doubt as to the veracity and reliability of [REDACTED]'s allegations.

[56] Ms. [REDACTED] stated that the assessment referenced in recommendation 1 of the letter of November 12, 2021 and filed as Exhibit # 26 was intended to be

done by CAMH. Ms. [REDACTED] when cross-examined by Defence counsel admitted that when she wrote this letter she was aware that the first condition could not be satisfied as CAMH does not conduct such assessments while charges are pending. This information she agreed was readily available on CAMH's website. In addition, I find she would have had to have known, given that Mr. [REDACTED] was adamantly denying all of the allegations that the criminal charges were not going to be resolved quickly. I find the behaviour of the authors of the letter to be bordering on, if not, unprofessional. Clearly it was impossible for Mr. [REDACTED] to fulfill these recommendations any time soon in order to see his son, and Ms. [REDACTED] knew it; yet she was not transparent about this with Mr. [REDACTED].

[57] Ms. [REDACTED] was cross-examined as to the possibility that [REDACTED] had either been coached or had simply made up these allegations. She responded that she did not believe either of these two scenarios were the case. Her opinion, she testified, was based particularly on what she characterized as consistency in [REDACTED]'s allegations and that kids can't maintain stories that are so detailed if this is a coaching situation. She also testified that when statements are related to a "feeling" that also militates against coaching. She stated that in her interview with [REDACTED], that aside from being consistent, "he got into the allegations very directly" and he used the term "yucky" which was related to a feeling. She also testified that Ms. [REDACTED] stated that she didn't know what was true and if Ms. [REDACTED] had coached [REDACTED] she wouldn't have made such a



statement. I find the grounds for her belief not to be well grounded. I find it was clear that [REDACTED]'s story was constantly changing or evolving and was full of inconsistencies when it came to any details or even events that occurred – for example the neighbours “story”. I find he was definitely unable to maintain a consistent story. He did “get into the allegations very directly” according to Ms. [REDACTED], which I find, contrary to Ms. [REDACTED], could be an indication of coaching. During the first interview with DC [REDACTED], I find [REDACTED] was not focussed and was acting like a [REDACTED] year old boy – crawling all over, playing with Lego and not seeming very interested in the questions being asked. In the interview with Ms. [REDACTED] she stated that he got into the allegations directly and in the second police interview he did the same with DC [REDACTED] as noted above at para. 51. I find it was almost as if he had been “primed” to talk about the allegations before these interviews. At para. 51 above, I noted that when asked by DC [REDACTED] to demonstrate with his hand how his father had had him touch him, he was unable to do so and when asked by the Crown in examination-in-chief “to show her what he (father) would do with the feather he stated, “I don’t remember what he did so I can’t show you”. His allegations were consistent only in as much as there had been touching but nothing more. I find it was almost as if he had a script about “touching” generally but once off that script he lost the details.

[58] Ms. [REDACTED]'s opinion was that [REDACTED] describing the touching as “yucky” related to a feeling and this was inconsistent with coaching. I do not agree with

this and find this description could well have originated from ██████'s mother and grandmother. His mother and grandmother described the feather as gross and creepy respectively. While I acknowledge neither used the word yucky, ██████ testified that his mother described the feather as a "creepy feather" that had to be thrown in the garbage and the adults on the Zoom call had chuckled and viewed it as a sexualized object. I find it is quite possible that their reaction to the feather was transmitted to ██████.

[59] Finally, the fact that, as Ms. ██████ stated, that Ms. ██████ had told her that she didn't know if ██████'s allegations were true as a reason for her not believing that ██████ had coached ██████, I find does not necessarily negate coaching. Ms. ██████ is an intelligent woman who might well realize that demanding that ██████'s allegations be immediately believed and police action taken might possibly lead some to wonder if there had been coaching.

#### **Ms. K█████'s Evidence and Suggestibility of ██████**

[60] It was clear from K█████'s testimony that her relationship with Mr. ██████ was not amicable and that the various issues surrounding their separation and divorce had been and were continuing to be the subject of much litigation in the Superior Court. Unfortunately, I found it necessary throughout the trial to continue to remind everyone that I was not there to relitigate the family court issues. As a result I attempted to limit evidence concerning those issues. I did, however, hear some evidence as to these issues and this was sufficient for me to

find that despite Ms. ██████'s testimony to the contrary there were still a number of issues left to be resolved and that not long before these disclosures it had become clear that she was not going to be able to live in and return to work in the U.S. and take ██████ with her. I cannot however given the limited evidence I did hear find as Mr. ██████ stated that she was responsible for ██████ making up these allegations against him.

[61] I do find that there were some contradictions in her testimony. For example, she testified that she did not provide her mother with the number to call the authorities, yet her mother testified that K█████ had not only provided the number to her but had looked it up so that she could call the CAS. I find that the looking up is something that K█████ should have remembered. She denied speaking negatively about Mr. ██████ yet ██████ testified that she had said that his father was the reason for them not being able to stay in the U.S.. She also testified that, contrary to what ██████ had stated in his first interview with DC ██████, she did not tell ██████ that "his father needs to go to jail". She testified that this was something her mother had said, yet her mother categorically denied doing so.

[62] Given my finding in para. 60 above that there is not sufficient evidence to find K█████ responsible for ██████ making up the allegations, I do, however, find that what is more likely is that she to a certain degree, whether knowingly or not, influenced some of what ██████ said to her and said in his interviews and in court. ██████ I find, and perhaps no different than any young



child, was suggestible. For example, in cross-examination K [REDACTED] agreed that every time she told [REDACTED] what to do he would come back from his father's and tell her that he did it as noted above at para. 21. I find that this example illustrates how highly suggestible by his mother [REDACTED] was. In addition, I note that [REDACTED] in his first interview with DC [REDACTED] when discussing his father's touching stated, "and we don't like what is someone touching", He used the word "we" not "I" which I find could indicate that someone, has told him this. This someone was likely his mother given the statements she acknowledged making to [REDACTED] as set out in para. 19 above. I acknowledge that when asked specifically about this, he did state that no one had told him to say this. It does, however, add to the concern about suggestibility if not possible coaching. I also note that both K [REDACTED] and her mother testified to finding feathers creepy and gross and both had an immediate negative reaction to the feather that [REDACTED] had brought home from his father's – to the extent that K [REDACTED] testified that she had him put it in the garbage not once but twice. [REDACTED], I find was a very intelligent child and this may well have influenced his focus on the feather and the bad touching with it.

[63] I find that, Ms. [REDACTED]'s role, [REDACTED]'s mother's statements to him, and that [REDACTED] was caught in the middle of his parents difficult and protracted separation and divorce and, according to Ms. [REDACTED] was suffering emotional effects as a result, all suggest that [REDACTED] may have been highly

susceptible to suggestions made to him whether intended or not, and as such a reasonable doubt is raised as to the veracity and reliability of his allegations.

**[64]** For all of the reasons enumerated above I find Mr. [REDACTED] not guilty on all counts.

**Released: February 24, 2023**

[REDACTED]  

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Signed: Justice M.L. Hogan