

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *R. v. Comeau*, 2017 NSSC 62

**Date:** 20170214

**Docket:** CRH No. 451437

**Registry:** Halifax

**Between:**

Her Majesty The Queen

v.

Joseph Elizee Comeau

<b>Restriction on Publication: s. 486 of Criminal Code</b>
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**Judge:** The Honourable Justice Patrick Duncan

**Heard:** November 17, 18, December 13, 2016; January 30 and February 14, 2017, in Halifax, Nova Scotia

**Written Decision:** March 7, 2017

**Counsel:** Carla Ball and Matthew Kennedy, for the Crown  
Jonathan Hughes, for the Defence

## **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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 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

**By the Court:**

**The Charge**

[1] The accused Joseph Comeau is charged that he, on or about the 22nd day of May 2015 at or near Halifax, Nova Scotia, did unlawfully commit a sexual assault on E.W., contrary to section 271 of the **Criminal Code**. He has entered a plea of not guilty. This is the decision following upon his trial.

**The Trial**

[2] The Crown presented the testimony of seven (7) witnesses together with an Agreed Statement of Fact and a statement of the accused made to the police. The complainant did not testify, for reasons that are set out below and in the Agreed Statement of Fact.

[3] The accused testified on his own behalf.

**Fundamental Legal Principles**

*Presumption of Innocence and Burden of Proof*

[4] Joseph Comeau has pleaded not guilty. The first and most important principle of law applicable to every criminal case is the presumption of innocence. An accused enters the proceedings presumed to be innocent, and the presumption of innocence remains throughout the case unless the Crown, on the evidence, proves beyond a reasonable doubt that he is guilty.

[5] The burden of proof rests with the Crown and never shifts. There is no burden on Mr. Comeau to prove that he is innocent.

[6] It is virtually impossible to prove anything to an absolute certainty, and the Crown is not required to do so. Such a standard would be impossibly high. However, the standard of proof beyond a reasonable doubt falls much closer to absolute certainty than to probable guilt. It is not enough to conclude that Mr. Comeau is probably guilty or likely guilty, that is not sufficient. In those circumstances, I must give the benefit of doubt to the accused.

[7] I must decide, looking at the evidence as a whole, whether the Crown has proved Mr. Comeau's guilt beyond a reasonable doubt.

*Assessment of Evidence*

[8] In fulfilling my responsibilities, it falls to me to decide how much or little of the testimony I accept. I may believe some, none or all of it.

*W.D. Instruction*

[9] Joseph Comeau testified. When a person charged with an offence or offences testifies, his evidence must be assessed in the same way that the testimony of any other witness must be assessed. I may accept all, part, or none of Mr. Comeau's evidence.

[10] Mr. Comeau admits the *actus reus* of the offence alleged, that is, he admits the conduct that is alleged by the charge. He denies that he had the necessary *mens rea* of the offence, that is, he denies having the necessary intention for the commission of the offence. If I believe the testimony of Mr. Comeau that he did not commit the offence charged, then I must find him not guilty.

[11] I am alert to the applicable principles of *R. v. W.D.* in assessing Mr. Comeau's testimony and its role in determining whether ultimately the Crown has met its burden.

**Analysis**

[12] The parties have tendered an Agreed Statement of Facts. It states:

1. The jurisdiction of the offence – at or near Halifax, in the county of Halifax, in the province of Nova Scotia – is admitted.
2. The time and date of the offence – the evening of May 22, 2015 – are admitted.
3. The identity of the accused, Joseph Elizee Comeau, is admitted.
4. The qualifications of Dr. Catherine (sic) Meehan are admitted: i.e., that she is a duly qualified medical practitioner licensed to practice medicine in the province of Nova Scotia, with special competence in the care of the elderly, and qualified to give expert opinion evidence on the diagnosis and symptomology of dementia, including the effects of dementia on mental capacity.

And further, it is admitted that on the date in question:

5. The complainant, E.W. ([date of birth]), was a resident at [the facility] – a continuing care facility located at [address] – and living in [her room] (on the [special care] floor).
6. The accused, Joseph Elizee Comeau, was employed as a housekeeper at [the facility].
7. At approximately 6:30 – 7:00 pm, Mr. Comeau was on-duty on the [special care] floor.
8. He entered [E.W.’s room] – without his cleaning supplies – where he was alone with Ms. W. The door to [Ms. W.’s room] was closed.
9. There was sexual contact between Mr. Comeau and Ms. W.
10. Juanida Magsayo was employed as a continuing care assistant at [the facility] (helping residents with daily activities such as bathing, dressing, and eating) and was on-duty on the [special care] floor.
11. Juanida Magsayo saw Ms. W. and Mr. Comeau interacting in the hallway at approximately 7:00 p.m.
12. Juanida Magsayo approached Ms. W. and had a conversation with Ms. W. alone.
13. Ms. W. told Juanida Magsayo that Mr. Comeau had asked her to “give him a blow job.” Ms. W. used her hands to demonstrate the size of Mr. Comeau’s penis and made a hand gesture as if she had choked on something.

And further, that:

14. Ms. W. has no recollection of their contact on that date in question and due to mental disability is not a competent witness.
15. On June 11, 2016, Detective Constable Nancy Wagner met with Ms. W. in her room at [the facility]. Ms. W. did not remember a male employee having been in her room.
16. On Sept. 9, 2015, Detective Constable Nancy Wagner interviewed Joseph Comeau at the Halifax Police Station. Mr. Comeau’s statement was a video and audio-recorded. His statement was given freely and voluntarily.

[13] Dr. Catheryne Meehan was qualified to give opinion evidence as a medical practitioner licensed to practice medicine in the province of Nova Scotia, with special competence in the care of the elderly, and qualified to give expert opinion evidence on the diagnosis and symptomology of dementia, including the effects of dementia on mental capacity.

[14] Dr. Meehan has been a medical doctor for 33 years and is employed by the Nova Scotia Department of Health working in long-term care facilities. One of those

facilities is [the facility] where she acts as the family physician for level II patients, those who are characterized as requiring the most nursing support. A majority of her patients have dementia. She has been working in this specialized area of practice for approximately 9 ½ years.

[15] The determination of whether a patient is level II is made by nursing assessments. A level II patient is generally unable to carry out the basic activities of daily living which may include personal care, grocery shopping, and decision making.

[16] A Clinical Geriatric Assessment (CGA) is performed every six months to determine the cognitive, emotional, behavioural and mobility status of the resident. As well, a mini mental status exam (MMSE) is performed – that is a tool used in diagnosing dementia. These tests assist the staff in observing and recording changes in the resident’s medical status.

[17] Ms. W. was hospitalized after suffering [an injury]. Her MMSE score in April 2013, while still in hospital, was 18 out of 30 which placed her in the moderate dementia range, a range being 10 to 20 out of 30. Under 10 indicates severe dementia. Her family felt that she was unable to return home as she was exhibiting difficulties in caring for herself and managing her affairs.

[18] Ms. W. moved into [the facility] as a resident of the [special care] floor, a locked unit for residents who are at risk of wandering because of their dementia. While most of the residents of that floor suffer from dementia there can be exceptions.

[19] Dr. Meehan became the family doctor for the complainant, E.W., in August 2013. She described the complainant, at their first meeting, as “quite pleasant”, in her mid-70s, and that “actually she presented relatively well cognitively”. She described Ms. W. as relatively functional compared to other individuals on the floor and that while she needed assistance with bathing and being reminded to dress, she could dress herself, feed herself and was ambulatory.

[20] The doctor noted that during this first interview Ms. W. made sexual innuendos and engaged in inappropriate behaviour. At one point Ms. W. pulled up her blouse and showed her breasts to the doctor while giggling and laughing. There was no request for her to do this and no apparent reason to do so.

[21] There were successive CGAs conducted during 2014 and 2015, the results of which Dr. Meehan reviewed with the assistance of her notes made at the time. Ms. W. was perceived as medically and cognitively stable though suffering from dementia which manifested itself by some impairments of her memory, complex attention, social cognition and ability to assess social situations. She was described as often inappropriate in her language, and staff noted that Ms. W. exhibited sexual disinhibition. Her MMSE remained in the 18 to 22 range which would be consistent with mild to moderate cognitive impairment. Her care needs remained about the same.

[22] The last CGA of Ms. W. prior to the offence date took place in February 2015. She was again observed to be relatively stable, medically and cognitively. An MMSE in March resulted in an 18/30 score. Between March and June of 2015 Dr. Meehan attended on Ms. W. for [various health conditions]. No cognitive testing was undertaken during this time.

[23] On June 29, 2015 Dr. Meehan was requested to conduct a “capacity assessment”. Her opinions at the end of that assessment were as follows:

- As to financial capacity: Ms. W. had no idea of what her finances were;
- As to her health: she had a “complete lack of insight to her needs and her cognitive state”;
- As to social capacity: Ms. W. was described as somewhat of a loner;
- As to her capacity to enter into a sexual relationship, Dr. Meehan said: “I felt that she lacked capacity there as well, lacked insight and was unable to remember what happened five minutes previously.” It was her view that Ms. W’s reasoning was impaired and she would have impairment of her ability to understand her actions and the ramifications that those actions might have.

[24] On July 8, 2015, Dr. Meehan was again asked to provide her opinion as to Ms. W’s capacity to give informed consent to sexual activity. Dr. Meehan’s view was and is that Ms. W. could not provide informed consent as she lacked insight, judgment and reasoning necessary to make a safe decision to engage in sexual activity. She had no short-term memory and her midterm memory was impaired. These are functions that are necessary to make safe decisions and therefore she believes that Ms. W. would not understand the consequences of engaging in sexual

activity. Dr. Meehan's opinion is that Ms. W's lack of capacity to provide informed consent to sexual activity existed in May 2015, being the time of the alleged offence.

[25] Ms. W. exhibits symptoms of dementia with vascular aspects that affect the frontal cortex of the brain. A patient with this condition has a less impaired memory but also is less inhibited in their conduct. As such, she would be unable to inhibit her inappropriate sexual behaviors. Dr. Meehan is aware that Ms. W. was acting in a sexual manner with a male resident at times after May 2015.

[26] In direct examination Dr. Meehan was asked whether Ms. W's impaired cognitive state would be apparent in exchanging pleasantries. Dr. Meehan replied that "possibly not".

[27] In cross-examination Dr. Meehan agreed that Ms. W. could present well cognitively initially but that if one asked her more detailed questions it would become apparent that she had cognitive issues. If, for example, one asked her about something that happened the day before she would give an answer but you would very likely find out that the answer was false if you were to follow up on it. She might say that she is looking for her lost dog, but she does not have a dog.

[28] Dr. Meehan agreed that Ms. W. could engage in small talk. She agreed that Ms. W. was ambulatory and walked around the floor and engaged in conversations. She again agreed that her impaired cognition would not immediately be apparent to the lay person so, superficially, one would not see much change in her over the period in which she was a resident. It would be necessary to spend some time with her.

[29] Dr. Meehan differentiated between the capacity to appreciate conduct and the capacity to give consent. In Ms. W's case it was her lack of an appreciation of the consequences of her activity which formed the basis for Dr. Meehan's conclusions. Therefore, a person such as Ms. W. can say that "yes this is what they want to do but they cannot appreciate the outcome of it". She agreed that this would not necessarily be visible to a lay person who does not have access to the medical records or experience that she does.

[30] Dr. Meehan indicated that there are special protocols for managing patients that are sexually uninhibited. In such cases a social worker with expertise in long-term care patients and their sexual issues would be employed to provide staff with training as to managing persons with these issues. While she believed the staff at [the facility] had such training she was not sure if it was in fact provided.

[31] In redirect examination, Dr. Meehan clarified that when she described Ms. W. as presenting “relatively well” cognitively that it was relative to other patients on the floor. Because she was ambulatory and could make small talk while others “were in wheelchairs talking nonsense” Ms. W. would appear to be more reasonably together, using Dr. Meehan’s words. Dr. Meehan repeated that it would be quickly apparent that Ms. W. was cognitively impaired if one asked her for specific information, something more than a brief exchange of pleasantries.

[32] I note at this point that Dr. Meehan indicated that she believed Ms. W. would not remember engaging in sexual activity, but paragraph 13 of the Agreed Statement of Fact indicates that Ms. W. approached Juanida Magsayo, a Continuing Care Assistant, and described her sexual encounter with Mr. Comeau. The fact that Ms. W. is alleged to have recalled the incident seems inconsistent with Dr. Meehan’s opinion that she would not recall events 5 minutes after they occurred. Dr. Meehan, however, was not asked to reconcile this apparent inconsistency.

*Evidence of the actus reus*

[33] I will begin by examining the evidence with respect to the conduct that took place on May 22, 2015 and which gave rise to the charge.

[34] The defendant admits that there was sexual contact between himself and Ms. W. on the date and in the location set out in the Indictment. (See paragraph 9 of the Agreed Statement of Facts)

[35] He further admits that after the incident Ms. W. approached Juanida Magsayo, a Continuing Care Assistant, and said that Mr. Comeau had asked her to “give him a blow job”. Ms. W, according to Juanida Magsayo, used her hands to demonstrate the size of Mr. Comeau’s penis and made a hand gesture as if she had choked on something. (See paragraphs 10, 12 and 13 of the Agreed Statement of Facts). Juanida Magsayo did not testify; I have no further details of the conversation and of course I do not have Ms. W. available to give evidence on this conversation. Dr. Meehan’s evidence would suggest that Ms. W. should not have been able to recall the incident so the accuracy of Ms. W’s statement is difficult to assess.

[36] Joseph Comeau has provided his version of what occurred on three different occasions. The first was in an interview with his supervisor Teresa MacFadyen. The second was in an interview with Det. Cst. Nancy Wagner on September 9, 2015 and finally his in Court testimony.

[37] Mr. Comeau told D/Cst Wagner that he was about to finish mopping the floor when Ms. W. approached him, took him by the arm and told him that she had not seen him in a long time. He corrected her by saying that it had only been two days since they had last seen each other. She told him that he looked good and that he smelled nice. She then asked him to go into her room and so he did. Ms. W. asked him to sit on the edge of the bed which he did. Ms. W. sat on a chair facing him and pointed at his penis asking “can I see it?”. For reasons that he was unable to explain he took his penis out at which point she bent over and kissed it, without saying anything to him.

[38] According to Mr. Comeau, Ms. W. then pulled her top up. She was wearing a bra. She said “I usually do not wear one of these. I do not know why I am wearing one today”. She did not ask him to touch her although he thought that perhaps she wanted him to. He did not touch her.

[39] He said that he then got up and went toward the bathroom with his penis still hanging out of his pants. She approached him as he got to the bathroom door and asked to see it again. Mr. Comeau said that he had to go. He then asked her whether she would like to kiss his penis. She said yes and so he allowed her to kiss his penis and then put it away and left. He estimated that the time in her room was about 10 minutes.

[40] Mr. Comeau could only remember Ms. W. telling him that he looked good and that she liked him and that he smelled good.

[41] Mr. Comeau’s testimony at trial as to the sequence of events giving rise to this charge was consistent with that given in his statement to the police, although in his testimony he was able to expand a bit on the discussion that he and Ms. W. had before the incident took place.

### **The Law of Sexual Assault**

[42] Sexual assault is an assault as defined in section 265 of the **Criminal Code** where the assault is committed in circumstances of a sexual nature. Relevant to this case is section 265(1)(a) which says that a person commits an assault when:

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

[43] Section 273.1 defines consent for the purposes of section 271, being the charge in this case, as the “voluntary agreement of the complainant to engage in the sexual activity in question.”

[44] The evidence of Mr. Comeau confirms that he intended that Ms. W’s mouth contact his erect penis. Such conduct would be lawful if Ms. W. consented to this sexual activity, that she had the legal capacity to consent, and that there was no other circumstance which vitiated her consent.

[45] The uncontradicted sworn testimony is that the complainant initiated the sexual contact between the accused and herself and, but for the issue of whether she had the legal capacity to consent to this conduct, in all other respects would have appeared to have given her consent to the sexual activity in question.

[46] Section 273.1(2) says that:

- (2) No consent is obtained, for the purposes of sections 271, ..., where
  - (b) the complainant is incapable of consenting to the activity.

[47] The Crown maintains that Ms. W. did not have the capacity to consent to the sexual contact between herself and the accused. The prosecution relies upon the evidence of Dr. Meehan to support this position. The defence did not take serious issue with the prosecution’s position in this regard.

*Has the Crown proved beyond a reasonable doubt Ms. W’s incapacity to consent?*

[48] Ms. W. must have been subjectively consenting to the activity and to be valid it must be the consent of a conscious and operating mind. Dr. Meehan’s opinion is that for there to be informed consent the participants must not only understand the sexual activity and communicate their agreement to that activity but also must be able to understand the potential consequences of the activity. She believes that Ms. W. lacked the necessary insight as to the consequences of her sexual activity to have the capacity to give informed consent and that she was disinhibited by her cognitive impairment, not by a conscious and operating mind.

[49] I accept Dr. Meehan’s opinion and the facts upon which it is based. Ms. W. was unable to understand the risks and consequences associated with the activity she engaged in with Mr. Comeau. Therefore, I am satisfied beyond a reasonable doubt that Ms. W. lacked the necessary capacity to consent to the sexual activity that she engaged in with Mr. Comeau.

*Mens Rea*

[50] McLachlin C.J., writing in *R. v. J.A.* 2011 SCC 28, described the *mens rea* necessary to the proof of an offence of sexual assault at para. 24, where she said:

24 A person has the required mental state, or *mens rea* of the offense, when he or she knew that the complainant was not consenting to the sexual act in question, or was reckless or wilfully blind to the absence of consent. The accused may raise the defence of honest but mistaken belief in consent if he believed that the complainant communicated consent to engage in the sexual activity. However, as discussed below, section's 273.1 (2) and 273.2 limit the cases which the accused may rely on this defence.

[51] Section 273.2, which Chief Justice McLachlin referred to states:

**Where belief in consent not a defence**

273.2 It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where

- (a) the accused's belief arose from the accused's
  - (i) ...,
  - (ii) recklessness or wilful blindness; or
- (b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

[52] In the case of *R. v. R.R.* 2001 151 OAC 1, an accused was convicted of sexual assault upon a 21-year-old disabled complainant. The accused appealed arguing that the complainant did consent and was capable of consent but that if she did not consent he had an honest but mistaken belief in consent and in capacity to consent. The appeal was dismissed. Abella J.A., as she then was, held, at para. 57:

57 ... Under any circumstances, there is a responsibility, prior to engaging in sexual activity, to take reasonable steps to ascertain consent: **Criminal Code** section 273.2 (b). But in circumstances such as these, where one of the participants has demonstrable mental limitations, the threshold of responsibility escalates exponentially. This is not to suggest that persons who are developmentally disabled cannot consent; rather, it requires that prior caution be exercised to avoid the exploitation of an exceptionally vulnerable individual. The issue in any event was not the capacity of persons with developmental disabilities to consent to sexual activity; rather, the issue was the capacity of this particular complainant to consent to sexual

activity with the appellant and whether he had an honest but mistaken belief in that capacity.

[53] Mr. Comeau is 58-years-old and married. He has worked as a cleaner for “most of his life” and for the 26 years prior to the incident in this case he carried out this work at [the facility]. He is not a sophisticated person and it is apparent that he has a genuine remorse for his conduct and understands it to be at least morally and socially wrong. His counsel argues though that Mr. Comeau had a reasonable but mistaken belief that Ms. W. had the capacity to and did give her consent to the sexual acts that give rise to this charge.

[54] I accept that Ms. W. complimented the accused and invited him to come to her room; that she took him by the arm to the room and that she requested to see the accused’s penis. I accept Mr. Comeau’s evidence as to the entire sequence of events including that Ms. W. lifted her shirt to show him her breasts, though while wearing a bra. This type of uninhibited sexualized behaviour and manner of speaking was consistent with the observations of Dr. Meehan, and other staff members on the floor. By itself, the complainant’s words and conduct communicated consent to the sexualized activity. However, Ms. W. did not have capacity.

[55] The question then is whether or not Mr. Comeau’s belief arose from his recklessness or wilful blindness to Ms. W’s lack of capacity; or whether or not he failed to take reasonable steps, in the circumstances known to the him at the time, to ascertain that the Ms. W. was consenting? This is an evidentiary burden that Mr. Comeau must satisfy.

[56] Mr. Comeau stated to D/Cst. Wagner that it was not his intention to hurt anyone. He said: “and I still do not even know why I did it.” He expressed remorse for his conduct. From his appearance in the video of this statement and from his testimony at trial I believe he was being truthful. That does not resolve the question however.

[57] There were several circumstances in this case that should have alerted Mr. Comeau that he needed to take reasonable steps to determine Ms. W’s capacity to consent to the sexual activity in question.

[58] Mr. Comeau was a long-time employee at [the facility] and was very familiar with the fact that the residents on [the special care floor] were Level II, special care patients who had significant mental and physical impairments. Residents of that unit are approaching the end of their lives.

[59] The floor was a locked unit to minimize the risk that a dementia patient could wander off the floor. Some residents, and Mr. Comeau believes that Ms. W. was one of them, wear a “wander guard” which is intended to ensure that a patient cannot wander off the floor.

[60] There was an unwritten rule that staff should not go into a resident’s room with the door closed after them. This was known to Mr. Comeau. As Mr. Farmer noted, the rule is intended as a protection for both the employee and the resident - against inappropriate conduct by the employee or allegations of inappropriate conduct against the employee. It is precisely because of the infirmities of these residents that such a rule is needed.

[61] Prior to the offence date, the accused entered Ms. W’s room and the door was closed. He was warned by his supervisor that this was not acceptable and not to do it again, and yet Mr. Comeau did it again on the day of the incident that is the subject of this charge. Notwithstanding this policy, and the warning he received, Mr. Comeau chose to go into the room with Ms. W. and with the door closed on the day of the alleged offence. He knew that this was inappropriate, and that it was risky behaviour. He failed to offer a reasonable explanation for why he did this. I am prepared to infer that he allowed it to happen because he intended a private encounter with Ms. W. and that he knew that it was wrong to do so.

[62] Mr. Comeau acknowledged that Ms. W. showed memory deficits when he spoke with her. On one occasion, although they had been talking not very long before that occasion, Ms. W. felt that it had been a long time between their meetings. In their conversations, she was repetitive and the topics of conversation were very limited and superficial. Again, these were things that should have alerted Mr. Comeau to her cognitive deficiencies.

[63] While it was not unheard of, it was unusual to have someone on the floor who was more able. Ms. W, again at least superficially, appeared to be one of those persons who, relative to the other residents of the floor, appeared cognitively well. She was ambulatory and was described by Dr. Meehan as pleasant. She could carry on short conversations that were appropriate and responsive, if not always containing accurate information. This was not to suggest that she would compare well, cognitively speaking, with the healthy adult population, but on this unit she may have stood out as being somewhat less impaired. Her MMSE scores were stable and consistent with moderate to mild dementia which again, while not a fact known to

the accused, is consistent with the fact that she may not have seemed as impaired to him as those residents on the floor with severe dementia.

[64] Ms. W. was prone to making sexual innuendos and engaging in sexualized behaviours. So, it is not surprising that she was somewhat suggestive in her comments to Mr. Comeau. He said that he enjoyed speaking with her and said that it made him feel good about himself on the occasions when they spoke. This undoubtedly, in my view, played a role in his failure to be more careful in considering what her true capacity was.

*What steps did he take to ascertain her capacity to consent?*

[65] Mr. Comeau did not know Ms. W's name at the time of the incident. He explained that he stopped learning the residents' names because it made it easier for him since he knew that this was their "last stop" and that knowing that made him sad.

[66] Mr. Comeau believes that he spoke with Ms. W. on four different occasions, each time being relatively short conversations about superficial topics. The conversations were repetitive. These conversations did not afford Mr. Comeau an opportunity to, nor did he make the effort to, determine by longer conversations whether Ms. W. was suffering any mental deficits.

[67] In his statement to the police, when asked about his interaction on that first occasion with her, he described Ms. W. as "just someone to talk to, just... she felt good because someone talked to her." (page 25)

[68] He described Ms. W. as being "old school" and demonstrated good manners. He acknowledged that she did not have the best memory for a couple of things as they talked. He told D/Cst. Wagner that Ms. W. had not said anything to him that was "awkward or wrong or inappropriate or maybe even sexual in nature".

[69] Mr. Comeau was asked by the police to explain why he did this. He said: "I do not know if I thought I was doing her a favour or what. I honestly do not." When asked what caused him to have an erection at the time of the incident he replied that it was "because she was paying attention to me. It could have been just that."

[70] The evidence which I find most problematic to Mr. Comeau's defence came in his own testimony, in particular during cross-examination. He never told Ms. W.

his name or any of his personal details. He made no inquiry of her about who she was or any of her background or circumstances.

[71] He agreed that it was odd that a woman who he did not know and had minimal conversations with wanted to see his penis. He testified that while in the room he thought to himself that he should not be doing this, and that “this is wrong”. He agreed that he had made no inquiries about her mental fitness and that he knew that there must be something wrong with her mental health. He did not ask why she was on the special care floor. He never spoke to a doctor or other caregivers to inquire about her condition.

[72] These were all things that should have alerted him to the need to make better inquiry. The one thing that gave me and has given me some concern in assessing the reasonableness of Mr. Comeau’s belief in Ms. W’s capacity to give consent to the sexual activity stems from the fact that the staff on the unit, who are familiar with her medical history, permitted Ms. W. to engage in sexual activity with one of the other residents. This fact was not known to Mr. Comeau and so is not part of an assessment of his understanding of Ms. W’s capacity to consent. What it does suggest, however, is that staff believed that Ms. W. had the capacity to consent to engage in sexual activity with another resident.

[73] I posed this seemingly contradictory evidence to Crown counsel who reminded me that the question before this Court is not whether Ms. W. had the capacity to consent to sexual activity with another person but rather whether she had the capacity to consent to engage in sexual activity with Mr. Comeau. This response does not answer the question. Dr. Meehan’s evidence that Ms. W’s capacity to consent was impaired because she was unable to appreciate the risks and consequences of her actions would be no less accurate if she were to engage in sexual activity with Mr. Comeau or with some other person. There is no reason to believe, having regard to Dr. Meehan’s evidence, that Ms. W. could switch on and off an appreciation of the consequences of her actions. She either has capacity or she does not.

[74] So what does this evidence mean in the context of Mr. Comeau’s understanding of Ms. W’s capacity to consent? Dr. Meehan relies heavily on the notes and briefings provided to her by the staff of [the facility] who work on a daily basis with Ms. W. That same staff permitted Ms. W. to engage in sexual relations with another person on the unit, notwithstanding their familiarity with her CGA results and other medical information. They would have far more information

available to them than Mr. Comeau in terms of assessing the appropriateness of Ms. W. engaging in such activity.

[75] There are different explanations available for this, none of which were examined directly in the evidence.

[76] I agree with the Crown in one respect. It is not relevant to deciding whether Mr. Comeau took reasonable steps to ascertain consent having regard to the circumstances as he knew them at the time of the sexual activity. The fact that he is charged and others are not may seem like a double standard but ultimately the Crown, apprised of all the circumstances, has the discretion to decide who to prosecute and for what offence. It has not been suggested, nor is there any evidence to suggest, that their discretion was exercised inappropriately in proceeding with the prosecution of Mr. Comeau.

[77] At most, it is evidence that may be seen as consistent with the conclusion that Ms. W. appeared to have the capacity to consent which would be supportive of Mr. Comeau's position.

## **Conclusion**

[78] Dr. Meehan allowed that Ms. W. could appear relatively well cognitively if only addressed for short periods of time and without any probing questions. Ms. W. presented herself to Mr. Comeau as a person who could carry on short conversations, who expressed an interest in him and initiated the sexual activity by asking the accused to show her his penis after which she kissed it without being prompted to do so, at least on the first occasion. By her conduct and words Ms. W. gave every indication of her consenting to the activity.

[79] Defence counsel urges that a difference should be drawn between recognizing that there are medical reasons for concluding that a person does not have capacity and the legal test for an accused, in the circumstances, to make adequate inquiry. I do not dispute that suggestion.

[80] The fact that Ms. W. was permitted to engage in sexual activities with other residents by a staff that was fully cognizant of her medical's status could support the notion that Mr. Comeau would have formed the view that Ms. W's cognitive impairments were not so significant as to render his conduct criminal by virtue of an inability on her part to give informed consent to the sexual activity.

[81] Mr. Comeau has expressed remorse and that he knew at the time that what he was doing was wrong and that he should have withdrawn from the situation. It is possible that Mr. Comeau recognized that what he did was morally or socially wrong but not that Ms. W's impairments rose to the level that would vitiate any consent that she gave to such sexual activity. However, there are many reasons why Mr. Comeau should have thought to take steps to inquire.

[82] In the totality of the circumstances that Mr. Comeau was aware of including the characteristics of the residents on Ms. W's unit, of Ms. W's memory, her social deficits, and her apparent mental health issues it was incumbent on Mr. Comeau to take reasonable steps to ensure that Ms. W. had the capacity to provide informed consent to the sexual activity that the couple engaged in. He did not do this. He made no reasonable inquiries that were clearly indicated to be necessary by the circumstances as he knew them. He engaged in the most superficial short conversations with a total stranger. He ignored warnings to stay out of her room with the door closed and he ignored the warnings that were in contravention of the facility policy.

[83] I conclude that given Mr. Comeau's own admissions of the wrongfulness of his conduct seen against the totality of the circumstances as they appeared to him at the time, that he turned a wilfully blind eye to the question of Ms. W's capacity to consent and that he did so to gratify himself when the opportunity presented itself at the instance of a disinhibited Ms. W. He failed to take reasonable steps in the circumstances known to him at the time to ascertain that Ms. W. gave informed consent to the sexual activity.

[84] The accused has not met the evidentiary burden of establishing that he had an honest but mistaken belief in the informed consent of Ms. W. to the sexual activity.

[85] As a result, I find the Mr. Comeau guilty.

Duncan, J.