Citation: R v Ackman, 2017 MBCA 78 Date: 20170828
Docket: AR16-30-08612

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Diana M. Cameron
Mr. Justice Christopher J. Mainella
Madam Justice Janice L. leMaistre

B E T W E E N:

HER MAJESTY THE QUEEN	)	***Z. M. Jones***
	)	*for the Appellant*
	)	
Respondent	)	***D. L. Carlson*** *and*
	)	***J. M. Mann***
- and -	)	*for the Respondent*
	)	
	)	*Appeal heard:*
DARRELL ERWIN ACKMAN	)	***April 24, 2017***
	)	
	)	*Judgment delivered:*
(Accused) Appellant	)	***August 28, 2017***

NOTICE OF RESTRICTION ON PUBLICATION: No one may publish, broadcast or transmit any information that could disclose the identity of the complainant(s) or witness(es) (see section 486.4 of the *Criminal Code*).

On appeal from 2016 MBQB 109

CAMERON JA

Introduction and Issues

[1] The accused appeals his convictions after a trial by judge and jury of 14 offences relating to seven complainants, as follows:

- living on the avails of prostitution of a person under the age of 18 (then section 212(2) of the *Criminal Code* (the *Code*), as

repealed by section 13 of the *Protection of Communities and Exploited Persons Act*, SC 2014, c 25) (x4);

- attempting to live on the avails of prostitution of a person under the age of 18 (then section 212(2) of the *Code* and section 24(1) of the *Code*);

- living on the avails of prostitution (then section 212(1)(j) of the *Code*—this section was also repealed by section 13 of the *Protection of Communities and Exploited Persons Act*, SC 2014, c 25);

- making child pornography (section 163.1(2) of the *Code*) (x3);

- sexual assault (section 271 of the *Code*) (x3);

- invitation to sexual touching (section 152 of the *Code*); and

- possession of proceeds of crime over $5,000 (section 354(1) of the *Code*).

[2] The accused also applies for leave to appeal and, if granted, appeals the cumulative sentence for all of the offences of 15 years' imprisonment less credit for four years and four months of time served in pre-sentence custody, leaving a go-forward sentence of 10 years and eight months' imprisonment. As I later briefly state, I would deny leave to appeal.

[3] The accused's first ground of appeal involves all of the charges of living on the avails of prostitution and the charge of possession of proceeds

of crime. Prior to the commencement of his trial before the jury, the accused filed a motion requesting a judicial stay of proceedings for each of those charges pursuant to section 24(1) of the *Canadian Charter of Rights and Freedoms* (the *Charter*). He asserted that the prosecution of the charges breached his right to life, liberty and security of the person guaranteed by section 7 of the *Charter*. In support of his application, he relied on the Supreme Court of Canada decision of *Canada (Attorney General) v Bedford*, 2013 SCC 72, wherein the Court declared section 212(1)(j) of the *Code*, living on the avails of prostitution, to be invalid. It then imposed a one-year suspension of the declaration of invalidity (the suspension).

[4] The case-management judge (not the same as the trial judge) denied the accused's *Charter* motion. In my view, the ground of appeal relating to her decision raises three issues.

[5] The first issue is whether the *Bedford* decision applies to a charge of living on the avails of prostitution of persons under the age of 18 years. As I later explain, in my view, the *Bedford* decision does not apply to those charges.

[6] Regarding the remaining charge of living on the avails of prostitution involving the adult complainant, the accused argues that, during the course of his prosecution, the suspension ended, thereby invalidating the section of the *Code* under which he was charged and that no new legislation was enacted. Relying on *R v Demers*, 2004 SCC 46, he submits that he should receive a stay of proceedings on the basis that the conduct underlying this charge fell within the type of behavior that formed the basis for the Court's finding in *Bedford* that section 212(1)(j) was overbroad. I disagree.

In my view, Parliament enacted corrective legislation within the period of the suspension in response to the overbreadth concerns raised in *Bedford*. Further, the facts in this case do not fall within the categories of overbreadth contemplated by that case. Finally, the accused was charged within the timeframe of the suspension and the rule of law justified his continued prosecution.

[7] The accused's second ground of appeal involves the dismissal of his request that the jury be given a warning as provided for in *Vetrovec v The Queen*, [1982] 1 SCR 811, regarding one of the underage complainants in this matter, MS. He maintains that she was charged with procuring and receiving material benefits in relation to some of the same complainants. He argues that she was, in effect, an unindicted co-accused. While the trial judge refused the accused's request, he did give a warning to the jury regarding the evidence of MS. I would dismiss this ground on the basis that the accused has not shown that the trial judge misdirected himself or that his decision was so clearly wrong as to amount to an injustice.

Background

[8] In late 2011, at the age of 42, the accused started an "escort" business in Winnipeg. Having the experience of previously operating such a business in Florida, he systematically created a client list and placed advertisements on the internet. He set about finding young females, including the complainants, to perform sexual services for financial gain. During the course of operating his business, the accused obtained clients for sexual services and negotiated the terms for the complainants to perform them. He also acted as their driver. These interactions were referred to as

"calls". Although there were exceptions, the accused generally kept half of the money paid for the sexual services. The accused carried on business in this manner until July 2012, when he was arrested as a result of a sting operation wherein he offered the sexual services of a person under the age of 18 years for financial gain to undercover police officers.

[9] What follows is a brief summary of the facts relating to each complainant and the charges for which the accused was convicted.

[10] The first incident involved A. She was 18 years old when she met the accused in December 2011. At the request of one of her friends, the accused picked them up from a motel where they had been drinking. A testified that she believed that she had been drugged as she recalled little of the remainder of the night. However, she did remember that the accused told her to put his penis in her mouth and touch herself. She also recalled that another man videotaped the accused having vaginal intercourse with her. When A woke up at home the next day, there was semen and blood on her underwear and bruising on her arms and legs. She found $100 and the accused's escort business card in her pocket. The accused testified that he had consensual sex with the complainant and denied drugging her. The jury convicted the accused of sexual assault on the basis that the complainant was incapacitated and could not consent to sex.

[11] DA met the accused in February 2012. She had just turned 18 years of age. She was addicted to opiate drugs. The accused picked DA up when she was working as a sex-trade worker on a street corner. He convinced her to work for him. He moved into her apartment and arranged for her to perform sexual services for money there as well as at other

locations. She testified that the accused started keeping her share of the money, only giving her small amounts on the premise that he was preventing her from buying drugs. She ended their relationship near the end of March 2012. The accused was convicted of living on the avails of prostitution regarding DA.

[12] In July 2012, the accused met D. She was 14 years old and a ward of Child and Family Services. She had engaged in the sex trade prior to going to work for the accused. She also had sexual interactions, including vaginal intercourse, with the accused which were videotaped by another young woman. In his reasons for sentence the trial judge stated that the video left "nothing to the imagination" (at para 17). Although there was no evidence relating it to the accused, D committed suicide prior to the trial. On the basis of the videotaped statement that she gave to the police, the testimony of one of the other complainants and the video of him having sex with D, the accused was convicted of living on the avails of prostitution of a person under the age of 18 years, sexual assault and making child pornography.

[13] D introduced the accused to MS who was 16 years of age at the time, but turned 17 shortly thereafter. She had just been released from the Manitoba Youth Center and was placed in the permanent care of Child and Family Services during the course of her relationship with the accused. She started working as a sex-trade worker for the accused the same day that she met him. Indeed, the accused referred to her as the "bread winner". Drugs and alcohol factored heavily in the relationship. MS also had sexual relations culminating in sexual intercourse with the accused, which was videotaped. The sexual acts were performed in front of B, who was 14 years

old at the time. It was MS who the accused offered to the undercover police officer for sex for money. The accused was convicted of living on the avails of prostitution of a person under the age of 18 years and making child pornography in relation to MS.

[14] Next, JM met the accused through D and MS. She was 16 years old and was also in the care of Child and Family Services. At the time he first met JM she was "terribly drunk" (reasons for sentence at para 18). Despite this, he dropped her off at a client's apartment to perform sexual services for money. The call did not go well as JM vomited during her interaction with the client. On another occasion, JM went with MS to a home where men were partying. She partially stripped and was fondled by the men while the accused was watching. The accused was paid $2,000 for the services of the complainants that night. JM was unable to testify at the trial because she also committed suicide. Again, there is nothing to link her suicide to the accused. Based on her statement to the police and the evidence of MS, the accused was convicted of living on the avails of prostitution of a person under the age of 18 years in relation to JM.

[15] MS also introduced the accused to B. At the time, B was 14 years old. She only spent one night with the accused, albeit an eventful one. First, the accused sent her into a client's car to perform sexual services. Although the client changed his mind about having the services, the accused received $200 from the client, of which he gave $40 to B. Next, the accused took B to his suite where he videotaped her in several poses depicting her genital and buttocks areas, although she had her panties and a top on. The accused then started to have sex with MS and encouraged B to have sex with him also. Although she did not want to, she gave in and briefly engaged in

sexual intercourse with him. It ended when she told him to stop. The accused was found guilty of attempting to live on the avails of prostitution of a person under the age of 18 years, sexual assault and making child pornography in relation to B.

[16] The accused became involved with S after he approached her at a local mall and, on a later date, at a McDonald's restaurant. She was 14 years old at the time and frequently consumed drugs and alcohol. She would accompany MS when MS provided sexual services for money. On one occasion, MS had S "finish [a client] off". She also partially stripped at a bachelor party. The accused received money for these acts. The accused also offered S $1,000 for sex, which she refused. S was with MS and the accused at the time of his arrest. Indeed, the accused told the undercover officer that she was "in training" (reasons for sentence at para 13). The accused was convicted of living on the avails of prostitution of a person under the age of 18 years and invitation to sexual touching regarding S.

[17] Finally, after his arrest, police searched the accused's home. They located some of the videos. They also located approximately $15,300 in small denominations in cups under his bed. For this, he was convicted of possession of proceeds of crime.

Discussion

Ground 1—Did the Case Management Judge Err In Dismissing the Accused's Section 24(1) Charter Application?

Positions of the Parties

[18] The accused's argument regarding *Bedford* is threefold. He

contends that the declaration of invalidity should be extended to include the charges involving the complainants who were under the age of 18 at the time of the offence. He asserts that the concern for the safety and security of persons working in the sex trade is the same, if not more so, for persons under the age of 18.

[19] Next, he argues that, despite the fact that he was charged during the period of suspension, it had ended by the time of his trial and the impugned provisions were not amended. In accordance with *Demers*, he says that an examination of the evidence shows that he was not the controlling exploitive pimp targeted by the legislation. Therefore, he maintains that he should receive a stay of proceedings.

[20] Finally, the accused claims that he should benefit from the change in the law that occurred while he was still in the system in accordance with the decision of *R v Wigman*, [1987] 1 SCR 246.

[21] The Crown argues that the *Bedford* decision is inapplicable to the charges involving the underage complainants. It argues that the crime of living on the avails of prostitution of a person under the age of 18 years is a distinct offence, not considered by the Court in *Bedford*.

[22] Further, the Crown argues that the effect of the suspension was to create a period of temporary validity of the provision. It maintains that the court must consider the state of the law at the time the accused was charged, not at the time of the trial.

The *Bedford* Decision

[23] Prior to becoming involved in an analysis of the issues, it is helpful to briefly review the *Bedford* decision. In that case, the Supreme Court of Canada struck down certain prostitution-related offences in the *Code*, including section 212(1)(j) (living on the avails of prostitution), on the basis that it was overbroad. *Bedford* was not a case involving a criminal prosecution. Rather, its factual foundation consisted of the evidence of three adult women regarding their experiences as sex-trade workers, including evidence of the negative effect that section 212(1)(j) had on their security and safety.

[24] It is important to appreciate that when a provision is found to be overbroad, courts "recognize that the law is rational in some cases, but that it overreaches in its effect in others" (*Bedford* at para 113). In considering the purpose of section 212(1)(j), McLachlin CJC, writing for the Court, stated (at para 137):

> This Court has held, *per* Cory J. for the majority in *Downey*, that the purpose of this provision is to target pimps and the parasitic, exploitative conduct in which they engage:
>
> > It can be seen that the majority of offences outlined in s. 195 are aimed at the procurer who entices, encourages or importunes a person to engage in prostitution. Section 195(1)(*j*) (now s. 212(1)(*j*)) is specifically aimed at those who have an economic stake in the earnings of a prostitute. It has been held correctly I believe that the target of s. 195(1)(*j*) is the person who lives parasitically off a prostitute's earnings. That person is commonly and aptly termed a pimp. (p. 32)

[25] She took no issue with the policy purposes of the provision.

Nonetheless, she found the provision to be overbroad to the extent that it deprived "the applicants of their security of the person in a manner unconnected to the law's objective" (at para 142). She said (*ibid*):

> The law punishes everyone who lives on the avails of prostitution without distinguishing between those who exploit prostitutes (for example, controlling and abusive pimps) and those who could increase the safety and security of prostitutes (for example, legitimate drivers, managers, or bodyguards). It also includes anyone involved in business with a prostitute, such as accountants or receptionists.

[26] Despite finding that section 212(1)(j) violated section 7 of the *Charter* and could not be saved by section 1, McLachlin CJC determined that the declaration of invalidity would be suspended for one year.

[27] In this case, the conduct underlying the charges against the accused occurred before the *Bedford* decision. The accused was charged with the offences after the decision but during the period of time that the suspension was in effect. His trial commenced after the period of suspension.

[28] Within the time period of the suspension, Parliament repealed the impugned provision and, regarding all offences involving living on the avails of prostitution, replaced them with section 286.2 of the *Code*. See the *Protection of Communities and Exploited Persons Act*.

Application of *Bedford* to Persons under the Age of 18

[29] At the time the accused was charged, the *Code* contained two distinct offences of living on the avails of prostitution.

[30] Section 212(1)(j) provided:

> **Procuring**
> **212(1)** Every one who
>
> > (j) lives wholly or in part on the avails of prostitution of another person,
>
> is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

[31] Section 212(2) provided:

> **Living on the avails of prostitution of person under eighteen**
> **212(2)** Despite paragraph (1)(j), every person who lives wholly or in part on the avails of prostitution of another person who is under the age of eighteen years is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years and to a minimum punishment of imprisonment for a term of two years.

[32] In considering the argument that *Bedford* did not apply to minors, the case management judge stated:

> Although Bedford rules 212[(1)](j) to be unconstitutional and [the accused] is charged under that section generally, the bulk of his impugned charges involved either vulnerable people or children involved in prostitution.

[33] Unfortunately, in this case, the cover page of the indictment mistakenly stated that the accused was charged pursuant to section 212(1)(j) with respect to all of the charges of living on the avails of prostitution. However, a close reading of the indictment shows that all of the counts involving persons under the age of 18 were laid pursuant to section 212(2) and not section 212(1)(j).

[34] In my view, to the extent that the case management judge appears to have believed that the accused was charged under section 212(1)(j), she erred.

[35] I would decline to extend *Bedford* to section 212(2). I agree with the Crown that the underlying premise in *Bedford* was that prostitution was not illegal as it pertained to adults (see paras 1, 5). On the other hand, prostitution involving persons under the age of 18 years was and continues to be illegal. Then section 212(4) (now section 286.1(2)) prohibits everyone from obtaining sexual services for consideration from a person under the age of 18.

[36] Simply put, section 212(2) was not part of the challenge in *Bedford* and therefore only evidence regarding adults was considered. There was no evidence regarding the security and safety of persons under the age of 18 years or any evidence regarding the unique effects of prostitution on minors in light of their inherent vulnerability and heightened need for protection.

[37] Finally, the accused has not challenged the provision itself. He is not asking that section 212(2) be declared invalid pursuant to section 52 of the *Constitution Act, 1982*. Rather, he is simply asking for a stay of proceedings pursuant to section 24(1) of the *Charter* based on the *Bedford* decision regarding section 212(1)(j).

[38] In my view, the above is dispositive of the matter as it pertains to the four charges of living on the avails of prostitution of a person under the age of 18 years and the one charge of attempting to live on the avails of prostitution of a person under the age of 18. While section 212(2) has since been repealed and reenacted in section 286.2(2) of the *Code*, the accused

was convicted of the charge that was in effect at the time the offences were alleged to have been committed and therefore his prosecution pursuant to that provision was legal. See *R v Stevens*, [1988] 1 SCR 1153 at paras 1, 3.

The *Demers* Decision

[39] Regarding the remaining charge of living on the avails of prostitution pursuant to section 212(1)(j) involving the complainant DA , the accused argues that he is entitled to a section 24(1) *Charter* remedy in accordance with *Demers* on the grounds that Parliament did not amend the legislation within the period of the suspension. Thus, he asserts that he should be entitled to the benefit of the *Bedford* ruling of invalidity on the basis that the conduct underlying his charges was of the same nature that founded the determination that section 212(1)(j) was overbroad.

[40] The Crown argues that the evidence supports the contention that the accused was exploiting all of the complainants to further his commercial enterprise and that his actions did not bring him within the overbreadth concerns expressed in *Bedford*.

[41] In *Demers*, a majority of the Supreme Court of Canada declared certain sections of the *Code*—dealing with offenders who, by reason of mental disability, were unfit to stand trial—overbroad and unconstitutional. The legislation was found to be overbroad because it did not provide for the ability to obtain an absolute discharge to accused persons found to be permanently unfit, and yet not a significant threat to public safety. The Court observed that such persons were "subject to indefinite appearances before the Review Board and to the exercise of its powers over them" (at para 2). After declaring the legislation to be invalid pursuant to section 52

of the *Constitution Act, 1982*, the Court suspended the declaration of invalidity for 12 months.

[42] Despite the fact that Mr. Demers successfully challenged the legislation, the Court denied his request for a personal remedy pursuant to section 24(1) of the *Charter* on the basis that to allow such a remedy during the period of suspension would be tantamount to giving the suspended declaration of invalidity retroactive effect (at paras 61-62). However, the Court stated that if Parliament did not amend the invalid legislation within the 12-month suspension, persons "who do not pose a significant threat to the safety of the public" could ask for a stay of proceedings as an individual remedy pursuant to section 24(1) of the *Charter* (at para 63). In the result, absent any corrective amendment, only those who fell within the scope of overbreadth could obtain a prospective remedy pursuant to section 24(1).

Protection of Communities and Exploited Persons Act

[43] In this case, the accused is correct that Parliament did not amend section 212(1)(j) of the *Code*. Rather, in the *Protection of Communities and Exploited Persons Act*, it repealed that section and enacted section 286.2(1), dealing with the receipt of material benefit resulting from an offence of obtaining sexual services for consideration. Having received royal assent on November 6, 2014, section 286.2(1) was in force before the end of the suspension.

[44] Section 286.2(1) currently provides:

> **Material benefit from sexual services**
> **286.2(1)** Everyone who receives a financial or other material benefit, knowing that it is obtained by or derived directly or

> indirectly from the commission of an offence under subsection 286.1(1) [Obtaining sexual services for consideration], is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years.

[45] At the same time, Parliament enacted section 286.2(4) allowing for exceptions to the offence in an attempt to deal with the overbreadth concerns expressed in *Bedford*. It states:

> **Exception**
> **286.2(4)** Subject to subsection (5), subsections (1) and (2) do not apply to a person who receives the benefit
>
> **(a)** in the context of a legitimate living arrangement with the person from whose sexual services the benefit is derived;
>
> **(b)** as a result of a legal or moral obligation of the person from whose sexual services the benefit is derived;
>
> **(c)** in consideration for a service or good that they offer, on the same terms and conditions, to the general public; or
>
> **(d)** in consideration for a service or good that they do not offer to the general public but that they offered or provided to the person from whose sexual services the benefit is derived, if they did not counsel or encourage that person to provide sexual services and the benefit is proportionate to the value of the service or good.

[46] However, as I later discuss and of import to the facts of this case is that, pursuant to section 286.2(5)(e), none of the exceptions in 286.2(4) apply if the person commits an offence under section 286.2(1) where that person "received the benefit in the context of a commercial enterprise that offers sexual services for consideration".

[47] Thus, contrary to the accused's assertion that the legislation was

not amended in accordance with *Demers*, in my view, section 286.2 of the *Code* constitutes corrective legislation in response to the *Bedford* decision.

The Effect of the Corrective Legislation

[48] In order to understand the significance of the corrective legislation, I would note the following statement by Peter W Hogg in *Constitutional Law of Canada*, 5th ed Supplemented, vol 2 (Toronto: Thompson Reuters, 2007) (loose-leaf 2016 supplement) (at p 40-13):

> A suspended declaration of invalidity is delayed in coming into force, but if and when it comes into force it has the normal retroactive effect of a court order. It operates to invalidate the unconstitutional statute from the time of its enactment. Of course, a suspended declaration of invalidity will not come into force at all if during the period of suspension the competent legislative body enacts corrective legislation that replaces the unconstitutional statute with one that is constitutional.
>
> [emphasis added]

[49] Hogg states that, in his view, it "would seem to follow from the retroactive effect of a declaration of invalidity (including one that is suspended), that the corrective legislation would also have to be retroactive in its effect" (at p 40-13). I will examine the application of the current legislation to the accused later in these reasons.

[50] Kent Roach, in *Constitutional Remedies in Canada*, 2nd ed (Toronto: Thomson Reuters, 2016) (loose-leaf release no 28, September 2016), writes that a suspended declaration of invalidity allows courts to recognize the social interests that would be immediately affected by a declaration of invalidity. He states (at p 14-73):

> It also provides legislatures an opportunity to enact remedial legislation before unconstitutional legislation becomes of no force and effect. As such, it recognizes the role of the legislature in making policy choices not dictated by the Charter and in selecting among a variety of means to bring unconstitutional legislation into compliance with the Charter. At the same time, a suspended declaration of invalidity does not force the legislature to act. It provides it with an opportunity to act before the declaration of invalidity takes effect.

[51] In my view, the above reasoning is consistent with *Demers*. In that case, the court held that a prospective section 24(1) *Charter* remedy was available absent an amendment to the impugned legislation. However, as was ultimately the case, Parliament did enact corrective legislation and it was that legislation that governed those who otherwise would have been entitled to apply for a *Charter* remedy. Having said that, I acknowledge that the context of *Demers* was different in that it involved an ongoing situation as opposed to an event, such as the commission of a crime.

[52] I would note that a similar conclusion was reached in *R v Al-Qaysi*, 2016 BCSC 937, regarding the commission of a crime. However, it was not reached as a result of constitutional law analysis, but rather, based on the *Interpretation Act*, RSC 1985, c I-21 (the *IA*). In that case, the accused was convicted in the Provincial Court of communicating for the purposes of prostitution. While his trial commenced during the period of suspension, his conviction occurred after it. The accused applied for leave to appeal his summary conviction on the basis that the suspension had ended. Bowden J denied the application, stating that the effect of the suspension was not a "pressing legal issue" that required resolution in that case (at para 19). Nonetheless, he stated that, if he had granted leave, he would have dismissed

the appeal on the basis that the offence was repealed prior to the end of the suspension and was therefore still valid and enforceable pursuant to section 43 of the *IA*. That section provides that, where an act has been repealed, the proceedings instituted under it may be continued. Bowden J noted that the impugned section had been replaced by section 286.1 of the *Code*. He remarked that section 44(c) of the *IA* provided that, where a provision has been replaced, the proceedings under the former legislation "shall be taken up and continued under and in conformity with the new enactment" (at paras 24-28). He concluded that sections 43 and 44 of the *IA* applied to validate the conviction "after the repeal" and "the expiry of the suspension of the declaration of invalidity" (at para 30).

[53] Thus, the comments of Bowden J in *Al-Qaysi* are consistent in the result with *Demers* and Hogg, although for different reasons.

[54] Applying the reasoning of Hogg, I would conclude that the suspended declaration of invalidity could not be said to have taken effect as a result of the enactment of section 286.2 of the *Code*. In this case, the jury was instructed in a manner compliant with both the current section 268.2(1) and section 212(1)(j) as it then was.

[55] Furthermore, the accused would not have received the benefit of a jury instruction regarding the exemptions in section 286.2(4) because he testified that he was running a business and that he managed it as such, thus invoking section 286.2(5)(e), the commercial enterprise exception, to the exemptions. His defence was grounded in his claim that he was only running an escort business and did not know that complainants were exchanging sexual services for money. In response to his testimony, the jury

was fully instructed on the difference between an escort service and living on the avails of prostitution. Evidently, the jury did not believe the accused.

Application of *Demers*

[56] If I am wrong and section 286.2 did not replace section 212(1)(j) and the declaration of invalidity did come into force, I would hold that the application of *Demers* in this case demonstrates that the actions of the accused did not fall within any of the categories of overbreadth identified in *Bedford*. That is, when the actions of the accused are viewed in their entirety, he cannot be said to have been acting to "increase the safety and security of prostitutes" (*Bedford* at para 142). As I have already said, the case management judge commented that the nature of the allegations against the accused involved vulnerable people. The accused was exploiting young girls, including the complainant DA. She had barely turned 18 years of age and was addicted to opiate drugs when the accused started pimping her. He recruited her from the street, arranged for all of the calls that she went on, determined the fees to be charged for each call and where the sexual services were to be performed. He gave her alcohol and drugs, videotaped her in sexually compromised positions while she was intoxicated and uploaded the video onto the internet. Moreover, the accused started keeping DA's share of the money that she earned from performing sexual services. I acknowledge that DA had been a sex-trade worker since she was 11 years of age. Nonetheless, a review of her evidence leads to the conclusion that the accused was the controlling mind of the enterprise and that she was just another one of his workers. As is apparent, I reject the accused's contention that he was not the parasitic pimp envisioned by the legislation or that the prosecution of him was overbroad.

[57] Thus, for the above reasons, I do not accept the accused's argument that an application of *Demers* leads to the conclusion that he should receive a stay of proceedings.

Effect of the of the Suspension Period and the Rule of Law

[58] The accused argues that, in light of the fact that the suspension had ended by the time he was brought to trial, he should have benefited from the change in the law that occurred while he was still in the system, and, thus, he should receive a stay of proceedings.

[59] The Crown contends that the suspension operated to create a period of temporary validity during which section 212(1)(j) was legally effective and enforceable and that the principle of rule of law supported his continued prosecution.

[60] As I have already stated, in my view, the effect of the enactment of section 286.2 of the *Code* prevented the declaration of invalidity from taking effect. Nonetheless, I have considered the issue below.

[61] In contemplating the effect of the suspension, the case management judge stated, "The effect of the stay must be to avoid creating a legal vacuum." She said that it would not make sense that a person legitimately charged pursuant to section 212(1)(j) who successfully delayed their prosecution until the end of the suspension period would "get a free ride". She concluded:

> The only meaningful conclusion is that the stay of suspension means that anyone charged before the decision or during the suspension can be prosecuted under the old regime, and anyone

> after the suspension period, could only be charged with new offences under the new regime.

[62] The decision of the case management judge regarding the effect of the suspension involves a question of law which is to be reviewed on the standard of correctness. See *R v Farrah (D)*, 2011 MBCA 49 at para 7.

[63] In support of his contention that he should receive a stay of proceedings, the accused asserts that courts have recognized that, while a person may be charged during the period of suspension, he or she can successfully appeal their convictions after the expiration of that period. In this regard, he relies on *R v Guo*, 2014 ONCA 206. In *Guo*, the Court granted a consent adjournment of the accused's conviction appeal on one count of keeping a common bawdy house (that charge also having been found to be unconstitutional in *Bedford*) until the declaration of invalidity was to take effect.

[64] In a similar vein, in *R v LRS*, 2016 ABCA 307, LRS was convicted of a number of offences, including living on the avails of prostitution and procuring illicit sexual intercourse. The Crown consented to his appeal regarding those two offences based on the *Bedford* decision.

[65] Neither of the above cases is binding, or contains any analysis of the effect of the suspension. Furthermore, each of those appeals was consented to by the Crown. Thus, the accused's argument in this regard is unpersuasive.

[66] There is very little case law dealing with the issue of the termination of the suspension of the declaration of invalidity as a result of

the decision in *Bedford*.

[67] In *R v Moazami*, 2014 BCSC 261 (on appeal to the BCCA), Mr. Moazami was charged with, among other things, living on the avails of prostitution. His trial was scheduled to proceed during the time that the suspension was in effect. Mr. Moazami argued that the suspension was not binding on the basis that it was an ancillary part of the Court's judgment in *Bedford*. In rejecting his argument, Bruce J held that the suspension was indeed binding and that there could be "no exceptions or exemptions from the order that are not expressly or by necessary implication included" in it (at para 18). She refused to decide what the consequence would be should the period of suspension end by the time that the accused appealed any future conviction.

[68] In my view, the issue involves the apparent conflict between two legal principles. The first principle is that an accused is entitled to any benefit of a change in the interpretation of the law provided that he or she is still in the system. This principle was enunciated in *Wigman*. In that case, judicial interpretation of the requisite *mens rea* for attempted murder had changed between the time that Mr. Wigman was tried and the time of his appeal. Holding that Mr. Wigman was entitled to the benefit of the more recent interpretation, the Court stated (at para 29):

> Provided that he is still in the system, an accused charged with an offence is entitled to have his or her culpability determined on the basis of what is held to be the proper and accurate interpretation of the *Code*.

[69] The argument in this case is that, since the suspension expired

while the accused was still in the system, he should be entitled to that benefit.

[70] On the other hand, in *Re Manitoba Language Rights*, [1985] 1 SCR 721, the Court held that all Manitoba statutes enacted only in English were invalid. However due to the fact that "a legal vacuum" would be created with "consequent legal chaos" (at p 747) the statutes were "deemed to have temporary force and effect for the minimum period . . . necessary" (at p 782). The effect of this ruling was to protect the then existing body of Manitoba laws, and all things done on the basis of past laws (at pp 781-82) until corrective legislation could be enacted.

[71] At the time that it heard *Re Manitoba Language Rights*, the Court also heard *Bilodeau v AG (Man)*, [1986] 1 SCR 449. That case involved an appeal by Mr. Bilodeau of a conviction for a provincial offence, in part, on the basis that the legislation pursuant to which he was convicted was only enacted in English. Several months after rendering its decision in *Manitoba Language Rights*, the Court held that, despite Mr. Bilodeau's challenge, the conviction was saved. It stated (at pp 456-57):

> In the present case, the very basis of the appellant's appeal from conviction is the invalidity of the statute under which he is convicted. The invalidity was raised as a defense to the charge.
>
> . . .
> The conviction is, however, saved by the principle of rule of law. One of the manifestations of this principle with respect to the legal situation in Manitoba is stated in the *Reference re Manitoba Language Rights*, at p. 768:
>
> > All rights, obligations and any other effects which have arisen under Acts of the Manitoba Legislature which are purportedly repealed, spent, or would currently be in force

> were it not for their constitutional defect, and which are *not* saved by the *de facto* doctrine, or doctrines such as *res judicata* and mistake of law, are deemed temporarily to have been, and to continue to be, enforceable and beyond challenge from the date of their creation to the expiry of the minimum period of time necessary for translation, re-enactment, printing and publishing of these laws.
>
> Thus, the conviction of the appellant under the invalid *Highway Traffic Act* [RSM 1970, c H60] is enforceable pursuant to this Court's decision and order in the *Reference re Manitoba Language Rights*.

[72] Thus, despite the change in the law, Mr. Bilodeau's conviction was upheld under the rule of law because at the time that he was charged, the offence was valid. Also see *R v Clay* (2000), 146 CCC (3d) 276 (Ont CA), aff'd on other grounds, 2003 SCC 75 at paras 57-58, where the Court applied the rule of law to deny a request for a personal remedy pursuant to section 24(1) of the *Charter*.

[73] To be sure, a suspension of a declaration of invalidity is significant. In essence, it is an acknowledgement that "the preservation in force of an unconstitutional law [is] preferable to the legal discontinuity that would otherwise result." Hogg at p 40-11.

[74] In *Bedford*, when considering whether or not to impose the suspension regarding the impugned sections, McLachlin CJC stated (at para 167):

> How prostitution is regulated is a matter of great public concern, and few countries leave it entirely unregulated. Whether immediate invalidity would pose a danger to the public or imperil the rule of law (the factors for suspension referred to in *Schachter v. Canada*, [1992] 2 S.C.R. 679) may be subject to

> debate. However, it is clear that moving abruptly from a situation where prostitution is regulated to a situation where it is entirely unregulated would be a matter of great concern to many Canadians.

[75] The purpose of the suspension was to avoid the creation of a situation wherein prostitution, including living on the avails of prostitution, would be unregulated. The systematic staying of proceedings against persons who were validly charged, either before or during the suspension, on the basis that it ended while they were still in the system, would undermine this purpose. Thus, in my view, the rule of law operates to justify the continued prosecution of the accused in a manner similar to *Bilodeau*.

[76] Based on all of the above, I would dismiss the accused's appeal regarding his section 24(1) *Charter* application.

Ground 2—The Vetrovec Application

[77] The accused also asserts that the trial judge erred in his instructions to the jury by failing to provide a *Vetrovec* warning regarding the evidence of MS. It is his position that she had outstanding charges involving procuring and receiving material benefits from the sexual services of a person under 18. The accused asserts that it was MS who asked some of the other complainants to come and work with her. He contends that she was essentially an unindicted co-accused.

[78] The decision of whether to issue a *Vetrovec* warning and the nature and extent of the warning are discretionary and, absent misdirection or a decision that is so clearly wrong as to amount to an injustice, is to be reviewed on a deferential standard. See *R v Fatunmbi*, 2014 MBCA 53 at

paras 15-17, leave to appeal to SCC refused, 2015 Canlii 1298.

[79] In *Fatunmbi*, Beard JA reviewed the history underlying *Vetrovec* and the evolution of cautionary warnings. She noted that such warnings could apply to witnesses who were not actual accomplices, including complainants (see paras 26-36). Regarding the nature of the warning, she stated (at para 41):

> In fact, however, trial judges have considerable discretion as to the actual form and wording of the warning. In *McWilliams' Canadian Criminal Evidence*, the authors state (at para. 34:60.10):
>
> > Within a principled exercise of discretion to assist the triers of fact in evaluating the reliability of evidence, a trial judge may, depending on the circumstances of a specific case, (1) provide no opinion or caution to jurors about a witness's testimony, (2) give a full *Vetrovec* warning, a clear and sharp caution against acting on the suspect witness's evidence without more, (3) give an "equivalent warning" to that required by *Vetrovec*, or (4) issue a "lesser instruction" alerting jurors to features of the witness's evidence or background to take into account in assessing the worth of the witness's evidence.
> >
> > In many cases, <u>without a strict *Vetrovec* warning, a jury charge which highlights for the triers a witness's motivation to lie or other apparent flaw in the prosecution witness's credibility will sufficiently apprise jurors of the care with which they should assess the witness's credibility</u>.
>
> [emphasis added]

[80] In this case, the issue of whether to give a *Vetrovec* warning was an area of concern for the trial judge. At one point during the trial he gave a special witness warning regarding issues that could affect the credibility of

DA, JM and MS. This mid-trial caution concerned the criminal records of the witnesses and the use of alcohol and drugs by the witnesses around the time that they were interacting with the accused.

[81] In his final instructions, the trial judge repeated his original cautions regarding the above witnesses. However, specific to MS, he stated:

> Second, in respect of [MS], you heard that she has two outstanding charges of procuring and receiving material benefits from the sexual services of a person under 18. A Crown witness who is awaiting trial herself on a charge may have an interest and testify favourably for the Crown. Favourable testimony here may help the witness out with her case later on or the witness may believe that it will do so. I will remind you, though, that [MS] testified in direct and in cross-examination that she neither received nor expected any favour for testifying. Nevertheless, you should approach her evidence with care and caution and take into account the fact that she is awaiting trial on another charge as a factor to consider in determining how much or how little you will believe of and rely on her evidence. How much and how little this factor influences you is up to you.

[82] He later cautioned the jury as follows:

> Further, for some witnesses, such as [MS] or [D], and possibly others, you may find possibly because of their role or participation or activities with [the accused] and doing "calls" or for other reasons, that they were not as candid or truthful in speaking with police or testifying before you. If you find this respecting any witness, it will be a signal to be careful with what you accept of their evidence.

[83] Right after this caution, he told the jury that when they were considering the evidence of the complainants they should consider any inconsistent statements or evidence.

[84] Later, when reviewing the evidence of MS, he stated:

> [MS] was contradicted on a number of points by other witnesses, [in] particular respecting whether she persuaded others to work for [the accused], and maybe even her, or do calls.

[85] While the trial judge did not go so far as to tell the jury that it would be dangerous to convict the accused on the evidence of MS alone, and that they should look to evidence to corroborate her testimony, in my view, his cautions regarding MS were sufficient to alert the jury to the care with which they should have approached her evidence.

[86] The accused has not shown that the trial judge misdirected himself nor was his decision so clearly wrong as to amount to an injustice. Thus, I would dismiss this ground of appeal.

The Sentence Appeal

[87] The accused was convicted of numerous serious sexual offences involving vulnerable persons including those under the age of 18 years. As earlier stated, the trial judge sentenced the accused to 15 years' imprisonment minus the credit for pre-sentence custody for a go-forward sentence of 10 years and eight months' imprisonment.

[88] At the hearing of this appeal, counsel for the accused conceded that a cumulative sentence of 10 years for the three charges of making child pornography, three charges of sexual assault and one charge of invitation to sexual touching would be fit, but argued that, combined with the additional sentences for the charges of living on the avails, the overall sentence became too long and unfit.

[89] The crimes that the accused committed were numerous and serious. The accused's moral culpability was high. Indeed, during his initial analysis and in applying *R v Wozny*, 2010 MBCA 115, the trial judge found that, consecutively considered, the total sentence for all of the offences would be 22 years. He then reduced it to 15 years based on the totality principle.

[90] In my view, the accused has not shown that he has an arguable case that the sentence was unfit. See *R v Gill*, 2010 MBCA 92 at para 2.

Decision

[91] Thus, for all of the above reasons I would dismiss the accused's appeal as to conviction and deny leave to appeal the sentence imposed.

Cameron JA

I agree: Mainella JA

I agree: leMaistre JA