Citation: R v Dyck, 2019 MBCA 81 Date: 20190730
Docket: AR18-30-09102

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Diana M. Cameron
Madam Justice Jennifer A. Pfuetzner
Madam Justice Janice L. leMaistre

B E T W E E N:

HER MAJESTY THE QUEEN	)	***S. B. Simmonds*** *and*
	)	***K. J. Advent***
	)	*for the Appellant*
Respondent	)	
	)	***D. L. Carlson*** *and*
	)	***R. D. Lagimodière***
- and -	)	*for the Respondent*
	)	
	)	*Appeal heard:*
SHERYL ANN DYCK	)	***February 25, 2019***
	)	
	)	*Judgment delivered:*
(Accused) Appellant	)	***July 30, 2019***

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*).

CAMERON JA

Introduction and Issues

[1] The accused appeals her conviction for sexual exploitation (section 153(1) of the *Criminal Code* (the *Code*)) on the ground that she received ineffective assistance of counsel who represented her at her trial (trial counsel). In support of her appeal, she has filed a motion for fresh evidence.

[2] She also applies for leave to appeal and, if granted, appeals her sentence of three and one-half years' incarceration imposed by the trial judge.

She argues that the trial judge erred when he refused to consider her motion pursuant to section 12 of the *Canadian Charter of Rights and Freedoms* (the *Charter*) to have the mandatory minimum sentence (MMS) of one year of imprisonment for the offence of sexual exploitation (section 153(1.1)(a) of the *Code*) declared unconstitutional. Further, she argues that the trial judge erred in his assessment of the mitigating and aggravating factors, resulting in an unfit sentence.

[3] In my view, while the representation at trial was not perfect, the accused did not receive ineffective assistance. Therefore, I would dismiss her conviction appeal.

[4] While the trial judge may have misstated the period of time during which the sexual incidents occurred, he did not misapprehend or mischaracterise the evidence. He did not err in his assessment of the mitigating and aggravating factors. In my view, the sentence has not been shown to be unfit and, for reasons that I later articulate, I would decline to consider the accused's *Charter* challenge to the MMS. Therefore, while I would grant leave to appeal the sentence, I would dismiss the appeal.

Background and Trial Proceedings

[5] The indictment charged the accused with sexual exploitation between March 2014 and October 2014. However, while the accused started grooming-type behaviours in March 2014, the sexual encounters did not actually start until September 2014. During the period set out in the indictment, the complainant was 16 and turned 17 years old. He was a student in a Winnipeg high school (the school) and the accused was an educational assistant (EA) in his class. The accused was 42 years old when she

commenced working with the complainant and 43 when the sexual encounters occurred.

[6] During the relevant time, the complainant was enrolled in a specialised learning alternative program (the LAC) at the school. He was in that program due to past behaviours in school, learning gaps and prior involvement in the youth justice system. He was going to that specific school as, due to "past connections", he was unable to attend other high schools. The complainant had previous gang affiliations and was a witness in a murder trial. Therefore, for his own safety, he was involved in a specialised plan providing for his constant supervision throughout the school day. He was only allowed to leave the classroom or the school grounds during school hours in the company of a staff member.

[7] The accused was the main EA assigned to the complainant. Part of her job was to supervise him in the classroom and accompany him on breaks, walks or any time that he was outside of the classroom. She also escorted him off school grounds to go to the local convenience store. The principal of the school described the position of an EA as a "role model" and a "positive adult" in the student's life.

[8] The complainant was the first witness to testify at the trial. After a contested *voir dire*, his video-recorded police statement was admitted in evidence pursuant to section 715.1(1) of the *Code*. Among other things, he testified that the accused performed fellatio on him on numerous occasions and that he engaged in vaginal sexual intercourse with her one time.

[9] In addition to the police officer who interviewed the complainant, the Crown called the principal of the school, the complainant's mother, the complainant's sister and his friend, A.W. The complainant's sister and A.W.

were with the accused and the complainant on the night that the sexual intercourse occurred.

[10] The accused testified, denying the offence. She called the complainant's teacher to describe the accused's competence as an EA, his observations of the relationship between the accused and the complainant, as well as to describe behavioural issues displayed by the complainant at school. The accused also called three other witnesses whom she only became aware of near the end of the trial. More will be said about these witnesses later. Suffice it to say that they did not advance the accused's case.

The Decision of the Trial Judge

[11] The trial judge accepted the evidence of the complainant. He observed that while the relationship between the complainant and the accused started out as professional in nature, it began to change when the accused started to smoke marihuana with the complainant, provide him with rides to the convenience store and drive him home from school. She provided the complainant with money, food, alcohol and drugs, including cocaine. She lent him pornographic videos.

[12] The trial judge found that, in the fall of 2014, the accused started allowing the complainant to drive her car. The relationship turned sexual when, one day, the accused performed fellatio on the complainant while in her car behind a local convenience store. The complainant said that the accused had performed fellatio on him approximately 15 times in total during the course of their sexual relationship.

[13] The trial judge observed that, on the night of the complainant's 17th birthday, the accused supplied him, his sister and A.W. with alcohol and

cocaine. He found that they went to an apartment associated with A.W. where the accused and the complainant went into a bedroom and engaged in sexual intercourse.

[14] In accepting the complainant's version of what happened on the night of his birthday, the trial judge found confirmation in the testimony of the complainant's sister and A.W. While they heard and saw slightly different aspects of the encounter, each testified that they saw the accused and the complainant go into the bedroom together, that they heard noises in the room and that the complainant was pulling up his pants when he exited the room. A.W. testified that at one point he looked into the room and saw blankets moving.

[15] The trial judge noted that when the complainant's mother found out about the events of the evening from his sister, who was concerned, she also became concerned and contacted both the school and the police. On October 3, 2014, the accused was suspended from her position as an EA at the school.

[16] Despite being suspended, the trial judge found that the accused continued to see the complainant up until the time that he provided a police statement. The trial judge found that she continued to supply the complainant with drugs and alcohol and that she allowed him to drive her car, even though he was unlicensed. He found support for his conclusions from video surveillance from a liquor store tendered by the Crown. In that video, the accused and the complainant enter the store together, at a time when the complainant was supposed to have been in school. After viewing various bottles of liquor with the complainant, the accused buys two. Also of note is that the complainant has a set of keys in his hand while in the liquor store.

[17] As indicated, the accused denied any sexual contact with the complainant. Among other things, she denied smoking marihuana with the complainant or providing him with any drugs or alcohol. She denied letting him drive her car. She said that she was never alone with the complainant. She denied ever meeting his sister. She said she did not go out with the complainant, his sister and A.W. on the night of the complainant's birthday.

[18] Regarding the video from the liquor store, she said that she was buying the liquor for A.W.'s uncle in anticipation that he was going to fix the bumper on her car. She denied that the keys that the complainant had in his hand in the video were her car keys.

[19] The trial judge rejected the accused's testimony. He found her evidence to have been given in a deliberate and rehearsed fashion. In his reasons, he said that the accused's denial that the keys seen in the complainant's hand in the video were hers offended the rule in *Browne v Dunn* (1893), [1894] 6 R 67 (HL (Eng)) because trial counsel had not cross-examined the complainant about this.

The Conviction Appeal—Ineffective Assistance of Counsel

[20] In her factum, the accused lists several complaints about the conduct of trial counsel. I have summarised the complaints as follows:

i) Late filing of the notice of constitutional question and failing to serve the Attorney General in a timely fashion;

ii) Failing to advance the appropriate theory during the section 715.1(1) *voir dire*;

iii) Failing to follow the rule in *Browne v Dunn* when cross-examining the complainant;

iv) Eliciting evidence that was harmful to the accused when cross-examining the complainant and A.W.;

v) Failing to cross-examine the complainant regarding his estimates of the number of times that he smoked marihuana with the accused or the number of times that she performed fellatio on him;

vi) Failing to advance a conspiracy theory in relation to the Crown's evidence and to cross-examine the Crown witnesses accordingly;

vii) Failing to prepare the accused or the witnesses she called to testify.

[21] In addition, the accused argues that it is the combined effect of her complaints that amounted to ineffective assistance of counsel, thereby resulting in a miscarriage of justice.

The Law

[22] In *R v GDB*, 2000 SCC 22, the Supreme Court of Canada held that the right to effective assistance of counsel was derived from, "the evolution of the common law, s. 650(3) of the *Criminal Code* of Canada and ss. 7 and 11(*d*) of the *Canadian Charter of Rights and Freedoms*" (at para 24).

[23] As noted in *R v Owens*, 2018 MBCA 94 (at para 47):

> Ineffective assistance of counsel may result in an injustice in two ways. The first occurs when prior counsel's overall performance was so incompetent that it affected the fairness of the trial. The other is where, even if trial fairness is not affected, the ineffective assistance calls into question the reliability of the verdict (see *R v Le (TD)*, 2011 MBCA 83 at para 157). If either situation exists, a miscarriage of justice has occurred and the appellate court will overturn the conviction and either enter an acquittal or order a new trial (see section 686(1)(a)(iii) of the *Criminal Code* (the *Code*)).

[24] In *R v Le (TD)*, 2011 MBCA 83, Scott CJM cited with approval the reasoning of Doherty JA in *R v Joanisse* (1995), 102 CCC (3d) 35 at 58 (Ont CA) (at para 159):

> In *Joanisse*, Doherty J.A. firstly indicated that a court should take a cautious approach to claims based on the alleged incompetence of trial counsel (at p. 58):
>
> > .... Such claims can be easily made. It would be a rare case where, after conviction, some aspect of defence counsel's performance could not be subjected to legitimate criticism. Convictions would be rendered all too ephemeral if they could be set aside upon the discovery of some deficiency in counsel's defence of an accused. Appeals are not intended to be forensic autopsies of counsel's performance at trial.
> >
> > The spectre of retrospective appellate analysis of counsel's conduct of the defence could discourage vigorous and fearless representation at trial and encourage defensive advocacy aimed more at protecting counsel from subsequent criticism than advancing the cause of his client. ....
> >
> > [emphasis added]

[25] There is a strong presumption in favour of competence of counsel. Quoting from *Joanisse* and *Strickland v Washington*, 104 S Ct 2052 (1984) in *Le*, Scott CJM reinforced that: i) judicial scrutiny of counsel's performance must be highly deferential; ii) the determination must be made based on the reasonableness of counsel's challenged conduct on the facts of the particular

case; iii) the wisdom of hindsight has no place in the assessment; and iv) the purpose of appellate inquiry is not to grade the performance of counsel, but to determine whether a miscarriage of justice occurred (see *Le* at paras 162-66).

[26] The burden remains on the appellant to establish ineffective assistance (see *Le* at para 166). In *Le*, Scott CJM summarised the three components that must be established in order to have a conviction quashed on the ground of ineffective assistance of counsel (at para 189):

> (1) The factual component: an appellant must establish, on a balance of probabilities, the facts on which the claim of incompetency is based. If that is not established, there is no need to go any further.
>
> (2) The prejudice component: if the factual foundation has been made out, the court will, for the purposes of this component, assume incompetence on the part of counsel. See *Joanisse* at p. 62, Doherty J.A. At this stage, an appellant must establish, on a balance of probabilities, that the presumed incompetence resulted in a miscarriage of justice. If it did not, there is no need to go any further.
>
> (3) The performance component: if it is determined that the reliability of the verdict was affected by the presumed incompetence, the court will then consider whether the actions of counsel were, in fact, incompetent. At this stage of the analysis, the presumption reverts to "a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance" and the onus falls on an appellant to establish that it did not (*G.D.B.* at para. 27). Again, that analysis is conducted without the benefit of hindsight.

Analysis

i) Late Filing of Notice of Constitutional Question and Failing to Serve the Attorney General in a Timely Fashion

[27] At the commencement of the trial, trial counsel indicated that she intended to make an application pursuant to sections 7 and 11(*b*) of the *Charter* on the basis that the accused's right to be tried within a reasonable time had been infringed. By way of remedy, she requested a stay of proceedings pursuant to section 24(1) of the *Charter*.

[28] The accused was arrested and charged on December 11, 2014. Her trial commenced on May 15, 2017. On that day, the accused had intended to proceed with her *Charter* motion. However, although the accused had served the prosecutor with her notice of motion regarding the constitutional issue, she had not served the Constitutional Law Branch of the Attorney General of Manitoba (the Attorney General) or the Federal Attorney General with the motion 30 days in advance of the date set for the hearing of arguments in accordance with sections 7(2) and 7(5) of *The Constitutional Questions Act*, CCSM c C180 (the *Act*). The Attorney General had not been served until May 9, 2017, 6 days prior to the start date of the trial.

[29] Prior to the commencement of the *Charter* argument, the Crown asked that it be dismissed pursuant to r 2 of the Manitoba, *Court of Queen's Bench Rules*, Man Reg 553/88, for failing to comply with the rules regarding pre-trials. That is, the accused failed to identify her proposed *Charter* motion at the pre-trial conference. The trial judge expressed concern over the accused's failure to follow the rules in this regard. Nonetheless, after some discussion about the fact that the trial was set to commence 29 months after the date that the charge was laid, a period of less time than the presumptively unreasonable ceiling found in *R v Jordan*, 2016 SCC 27, the trial judge indicated that he was prepared to hear the accused's argument on the *Charter* motion. He indicated that if he required a response from the Crown, the motion would be set over to an appropriate time. Trial counsel then asked for

a recess to speak with the accused. After speaking with the accused, she withdrew the *Charter* motion.

[30] On appeal, the accused does not make any submission regarding the merits of the *Charter* motion. She only relies on the failure to serve the Attorney General as an example of alleged ineffective assistance.

[31] The late filing of the *Charter* motion did not result in the accused being unable to pursue her argument. The trial judge was prepared to let her proceed. Moreover, the accused has not filed any material regarding the merits of the *Charter* motion or how the failure to advance it contributed to a miscarriage of justice.

[32] I would also note that trial counsel was not alone in her failure to submit her materials in a timely fashion. As was pointed out by the Crown at the hearing of this appeal, current counsel, who became the accused's lawyer after she was convicted and before the sentencing hearing, failed to respect the requirements of the *Act* when filing and serving the accused's notice of motion challenging the constitutionality of the MMS for sexual exploitation. Those materials were filed and served only one week before the date scheduled for the sentencing hearing.

[33] In reaching the above conclusion, I do not want to be taken as minimising trial counsel's failure to advise the Court of her intended *Charter* motion at the pre-trial conference or her failure to comply with the timelines in the *Act*. Such omissions occur far too frequently in Manitoba, thereby causing unnecessary and unacceptable delay. In *Jordan*, the Supreme Court of Canada stressed (at para 114):

> [C]ourts are important players in changing courtroom culture. Many courts have developed robust case management and trial

> scheduling processes, focussing attention on possible sources of delay (such as pre-trial applications or unrealistic estimates of trial length) and thereby seeking to avoid or minimize unnecessary delay.

See also *R v Cody*, 2017 SCC 31.

[34] Certainly, such changes have occurred in Manitoba. The expectation is that counsel will comply with the *Court of Queen's Bench Rules* and practice directions, as well as with the notice provisions in the *Act*.

ii) Failing to Advance the Appropriate Theory During the Section 715.1(1) *Voir Dire*

[35] At the *voir dire* to determine the admissibility of the complainant's video-recorded police statement, trial counsel argued against its admission pursuant to section 715.1(1) of the *Code* on the basis that it was not made within a reasonable length of time after the offence was alleged to have occurred. She argued that, because the indictment alleged the offence to have spanned the period between March and October of 2014, it was vague as to when the specific incidents occurred. In support of her argument, she relied on the case of *R v JC*, 2013 BCPC 310, wherein Gouge J refused to admit a video statement because the reasonable time requirement had not been met in circumstances where it could not be determined "at least approximately" when the alleged sexual touching occurred (at para 6).

[36] The trial judge admitted the complainant's police statement. He distinguished *JC* and identified several instances in the complainant's statement which clearly identified a timeline. After conducting a thorough analysis, he held that the delay in taking the statement in this case was not

unreasonable and that, having met all of the pre-conditions set out in section 715.1(1), the statement was admissible.

[37] The accused asserts that the argument proffered by trial counsel was not tenable because the last act complained of occurred on the complainant's birthday, a known date just three weeks prior to the taking of his statement. In her view, the better argument would have been to ask the trial judge to exercise his discretion to deny the admission of the complainant's police statement based on the leading nature of the questions asked by the investigating officer during the taking of the statement. She submits that the position taken by trial counsel caused her to "waste" her cross-examination of the investigating officer.

[38] Despite taking the above position, the accused does not identify any specific instances of leading questions that she says are objectionable. She leaves it to this Court to determine which ones are relevant.

[39] As noted by the Crown, once the technical requirements of section 715.1(1) are met, exclusion of the evidence will be "relatively rare" subject to the trial judge being "satisfied that [to admit the evidence] could interfere with the truth-finding process" (*R v F(CC)*, [1997] 3 SCR 1183 at paras 51-52).

[40] I have reviewed the complainant's statement. In my view, the accused's assertion is unfounded. None of the questions asked by the investigating officer were leading in the sense that they influenced the recounting of the events by the complainant. The history of the relationship between the complainant and the accused and the sexual nature of its development was conveyed in narrative form by the complainant. While the investigating officer may have made suggestions in trying to help the

complainant recall the number of times he smoked marihuana with the accused, none were related to the substance of the offence. Thus, while the original argument advanced by trial counsel regarding the section 715.1(1) application was unsuccessful, I cannot say that it evidenced ineffective assistance. In my view, the alternative argument now advanced by the accused lacks a factual foundation.

iii) Failing to Follow the Rule in *Browne v Dunn* When Cross-Examining the Complainant

[41] In *R v Pasqua*, 2009 ABCA 247, the rule in *Browne v Dunn* was described as (at para 17):

> [A] general duty on counsel to put a matter directly to a witness if counsel is going to later adduce evidence to impeach the witness' credibility or present contradictory evidence. . . . In *R. v. Paris* (2000), 138 O.A.C. 287, 48 W.C.B. (2d) 294, leave to appeal to Supreme Court of Canada dismissed, [2001] S.C.C.A. No. 124, the Ontario Court of Appeal summarized this rule at para. 22:
>
> > Where a witness is not cross-examined on matters which are of significance to the facts in issue, and the opposing party then leads evidence which contradicts that witness on those issues, the trier of fact may take the failure to cross-examine into consideration in assessing the credibility of that witness and the contradictory evidence offered by the opposing party. The effect of the failure to challenge a witness's version of events on significant matters that are later contradicted in evidence offered by the opposing party is not controlled by a hard and fast legal rule, but depends on the circumstances of each case: [citations omitted].

[42] Courts have recognised that the rule should not be applied too stringently in the criminal context. That is, appropriately confronting a witness with the opposing side's competing theory or position can satisfy the rule. Not all contradictory evidence must be put explicitly to a witness (see

R v Khuc, Bui, Pham & Tran, 2000 BCCA 20 at para 44; *R v Drydgen*, 2013 BCCA 253 at para 17; *R v KWG*, 2014 ABCA 124 at para 45; and Dylan Finlay, "'Putting' *Browne v Dunn* into Perspective", Case Comment on *R v KWG* (24 July 2014) online (pdf): <www.ablawg.ca/wp-content/uploads/2014/07/Blog_DF_R_v_KWG_July-2014.pdf>).

[43] At the trial, the Crown led the first evidence regarding the issue. In direct examination, the Crown specifically asked the investigating officer if it appeared that the complainant had anything in his hands in the video recording from the liquor store and the officer responded, "keys, or what appears to be car keys". At that point, trial counsel interrupted, stating that all that could be seen was that the complainant was holding keys and she observed that the officer was nodding his agreement.

[44] Of note, the investigating officer only testified after the complainant. During his testimony, the complainant was not asked about the video nor did either party question him as to whether he was holding any keys, let alone the accused's car keys, while they were in the liquor store. In fact, the video had not yet been entered in evidence at the time that the complainant testified.

[45] The next mention of the keys appears in the direct examination of the accused. After the accused explained her version of the events as to why she was at the liquor store with the complainant, trial counsel asked her whether the complainant had her car keys in his hand in the video, and she said that he did not. She repeated this denial in response to questions by the trial judge and by the Crown on cross-examination.

[46] In assessing the accused's credibility, the trial judge commented on trial counsel's failure to ask the complainant about the keys in his hand in the video. He said:

> This is noteworthy, given that the accused took the stand and said that the keys in possession of the complainant were not hers. This offends the rule in *Browne v. Dunn*, in that the complainant should have been given an opportunity to respond to that suggestion.

[47] As earlier stated, the rule in *Browne v Dunn* may be satisfied if counsel puts the competing theory to the witness. In this case, trial counsel cross-examined the complainant regarding the accused's position that she never let him drive her car. In light of the fact that the complainant did not testify that the keys in his hand in the video belonged to the accused, it was sufficient that trial counsel confronted him in the manner that she did.

[48] Alternatively, in my view, while the trial judge placed some weight on trial counsel's failure to cross-examine the complainant regarding the keys, it was not determinative of his rejection of the accused's evidence. He also found her evidence to be rehearsed, unlikely, inconsistent and unbelievable when considered within the context of all of the evidence called at the trial. Thus, I would find that the accused has not satisfied the prejudice component of her claim.

iv) Eliciting Evidence That Was Harmful to the Accused When Cross-Examining the Complainant and A.W.

[49] During the cross-examination of A.W., trial counsel asked him about the name of another student from the school who may have also had a relationship with the accused. This was hearsay evidence that A.W. said he heard from the complainant. At first, A.W. said that he could not remember

the name of the person. Upon further questioning, he gave the name J. That name was different from the one that he had earlier provided in his police statement. During the course of trial counsel's cross-examination regarding the issue, the trial judge questioned her as to why she would potentially harm the accused by bringing up other possible victims. In response, trial counsel pointed out the above-mentioned inconsistency, stating that the fact that A.W. had only first identified J in cross-examination was relevant to A.W.'s credibility and provided evidence that he had spoken with the complainant about the allegations "[j]ust outside the courtroom". Of significance, both the complainant and A.W. only mentioned J for the first time in their respective cross-examinations at trial.

[50] In any event, both the trial judge and trial counsel agreed that the evidence that there was another possible victim was hearsay. The trial judge stated that he was "not going to hold [the hearsay] against [the accused]" and later agreed with trial counsel's assertion that she could use this information to cross-examine on the credibility of A.W. Thus, taken in context and in light of all of the evidence, I would not conclude that trial counsel's cross-examination in this regard satisfied the prejudicial component for ineffective assistance.

v) Failing to Cross-Examine the Complainant Regarding His Estimates of the Number of Times That He Smoked Marihuana with the Accused or the Number of Times That She Performed Fellatio on Him

[51] The accused argues that trial counsel failed to cross-examine the complainant regarding the implausibility of the number of times that he

smoked marihuana with her and the number of times that she fellated him. It is this argument that gives rise to the accused's motion for fresh evidence.

[52] In his statement, the complainant estimated that he had smoked marihuana with the accused approximately 100 times between the months of March and October of 2014. He estimated that the accused performed oral sex on him approximately 15 times between the commencement of the school year in September 2014 and the time that she was arrested.

[53] The fresh evidence consisted of an affidavit of an associate of the accused's current counsel's law firm attaching the school calendar indicating times when the school was in session and various school events. It also included a history indicating the periods when the complainant was in custody during the relevant timeframe. No written submissions were filed regarding the motion or how the evidence met the test for admission of fresh evidence where ineffective assistance of counsel is alleged.

[54] The test for the admission of fresh evidence where ineffective assistance of counsel is alleged is set out in *R v Zamrykut*, 2017 MBCA 24 at para 3 quoting *R v Aulakh (BS)*, 2012 BCCA 340 at para 68. There are several steps involved in the determination of whether to admit such evidence. First, the court must determine whether the evidence is admissible pursuant to the rules of evidence. Even if admissible, the evidence will not be admitted if it could not have reasonably affected the result. If this determination is not apparent and the evidence is relevant and credible to the issue of ineffective assistance, it should be admitted for the limited purpose of determining the issue of ineffective assistance, but not to decide the substantive issue of whether a miscarriage of justice occurred. The court must then consider whether, in light of the fresh evidence, the performance component of the test

for ineffective assistance has been established on the balance of probabilities. To establish this, the accused must show that the actions of counsel did not fall within the standard of reasonable professional judgment. If the performance component is met, the accused must establish the prejudice component of the test. That is, that there exists a reasonable probability that the outcome of the trial would have been different with effective assistance. The issue is whether there has been a miscarriage of justice. If the final component is met, the fresh evidence is admitted and the appeal allowed. If not, the fresh evidence motion should be dismissed.

[55] While I agree that the fresh evidence offered in this case is admissible under the general rules of evidence, in my view, the motion for fresh evidence fails on the second prong of the test for admitting evidence of ineffective assistance. That is, the evidence could not have reasonably affected the result. In this case, the fresh evidence really amounted to a numbers argument between the Crown and the accused. The accused argued that there were 62 days in the spring of 2014 when the accused could have smoked marihuana with the complainant and approximately 10 days in September when she could have performed the sexual acts on him. The Crown argued that there were 115 days wherein the accused could have smoked marihuana with the complainant and that, while the sexual intercourse occurred on the complainant's birthday, he indicated in his statement that the accused continued to fellate him after his birthday, thereby expanding the number of possible days that she could have committed the acts. In the Crown's view, the fresh evidence actually supported that the accused could have fellated the complainant 15 times, as he estimated.

[56] The trial judge was well aware of the relevant timeframes and the number of occasions that the complainant asserted the accused smoked

marihuana with him and fellated him. He found that the sexual acts transpired as described by the complainant. It was apparent from the complainant's statement and testimony that he was only giving his best estimate of the number of times that the impugned activities occurred. Further, I agree with the assertion of the Crown that, even within the confines of the fresh evidence, there was opportunity for repeated instances for the accused to have engaged in both activities as alleged by the complainant.

[57] In my view, the fresh evidence could not have reasonably affected the result and I would not admit it in support of this ground of appeal.

vi) Failing to Advance a Conspiracy Theory in Relation to the Crown's Evidence and to Cross-Examine the Crown Witnesses Accordingly

[58] The theory advanced at the trial was that the complainant made up the allegations because he resented the accused due to the significant amount of power that she had over him during school hours and because she had reported him for various instances of inappropriate behaviour, including coming to school smelling of marihuana.

[59] The accused submits that this theory was "doomed to fail" because the complainant was not the person who came forward with the allegations. She submits that, in order to succeed, the theory that the complainant, his sister and A.W. colluded to falsely implicate the accused should have been advanced.

[60] In order to advance the above theory, there would have had to be three people involved. First, the sister, who reported the inappropriate behaviour to the complainant's mother, as part of a scheme to have the issue

become known. Next, those involved in the collusion would have had to believe that the mother would report the matter to the school or other authority. In order to maintain consistency, all parties would have had to discuss what happened on the evening that the alleged sexual intercourse occurred. However, the evidence of these three individuals was not consistent. In both his statement and testimony, the complainant said that his sister was dropped off before he went to the apartment where he had sex with the accused. On the other hand, the complainant's sister and A.W. testified that she was at the apartment at the relevant time. Furthermore, the evidence confirmed that both the complainant's mother and the police had to persuade the complainant to disclose his relationship with the accused as opposed to him actively attempting to implicate the accused. In fact, the trial judge considered the collusion theory, stating that it made "no sense at all."

[61] A review of the cross-examination of the complainant shows that trial counsel repeatedly advanced the theory that the complainant was unreliable and fabricated his account of the events. Among other things, trial counsel questioned: i) his ability to recall based on drug and alcohol use and the effect of prescribed medication he was taking when combined with such use; ii) the lack of opportunity to have ever been alone with the accused in her vehicle; iii) his temperament; iv) his resentment toward the accused based on her position and exercise of authority over him; v) the lack of other witnesses who could corroborate his account of his relationship with the accused; vi) his motive for wanting to be agreeable with police in giving his account of what happened; and vii) his criminal record.

[62] In addition, trial counsel called the complainant's teacher, who refuted a number of the complainant's assertions regarding his behaviour in

the classroom and confirmed the accused's account of her professional relationship with the complainant.

[63] I agree with the Crown that the closing submissions of trial counsel properly focussed on the weaknesses in the Crown's case and why the evidence of its witnesses could not be accepted. Based on the above, I am not convinced that the failure to advance the collusion theory satisfied the prejudice component of ineffective assistance.

vii) Failing to Prepare the Accused or the Witnesses She Called to Testify

[64] Finally, the accused argues that neither she nor any of the witnesses called on her behalf were properly prepared to testify.

[65] Regarding the accused, a review of the record demonstrates that trial counsel had prepared her to testify. It is obvious that the questions in direct examination were formulated after having consulted with the accused. They were specific to her personal circumstances and fully addressed the accused's response to the allegations against her. Further, the accused did not appear to be taken by surprise in either direct or cross-examination. The trial judge stated that the accused's evidence appeared to be "rehearsed". While not a positive finding, it does not necessarily evidence a lack of preparation. In addition, the accused has not filed an affidavit detailing any of her complaints in this regard. Therefore, I would dismiss this argument on the basis that there is no factual foundation to support it.

[66] The main crux of the accused's position that the witnesses were not prepared comes from an unusual development near the end of the trial. The day that he was scheduled to testify, the complainant's teacher told trial

counsel that there was another EA in his classroom who had knowledge that the complainant had admitted, in essence, that he had made up the allegations against the accused. Trial counsel contacted that EA and told him to attend court that day. When the EA testified, it turned out that his knowledge was based on hearsay evidence from the complainant's aunt and her daughter. The aunt was also an EA at the complainant's school. Trial counsel then contacted the aunt and her daughter who testified the following day. Neither witness agreed that the complainant had told them that the allegations were untrue. Rather, they admitted that they had simply heard rumours.

[67] The effect of calling these three witnesses to testify, when none could provide any admissible evidence, constituted a waste of court time and did not advance the position of the accused. Trial counsel did not properly interview any of these witnesses and she should not have called them to testify in these circumstances. While I realise that the information trial counsel received was a last-minute development, she should have taken the time to better explain her situation to the Court and request the appropriate time required to determine what evidence the potential witnesses could offer.

[68] On the other hand, in my view, the accused did not suffer prejudice from having the witnesses called. In his reasons, the trial judge simply noted that the EA had nothing to offer. He did not mention the complainant's aunt or her daughter. It is evident that their testimony had nothing to do with the conviction of the accused. Thus, I cannot conclude that there was evidence of a miscarriage of justice on this basis alone.

Conclusion on Conviction Appeal

[69] The accused has advanced many examples of what she maintains constituted ineffective assistance. She submits that while each one of the

issues individually might not rise to the level of ineffectiveness, when viewed cumulatively, they demonstrate that she did not receive a fair trial and that a miscarriage of justice occurred. A review of her allegations shows that some of them are not supported by the record, while others simply advocate that different arguments should have been advanced than the ones pursued by trial counsel. As I earlier indicated, there were problems in the trial. While I agree that the trial was not perfect, I cannot conclude that the accused received an unfair trial or that the verdict is unreliable (see *Le* at paras 180-84). Thus, I would dismiss the conviction appeal.

Sentence Appeal

[70] In support of her sentence appeal, the accused argues that the trial judge erred by misapprehending the facts and overemphasising the aggravating factors. She further argues that the sentence imposed exceeded those imposed on similar offenders for similar offences. She submits that the trial judge considered an improper range of sentence that is intended to apply only to the offences of sexual assault (section 271 of the *Code*) and sexual interference (section 151(a) of the *Code*). Finally, she argues that the trial judge erred by refusing to consider her argument that the MMS of one year of incarceration prescribed by section 153(1.1)(a) of the *Code* is unconstitutional. She asks that this Court substitute the sentence imposed with a conditional sentence order or, alternatively, a period of incarceration that is less than two years.

[71] The Crown argues that the trial judge made no errors in law and therefore his decision is entitled to deference. It submits that, if there were any misapprehensions of the evidence by the trial judge, they were insignificant when considered in the context of the evidence as a whole.

Further, it argues that the trial judge did not mischaracterise the evidence. In the Crown's view, the sentence imposed was within the applicable range, and not unfit.

[72] The standard of review applicable to sentencing decisions was recently summarised by Steel JA in *R v PES*, 2018 MBCA 124 (at paras 13-15):

> [T]he standard of review for sentence appeals is highly deferential. We must defer to the sentencing judge's exercise of his discretion on sentence absent an error in principle or a material misapprehension of evidence that had an impact on the sentence or the imposition of a sentence which is demonstrably unfit.
>
> . . .
>
> If an error in principle has occurred and has had a material impact on the sentence imposed, then the appellate court need not extend deference to the original sentence. The appellate court can look at the matter from a fresh perspective and impose the sentence that it deems appropriate in the circumstances or, the appellate court may find that, notwithstanding the error in principle, the original sentence is still fit and uphold that sentence (see *R v Sidwell (KA)*, 2015 MBCA 56 at para 13).
>
> The standard of review relating to factual errors and inference drawing is one of palpable and overriding error (see *R v Kunicki*, 2014 MBCA 22 at para 17).

Overemphasis of Aggravating Factors, Mischaracterisation and Misapprehension of the Evidence

[73] The accused argues that the trial judge made a number of errors in considering the aggravating and mitigating factors. First, she argues that the trial judge erred when he rejected her argument that the evidence from the principal, that the "level of trust is lower for [EA]s than teachers, and their

level of control is limited", attenuated her level of moral blameworthiness compared to that of a teacher in the same circumstances.

[74] The trial judge found that "it does not matter whether in this particular case [the accused] gained [her] position [of trust] as [an EA] or as a teacher given what transpired". Referencing the accused's testimony that she had authority over the complainant and it was her job to tell him what to do, the trial judge found that the accused was well aware of what her authority was over the complainant and that she knew she was in a position of trust.

[75] In my view, the trial judge did not err in refusing to draw a distinction between the difference in authority between a teacher and an EA in the context of this case. The evidence is clear that the accused spent significant time with the complainant. In fact, when asked to describe the accused's demeanour in the classroom toward the complainant, his teacher stated:

> I would say it was, if anything, motherly. There were -- there was another EA and it tends to be a kind of familiar pattern that the males are kind of dad -- like we are very much like their parents in many ways.

[76] The determination of moral culpability based on the nature of a relationship between an accused and an individual whom that person sexually exploits is not determined by a simple classification such as teacher versus EA. It is based on the true nature of the interaction between the parties. The hierarchy of power and authority is but one way to measure the nature of the relationship. In this case, regardless of the fact that the accused was not the complainant's teacher, all agreed that she was responsible for the majority of his movements within and outside of the school during school hours. She had a significant amount of control and authority over him. The trial judge found

that, based on the nature of their de facto relationship and the power that the accused had over the complainant, there was no real distinction to be made when assessing her moral blameworthiness. I am not persuaded that he erred in that regard.

[77] Next, the accused argues that the trial judge erred when he found her continued denial of the offence to be aggravating. A review of the trial judge's decision shows that he found her continued denial of the offence hampered her ability to rehabilitate. However, he tempered his comments by acknowledging that Dr. Rutner's psychiatric report, filed by the accused in the sentencing proceedings, showed that the accused appeared to be "moving somewhat in the direction of acknowledging what this trial has been about" and that she was capable of embracing the rehabilitative process. In my view, while not an aggravating factor, the trial judge did not err in recognising that the accused was not yet on the path to rehabilitation, something that would have been a mitigating factor.

[78] The accused also argues that the trial judge erred when he refused to accept her counsel's submission that she was unsophisticated as a mitigating factor. The accused's argument is grounded in Dr. Rutner's report, which stated that "[the accused] is an emotionally and socially unsophisticated woman with an 11th grade education and emotional problems."

[79] The trial judge rejected that the accused was unsophisticated based on the manner in which she gave her trial testimony, as well as the manner in which she expressed herself at the conclusion of her counsel's sentencing submissions.

[80] In my view, no error has been shown. Having observed the accused throughout the trial and having heard evidence about her employment as an

EA, the trial judge was entitled to reach the conclusion that he did. Regardless, he did acknowledge and agree with many of the accused's background factors that Dr. Rutner considered in his report. Over all, the report did not address the offending behaviour or the manner in which the accused inserted herself into the complainant's life in order to facilitate the sexual acts. Regarding her Grade 11 education, the principal stated that she had a good employment history and the complainant's teacher stated that she "came to [his] room and was highly recommended from the staff that she had worked with previously, and [he] found that she was very effective and just a good addition to the room." In short, there was ample evidence on which the trial judge could rely to reject the assertion that the accused was unsophisticated.

[81] Next, the accused argues that the trial judge erred in finding that the incidents occurred over a "protracted" period of time. A review of the trial transcript in its entirety demonstrates that, while the trial judge stated at one point that the sexual behaviour started in the fall of 2014 and occurred "over the next several months", he was well aware of the actual timeframe over which the sexual acts occurred. I agree with the Crown that any mischaracterisation made by the trial judge in this regard had no impact on the sentence given the trial judge's finding that the accused had been grooming the complainant for their sexual encounters since she started smoking marihuana with him in March 2014.

[82] Finally, the accused makes a general assertion that the trial judge overemphasised the aggravating factors and underemphasised the mitigating ones. In my view, the trial judge properly acknowledged the mitigating factors. The fact that he emphasised what were undisputed aggravating factors is not an error. There were numerous aggravating factors in this case.

To list a few, they included: the nature of the relationship; the significant grooming leading up to the sexual acts, including the provision of pornography, driving privileges, drugs and alcohol; recruiting the complainant to obtain drugs for her; the nature and number of the sexual acts (many of which were unprotected); and that the relationship did not end despite the fact that the accused was suspended from her employment.

Failure to Consider Similar Cases

[83] The accused submits that an appropriate sentence would be one of 18 months' incarceration to be served in the community by way of a conditional sentence. In this regard, she cites a number of decisions from across the country wherein sentences ranging from conditional sentences to periods of incarceration in a provincial institution were imposed on teachers for the offence of sexual exploitation. Alternatively, she argues that, should a conditional sentence not be appropriate, a sentence no longer than the period of 18 months' incarceration, as was upheld by this Court in *R v Frost*, 2017 MBCA 43, should be imposed. In support of her position, the accused argues that the trial judge erred by treating the case as one of sexual interference or sexual assault such as in *R v Sidwell (KA)*, 2015 MBCA 56. She argues that:

> Parliament has decided that in normal circumstances, 16 year olds can consent to sexual activity. However, Parliament has decided that our society will not allow them to legally consent with someone who is in a position of trust. Although factual consent is not generally considered to be [a mitigating] factor, it is a circumstance that separates exploitation from assault and is an important consideration when determining the severity of an offence.

[84] At the sentencing hearing, the Crown asked for a sentence of five years' incarceration. It argued that the starting point for a case such as this,

involving the sexual exploitation of a child, should be similar to those for sexual assault and sexual interference involving children.

[85] In my view, a brief review of recent decisions of this Court regarding the development of sentencing principles relating to the sexual abuse of minors and the offence of sexual exploitation is sufficient to dispose of the matter.

[86] In *Sidwell*, Steel JA, writing for the Court, confirmed that a conviction for sexual interference may constitute a major sexual assault thereby engaging the same sentencing guidelines, depending on the circumstances of the case (see paras 34-35). However, she was careful to emphasise that (at para 36):

> The determination of an appropriate range of sentencing is fact-specific, as well as charge-specific. When considering an appropriate sentence, a sentencing court should conduct that analysis in the context of factually similar cases. All cases of child sexual abuse should be treated in a principled manner, and if the conduct of the accused and the circumstances of the offence and offender are similar, then similar sentences should result.

[87] In overturning the two and one-half year sentence imposed on the accused for sexual interference in that case and imposing a sentence of four years' incarceration, she stated that the acts of masturbation, oral sex, anal sex and attempted anal sex constituted major sexual assaults as defined in *R v Sandercock*, 1985 ABCA 218 (see para 37). Further, she affirmed that "where major sexual assaults are committed on a young person within a trust relationship by means of violence, threats of violence or by means of grooming, the starting point for sentence consideration is four to five years' incarceration" (at para 38) (emphasis added).

[88] *Sidwell* dealt with the charge of sexual interference, not sexual exploitation. In *Frost*, this Court upheld a sentence of 18 months' incarceration for a charge of sexual exploitation involving sexual intercourse between the accused in that case and the 17-year-old complainant who was a domestic helper. In that case, Chartier CJM and Steel JA, writing for the Court, stated (at paras 7-8):

> The accused argues that the offence of sexual exploitation is fundamentally different than sexual assault, sexual interference or invitation to sexual touching and it would not be appropriate to apply that sentencing jurisprudence. The accused submits that 18 months is not demonstrably unfit given this offence and this offender.
>
> While we acknowledge that this is a confused and difficult area of the law, we do not believe that this is the case to attempt to resolve it. Even if we agreed with the Crown that there was an error in principle here, we do not agree that the sentence imposed was demonstrably unfit for this offender.
>
> [emphasis added]

[89] Next, in *R v SJB*, 2018 MBCA 62, Mainella JA, writing for the Court, overturned a sentence of 18 months' incarceration—imposed on an accused for the offence of sexual exploitation—on the basis that the sentencing judge erred in principle by mischaracterising some of the circumstances of the offence as mitigating. A sentence of three years' incarceration was imposed. In that case, the 31-year-old accused had sexual intercourse approximately 10-12 times over a period of two months with a 17-year-old female to whom he stood in the relationship as a father. In reaching this conclusion, Mainella JA acknowledged the Crown's position that the four to five-year starting point applicable to a major sexual assault should apply. He explained (at paras 37-38):

> The concern I have with the Crown's position is that, as I have explained, it is not an element of the offence of sexual exploitation that the accused did actually abuse his or her position of trust or authority. To automatically say that a conviction for sexual exploitation means the starting point for sentence is the same as a major sexual assault is contrary to comments made by this Court in *Sidwell* that all sentences with respect to the sexual abuse of a person under age 18 must be arrived at "in a principled manner" (at para 36).
>
> In some sexual exploitation cases, this Court has found the analogy to a major sexual assault persuasive (see *R v GSF*, 2009 MBCA 5); in other cases, less so (see *Frost*). Sentencing offenders for the offence of sexual exploitation requires acute sensitivity to subtleties related to the commission of the offence, the offender, the harm occasioned to the victim(s) and the needs of society.

[90] In that case, after noting that punishment for those who sexually offend against persons under the age of 18 has been increasing, Mainella JA concluded (at para 40):

> Given that this was a case of repeated sexual abuse of a person under the age of 18, which included penetration, by a stepfather actually abusing his position of trust, there is no principled reason not to look to the four to five-year starting point discussed in *Sidwell*. Sexual exploitation offenders in other provinces similarly situated appear to face comparable sentences (see *R v JJW*, 2004 ABCA 50 at para 14; *R v M(D)*, 2012 ONCA 520 at paras 30-44; *R v Worthington*, 2012 BCCA 454 at paras 35-45; *R v DM*, 2012 ONCA 894 at paras 65-69; and *ES* at paras 60-61).

[91] In imposing a sentence of three years' incarceration, Mainella JA noted the significant mitigating factors, including that the accused had commenced "a rehabilitative path involving intensive therapy before being sentenced" (at para 41).

[92] In *PES*, Steel JA reviewed the history of the offence of sexual exploitation. She noted that, historically, the offence had not been treated as seriously as other sexual offences. However, in 2005, the penalties were amended to make them the same as for sexual interference and invitation to sexual touching. In her view, this action, in addition to the raising of the minimum and maximum penalties for each of the above-mentioned offences by Parliament in 2005, 2012 and 2015, reflected society's better understanding of the impact of these offences (see paras 58-61).

[93] Steel JA also stated that, while consent is irrelevant, that does not mean that each sexual assault, sexual interference or sexual exploitation constitutes a major sexual assault and, even if it did, sentencing need not always take place within the applicable range stated for such an offence (see paras 63-66). She stated that sentencing is an individualised process, the essential question being one of fitness (see para 66).

[94] Importantly, she confirmed that, in *SJB*, this Court extended the *Sidwell* analysis by allowing for the four to five-year guideline to be applied when appropriate in cases of sexual exploitation. She stated that there is nothing inherently different about sexual exploitation that justifies treating it differently than other sexual offences (see paras 68-69).

[95] Thus, the law in Manitoba is now settled regarding the application of the *Sidwell* guideline. Where applicable, the four to five-year guideline will be appropriate. On the other hand, cases such as *Frost*, where the trial judge found no premeditation, grooming or predatory behaviour, and no abuse of the trust relationship, recognise that there are "infinitely variable ways in which the offence can be committed and a wide range of offenders" (*PES* at

para 69). As stated by Steel JA, "Factually similar cases should be treated similarly" (*ibid*).

[96] In this case, in imposing a sentence of three and one-half years, the trial judge extensively reviewed the law regarding the principles to be applied. Rather than categorising the facts as falling within the *Sidwell* guideline or that of a major sexual interference as found in *R v Hajar*, 2016 ABCA 222, he determined that, as part of the individualised approach to be taken in cases such as this, all relevant factors should be taken into account. He considered, among other things, the nature of the trust relationship (including its length), the number and nature of the sexual incidents, the significant age difference between the accused and the complainant, the vulnerable circumstances of the complainant, the grooming behaviour that occurred, the accused's use of drugs (including cocaine) with the complainant and the impact on the complainant. He also considered the circumstances of the accused, including her lack of criminal history, the fact that she had been previously in an abusive relationship during which (at age 16) she had twin daughters, her current longstanding relationship with her husband and the son that they have. He noted that she struggled with the challenges presented due to the fact that her son has ADHD and Tourette's. He also considered her employment history, education and her loss of employment. He acknowledged that the testing provided by probation services indicated that she was at a low risk to re-offend.

[97] As evidenced by my review of the case law above, the sentence imposed was comparable to those imposed in *SJB* and *PES*. As noted in *PES*, "offenders similarly situated in other provinces appear to face comparable sentences, although not all" (at para 75). See for example *R v Hood*, 2011 ABCA 169 at paras 1, 15; and *R v MPS*, 2017 BCCA 397 at para 18.

[98] In light of the above, I have not been persuaded that the trial judge erred. His decision regarding sentence is therefore entitled to deference. In in my view, the sentence of three and one-half years is not demonstrably unfit. Therefore, I would dismiss this ground of appeal.

Constitutionality of the MMS

[99] The accused asked that if this Court found that a sentence of two years less a day of incarceration was appropriate, thereby making her eligible for a conditional sentence, then consideration should be given to her argument that the MMS of one year of incarceration for the offence of sexual exploitation is unconstitutional.

[100] At her sentencing hearing, the accused made a motion pursuant to section 12 of the *Charter* for a declaration that the MMS was unconstitutional. She argued that the Court should follow the Nova Scotia Court of Appeal decision in *R v Hood*, 2018 NSCA 18, wherein the Court declared the MMS of 12 months' incarceration for the charges of sexual exploitation, sexual interference and child luring (section 172.1(1) of the *Code*) to be unconstitutional. The trial judge denied her request, stating that "to rule on [the *Charter* motion] would have no effect on the ultimate sentence here."

[101] After the decision of the trial judge, this Court declared the MMS of 12 months' incarceration for the offence of sexual interference unconstitutional in *R v JED*, 2018 MBCA 123. In that case, Steel JA, in dissent, but not on this point, considered and ruled on the constitutional issue despite the fact that the Court imposed a sentence in excess of the MMS. In exercising her discretion to consider the matter, she found that the constitutional issue had been fully argued on an adequate factual record, that the issue was likely to reoccur and that a decision would settle the matter in

Manitoba (see paras 84-88). In reaching her conclusion, she noted that the MMS for sexual interference had been declared unconstitutional in the Ontario cases of *R v ML*, 2016 ONSC 7082; and *R v Ali*, 2017 ONSC 4531.

[102] Since *JED*, the MMS for sexual interference has been held to be unconstitutional in *R v Scofield*, 2019 BCCA 3; and *R v Ford*, 2019 ABCA 87. The MMS for sexual exploitation was found to be unconstitutional in *R v Cristoferi-Paolucci*, 2017 ONSC 4246; and *R v EO*, 2019 YKCA 9. It should be noted that the convictions in *Cristoferi-Paolucci* were overturned by the Ontario Court of Appeal (see *R v JCP*, 2018 ONCA 986).

[103] Interestingly, in Alberta there exists differing rulings with respect to the offences of sexual exploitation and sexual interference. In *R v EJB*, 2018 ABCA 239, leave to appeal to SCC refused, 38367 (23 May 2019), the Court held the MMS for sexual exploitation to be constitutional whereas, in the later decision of *Ford*, the Court held the MMS for sexual interference to be unconstitutional. In that case, Martin JA, writing for the Court, acknowledged the "unusual situation", but stated that a reconsideration was not required because different sections of the *Code* were in question (at para 19). As well, he noted that the hypotheticals that he considered in that case were different from those considered in *EJB* (see para 20).

[104] Recently, in *R v Morrison*, 2019 SCC 15, the Supreme Court of Canada declined to rule on the constitutionality of the MMS of 12 months' incarceration for the offence of child luring. Writing for the majority, Moldaver J stated that the reason for refusing to rule on the issue was because, in that case, the Court clarified the high level of *mens rea* required to commit the offence and stated that the courts below had considered the constitutionality of the MMS with a lesser standard of moral culpability in

mind. He also found that the parties had not had the benefit of making submissions in light of the clarification (see para 145).

[105] Despite the above, Moldaver J reviewed the arguments for and against the constitutionality of the MMS for child luring (see paras 146-53). Importantly, he explained the concerns that arise when considering a section 12 *Charter* argument when the offence in question is hybrid (at para 151):

> From a s. 12 perspective, then, hybrid offences raise the following key concern: If we assume — as Parliament evidently did — that the sentencing floor embodied by the summary conviction mandatory minimum represents a fit sentence in at least *some* reasonably foreseeable cases, and this Court cannot rely on prosecutorial discretion to ensure that the higher mandatory minimum is invoked only where proceeding summarily would be inappropriate, then it would seem that there will necessarily be *some* reasonably foreseeable cases in which the application of the higher mandatory minimum will be disproportionate (i.e., too severe). Put differently, by identifying a sentencing floor embodied by the summary conviction minimum sentence, Parliament has openly acknowledged that there will be circumstances in which the application of the higher mandatory minimum will be harsher than necessary. Yet, following *Nur* [*R v Nur*, 2015 SCC 15], the court is precluded from relying on prosecutorial discretion to eliminate the risk that the higher mandatory minimum will be applied where the lower mandatory minimum ought to be applied.

[106] I would note that this argument was not significantly considered in the jurisprudence declaring the various MMSs unconstitutional.

[107] In addition, Moldaver J acknowledged the differing positions taken by the courts regarding the MMS for sexual offences involving children and youth, stating (at para 154):

> Returning to the potential significance of the fact that s. 172.1 is a hybrid offence, I would add that this Court in *Nur* did not go so far as to state that in the context of a hybrid offence where a summary conviction carries a lesser mandatory minimum or no minimum at all, *every* mandatory minimum attaching to a conviction on indictment is necessarily grossly disproportionate and therefore contrary to s. 12. In this regard, without commenting on the merits of the decision, I note that the Alberta Court of Appeal recently upheld the constitutionality of a one-year mandatory minimum that is triggered following a conviction on indictment for sexual exploitation under s. 153(1) of the *Code*, which, like child luring, is a hybrid offence: see *R. v. EJB*, 2018 ABCA 239, 72 Alta. L.R. (6th) 29. On the other hand, and again without commenting on the merits, there is recent appellate authority going the other way: see, e.g., *R. v. Hood*, 2018 NSCA 18, 45 C.R. (7th) 269, where the Nova Scotia Court of Appeal struck down the one-year mandatory minimums for sexual exploitation, sexual interference, and child luring, all of which are hybrid offences.

[108] The decision in *Morrison* was rendered on March 15, 2019. Interestingly, on May 23, 2019, the Supreme Court of Canada dismissed the application for leave to appeal filed in *EJB*. A review of the documents filed in support of that application demonstrate that the Alberta Court of Appeal's decision upholding the constitutionality of the MMS for sexual exploitation and its divergence from the *Hood* decision from Nova Scotia were front and center.

[109] Aside from *JED*, few of the above cases were argued at the hearing of this appeal. Indeed, many of those decisions had not been rendered at that time. In this case, it would be unfair to decide the issue based on the materials filed and the oral arguments made at the hearing considering the recent developments in the law. In my view, as the sentence imposed by the trial judge was not unfit, it would not constitute a proper use of judicial resources to have the matter reargued before the panel. Therefore, in light of the above,

and the position taken by the accused that this Court rule on the constitutionality of the MMS if it were to find that a period of two years' incarceration was appropriate, I would decline to consider the *Charter* issue in this case.

Decision

[110] For the reasons given, I would dismiss the accused's conviction appeal. I would grant leave to appeal sentence, but would also dismiss the sentence appeal.

Cameron JA

I agree: Pfuetzner JA

I agree: leMaistre JA