IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Freda M. Steel
Mr. Justice Christopher J. Mainella
Madam Justice Janice L. leMaistre

B E T W E E N :

	)	***D. L. Carlson*** *and*
HER MAJESTY THE QUEEN	)	***A. Y. Kotler***
	)	*for the Appellant*
	)	
Appellant	)	***M. O. Walker*** *and*
	)	***A. E. M. Fenske***
- and -	)	*for the Respondent*
	)	
J. E. D.	)	*Appeal heard:*
	)	***April 18, 2018***
	)	
(Accused) Respondent	)	*Judgment delivered:*
	)	***November 22, 2018***

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 2017 MBPC 33

STEEL JA (dissenting in part):

[1] The Crown seeks leave and, if granted, appeals the 90-day intermittent sentence imposed following the accused's conviction on two counts of repeated sexual interference against his young nieces. The appeal raises the constitutionality of the one-year mandatory minimum sentence for sexual interference against a child under section 151(a) of the *Criminal Code* (the *Code*). It also gives rise to the difficult question of determining how the

principles of deterrence and denunciation are to be applied in a situation where the accused has cognitive challenges.

[2] While we are unanimous on most issues, including the unconstitutionality of the one-year mandatory minimum sentence with respect to section 151(a), I am in the minority on the issue of reincarceration for the reasons found at paras 110-29 of this judgment.

FACTS

[3] The offences involved the accused's nieces. The older child was abused for two years between the ages of seven and nine, and the younger child was abused for six months, starting when she was six.

[4] The accused suffers from developmental delay associated with lack of oxygen at birth, Cerebral Palsy, Attention Deficit Hyperactivity Disorder (ADHD) and Autism Spectrum Disorder (ASD). When the offences were discovered, the accused was 23 years old and residing with his father, sister and nieces. The sister was not in a position to parent, so the accused was often asked to babysit even though he was developmentally delayed.

[5] In 2014, the accused's father caught him fondling the younger child under a blanket while they watched television together. A subsequent investigation revealed that he had repeatedly abused both girls, touching and rubbing their vaginas both over and under their clothes. He had made them lie on top of him or sit next to him so he could touch them. He admitted offending against the older child between 70 and 100 times, often while he was babysitting. There was no digital penetration of either of the girls, just touching and rubbing.

[6] He admitted knowing that his abuse of the girls was wrong, but stated that he "had difficulty resisting when presented with the opportunity." He denied wanting to harm the girls and expressed considerable regret about his offending, but also minimised his behaviour, telling himself that it was "not a big deal" in order to block out his guilt.

[7] The accused called two witnesses at the sentencing hearing, Dr. Laura Jakul (Dr. Jakul) and Dr. Daniel Rothman (Dr. Rothman). Both doctors were clinical and forensic psychologists qualified by the Court to give expert opinion evidence in the areas of sexual-offending behaviour, the characteristics of ASD, the interplay between ASD and sexual offending, and the recommended sexual-offender treatment for people with cognitive disabilities, including ASD. Both experts prepared written reports for the Court.

[8] The accused also filed six letters of reference from family members and family friends, including that of his mother. The letters emphasised the vulnerability of the accused and his considerable growth since he began therapy.

[9] The Crown called two witnesses as well, one from Headingley Correctional Centre and the other from Stony Mountain Institution. Each of them gave evidence about sexual-offender treatment available at their respective institutions.

[10] Dr. Jakul first met with the accused in September 2015 and prepared reports in November 2015 and October 2016, and also testified at the hearing. She described a challenging childhood, with health issues that resulted in social isolation, social barriers and bullying, as well as a chaotic family life.

The accused struggled with substance abuse, symptoms of depression, discomfort with social interactions and relationships. His intellectual functioning was below average. So although he did complete university courses, it was with additional tutoring and support offered through disability services. He requires frequent supervision, reminders and cues to stay on task.

[11] The accused was not diagnosed with ASD before these offences occurred. The prevalence of ASD in the general population is approximately one per cent. Individuals with ASD have different levels of impairment. So although everyone with an ASD has challenges in certain areas of their lives, not everyone with such a disorder has the same challenges. There is a great variability in the manner in which the conditions present and their severity. However, some key features of ASD include an inability to regulate one's emotions, difficulties relating to how other people are feeling, misinterpreting social cues and interactions and developing an intense focus on specific interests.

[12] Dr. Jakul reported that the accused fell at the lowest level of impairment with respect to ASD. He does require some supports in terms of social communication. In particular, he has difficulty understanding social, verbal and non-verbal behaviours and difficulty approaching other people in appropriate ways socially. His symptoms meet the DSM-5 criteria (see American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 5th ed (Arlington VA, American Psychiatric Association, 2013)) for ASD without accompanying intellectual or language impairment. His difficulty in understanding what another person may be thinking or feeling is a core cognitive feature of ASD conditions.

[13] Dr. Jakul indicated:

> His distorted ways of thinking about his offending currently preclude him from assuming complete responsibility for his behaviour and addressing his shame about it. These distorted perceptions are likely partly a function of his cognitive and mental health challenges, and lack of knowledge and understanding of sexual development, age appropriate sexual behaviours, and issues related to consent.

[14] The accused indicated that since the age of 18, he had been using marihuana daily and had been accessing adult pornography as well as child pornography, and experienced some level of attraction to female children which, Dr. Jakul indicated, seemed like a "central part of what contributed to the hands-on offending." However, she testified that the current empirical literature was unclear as to the relationship between the accused's ASD and his offences or as to any conclusions about future offending. There have, in fact, been no large-scale studies in terms of the sexual-offending behaviour of individuals with ASD. She placed him in the "[l]ow-[m]oderate" category in terms of the risk of reoffending. That said, she did recommend that he not be alone with children.

[15] She also concluded that he was a good candidate for community supervision from a treatment and risk-management perspective and had a high level of motivation for treatment. Although treatment services were available within either the federal or the provincial correctional system, she felt the best opportunity to access the most appropriate treatment resources specific to his risk and need would occur in the community. She testified that given the accused's level of naïveté, he would be especially vulnerable to exploitation in a prison environment.

[16] Dr. Rothman's report and testimony focussed more closely on the question of the connection between the accused's ASD and his offending behaviour. Approximately 80 per cent of Dr. Rothman's practice dealt with individuals who came into conflict with the criminal justice system because of sexual-offending behaviour and approximately 25 to 30 per cent of the individuals that he treated would fit into the description of being on the autism spectrum and involved in sexual-offending behaviour.

[17] Like Dr. Jakul, Dr. Rothman wrote that the research is divided as to whether ASD may contribute to criminogenic behaviour. To date, no large-scale studies have been conducted examining sexual behaviours in adults with developmental disabilities. Ultimately, upon cross-examination, he concluded that there was uncertainty as to whether ASD, in and of itself, was a risk factor for developing sexual-behavioural problems and acknowledged that it was very rare for people with an ASD to become involved violently or in sexual-offending behaviour. He concluded that it remains unresolved by the current literature whether ASD's in themselves, are a risk factor for the development of sexual-behaviour problems.

[18] Dr. Rothman indicated that while it was entirely probable that the accused's ASD played a role in his sexual-offending behaviour, it was by no means attributable in whole to that condition. Rather, it may have led to a failure to fully appreciate the inappropriateness of his conduct. In his report, Dr. Rothman wrote that:

> [T]he vast majority of individuals on the autism spectrum never engage in sexually abusive behavior and most individuals who commit sexual crimes do not have autism spectrum disorders. Youth and adults who engage in abusive sexual conduct are diverse populations and no "typology" exists for reliably

> identifying those who have engaged in these behaviors. There are multiple variables (both within the individual as well as the situation) that can interact and lead to sexual offending.

[19] Conversely, the use of cognitive distortions to justify sexual offences against children is not restricted to autistic offenders—on the contrary, the vast majority of sexual offenders resort to such distortions.

[20] Like Dr. Jakul, Dr. Rothman considered the accused a good candidate for community supervision. At the time of his report, Dr. Jakul was seeing the accused once a month and he was also taking part in group therapy.

[21] The unit manager of the Assiniboine Treatment Centre testified about the individualized treatment options available for autistic offenders at Headingley Correctional Centre. She advised that they had offenders who, like the accused, were assessed at Level 1. The correctional program facilitator at Stony Mountain Institution testified that, like Headingley Correctional Centre, it had significant training and experience with autistic offenders.

[22] The accused was charged in January 2015 and released on judicial interim release at that time. In January 2016, he pled guilty to two counts of sexual interference and was sentenced to a 90-day intermittent sentence and three years' probation.

TRIAL DECISION

[23] At the sentencing hearing, the Crown recommended a sentence of 30 months for the offences against the older child, followed by 18 months for those against the younger child, for a total sentence of four years. They agreed

that there should be a 12-month reduction for totality reasons, leaving a three-year sentence. The defence argued that the accused's condition made a custodial sentence an inappropriate vehicle for conveying the deterrence and denunciation that would ordinarily attach to offences of this nature. The accused also argued that his needs would be better met in a non-custodial setting and sought a community-based disposition.

[24] The sentencing judge correctly indicated that although the *Code* was amended in 2015 to require the imposition of consecutive sentences where an offender is being sentenced for sexually abusing multiple victims, these amendments were not in force when the present offences were committed and therefore, he was not required to apply them in the present case.

[25] Nonetheless, the case law before the amendments indicated that sexual offending against multiple victims results in separate and distinct harm to those that have been victimized and it is for this reason that a separate and distinct consecutive sentence should result (see *R v RJ*, 2017 MBCA 13). Therefore, he held that consecutive sentences were appropriate here and this decision has not been seriously questioned either at trial or on appeal.

[26] Given the mandatory minimum sentence (MMS) of one year for each offence, that would mean a MMS of two years. The sentencing judge then considered whether the MMS infringed sections 9, 12 and 15 of the *Canadian Charter of Rights and Freedoms* (the *Charter*). He began the analysis as required by determining the appropriate range of sentences that should apply to the accused.

[27] In his reasons, the sentencing judge noted that *R v Sidwell (KA)*, 2015 MBCA 56 established the starting-point sentence for a major sexual

assault of a child, by a mature person in a position of trust, with prior good character and no criminal record, as four to five years' imprisonment (see para 22). However, having heard expert evidence regarding the accused's ASD, the sentencing judge concluded that the accused's ASD "played a substantial role in his offending behaviour" (at para 47) and that the expert evidence illustrated that the accused "has been impelled to commit the present offences by his mental illness" (at para 51).

[28] The sentencing judge thus concluded that the accused's ASD was a major mitigating factor (see para 52) and that the accused had reduced moral blameworthiness (see para 67). He also noted that the expert evidence indicated that a jail sentence would be a setback for the accused due to his vulnerabilities and the bad influences in a custodial setting (see para 41).

[29] The sentencing judge considered a number of cases in an attempt to establish a range responding to the salient features of the accused's offending and background circumstances (see para 55), and concluded that the facts not only accorded with a range of sentence spanning from probation at the low end to nine months' incarceration at the high end (see para 57), but that the facts of this case accorded with the lower end of the range.

[30] As aggravating factors, he identified that there were many instances of abuse, there were two victims and the accused was in a positon of trust at the time in respect of both of his nieces. As mitigating factors, he identified the fact that the accused did not engage in any grooming or threats of violence in order to cover up his actions. In addition, while the conduct was abhorrent, it was touching and not penetration. Other cases of sexual interference involved more serious intrusions on the victims' sexual integrity. While this

fact is not mitigating, it does distinguish this case from other cases that use the same starting point.

[31] The sentencing judge placed great emphasis on the accused's cognitive disabilities. He did not consider him a "mature" (at para 32) first-time offender as contemplated in *Sidwell*, given his difficulties. The sentencing judge held that the expert evidence led suggested a link between the accused's ASD and the offences committed by him.

[32] The Crown proceeded against the accused by way of indictment, making him subject to a one-year MMS for each count. The sentencing judge held that section 151(a) of the *Code* infringed sections 9 and 12 of the *Charter*, leading him to conclude that the one-year MMS was unconstitutional.

[33] He concluded that an appropriate sentence with respect to the older child was four months in jail plus three years of supervised probation and with respect to the younger child, three months in jail plus three years of supervised probation (see para 100). Taking the principle of totality into account, the sentencing judge reduced the sentence of four months to two months and the sentence of three months to one month. The total sentence therefore amounted to three months allowing for his sentence to be served intermittently (see paras 102-4).

[34] The Crown raises seven grounds of appeal. It alleges that the sentencing judge misapprehended the evidence by concluding that the accused's ASD "impelled" him to abuse the victims (at para 51). Further, the Crown submits that the sentencing judge overemphasised the role of rehabilitation, understated the harm inflicted on the victims, wrongly assessed the appropriate range of sentence, misapplied the totality principle and that

the sentence imposed was demonstrably unfit. The Crown also asserts that the sentencing judge erred in finding violations of sections 9 and 12 of the *Charter*.

DECISION

Standard of Review

[35] The Crown and defence counsel agree on the well-established principle that the standard of review for sentence appeals is highly deferential. We must defer to the sentencing judge's exercise of discretion on sentence, absent an error in principle or a material misapprehension of the evidence which had an impact on the sentence, or the imposition of a sentence which is demonstrably unfit.

[36] As *R v Houle*, 2016 MBCA 121 explains (at para 11):

> A material error has two qualities beginning with demonstration of an error in principle, such as an error in law, a failure to consider or give sufficient weight to a relevant factor, consideration of an irrelevant factor or an overemphasis of an appropriate factor. The second aspect is that the error must have impacted the sentence in more than just an incidental way (see *Lacasse* [*R v Lacasse*, 2015 SCC 64] at para 44). Where the error is harmless, as it has "no real effect" on the sentence, appellate intervention is not permitted (*Lacasse* at para 45). A sentence will be demonstrably unfit where it unreasonably departs from the principle of proportionality taking into account the individual circumstances of the offence and the offender and the acceptable range of sentence for similar offences committed in similar circumstances (see *Lacasse* at paras 52-55; and *R v Ruizfuentes (HS)*, 2010 MBCA 90 at para 7, 258 ManR (2d) 220).

[37] One of the grounds of appeal is that the sentencing judge erred in assessing the appropriate range of sentence. The choice of sentencing range or of a category within a range falls within the sentencing judge's discretion and cannot in itself constitute a reviewable error (see *R v Lacasse*, 2015 SCC 64 at para 51). It is only if the sentence imposed is demonstrably unfit that the appellate court may intervene. Choosing the wrong sentencing range may simply be a factor in determining whether the sentence is demonstrably unfit (see *R v Dyck*, 2018 MBCA 33 at para 23).

[38] On the other hand, whether the sentencing judge applied the correct legal principles in connection with his finding that the one-year MMS under section 151(a) of the *Code* violates the accused's rights under sections 9 and 12 of the *Charter* attracts a standard of correctness (see *R v McIvor*, 2018 MBCA 29 at para 15).

Analysis

The Sentencing Judge Erred in Misapprehending the Evidence

[39] The sentence imposed on the accused was significantly outside of the current sentencing guidelines for sexual interference. The Crown argues that this occurred for a variety of reasons, but one of them was the misapprehension of the evidence by the sentencing judge. The sentencing judge concluded that the accused's ASD "contributed in a substantial way to the offences before the court" (at para 46). However, he went further and stated that, "As has been illustrated by Dr. Rothman, [the accused] has been impelled to commit the present offences by his mental illness" (at para 51). This is an overstatement and misinterpretation of the evidence.

[40] Dr. Rothman testified that the accused's ASD certainly made it harder for him to appreciate the full impact of his actions and to appreciate and understand social interactions. Dr. Jakul described impairment in social communication and challenges with planning and organizational skills. This, together with his other difficulties, including his developmental delay and family background, led to social isolation and responsibilities with respect to childcare that were beyond his ability.

[41] However, Drs. Rothman and Jakul also made it clear that the literature is far from establishing a "causal link" between ASD and sexual offending. "[C]ausal link", the phrase used by the defence in their factum and "impelled" (at para 51), the word used by the sentencing judge in his reasons, implies a direct connection between ASD and sexual offending that was not established by the expert evidence. Certainly, there is nothing in the research sufficiently definitive to label thousands of law-abiding, productive members of society as likely to offend against children.

[42] As Dr. Rothman indicated, many individuals without ASD have cognitive distortions and difficulties with impulse control that lead them to sexual offending and most individuals with ASD do not offend sexually. Individuals with ASD are varied and the ways in which they are affected vary in nature and severity. An individual holistic assessment in each case must be undertaken.

[43] However, I disagree with the Crown's statement that the accused's ASD did not reduce the accused's moral blameworthiness. The degree to which it impacts sentencing will be discussed later in these reasons. At this point, it is sufficient to state that, while the accused's ASD is a mitigating

factor that should be taken into account, the evidence does not support a finding that the ASD "impelled" (at para 51) the offending. In fact, the evidence does support a finding that the accused knew, at all times, that what he was doing was wrong and that he should not be doing it, that the cognitive distortions he relied on to justify his behaviour were common to many, if not all, sexual offenders and that according to Dr. Rothman, ASD does not pre-dispose one to pedophilia although in the case of the accused, it made him more vulnerable.

[44] As appellate courts have regularly recognised, intervention is appropriate where a material misapprehension has had an impact on the sentence (see *R v R (M)*, 1998 CarswellOnt 892 at para 10 (CA); *R v Wright*, 2011 ABCA 42 at paras 11-13; and *R v Dieckmann*, 2017 ONCA 575 at para 78, leave to appeal to SCC refused, 37788 (15 March 2018)).

The Sentencing Judge Erred in His Application of the Principle of Totality

[45] I also find that the sentencing judge erred in his application of the principle of totality. Having determined that sentences of four months for the older child and three months for the younger child were appropriate, he reduced those sentences even further finding that the totality principle "directs the court to consider the aforementioned 'exceptional circumstances'" (at para 101). This, he stated, allowed him to "balance the seeming incongruent principles of deterrence and denunciation with rehabilitation" (at para 102). In an earlier paragraph, he had listed the mitigating factors, the accused's difficult background, his mental health condition, his remorse; in short "the totality of the circumstances" (at para 99).

[46] Actually, the totality principle does not involve going back to "double-count" mitigating factors, nor does it require the sentencing judge to once again consider the various sentencing principles. Both the issue of balancing rehabilitation against deterrence and the issue of the accused's mental condition were considered when the sentencing judge arrived at the initial sentence.

[47] Instead, as Chartier JA (as he then was) observed in *R v Ladouceur and Traverse*, 2008 MBCA 110, when one is dealing with consecutive sentences, the judge must establish the appropriate sentence for each offence separately. The totality principle allows the judge to consider the length of incarceration of all the sentences combined. It is the analysis of that total sentence that is to be considered. The totality principle represents a "last look" (at para 35) to ensure that the sentence imposed is not unduly crushing or fundamentally out of step with the offender's moral blameworthiness.

[48] As I pointed out in *Sidwell* (at para 31):

> The totality principle serves a different purpose in sentencing. It looks to the future and offers one last reality check. Having already considered the offences and the offender, and the aggravating and mitigating factors for the multiple offences, and having arrived at an appropriate sentence for each offence, the principle requires the sentencing judge to ask the following question: Is the aggregate length of the future incarceration, for the consecutive multiple offences so long that, given this accused and his prospects for rehabilitation, it deprives him of all hope?

[49] In addition, the sentencing judge did not explain why a combined sentence of seven months was crushing or disproportionate, instead, he simply

stated that "it is necessary to reduce each of the counts to allow for a rehabilitative sentence" (at para 102).

The Sentencing Judge Erred in Overemphasising the Role of Rehabilitation in Relation to Deterrence, Denunciation and Public Protection

The Sentencing Judge Erred in Assessing the Appropriate Range of Sentence

The Sentence Imposed Was Unfit

[50] Sentences for sexual offences have been increasing over the past several years, especially sexual offences involving children (see *R v Norton*, 2016 MBCA 79 at para 43). As well, the sentencing judge correctly observed that section 718.01 of the *Code* requires a sentencing judge to give primary, but not exclusive, consideration to the objectives of denunciation and deterrence when imposing a sentence for an offence involving abuse of a child.

[51] The law does not require a sentencing judge to find "exceptional circumstances" to justify imposing a sentence that departs downward from a judicially created starting point or sentencing range (see *R v Burnett*, 2017 MBCA 122 at para 25). It is proportionality that is the *sine qua non* of a just sanction (see *R v Ipeelee*, 2012 SCC 13 at para 37). As well, as I indicated earlier, an error in assessing the appropriate range of sentence is not a reviewable error. It merely adds to the assessment as to whether the sentence is demonstrably unfit. Ranges of sentences are tools only, designed to minimise the disparity of sentences between similar offenders committing a

particular offence in like circumstances (see *Lacasse* at paras 2, 57; and *Burnett* at para 9).

[52] As it happens, the sentencing judge did err in assessing the appropriate range of sentence in this case. In his reasons, he reviewed over 10 cases and came to the conclusion that the range of sentence spanned from probation at the low end, to nine months' incarceration at the high end. The number of incidents (the incidents of fondling were numerous—somewhere between 70 and 100—over a period of two years for the older child and a period of six months for the younger child), the length of time, the age of the victims and the position of trust are all aggravating factors that the sentencing judge mentioned, but gave almost no weight to in arriving at the sentence.

[53] Indeed, the sentencing judge stated that although the offending by the accused was committed repeatedly over a long period of time, they were at the lower end of the scale in comparison to the sexual interference charges the courts considered in the other cases (see para 62). Yet, most of the cases he cited involved incidents at a much lower level of severity than at bar. While they did involve sexual touching, most of them involved only one incident. See, for example, *R v JAH*, 2011 NSSC 434; *R v TMB*, 2013 ONSC 4019; *R v SJP*, 2016 NSPC 50; and *R v CK-D*, 2016 ONCA 66, all of which resulted in sentences ranging from three to six months. However, several of the cases attracted higher sentences even though they only involved a single incident.

[54] In *R v Bachewich*, 2007 ABCA 199, a one-year sentence was upheld for a single incident of sexual touching against a nine-year-old girl. While the victim was asleep, the accused placed his hand inside her panties and briefly stroked her vagina, waking her up. In Manitoba, *R v Klassen*, 2014 MBQB

18, is an example of one incident of sexual touching which resulted in a sentence of one year. In *R v ML*, 2016 ONSC 7082, the offender touched and squeezed the bare breasts of his daughter's 15-year-old half-sister on one occasion and a nine-month sentence was imposed. In *R v P (KW)*, 2016 MBQB 99, two instances of sexual touching over a six-month period by an offender in a position of trust attracted a sentence of 30 months.

[55] In *R v Storheim*, 2014 MBQB 141, leave to appeal to Man CA refused, 2015 MBCA 14, the offender priest touched an 11-year-old altar boy around his penis area alleging he was looking for pubic hair and invited the boy to touch his testicle, which the boy did. The offender did not have a criminal record, had a low risk of recidivism and experienced vast bad publicity. The offender was sentenced to eight months' incarceration. In that case, Mainella J (as he then was), noted that in *R v R (GW)*, 2011 MBCA 62, the Manitoba Court of Appeal "cited, with approval, sentences in the range of 12-27 months for first offenders who fondled or touched the genitalia of a child on one or two occasions" (at para 75) and also noted that this range "included cases where there was a breach of trust" (*ibid*).

[56] Few of the cases relied on by the sentencing judge involved anything like the prolonged and repeated abuse at issue in this case, even if a mental illness was involved. Indeed, the one case where probation was imposed on an individual with a mental health issue involved an adult victim and a single incident committed by a non-family member who was not in a position of trust. In fact, the victim, who was 20, and the offender were strangers who had just met outside the store where the offence occurred. In the course of the assault, the offender touched the victim's breast and vagina outside her

clothes. The Crown proceeded summarily (see *R v Webster*, 2015 CarswellNfld 194 at paras 4-7 (PC)).

[57] The other case cited by the sentencing judge that involved mental health challenges was, in many ways, very similar to the case at bar. The offender received a one-year incarceratory sentence and three years' probation for a one-time occurrence of fondling his six-year-old stepniece while babysitting her, even after the judge concluded that the offender's condition had played a role in the offence. The offender pled guilty to one count of sexual assault and the charge of touching for a sexual purpose a child under 16 pursuant to section 151 of the *Code* was stayed (see *R v ERDR*, 2016 BCSC 684 (*ERDR #1*); and *R v ERDR*, 2016 BCSC 1758 (*ERDR #2*)).

[58] The assault occurred while the child was asleep on the couch in the living room. The offender touched the child's vagina with his fingers and palm after removing her clothes. He stopped when she woke up. The offender in that case had many similarities, in that he was 29 years old at the time of sentencing, had been diagnosed with Level 1 ASD, had never dated, was not capable of living independently, spent much of his time on the computer or playing video games and had a particular interest in pornographic anime. The expert giving testimony in that case also concluded that ASD was a contributing cause to the accused's offending behaviour, but that the offender knew that what he was doing when he touched the child was morally wrong.

[59] The judge in that case rejected the Crown's estimate of a range of 30 months and held that an appropriate range of sentence here would be nine to 18 months. She also rejected the defence submission that an appropriate range of sentence would be 90 days, based on the offender's ASD as well as

other mitigating factors. Although the judge acknowledged that the offender's ASD lessened his moral blameworthiness, she held that a sentence of 90 days would not adequately reflect the seriousness of the offence, the moral blameworthiness of the offender and society and Parliament's obvious concern with respect to the harm done by child sexual assault. She concluded that a sentence of one year followed by three years' probation was the appropriate sentence.

[60] The sentencing judge in this case distinguished *ERDR #1* on the basis that the offence had been "planned and deliberate" (at para 56). Given the number of incidents at issue in this case and multiple victims, it is hard to characterise the accused's actions in any other way but deliberate. He knew what he was doing at all times during the two years that the abuse lasted.

[61] More to the point are cases where the sexual acts were those of touching, but over a longer period of time, similar to the case at bar. Those cases garnered lengthier sentences, with the more recent cases resulting in more severe sentences in accord with the increasing severity with which child abuse cases are treated.

[62] In *R v RNS*, 2000 SCC 7, the offender was convicted of sexual interference and invitation to sexual touching for fondling the vagina of his step-granddaughter over a four-year period, when she was between five and eight years old. No penetration occurred. The offender had no criminal record and suffered heart problems and hypertension. The sentencing judge thought the facts could warrant a jail term in the range of 18 months to two years, but took into account the offender's mitigating factors (see para 9), and sentenced him to nine months of jail and two years of probation. On appeal, the sentence

was changed to a nine-month conditional sentence. On a further Crown appeal, the Supreme Court of Canada restored the nine-month jail sentence referring to it as a relatively lenient sentence. So, even as early as 2000, the Supreme Court of Canada recognised that a nine-month period of incarceration for a course of conduct was a lenient sentence, but in this case was appropriate due to the offender's precarious personal circumstances.

[63] In *R v Sayers*, 2015 ABCA 21, a 56-year-old offender, a close family friend, touched the breasts and vagina of an eight-year-old girl under her clothes over a four-year period, at least eight times. He was not in a position of trust, had no criminal record and was at low risk to reoffend. The Court of Appeal upheld a sentence of three and one-half years and held that, while a major sexual assault for the purpose of sentencing is usually a sexual assault which involves some penetrative sex act, certainly repeated acts of abuse committed over a period of years against a vulnerable child during her formative years could be so described (see para 12).

[64] In *R v SJ (M)*, 2015 NWTSC 43, the offender frequently sexually touched his daughter between the ages of five and 13. He had no criminal record, but the Court held that his moral blameworthiness was very high and imposed a sentence of three years.

[65] In *R v McLean*, 2016 SKCA 93, the offender pled guilty to a number of sexual offences with respect to four girls (between 12 and 14 years old), including luring, extortion, making child pornography and sexual interference. The offender was 18 at the time of the offences, had no criminal record, was naïve and immature, had minimal interaction with girls his age and found it easier to talk to younger girls, and had moderate-high risk to

reoffend sexually. The offender felt wrong and remorseful while he was offending and showed remorse after he was arrested. On appeal, the Court of Appeal imposed a one year and one-day jail sentence as a consecutive sentence for sexual interference to conform with the MMS and brought the total jail time to three years. The MMS was not challenged, but Ottenbreit JA justified the one year and one-day sentence for the sexual interference, stating (at para 76):

> In a case decided by this Court before the mandatory minimum sentence for this offence was established, the range for sexual interference offences was found to be nine months to four years. "(T)he lower end of the range is available only to those cases at the lower end of the very broad spectrum of gravity encompassed by the offence defined by s. 151" (*R v K. (E.G.*), 2001 SKCA 77 at para 9, 207 Sask R 198).

[66] These cases appear to establish a range of sentence between nine months and three and one-half years of incarceration for sexually fondling a child's body, breasts and/or genitals, without penetration, where the offender has no criminal record. Lower sentences tend to take into account mitigating circumstances such as poor health or very brief touching, however, even one-time touching often results in a sentence of around one year. Longer sentences seem to reflect periods of inappropriate touching behaviour over a longer period of time or where, similar to *Sidwell*, violence, grooming or threats are involved in addition to more grievous intrusions to the child's sexual integrity. Although it is an older case, attention should be particularly paid to the Supreme Court of Canada's decision in *RNS*, which suggested a range of 18 months to two years for long-term fondling of a child by a person in a position of trust, absent exceptional mitigating circumstances.

[67] This range also appears to be consistent with discussions and comments made in other recent Manitoba Court of Appeal and Court of Queen's Bench decisions about a general range for sexual interference. As mentioned earlier, in *R (GW)*, the Court was considering the proper sentence for an offender who had touched the buttocks and vagina of a nine-year-old girl and who had previously been convicted of a similar assault. The Court reviewed several cases in which sentences ranging from 12 to 27 months were imposed upon offenders who had engaged in touching type of behaviours with children and were first-time offenders (see para 33). Thus, the Court appeared to accept that sexual interference by a first-time offender involving touching-type behaviours will attract sentences of around 12 to 27 months.

[68] Having established a general range for repeated sexual touching by a first-time offender in a position of trust, the issue becomes how evidence that the offender has a cognitive limitation should affect the application of this range. In other words, to what extent is the accused's moral blameworthiness reduced in this case by virtue of the fact that he is an ASD affected person?

[69] In *R v Friesen*, 2016 MBCA 50, the Court determined that an offender's diagnosis of Fetal Alcohol Spectrum Disorder (FASD) could reduce an offender's moral blameworthiness if there is a connection between the condition and the offence for which he or she stands charged (see para 26). However, the extent to which a mental disorder reduces an offender's moral blameworthiness "is an evidentiary issue that must be assessed on a case-by-case basis" (at para 25).

[70] These principles were reiterated in *R v Okemow*, 2017 MBCA 59 (at para 72):

> A reduction of moral blameworthiness for the purposes of sentencing, either for an adult or a young person, due to a recognized and properly diagnosed mental illness or other condition where the functioning of the human mind is impaired, is a "fact-specific" case-by-case determination as opposed to an automatic rule that the mental illness or cognitive limitation necessarily impacted the commission of the offence in question (see *R v Roulette*, 2015 MBCA 102 at para 7; *R v Friesen*, 2016 MBCA 50 at para 23; *R v Manitowabi*, 2014 ONCA 301 at paras 55-57; *R v Ellis*, 2013 ONCA 739 at paras 107-127; *R v Ramsay*, 2012 ABCA 257 at paras 33-39; *R v Branton*, 2013 NLCA 61 at para 35; and *R v MJH*, 2004 SKCA 171 at para 29).

[71] In that case, Mainella JA suggested that, when sentencing offenders with a cognitive or mental disorder, sentencing judges should consider and assess each of the three following questions (at para 73):

> 1. Is there cogent evidence that the offender suffers from a recognized mental illness or some other cognitive limitation?
>
> 2. Is there evidence as to the nature and severity of the offender's mental circumstances such that an informed decision can be made as to the relationship, if any, between those circumstances and the criminal conduct?
>
> 3. Assuming the record is adequate, the sentencing judge must decide the offender's degree of responsibility for the offence taking into account whether and, if so, to what degree his or her mental illness or cognitive limitation played a role in the criminal conduct.

[72] When evaluating whether an offender's moral blameworthiness was affected by his or her mental illness or other form of cognitive limitation, guidance in making this evaluation may also be sought by considering the following passage from *R v Ramsay*, 2012 ABCA 257 as follows (at paras 24-25):

> Where the cognitive deficits experienced by the offender significantly undermine the capacity to restrain urges and impulses, to appreciate that his acts were morally wrong, and to comprehend the causal link between the punishment imposed by the court and the crime for which he has been convicted, the imperative for both general deterrence and denunciation will be greatly mitigated (*Quash* [*R v Quash*, 2009 YKTC 54] at para 71; *Harper* [*R v Harper*, 2009 YKTC 18] at para 47).
>
> . . .
>
> The degree of moral blameworthiness must therefore be commensurate with the magnitude of the cognitive deficits attributable to FASD. The more acute these are shown to be, the greater their importance as mitigating factors and the less weight is to be accorded to deterrence and denunciation, all of which will serve to "push the sentence ... down the scale of appropriate sentences for similar offences".
>
> [emphasis added]

[73] Three areas of guidance can be gleaned from the above passage. First, in determining whether a mental disorder affects the moral culpability of an offender, a court should consider whether the evidence indicates that the offender's cognitive defects undermine the offender's capacity: (1) to restrain urges and impulses; (2) to appreciate that his or her acts were morally wrong; and (3) to comprehend the link between the punishment imposed by the court and the crime for which he or she has been convicted. The mental illness does not have to have caused the offender to commit the crime. It is sufficient that the mental illness contributed to the commission of the offence. Second, the magnitude of the cognitive deficits must be considered so that the degree of moral blameworthiness can be commensurate with the magnitude of those deficits. Third, public safety issues will always have to be taken into account as well.

[74] There have been other cases dealing with offenders who suffer from cognitive limitations. Sentencing courts have considered the particular circumstances of the offenders and found their disability to be a significant mitigating factor. In these cases of diminished responsibility through mental disorder, treatment of the offender is generally given priority over deterrence as a sentencing factor (see *R v Kagan*, 2008 NSSC 26 at para 22; *R v Somogyi*, 2011 ONSC 483 at para 34; and *R v Scofield*, 2018 BCSC 91 (*Scofield #1*)).

[75] There is no question that an offender's mental disability can be a significant mitigating factor and relevant to sentencing principles and objectives (see *R v Adamo*, 2013 MBQB 225 at para 68; *Okemow* at para 107; and *R v Ford*, 2017 ABQB 322 at paras 47-48). When sentencing individuals with cognitive limitations, deterrence and punishment assume less importance.

[76] This decreased emphasis on punishment and deterrence in these circumstances is consistent with the proportionality principle in section 718.1 of the *Code*. A sentence must be proportionate to not only the gravity of the offence, but also the degree of responsibility of the offender. So, the weight to be given to an offender's mental illness will vary depending upon the circumstances of the case; including the nature of the degree of the illness, the prospects for treatment and any connection between the illness and the offence committed. The presence of a mental illness does not automatically justify a lighter sentence than would otherwise be appropriate.

[77] In this case, I cannot say the sentence was proportional. While the fact that the accused suffered from ASD was a mitigating factor, there is no

evidence it caused the accused to commit the sexual assault. Drs. Jakul and Rothman were clear that the literature is clearly divided as to the link. While cognitive dissonances are present in many people who commit sexual-offending behaviour and present in people with ASD, neither expert could testify as to a causal link. What they could do is testify to the challenges faced by the accused and the way in which that contributed to his impulses to sexually offend.

[78] The sentencing judge placed excessive weight on the accused's condition, while underemphasising the aggravating factors associated with his actions. Adding to the demonstrably unfit sentence was the range of sentence arrived at by the sentencing judge. It was more appropriate to a situation of minimal sexual touching rather than the course of conduct present here. All of this led to a sentence that is demonstrably unfit given the number of incidents, the length of time, the position of trust and the ages of the two victims involved.

[79] I agree with the sentencing judge that the accused is "far from the 'mature' first time offender contemplated in *Sidwell*" (at para 32). The evidence also detailed his other limitations and background. There was substance abuse and mental health issues experienced by all three of his siblings and he grew up in a chaotic household. While not causally linking it to the criminal conduct, the evidence explained the role those circumstances and his ASD played in leading to the criminal conduct.

[80] Also to be noted here is that there was no grooming, threats or violence other than the violence of the acts themselves. The incidents

occurred between 2012 and 2014 and he was charged in January 2015. He was not willingly placed in his position of trust.

[81] I also agree with the sentencing judge that a downward assessment from the *Sidwell* starting point of four to five years is appropriate in this case. While I acknowledge all the mitigating factors mentioned previously and, in particular, the accused's ASD, which significantly reduced his moral blameworthiness, I cannot agree that a 90-day intermittent sentence is appropriate here. The number of incidents, the length of time, the age of the victims and the fact that the accused knew exactly what he was doing, knew it was wrong but nonetheless continued his actions, call out for a stronger response. I would substitute a sentence of 18 months for the offences against the older child and one year with respect to the younger child for a total of 30 months.

[82] I would then reduce the sentence of 18 months by eight months based on totality for a total of 22 months. While I agree with the Crown that incarceration is difficult for all first-time offenders, it is especially difficult for youthful, first-time offenders with cognitive difficulties. The danger of exploitation and the naïveté of the accused was emphasised in both of the doctors' reports and all of the reference letters. I would give him credit for three months already served leaving a remaining sentence of 19 months. I would not change the period of probation or the ancillary orders.

Constitutional Argument

[83] Pursuant to section 151(a) of the *Code*, the MMS for a conviction for sexual interference, proceeded with by indictment, is one-year imprisonment. The sentencing judge's conclusion that section 151(a) violates

section 12 of the *Charter* was based on his finding that a sentence far below the MMS should be imposed.

[84] While the Crown disagrees with this finding, it argues that since the appropriate sentence in this case exceeds the one-year MMS imposed by the section in the *Code*, it is not necessary for this Court to rule on the issue. The Crown argues that there remains no basis for concluding that section 151(a) contravenes section 12, nor is there any need to address a constitutional challenge that is moot.

[85] The accused argues that even if this Court finds that the sentencing judge erred and a just and fit sentence for the accused is not grossly disproportionate to the MMS, this situation calls out for the Court to exercise its discretion and decide the section 12 issue, nonetheless.

[86] At the time of the accused's sentencing hearing, there were few cases where courts had considered the constitutionality of the MMS for sexual offences involving children. Since then, a number of courts across the country have held that, with the exception of offences dealing with child pornography (see *R v John*, 2017 ONSC 810), such MMS's do violate section 12 of the *Charter* and are not justified under section 1. The MMS for section 151(a) has been struck down by trial courts in Nova Scotia, British Columbia and Ontario (see *SJP*; *ML*; *R v Ali*, 2017 ONSC 4531; and *Scofield #1*).

[87] I agree with the accused that it would be appropriate to exercise my discretion and consider the section 12 argument even if it is ultimately determined that the accused's sentence would not be grossly disproportionate. Normally, the course of judicial restraint would be to decide the case on the narrowest possible of grounds. However, in light of the number of cases

across the country that have considered the constitutionality of the MMS related to sexual offences involving children, it would be in the interests of justice to have a similar determination made in Manitoba.

[88] There is still a strong adversarial context here. The constitutional issue has, in fact, been fully argued on the basis of an adequate factual record and the issue is likely to reoccur. It is an appropriate use of judicial resources. A decision would take advantage of argument and evidence that would otherwise be wasted, in the sense that fresh argument and fresh evidence would be needed in a later case where the issue recurred. See *ERDR #1*; *ERDR #2*; *R v Antwi*, 2016 ONSC 4325; *R v Plange*, 2018 ONSC 1657; and *R v Sharma*, 2018 ONSC 1141, which are cases where the courts went on to address the constitutionality of the MMS, even though it was not strictly necessary because the MMS did not affect the offenders.

[89] Section 12 of the *Charter* provides, "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment."

[90] A sentence will violate section 12 where it is grossly disproportionate to a fit punishment in the circumstances. This is determined by comparing the sentence to the facts of the case, or to reasonable hypotheticals. A sentence will only be found to be grossly disproportionate in the clearest of cases, where it is "so excessive as to outrage standards of decency" (*R v Smith (Edward Dewey)*, [1987] 1 SCR 1045 at 1072) and where it is "abhorrent or intolerable" to society (*R v Lloyd*, 2016 SCC 13 at para 24). A sentence that is merely excessive or unfit is not grossly disproportionate. It must "shock the conscience of Canadians" (*Lloyd* at para 33) or Canadians

"would find the punishment abhorrent or intolerable" (*R v Wiles*, 2005 SCC 84 at para 4; and *R v Ferguson*, 2008 SCC 6 at para 14).

[91] A sentence is at greater risk of being grossly disproportionate where the offence captures a wide range of conduct and circumstances (see *R v Forcillo*, 2018 ONCA 402). Sexual interference is such an offence as it captures a broad range of conduct from a touch "to the worst forms of human degradation" (*R v Sandercock*, 1985 ABCA 218 at para 11).

[92] Following *R v Nur*, 2015 SCC 15, there is a two-step analysis to determine whether the MMS was grossly disproportionate (see para 46):

1. The court must determine what constitutes a proportionate sentence for the offence, having regard to the objectives and principles of sentencing in sections 718-718.2 of the *Code*; and

2. The court must ask whether the MMS requires the judge to impose a sentence that is grossly disproportionate to the fit and proportionate sentence. If the answer is yes, the MMS provision is inconsistent with section 12 and will fall unless justified under section 1 of the *Charter*. In the analysis under the second step, the court is to determine the effect of the MMS on the offender in the present circumstances and on a hypothetical offender in reasonably foreseeable circumstances (see *R v EJB*, 2018 ABCA 239 at para 11; and *R v Morrison*, 2017 ONCA 582 at para 117).

[93] As *Nur* goes on to explain (at paras 74-76):

> First, what is reasonably foreseeable necessarily requires consideration of the sort of situations that may reasonably be

> expected to be caught by the mandatory minimum, based on experience and common sense. This means that personal characteristics cannot be entirely excluded. . . .
>
> Second, cutting the other way, is the admonition of *Goltz* [*R v Goltz*, [1991] 3 SCR 485] that far-fetched or remotely imaginable examples should be excluded from consideration. This excludes using personal features to construct the most innocent and sympathetic case imaginable — on that basis almost any mandatory minimum could be argued to violate s. 12 and lawyerly ingenuity would be the only limit to findings of unconstitutionality. To repeat, the inquiry must be grounded in common sense and experience.
>
> Thus, the inquiry into reasonably foreseeable situations the law may capture may take into account personal characteristics relevant to people who may be caught by the mandatory minimum, but must avoid characteristics that would produce remote or far-fetched examples.

[94] There are a myriad of possible reasonable hypothetical scenarios, some of which are already reflected in the facts of decided cases. It is unnecessary for me to speculate as to reasonable hypotheticals since, as previously mentioned, other courts have already dealt with actual cases where the MMS was held to be grossly disproportionate.

[95] To date, the Supreme Court of Canada has not discussed the MMS relating to sexual interference, but two appellate courts have held the MMS contravened section 12 of the *Charter*. In both *R v Hood*, 2018 NSCA 18; and *Caron Barrette c R*, 2018 QCCA 516, it was determined that the MMS applying to sexual interference was unconstitutional and the MMS provision was struck down.

[96] In *Hood*, the offender suffered from Bipolar Mood Disorder. She texted former students sexually explicit images and performed a sex act with

one of them. The sentencing judge had determined that the MMS for the offender's sexual interference conviction would be grossly disproportionate to the seriousness of her crimes and her degree of responsibility, indicating that a three to nine-month jail sentence would be appropriate. The sentencing judge thus struck down the MMS on the basis of the circumstances of the offence and the offender before him, and consequently did not consider any hypotheticals. He imposed a 15-month conditional sentence.

[97] The Nova Scotia Court of Appeal rejected the sentencing judge's conclusion that the one-year MMS for sexual interference was unconstitutional *vis-à-vis* the offender's particular circumstances, noting that these were very serious offences that took place over a period of months, with a lot of planning. The Court, however, determined that the MMS for sexual interference failed "constitutional muster" (at para 149) on the basis of a reasonable hypothetical, involving reasonable variations of the offender's circumstances. The Court considered a hypothetical, which it considered to be "foreseeably captured" (at para 142) by the offence of sexual interference, and neither "remote" nor "far-fetched" (*ibid*). The hypothetical states (at para 150):

> [A] first-year high school teacher in her late 20's with no criminal record. She suffers the same mental health challenges as Ms. Hood. One evening, she texts her 15-year-old student ostensibly to inquire about a school assignment. Feeling manic, she directs the conversation from casual to sexual. They agree to meet that same evening in a private location where they fondle each other. That was their one and only sexual encounter. Consider further a guilty plea, coupled with the teacher's sincere remorse.

[98] The Court concluded that it would be unlikely that a proportionate sentence for this hypothetical would draw jail time or, at most, would draw only a brief period of incarceration. In this regard, the Court concluded that the one-year MMS for sexual interference would be grossly disproportionate and would represent cruel and unusual punishment (see para 154).

[99] In *Caron Barrette*, the offender pled guilty to two counts of sexual interference. The offender was 23 years old and had a romantic relationship with a 14 year old, with the approval of her parents. The offender and the victim lived together for a year and one-half within the home of the victim's parents, separated for a while, and then lived together again in their own apartment. They were unaware that the relationship was illegal despite the "consent" of the victim's parents. A relative informed the police and after being advised of the illegality of the relationship, the offender and the victim ended it. The offender pleaded guilty to two counts of sexual interference. The sentencing judge imposed upon him 14 months—12 months for the acts in 2011 and two months consecutive for the acts in 2013.

[100] The lower court determined that the MMS of one year was unconstitutional on the basis of reasonable hypotheticals. In the course of sentencing, the sentencing judge considered three hypotheticals:

1. a romantic relationship similar to that which existed between the offender and the victim, but for a period of several days, which only involved kissing and touching;

2. an isolated caress, over the clothes, on the thigh or buttocks, by a person who is not an authority figure, and without consequences for the victim; and

3. a romantic relationship in which the victim is 15 and one-half years old and legally unable to consent at the beginning of the relationship, and the relationship continues after she reaches 16 years old.

[101] On appeal, the Court of Appeal began the inquiry by considering what would be an appropriate sentence for this offender in these circumstances, and concluded that global punishment of 90 days intermittent (45 days per count) would be a just and proportionate sentence. The Court thus concluded that the one-year MMS was therefore grossly disproportionate with regard to the circumstances of the offender and concluded that the sentence imposed on the offender violated section 12 of the *Charter*. The Court noted that although this conclusion meant that it did not have to consider the hypotheticals considered in the lower Court, the Court decided to do so.

[102] The Court determined that the hypotheticals considered by the sentencing judge were not far-fetched and reviewed a number of cases which bore similarity to each of the hypotheticals (see paras 94-102). The Court concluded that the hypotheticals were reasonably likely to occur and that the MMS of one year in such circumstances would be disproportionate and contrary to the *Charter*, as determined by the Court below (see paras 103-4).

[103] Besides these two appellate cases, as stated, there are several lower court cases from other jurisdictions that have determined that the MMS for sexual interference violates section 12 of the *Charter* and cannot be justified under section 1. Some do so on the basis of the circumstances of the case before the court. See *Scofield #1*; and *R v Scofield*, 2018 BCSC 419 (*Scofield #2*) (the 22-year-old offender, who had mental health issues and

severe cognitive impairment, had full sexual relations with two 15-year-old girls); and *SJP* (the half-asleep Indigenous offender rubbed his diapered toddler against his clothed groin for several moments). Others do so on the basis of reasonable hypotheticals. See *ML* at paras 79-85; and *R v BJT*, 2016 ONSC 6616.

[104] For another example of a "real-life" scenario that could be caught by the one-year MMS if the matter was proceeded with by indictment, see *R v Lonegren*, 2009 BCSC 1678 where the offender was convicted of sexual interference and subject to the then 45-day MMS, as the Crown proceeded by indictment. The offender, who was 51 years old and had no criminal record, stroked the nine-year-old victim's back and buttocks under her pajamas while she was apparently asleep and stopped what he was doing when she stretched to make him think she was waking up. The Court imposed an intermittent 45-day jail sentence upon the offender. Had this same fact scenario occurred today, a MMS of one year would apply. Such a sentence would be grossly disproportionate to the circumstances of the offence and offender.

[105] On the other hand, the recent decision of the Alberta Court of Appeal in *EJB* held that the MMS for sexual exploitation (see section 153(1.1)(a) of the *Code*) was not grossly disproportionate. The offender was convicted of sexual exploitation of his 16-year-old niece. He had sexual intercourse with her on six occasions over a period of approximately five weeks. The Court overturned the lower Court's two-year conditional sentence and substituted a sentence of four years' incarceration. In so finding, it disagreed with the position taken by the Nova Scotia Court of Appeal in *Hood* which also struck down the one-year MMS for sexual exploitation and luring (see sections 172.1(1)(a)-(b) of the *Code*) as well as section 151(a). In the case at

bar, I am dealing only with a constitutional challenge to section 151(a) of the *Code*.

[106] The Alberta Court of Appeal distinguishes *Hood* on the basis that the offender suffered from Bipolar Mood Disorder. Actually, the Nova Scotia Court of Appeal found that the MMS was constitutional with respect to the offender and the particular facts of the case at hand. However, the Court then went on to put forth several hypotheticals. I would say that the facts of the hypotheticals used in *Hood* are exactly the kind of facts where a one-year sentence for that offender on those facts is grossly disproportionate. So, for example, a 22-year-old accused with mental health issues might very well kiss or touch a 15-year-old (see *Scofield #1*; and *Scofield #2*) or an individual with Bipolar Mood Disorder might fondle a student one time only (see *Hood*).

[107] In short, in my view, the reasons of the Courts of Appeal in *Hood* and *Caron Barrette* are compelling, especially when one considers the reasonable hypotheticals they suggest, which are based upon previous cases before the court. The problem with the MMS provision for the offence of sexual interference is that it is a sweeping law that casts its net over a wide range of potential conduct. Given the elements that constitute the offence, it would cover situations ranging from a single touch by a 20-year-old of a 15-year-old to much more serious, numerous and long-term sexual violations of a toddler. I find the MMS of one year for sexual interference is grossly disproportionate.

Section 1

[108] The Crown did not make any submissions with respect to justification under section 1 of the *Charter* at the sentencing hearing or appeal.

This is not surprising since, as McLachlin CJC commented in *Nur*, once you have a section 12 finding, it is hard to show it is saved under section 1 (see para 111).

Section 9

[109] Given my finding with respect to section 12, it is unnecessary to go further. In fact, the defence conceded that the sentencing judge erred in his finding that section 151(a) contravenes section 9 of the *Charter*. The section 9 prohibition on arbitrary detention or imprisonment is directed to protecting individual liberty from unjustified state interference and is usually engaged when police stop and arrest or detain an individual (see *R v Grant*, 2009 SCC 32 at paras 9-21). Even assuming section 9 applies in the post-conviction context, the question whether a detention or imprisonment is disproportionately severe for the offence for which it was imposed is not an issue under section 9. The severity of treatment or punishment is more properly reviewed under section 12 (see *R v Lyons*, [1987] 2 SCR 309; and Peter W Hogg, *Constitutional Law of Canada*, 5th ed Supplemented (Toronto: Thomson Reuters, 2007) vol 2 (loose-leaf updated 2014, release 1) at 49-9).

The Request to Not Reincarcerate the Accused

[110] At the hearing of this appeal, the question of reincarceration was raised should the Crown be successful in its appeal. Counsel were allowed to file further written submissions on that issue.

[111] The accused argues that his reincarceration at this point in time would not "serve the ends of justice" (*Burnett* at para 38) (see also Hon Gilles Renaud, *The Sentencing Code of Canada: Principles and*

Objectives (Markham: LexisNexis, 2009) at paras 5.11-5.14) and requests a stay of execution of the newly imposed sentence. He submits that reincarceration would be counter-productive and that it would substantially disrupt his progress towards rehabilitation.

[112] The Crown submits that the Court's consideration of the issue should be broadened to include systemic factors such as the impact on the public's perception of the justice system and the message that this sends to both victims and lower courts. It argues that the stay of an offender's sentence should not become a routine feature of successful appeals. Rather, the Crown asserts, the focus should be on whether the offender is in such a different position with regard to sentence than he or she was at the time of the original sentencing so that reincarceration would constitute an injustice. The Crown submits that given the nature, number and duration of this accused's offences, a significant incarceratory disposition was appropriate at the time of sentencing and remains appropriate now.

[113] This Court has recently dealt with the issue of reincarceration on several occasions and has laid out a variety of factors to be considered which are largely fact-specific to the offender and the case. While the overarching question is whether reincarceration of the accused will "serve the ends of justice" (*Burnett* at para 38), at the end of the day, that exercise of discretion "is a contextual and fact-driven analysis applied to the individual situation" (*Burnett* at para 40). See also *Norton* at paras 58-64; *R v Anderson*, 2017 MBCA 31 at para 32; and *Okemow* at paras 141-42.

[114] An appellate court allowing a Crown appeal against sentence has the authority to grant a stay of execution against the remaining portion of a

custodial sentence (see *R v Proulx*, 2000 SCC 5 at para 132; and *R v Smickle*, 2014 ONCA 49 at para 10).

[115] In *R v McMillan (BW)*, 2016 MBCA 12, Chartier CJM identified some of the relevant factors that can aid an appellate court in considering whether reincarceration will serve the ends of justice (see para 36). They are non-exhaustive and are to be used to assist the court in balancing the applicable purposes, objectives and principles of sentencing so as to achieve a disposition that is compatible with the overall purpose of contributing to respect for the law and the maintenance of a just and safe society (see *R v Veysey*, 2006 NBCA 55 at para 32; and *R v Taylor*, 2013 NLCA 42 at para 65). They include:

1. the seriousness of the offence. Can the principles of denunciation and deterrence be satisfied without reincarceration? Can they be achieved by other means or in the circumstances, are they outweighed by other considerations?

2. the elapsed time since the offender was released from custody and the date when the appellate court hears and decides the appeal. The longer the delay, the greater the chance that reincarceration will have a negative impact on the offender's rehabilitation. See, for example, *Veysey* at para 35;

3. whether any delay is attributable to one of the parties (see *R c Clarke*, 2015 QCCA 1995 at para 48);

4. the length of sentence remaining to be served. Yet, in *R v Schertzer*, 2015 ONCA 259, the Ontario Court of Appeal refused to

reincarcerate five police officers convicted of obstructing justice, although the original sentence was a 45-day conditional sentence and on appeal, the Court substituted a sentence of three years;

5. the potential for injustice if the new sentence is served. For example, had the sentence on appeal been imposed originally, the offender would have been in remission or parole by now;

6. the length of time since the offence occurred or the original sentence was imposed; and

7. rehabilitation issues, including the impact of reincarceration on the rehabilitation of the offender; whether there has been evidence of progress in rehabilitation or evidence of rehabilitative efforts since the original sentencing; and the behaviour and conduct of the offender in the ensuing period since sentencing.

[116] There is no doubt that the offences in this case were serious. Still, in considering the totality of the circumstances, the sentencing objectives of denunciation and deterrence can be properly respected without reincarceration (see *Burnett* at para 41). This Court has stayed the execution of a sentence in other sexual assault cases. In *R v Shalley*, 2005 MBCA 150, this Court stayed the execution of the sentence on appeal where the original sentence was an intermittent sentence of 90 days' incarceration on a first-time offender for a major sexual assault sentence which this Court found was unfit and would have substituted a sentence of two years less a day.

[117] Other factors listed above are in favour of, or at the very least, neutral to the accused. For example, there are no delays that can be attributed

to the accused even though a significant length of time has elapsed since the events occurred. The principal reason for the time between the date the accused pled guilty to the charges and the date he was sentenced, was for the purpose of consideration of the *Charter* challenge related to the MMS concerning section 151(a) of the *Code*. Also, the accused completed the custodial portion of this sentence in December 2017, more than four months before the hearing of this appeal.

[118] In terms of the impact of reincarceration on the rehabilitation of the accused, there is no question that it would be negative. The accused has made significant progress in his rehabilitation since his sentencing in July 2017, including continuing progress since the completion of his custodial sentence in December 2017.

[119] At the time of the appeal, Dr. Jakul submitted an updated treatment report dated April 16, 2018. She notes that the accused has been receiving treatment since 2015, that he has made strong progress, has been attending programs through Forensic Psychological Services since January 2016 and is still attending as of the present date. He continues to meet with Dr. Jakul on a monthly basis (after weekly meetings for the first six months of his treatment and bi-weekly meetings after that).

[120] He has successfully completed sexual offending specific treatment and is appropriately managing his risk factors for unhealthy sexual behaviour. Dr. Jakul observed that his efforts to address and manage his risk factors in treatment have further reduced his risk of reinvolvement which was already a low-moderate risk at the time of his initial psychological risk assessment. He

is consistently highly engaged in the treatment process and motivated to continue making advances in his rehabilitation.

[121] He is also currently working with a community integration manager who helps the accused to focus on his individual goals in the community. Dr. Jakul describes the community integration manager as a highly trained community support worker that assists in bridging and supporting therapeutic goals in the community, as well as attending to skill building and assisting with the completion of practical tasks. This form of support is key to addressing the social isolation of the accused and his previously limited skills for healthy living. The community integration manager is also assisting him with a number of practical tasks, including updating his resume and applying for employment, volunteering with Winnipeg Harvest, budgeting and organising a return to university. His parents are highly supportive of his treatment goals.

[122] Both Drs. Jakul and Rothman expressed concerns that reincarcerating the accused would disrupt the treatment progress he has made in developing social skills and relationships that serve as protective factors against future offending and put him at risk due to his ASD-related vulnerabilities. Dr. Jakul testified that, given his disability, the accused's risk of reoffending might actually increase if he was reincarcerated because of associating with negative peers and being exposed to anti-social attitudes. She continued to raise concerns about the vulnerability of the accused in a prison environment. It has been Dr. Jakul who has been treating the accused on either a weekly or bi-weekly basis for nearly one and one-half years. She is best positioned to speak to the accused's vulnerabilities in a correctional institution.

[123] While the Crown argued that the accused completed the incarceratory portion of his sentence without incident, a 90-day intermittent sentence is hardly representative of a routine prison environment. In *Okemow*, the Court stated, "while a custodial sentence is difficult for any offender, it is particularly difficult for those suffering from cognitive limitations" (at para 136).

[124] As well, it should be noted that the accused was on judicial interim release in the community from January 7, 2015, until his sentencing date of July 26, 2017, and complied with the conditions of his release. He regularly attends meetings with his probation officer and there have been no concerns about his compliance with the conditions of his probation order. There has been no post-sentence misconduct; not only has he now served the whole of the 90-day intermittent sentence imposed, but he has also served approximately 10 months of his three-year probation order. Had the accused been sentenced to the term requested by the Crown on July 26, 2017, he would have been eligible for day parole in February 2018 and would have been eligible for full parole in July 2018.

[125] This is not an easy case. I agree that when courts are considering whether to stay the execution of a sentence, the analysis should include systemic concerns (see *Taylor* at para 64; and *R v Dufour*, 2015 ONCA 426 at para 13). I note the sentencing judge's comment that a noteworthy compromise between the principles of denunciation and deterrence and rehabilitation might have been a jail sentence in the community; however, such sentences are no longer available.

[126] When I balance all of the relevant factors, I am of the view, in the totality of the circumstances, that the remaining custodial portion of the sentence should be stayed. While stays should not be allowed to become routine, neither need they be exceptional. The principal factors are: the time elapsed since the events first occurred (approximately six years); that sending this youthful first-time offender with ASD back to jail would negatively impact on his successful rehabilitation; the fact that the original jail sentence has already been served and that had the Crown's sentence been imposed at the outset, he would already be out on parole.

[127] Society is better served by the continuing transition of this individual into a productive member of his community. Even the Crown admits that the accused's progress has been positive. He has, as Dr. Jakul reported, "made gains in treatment so far, and it is expected that with ongoing treatment he will continue to build his understanding, insight and skills for living a healthier life in the community." Surely, that is of more benefit to society than incarcerating him. Reincarceration of this accused risks a danger to the long-term security of the community because any positive steps he has taken towards rehabilitation may be lost (see *Burnett* at para 38). In my view, the errors identified can be corrected while still doing individualized justice to the accused given his present circumstances (see *R v Sass; R v Zammit*, 2018 MBCA 46 at para 47).

[128] Accordingly, I would grant leave to appeal, allow the appeal and substitute a period of 22 months' incarceration. I would not interfere with the probation order or the ancillary orders. Finally, I would stay the remaining custodial portion of the sentence.

[129] I find that although the one-year MMS required by section 151(a) of the *Code* is not grossly disproportionate for this accused, it would be grossly disproportionate for reasonably foreseeable less-serious offenders whose conduct would be captured by section 151(a). Consequently, I find that section 151(a) violates section 12 of the *Charter*. The Crown, upon whom the onus falls, offers no justification under section 1 of the *Charter*. Therefore, I declare that portion of section 151(a) that prescribes a MMS of one year to be of no force and effect.

Steel JA

MAINELLA and LEMAISTRE JJA

Introduction

[130] We are in agreement with our colleague, Steel JA, that the Crown's sentence appeal should be allowed because the sentencing judge misapprehended the evidence. It was a palpable and overriding error for him to find that the accused's ASD condition "impelled" (at para 51) him to molest his nieces over a lengthy period of time. We agree, albeit for slightly different reasons, that in the circumstances, a fit sentence for the accused would be 22 months' imprisonment, less credit for time served, along with a period of three years' supervised probation and the ancillary orders originally imposed. We further agree with our colleague that the MMS of imprisonment for a term of one year for the offence of sexual interference is unconstitutional, based on the reasonable hypothetical of one-time sexual touching of a nature that minimally intrudes on the sexual integrity of a complainant.

[131] As our colleague explains, our primary disagreement with her is over the issue of reincarceration. In our view, the record does not reasonably support our colleague's conclusions that the accused's moral blameworthiness is reduced because of his ASD condition and that permanently staying the sentence, as varied, would adequately meet the objectives of denunciation and deterrence.

ASD and the Moral Blameworthiness of the Accused

[132] This Court and other courts of appeal have accepted that an offender's moral blameworthiness is not automatically reduced because they suffer from a mental disorder or cognitive limitation (see *Okemow* at para 72).

In order to avoid the opposing sentencing errors of underemphasising or overemphasising the effect of an offender's mental disorder or cognitive limitation, the sentencing judge must engage in the careful fact finding described in *Okemow* (at para 73):

> 1. Is there cogent evidence that the offender suffers from a recognized mental illness or some other cognitive limitation?
>
> 2. Is there evidence as to the nature and severity of the offender's mental circumstances such that an informed decision can be made as to the relationship, if any, between those circumstances and the criminal conduct?
>
> 3. Assuming the record is adequate, the sentencing judge must decide the offender's degree of responsibility for the offence taking into account whether and, if so, to what degree his or her mental illness or cognitive limitation played a role in the criminal conduct.

[133] The expert evidence here is that the accused suffers no intellectual or language impairment because of his ASD. In terms of his social interaction and repetitive behaviours, his ASD is at the "lowest level of impairment." There is no empirical research or professional agreement that there is a relationship between having ASD and sexual offending; indeed, as Dr. Jakul explained, some professionals believe that the characteristics of those suffering from ASD "serve as protective factors against [sexual] offending". Dr. Rothman noted that most people that suffer from ASD are "law-abiding" and most of the research indicates that "only a minority of those with ASDs engage in sexual or violent offending or otherwise illegal behaviour."

[134] According to Dr. Rothman, most sexual offenders engage in "cognitive distortions" to justify their illegal conduct. While both

Drs. Jakul and Rothman gave an opinion that the accused's ASD condition was connected to his offending, neither could say to what extent that condition contributed to his cognitive distortions. In fact, there is significant evidence to explain the accused's sexual offending as being unrelated to the accused's ASD condition:

- he had been regularly consuming child pornography before the offending against his nieces began;
- his preferred form of pornography involved girls between the ages of six and 12 (the age group of his nieces);
- before offending against his nieces, he had sexual fantasies of having sex with a child;
- before offending against his nieces, he knew having sex with a child was "wrong", but he also thought he would not be "hurting anyone" if he did it;
- he perceived his niece SL as enjoying his fondling and touching his erect penis outside his clothing;
- he perceived his niece AP as resisting the fondling at times, but he continued nevertheless;
- he explained the fondling of his nieces by saying that they invited the sexual contact and/or seemed to be enjoying it without him causing any harm;

- he was ashamed of fondling his nieces, masturbated to prevent arousal, knew what he was doing was wrong, but continued molesting them;

- the accused's sexual touching did not cease before discovery, but only after he was caught in the act by his father; and

- after his arrest, he advised Dr. Jakul of having an interest in, what he called, "a 'consensual bondage' experience with a child."

[135] Dr. Rothman described the accused as having a "mixed arousal pattern" that was not normative. At the sentencing hearing he testified:

> So [the accused has] a primary sexual interest in adult females, a moderate level of arousal to female children including low levels of arousal to infants, some level of interest and arousal in pictures depicting a child being restrained or in sexual contact. So, no, I would not describe that as a normative pattern of sexual arousal.

[136] Despite our colleague's comments in the last sentence of para 75 of her reasons, in sentencing sex offenders of children, Parliament has mandated that primary consideration be given to the sentencing objectives of denunciation and deterrence regardless of the cognitive limitation(s) of the offender (see section 718.01 of the *Code*).

[137] There is no question that the accused suffered from a cognitive limitation. It is also agreed that the nature and severity of his condition was minimal. As previously mentioned, neither expert witness could give an opinion as to the extent to which the ASD contributed to the commission of the offences; at the same time, there was clear evidence of other reasons, such

as the accused not having normative patterns of sexual arousal, as being the principal cause of his sexual offending. In our view, the mild degree of severity of the accused's cognitive limitation because of ASD does not justify a reduction of his moral blameworthiness given the gravity of the offences committed (i.e., long-term and repeated molestation of two young children while he was in a position of trust). See *R v Ellis*, 2013 ONCA 739 at paras 116-17, leave to appeal to SCC refused, 35649 (1 May 2014).

[138] In terms of what should be a fit sentence given his degree of responsibility, we begin with the observation that the Crown only sought a total sentence of three years' imprisonment for the two offences, notwithstanding that this was a situation involving major sexual assaults by a person in a position of trust which could, for a different offender, have warranted a much longer sentence. As explained by Hamilton JA in *R v T (RW)*, 2006 MBCA 91 (at para 4):

> The offence committed by the accused falls within the category of offences described in *R. v. C.D.* (1991), 75 Man.R. (2d) 14 (C.A.), and *R. v. M.F.D.* (1991), 75 Man.R. (2d) 21 (C.A.): "a major sexual assault committed in a family relationship where the victim is a young child and serious sexual acts are repeated over a period of time" (*C.D.*, at para. 16). Thus, the focus of sentencing is denunciation and deterrence. The starting point to sentencing for such an offence is four to five years' imprisonment. See *C.D.*, *M.F.D.*, *R. v. P.M.T.* (1996), 113 Man.R. (2d) 179 (C.A.), and *R. v. D.B.R.* (2005), 195 Man.R. (2d) 42, 2005 MBCA 64.

[139] As our colleague explains, there are other mitigating factors in this case, such as the accused's youth, health problems, a significantly dysfunctional upbringing and family life, and substance and pornography abuse which impeded his maturation. We agree with her that the accused has

made efforts to address his inappropriate sexual attitudes since his arrest. However, the record is clear that there is a long road ahead in terms of developing proper insight into his sexual attitudes and to managing his deviant sexual proclivities without supervision. According to Dr. Jakul, the accused has assumed some responsibility for his sexual offending, but also has minimised his culpability and the seriousness of what he did. Most telling is Dr. Jakul's opinion that, at this point in his stage of rehabilitation, the accused should not be alone in the company of children under any circumstances.

[140] While the accused's cognitive limitation is not a major mitigating factor in the determination of sentence, it is a proper consideration to reduce his sentence for reasons of totality (see *Okemow* at para 136). We recognise that incarceration may be more difficult for people who are disabled in some way and the record supports that conclusion for this accused. Dr. Jakul noted in her materials that the accused's vulnerabilities arising from his ASD make him vulnerable in a confined setting to "aggressive, manipulative, and/or antisocial individuals."

[141] While we may have calculated the sentence somewhat differently than our colleague by giving a higher initial sentence for each offence and a greater adjustment for totality, the ultimate length of sentence she suggests is fit given all of the circumstances for this accused.

The Power to Stay Execution of a Sentence Varied on Appeal

[142] Section 687(1) of the *Code* sets out the powers of the court of appeal on an appeal against sentence:

> **Powers of court on appeal against sentence**
> **687(1)** Where an appeal is taken against sentence, the court of appeal shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against, and may on such evidence, if any, as it thinks fit to require or to receive,
>
> **(a)** vary the sentence within the limits prescribed by law for the offence of which the accused was convicted; or
>
> **(b)** dismiss the appeal.

[143] The Supreme Court of Canada has accepted that the execution of a sentence after a successful Crown appeal may be permanently stayed if it is in the interests of justice to do so (see *Proulx* at para 132; *R v RAR*, 2000 SCC 8 at para 35; *RNS* at para 24; *R v Anderson*, 2014 SCC 41 at para 65; and *R v Suter*, 2018 SCC 34 at para 103). The persuasive burden is on the offender to demonstrate why an otherwise fit sentence should not be enforced (see *R v F (GC)* (2004), 188 CCC (3d) 68 at paras 34-35 (Ont CA); *Veysey* at paras 31-33; *R v Smith*, 2008 SKCA 20 at para 82; *R v Sinclair*, 2012 MBCA 24 at para 21; and *Taylor* at paras 63, 81-82, 119).

[144] As our colleague explains, several factors are to be taken into consideration when deciding whether or not reincarceration serves the ends of justice. The only comment we would add is that an appellate court must be cautious to not overemphasise post-sentencing rehabilitation of an offender as it has the "potential to distort the sentencing process" (*Dufour* at para 29) and may create disparities in the sentences for similarly situated offenders contrary to section 718.2(b) of the *Code*.

Inadequacy of the Accused's Sentence Without Reincarceration

[145] Section 718.01 of the *Code* mandates that, in the imposition of a proportionate sentence for offences involving abuse against children, "primary consideration" must be given to the objectives of "denunciation and deterrence" (emphasis added). The conjunctive qualities of this statutory direction by Parliament are of importance to this case as in our view, our colleague's conclusion on reincarceration is a result that does not satisfy the objective of denunciation for the offences the accused committed.

[146] Fondling a child without penetration of an orifice of the body is typically not considered to be a major sexual assault for the purposes of imposing a sentence. However, the circumstances of repeated fondling may, as the parties agree, elevate the gravity of the offence to a major sexual assault for the purposes of sentencing (see *R v Kemper*, 2004 ABCA 348 at para 7; and *R v Merrick*, 2012 ABCA 319 at para 8). It is also noteworthy that the accused's conduct involved not one, but two major sexual assaults, each committed against a very young child to whom the accused was in a position of trust at the time of offending (see sections 718.2(a)(ii.1), (iii) of the *Code*).

[147] The sentencing objective of deterrence is future orientated with the goal of punishment discouraging certain conduct being committed by either the accused or the public at large. The sentencing objective of denunciation is different than deterrence. In *R v Anderson*, 2018 MBCA 42, that objective was explained in the following manner (at para 81):

> The starting point for the principle of denunciation is the symbiotic relationship between law and shared community values, such as the prohibition against homicide or the protection of sexual integrity. The aim of denunciation is to maintain respect for the

> law by society as a whole for such norms. A denunciatory sentence communicates society's disapproval of the wrongdoing while also affirming the importance of the values that the criminal law enforces for the benefit of everyone (see *M (CA)* [*R v M (CA)*, [1996] 1 SCR 500] at para 81).

[148] In *R v Alfred* (1998), 122 CCC (3d) 213 (Ont CA); *F (GC)*; and *R v F (DG)*, 2010 ONCA 27, the Court stressed the importance of societal denunciation of serious sexual crimes committed against children by a person in a position of trust as reason to not stay the execution of a successful Crown sentence appeal, despite the potential hardship of reincarceration to an offender and the jeopardising of the prospects for rehabilitation and reintegration into the community. In our view, that analysis is equally applicable in this case.

[149] While our Court has been reluctant to reincarcerate offenders who have completed their sentence and been released back into the community, in our view, the circumstances here require it. The dramatic increase in the accused's sentence from 90 days' imprisonment reflects that the sentencing judge failed to give primary consideration to the objectives of deterrence and denunciation and the historic precedents regarding the applicable range of sentence for the offences committed (see *R v HE*, 2015 ONCA 531 at para 56). The length of sentence remaining to be served is significant; and that favours reincarceration.

[150] We are not persuaded by our colleague's reliance on the decision in *Shalley* as a reason to permanently stay the accused's varied sentence. *Shalley* was a case of poor judgment involving a one-time incident of sexual assault against an adult complainant by an intoxicated offender. There is no

suggestion in that decision that the offender had inappropriate distortions in his thinking towards sexual contact with children as is the case here. In our view, *Shalley* is readily distinguishable on its facts from the present situation. The importance of societal denunciation of long-term molestation of young children by a person in authority is good reason to execute a varied sentence after a successful Crown appeal, not stay it. Reincarceration reinforces an expectation that sentences will be enforced (see *Taylor* at para 79).

[151] In our view, the delay in this case (four years since arrest and just over 14 months between the original sentencing and the disposition of this appeal) is neutral to the question of this accused's reincarceration. There is no suggestion the Crown unreasonably delayed its prosecution in this Court or the sentencing court. As our colleague notes, the principal reason for delay in this Court and in the sentencing court, is as a result of the accused's constitutional challenge to the MMS for sexual interference. That constitutional challenge and the legal issues relating to it, are of little relevance to this accused's sentence as it is well established that the range of sentence for conduct amounting to a major sexual assault against a child by a person in a position of trust is well in excess of a term of imprisonment of one year (see *Sidwell* at para 49).

[152] In terms of the hardship of reincarceration and the risk it poses to the accused's successful rehabilitation and reintegration in the community, we agree with our colleague that the accused has made positive strides towards understanding his risks for sexual offending against children. However, the view of Dr. Jakul is that ongoing counselling and treatment is required for an undetermined length of time. While Dr. Jakul's professional opinion that

treatment in the community is the best option for the accused, that view is not determinative in a serious case such as this (see *F (DG)* at para 32).

[153] At the sentencing hearing, there was evidence about the counselling and programming available for sexual offenders in federal prisons and provincial jails. The record is clear that if incarcerated, the accused's sexual-offender counselling and treatment will not be interrupted, as there is adequate programming for him in a provincial jail. Headingley Correctional Centre has units designed for offenders with special needs such as the Assiniboine Treatment Centre (ATC) and the Differential Needs Unit. Both of these units provide a therapeutic community with direct supervision of offenders and have staff with experience in dealing with offenders with special needs, including Level 1 ASD. The ATC also offers significant programming that can be adapted to meet an offender's needs in group and one-to-one settings, the services of a part-time psychologist and cooperation with community resources, including Forensic Psychological Services. The supervision, treatment and professional counselling the accused will receive in custody is as substantial, and arguably more, than what he is receiving from Dr. Jakul in his sessions with her, which are now occurring only approximately once a month.

Conclusion and Disposition

[154] We echo our colleague's comment that this is not an easy case. However, we have come to a different conclusion as to what is an appropriate exercise of discretion on the facts. Upon examination of the factors outlined by our colleague and mindful of the danger of overemphasising the

importance of post-sentencing rehabilitation of the accused, the ends of justice would be better served by reincarcerating the accused.

[155] We would dispose of this appeal as our colleague suggests except that the request to permanently stay the accused's sentence, as varied, is dismissed. A warrant of committal will issue.

Mainella JA

leMaistre JA