Citation: R v PES, 2018 MBCA 124 Date: 20181122
Docket: AR17-30-08895

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Freda M. Steel
Mr. Justice Marc M. Monnin
Mr. Justice Christopher J. Mainella

B E T W E E N :

HER MAJESTY THE QUEEN	)	***J. L. Ostapiw***
	)	*for the Appellant*
Respondent	)	
	)	***J. M. Mann***
- and -	)	*for the Respondent*
	)	
P. E. S.	)	*Appeal heard:*
	)	***June 4, 2018***
(Accused) Appellant	)	
	)	*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*).

STEEL JA

[1] The accused seeks leave and, if granted, appeals his sentence of three and one-half years' incarceration imposed with respect to his conviction, following a guilty plea, for one count of sexual exploitation pursuant to section 153(1) of the *Criminal Code* (the *Code*). The ancillary orders are not at issue on appeal.

FACTS

[2] At the material time, the accused, then 61 years old, was the general manager of a local curling club. The then 16-year-old complainant was at the

curling club practising with his high school curling team when the accused approached him and another boy, both of whom were unknown to the accused and offered them employment at the curling club. It was the complainant's first job.

[3] The first sexual incident occurred in January 2012 when the accused fellated the complainant in the sauna at the curling club. This was the complainant's first sexual encounter. Previously, the accused had taken the complainant down to the sauna, but had been interrupted by an employee.

[4] On the second occasion, they engaged in anal intercourse. On the third occasion, they engaged in oral and anal intercourse and watched sexually explicit videos. The fourth incident was similar. In September 2012, they once again engaged in anal intercourse at the curling club while the complainant was working. The relationship between the parties ended after the accused kissed the complainant while out in public.

[5] The accused lost his job because of this offence and was the subject of media coverage. He lost support from friends when the charge became public. He became homeless and due to unemployment, was forced to take his Canada Pension early, which resulted in reduced benefits. His adult daughter terminated her relationship with him and his relationship with his grandchildren was limited.

[6] At the time of sentencing, the accused was 66 years of age and had several medical conditions. He presented with a low risk of reoffending and had no prior criminal record. He stated that he did not know at the time of the offences that because of the employment relationship, the conduct was illegal.

[7] The Crown asserted that the accused had committed major sexual assaults against the complainant while in a position of trust or authority and sought a sentence of three to three and one-half years in custody. Defence counsel suggested a sentence of six to nine months' incarceration, arguing that the sexual conduct was mutually consensual and that the complainant was old enough to consent, but it was only the position of authority held by the accused that made the relationship criminal.

SENTENCING DECISION

[8] The sentencing judge imposed a sentence of three and one-half years. He characterised the accused's behaviour as being predatory and including grooming. He listed the following conduct to support this characterisation:

> This includes discussing sexual preferences, offering to take a sauna, being naked in the sauna, performing oral sex acts, then escalating that behaviour to anal intercourse, implementing sexual devices and sexual humiliation. . . . [The accused] initiated the sexual contact even if, as he claims, the two engaged in mutual flirting and the victim initiated the topic of his sexual preferences. [The accused] had control of the curling rink facilities, knew when he could engage the young person in the sauna alone, offered the first sexual contact of oral sex, and then initiated subsequent acts including anal intercourse. He planned the activities by bringing with him lubricant and sexual devices regardless if they were stored in his locker or not.

[9] On appeal, defence counsel disputes some of the facts relied upon by the sentencing judge, particularly with respect to aggravating factors. In particular, the accused states that he was the general manager of the curling club and the person who did the hiring, but was not on the board of directors,

that there was no grooming and that the accused did not know that his actions were illegal.

[10] Furthermore, the accused asserts that counsel had agreed that the accused did not abuse his position of authority over the complainant and that the sexual encounters were not linked to his employment, something that the sentencing judge did not seem to accept.

[11] The accused submits that the sentencing judge erred by characterising the conduct as a "major sexual assault" rather than examining the circumstances of the offence and looking at cases with similar circumstances. While it was accepted that the conduct was a major sexual assault for the purposes of culpability, it was not conceded that the conduct was a major sexual assault for sentencing purposes.

[12] Finally, the accused submits that the sentence was unfit.

ANALYSIS

Standard of Review

[13] The Crown and defence 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 his discretion on sentence absent an error in principle or a material misapprehension of evidence that had an impact on the sentence or the imposition of a sentence which is demonstrably unfit. 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).

[14] If an error in principle has occurred and has had a material impact on the sentence imposed, then the appellate court need not extend deference to the original sentence. The appellate court can look at the matter from a fresh perspective and impose the sentence that it deems appropriate in the circumstances or, the appellate court may find that, notwithstanding the error in principle, the original sentence is still fit and uphold that sentence (see *R v Sidwell (KA)*, 2015 MBCA 56 at para 13).

[15] The standard of review relating to factual errors and inference drawing is one of palpable and overriding error (see *R v Kunicki*, 2014 MBCA 22 at para 17).

Consent

[16] It is troubling that the accused focusses much of his argument on the fact that the complainant in this case consented to the sexual activity. He argues that, while consent is an irrelevant consideration in determining culpability, it is a consideration in sentencing. He states that, "The intercourse was not non-consensual in the traditional sense" and that sexual exploitation

is a unique offence and "should be recognized as distinct from the analysis that is applied to other sexual offences involving minors."

[17] For example, in his factum, the accused refers to "several incidents of consensual sexual contact", "the relationship was factually consensual" and "it was clear that the incidents were not sexual assaults in the 'normal course'". Again, he submits that "his pattern of legal, consensual activity should not be used to establish a pattern of behaviour consistent with grooming the young man".

[18] Again, the accused argued that this was not a major sexual assault, but rather a "consent sexual relationship which is criminal by virtue of [the accused's] being in a position of authority over the victim" and therefore, the sentencing judge erred in categorising these incidents as major sexual assaults.

[19] Such statements miss the point. I reject this argument completely. The fact that there was ostensible consent is irrelevant. Sex between a person under 18 and a person in a position of trust, authority or in a relationship of dependency or exploitation is criminal. As noted in *R v Kiska* (12 April 2016), Winnipeg (Man Prov Ct), "In these cases the power imbalance is too great and we do not accept that true consent is possible." Indeed, pursuant to section 150.1 of the *Code,* consent is not a defence to sexual exploitation.

[20] Society has been aware for some time that young persons (in this case between the ages of 16 and 17) are at a vulnerable age in their development and can be easily manipulated and exploited by individuals who they trust and who are in positions of authority over them. That is why Parliament has taken the choice away from them. The consent of the complainant is not relevant in establishing the offence and it is not relevant as

a mitigating factor in sentencing (see *R v Audet*, [1996] 2 SCR 171 at para 23; and *R v Norton*, 2016 MBCA 79 at para 42).

[21] To suggest otherwise is not only contrary to the jurisprudence of this Court, it also fails to recognise the insidious nature of an exploitive relationship. In addition to the power imbalance inherent in the relationship, a young person is exceptionally vulnerable due to his or her developing sexual curiosity and identity, coupled with a lack of maturity and experience.

[22] As noted in *R v Hajar*, 2016 ABCA 222 (at para 98):

> [O]ne of the most destructive consequences of using *de facto* consent in mitigation of sentence is that it implicitly, and improperly, shifts the blame to the child. It suggests the child is complicit in the act and therefore responsible for the harm suffered. The courts cannot give legitimacy to the notion that a child is capable of giving valid consent to the sexual activity between the child victim and adult offender.

Misapprehension of the Evidence

[23] Defence counsel argues that the Crown's submission contained several facts that were disputed by the accused and, yet, still adopted by the sentencing judge.

[24] I do not agree with the accused's characterisation with respect to most of the points raised in argument. The sentencing judge did not indicate that the accused was on the board of directors of the curling club. It was the Crown, in his submissions, who made that statement and defence counsel corrected the mistake in her submissions. In his reasons, the sentencing judge

only indicated that the accused was the general manager who did the hiring, which was correct.

[25] It was also correct for the sentencing judge to find that the accused knew that he should not be in the sauna with the complainant. He was warned by another employee before the first sexual encounter occurred that it was inappropriate. In fact, the employee was so concerned that he approached the board of directors.

[26] The accused also disputes that he targeted the complainant and offered him employment only to place himself in proximity to the complainant for his own sexual purposes. He rejects the implication that he hired the complainant because he had a plan to eventually start a sexual relationship with him.

[27] The Crown chose not to call evidence to prove that disputed fact. There is no evidence or admission that the accused hired the complainant for the purpose of engaging in a sexual relationship with him. In his reasons, the sentencing judge relies on that disputed fact. He states, "He sought out the victim to hire him".

[28] There is a difference between findings of fact and inferences from facts proven. Inferences can be drawn from admitted facts in a sentencing hearing in the same way as they can be drawn in a trial.

[29] The complainant was at the curling club playing with his school team and never applied for a job at the club. He and another boy were approached by the accused, who did not know either boy, and offered them employment. It was the first job the complainant ever had. Given these

undisputed facts, I think it was reasonable for the sentencing judge to infer that the accused was targeting the complainant. However, if I am wrong on that point, given my decision with respect to grooming, I do not believe it was an error that materially affected the sentencing (see *R v Lacasse*, 2015 SCC 64).

Emotional and Psychological Harm to the Complainant (Section 718.2(a)(iii.1) of the *Code*)

[30] In his reasons, the sentencing judge took into account that there was emotional and psychological harm done to the complainant. He stated:

> The harm to the victim was substantial. This was the victim's first sexual encounter and the victim was struggling with [his] sexual orientation, gender identity. According to the victim's mother, it caused the victim to change [his] behaviour both at home and in career planning and has caused the victim to seek out counsel[l]ing.

[31] The accused argues that there was no victim impact statement from the complainant and that the victim impact statement that was provided was from the complainant's mother which needed to be approached with caution because "she brought her own perspective and history to the proceeding that had nothing to do with the [accused]." In addition, the harm occasioned to the complainant, it is submitted, is not as bad as in *R v Frost*, 2016 MBQB 21, aff'd 2017 MBCA 43, where the victim had engaged in self-harm and other consequences as a result of the offence.

[32] It is impossible to compare in minutiae the harm occasioned to child victims of sexual abuse nor is it desirable to do so. Also, while a court should weigh the victim impact statement carefully, section 726.1 of the *Code* would

allow the court to take all relevant information into account, including the victim impact statement from the mother, placing the appropriate weight on it.

[33] Section 726.1 of the *Code* reads as follows:

> **Relevant information**
> **726.1** In determining the sentence, a court shall consider any relevant information placed before it, including any representations or submissions made by or on behalf of the prosecutor or the offender.

[34] None of the evidence relied upon by the sentencing judge was disputed. In reading the mother's victim impact statement to the Court, the Crown introduced it by indicating he was reading it to the Court, "that which counsel have agreed is admissible". In his factum, the accused conceded that an offence of this nature always causes harm to the complainant. Indeed, the accused acknowledged during his sentencing submissions that:

> And issues, of course of sexual orientation, sexual identity are very personal and private and this, this victim in particular, we appreciate, you know, was, was struggling as teenagers do with these issues in general but was struggling with this issue and we're not disputing that in any way, shape or form.

[35] Moreover, the determination as to whether to accept the hearsay evidence or not, and the weight to be placed on it, is one for the sentencing judge (see *Kunicki* at para 25). In my view, it was reasonably open to the sentencing judge to conclude that the offence had a significant impact on the complainant.

Grooming and Predatory Behaviour

[36] If proven, it is an aggravating factor that an offender groomed a person under the age of 18 for sexual activity (see *Norton* at para 36; and *R v SJB*, 2018 MBCA 62 at para 26). The terms "grooming" or "predatory behaviour" are often used by courts in sexual exploitation cases. They are used as a description of conduct where "the perpetrator attempts to prepare the child victim for increasingly more intrusive sexual abuse" (*R v G (A)* (2004), 190 CCC (3d) 508 at para 11 (Ont CA)). See also *R v Storheim*, 2014 MBQB 141 at paras 46-47, leave to appeal to Man CA refused, 2015 MBCA 14.

[37] So, for example, it is common for the perpetrator to start with initial discussions of sexually related topics or watching pornographic videos together which may lead to kissing, touching and other forms of intimate conduct, including oral sex and sexual intercourse (see *G (A)* at para 11; and *R v DM*, 2011 ONSC 3183 at para 54). The victim may be offered alcohol or drugs or given gifts of money and jewellery in order to lessen the victim's inhibitions and to make them more receptive to the sexual overtures. The perpetrator may target a victim who is especially vulnerable because of difficulties at home, immaturity or other similar characteristics.

[38] Often cases that employ the concept of "grooming" involve conduct that was planned and premeditated (see *Kiska*). On the other hand, in cases where grooming is not found to have occurred, the conduct is characterised as spontaneous, impulsive, unplanned or spur of the moment.

[39] In *R v MR*, 2015 ONSC 7825, the offender volleyball coach was charged with two counts of sexual assault and one count of sexual exploitation

involving a teenaged volleyball player. In that case, a clinical child psychologist provided expert evidence about grooming. She described it as follows (at p 31):

> She says that it is a gradual desensitization, leading to more intrusive sexual contact. Methods used include creating sexually charged environments through eroticized conversations and offering alcohol as a dis-inhibitor. The gradual eroticization and feelings of complicity in a victim to requests by an abuser can be effective as threats of harm by an abuser to silence a victim.

[40] Most recently, the Quebec Court of Appeal addressed the concept of grooming in the luring context in *R c Rayo*, 2018 QCCA 824. In that case, Kasirer JA cited a 2010 study which described grooming as (at para 139):

> Grooming is often characterized as seduction – a slow and gradual process of active engagement and a desensitization of the child's inhibitions – with an increasing gain in power and control over the young person.

[41] The accused asserts that the sentencing judge erred in characterising the actions of the accused as being predatory or as grooming. He submits that there was no support for the sentencing judge's conclusion that the accused was a predator who groomed the complainant. Many of the factual assertions that supported inferences of targeting and grooming relied upon by the sentencing judge, as argued by the accused, were in direct conflict with the submission of defence counsel, and unproven by the Crown.

[42] I agree with the accused that where a fact, particularly in support of an aggravating factor, is disputed, then the fact put forward on behalf of the offender must be accepted unless the Crown proves the disputed fact. As

indicated by the Supreme Court of Canada in *R v Gardiner*, [1982] 2 SCR 368 (at pp 414-15):

> It should also be recalled that a plea of guilty, in itself, carries with it an admission of the essential legal ingredients of the offence admitted by the plea, and no more. Beyond that any facts relied upon by the Crown in aggravation must be established by the Crown. If undisputed, the procedure can be very informal. If the facts are contested the issue should be resolved by ordinary legal principles governing criminal proceedings including resolving relevant doubt in favour of the offender.

See also *R v R (GW)*, 2011 MBCA 62.

[43] Section 724(3)(e) of the *Code* sets out the procedure to follow when a dispute of a fact arises in the course of sentencing submissions. Generally, the party asserting the fact bears the onus of proving it on a balance of probabilities. When the disputed fact constitutes an aggravating factor, the Crown is required to establish it beyond a reasonable doubt.

[44] However, there is a difference between facts admitted and inferences taken. That section does not preclude a sentencing judge from making an inference from the undisputed facts presented at an informal sentencing hearing without the requirement for hearing further evidence. Of course, where an aggravating factor is involved, the undisputed facts must support that inference beyond a reasonable doubt (see *LeBreton v R*, 2018 NBCA 27).

[45] There was ample evidence from which the Court could infer that, once hired, the accused groomed the complainant to gradually accustom him to more intrusive sexual encounters.

[46] There was a clear progression in the nature and degree of sexual contact, becoming increasingly more intrusive. Each sexual encounter included an additional and different form of sexual contact. They watched sexually explicit videos together and played card games in which the players removed a piece of clothing for each card. The sexual activity progressed from sexual conversations to fellatio to anal intercourse, sometimes involving the use of sex toys such as anal beads and dildos, which were always introduced by the accused. The fact that there was no violence or weapons does not change the fact that grooming took place and that it was an aggravating factor.

[47] Just as consent is irrelevant, it is irrelevant that the complainant first raised the topic of his sexual preferences, curiosities and experiences, which were later pursued and acted upon by the accused. It was incumbent on the accused not to act upon any of that. It was also an undisputed fact and the sentencing judge did not misapprehend the evidence that the actual physical touching started with the accused asking the complainant's permission for the accused to perform fellatio on him. Parliament places the responsibility on the adult not to take advantage of the vulnerability of a young person. It is the adult who has the responsibility to decline having any sexual contact with a young person.

[48] Given that the sexual contact between the accused and the complainant extended over a number of months, it is apt to characterise this case as involving planning and premeditation on the part of the accused, rather than spontaneous or impulsive behaviour. It was conduct he had time to reflect on and prevent.

[49] The sentencing judge acknowledged the parties' admission that the accused did not threaten the complainant's employment or offer him any inducements. He acknowledged that there was no overt coercion and that the "victim agreed to perform all of the sexual acts." But, that does not mean that the accused's position of authority did not have a role to play in these events and I do not find that the sentencing judge misapprehended the evidence in this respect.

[50] While the complainant told police that he felt he was able to refuse the sexual contact and that the accused never threatened his employment or offered him special benefits, he also told them that he looked up to the accused as his boss and as an authority figure. It is exactly that type of vulnerability that section 153(1) of the *Code* was designed to protect against.

[51] The grooming took place within the circumstances of the complainant's employment. While the sauna and basement of the curling club may have been the accused's preferred location for his sexual encounters, it was still the place of employment for the complainant and the sexual encounters took place within the context of that employment. It was undisputed that all of the sexual contact occurred when no one else was present and the complainant was working.

[52] So, for example, during a staff Christmas party, approximately one month after the complainant began his employment, the accused told him that he was having problems with the sauna, located in the basement of the building. Once they were alone in the basement, the accused encouraged the complainant to use the sauna with him. When they were located by an

employee of the curling club, the accused was naked and the complainant wore only his underwear.

[53] The accused argues that the sentencing judge erred in finding that the accused misled the complainant to get him down to the basement for the purpose of isolating him for sexual activity. I disagree. Few people check out problems with a sauna while naked and few managers go down to relax in a sauna in the middle of the staff Christmas party. The sentencing judge made a reasonable inference from the facts. The Court is not prevented from drawing an inference simply because the accused makes an assertion that is not supported by the facts which are admitted (see *R v Coss*, 2012 MBQB 272 at para 11).

[54] The employee confronted the accused about the impropriety of the situation and also reported the incident to the board of directors of the curling club and was told by them that the situation would be addressed. The accused argues that the sentencing judge erred in considering that, because of that incident, the accused should have been deterred from initiating the subsequent sexual relationship in some fashion and that the sentencing judge considered that an aggravating factor. The accused argues that he did not know his activities were wrong. Given the confrontation between the employee and the accused regarding the above incident, it was undeniable that the accused would have known that what he was doing was wrong and inappropriate.

Position of Authority (Section 718.2(a)(iii) of the *Code*)

[55] The accused argues that the sentencing judge ought not to have considered the accused's position of authority as an aggravating factor

because it was agreed that he had not abused his position of authority when he sexually abused the complainant.

[56] What was agreed between counsel was that at no point did the accused threaten the complainant's employment or give the complainant any employment benefit for complying with his sexual advances. The sentencing judge confirmed this in his reasons. While the existence of a position of authority is an element of the offence of sexual exploitation and therefore not, in itself, aggravating, the sentencing judge was entitled to consider, as aggravating, the way in which the employment was used to facilitate the development of the sexual relationship.

[57] There are different ways in which an individual may abuse his or her position. As the complainant stated to the police, the accused was his boss and someone he respected. The accused had complete control over the complainant's work situation. All of the sexual contact occurred while the complainant was working and alone with the accused. As mentioned earlier, the accused used the location and circumstances of employment to assist in the grooming of the complainant.

Sentence is Unfit

[58] Parliament has become increasingly concerned regarding the sexual abuse of children and has increased the penalties in relation to those offences. One of those offences is sexual exploitation. The history of section 153 of the *Code* can be traced back to the old offence of seduction which was first introduced into Canada in 1886 (*An Act to punish seduction, and like offences, and to make further provision for the Protection of Women and Girls*, SC 1886, c 52, section 1). Historically, sexual exploitation was not treated as

seriously by Parliament as other sexual offences against children. Originally, sexual exploitation was subject to a five-year maximum penalty when proceeded by indictment; whereas sexual interference and invitation to sexual touching had a ten-year maximum.

[59] On November 1, 2005, the penalties for sexual exploitation were amended to be the same as sexual interference and invitation to sexual touching. The maximum sentence for sexual exploitation was increased to 10 years and minimum sentences of imprisonment were implemented for all of these offences (see *An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act*, SC 2005, c 32, sections 3-4).

[60] On August 9, 2012, Parliament raised the minimum sentences for the offences of sexual interference, invitation to sexual touching and sexual exploitation (see *Safe Streets and Communities Act*, SC 2012, c 1, sections 11-13) and, on July 17, 2015, Parliament raised the maximum sentences for these offences (see *Tougher Penalties for Child Predators Act*, SC 2015, c 23, sections 2-4). Currently, all of these indictable offences carry a minimum sentence of one year and a maximum sentence of 14 years (see sections 151-53 of the *Code*).

[61] The change in the way that Parliament has treated sexual exploitation and the other sexual offences against children, reflects society's better understanding of the impact of these offences on the victims and the corresponding seriousness of these offences.

[62] As the offence involved the abuse of a person under the age of 18, primary consideration must be given to the sentencing objectives of

denunciation and deterrence (see section 718.01 of the *Code*).

[63] One of the grounds of appeal is that the sentencing judge erred in categorising these incidents as major sexual assaults. While consent is irrelevant in child abuse cases, that does not mean that each sexual assault, sexual interference or sexual exploitation constitutes a major sexual assault.

[64] I would point out in passing, that when the guilty pleas were entered, defence counsel stated the following:

> I believe my friend just wants it clear for the record that this would constitute, in normal courses, a major sexual assault in that there was penetration, so I make that clear at the outset in terms of the facts.

[65] Also, even if the sentencing judge erred in categorising this offence as a major sexual assault, it would not constitute an error in principle. See *R v JAG*, 2008 MBCA 55 (at para 9):

> The fact that the sentencing judge made a finding that she was dealing with a major sexual assault is not in and of itself an error in law as a mischaracterization of an offence, according to judicially created categories, is not an error in principle nor should it be treated as one. See *R. v. McDonnell*, [1997] 1 S.C.R. 948. It, however, invites a review from this court as to whether the sentence imposed was fit because it brought into the sentencing process issues that should not have been present and could easily have skewed what would otherwise be the normal considerations applicable in determining an appropriate sentence for this offence.

[66] Even if the offence of sexual exploitation is characterised as a major sexual assault in this case, that does not mean sentencing should always take place within the applicable range stated for a major sexual assault upon a child

by a person in a position of trust or authority. This Court has said many times that a variety of factors are to be considered. Sentencing must remain a highly individualized process. The essential question is whether the sentence is a fit one.

[67] In *Sidwell*, this Court indicated that, while a starting point of four to five years in a situation of a serious violation of the sexual integrity of a child by someone in a position of trust or authority was a guideline, sentencing judges were to engage in a principled approach in determining a fit and appropriate sentence. The case further suggested some factors that might be looked to in cases of sexual interference and/or sexual assault.

[68] In *SJB*, this Court extended that analysis to the offence of sexual exploitation. Of particular importance is the comment where the Court stated (at para 38):

> In some sexual exploitation cases, this Court has found the analogy to a major sexual assault persuasive (see *R v GSF*, 2009 MBCA 5); in other cases, less so (see *Frost*). Sentencing offenders for the offence of sexual exploitation requires acute sensitivity to subtleties related to the commission of the offence, the offender, the harm occasioned to the victim(s) and the needs of society. It is not necessary to say anything more other than to reiterate the comments made by Steel JA in *Sidwell* (at para 52):
>
> > What is important is to find an appropriate sentence which responds to the conduct of the accused and the aggravating and mitigating circumstances, rather than determining specifically whether the accused's conduct constituted a major sexual assault. Sentencing precedents should be sought out that involve similar sexual acts and circumstances.

[69] The case law indicates a broad range of sentences for this offence, largely because there are infinitely variable ways in which the offence can be

committed and a wide range of offenders, but there is nothing inherently different about sexual exploitation that justifies treating it differently than other sexual offences. Factually similar cases should be treated similarly, regardless of the specific charges involved.

[70] In *Frost*, where a sentence of 18 months was imposed, the relationship existed for just over a few months between the offender and the young girl whom his wife hired to assist the family. The trial judge found no premeditation, grooming or predatory behaviour had taken place. There was a specific finding that he did not abuse his position of trust. Given the circumstances of the offence and the offender, the Court found deviation from the *Sidwell* starting point of four to five years was appropriate. Those findings, along with certain circumstances of the offender's situation, led to the sentence, which was affirmed on appeal.

[71] *SJB*, where a sentence of three years' imprisonment was imposed, was a case of repeated sexual abuse, including penetration, of a person under the age of 18, by a stepfather actually abusing his position of trust. In that case, this Court held that there was no principled reason not to look to the four to five-year starting point discussed in *Sidwell*.

[72] The *Code* also gives guidance as to factors that might be looked at in the imposition of a fit sentence. In determining whether a relationship is exploitative, the *Code* instructs judges to look to:

> **Inference of sexual exploitation**
> **153(1.2)** A judge may infer that a person is in a relationship with a young person that is exploitative of the young person from the nature and circumstances of the relationship, including

> **(a)** the age of the young person;
>
> **(b)** the age difference between the person and the young person;
>
> **(c)** the evolution of the relationship; and
>
> **(d)** the degree of control or influence by the person over the young person.

[73] These factors are also instructive in weighing the seriousness of the sexual violation. So, regard may be had to the difference in age, maturity and experience; the impact on the complainant; the targeting of a complainant because of their particular vulnerability; the nature of the trust or authority relationship; the use of the position; the presence or threat of physical violence, threats, bribes, grooming or predatory behaviour; and the nature, frequency and duration of the abuse. This list is not exhaustive.

[74] In the case at bar, the sentencing judge took into account:

- there was a 45-year age difference between the accused and the complainant;
- there was significant psychological harm to a vulnerable victim;
- the accused was the complainant's immediate supervisor as well as the general manager of the curling club. As the general manager, the accused's control of the work environment provided him with the opportunity to exploit the complainant and allowed him to use the workplace to carry out that abuse; and

- there was grooming. The relationship became more and more sexually intrusive with the accused being the one in control and escalating the behaviour.

[75] Sexual exploitation of offenders similarly situated in other provinces appear to face comparable sentences, although not all. The Alberta Court of Appeal confirmed in *R v JJW*, 2004 ABCA 50, a case of sexual exploitation that, "This Court has consistently stated that the starting point for serious sexual assaults involving children in trust situations is four years" (at para 14).

[76] Again, in *R v Hood*, 2011 ABCA 169, the Alberta Court of Appeal upheld a three and one-half year sentence on an offender who sexually exploited an employee, although there was no direct manipulation of the employee-manager relationship (see para 13). See also *R v MPS*, 2017 BCCA 397 at para 18.

[77] The accused also takes issue with the fact that the sentencing judge applied a framework from a dissenting opinion in the Alberta Court of Appeal in *R v Vigon*, 2016 ABCA 75. This dissenting opinion sets out a framework for consideration in determining an appropriate sentence for sexual exploitation. It develops rigid analytical categories for sexual abuse. Courts in our province may find decisions from courts in other provinces persuasive, albeit not binding, but this was a dissenting opinion, something not mentioned by the sentencing judge. This Court does not adopt that dissenting opinion. Rigid categories in sentencing unnecessarily limit the discretion of the sentencing judge. We do not endorse it.

[78] While this was an error on the part of the sentencing judge, it was not an error that impacted materially on the sentence. Although we do not endorse the strict categorisation of the Alberta Court of Appeal dissent, all of the factors mentioned in the *Vigon* dissent, factors such as the nature of the relationship, the nature of the sexual contact, its duration and the harm and age of the victim, are encompassed within the framework established in *Sidwell* (see *Vigon* at paras 84-105; and *Sidwell* at para 53). Moreover, the sentencing judge did not rely on *Vigon*. After discussing the case, he then went on to discuss *Sidwell* and in particular, the differences between the sentences in *Frost* and *Kiska*. He explained why this case was closer to *Kiska* in his opinion.

[79] Given a review of sentences for similar offences in similar circumstances with an offender of this age and medical condition, the sentence of three and one-half years is undoubtedly on the high end. However, deviation from a sentencing range or the placement of an offence within a judicially created category are not errors in principle unless the sentence imposed departs significantly and without justification from the contemplated sentences (see *Lacasse* at para 57). In this case, I cannot say that the sentence is out of the range or demonstrably unfit so as to allow us to intervene.

[80] I would grant leave to appeal, but dismiss the appeal.

Steel JA

I agree: Monnin JA

I agree: Mainella JA