

**IN THE COURT OF APPEAL OF MANITOBA**

*Coram:* Mr. Justice Christopher J. Mainella  
Mr. Justice James G. Edmond  
Mr. Justice David J. Kroft

***BETWEEN:***

<b><i>HIS MAJESTY THE KING</i></b>	)	<b><i>R. N. Malaviya, K.C.</i></b>
	)	<b><i>for the Appellant</i></b>
	)	
	)	<b><i>K. A. Porath</i></b>
	)	<b><i>for the Respondent</i></b>
<b><i>- and -</i></b>	)	
	)	<b><i>Appeal heard and</i></b>
<b><i>KYLE WADE HANNA</i></b>	)	<b><i>Decision pronounced:</i></b>
	)	<b><i>May 2, 2025</i></b>
<b><i>(Accused) Respondent</i></b>	)	
	)	<b><i>Written reasons:</i></b>
	)	<b><i>May 15, 2025</i></b>

**NOTICE OF RESTRICTION ON PUBLICATION:** No one may publish, broadcast or transmit any information that could disclose the identity of the victim or a witness (see *Criminal Code*, RSC 1985, c C-46, s 486.4).

**MAINELLA JA** (for the Court):

**Introduction**

[1] The principal issue in this Crown sentence appeal is the fitness of a conditional sentence order (CSO) for a sexual assault committed against an adolescent.

[2] On February 8, 2024, after a trial in the Provincial Court, sitting in Flin Flon, Manitoba, the accused was convicted of sexual assault. On September 12, 2024, he was sentenced to a CSO of two years, less a day, to be followed by three years of supervised probation and various ancillary orders. On November 22, 2024, a judge of this Court suspended the CSO pending determination of the appeal and required the accused to enter into a recognizance (see *Criminal Code*, RSC 1985, c C-46, ss 683(5)-683(5.1) [the *Code*]).

[3] Having considered the submissions of counsel, we granted the Crown leave to appeal against the sentence and allowed the appeal. The accused's sentence was varied to three years' imprisonment, less credit for 122 days of time served. We stated that we would give our reasons for doing so in writing. We now do so.

### Background

[4] The accused was thirty-two years old at the time of the offence; he is non-Indigenous. The victim was sixteen years old and is Indigenous. The accused and the victim casually knew each other through a mutual friend. The accused and the victim shared the interest of watching others play video games on the internet.

[5] The judge's summary of the allegation as being one of "a power imbalance, where a male twice the victim's age took her to his home and supplied her with drugs and then made inappropriate advances", is apt.

[6] Late one evening in May 2021, the accused contacted the victim via social media and invited her to sneak out of her parents' home to come to his

place to smoke marihuana. The victim agreed and he picked her up in his vehicle at about 2:00 a.m.

[7] When the two returned to the accused's residence, he supplied the victim with marihuana and then began to make repeated sexual advances towards her while the two were watching video gaming in the living room.

[8] The accused sexually touched the victim's vagina while they were sitting on the couch. His hand touched her crotch, lower back and behind. The victim moved forward to avoid the touching without saying anything.

[9] The accused is a large man and the victim is petite. The accused moved from the couch to a chair and invited the victim to sit on his lap. She declined. The accused grabbed the victim's wrist and placed her on his lap. He then rubbed her thighs and breasts with both hands and told her, if she did not start eating, she would "lose my boobs." The victim managed to get away and went to the kitchen.

[10] Sometime between 4:00 a.m. and 4:30 a.m., the victim decided to leave. Before leaving, the accused asked her if they could "make out." The victim said "[n]o." He asked to kiss her. She again said "no". He kissed her on the mouth anyway. The accused drove her back to where he picked her up initially and tried to kiss her again; she deflected with a side hug. The victim got away and snuck back into her parents' home. The accused then sent her a text message telling her she couldn't "tell anybody" or their mutual friend would "kill the both of [them]". The victim was confused by the message.

[11] The victim disclosed the incident to the police just over three months later after suffering a panic attack when she saw the accused at her place of

employment and disclosing the incident to her mother. The accused was arrested and charged.

[12] The accused's trial turned primarily on the credibility of the victim and the accused, who both testified. The judge rejected the accused's testimony where he denied the sexual touching. He claimed that the victim may have hallucinated as a result of the consumption of "dirty weed", that the victim made up the allegation because she was upset that the accused was spending too much time with their mutual friend and that the victim was "crazy". The judge found the victim's evidence to be sufficiently credible to prove the allegation of sexual assault beyond a reasonable doubt.

[13] While a pre-sentence report (PSR) was ordered, it was not completed, despite almost seven months passing, because the accused failed to cooperate in its preparation despite several opportunities and warnings from the judge about the consequences of not cooperating. Matters came to a head in September 2024. The accused explained his lack of cooperation in the preparation of the PSR as resulting from changing lawyers, losing his court paperwork, and being away from Flin Flon in the wilderness repairing damage caused by bears and his phone service was unreliable.

[14] The judge said that further delays were intolerable. He cancelled the PSR and said they were "proceeding without it". In his reasons for sentence, the judge said he was "less than impressed" with the accused's failure to cooperate with the preparation of a PSR. He described the accused's explanations for not cooperating with the preparation of a PSR as being "largely nonsensical and hollow."

[15] At the time of sentencing, the accused was gainfully employed in retail and had no prior criminal record. He had an uneventful childhood save that his father died suddenly from cancer when he was seventeen years old. He fears he is also at an elevated risk of cancer as a result. He suffers from depression that he addresses with medication. He pays child support for his fifteen-year-old son. The accused has positive social support and spends his free time raising horses.

[16] Victim impact statements were filed by the victim and her parents. Both statements refer to fear, panic attacks and trauma the victim has suffered because of the incident and the lengthy court process.

[17] The Crown sought a sentence of between three to four years' imprisonment. The accused requested a CSO of two years, less a day, followed by supervised probation for three years.

[18] The judge said he was mindful of the decision in *R v Friesen*, 2020 SCC 9 [*Friesen*]. He called it "a template for sentencing in these types of cases." He indicated that it was "key" that the accused's sentence "take into account the wrongfulness and harmfulness of sexual offences against children when applying the proportionality principle."

[19] The judge also said that section 718.01 of the *Code* requires that primary consideration be given to the objectives of denunciation and deterrence for a sentence involving sexual abuse of a child but that "the sentencing judge retains discretion to accord significant weight to other factors including rehabilitation in exercising discretion in arriving at a fit sentence in accordance with the overall principle of proportionality."

[20] The judge highlighted the circumstances of the offence this way:

- (i) the victim was a vulnerable Indigenous female in the accused's home;
- (ii) there was a significant age difference between the accused and the victim;
- (iii) the acts committed were "[brutish]";
- (iv) the acts were a "very significant interference" with the victim's "sexual integrity"; and
- (v) the crime had caused "significant harm" to the victim in terms of her "physical and mental health".

[21] The judge made the following comments about the circumstances of the accused:

- (i) the accused could not be penalized for taking the matter to trial, but he did not benefit from the demonstration of remorse flowing from a guilty plea;
- (ii) based on the accused's comments to the Court during sentencing, the judge found that the accused lacked insight into "the wrongfulness of his actions" or a sincere "level of remorse" for his crime;
- (iii) the accused was on judicial interim release for the offence since 2021 without incident except for a "small blip" relating to his address; and

- (iv) he was gainfully employed and had support from friends and family.

[22] The judge then said: “Balancing everything I am of the view that a fit and proportionate sentence is as follows: 2 years less a day [CSO].” The judge further commented: “I cannot ignore . . . [the accused’s] ability to follow largely his bail conditions since 2021, and that he has not substantively reoffended, his stable employment, residence, pro-social companions, family, and hobbies bode well for the safety and the protection of the public as does the absence of a prior record.” The judge said he was satisfied that the requirements of section 742.1(a) of the *Code* were met in this case.

### Discussion

[23] We start by addressing the accused’s submission that the conclusory nature of the judge’s reasons should not be a concern because the Provincial Court of Manitoba is a court “of volume; it cannot be held to a standard of perfection.” Leaving aside that the sentence here arose after a trial that took place over several months, as opposed to a matter that came up unexpectedly on a busy docket, in our view, this submission is answered in full by the deferential standard of review in a sentencing appeal and the limited focus of appellate review.

[24] A sentencing decision is entitled to a high degree of deference on appeal. Absent the sentence being demonstrably unfit or the sentencing judge making an error in principle that had an impact on the sentence, the appellate court should not intervene and vary the sentence (see *Friesen* at para 26; *R v Lacasse*, 2015 SCC 64 at paras 11, 67).

[25] Section 726.2 of the *Code* requires a sentencing judge to provide reasons for the sentence imposed. This duty is satisfied if the sentencing judge provides “an intelligible pathway to the result reached given the context of the specific case” (*R v Ramos*, 2020 MBCA 111 at para 47 [*Ramos*], aff’d 2021 SCC 15). Even where reasons are “objectively inadequate,” the appellate court should not interfere with a decision where the basis for it is apparent from the record, even without being articulated (*Ramos* at para 51).

[26] On an appeal, the role of this Court is not to “finely parse the trial judge’s reasons in a search for error” (*R v GF*, 2021 SCC 20 at para 69 [*GF*]). A “[t]rial [judge] [is] presumed to know the law with which they work day in and day out” (*R v Burns*, [1994] 1 SCR 656 at 664, 1994 CanLII 127 (SCC)). An appellate court must be sensitive “to the time constraints and general press of business in the criminal courts. The trial judge is not held to some abstract standard of perfection” by a duty to recite law that is familiar to them at length in a manner akin to a jury instruction (*R v Sheppard*, 2002 SCC 26 at para 55(7)). However, the presumption that trial judges are presumed to know the law they work with on a day-in/day-out basis does not negate the need for reasons to show that the law is correctly applied in the particular case (see para 55(9)).

[27] Finally, an appellate court cannot intervene simply because a “trial judge has done a poor job in expressing himself or herself” (*Ramos* at para 50). As was explained in *GF*, “[w]here ambiguities in a trial judge’s reasons are open to multiple interpretations, those that are consistent with the presumption of correct application must be preferred over those that suggest error” (at para 79).



[28] The error here is that, while the judge referred to *Friesen* and some of the relevant sentencing factors set out in the *Code* in his decision, he failed to give effect to prioritizing the objectives of denunciation and deterrence in determining both the length of the accused's sentence and whether a CSO would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2 of the *Code*.

[29] Despite the judge making highly negative findings against the accused in terms of the seriousness of the offence, the accused's lack of insight into his criminality, his lack of remorse and his deliberate refusal to cooperate in the preparation of the PSR, the judge reached the conclusion that a fit sentence in the circumstances should be less than two years and it could be served in the community. The only justification provided is a few personal circumstances of the accused that focused on restorative objectives and rehabilitation.

[30] While the judge is presumed to know the law, the twist in the plot he revealed at the end of his reasons is not adequately explained, nor is the justification for such a dramatic leap readily apparent from the record. For instance, the judge cites no precedents as comparators to assess proportionality and the length of sentence he imposed (see *R v Hiebert*, 2024 MBCA 26 at para 23 [*Hiebert*]).

[31] In our view, the judge erred in principle by unreasonably underemphasizing a relevant sentencing factor—the primacy of denunciation and deterrence for a sexual offence against a child and a vulnerable Indigenous female (see *Friesen* at paras 26, 76; see also *Hiebert* at para 22; *R v BM*, 2023

ONCA 224 at para 22). We are also satisfied that this error impacted the sentence. Our reasons for that conclusion are as follows.

[32] A sentencing judge’s duty under section 718.01 of the *Code* to “give primary consideration to the objectives of denunciation and deterrence” in imposing a sentence for the sexual abuse of a child means that, in order to ensure that a sentence properly reflects the gravity and wrongfulness of the conduct, the personal factors of the offender, while important, “necessarily take on a reduced role” in arriving at a fit sentence (*R v KNDW*, 2020 MBCA 52 at para 21).

[33] Justice Winteringham noted in *R v JFVD*, 2025 BCCA 4 at para 81:

As the Court in *Friesen* concluded, prioritizing the objectives of denunciation and deterrence “confirms the need for courts to impose more severe sanctions for sexual offences against children”: at para. 101. That need is directly related to the form of sanction required, as separation from society reinforces and gives practical effect to denunciation and deterrence: *T.J.* at para. 103.

[34] However, it is also made clear in *Friesen* that giving primacy to denunciation and deterrence does not mean that weight cannot be given to compelling personal circumstances or mitigating factors in assessing proportionality provided the record reasonably supports such an exercise of discretion (see paras 91, 104).

[35] Given the personal circumstances of the victim as a vulnerable Indigenous female, section 718.04 of the *Code* also mandates that primary consideration be given to the objectives of denunciation and deterrence for the accused’s sentence (see *R v Bunn*, 2022 MBCA 34 at paras 109-10).

[36] In *Friesen* (see paras 121-39), the Court suggested that sentencing judges look to several non-exhaustive factors to arrive at a fit sentence for a sexual offence committed against a child:

- (i) the offender's likelihood to reoffend;
- (ii) whether the offender abused a position of trust or authority;
- (iii) the duration and frequency of sexual violence;
- (iv) the age of the victim; and
- (v) the degree of physical interference.

[37] We make several observations about these factors from *Friesen* in relation to this case.

[38] All forms of sexual violence against a child are highly morally blameworthy because of the vulnerability of children (see *Friesen* at paras 88-90). The judge found that the degree of physical interference was significant despite this being one occurrence of sexual violence. *Friesen* confirmed that the harm analysis of child sexual abuse should not be overwhelmed by the question of whether there was penetration, fellatio or cunnilingus (see paras 144, 147). The pre-*Friesen* analysis of assessing sexual touching as "major" or "minor" in relation to a child is not to be used by sentencing courts. Lasting harm to a victim can arise from any type of sexual touching, as is the situation here (see para 145). There "is no type of hierarchy of physical acts for the purposes of determining the degree of physical interference. . . . [D]epending on the circumstances of the case, touching that is both extensive and intrusive can be equally or even more physically

intrusive than an act of fellatio, cunnilingus, or penetration” (at para 146). The gravity of the offence here was quite serious and has left the victim emotionally scarred.

[39] Next, in terms of the accused’s likelihood to reoffend, the judge ignored his finding that the accused deliberately refused to cooperate in the preparation of the PSR despite ample opportunity to do so and warnings of the consequences of not doing so.

[40] A PSR prepared in conformity with section 721 of the *Code* “is intended to be an ‘accurate, independent and balanced assessment’ of an offender, his background and his prospects for the future” (EG Ewaschuk, *Criminal Pleadings & Practice in Canada*, 3rd ed (Toronto: Thomson Reuters, 1988) (loose-leaf updated 2025, release 2), pt V, ch 18 at s 18:222, online: WL Can). Given the professionalism and experience of probation officers, it provides valuable insight into an offender’s character for a sentencing judge—particularly on the question of the likelihood to reoffend.

[41] We fail to understand how anything other than the accused having poor rehabilitative prospects can arise on this record. The accused showing disrespect to an order of the Court by willfully evading the preparation of the PSR over several months, despite repeated warnings to cooperate, leads only to one reasonable conclusion—he is a risk to reoffend.

[42] In terms of the age disparity between the victim and the accused, while the judge mentioned that disparity, he failed to consider the commentary in *Friesen* that sexual violence against adolescent girls is a particularly serious crime that has historically resulted in disproportionality low sentences. Sentencing judges are required to be acutely sensitive to this fact in assessing

proportionality (see para 136). A mature person taking advantage of an adolescent girl by inviting her into their home in the middle of the night with the objective of giving her intoxicants and engaging in sexual touching is highly blameworthy conduct. The judge's reasons do not reflect that important component of proportionality in a meaningful way.

[43] Finally, the mitigating factors in this case are common to many offenders. There is a complete absence of a compelling personal circumstance or other significant mitigating factors (see e.g. *R v AL*, 2025 ONCA 9 (mental health disabilities, limited intellectual capacity and history of abuse); *R v RV*, 2022 ONCA 830 (terminal cancer)).

[44] While a lack of a criminal record, steady employment, community support and general adherence to conditions of judicial interim release are relevant considerations, they are not mitigating factors of sufficient magnitude to temper giving primacy to denunciation and deterrence in a serious case such as this (see *R v Soriano*, 2024 MBCA 88 at paras 18, 23; *R v Dew*, 2024 MBCA 55 at paras 43-44; *R v Golden*, 2009 MBCA 107 at paras 109-11).

[45] We are satisfied that the judge unreasonably attached significant importance to the unremarkable mitigating factors in this case despite the fact that the accused had high moral blameworthiness and the judge was required to impose a sentence that satisfied the statutory aggravating factors of an offence involving the sexual abuse of a child that had a significant impact on the victim (see the *Code*, ss 718.2(a)(ii.1) to 718.2(a)(iii.1)).

[46] A sentencing judge must do more than simply acknowledge the harmfulness and wrongfulness of sexual violence against children; sentences must reflect these concerns both in terms of the gravity of the offence and the

degree of responsibility of the offender (see *R v SADF*, 2021 MBCA 22 at para 34). In our respectful view, the message the sentence needed to send to the public, the accused and other like-minded offenders to give proper primacy to the objectives of denunciation and deterrence for this sexual violence against a child was a dramatically different one than what the judge pronounced.

[47] While this Court has not adopted a sentencing range for sexual assault involving a child, post-*Friesen*, we are mindful that, in *Friesen*, the Court noted “that mid-single digit penitentiary terms for sexual offences against children are normal” and “upper-single digit and double-digit penitentiary terms should be neither unusual nor reserved for rare or exceptional circumstances” (at para 114). The Court also said “that substantial sentences can be imposed where there was only a single instance of sexual violence and/or a single victim” (*ibid*).

[48] Not surprisingly, post-*Friesen*, most of the decisions of this Court involving sexual violence against a child have resulted in a penitentiary sentence (see *R v Silaphet*, 2024 MBCA 58 at para 67). In our view, that trend conforms to the directions in *Friesen* and by Parliament in the *Code* to the effect that the harmfulness and wrongfulness of sexual offences against children is central to a proper assessment of the proportionality principle both in terms of the gravity of the offence and the degree of responsibility of the offender.

[49] In our judgment, the multitude of significant aggravating factors and the lack of compelling mitigating factors lead inextricably to the conclusion that a fit sentence for this accused should be a penitentiary sentence. That is

the only conclusion that this record can reasonably support. Accordingly, consideration of a CSO by the judge was inappropriate (see *R v Proulx*, 2000 SCC 5 at paras 57, 127). Due to the material error in principle committed by the judge, the CSO and order of supervised probation must be set aside and the accused re-sentenced.

[50] In light of the untainted findings of the judge as to the accused's high moral blameworthiness, the disturbing nature of his conduct, the lasting harm it caused to the victim and the accused's personal circumstances—particularly him being a first-time offender—a fit sentence in light of the commentary in *Friesen*, the objectives and principles in sections 718-718.2 of the *Code*, and the aggravating and mitigating factors mentioned previously would be one of three years' imprisonment, less credit for time served.

[51] Pursuant to section 683(7) of the *Code*, before varying the accused's sentence, we are required to take into account the conditions of the release order that was imposed on November 22, 2024 when the CSO was suspended. We would note that the conditions of that release order were less onerous than the CSO and there is no suggestion of substantial hardship to the accused by the suspension of the CSO. While compliance with strict conditions of judicial interim release is a relevant sentencing factor, credit for such a period of time is calculated in a different manner than is the case for pre-trial custody under section 719(3) of the *Code* (see also *R v Irvine*, 2008 MBCA 34 at paras 27-29).

[52] In our view, what is fair and just is that the accused be given a total credit of 122 days of time served to cover time served in pre-trial custody; time served while serving his CSO; and some minimal credit (thirty days) for

the time spent on judicial interim release, without incident, after his CSO was suspended.

Disposition

[53] In the result, leave to appeal was granted against the sentence and the appeal was allowed. The accused's sentence for sexual assault was varied to three years' imprisonment, less credit for 122 days of time served. The CSO and order of supervised probation were set aside but the ancillary orders originally imposed shall remain.

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Mainella JA

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Edmond JA

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Kroft JA