Citation: R v KB, 2025 MBCA 73
Date: 20250821
Docket: AR24-30-10063

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Diana M. Cameron
Madam Justice Lori T. Spivak
Madam Justice Anne M. E. Turner

B E T W E E N:

	)	***E. J. Roitenberg, K.C.***
	)	*for the Appellant*
HIS MAJESTY THE KING	)	
	)	***M. A. Bodner*****,**
Respondent	)	***A. C. Smith*** *and*
	)	***P. Benham***
- and -	)	*for the Respondent*
	)	
K. B.	)	*Appeal heard:*
	)	***January 27, 2025***
(Accused) Appellant	)	
	)	*Judgment delivered:*
	)	***August 21, 2025***

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).

CAMERON JA

[1] The accused appeals his conviction for luring a child (section 172.1(1)(b) of the *Criminal Code*, RSC 1985, c C-46 [the *Code*]), after trial in the Provincial Court. While he lists six grounds of appeal, I would state the issues as being whether the trial judge erred (1) in dismissing his motion for a directed verdict based on a no evidence motion (the no evidence motion), (2) in her assessment and application of the evidence and, (3) in dismissing his motion to stay the proceedings on the basis that his right to be

tried within a reasonable time pursuant to section 11(b) of the *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act*, *1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [the *Charter*], had been violated.

[2] For the reasons that follow, I would dismiss the appeal.

Facts

[3] The accused was a teacher, coach and mentor to the victim, with whom he fostered a close relationship, including through the extensive use of telecommunications. A brief overview of that relationship provides sufficient context to the issues involved in this appeal.

[4] The accused and the victim first met when she was thirteen years old and in grade seven of elementary school. He was twenty-five years old and was her substitute teacher. The following year, he was her grade eight homeroom teacher. It was during this time that they became close, as demonstrated by the fact that the victim chose the accused as the subject for her class assignment, "My Incredible Influence." On his own accord, the accused wrote a similar paper about her. When the victim graduated in grade eight, the accused gave her an engraved picture frame with a photo of the two of them with a lengthy note thanking her for, among other things, making him feel "full of love."

[5] Shortly before the victim was scheduled to commence grade nine in a different school (the high school), the accused used an Instagram coaching account to message her. When she did not initially respond, he persisted in

contacting her and the two began to message on Instagram, trading numerous messages as well as photos and videos.

[6] The accused became one of the coaches of the high school's varsity girl's basketball team (the basketball team). He convinced the victim to have her older sister play on the basketball team so that he could see the victim more frequently.

[7] The accused left letters and gifts for the victim in her locker. He would also leave notes and messages for her on her cellphone. As well, the two of them constantly texted each other. In his texts, the accused frequently referred to how much he loved the victim, loved spending time with her and enjoyed hugging her. They also had numerous video chats over Facetime.

[8] When the victim was in grade nine, the accused invited her to join the basketball team, telling her that she was the first grade nine student asked to play on the varsity team. They went to games at other schools and tournaments together. The duration and frequency of the hugs between them increased. The accused had the victim over to his house alone for lunch. He visited the victim at her parents' house when her family was not at home. He told the victim that they had to keep their relationship a secret as, if discovered, it would ruin his career.

[9] Eventually the victim's parents learned of the relationship when they received a large phone bill resulting from all the text messages. Even after the victim's parents had seized her phone, the accused sent two further Instagram messages to her. In the first, he described his hurt at not being able to see, talk or text her, and tell her how much he missed and loved her. In the second, he stated that he could not wait to see her and he encouraged her to

"[s]tick through it". He ended that message by stating: "Love your bestfriend."

[10] In total, the accused and the victim exchanged thousands of Instagram and text messages.

Issue 1—The No Evidence Motion

The Legislated Offence and the Information

[11] Section 172.1(1) of the *Code* establishes the offence of luring a child. Subsections 171.1(1)(a), (b) and (c) specify different elements of each offence by delineating the ages of the victim each subsection is applicable to and the certain designated offences (the designated offences), the facilitation of which must be intended to commit the offence.

[12] Section 172.1(1)(b) of the *Code* provides:

Luring a child **172.1 (1)** Every person commits an offence who, by a means of telecommunication, communicates with	**Leurre** **172.1 (1)** Commet une infraction quiconque communique par un moyen de télécommunication avec :
(b) a person who is, or who the accused believes is, under the age of 16 years, for the purpose of facilitating the commission of an offence under section 151 or 152, subsection 160(3) or 173(2) or section 271, 272, 273 or 280 with respect to that person; or	**b)** une personne âgée de moins de seize ans ou qu'il croit telle, en vue de faciliter la perpétration à son égard d'une infraction visée aux articles 151 ou 152, aux paragraphes 160(3) ou 173(2) ou aux articles 271, 272, 273 ou 280;

[13] The elements of section 172.1(1)(b) are that (1) the accused must have communicated by means of telecommunication, (2) the communication must be with a person who is or whom the accused believes is under sixteen years of age, and (3) the accused's purpose in making the communication must be to facilitate one of the designated offences with whom the communication is made (see *R v Morrison*, 2019 SCC 15 at para 43 [*Morrison*]; *R v Levigne*, 2010 SCC 25 at para 23; *R v Legare*, 2009 SCC 56 at para 36 [*Legare*])[1].

[14] The amended information of which the accused was convicted states:

> [The accused], on or between 1 July 2019 to March 12th, 2020, both dates inclusive, at or near [location], Manitoba, did communicate via telecommunications to lure [the victim], a young person under the age of 16, contrary to section 172.1(1)(b) of the Criminal Code of Canada.

Positions of the Parties at Trial

[15] In support of the no evidence motion, the accused relied on *Legare*, emphasizing that the offence of luring a child is an inchoate offence, meaning that it is "a preparatory crime that captures otherwise legal conduct meant to culminate in the commission of a completed crime" (*ibid* at para 25).

[1] In *Legare*, the Court was dealing with section 172.1(1)(c) of the *Code*. At the time, that section provided that it was an offence to communicate by a computer system with anyone under the age of fourteen years for the purpose of facilitating the commission of offences under section 151 or 152, 160(3) or 173(2), or section 281 of the *Code*. As Fish J noted at footnote 1 of *Legare*, section 172.1(1)(c) has since been renumbered as the current section 172.1(1)(b) and amended to raise the age to sixteen years from fourteen. For the purpose of these reasons, I will simply refer to Fish J's analysis as applying to section 172.1(1)(b).

[16] One of the essential elements of the offence of luring a child is that the telecommunication must be for the purpose of facilitating the commission of a specified secondary offence (i.e. a designated offence) (see *ibid* at para 36). The accused submitted that the term specified secondary offence, as it is used in *Legare*, means that it is essential that the information identify one of the designated offences referred to in section 172.1(1)(b). That did not occur in this case. Thus, he argued that the specific subjective intent to commit a designated offence could not be proven.

[17] Additionally, the accused maintained that the evidence did not disclose his subjective intent at the time of the relevant communications and that no sexual intention toward the victim was ever expressed or proven. Therefore, even if it was not essential to specify one of the designated offences in section 172.1(1)(b) in the information, there was still no evidence of a specific intent to facilitate one or any of them.

[18] The Crown relied on the case of *R v Himes*, 2016 ONSC 249 [*Himes*], which held that, in the circumstances of that case, the trial judge did not err in holding that the Crown did not have to specify the designated offence in an information that had been amended to allege an infraction of section 172.1(1)(b). In that case, the appeal judge found that the trial judge was able to determine which of the designated offences the evidence supported.

[19] The Crown further argued that section 172.1(1)(b) of the *Code* particularizes the offence. It submitted that the choice to proceed pursuant to section 172.1(1)(b), as opposed to either section 172.1(1)(a) or 172.1(1)(c),

served to limit the specific designated offences alleged, given that each of those sections enumerates different offences.

[20] Finally, the Crown argued that the evidence disclosed that the accused was progressively increasing his closeness and physical contact with the victim, including the duration and frequency of him hugging her and that the communications demonstrated an intent to facilitate the commission of the offence of sexual interference, invitation to sexual touching and exposure, all of which are designated offences in section 172.1(1)(b).

The Decision of the Trial Judge

[21] The trial judge correctly stated that the test for "a no-evidence motion is whether 'there is admissible evidence (direct or circumstantial) which could, if it were believed, result in a conviction'" (see also *R v Arcuri*, 2001 SCC 54 at para 21 [*Arcuri*]). However, before dealing with the evidence, she determined that she would consider the accused's argument that the information did not specify a designated offence. She said:

> Even though [the accused's] position on this point is, in effect, that the Information omits an essential element of the offence, he has *not brought a motion to quash the Information for insufficiency, which, of course, is to be brought before plea and thereafter only by leave of the Court*. And while this is *not a motion to quash the Information,* in my view, the same law and principles apply.
>
> [emphasis added]

[22] The trial judge then considered section 581 of the *Code*, which addresses the form and substance of an information. After examining the entirety of section 172.1(1), inclusive of subsections (a), (b) and (c), the

relevant case law and the wording of the information, she found that it contained "sufficient details to give the accused reasonable information with respect to the charge and to enable him to identify the transaction to permit the adequate preparation of the defence."

[23] Next, the trial judge noted that the issue of whether the underlying designated offence needed to be particularized was not considered in *Legare*. She agreed with the Crown that the designated offence need not be specified. Rather, proof beyond a reasonable doubt that the accused's intent was to facilitate one or more of the designated offences in section 172.1(1)(b) would be sufficient.

[24] Finally, the trial judge referred to the evidence, finding that while the accused did not use sexually explicit language, if believed, the evidence was reasonably capable of supporting the inferences that the Crown would ask her to draw when considering the verdict.

Issue on Appeal and Positions of the Parties

[25] The accused argues that the trial judge erred in her interpretation and application of the law applicable to the charge of luring a child made pursuant to section 172.1(1)(b). He submits that this is a question of law reviewable on the standard of correctness. I agree.

[26] The accused essentially makes the same argument as he did before the trial judge. That is, "one can't have subjective intent of facilitating the commission of a specified offence if the offence is not specified." He submits that in *Legare*, Fish J held the words "for the purpose of facilitating the commission" of a designated offence found in section 172.1(1)(b)

demonstrate that the accused's intent must be determined on a subjective basis and the trial judge erred in concluding that it need not be particularized in the information. The accused states that this reflects the intention of Parliament when it expressly set out the designated offences in section 172.1(1)(b).

[27] Finally, he argues that, given that there was no evidence called demonstrating that the accused was acting for the purpose of committing one of the designated offences, the trial judge erred by imposing her own view of the purpose of the communications in drawing the inferences as opposed to considering the accused's subjective intent.

[28] The Crown submits that the trial judge correctly identified the elements of the offence and did not err when she found that the offence will be made out if an intent to facilitate one or more of the designated offences is proven. It argues that the trial judge considered the totality of the evidence when finding that, if believed, it supported an inference of guilt.

Discussion

[29] The accused characterizes his argument as being that there was no evidence to support the charge, as the Crown could not establish specific intent to commit an unspecified designated offence. He argues that the trial judge erred in considering the law related to the quashing of an information based on insufficiency. I disagree.

[30] At its core, the accused's position is that the information was insufficient. This is why he alleges that the Crown could not prove, and he could not defend, the specific intent required to facilitate one of the designated offences.

The Sufficiency of the Information

[31] I start by noting that section 2 of the *Code* provides that a count in an information means a charge and that an indictment includes an information or a count therein.

[32] In her analysis, the trial judge set out subsections 581(1), 581(2), 581(3) and 581(5) of the *Code*, which state:

General Provisions respecting Counts

Substance of offence
581 (1) Each count in an indictment shall in general apply to a single transaction and shall contain in substance a statement that the accused or defendant committed an offence therein specified.

Form of statement
(2) The statement referred to in subsection (1) may be

(a) in popular language without technical averments or allegations of matters that are not essential to be proved;

(b) in the words of the enactment that describes the offence or declares the matters charged to be an indictable offence; or

Dispositions générales quant aux chefs d'accusation

Note marginale :Substance de l'infraction
581 (1) Chaque chef dans un acte d'accusation s'applique, en général, à une seule affaire; il doit contenir en substance une déclaration portant que l'accusé ou le défendeur a commis l'infraction qui y est mentionnée.

Style de la déclaration
(2) La déclaration mentionnée au paragraphe (1) peut être faite :

a) en langage populaire sans expressions techniques ni allégations de choses dont la preuve n'est pas essentielle;

b) dans les termes mêmes de la disposition qui décrit l'infraction ou déclare que le fait

(c) in words that are sufficient to give to the accused notice of the offence with which he is charged.

Details of circumstances

(3) A count shall contain sufficient detail of the circumstances of the alleged offence to give to the accused reasonable information with respect to the act or omission to be proved against him and to identify the transaction referred to, but otherwise the absence or insufficiency of details does not vitiate the count.

Reference to section

(5) A count may refer to any section, subsection, paragraph or subparagraph of the enactment that creates the offence charged, and for the purpose of determining whether a count is sufficient, consideration shall be given to any such reference.

imputé est un acte criminel;

c) en des termes suffisants pour notifier au prévenu l'infraction dont il est inculpé.

Détail des circonstances

(3) Un chef d'accusation doit contenir, à l'égard des circonstances de l'infraction présumée, des détails suffisants pour renseigner raisonnablement le prévenu sur l'acte ou omission à prouver contre lui, et pour identifier l'affaire mentionnée, mais autrement l'absence ou insuffisance de détails ne vicie pas le chef d'accusation.

Mention d'article

(5) Un chef d'accusation peut se référer à tout article, paragraphe, alinéa ou sous-alinéa de la disposition qui crée l'infraction imputée et, pour déterminer si un chef d'accusation est suffisant, il est tenu compte d'un tel renvoi.

[33] In addition, I would mention the following provisions of the *Code* dealing with omissions and deficiencies in indictments:

- Section 583, which provides that an indictment is not insufficient by reason of the absence of details where the count otherwise fulfils the requirements of section 581. More specifically, subsection 583(f) provides that it is not insufficient only by reason that it does not specify the means by which the alleged offence was committed.

- Section 587, which provides the court with the ability to order further particulars that 587(1)(e) further describe the writing or words that are the subject of the charge, and 587(1)(f) further describe the means by which an offence is alleged to have been committed.

[34] Section 601 of the *Code* deals with the amendment and quashing of indictments. Relevant to this case are the following subsections:

- Section 601(1), which provides that a motion to quash an indictment shall be taken before the accused enters a plea and only by leave of the court after a plea has been entered.

- Section 601(3), which provides that the court shall amend an indictment at any stage of the proceedings, including if it fails to state or states defectively anything required to constitute the offence or is defective in substance if the matters for the proposed amendment are disclosed by the evidence at the preliminary hearing or trial.

- Section 601(4), which provides what the court must consider when determining whether an amendment should be made to an

> indictment, including, among other things, matters disclosed by the evidence in the preliminary hearing or trial, the circumstances of the case, prejudice and whether the amendment can be made without causing an injustice.

[35] Historically the courts strictly interpreted charging counts. See, for example, *Brodie v R*, 1936 CanLII 1 (SCC) [*Brodie*], where Rinfret J stated that counts in an indictment must specify the time, place and matter in describing the offence (see 189). Over time and in response to changes in the *Code*, courts have moved away from focussing on the technical aspects of a count and more towards the substance of the charge (see *R v Sault Ste Marie*, 1978 CanLII 11 at 1307 (SCC); *R v Côté*, 1977 CanLII 1 at 13 (SCC)).

[36] In *R v B(G)*, [1990] 2 SCR 30, 1990 CanLII 7308 (SCC), Wilson J, writing for the Court, noted that since *Brodie*, "there has been an increased tendency for the courts, including this Court, to reject insufficiency arguments on the basis that they are overly technical and an unnecessary holdover from earlier times" (at 42). Nonetheless, what constitutes reasonable or adequate information with respect to the offence alleged will vary, depending on the case (see *ibid* at 43).

[37] In *R v GR*, 2005 SCC 45 at para 15, Binnie J clarified that while the courts

> have taken a broader view of sufficiency . . . the fundamental requirement that the accused be able clearly to ascertain from the offence charged (*as described in the enactment creating it* or as charged in the count or as expressly stated to be an included

> offence in [the *Code*] itself), the charges for which he or she risks conviction.
>
> [emphasis added]

[38] In this case, the designated offences are specifically listed in the enacting legislation, section 171.1(1)(b) of the *Code*. The issue is whether a designated offence must be particularized in the charge. Therefore, it is necessary to examine jurisprudence concerning the wording of charges dealing with the luring provisions of the *Code*.

[39] I am unaware of any case wherein a charge of luring a child has been quashed for failing to specify one of the designated offences. Rather, this issue was directly addressed and rejected in *Himes*. In that case, the accused was charged with two offences pursuant to section 172.1(1)(c). The trial judge allowed the Crown's request to amend the charges to allege contraventions of section 172.1(1)(b), but did not require the Crown to specify a designated offence as part of the amendment. In upholding the convictions, Fregeau J rejected the accused's argument that the trial judge erred in allowing the amendment without ordering the Crown to specify the designated offences.

[40] In his reasons, Fregeau J found no error in the trial judge's finding that a number of designated offences set out in section 172.1(1)(c) could be proven based on the evidence, that the charge as amended was sufficient to make full answer and defence and that it was "up to the trial judge at the end of the day to determine what specific secondary offence or offences, if any, the evidence supported" (*ibid* at para 31; see also para 33).

[41] In *R v Trimm*, 2023 NLCA 13 [*Trimm*], the Court considered a charge alleging that the accused communicated with the victim, "a person under (or believed to be under) 16 years old, by means of a computer system for the purpose of facilitating the commission of an offence contrary to sections 172.1(1)(b) and (2)(a) of the *Code*" (at para 44). The Court noted that all eight of the possible designated offences included in section 172.1(1)(b) were listed in the charge. Furthermore, in convicting the accused, the trial judge did not identify any designated offence as having been facilitated (see *ibid* at para 48).

[42] In considering the argument that the trial judge erred in her interpretation and application of the third element of the offence (that the accused's purpose in making the communication must be to facilitate one of the designated offences with whom the communication is made), the Court stated that it was "unhelpful" (*ibid* at para 51) that the charge listed all of the designated offences but did not find it to be insufficient. Nonetheless, the Court underscored that the wording of the information was confusing and that adding surplus allegations did not advance the general proposition that a charge must provide an accused with enough information to defend the charge.

[43] Nevertheless, the Court rejected the accused's argument that the trial judge erred in failing to identify a designated offence when convicting the accused. After eliminating the designated offences for which there was no evidence, the Court stated that it was not necessary for the trial judge to pick just one of the remaining designated offences. It explained (*ibid* at para 53):

> This is because child luring is an inchoate offence, which means that it is a preparatory crime that captures otherwise legal conduct meant to culminate in the commission of a completed crime, which may never happen (*R. v. Legare*, 2009 SCC 56, [2009] 3 S.C.R. 551, at para. 25; and *Morrison*, at para. 40). The offender need not meet or intend to meet the victim with a view to committing any of the specified secondary offences (*Legare*, at para. 25). The communications do not need to describe any secondary offence or even be sexual in nature (*Legare*, at para. 29).

[44] The Court supported its conclusion, in part, by noting that, "[s]exual predators do not necessarily groom child victims for a particular sexual offence; they groom children to make it easier to use them for sexual activity" (*Trimm* at para 54). And further, "that an interaction between an adult and a child may result in more than one of the secondary offences being committed" (*ibid* at para 55).

[45] In the result, the Court upheld the conviction, finding that although the trial judge did not specifically identify any designated offences, her reasons identified an intention to facilitate the offences of sexual assault and sexual interference.

[46] In my view, specifying all the designated offences or simply identifying the specified designated offences by reference to section 172.1(1)(b) of the *Code* in the charge are not materially different. Either way, neither has been found to constitute an insufficient charge.

[47] Finally, I would just note that while the sufficiency of the charge was not an issue in the case of *R v Lymych*, 2024 MBCA 61, Beard JA, writing for this Court, considered a charge laid pursuant to section 171.1(1)(b) that did "not identify which of the several designated offences is allegedly being

facilitated" (at para 29); nonetheless, she stated, "the trial judge found [the facilitated offences to be] sexual interference (s 151) and/or sexual assault (s 271)" (*ibid*).

[48] In the result, I am not convinced that the trial judge erred in considering the provisions of the *Code* and related jurisprudence dealing with the sufficiency of an information or in the conclusion she reached.

The No Evidence Motion

[49] In *R v Barros*, 2011 SCC 51 at para 48, the Supreme Court of Canada explained:

> A directed verdict is not available if there is any admissible evidence, whether direct or circumstantial which, if believed by a properly charged jury acting reasonably, would justify a conviction: *R. v. Charemski*, [1998] 1 S.C.R. 679, at paras. 1-4; *R. v. Bigras*, 2004 CanLII 21267 (Ont. C.A.), at paras. 10-17. Whether or not the test is met on the facts is a question of law which does not command appellate deference to the trial judge.

[50] At the trial, the accused maintained that the evidence did not disclose subjective intent to facilitate the commission of one or any of the designated offences and that no sexual intention toward the victim was ever expressed.

[51] I am not convinced that the trial judge erred in law in finding that there was some evidence which, if believed, could support a conviction.

[52] In reaching her conclusion, the trial judge recognized that there was no direct evidence of an intention to commit any of the designated offences. However, she also noted that sexually explicit language is not an essential

element of the offence, nor is it required to demonstrate an intent to carry out the designated offence (see *Legare* at para 29).

[53] Recognizing that she was dealing with circumstantial evidence of intent, the trial judge cited *Arcuri* at para 23, underscoring that she was required to engage in only a limited weighing of the evidence to determine whether, if believed, the subjective intent to facilitate the commission of one of the designated offences was reasonably capable of supporting an inference of guilt, as opposed to actually drawing any inference. She was also aware that she was not making factual findings or assessing credibility at this stage of the proceedings.

[54] After considering the evidence, including the nature of the relationship between the parties, the frequency and timing of the communications, and the behaviour and actions of the accused, including the nature of the physical contact throughout the relationship, she found that it was reasonably capable of supporting an inference of guilt. In my view, the accused has not demonstrated error in this regard.

Issue 2—The Trial Judge's Assessment and Application of the Evidence

[55] This issue concerns the accused's allegation that the trial judge erred in her assessment of his testimony. He submits that the trial judge used his after-the-fact acknowledgment that his relationship with the victim was improper as a basis to disbelieve his evidence regarding his intent at the time of the communications. As well, he submits that it was an error for the trial judge to disbelieve his evidence regarding the subjective interpretation and intent of the messages in circumstances where it coincided with the evidence of the victim. He argues that this error demonstrates that the trial judge

imported her subjective belief as to what objectively must have been intended contrary to *Legare*.

[56] Finally, the accused submits that given the absence of direct evidence of subjective intent to facilitate a designated offence, no evidentiary foundation was laid that would allow the trial judge to infer guilt contrary to *R v Villaroman*, 2016 SCC 33 [*Villaroman*].

[57] In essence, the accused is arguing that the verdict was unreasonable. Thus, he must establish that the verdict is one that a properly instructed trier of fact, acting judicially, could not have reasonably rendered (see *R v Sinclair*, 2011 SCC 40 at paras 4, 16). In a trial by judge alone, an appellate court may also find a verdict to be unreasonable where the trial judge has drawn an inference or made a finding of fact essential to the verdict that is plainly contradicted by the evidence relied on by the trial judge in support of that inference or finding, or is incompatible with evidence that has not otherwise been contradicted or rejected by the trial judge (see *R v RP*, 2012 SCC 22 at para 9 [*RP*]).

[58] In *Villaroman*, Cromwell J explained the application of the standard, stating: "Where the Crown's case depends on circumstantial evidence, the question becomes whether the trier of fact, acting judicially, could reasonably be satisfied that the accused's guilt was the only reasonable conclusion available on the totality of the evidence" (at para 55).

[59] Credibility assessments are subject to review on the standard of deference and cannot be interfered with unless they "cannot be supported on any reasonable view of the evidence" (*RP* at para 10).

[60] The accused testified that he did not cultivate a relationship with the victim with any sexual intent. Rather, he characterized it as a close friendship similar to one of a big brother/little sister relationship.

[61] The trial judge rejected the accused's evidence in this regard, stating:

> [The accused] acknowledged in his evidence that looking back, he and the [victim] being in the presence of each other outside of school was inappropriate. However, at the time he did not believe the relationship between them was wrong.
>
> I found [the accused's] claim beyond belief that at the time he did not know what he was doing was wrong or inappropriate. I cannot imagine that a person in [the accused's] position as a teacher in the Manitoba public school system and coach of high school sports in 2019 and 2020 would not have been aware at the time that he was crossing relationship boundaries with a student or athlete. I cannot believe that he thought that texting and Facetiming a student or athlete at all hours of the night, confessing his love for her, secretly having lunch together at his place, secretly watching a movie at her place while her family was away, and repeatedly hugging her was an appropriate relationship to be having with a 14-year-old child.

[62] She then continued to list numerous reasons why she found his evidence that he viewed the relationship with the victim to be one of a close friend or big brother/little sister and his denial of any sexual intent toward the victim to be incredible. In support of her finding, she referred to his testimony admitting his desire to keep their relationship secret, as well as several Instagram and text messages demonstrating his awareness of the inappropriate nature of what he was doing at the time. Referring to numerous texts, she also disbelieved the accused's testimony that he was not looking for attention from the victim. In addition, she found his evidence to be internally inconsistent

with his own testimony and stated that he significantly downplayed the extent of his relationship with the victim.

[63] Contrary to the accused's assertion, the trial judge did not use his hindsight admission that his behaviour was inappropriate to disbelieve him; she simply disbelieved his denial that he did not believe the relationship was inappropriate at the time. I am not convinced that she erred in this regard.

[64] In determining whether the Crown had proved the case beyond a reasonable doubt, the trial judge acknowledged the victim's evidence that she viewed her relationship with the accused as a friendship or like one of big brother/little sister. However, the trial judge considered that the victim was only fourteen years old at the time and "could not be expected to identify the intent of a 27-year-old man, a teacher, a coach, who was giving her endless attention and praise." The trial judge continued by stating:

> He was making her feel important, special, telling her that she was his favourite person ever, out of the whole entire world, despite having a wife who was expecting and other friends and family. He was constantly complimenting her, telling her that she was the only person he had such a connection with. She enjoyed the attention, and as a child that is entirely understandable.

[65] Contrary to the accused's submission, the trial judge was entitled to consider the victim's evidence in the manner that she did. She was not required to have a reasonable doubt regarding the accused's statement that he had no sexual intent toward the victim simply because the victim testified that she did not perceive one. As was noted in *R v Bertrand Marchand*, 2023 SCC 26 at para 52:

> Grooming often goes hand in hand with the common features of luring, namely a "prolonged, deliberate and careful cultivation of a young person with a view to engendering trust and intimacy, all designed to promote sexual conduct between the two parties" (*Paradee*, at para. 20). While often a preparatory process, grooming need not culminate in a sexual act to be harmful. Grooming allows an offender to gain power and control over the young person, which in turn may lead to distinct psychological harm.

[66] Furthermore, the trial judge articulated other reasons why she had concerns with the victim's testimony, including, among other things, that the victim testified that she could not recall many instances of or the frequency of hugs that occurred between her and the accused despite the fact that they were clearly referred to in the electronic communications between them.

[67] I do not accept the accused's argument that the trial judge imported her subjective belief, causing her to determine objectively the accused's specific intent. The evidence speaks for itself in this regard—the accused was clearly aware that he was fostering a deep relationship with the victim, slowly increasing the intimate nature and duration of their private physical contact.

[68] Moreover, regarding the subjective *mens rea* required to prove the intent to facilitate the commission of a designated offence, I note that in *Morrison*, Moldaver J, writing for the majority, acknowledged that luring a child is a serious crime carrying a high degree of stigma and potentially severe punishment. Despite this, he questioned the nature of the *mens rea* to be proven, stating: "That said, I am very doubtful that this stigma and punishment rise to the level of requiring purely subjective *mens rea*" (*ibid* at para 79).

[69] Regarding *Villaroman*, the accused argues that he did not engage in any overtly sexual behaviour with the victim, nor did his communications with her contain any sexual content. Thus, he argues that there were other plausible theories or reasonable possibilities other than guilt that the trial judge could have drawn, such as the two being engaged in a close friendship, a big brother/little sister relationship, or that of uncle and niece.

[70] The trial judge carefully conducted a *Villaroman* analysis of the evidence. She found there was no reasonable inference other than guilt. In doing so, she relied on numerous communications between the accused and the victim, which demonstrated the nature of their relationship. In reaching her conclusion, she took into account:

- the types, timing and frequency of the communications, including that they occurred at all times of the day and night, including on school days;
- the accused's desire to keep the relationship a secret from his wife, the victim's parents, other students and colleagues;
- his inability to keep away from the victim, despite students noticing their relationship and rumours starting about it;
- his warning her to be careful of boys and describing behaviour they might exhibit in trying to attract the victim while actively engaging in the same behaviour with her;

- secret notes he gave the victim repeating his need to see her and the fact that he made every effort to do so, including by giving her rides and driving by her house in hopes of seeing her;

- giving her gifts of chocolate;

- his expression of excitement about them being able to lie in bed together at the hotel that they stayed at for the basketball tournament;

- the constant plans to secretly meet and hug, which were often followed through, and discussions of the hugs becoming longer and more frequent; and

- his expressions of love to her and that she was his most favourite person in the world.

[71] Based on the above, the trial judge found the inferences the accused advanced to be incredible and not reasonable as contemplated in *Villaroman*. This finding was open to her on the whole of the evidence.

Issue 3—Unreasonable Delay

The Jordan Framework

[72] Prior to examining the delay occasioned in this case, it is helpful to briefly review the framework for assessing delay set out by the Supreme Court in *R v Jordan*, 2016 SCC 27 [*Jordan*]. In that case, the Court set a presumptive ceiling of eighteen months of delay for cases tried in provincial court (the

relevant timeframe in this case) and thirty months in the superior court (see *ibid* at para 49).

[73] The determination of delay involves "calculating the total delay from the charge to the actual or anticipated end of the trial" (*ibid* at para 60) and then subtracting defence delay.

[74] In *R v KGK*, 2020 SCC 7 [*KGK* SCC], the Court specified that while the right to be tried within a reasonable time pursuant to section 11(b) of the *Charter* extends up to and including the date on which sentence is imposed, the ceilings set in *Jordan* apply to the end of the evidence and argument and do not include verdict deliberation time (see *KGK* SCC at para 3).

[75] Should a case exceed the *Jordan* ceilings, it is presumed to be unreasonable. The Crown must rebut the presumption by demonstrating exceptional circumstances, failing which, the court will stay the proceedings.

Exceptional Circumstances

[76] Exceptional circumstances may arise from discrete events or a case that is particularly complex (see *ibid* at para 71). The determination of whether circumstances are exceptional depends "on the trial judge's good sense and experience" (*ibid*).

[77] *Jordan* defines exceptional circumstances as those that are outside of the Crown's control in that "they are reasonably unforeseen *or* reasonably unavoidable" and the Crown cannot "reasonably remedy the delays emanating from those circumstances once they arise" (at para 69). However, if possible, the Crown must still "show that it took reasonable available steps to avoid and

address the problem *before* the delay exceeded the ceiling" (*ibid* at para 70) [emphasis in original].

[78] In cases involving discrete events that occur where a trial is scheduled to finish close to the ceiling, "it will be more difficult for the Crown and the court to respond with a timely solution" (*ibid* at para 74). In such a situation, it is likely they will present exceptional circumstances.

[79] Delay occasioned by discrete events must be deducted from the total period of delay in determining whether the ceiling has been reached. However, any portion of the delay that could have reasonably been mitigated by the Crown or the court may not be subtracted (see *ibid* at para 75).

[80] I now turn to a review of the background and timeline of the proceedings in this case.

Background and Timeline

[81] The information charging the accused was sworn on June 15, 2021. He was arrested on July 26, 2021.

[82] A case management conference (the CMC) was held on March 10, 2022. While the CMC memo stated that the parties agreed that the trial would take two days to complete, counsel for the accused (defence counsel) (the same as on appeal), later emailed the CMC judge and the Crown clarifying that he had suggested at the CMC that it would be "prudent" to set three days for the trial but that the Crown and the Court advised him that it would be difficult to do so given the rural location where the trial was to be held.

[83] On March 24, 2022, trial dates of November 2 and 3, 2022 were confirmed.

[84] On November 2, 2022, the Crown presented its evidence, including calling the victim to testify. It filed one exhibit consisting of a disc containing thousands of Instagram messages, text messages and notes exchanged between the accused and the victim. The accused agreed that he was the author of the messages, texts and notes as alleged, and the Crown concluded its case.

[85] Immediately after the conclusion of the Crown's case, the accused made the no evidence motion. At that time, defence counsel indicated to the trial judge that she might want to take until the following day to review the evidence before he made his submissions. He suggested that he outline his argument so that she would have it in mind when she reviewed the evidence.

[86] In response, the trial judge indicated that she did not want to "derail the rest of the time". Trial counsel responded by saying that "[i]t shouldn't" and proceeded to outline his argument. The Crown then referred to evidence that it contended supported the charge. After hearing the Crown, defence counsel said that he would wait until the following day to make his submissions to give the trial judge an opportunity to review the material on the disc.

[87] Submissions regarding the no evidence motion were completed by 11 a.m. the following day. At that time, the trial judge indicated that she hoped to have the decision ready that afternoon and asked if the parties would be able to finish the case that day if she ruled against the accused. She said

that if defence counsel anticipated that he would not be able to complete the case that day, she would rather not rush to give a decision.

[88] Defence counsel confirmed that if the trial judge ruled against him, he would not be able to finish the case on that day. The trial was adjourned pending the decision of the trial judge.

[89] In detailed reasons, on January 10, 2023, the trial judge dismissed the no evidence motion. Prior to setting a continuation date, defence counsel expressed his intention to bring a motion for delay. The trial judge stated that she would prefer to finish the trial prior to hearing a delay motion. The parties agreed that one day would be required to complete the accused's evidence and make final arguments. It was agreed that the delay motion could be heard at a later date.

[90] On January 20, 2023, during discussions attempting to identify a continuation date, defence counsel provided dates that he was available, including January 25, 2023, a date that had not been offered by the trial coordinator's office. On January 22, the Crown advised that it would be available on that date. However, on January 23, when the trial coordinator attempted to confirm the date, defence counsel indicated that he was no longer available. Subsequently, a continuation date of February 13, 2023 was agreed to.

[91] Unfortunately, the Crown attorney who had conduct of the matter at the time (the prosecuting Crown) (not the same as on the appeal) suffered a death in her family, thereby causing the continuation date to be rescheduled to May 11, 2023.

[92] A review of the transcript of May 11, 2023, shows that a different prosecuting Crown had assumed conduct of the prosecution (the second prosecuting Crown). On that date, the accused testified and final arguments were made.

[93] On July 20, 2023, the trial judge gave her reasons for convicting the accused. The delay motion was later heard and dismissed by the trial judge.

Reasons of the Trial Judge

[94] In dismissing the delay motion, the trial judge found that the time between the laying of the charge and the first trial date in November 2022 was approximately sixteen months and eighteen days. However, the trial evidence and closing submissions did not conclude until May 11, 2023, about twenty-two months and twenty-five days after the information was sworn. She found this period of time to be the total delay. The trial judge then characterized the total delay into three separate time periods.

[95] Regarding the first time period, between the laying of the charge and the trial dates in November, she considered, but rejected, defence counsel's argument that the trial would have finished if the Crown and the Court had heeded his suggestion that it would be prudent to set three days. In doing so, she noted that after defence counsel had advised the Crown and the Court that he suggested that it would be prudent to schedule three days for the trial, the Crown asked defence counsel if he wanted to go back to the judge who presided over the CMC to ask for an additional date, advising that November 4, 2022 (a third consecutive date for the trial) was available. Defence counsel was not available on that date and no further discussions occurred, resulting in the two days being subsequently set. The trial judge

concluded that, based on the above, it appeared that the parties agreed to move forward and make a good faith effort to finish the matter within the two days set.

[96] The trial judge considered the second period to be from the time that the trial was adjourned in November 2022 until the proposed continuation date of January 25, 2023, and the actual date set of February 13, 2023. She characterized the period up until January 25, 2023, as a discrete event caused by the no evidence motion. While she found the motion to be a legitimate defence motion, she stated that it was not a situation that the Crown reasonably should have anticipated, nor could it have reasonably anticipated that it would delay the trial. In reaching this conclusion, she noted that there was nothing in the CMC memo to indicate that a mid-trial motion would be brought. She stated that, even at the time of the motion, defence counsel still anticipated that the case could be completed in the time originally allotted but that the motion just took longer than expected. She attributed eighty-three days to this exceptional delay.

[97] She attributed nineteen days of delay between January 25, 2023, and February 13, 2023, to the defence, given defence counsel's indication that he was originally available on January 25, that the Crown and the Court adjusted to his schedule, but then he indicated that he was no longer available.

[98] She characterized the third period of time, between February 13 and May 11, 2023, as a discrete circumstance caused by the unforeseen event of the death of the prosecuting Crown's family member. She attributed eighty-seven days to this exceptional delay.

[99] In the result, the trial judge found 170 days, consisting of the eighty-three and eighty-seven days, to be exceptional. She deducted this from the total delay of 676 days. This left a period of 506 days or approximately 16.6 months of delay—a delay below the *Jordan* ceiling. Noting that defence did not argue that the delay was unreasonable despite being under the *Jordan* presumptive ceiling, the trial judge found no breach of section 11(b) of the *Charter*.

Positions of the Parties and New Issue Raised

[100] In his factum, the accused raises three main arguments relating to the delay issue. First, that the trial judge erred when she attributed nineteen days to defence delay. Next, the accused argues that the trial judge erred when she characterized the delay occasioned by the no evidence motion as exceptional. Finally, he submits that the trial judge erred in attributing the total amount of delay between February 13 and May 11, 2023, arising from the death in the prosecuting Crown's family, as an exceptional circumstance.

[101] Arguing that the trial judge committed no error, the Crown's responding factum directly addresses the arguments of the accused.

[102] At the hearing of the appeal, this Court questioned the characterization of the delay regarding the time it took the trial judge to determine the no evidence motion (November 3, 2022 to January 10, 2023). The panel queried as to whether that time should be characterized as interlocutory judicial deliberation time and, if so, how it should be factored into the *Jordan* analysis.

[103] In the result, the Court ordered that the parties file supplemental factums dealing with the issue, which they did, with the final supplemental reply factum of the accused being filed on May 12, 2025.

[104] The accused submits that the presumptive ceilings set in *Jordan* include the inherent time requirements of a case and that pre-trial and interlocutory motions are part of the inherent requirements of the case. In support of his position, he underscores that in *KGK* SCC, Moldaver J emphasized that legitimate steps taken by defence would not stop the *Jordan* clock from running. Correspondingly, he argues the judicial deliberation time for such motions is also factored into the *Jordan* ceilings. He submits that in limiting the ruling in *KGK* SCC to verdict deliberation time, the Supreme Court signalled its intent that judicial deliberation time for pre-trial and interlocutory matters had already been factored into the *Jordan* ceilings.

[105] The Crown argues that the presumptive ceilings in *Jordan* apply to the inherent time requirements of the case, including factors that reasonably contribute to the time it takes to prosecute a case, such as deliberation time arising from routine motions. However, it submits that these factors do not include unforeseen motions that involve technical and complex arguments that were made at the last minute, as in this case. It submits that a contextual and flexible approach be taken when assessing interlocutory judicial deliberation time.

Standard of Review

[106] In the recent case of *R v Flett*, 2024 MBCA 99 at para 46 [*Flett*], leMaistre JA summarized the standard of review for section 11(b) *Charter* decisions as set out in *R v MS*, 2023 MBCA 90 [*MS*], as follows:

> The standard of review for a judge's characterization of periods of delay—allocation of the delay—and whether the delay was unreasonable is correctness. A judge's findings of fact—who or what caused the delay—are entitled to deference and will not be disturbed absent palpable and overriding error. In the absence of a legal error, a judge's determination as to whether exceptional circumstances exist and whether the Crown has reasonably mitigated delay arising from an exceptional circumstance is also entitled to deference.

Defence Delay

[107] In my view, the accused has not demonstrated that the trial judge erred in finding that, after proposing a trial date five days in the future and re-booking that date without advising the Crown or the trial coordinator (who were obviously trying to accommodate the accused), the accused occasioned the nineteen days of delay that occurred from the proposed continuation date until the time of the actual continuation date of February 13, 2023. In this regard, I disagree with the accused that this was part of the delay occasioned by the no evidence motion.

[108] *Jordan* makes clear that time will be deducted from total delay where the Court and the Crown are available and the defence is not (see para 64). In my view, this is particularly applicable in the circumstance of this case.

Exceptional Circumstance—The No Evidence Motion and Judicial Deliberation Delay

Introduction

[109] In the circumstances of this case, the trial judge did not err in finding

that the no evidence motion constituted an exceptional circumstance outside of the Crown's control, consisting of a discrete event that triggered the delay. Contrary to the position of the accused, in my view, the nature of the submission made in support of the no evidence motion was not standard. The main crux of the accused's argument at trial did not concern the sufficiency of the evidence. Rather, it was a novel, complex legal argument that required judicial deliberation.

[110] While the no evidence motion may have been legitimate, it also occasioned the delay that was required to determine it. It is in this context that I consider the jurisprudence regarding interlocutory judicial deliberation delay.

Jurisprudence

[111] In *Flett*, this Court recognized the differences in the manner that courts treated interlocutory judicial deliberation delay but did not find it necessary to determine the issue (see paras 53-54, 62). In reaching her conclusion in that case, leMaistre JA based her decision, in part, on her agreement with and application of the statement of the Alberta Court of Appeal in *R v Chang*, 2019 ABCA 315 [*Chang*], that "deliberation time should be exempted only if it actually extends the timeline" (at para 79). I agree.

[112] In general, the case law demonstrates three approaches to delay occasioned by interlocutory judicial deliberation time. They are (1) interlocutory deliberation time is included in the *Jordan* ceilings, (2) interlocutory deliberation time should be deducted from the *Jordan*

ceilings, and (3) interlocutory deliberation time may be considered an exceptional circumstance.

[113] I would start with a consideration of the jurisprudence that pre-dates *KGK* SCC, as many of the decisions addressed judicial deliberation time both before and at the conclusion of the evidence and arguments in a trial.

[114] *R v Mamouni*, 2017 ABCA 347 [*Mamouni*], is an early example of where the differing opinions were stated. Justice Watson stated that *absent exceptional circumstances*, the time taken to determine an interlocutory motion is to be considered as part of the ceilings enunciated in *Jordan* (see *Mamouni* at paras 51-55). On the other hand, Slatter JA held that the time it takes to render a reserved decision is not delay. He was of the view that section 11(b) of the *Charter* does "not require a trial judge to rush to judgment or cut corners in rendering a decision" (*Mamouni* at para 88). Justice Crighton found it unnecessary to determine the issue in that appeal.

[115] In *R v King*, 2018 NLCA 66 [*King*], Barry JA, writing for the Court, dismissed a Crown appeal of a case stayed as a result of a section 11(b) *Charter* breach arising from judicial deliberation delay regarding interlocutory applications. In his reasons, he stated that the time it took the Court to render reserved decisions should generally be considered part of the inherent time requirements of the case, included in the *Jordan* ceilings. In his view, such delay should not be considered an exceptional circumstance (see *King* at para 139). While concurring in the result, Hoegg JA disagreed on this point. Although she found that it was not necessary to determine the issue, she stated that she was "disinclined to the notion that the time a judge takes to decide pre-trial applications should be included in the 30-month presumptive

ceiling" (*ibid* at para 180). Of interest, O'Brien JA concurred with the reasons of Hoegg JA.

[116] In *R v Millar*, 2019 BCCA 298, Fitch JA, writing for the Court, declined to definitively consider the issue of the treatment of reserved deliberation time for interlocutory decisions. Nonetheless, he determined that, in that case, the total of six weeks of judicial deliberation time, which included deliberation time of the preliminary inquiry judge regarding committal, would not be excluded from the overall calculation of total delay.

[117] On the other hand, in *R v Brown*, 2018 NSCA 62 at paras 72-75 [*Brown*], the Nova Scotia Court of Appeal found that mid-trial judicial deliberation time should be excluded (i.e. subtracted) from the *Jordan* ceilings.

[118] In *R v KGK*, 2019 MBCA 9 at para 218 [*KGK* MBCA], I expressed my agreement with *Brown* in this regard.

[119] Similarly, in *Chang*, the Alberta Court of Appeal emphasized the related themes of "an unwillingness to subordinate quality justice to speed . . . and judicial independence" (at para 71). The Court explained (*ibid* at para 75):

> Public confidence is the cornerstone of judicial independence. The quality of reasons and decisions contributes to public confidence. So does promptness. When the two come into conflict, however, quality justice must take precedence over the ticking of a clock that began long before the judge was able to begin deliberating.

[120] The Court further stated that it did not endorse the view that interlocutory judicial deliberation delay should only be deducted from the *Jordan* ceilings in cases of exceptional circumstances.

[121] The Quebec Court of Appeal has consistently held that delay caused by judicial delay in rendering an interlocutory decision should be classified as exceptional. For example, in *R c Rice*, 2018 QCCA 198, the Court stated that reserving judgment on interlocutory matters "can put the brakes on a trial" and "may constitute discrete events" (at para 86). In *St-Pierre c R*, 2024 QCCA 341 [*St-Pierre*], Dutil JCA confirmed that the Court considered the time required to render an interlocutory ruling to be a discrete event when it has the effect of slowing down proceedings (see para 28). Also see the post-*KGK* SCC decision of *Rivera c R*, 2024 QCCA 1281 at para 44, which confirms *St-Pierre* in this regard.

[122] I pause here to note that, like *Chang*, the above statements appear to recognize that it is only judicial deliberation time that results in a delay of the trial that is to be considered.

[123] Post-*KGK* SCC, the Ontario Court of Appeal considered the issue in *R v Mengistu*, 2024 ONCA 575 [*Mengistu*]. In that case, the Court was dealing with the question of judicial deliberation time regarding committal after a preliminary hearing. Justice Monahan, writing for the Court, held that interlocutory judicial deliberation time should *generally* be considered to be already included in the *Jordan* ceilings and not be deducted from them. He supported his conclusion for the reasons succinctly summarized in *Flett* as follows at para 54:

> (1) *Jordan* implicitly accounted for judicial deliberation time for interlocutory decisions, (2) excluding judicial deliberation time for interlocutory decisions "would run counter to *Jordan*'s emphasis on certainty and predictability as a means to counter the culture of complacency towards delay in the criminal justice system" (*Mengistu* at para 31), and (3) "the presumptive time limits are intended to promote accountability on the part of all participants in the criminal justice system, including the courts themselves" (*Mengistu* at para 33).

[124] However, Monahan JA does not appear to have entirely closed the door on the issue. He considered the Crown's alternative argument that judicial deliberation time to determine the issue of committal was an exceptional circumstance in that case (see *Mengistu* at paras 36-37). Rather than outright rejecting the argument on the basis that mid-trial judicial deliberation time could not be excluded from the *Jordan* ceiling, he analyzed the argument on its merits, finding that the issue of committal in that case did not raise a number of complicated issues.

Discussion

[125] In *Mengistu*, Monahan JA stated that the issue of judicial deliberation delay in determining interlocutory matters was not addressed in *KGK* SCC and remained unsettled (see *Mengistu* at para 23).

[126] A review of the reasons in *KGK* SCC, *Mengistu* and *Flett* has led me to reconsider my *obiter* comments in *KGK* MBCA regarding the issue of judicial deliberation time for interlocutory rulings. For the reasons below, I am now of the view that save for instances where exceptional circumstances exist, such time should generally be included in the *Jordan* ceilings.

[127] In support of this conclusion, I would note that in *KGK* SCC, Moldaver J was careful to address the difference in the impact that delay can have on trial fairness pre- and post-evidence and argument. This is because the longer a trial is delayed, the greater the risk of loss or degradation of witnesses, evidence, and faded memories. These concerns are largely attenuated once the evidence is preserved in the record (see *ibid* at para 60).

[128] Next, I am cognizant of the comment made by leMaistre JA in *Flett* at para 57, wherein she stated:

> *Jordan* is clear that the presumptive ceilings reflect the inherent time requirements of a case. This includes "additional time to account for the other factors that can reasonably contribute to the time it takes to prosecute a case" (*ibid* at para 53), "the increased complexity of criminal cases since *Morin*" (*ibid*) and the role that process plays in the system (see *ibid*). In reasons concurring in the result, Cromwell J explained that the inherent time requirements of a case include "dealing with pre-trial applications" (*ibid* at para 176).

[129] I agree in general with the reasons enunciated in *Mengistu* for including judicial deliberation delay in the *Jordan* ceilings. However, I also recognize that there may be circumstances where judicial independence could be impacted where a trial judge is rushed to give a ruling on a significant or complex interlocutory matter.

[130] I would also note that the position that judicial deliberation time can be deducted from the *Jordan* ceilings if it amounts to an exceptional circumstance is similar to that taken by Watson JA in *Mamouni* (see para 55).

[131] Ultimately, it is my view that the above position balances the principles of judicial independence recognized in *Chang* and *KGK* SCC with

certainty and predictability as a means to counter the culture of complacency toward delay and the promotion of accountability for all participants in the justice system, including the courts, as recognized in *Jordan* and *Mengistu*.

[132] Applying the above, I am of the view that the trial judge's ruling that the no evidence motion was initially a discrete event deserves deference. The resulting delay due to judicial deliberation was the consequence of this event.

Exceptional Circumstance—Death in the Prosecuting Crown's Family

[133] The accused does not dispute that the death in the prosecuting Crown's family constituted exceptional delay. However, he submits that because the Crown was not available on some of the dates that he and the Court were available (which cannot be determined from the record), some of the delay should be attributed to the Crown. In support of his position, he argues that a different prosecuting Crown who could have been available on those dates should have been assigned. In this regard, he submits that the fact that the second prosecuting Crown had assumed conduct of the file for the May 11, 2023 continuation date reinforces his position. I disagree.

[134] First, there is no indication in the record as to exactly when the second prosecuting Crown was assigned the file or the reason for the reassignment.

[135] More importantly, a review of the email correspondence between the trial coordinator, the Crown's office and defence counsel indicates that while the trial coordinator offered continuation dates in April, the parties were not all available. The parties responded by providing several continuation dates consisting of all of the dates on which defence counsel said he was

available, spanning from March to July 2023. None of those dates were among those offered by the trial coordinator and were presumably unavailable. Nonetheless, the record suggests that after consulting with the trial judge, the trial coordinator was able to confirm the May 11, 2023 date.

[136] There is no indication on the record as to why the prosecuting Crown was reassigned or that any reassignment of a prosecuting Crown would have necessarily resulted in an earlier continuation date. Moreover, and importantly, whether the Crown has reasonably mitigated the delay from an exceptional circumstance is subject to deference (see *MS* at para 17). I am not convinced that the trial judge erred in attributing the entire delay to an exceptional circumstance.

Decision Regarding Total Delay

[137] In the result, the trial judge did not err in deducting eighty-three days as an exceptional circumstance based on the discrete event of the no evidence motion and the subsequent judicial deliberation delay. I agree that eighty-seven days should also be deducted for the exceptional circumstance of the death in the prosecuting Crown's family. Thus, as was found by the trial judge, 170 days will be deducted from the total delay of 676 days. The result being that the evidence and arguments were completed within 506 days or approximately 16.6 months of the laying of the charge, a period within the *Jordan* ceiling of eighteen months for provincial court matters.

Conclusion and Decision

[138] The accused has not demonstrated that the trial judge erred in dismissing his no evidence motion on the basis that the charge did not

particularize a designated offence that he was alleged to have facilitated pursuant to section 172.1(1)(b) of the *Code*, or in her conclusion that the evidence of subjective intent to facilitate the commission of one of the designated offences was reasonably capable of supporting an inference of guilt.

[139] Similarly, I am not convinced that the trial judge erred in the inferences she drew in reaching her conclusion that the accused intended to facilitate the offences of sexual interference or sexual assault.

[140] Finally, although the issue of judicial deliberation of interlocutory issues was only first raised by this panel, I am of the view that it was caused by the discrete event of the no evidence motion. I agree with the overall conclusion of the trial judge that the total delay from the laying of the charge until the conclusion of the evidence and arguments fell within the *Jordan* ceiling of eighteen months for matters dealt with in the provincial court.

[141] In the result, the appeal is dismissed.

Cameron JA

I agree: Spivak JA

I agree: Turner JA