NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Farler***, 2013 NSCA 13

Date: 20130130
Docket: CAC 379999
Registry: Halifax

Between:

Timothy Charles Farler

Appellant

v.

Her Majesty the Queen

Respondent

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Restriction on publication: Pursuant to s. 486(4) of the *Criminal Code*.

Judges: Oland, Fichaud and Beveridge, JJ.A.

Appeal Heard: November 19, 2012, in Halifax, Nova Scotia

Held: Appeal allowed in part, per reasons for judgment of Beveridge, J.A.; Oland and Fichaud, JJ.A. concurring.

Counsel: Appellant, in person
Jennifer A. MacLellan and Timothy O'Leary, for the respondent

Order restricting publication – sexual offences

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(*a*) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 172, 172.1, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.02, 279.03, 346 or 347,

(ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or

(iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16 and 18), 153 (sexual intercourse with step-daughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or

(*b*) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in any of subparagraphs (*a*)(i) to (iii).

Reasons for judgment:

INTRODUCTION

[1] Mr. Farler's legal odyssey began in 2002 when he was charged with sexual offences based on allegations by multiple complainants. In December 2003 he was convicted by a jury of 12 of those offences involving five of six complainants. The convictions were overturned by this Court due to legal error by the trial judge in his jury instructions (2006 NSCA 42). In that appeal Mr. Farler also asked for the remedy of a stay of proceedings based on delay. The Court found that the delay was not unreasonable and hence no violation of Mr. Farler's right to be tried within a reasonable period of time. A new trial was ordered.

[2] Mr. Farler again sought a stay based on delay before the Honourable Justice Robert W. Wright of the Nova Scotia Supreme Court. The application was dismissed on November 29, 2007 (2007 NSSC 380).

[3] At some point in time, Mr. Farler, with the consent of the Crown, re-elected to be tried by judge alone. His new trial was held before the Honourable Justice Arthur J. LeBlanc January 20 to February 10, 2011 on an indictment containing six counts tied to four complainants. The Crown offered no evidence on one count. It was dismissed. On the remaining counts, Justice LeBlanc reserved his decision until May 12, 2011. He delivered oral reasons which are unreported.

[4] The trial judge acquitted the appellant of three counts of sexual assault and convicted him on two counts in relation to one complainant. On February 12, 2012 the appellant was sentenced to two years' incarceration. Ancillary orders were issued prohibiting possession of firearms and weapons, mandating SOIRA registration, and prohibiting attendance at various types of locales pursuant to s. 161 of the *Criminal Code*.

[5] Mr. Farler appeals against conviction and sentence. He seeks to rely on fresh evidence and complains that the convictions cannot stand because the trial judge improperly used similar fact evidence, made legal error in his analysis concerning vitiation of consent, misapprehended the evidence, and the verdicts are unreasonable. The Crown cross-appealed sentence, complaining that the SOIRA

order was not in accord with what the *Criminal Code* mandated. The Crown subsequently abandoned its cross-appeal.

[6] For the reasons that follow, I would quash the conviction on the second count, allow the appeal from sentence with respect to the prohibition order under s. 161 of the *Code*, but otherwise dismiss the appeal with respect to the conviction on the first count and affirm the sentence of 24 months' incarceration.

ISSUES

[7] The appellant is self-represented on this appeal, as he was on his first appeal from conviction (on which, as described above, he was successful). The Notice of Appeal sets out 12 grounds of appeal. One ground was abandoned. There is some overlap amongst others. Based on the appellant's factum and submissions, the grounds can be conveniently consolidated into eight questions:

1. Did the trial judge err by improperly using similar fact evidence?

2. Did the trial judge err in how he found consent to have been vitiated?

3. Did the trial judge misapply the burden of proof?

4. Did the trial judge misapprehend the evidence?

5. Are the verdicts unreasonable or not supported by the evidence?

6. Is the proffered fresh evidence admissible?

7. Did the trial judge err in principle or by imposing an unfit sentence?

8. Did the trial judge err in law in granting an order under s. 161 of Code?

[8] Before examining the issues engaged by these questions, factual context is necessary. I will not review all the details painstakingly elicited at trial with respect to residences, school years and the relationships between the complainants

and the appellant. An overview will suffice. Additional factual details can be added as needed to address the arguments of the appellant.

FACTS

[9] Three complainants testified. Two were brothers, BKT and RT – younger by four years. The third complainant was VS, a friend of both brothers. It was common ground that the appellant first met BKT in 1981. BKT's and RT's parents had separated. Their mother sought the assistance of the Big Brothers and Big Sisters organization to provide a positive male presence in her boys' lives. BKT was originally matched to the appellant's roommate. The match was reportedly an excellent one and they enjoyed a very positive relationship.

[10] The roommate encouraged the appellant to get involved in the organization. He did so. His first match as a Big Brother was with JC in November 1981. The appellant and his roommate and their respective Little Brothers would go to hockey games, movies and other events together, and with a group of other companionable Big Brothers.

[11] The appellant and his roommate were members of the Armed Forces. The appellant's roommate was posted to Toronto in June 1982, thereby dissolving his match with BKT as a Big Brother. BKT was put on a waiting list for another match with a suitable Big Brother. The appellant and his Big Brother circle of companions expressed a desire to keep BKT as part of their group. At around this time, JC's mother re-married. This would ordinarily end his eligibility to be a Little Brother. Nonetheless, the appellant continued to be JC's Big Brother.

[12] The Big Brothers organization agreed to have the appellant act as the Big Brother to BKT effective September 1982. The appellant's role as Big Brother to both JC and BKT continued until JC's departure from the program in August 1983. There was no suggestion of any impropriety between the appellant and JC.

[13] The appellant lived at four locations throughout the time period covered by the charges against him: 190 Taranaki Drive and 188 Taranaki Drive, Dartmouth, Lumsden Crescent in Lower Sackville, and 425 Cow Bay Road, Dartmouth. The dates he moved into and from these locations took on some significance at trial. I will refer to these later.

[14] For now, it is sufficient to say that it is known that the appellant moved to 190 Taranaki Drive in September 1982, a house which he shared with others. It was at this address that BKT testified that sexual abuse began. He said he was 12 or 13 years old. There was a kitchen party. Alcohol was offered to BKT by co-tenants of the appellant. BKT drank in front of the appellant. The wine made him feel good. He went to sleep in the appellant's bed. He recalled little of the peripheral details. When he woke the appellant was fondling his penis.

[15] After that weekend, they drank together almost every weekend. He could not recall a weekend that sexual abuse did not happen. They would drink a little bit and then go to bed. The fondling would start. The manual stimulation would cause BKT to ejaculate. The sexual incidents progressed to the appellant performing oral sex on BKT.

[16] BKT also described one act of anal intercourse and two incidents of attempted anal intercourse. The attempts stopped when BKT recoiled or made some noise indicating it hurt. With respect to the completed act of anal intercourse, BKT said he was really drunk, passing out. He was only semi-aware of what was going to happen, then it dawned on him that the appellant's penis was already in. He did not feel pain, but was in a state of shock.

[17] The sexual incidents continued when the appellant moved to Lumsden Crescent in Lower Sackville. The consumption of alcohol was routine. BKT said there was a lot of sexual activity, mostly oral sex being performed by the appellant on BKT. BKT described going to the Nova Scotia Liquor Commossion with the appellant frequently. BKT said he would help chose what the appellant was going to buy for them to drink.

[18] BKT also described going camping at different locations. One particular location was Campers' Villa. He said they went there maybe a dozen times. He later said it may have been two dozen. The timing was vague. Some trips were with many others. BKT said VS was there one time. They all drank beer and hard liquor. VS was two years younger than BKT. They slept in close proximity in the same tent. BKT testified the appellant reached to play with him, BKT rolled over to avoid being groped. BKT said he then heard rustling and other noises, the same kind of noises when the appellant had fondled BKT. BKT believed the appellant

was doing the same thing to VS. BKT said he could smell the distinctive smell of sex.

[19] BKT also described other incidents where VS stayed overnight with him and the appellant in the appellant's bed at Taranaki Drive. He said he heard the appellant remove VS's underwear, and hit the floor. BKT testified that the appellant molested him as well while VS was in the same bed.

[20] The evidence of BKT with respect to what did or did not happen when the appellant purchased and moved to 425 Cow Bay Road was measurably more vague. BKT testified that he moved into the appellant's home in the summer of 1986. He used his trip to Vancouver for Expo 86 with the appellant as a reference point. However, the appellant testified that he did not buy the house at 425 Cow Bay Road until May 1987. The Crown admitted the appellant was correct on this point. During the trial the Crown and defence tendered a number of Agreed Statements of Facts. One of these established that the appellant purchased 425 Cow Bay Road on May 29, 1987. Nothing much turns on this error by BKT.

[21] It does make it clear that BKT was 17 years old when he moved into 425 Cow Bay Road. The appellant was no longer his 'Big Brother'. Ordinarily a Big Brother and Little Brother relationship is dissolved when the Little Brother turns 16. For BKT, this would have been in April 1986. The relationship can be extended for up to a year if the parties involved believe it would be beneficial. All agreed the relationship continue until BKT turned 17, which was in April 1987.

[22] As already noted, BKT moved in with the appellant in the summer of 1987. At first he was working and paid to live with the appellant. Then the appellant offered to let him live rent free if BKT went back to school and successfully completed his grade 11. BKT agreed. He had his own bedroom. He said there were sexual incidents there, but they were less frequent. He testified that he had some "fuzzy references", but nothing specific. The appellant would come in to his bedroom, and BKT would shy away or stop him from doing anything. After getting his grade 11, he enrolled at a program at the Vocational School for the year 1988-89. During this school year he moved back to his mother's. His evidence was that it was in 1988 he made that move.

[23] Six months after moving out, he asked the appellant if he could move back in. He did so in the spring of 1989. After that time, nothing really happened between them. They had a good understanding that BKT was there to rent and live. In his words "they were just roommates".

[24] BKT continued to live with the appellant until he moved to Ontario to live with his father in 1991. He continued to have a friendly relationship with the appellant until charges were laid in 2002.

[25] Although the trial judge acquitted the appellant of all allegations of sexual assault alleged to have been committed against VS and RT, some reference to their evidence is necessary to understand at least some of the appellant's complaints of error by the trial judge.

[26] VS testified that he was 14 years old when he first met the appellant at BKT's house. VS said he went to activities with the appellant and BKT such as hockey games, pizza nights and movies. He said at Taranaki Drive the appellant provided an inexpensive alcoholic drink called Golden Glow which he and BKT drank together. A man nicknamed Stubby was present and also a couple. VS claimed the woman became upset that the appellant had supplied alcohol to these teens, even to the point of threatening to call the police.

[27] Also at Taranaki Drive, one night VS got 'hammered' and crashed in the appellant's bed. When he woke, the appellant was fondling his penis and masturbating. In addition, VS described being the victim of sexual incidents at Campers' Villa and at the appellant's homes at Lumsden Crescent and 425 Cow Bay Road. He said he was generally 14-17 years of age when these occurred. They consisted of the appellant fondling, performing oral sex on him, and once an attempt by the appellant at anal intercourse. On all of these occasions the appellant supplied alcohol with VS drinking to excess, sometimes to the point of passing out.

[28] VS testified that on one camping trip to Campers' Villa, he, BKT and the appellant slept in the same tent. On the first night, he was not assaulted, but he claimed to have seen BKT being sexually assaulted by the appellant while he was beside him.

[29] RT testified that he had two Big Brother relationships. Both were with couples. There was nothing eventful about those relationships. He drank alcohol at a very young age, including many times that the appellant supplied it to him. RT said he was sexually, emotionally and physically abused by the appellant from age seven or eight until he was almost 14 years old. Most of the claimed sexual abuse was when RT lived with the appellant at 425 Cow Bay Road when RT was about 14 years old. On each occasion alcohol was involved, with RT consuming 12 or 14 drinks to the point of inebriation. He described other teens being present during the drinking.

[30] The appellant testified. He denied any sexual incidents with either BKT or VS as described by them. Instead he said that he began a consensual sexual relationship with BKT in November 1988 which lasted until the end of May 1989. BKT would have been a young adult – well over the age of 19, turning 20 in April 1989. The appellant also said that he had seven or eight sexual encounters with VS, but that these were consensual and happened from January or February 1990 to October 31, 1990. The appellant denied any sexual incidents with RT.

[31] For a variety of reasons, the trial judge found that due to the implausibility of certain aspects of RT's evidence, he had a reasonable doubt and acquitted the appellant on that charge. The trial judge was sceptical about the appellant's claim that he was carrying on a sexual relationship with VS. The judge accepted the evidence of the appellant that VS had called him on April 5, 2001 and tried to extort $70,000 for the benefit of RT. Again, he was left with a reasonable doubt about the credibility and reliability of VS's evidence and hence acquitted the appellant of the two counts that pertained to his allegations.

[32] The trial judge did not believe the evidence of the appellant that he and BKT had a consensual sexual relationship from November 1988 to the spring of 1989. Instead, he accepted the evidence of BKT and found as a fact that the appellant sexually assaulted BKT from when BKT was 13 years of age until he was 18 or 19. Further details of the reasons he gave will be provided when analyzing the appellant's complaints of legal error.

ANALYSIS

Use of Similar Fact Evidence

[33] The appellant asserts that similar fact evidence is presumptively inadmissible. He complains that the Crown did not apply to admit similar fact evidence. There was no *voir dire* to determine admissibility, yet the trial judge relied on similar fact evidence to convict. The two categories of 'similar fact evidence' cited by the appellant are the attempts or the act of anal intercourse that the appellant says occurred outside the time frame of the indictment, and the evidence of the appellant supplying alcohol to VS and RT.

[34] The appellant is quite correct in saying that similar fact evidence is presumptively inadmissible unless the Crown satisfies the trial judge that in the context of the case, the probative value of the evidence in relation to identified issues outweighs its potential prejudice (*R. v. Handy*, 2002 SCC 56, para. 55). The appellant is also correct that evidence of criminal or morally repugnant acts falling outside a count in an indictment is not admissible to prove the charges falling within the counts (*R. v. D.M.*,[2003] O.J. No. 1404 (C.A.)). That is, unless of course, a judge correctly determines that the evidence is admissible for a legitimate purpose or the probative value outweighs its prejudicial effect. However, I am not convinced that the trial judge committed any error, let alone one that would justify quashing the conviction. I say this for the following reasons.

[35] The appellant was represented at trial by counsel. No objection was taken to any of the evidence led by the Crown. The Crown did not ask the trial judge to consider evidence falling outside any count as evidence with respect to any of the charges. The only comment by the trial judge about the potential use of evidence from one count to another was "I remind myself that I cannot apply the evidence of one count to prove another".

[36] Contrary to the submission of the appellant, there was really no evidence of criminal or disreputable acts said to have been committed by the appellant outside the time frame of the counts set out in the indictment. The counts in the indictment with respect to the allegations of BKT were:

> 1. that he between the 4th day of January, 1983 and the 11th day of August, 1988, at or near Cole Harbour, in the County of Halifax; at or near Lower Sackville, in the County of Halifax; at or near Eastern Passage in the County of Halifax; and at or near Truro, in the County of Colchester, in the Province of Nova Scotia, did commit a sexual assault on BT, contrary to Section 246.1(1)(a) of the *Criminal Code*, S.C. 1980-81-82-83, as amended;
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> 2. AND FURTHER that he between the 12 day of December, 1988 and the 1st day of January, 1993, at or near Eastern Passage, in the County of Halifax and at or near Truro, in the County of Colchester, in the Province of Nova Scotia, did commit a sexual assault on BT, contrary to Section 271(1)(a) of the *Criminal Code*, R.S.C. 1985, as amended;

[37] BKT testified that sexual incidents started when he was 12 or 13. He would have turned 12 in April 1981, and had his 13th birthday in April 1982. But BKT was adamant that the first incident of sexual abuse happened when the appellant was living at 190 Taranaki Drive. The appellant did not move there until September 1982. BKT acknowledged in direct examination that he must have been 13 when the abuse started. He described the gradual progression of the sexual abuse. With respect to the incidents of actual or attempted anal intercourse the most BKT could say was:

> **A.** It was, you know, the same thing for quite a while and then we moved on, you know, to . . . to the oral and then, like I say, there was this one time where I believe it was the wintertime and I'm only going by some of the things that happened like around that time. Like I'm pretty sure it was around Christmas but I'm not a hundred percent certain because in all honesty, there isn't anything that I can . . . to judge it again.

[38] BKT said there were three incidents altogether, but only two occurred at Taranaki Drive. The second incident was also at Taranaki Drive. BKT said it was on this occasion that anal intercourse occurred. In terms of timing, all he could say was a time had passed since the first time. He described his condition as:

> **A.** The second time, we were drinking and we were really drinking cause I . . . I remember being so drunk that the room was spinning in some respects. Like, in terms of the memories of . . . of the days I was drinking, that was one of the memories I have of . . . of being really drunk, really intoxicated and just like every other time, we had . . . had gone to bed. It wasn't . . . it wasn't, from my

> recollection, close to the time, the first time, do you know what I mean? There was . . . there was a . . . there was a time had passed between the first . . . that . . . the first time and this night. And I don't remember exactly what we were doing that night but . . . and I don't remember if there was a big party in the house but we were . . . like I say, we were drinking quite a bit and we went to bed and the . . . see, and this is where it kind of gets a little grainy because I . . . I honestly was. . . was passing out, like I was falling asleep and then I remember . . . I remember Tim playing with me.

[39] Since the appellant did not move from 190 Taranaki Drive until approximately June 1984 there were two winter time frames for the act of anal intercourse to occur - the winter of 1982-83 or the winter of 1983-84. If the act occurred on or after January 4, 1983 it was within the time frame of the indictment. After a comprehensive review of the evidence of BKT and the appellant, the trial judge set out key findings. They were:

> I find as a fact that the accused, Mr. Farler, sexually assaulted BKT from the time he was 13 years of age until he was 18 or 19 years of age. These assaults began when Mr. Farler was still a Big Brother to [JC], although not in his presence. These occurred at 190 Taranaki Drive, at Lumsden Court, and at 425 Cow Bay Road and on camping trips. On many occasions, these incidents occurred while BKT was drunk or highly intoxicated to the point that he would be incapable of consenting. Additionally, he would have been incapable of consenting in law when he was under the age of 14.
>
> The assaults included oral and anal sex, although I am unable to conclude that the anal sex itself occurred after January 4th, 1983. However, I emphasize that I am satisfied beyond a reasonable doubt that sexual assaults did occur within the effective dates of the offence.

[40] In my opinion, it was open to the trial judge to find that the acts of attempted and actual anal intercourse occurred within the time frame of the indictment. It was also open to the trial judge to give the benefit of the doubt to the appellant and find the Crown's evidence was not clear and cogent enough for him to be satisfied beyond a reasonable doubt that the act of anal intercourse occurred on or after January 4, 1983.

[41] Giving the benefit of that doubt to the appellant does not transform the evidence about anal sex into evidence of criminal or morally reprehensible conduct outside the time frame of the indictment led by the Crown and used for

the improper purpose of propensity reasoning with respect to assessing if the Crown had proven allegations that clearly fell within the time frame of the indictment.

[42] The appellant sets out his argument in his factum as:

> 70. The learned trial judge uses the allegations of anal sex as the focal point to find that the sexual assaults did occur within the effective dates of the offence. However, no other examples of sexual assault are detailed in his decision.

[43] With all due respect to the appellant, I am unable to agree that the trial judge used the allegations of anal sex as his focal point or that no examples of other sexual assaults were recited in the decision. The trial judge set out in considerable detail the descriptions by BKT of the manual and oral sex, including how he felt before, during and after the hundreds of incidents. He accepted the evidence of BKT and did not believe the appellant's denials, nor left in a reasonable doubt by them or by any other evidence or lack thereof.

[44] With respect to alcohol, all three complainants described the appellant purchasing and providing alcohol to them. Obviously, the evidence of BKT was perfectly admissible. It went to explain the circumstances of why he did not do more to resist the sexual advances of the appellant and his reliance and relationship with the appellant. It also demonstrated that at least on some occasions he had consumed sufficient alcohol so as to be incapable of consent.

[45] It is only the claimed improper use by the trial judge of the evidence of VS and RT that the appellant objects to. The trial judge made a number of clear findings. He correctly charged himself that he could accept some, all or none of a witnesses' testimony. He carefully reviewed the prior inconsistent statements made by BKT and of the appellant. He said:

> All things considered, these instances of prior inconsistent statements do not shake BKT's credibility or reliability, nor is his credibility and reliability affected by his evidence that he decided to give a statement to the RCMP because of the other complainants, particularly his brother RGT, could have issues of credibility.

...

As I've indicated, Mr. Farler, like other witnesses, may be examined or has been examined on prior inconsistent statements. I can use these statements not only to assess his credibility, but I can also use them to determine what actually happened.

I do not believe Mr. Farler's evidence that all of his sexual relations with BKT were consensual and that they all occurred after BKT was 19 years of age or that they occurred after the Grey Cup party in 1988.

Mr. Farler denied that there was a non-consensual sexual relationship - in other words, denied sexually assaulting BKT - between 1982 and 1990. He claimed that he never touched him inappropriately during this period. He maintains that there was a consensual sexual relationship only beginning, as I indicated, Grey Cup night in 1989 and lasting until June or July 1990.

...

The significant issue affecting whether I believe Mr. Farler or whether I am left in a doubt by his evidence is his claim that there was a seamless transition from Big Brother-Little Brother relationship to being roommates and then to having a consensual sexual relationship with BKT. I find it incredible that Mr. Farler could transition from being a mentor or friend to being a friend with benefits, as he described it, and that the relationship became a consensual sexual relationship fairly suddenly.

[46] Later the trial judge dealt with the specific denial by the appellant that he had supplied alcohol to any of the complainants when they were minors.

I do not accept Mr. Farler's evidence that he did not provide alcohol to the complainants when they were minors. I find the complainants' evidence convincing on this point. I also accept C. T.'s evidence that on at least one occasion, she visited the residence and heard discussions involving BKT of the amount of drinking going on.

RGT described parties where alcohol was made available to minors, while WVS said he accompanied Mr. Farler to the liquor store when Mr. Farler would buy liquor for both of them. He described having liquor at Taranaki Drive furnished by Farler with the woman threatening to call the police.

> I conclude that Mr. Farler provided liquor to BKT from at least the age of 13. I also do not believe his evidence that BKT did not accompany him to the liquor store at a very early age. Mr. Farler changed his evidence on this point in cross-examination. I am not left in any doubt on this point.

[47] I am not at all certain that the reference by the trial judge to the evidence of the complainants as being convincing is problematic in terms of offending the prohibition of the Crown being able to tender or rely on other evidence of discreditable conduct. Supplying liquor to teenagers is legally wrong, but in these circumstances, it does not engage the danger of propensity reasoning – that is by virtue of that type of behaviour it might be used to infer that the accused is the kind of person who committed sexual assault on the complainant BKT.

[48] It is also important to note that in relation to the evidence of RT, the trial judge did not believe his evidence claiming that the appellant supplied liquor to him when he lived at Lumsden Crescent. Furthermore, much of the evidence by VS about the appellant and alcohol being purchased and provided was in relation to when VS and BKT were together. That was the case when VS said the woman was upset at Taranaki Drive to the point of threatening to call the police. There was considerable direct evidence from VS that, if accepted by the trial judge, confirmed the evidence of BKT.

[49] As noted in the trial judge's reasons quoted above, the appellant gave inconsistent evidence about having taken BKT to the liquor store with him at an early age. When confronted by the inconsistency, the appellant changed his evidence. There was also other evidence that tended to confirm the evidence of BKT of habitual drinking introduced by the appellant. Immediately after finding he was not left in any doubt (a standard to which he need not have been satisfied) the trial judge said:

> I am satisfied that Mr. Farler entered into a bet with BKT that neither would drink alcohol while Mr. Farler was at sea. In his letter, BKT states that he could not wait for Mr. Farler to return so he could start drinking again.
>
> I am unable to accept Mr. Farler's explanation that this was an attempt to stop BKT from drinking with friends because he had seen liquor bottles at BKT's mother's home. While BKT could not recall the specifics of the bet, I am convinced that BKT probably indicated that he wanted to resume drinking with Farler. The authenticity of this letter was not challenged.

> I also accept BKT's evidence that drinking was a regular event when he was with Mr. Farler on weekends wherever Mr. Farler was living. Although BKT had some minor experiences with alcohol before meeting Farler, after he met Mr. Farler drinking became habitual.
>
> He said, for instance, there would be ... when his mother was hospitalized in January 1986, he had parties with liquor in the house. Mr. Farler's own evidence was that he checked with BKT at the time and saw empty liquor bottles in the house.

[50] I would therefore not give effect to this ground of appeal.

Consent

[51] The appellant argues that the trial judge made a number of fatal errors in how he dealt with the issue of consent. To understand the complaints by the appellant, some of the trial judge's reasons bear repeating:

> I find as a fact that the accused, Mr. Farler, sexually assaulted BKT from the time he was 13 years of age until he was 18 or 19 years of age. These assaults began when Mr. Farler was still a Big Brother to [JC], although not in his presence. These occurred at 190 Taranaki Drive, at Lumsden Court, and at 425 Cow Bay Road and on camping trips. **On many occasions, these incidents occurred while BKT was drunk or highly intoxicated to the point that he would be incapable of consenting. Additionally, he would have been incapable of consenting in law when he was under the age of 14**.
>
> The assaults included oral and anal sex, although I am unable to conclude that the anal sex itself occurred after January 4th, 1983. However, I emphasize that I am satisfied beyond a reasonable doubt that sexual assaults did occur within the effective dates of the offence.
>
> **I am also satisfied that Mr. Farler was in a position of authority during this period**. He was, at first, a male role model and a Big Brother to BKT, a boy coming from a difficult family background. He was, indeed, the sole constant adult male in BKT's life. Furthermore, BKT living in his house also created a form of authority in the circumstances.

> That is not to say that every instance of a minor living in the home of an adult could create an authority relationship for the purpose of Section 244. But in the circumstances of this case, I am satisfied that this is so. [My emphasis]

[52] The appellant says there was no evidence of any sexual incidents between January 4, 1983 and April 1983 when BKT turned 14. He also says the conclusion that BKT was intoxicated to the point of incapacity is not supported by the evidence, and the trial judge used the wrong test in finding consent was vitiated by reason of the position of authority by the appellant.

[53] There is substance to some of these complaints by the appellant. However, for reasons I will set out below, any claimed error does not affect the overall verdict by the trial judge that the appellant sexually assaulted BKT between January 4, 1983 and December 11, 1988. The findings by the trial judge could have been more precise about what he found to have happened and when. Having said that, to sustain a conviction in Count #1, the Crown was required to prove beyond a reasonable doubt intentional application of force of a sexual nature within the defined time frame for which the complainant did not consent, and for which the appellant did not have an honest but mistaken belief in consent.

[54] BKT testified that throughout the myriad acts of manual stimulation, oral sex, and the few incidents of anal sex, there was never any conversation before, during or after. BKT said he never consented to any of them. As instructed by the leading authorities from the Supreme Court of Canada the absence of consent is part of the *actus reus* of the offence of sexual assault. Major J., writing for the majority in *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, succinctly summed up the law on this as follows:

> [25] The *actus reus* of sexual assault is established by the proof of three elements: (i) touching, (ii) the sexual nature of the contact, and (iii) the absence of consent. The first two of these elements are objective. It is sufficient for the Crown to prove that the accused's actions were voluntary. The sexual nature of the assault is determined objectively; the Crown need not prove that the accused had any *mens rea* with respect to the sexual nature of his or her behaviour: see *R. v. Litchfield*, [1993] 4 S.C.R. 333, and *R. v. Chase*, [1987] 2 S.C.R. 293.
>
> [26] The absence of consent, however, is subjective and determined by reference to the complainant's subjective internal state of mind towards the touching, at the time it occurred: see *R. v. Jensen* (1996), 106 C.C.C. (3d) 430

> (Ont. C.A.), at pp. 437-38, aff'd [1997] 1 S.C.R. 304, R. v. Park, [1995] 2 S.C.R. 836, at p. 850, per L'Heureux-Dubé J., and D. Stuart, *Canadian Criminal Law* (3rd ed. 1995), at p. 513.

[55] As noted above, BKT swore that he never consented to any of the sexual touching that he says happened. It is abundantly clear that the trial judge accepted the evidence of BKT. In addition to the excerpts of the trial judge's reasons already quoted earlier, the judge also said:

> I found BKT's evidence credible and reliable. Some of his evidence was inconsistent with statements he made to Constable Stewart and with the evidence he gave at the Preliminary Inquiry or at the first trial. However, I am satisfied that his explanation for such inconsistencies do not disturb the reliability and credibility of his evidence.
>
> He gave his evidence in my opinion in a clear and forthright manner. His descriptions of physical events such as Farler's attempts at anal penetration, actual anal penetration, were detailed, specific and convincing. I note as an example his description of anticipating pain from anal penetration and his account of briefly touching Farler's penis then stopping.
>
> In addition, BKT's description of Farler's various homes provided full and detailed description of Farler's bedrooms which were not challenged by Mr. Farler. Sharing a bed appears to have been inconsistent with the policy of Big Brothers organization, because Big Brothers wanted a Big Brother to respect the privacy of a Little Brother.
>
> I find as a fact that BKT slept in Farler's bed with Farler wearing underwear and that eventually he stopped wearing underwear believing that it would only come to a point when he would have to remove it.
>
> As I indicated, BKT described one location when Mr. Farler was performing a sexual act on him and he became aroused and briefly touched Mr. Farler's genitals then stopped. I find this a very frank admission on his part and I find that very persuasive.

[56] BKT was never challenged in cross-examination on his assertion that subjectively he did not consent. It was also open to the appellant to argue to the trial judge that BKT's evidence that he did not consent should not be accepted. This he did not do. Even without that argument, it was up to the trial judge to weigh the credibility of the complainant's claim that he did not consent with all of

the evidence. The trial judge found the complainant to be credible. He accepted his evidence.

[57] The appellant did not argue to the trial judge that the Crown had failed to establish the existence of *mens rea* to commit the offence. The *mens rea* to commit the offence of sexual assault is the accused intention to touch the complainant and knowing of, or being reckless of or wilfully blind to, a lack of consent on the part of the person touched (*Ewanchuk*, at para. 42). He did not testify that he had an honest but mistaken belief that BKT was consenting to sexual activities between January 4, 1983 and December 11, 1988. He claimed there were no sexual activities whatsoever until the night of the Grey Cup in November 1988. That night, and for the next five or six months, the appellant testified they engaged in consensual sexual acts. The trial judge rejected his evidence.

[58] In these circumstances, it was not necessary for the trial judge to have found that sexual incidents occurred between January 4, 1983 and BKT's 14th birthday in April 1983, and hence at an age when he could not validly consent, since the judge accepted the evidence of the complainant that he never consented to any of the activities that occurred in the specified time frame. Having said that, I am unable to agree with the appellant's submission that there was no evidence that sexual incidents occurred when BKT was under the age of 14 – and hence at an age where the law dictates that he could not validly consent to any such acts.

[59] BKT plainly testified that sexual acts started when the appellant lived at Taranaki Drive. The appellant spent two Christmas holidays while living at Taranaki Drive – 1982 and 1983. BKT testified that at the first Christmas, one of the appellant's roommates was on drugs and threw the Christmas tree out into the yard. BKT said he recalled this because the following Christmas they joked that at least this year they had a Christmas tree. BKT added that he knows there were sexual incidents before the first Christmas period, then the tree incident happened. I see nothing unreasonable in the trial judge's conclusion that sexual assaults occurred before BKT reached the age of 14.

[60] I have not overlooked the emphasis the appellant places on an earlier comment by the trial judge in his decision where he said "I note also that the complainants' evidence was on a continuum, and it was not possible to say

whether they were over or under the age of 14 when a given event allegedly occurred". I do not view this comment as a finding of fact that is inconsistent with, and therefore flaws, his later conclusion that the appellant sexually assaulted BKT when he was under the age of 14. The highlighted comment is found in a series of paragraphs where the trial judge spoke of the general principles that govern or at least guide a trier of fact in dealing with historical sexual assault allegations. The complete context of the comment is:

> Generally speaking, when adults testify about events that occurred when they were children, their credibility should be assessed according to the standards applicable to adult witnesses. But when the evidence relates to events that occurred in childhood or adolescence, in my opinion the presence of inconsistencies such as those relating to time, location, the Court should take into account the age of the witnesses at the time of these events. I note also that the complainants' evidence was on a continuum, and it was not possible to say whether they were over or under the age of 14 when a given event allegedly occurred.
>
> Given the number of years that have passed between the reporting of the incidents to the police and the dates of the alleged offence where there was a direct conflict between the evidence of BKT and RGT and WVS and Mr. Farler as to whether these incidents occurred, it is necessary to be cautious before acting on the testimony of the complainants.

[61] The judge's generic comment about the evidence of all three complainants testifying to the continuum of events and their seeming inability to say precisely that for any given event they were over or under 14, is not a finding of fact by the trial judge that he had a reasonable doubt if the appellant sexually assaulted BKT when he was under the age of 14. Reasons for judgment must be read as a whole and should not be read as if they were instructions to a jury, nor viewed "as a verbalization of the entire process engaged in by the trial judge in reaching a verdict" (Doherty, J.A., on behalf of the court, in *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 at 204 (Ont. C.A.), and see also: *R. v. Burns*, [1994] 1 S.C.R. 656).

[62] The second complaint by the appellant about how the trial judge dealt with the issue of consent is the trial judge's comment " On many occasions, these incidents occurred while BKT was drunk or highly intoxicated to the point that he would be incapable of consenting". It is a given that if a person has no capacity to

consent, there can be no issue of there being a reasonable doubt about consent. It simply cannot exist without an operating mind to give or withhold consent. A complainant who is asleep, unconscious or deprived of capacity due to drugs or alcohol lacks the capacity to consent.

[63] In this case, the complainant BKT did not say he was incapacitated from the consumption of alcohol on all occasions that the appellant sexually touched him. His evidence was that usually alcohol was consumed. For example in relation to the very first time he was assaulted he said:

> **A.** As I say, to tell you the truth, I don't . . . it . . . it's not very clear, you know. I . . . I remember going to bed and . . . and, you know, to tell you the truth, I don't know whether I was drunk, whether I wasn't drunk because in all honesty, my memory is . . . is of kind of the events not the surrounding what . . . how we got there.

[64] This is in keeping with his earlier description about the effect that the alcohol had on him that particular night:

> **Q.** Okay. How much of that did you have to drink?
>
> **A.** I honestly couldn't tell you in terms of quantity.
>
> **Q.** How did you feel?
>
> **A.** I felt good.
>
> **Q.** When you say you "felt good", what do you mean?
>
> **A.** I was semi-intoxicated, I guess. Like I wasn't stup- . . . in a drunken stupor but I could feel it.

[65] After the first night, drinking alcohol was a regular occurrence but did not always lead to intoxication and certainly not to the point of incapacitation. For example BKT testified:

> **Q.** Now, you said a couple of things there that I want to follow up on. Earlier you testified that at those residences, specifically Taranaki and Lumsden, that you

spent almost every weekend with Mr. Farler. On how many of those weekends would there be sexual interference from Mr. Farler?

A. In terms of numbers, again I . . . I can't tell you. Often, you know, very often.

Q. And when there was sexual interference, how often was alcohol involved?

A. Quite a bit. I'd say most of the time.

...

Q. Sure. Tell me what happened.

A. Well, I remember . . . you know, to tell you . . . I basically . . . it always . . . it was always like it was scripted. It was like we'd drink a little bit, we'd go to bed. At a certain point in time Tim would, you know, just start to . . . to fondle me or play with me or whatever, you know. As I say, I don't remember anything in terms of taking my underwear off. I don't remember anything in terms of . . . of movement or positioning. It just seemed to happen and . . . and, like I say, in all honesty, I just laid there and Tim did what he wanted to do and . . . and then when he was done he'd roll over and went to sleep and I went to sleep.

[66] In relation to sexual assaults when the appellant lived at Lumsden Crescent, BKT testified:

Q. Okay. In the course of these incidents at Lumsden, was there alcohol involved?

A. Yes.

Q. How many?

A. How many incidents or how much alcohol?

Q. How many of these incidents involved alcohol?

A. Oh God, almost all of them. I think by that time that was regularly we were drinking. There wasn't too many times we weren't drinking.

> Q. What impact did the alcohol have on you?
>
> A. Oh I was . . . I was getting drunk. I mean, by that point in time I think it was all about the getting drunk, do you know what I mean? Like, it . . .

[67] If the issue of consent boiled down to one of the Crown claiming they had established a lack of consent by BKT due to incapacitation from alcohol, there would be considerable force to the appellant's complaint. A drunken consent is still a consent. For the vast majority of incidents, BKT did not testify that the consumption of alcohol made him incapable of consenting (see *R. v. Faulkner* (1997), 120 C.C.C. (3d) 377; *R. v. Haraldson*, 2012 ABCA 147). But the trial judge did not find that there was no consent because on all of the alleged incidents BKT was drunk or highly intoxicated to the point of incapacity. All he said was he found that on many occasions this was so. The earlier excerpts show that BKT was not always drunk or highly intoxicated, but there was clear evidence he was sometimes in such a condition, even to the point of incapacity. He testified that:

> **A.** Unfortunately as the time has gone on here, some things have become a little more fuzzy. Some things I remembered, you know, and . . . and have become a little more clear to me as I . . . as I thought about it but again, a lot of the . . . the sexual stuff happened so often that some things just blur together and . . . and a lot of the time I was really drunk.
>
> ...
>
> **A.** ...we were drinking quite a bit and we went to bed and the . . . see, and this is where it kind of gets a little grainy because I . . . I honestly was . . . was passing out, like I was falling asleep and then I remember . . . I remember Tim playing with me.
>
> ...
>
> **A.** I . . . I don't even remember falling asleep honestly. I truly just passed out. I remember . . .
>
> **Q.** When you say passed out, passed out from what?
>
> **A.** From . . . from being drunk.

[68] But as already explained, BKT testified that he never consented to any of the sexual assaults, and the trial judge accepted his evidence as reliable and credible. So whether BKT was incapacitated from being able to consent due to intoxication on some, all, or just a few occasions is quite beside the point.

[69] The last complaint is that the trial judge did not apply the correct test in finding consent was vitiated by virtue of the appellant being in a position of authority *vis-à-vis* BKT. There were two counts of sexual assault in relation to the allegations by BKT. The first count of sexual assault covered the period between January 4, 1983 and December 11, 1988. The relevant *Criminal Code* provision was s. 246.1(1)(a), which provided:

> **246.1** (1) Every one who commits a sexual assault is guilty of
>
> (a) an indictable offence and is liable to imprisonment for ten years…

[70] Throughout this time period, s. 244 defined what constituted an assault, and what circumstances would exclude the existence of consent. The relevant portions stated:

> **244**. (1) A person commits an assault when
>
> (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
>
> (b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or
>
> (c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.
>
> (2) This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.
>
> (3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of

> (a) the application of force to the complainant or to a person other than the complainant;
>
> (b) threats or fear of the application of force to the complainant or to a person other than the complainant;
>
> (c) fraud; or
>
> (d) the exercise of authority.

[71] This section was re-numbered by R.S.C. 1985, c. C-46, as s. 265.

[72] Substantive amendments were made to the *Criminal Code* by Bill C-49 (S.C. 1992, c. 38) which was proclaimed in force August 15, 1992. One of the amendments was the introduction of a statutory definition of consent for purposes of sexual assault and an expanded iteration of when consent is said not to exist. The text is as follows:

> 273.1 (1) Subject to subsection (2) and subsection 265(3), "consent" means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.
>
> (2) No consent is obtained, for the purposes of sections 271, 272 and 273, where
>
> > (a) the agreement is expressed by the words or conduct of a person other than the complainant;
> >
> > (b) the complainant is incapable of consenting to the activity;
> >
> > (c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;
> >
> > (d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or
> >
> > (e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

> (3) Nothing in subsection (2) shall be construed as limiting the circumstances in which no consent is obtained.

[73] The second count in the indictment alleged a sexual assault between December 12, 1988 and January 1, 1993. Since s. 273.1 only came into force as of August 15, 1992, it was theoretically only relevant to the last five months of the second count. The trial judge found that the sexual incidents between BKT and the appellant stopped well before that time – indeed BKT moved to Ontario in 1991. Section 273(2)(c) had no relevance in the circumstances of this case.

[74] The appellant complains that the trial judge erred in law in applying the wrong test to vitiate consent by applying the criteria for vitiation in s. 273.1 which was not in force at the time of the alleged offence. He relies heavily on the decision of this Court in *R. v. L.R.L.*, 2000 NSCA 94 . In that case the decision of a trial judge was overturned. The accused was convicted of several sexual offences, including sexual assault contrary to s. 246.1(1)(a), committed between 1986 and 1990. Similar to the appellant in our case, he argued that the trial judge erred by applying s. 273.1(2)(c) – a section that was not in force at the relevant time. Glube C.J.N.S., writing for the Court, set out the problem with the trial judge's reasoning as follows:

> [93] The trial judge's decision with regard to these incidents is as follows:
>
> > ... The accused was a family friend and he cultivated the friendship of [J.M.A.] through various activities such as a Scout leader, * coach and so forth which caused [J.M.A.] to develop a sense of trust in him. He had confidence in and relied on the accused who was six years his senior at a stage in life when six years is a huge difference. I am satisfied that he abused this position of trust to induce [J.M.A.] to participate in the sexual acts complained of. Accordingly, I find the accused guilty of the charge under section 246.1 at it was at the time. [Emphasis added by Glube C.J.N.S.]

[75] The Court concluded the trial judge erred in law by using the test set out in the language of s. 273.1 in order to convict the appellant. The Crown suggested that "exercise of authority" under s. 265(3)(d) was the same as inducing consent by abusing a position of trust. This was rejected (para. 101-103). A useful discussion of the difference is set out by Morris Manning, Q.C. & Peter Sankoff,

Manning, Mewett & Sankoff: Criminal Law, 4th ed (Markham, Ont: LexisNexis Canada Inc., 2009) at 879-880:

> Section 265(3)(d) provides that no consent will be obtained where the complainant submits or does not resist by reason of the exercise of authority. The term "authority" is not defined in the *Code*, although certain cases of this nature should be easy enough to resolve. At its most extreme, the exercise of authority involves the express or implied use of power to enforce obedience. Military commanders have authority over their subordinates; employers can direct employees; parents, police officers, correctional officers and others will all be in a position of authority over other individuals. So long as the facts establish a real authority relationship, section 265(3)(d) may be engaged.
>
> Less obvious relationships may also come within this definition. In *Matheson*, the Ontario Court of Appeal considered whether a psychiatrist could exercise authority over a patient. Unlike some of the aforementioned relationships, it cannot be said that a psychiatrist has the legal power to enforce obedience and the accused correspondingly contended that he could not be said to have exercised any real authority over the complainant. The Court of Appeal disagreed, holding that what mattered was not the technical nature of the relationship between the parties, but whether the accused had the "power to influence the conduct and actions of others", and in the factual circumstances of the case, "whether the particular relationship has, rightly or wrongly, vested him or her with the ability to control the lives of [the complainant] in such a manner as to be able to extract their agreement to sexual activity".
>
> The *existence* of authority is not enough, however. In order to render a submission invalid, there also needs to be an exercise of such authority, although this does [not] necessarily mean an explicit demand, as the exercise of authority can be inferred from surrounding circumstances.
>
> Section 273.1 is also relevant to this discussion. It provides that no consent is obtained where the accused "induces the complainant to engage in the activity by abusing a position of trust, power or authority". The scope of this section has not really been tested, but it must be broader than section 265(3)(d). Indeed, it is difficult to imagine an "exercise of authority" sufficient to vitiate consent that did not also induce the complainant through the abuse of a position of authority. The few available decisions on point suggest that the threshold for section 273.1 is somewhat lower than what is needed in section 265(3)(d), on the grounds that "the use of the word 'induces' introduces a more subtle form of pressure that can be inferred from the circumstances of the exercise of the power or authority".

See also *R. v. Lutoslawski*, 2010 ONCA 207, at para. 12.

[76] In this case, the trial judge found that the appellant was in a position of authority *vis-à-vis* BKT. I will repeat the key paragraphs:

> **I am also satisfied that Mr. Farler was in a position of authority during this period. He was, at first, a male role model and a Big Brother to BKT, a boy coming from a difficult family background**. He was, indeed, the sole constant adult male in BKT's life. Furthermore, BKT living in his house also created a form of authority in the circumstances.
>
> **That is not to say that every instance of a minor living in the home of an adult could create an authority relationship for the purpose of Section 244. But in the circumstances of this case, I am satisfied that this is so.**
>
> [Emphasis added]

[77] While the appellant does not necessarily agree with the trial judge's finding that he was in a position of authority, he argues forcefully that simply being in a position of authority is not sufficient to vitiate consent within the meaning of s. 244(3)(d) [now s. 265(3)(d)]. I agree. The Crown in its oral submissions stresses that the trial judge early on in his decision correctly referenced the need to find not just a position of authority, but an exercise of that authority in order to vitiate consent. She argues that it is implicit in the trial judge's reasons that he found the appellant exercised his authority to extract consent.

[78] I have no difficulty in saying that there was ample evidence to support the trial judge's finding that the appellant, in the particular circumstances of this case, was at times in a position of not just trust, but authority. But the trial judge did not make a specific finding that the appellant exercised that authority. Relying on implicit findings to uphold a conviction for a criminal offence is a slippery slope. In this case, I need not resolve this issue. As detailed earlier, the trial judge specifically found BKT to be a reliable and credible witness. He accepted his evidence, which included repeated unchallenged assertions that he did not consent to any of the sexual incidents with the appellant. I would therefore not give effect to this ground of appeal.

Misapprehension of Evidence and Reversal of the Burden of Proof

[79] The appellant groups a number of complaints under this heading in his submissions. There can be little doubt that if a judge makes a material error as to the substance of evidence, and that error played a significant role in the reasoning process that lead to a conviction, the verdict cannot be allowed to stand. But as emphasized by the Supreme Court of Canada in *R. v. Lohrer*, 2004 SCC 80, the test is a stringent one. Binnie J., for an unanimous court said:

> 2 ...The misapprehension of the evidence must go to the substance rather than to the detail. It must be material rather than peripheral to the reasoning of the trial judge. Once those hurdles are surmounted, there is the further hurdle (the test is expressed as conjunctive rather than disjunctive) that the errors thus identified must play an essential part not just in the narrative of the judgment but "in the reasoning process resulting in a conviction".

See also *R. v. Schrader*, 2001 NSCA 20; *R. v. Deviller*, 2005 NSCA 71; *R. v. D.D.S.*, 2006 NSCA 34.

[80] The appellant cites but one instance where he says the trial judge was incorrect with respect to the substance of evidence. The appellant testified the first time that BKT stayed overnight at his home on Taranaki Drive was April 1, 1983. The appellant explained the reason for the overnight visit was they had attended a hockey game in Moncton with AS. A terrible snowstorm delayed them. AS slept in the appellant's bed and "BKT had his regular spot on the floor". At one point in his lengthy oral decision, the trial judge said:

> There are also inconsistencies and implausible assertions in Mr. Farler's evidence. For instance, Mr. Farler's evidence was that BKT's first overnight visit was on April 1st, 1983 when they ran into a snowstorm on their way back from Moncton and stayed at his house.
>
> He said BKT slept on the floor and [AS] shared the bed with him. I question his evidence in this respect. BKT claimed that they took a hotel room in Moncton because of the snowstorm. Mr. Farler, on the other hand, claims that it snowed so hard that he could not drive from Taranaki Drive to BKT's residence; yet he had driven from Moncton.
>
> His explanation does not sound credible to me. This version is inconsistent with logic or common sense. It is my conclusion that BKT's version

> that they stayed in Moncton overnight because of the snowstorm is more persuasive.

[81] A review of the transcript reveals that BKT did not in fact testify that he and the appellant had spent an overnight in Moncton due to a snowstorm. However, this error does not come close to being one of substance, or playing an essential role in the reasoning process that lead to the conviction. Whether they stayed overnight in Moncton due to snow or not was of no or little consequence. This was a non issue at trial. BKT's only evidence in direct about going to Moncton was in response to a question by the Crown for him to describe any other trips he took with the appellant. He answered they had driven to Boston, Oakville, Cape Breton, and Truro for coffee, to PEI camping and they drove to Moncton a couple of times.

[82] The only question asked in cross-examination by the appellant about any trip to Moncton to watch hockey was whether it was possible that AS also went. BKT believed so.

[83] The thrust of the trial judge's reason that he did not accept the appellant's evidence was due to the implausibility of the notion raised by the appellant's evidence that he drove from Moncton in a snowstorm and instead of driving BKT to his own home a relatively short distance away, took him to Taranaki Drive. I leave aside the difficulty, if this was the first time BKT spent an overnight at Taranaki Drive, how BKT slept in his regular spot on the floor.

[84] It is true that resolution of the credibility of the appellant was an important issue, as was the reliability and credibility of BKT. This point about coming home from Moncton during a snowstorm or staying in Moncton was hardly a telling one. The trial judge gave detailed reasons for rejecting the evidence of the appellant and for finding the evidence of BKT sufficiently reliable and credible when viewed in light of all the evidence to find beyond a reasonable doubt that the complained of acts occurred without BKT's consent.

[85] The balance of the appellant's submissions is a request to re-evaluate the evidence and come to different conclusions about the credibility or reliability of witnesses, and find a reasonable doubt should have been raised. For example, he argues:

> 160. When the extortion of the appellant coupled with the supporting testimony of BKT is taken into consideration, this should raise a reasonable doubt about the credibility of BKT.
>
> ...
>
> 162. The appellant's position is that the evidence does not support the trial judge's finding regarding alcohol abuse in relation to BKT.

[86] In essence, the appellant suggests that a reasonable doubt should have been found. The assessment of the credibility of witnesses is for the trier of fact. It is not the function of an appellate court to disregard findings of fact made by a trial judge except where those findings are unreasonable or not supported by the evidence. In my opinion, there was ample evidence for the trial judge to make the findings he did. I see no significant misapprehension of the evidence, and at least with respect to the first count in the indictment, evidence to support the findings and ultimate verdict on that count.

[87] The appellant argues that the trial judge erred in law by simply making it a contest between believing the complainant BKT or the appellant; and did not apply the third step in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, which is to consider all of the evidence. I am unable to agree.

[88] In a judge alone trial, he or she is not required to recite the three stage instruction that Cory J. set out in *R. v. W.(D.)* as a useful template to ensure juries do not inadvertently misunderstand or misapply the burden of proof. Here, the trial judge did remind himself of the principles articulated in *R. v. W.(D.)*, where he said:

> In the assessment of Mr. Farler's evidence, it is important to consider the analysis arising from **R. v. W.(D.)** which indicates that if I believe the evidence of Mr. Farler, I must find him not guilty. If I do not believe the evidence of Mr. Farler, but his evidence leaves me with a reasonable doubt, then I must find him not guilty. And if I do not know whom to believe, and that leaves me with a reasonable doubt, therefore I would have to find him not guilty. Even if I am not left with a reasonable doubt by the evidence of Mr. Farler, I must consider whether on the whole of the evidence I am satisfied beyond a reasonable doubt that the Crown has proven his guilt.

[89] In addition, the trial judge instructed himself on the twin principles of the presumption of innocence and the requirement of the Crown to prove its case beyond a reasonable doubt, and that the burden never shifts to the accused.

[90] The trial judge did not believe the evidence of the appellant, nor did he find that it raised a reasonable doubt. Detailed reasons were given for these conclusions. The appellant says it was the third step that was missing – a reflection or consideration of whether on the whole of the evidence was there a reasonable doubt. With all due respect to the appellant, I am not convinced there was any such error.

[91] The trial judge referred at length to evidence other than that of just BKT and the appellant. He referred to the evidence of Ms. Goddard, CT, and a number of the documents including the Agreed Statements of Fact. His reasons make it abundantly clear that he was alive to the issues raised by the appellant as to the reliability and credibility of the complainant. I see no basis to conclude that the trial judge reversed the burden of proof.

[92] There are two other legal issues raised by the appellant in his submissions under this broad heading. He says the trial judge failed to consider the issue of collusion amongst the complainants and improperly used prior consistent statements.

[93] All of the complainants and CT were cross-examined whether they had discussed their evidence with the others. All denied such a suggestion. Their evidence, if believed belied the spectre of collusion. It was VS that the trial judge found had tried to extort money from the appellant on behalf of RT. The trial judge acquitted the appellant of all charges tied to the allegations by these witnesses. With respect to BKT, he testified that he had at best a strained relationship with his brother, and none with VS. He had no discussions with either about any specifics. BKT testified as to the reasons he gave for cooperating with the authorities. He had what was from all reports a very friendly relationship with the appellant right up to the time charges were laid – even after he had given a statement to the police.

[94] The trial judge acknowledged that there was no onus on the appellant to demonstrate any motive on BKT make false allegations. With respect to why he came forward and testified, he frankly said it was done to support RT and VS. The trial judge was obviously aware of this issue. He expressly dealt with this evidence in his decision. He said:

> He was aware that they had a criminal record. He decided to cooperate, not for his own vindication or revenge against Mr. Farler, but to support the allegations being made by RGT and WVS that they had been sexually abused by Mr. Farler.

[95] The trial judge later made clear findings about the reliability and credibility of BKT. These findings included why BKT made the complaints and later testified:

> All things considered, these instances of prior inconsistent statements do not shake BKT's credibility or reliability, nor is his credibility and reliability affected by his evidence that he decided to give a statement to the RCMP because of the other complainants, particularly his brother RGT, could have issues of credibility.
>
> The evidence of the ongoing friendship with Mr. Farler before this time indicates to me that BKT had decided to live his life in a secret fashion and on an indefinite basis. But I am convinced that he concluded that others should not be denied the ability to pursue charges against Mr. Farler as a result of his own refusal to cooperate with the police.

[96] I fail to see any legal error on how the trial judge dealt with the issue of potential collusion amongst the complainants.

[97] The appellant says that the trial judge misapplied the "rule of *R. v. Dinardo*". This is a reference to the decision of the Supreme Court of Canada in *R. v. Dinardo*, 2008 SCC 24 where the Court acknowledged the well established law as to the limited role for prior consistent statements. Charron J., for the Court, confirmed it was legal error for the trial judge to consider the contents of the complainant's prior consistent statements to corroborate trial testimony. Since the error was not harmless a new trial was necessary. She said this:

> [36] As a general rule, prior consistent statements are inadmissible (*R. v. Stirling*, [2008] 1 S.C.R 272, 2008 SCC 10). There are two primary justifications for the exclusion of such statements: first, they lack probative value (*Stirling*, at para. 5), and second, they constitute hearsay when adduced for the truth of their contents.
>
> [37] In some circumstances, prior consistent statements may be admissible as part of the narrative. Once admitted, the statements may be used for the limited purpose of helping the trier of fact to understand how the complainant's story was initially disclosed. The challenge is to distinguish between "using narrative evidence for the impermissible purpose of 'confirm[ing] the truthfulness of the sworn allegation'" and "using narrative evidence for the permissible purpose of showing the fact and timing of a complaint, which may then *assist the trier of fact in the assessment of truthfulness or credibility*" *McWilliams' Canadian Criminal Evidence* (4th ed. (loose-leaf)), at pp. 11-44 and 11-45 (emphasis in original); see also *R. v. F. (J.E.)* (1993), 85 C.C.C. (3d) 457 (Ont. C.A.), at p. 476).

[98] The trial judge in the course of delivering his reasons made the following comment:

> The statement of the complainant to their mother, or in the case of RGT to Constable Lafontaine, are not evidence of the truth of the allegations. I may consider the narrative of events in statements in assessing the complainants' likely truthfulness, however. And I refer to **Dinardo** again at paragraph 37 to 39.

[99] While on its face, this comment is not an accurate statement of the law, I am unable to accept that this comment, or any other reference to what a witness had said in a prior statement, reflects reversible error. I say this for three reasons. First, the trial judge earlier correctly directed himself when he, just moments before, said:

> The evidence of Ms. T. as to what she was told by RGT or BKT and what she told Constable Lafontaine cannot be used to establish the truth of the contents, but only to relate the unfolding of events. It cannot be used for any other purpose and I refer to **R. v. Dinardo**.

[100] Second, trial judges are presumed to know the law, and here the trial judge referred to the correct paragraphs in *R. v. Dinardo* where the law is explained. Furthermore, how the disclosure occurred and its timing can assist a trier of fact in assessing credibility. Third, and most importantly, there are no instances where

evidence was led as to any details of the complainant BKT having made prior consistent statements. There was some evidence of RT having done so, but the appellant was acquitted of any allegations involving RT. I see no error by the trial judge in this respect.

Unreasonable Verdict

[101] An appeal court has the duty to set aside a verdict if it is unreasonable or cannot be supported by the evidence (s. 686(1)(a)(i)). To fulfill this duty, it is not sufficient that a court merely be satisfied that there was some evidence that could support a conviction. The duty requires that an appeal court re-examine, and to some extent re-weigh the evidence, and consider its effect. The traditional expression of the test was set out in *R. v. Yebes*, [1987] 2 S.C.R. 168 and later re-confirmed in *R. v. Biniaris*, [2000] 1 S.C.R. 381. Arbour J., writing for the court emphatically endorsed the correct approach:

> [36] The test for an appellate court determining whether the verdict of a jury or the judgment of a trial judge is unreasonable or cannot be supported by the evidence has been unequivocally expressed in *Yebes* as follows:
>
> > [C]urial review is invited whenever a jury goes beyond a reasonable standard. . . .[T]he test is 'whether the verdict is one that a properly instructed jury acting judicially, could reasonably have rendered'.
> >
> > (*Yebes*, *supra*, at p. 185 (quoting *Corbett v. The Queen*, [1975] 2 S.C.R. 275, at p. 282, *per* Pigeon J.).)
>
> That formulation of the test imports both an objective assessment and, to some extent, a subjective one. It requires the appeal court to determine what verdict a reasonable jury, properly instructed, could judicially have arrived at, and, in doing so, to review, analyse and, within the limits of appellate disadvantage, weigh the evidence. This latter process is usually understood as referring to a subjective exercise, requiring the appeal court to examine the weight of the evidence, rather than its bare sufficiency. The test is therefore mixed, and it is more helpful to articulate what the application of that test entails, than to characterize it as either an objective or a subjective test.
>
> ...

> [42] It follows from the above that the test in *Yebes* continues to be the binding test that appellate courts must apply in determining whether the verdict of the jury is unreasonable or cannot be supported by the evidence. To the extent that it has a subjective component, it is the subjective assessment of an assessor with judicial training and experience that must be brought to bear on the exercise of reviewing the evidence upon which an allegedly unreasonable conviction rests. That, in turn, requires the reviewing judge to import his or her knowledge of the law and the expertise of the courts, gained through the judicial process over the years, not simply his or her own personal experience and insight. It also requires that the reviewing court articulate as explicitly and as precisely as possible the grounds for its intervention. . . .

[102] I need not be detained on the additional narrower inquiry whether a verdict may also be disturbed under s. 686(1)(a)(i) on the basis that it was reached by reasons that are illogical or irrational (*R. v. Sinclair*, 2011 SCC 40). The appellant did not raise this issue. In any event, I see nothing irrational or illogical about the trial judge's reasoning.

[103] As mentioned before, there were two counts in the indictment. The first count alleged sexual assaults between January 4, 1983 and December 11, 1988. In my opinion, there was ample evidence to permit the trial judge to conclude that the appellant sexually assaulted BKT within the time frame set out in the first count. The real focus of the appellant's complaint is in relation to the second count. It read:

> AND FURTHER, that he, between the 12th day of December, 1988, and the 1st day of January, 1993 at or near Eastern Passage, in the County of Halifax and at or near Truro, in the County of Colchester, in the Province of Nova Scotia, did commit a sexual assault on [BKT], contrary to Section 271(1)(a) of the *Criminal Code*, R.S.C. 1985, as amended.

[104] In my respectful view, the evidence is so tenuous that a conviction on this count cannot stand. As detailed earlier, BKT was mistaken about the year he moved into 425 Cow Bay Road. It was not the summer of 1986, but that of 1987. As one of the Agreed Statements of Fact tendered by the Crown and defence established that the appellant purchased the house on Cow Bay Road at the end of May, 1987. BKT had turned 18 years old in April, 1987. With the urging of the appellant, he returned to school and completed his grade 11 from September 1987 to June 1988. He was then 19 years of age.

[105] BKT testified that he then went to Vocational School from September 1988 to June 1989. It was during this school year that he moved out and tried living with his mother again. With respect to the general time frame that he lived with the appellant at 425 Cow Bay Road he said:

> **Q.** Okay. In the time frame that you lived at Cow Bay Road, were there any incidents of a sexual nature that you've described as sexual interference between you and Mr. Farler?
>
> **A.** Yes.
>
> **Q.** Okay. Can you tell us on how many occasions something of that nature happened?
>
> **A.** Honestly I can't. In terms of total numbers or . . . or how long but ...
>
> **Q.** Are you able to say whether it was more or less frequent as compared to the other residences?
>
> **A.** Less frequent.
>
> **Q.** Less frequent? And what type of incidents were there?
>
> **A.** Tim would come into the room and . . . and usually there'd be oral sex. You know, there wasn't too much else. Again, you know, by that time and it wasn't . . . it wasn't honestly that frequent at all when we were in . . . in . . . in . . . when I first went back to Cow Bay and mainly because I was still going out with . . . with my . . . you know, a couple girlfriends and stuff like that. I had kind of moved on and so honestly I can't tell you how frequent it would have been but it wasn't . . . it wasn't very . . . it wasn't . . .

[106] BKT could not remember any specific incident. He repeated there was not too many. He had but vague muddled memories. This is what caused him to move out:

> **Q.** Now, these incidents that you say that occurred, you say that they were less frequently and it consisted mainly of oral sex?
>
> **A.** Uh huh.

Q. And in terms of oral sex, who performed oral sex on whom?

A. Tim performed oral sex on me.

Q. Okay. And again, I'm going to ask you same questions I asked you before. When you look back and you remember these incidents, do you remember one isolated incident or was it more of ... I don't want to say a blur. The word that you used was I think mumbled.

A. Jumbled. But, you know, in . . . in . . . there's not too many . . . I do vaguely remember instances in 425 but . . .

Q. Muddled.

A. Muddled, yeah.

...

A. I have some ... I have some fuzzy references, like fuzzy memories but I don't have anything specific. What I most remember about like living with Tim the first time is the times that he would come in and ... and times that I would, you know, shy away or ... or stop him from doing anything and ... and it ... you know, that was kind of the beginning of the end of our relationship in terms of friendship for a while. You know, it ... it caused a lot of tension and really that's ... that kind of the ... the reason I moved out. Again like I say, it ... I'm sure with ... with other stuff that Tim had going on in his life, the stresses and stuff like that, combined ... combined with, you know, whatever was happening between him and I, like I say, it was a little tense for a while.

[107] BKT testified he moved out and lived with his mother for six months "in the wintertime" and back to 425 Cow Bay Road in the spring or summer of 1989. Once he moved back to the appellant's he said nothing really happened. They had a platonic relationship and became roommates.

[108] The trial judge referred at length to the evidence that dealt with BKT's allegations of sexual assaults at 190 Taranaki Drive, Lumsden Court, and while camping. However, with respect to any events at Cow Bay Road, especially those that could even possibly fall within the time frame of December 11, 1988 and January 1, 1993, the only comments are as follows:

> I find as a fact that the accused, Mr. Farler, sexually assaulted BKT from the time he was 13 years of age until he was 18 or 19 years of age. These assaults began when Mr. Farler was still a Big Brother to [JC], although not in his presence. These occurred at 190 Taranaki Drive, at Lumsden Court, and at 425 Cow Bay Road and on camping trips. On many occasions, these incidents occurred while BKT was drunk or highly intoxicated to the point that he would be incapable of consenting. Additionally, he would have been incapable of consenting in law when he was under the age of 14.
>
> ...
>
> In conclusion, I find that Mr. Farler committed sexual assault on BKT as alleged in count 1 of the Indictment and also I am satisfied that the accused, that Mr. Farler, committed sexual assault on BKT at Eastern Passage as alleged in count 2 of the Indictment. However, I am not satisfied beyond a reasonable doubt that Mr. Farler sexually assaulted WVS or RGT.

[109] The trial judge found as a fact that the appellant sexually assaulted BKT from when he was 13 until he was 18 or 19 years of age. BKT turned 18 in April 1987. This was before he moved into 425 Cow Bay Road. Perhaps it was a slip and he meant to say 19 years of age, since BKT did testify to having some fuzzy memories of sexual encounters of less and less frequency when he moved into 425 Cow Bay Road. But BKT turned 19 as of April 1988. To convict the appellant on the second count he would have had to find that the sexual incidents occurred at 425 Cow Bay Road "until BKT was 20 years of age".

[110] Furthermore, BKT at no time testified that any sexual incidents actually occurred between December 11, 1988 and January 1, 1993. At best, BH said he moved out during the "wintertime" of 1988-89 to live with his mother, and moved back six months later, in the spring or summer of 1989. I acknowledge that it is theoretically possible for sexual incidents to have occurred within a very short period of time within the parameters of the second count. Nonetheless, it would be unreasonable on this evidence to conclude that the Crown had proven beyond a reasonable doubt that that was the case. Furthermore, it would be contrary to the trial judge's own finding that the assaults continued ***until*** BKT was 18 or 19 years of age. I would therefore quash the conviction on the second count.

Fresh Evidence

[111] The "fresh evidence" that the appellant seeks to rely on is the Victim Impact Statement filed by BKT. He argues that there are statements made by BKT in it that are inconsistent with his evidence at trial and that he should be able to question BKT as it goes to his credibility. The Crown does not say that a Victim Impact Statement can never amount to a piece of fresh evidence. Instead, it says there is no real inconsistency between the details in the Statement and BKT's trial evidence. I agree.

[112] The test for admission of fresh evidence on an appeal is set out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759 and repeatedly affirmed by the Supreme Court and other appellate courts. In a criminal case, the recognized approach to proffered fresh evidence is admitted if it is in the interests of justice to do so. The principles were set by McIntyre J. as:

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen*.
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
>
> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
>
> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[113] How these principles interact was described by Doherty J.A. in n *R. v. P.S.M.* (1992), 77 C.C.C. (3d) 402 (Ont. C.A.), p. 410, as:

> The last three criteria are conditions precedent to the admission of evidence on appeal. Indeed, the second and third form part of the broader qualitative analysis required by the fourth consideration. The first criterion, due diligence, is not a condition precedent to the admissibility of "fresh" evidence in criminal appeals, but is a factor to be considered in deciding whether the interests of justice warrant the admission of the evidence: *McMartin v. The Queen*, *supra*, at pp. 148-50; *R. v. Palmer*, *supra*, at p. 205.

(Adopted by the Supreme Court in *R. v. Lévesque*, 2000 SCC 47, at para. 14.)

[114] I am unable to agree with the appellant that any of the comments about the impact of the assaults had on his life are in contradiction with the thrust of his trial testimony. Hence, the Victim Impact Statement is not admissible as 'fresh evidence' since it could not reasonably be expected to impact the credibility findings made by the trial judge with respect to BKT.

Sentence appeal

[115] The appellant complains that the trial judge erred by imposing a sentence that was not proportionate to the gravity of the offence and the degree of responsibility of the offender and was otherwise not fit. He also complains that the judge was wrong to impose a SOIRA order and a prohibition order under s. 161 of the *Criminal Code*. I will address the prohibition order separately.

[116] While I do not necessarily endorse every comment made by the trial judge in the course of his oral reasons for sentence, I fail to see any reversible error. He referred to and applied the principles of sentence set out in s. 718, 718.1 and 718.2 of the *Criminal Code*. The offence involved an egregious breach of trust and prolonged sexual abuse of a teenager. Justice LeBlanc considered numerous sentencing decisions in the course of his reasons. The net sentence of 24 months' incarceration imposed by Justice LeBlanc is not outside the range, given the circumstances of this offence and that of the appellant. Absent a demonstrable error in law or principle, appeal courts are required to defer to a trial judge's exercise of discretion inherent in balancing the myriad principles and factors that can influence the imposition of sentence. I see no basis to interfere.

[117] The appellant's complaint about the SOIRA order is not well founded, factually or legally. His complaint is that the trial judge did not hear why he ought to be exempted from an order under s. 490.012 of the *Criminal Code*. A review of the transcript demonstrates that his counsel made submissions and provided case law in support of a request to exempt the appellant from a SOIRA order. Furthermore, at the time of sentence, the provision (s. 490.012(4)) that permitted an offender to seek exemption had been repealed (S.C. 2010, c.17, s. 5).

[118] Even if there were any merit to the appellant's complaint about the SOIRA order, this Court is without jurisdiction to entertain an appeal from a SOIRA order (see *R. v. Chisholm*, 2012 NBCA 79; *R. v. J.J.W.*, 2012 NSCA 96). It was for this reason the Crown abandoned its cross-appeal.

Prohibition Order – s. 161

[119] The trial judge imposed a prohibition order pursuant to s. 161(1)(a) and (b) of the *Criminal Code*, banning the appellant for five years from "attending a public park or public swimming area" where children could be present and from becoming employed or volunteering in a capacity that would involve "being in a position of trust or authority" towards children. As of the date of sentence, the relevant portions of s. 161 were as follows:

> **161**. (1) When an offender is convicted, or is discharged on the conditions prescribed in a probation order under section 730, of an offence referred to in subsection (1.1) in respect of a person who is under the age of 16 years, the court that sentences the offender or directs that the accused be discharged, as the case may be, in addition to any other punishment that may be imposed for that offence or any other condition prescribed in the order of discharge, shall consider making and may make, subject to the conditions or exemptions that the court directs, an order prohibiting the offender from
>
> > (*a*) attending a public park or public swimming area where persons under the age of 16 years are present or can reasonably be expected to be present, or a daycare centre, schoolground, playground or community centre;
> >
> > (*b*) seeking, obtaining or continuing any employment, whether or not the employment is remunerated, or becoming or being a volunteer in a capacity, that involves being in a position of trust or authority towards persons under the age of 16 years; or
> >
> > (*c*) using a computer system within the meaning of subsection 342.1(2) for the purpose of communicating with a person under the age of 16 years.
>
> (1.1) The offences for the purpose of subsection (1) are
>
> > (*a*) an offence under section 151, 152, 155 or 159, subsection 160(2) or (3), section 163.1, 170, 171 or 172.1, subsection 173(2) or section 271, 272, 273 or 281;

> (*b*) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983; or
>
> (*c*) an offence under subsection 146(1) (sexual intercourse with a female under 14) or section 153 (sexual intercourse with step-daughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988.

[120] Two issues arise. First, can an order under s. 161 be granted where the offences were committed before the provision came into force? Second, assuming the trial judge could consider making a prohibition order, did the offences of which the appellant was convicted fall within the scope of s. 161? The Crown concedes that the s. 161 order is "troublesome".

[121] The appellant correctly points out that s. 161 came into force on August 1, 1993[1], well after the time frame of the Indictment. The Appellant argues that, by virtue of s. 11(i) of the *Canadian Charter of Rights and Freedoms*, s. 161 could not apply to him. Section 11(i) provides:

> 11. Any person charged with an offence has the right
>
> (i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

[122] The Crown submits that there was no *Charter* violation, and suggests that "[n]o *Charter* argument was made at sentencing." With respect, this is not really accurate. Defence counsel initially brought up s. 11(i) regarding the trial judge making a firearms prohibition order under s. 109. He later pointed out the fact that s. 161 was not in force at the time of the offences :

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[1] S.C. 1993, c. 45, s 1. SI/93-156

> **MR. CHURCH:** So the issue . . . I wonder if you'd just consider the . . . these orders [provisions?] were not in place at the time of the offence. These orders for 161 and 109 were not in play at the time that this offence occurred. And isn't it that he's supposed to be sentenced based on the principles of when the conviction occurred?
>
> **THE COURT:** Well, I mean, do you have a case?
>
> **MR. CHURCH:** I don't have a case right out of my pocket, but I'll be willing to make a submission if you want to retain jurisdiction on that part.
>
> **THE COURT:** Sure. Yeah. Okay. Well, that will be … that may be a way of disposing it at least for today.

[123] It does not appear that any further oral or written submissions were made by either the defence or the Crown. In the trial judge's sentencing decision, he said:

> ...It is my view, counsel, that that s. 161, was intended to have a reach beyond the current time period. Understanding this provision as I do, it was the intention of Parliament, in my view, to make that provision applicable to offences even prior to January 4, 1983. So I am going to grant that order under 161.

[124] Just looking at s 161 on its face, the trial judge's assessment of legislative intent seems accurate; it appears that Parliament wanted prohibition orders to be available in cases of historic sexual offences, meaning sexual offences that were committed before s. 161 was in force. Why else would s. 161(1.1)(b) and (c) explicitly refer to offences that no longer exist?

[125] But the question remains whether this retrospective application complies with the *Charter*. If a prohibition order is considered "punishment", then an offender is entitled to "the benefit of the lesser punishment", which in this case would mean no prohibition order at all. So is a prohibition order "punishment" for *Charter* purposes?

[126] Unlike a SOIRA order, a prohibition order made under s. 161 is legislatively included within "sentence" under s. 673, for the purpose of Part XXI of the *Code* dealing with indictable offence appeals. However, the meaning of "sentence" is not necessarily the same as "punishment".

[127] An important clue is found in s. 161 itself, which says that a prohibition order may be imposed "in addition to *any other punishment* that may be imposed for that offence…" (emphasis added). A defining feature of "punishment" is the restriction of liberty. As Bateman J.A. explained in *R. v. Cross*, 2006 NSCA 30 at para. 46, (leave to appeal to SCC refused, [2006] S.C.C.A. No. 161), "The characteristics of punishment generally include some deprivation of liberty; unpleasant consequences; and public condemnation."

[128] A prohibition order by its very nature restricts an offender's liberty because it prevents him or her from going to certain places, and it has consequences for an offender who might otherwise want to visit parks, work with children, etc. So it seems to me that a prohibition order under s. 161 fits the definition of "punishment" and, based on that fact alone, an order under that section cannot be granted with respect to offences committed before it came into force in August 1993.

[129] This conclusion is in accord with the handful of cases that have considered s. 161 prohibition orders. For example *R. v. Burnett*, [1998] B.C.J. No. 245 (C.A.) where the offences had been committed between 1968 and 1970, Goldie J.A. struck the prohibition order that the trial judge had imposed:

> **9** Additionally, as I have mentioned, the applicant was subjected to the lifetime prohibition set out in s 161(1)(b) of the Criminal Code. This was very recently introduced into the Code and of course long after the offences in question took place. Mr. Mulligan has very properly drawn to our attention this fact and we are all in agreement that leave to appeal must be granted and the appeal allowed to the extent of expunging that portion of the sentence imposed upon the applicant.

See also *R. v. P.A.M.*, 2000 BCCA 126.

[130] More recently, in *R. v. M.E.*, 2012 ONSC 1078 Justice Hill refused a prohibition order where the offences were committed in the late 1980s and early 1990s before s. 161 was in force. He reasoned as follows:

> **77** As to corollary orders, there will be a DNA authorization pursuant to s. 487.051 of the *Code* and an order requiring Mr. M.E.(1) to comply for life with the *Sex Offender Information Registration Act*, pursuant to s. 490.013(2.1) of the *Code*. While these are protective schemes post-dating the offender's crimes, they are not sentences or punishments, and therefore properly imposed for the

> historical offences before the court. The weapons prohibition order (currently s. 109) sought by the Crown is a sentence as currently defined in s. 673 of the *Code* and was so defined in R.S.C. 1985, c. C-34, s. 601. Having regard to s. 11(i) of the *Charter* and ss. 44(e)(f) of the *Interpretation Act*, R.S.C. 1985, c. I-21, to the extent that the severity of the punishment is greater today than at the time the offender committed the crimes of which he has been convicted, the offender is deserving of the lesser punishment. Section 98(1) of the *Code*, the predecessor provision in force when Mr. M.E.(1) committed crimes attracting its operation, authorized, for a qualifying first conviction, a 5-year prohibition from possessing any firearm or ammunition or explosive substance. No notice for increased punishment having been proven by the prosecution relating to the 1982 conviction as a first qualifying conviction, a 5-year weapons prohibition order is imposed. **Although the parties agreed to the court making a prohibition order pursuant to s. 161 of the *Code*, generally relating to access to places where young children are commonly found, a "sentence" as defined in the *Code*, the statutory authorization for such an order/sentence was not in effect when the offender's crimes were committed the section first having been enacted by S.C. 1993, c. 45, s. 1. Accordingly, that order is refused.** [My emphasis]

See also *R. v. Boudreau*, 2012 ONCJ 322 at para. 67.

[131] I have not overlooked *R. v. J.K.*, [1999] N.S.J. No. 180 (C.A.), leave denied, [1999] S.C.C.A. No. 411. In that case, the appellant had been convicted of two counts of unlawfully touching a person under 14 for a sexual purpose, against two complainants. He committed the offences between 1989 and 1991, before s. 161 was enacted. Nevertheless, the trial judge made a lifetime prohibition order under s. 161(1)(b) of the *Code*. The prohibition order was not challenged on appeal. The appeal from sentence was allowed. In reducing the length of the sentence, Chipman J.A. commented, "On his release, the community will still have the protection afforded by the trial judge's prohibition order pursuant to s. 161(1)(b) of the *Code*." The issue of the legality of the prohibition order was not addressed by either the trial judge or this Court.

[132] Here the Crown did not make any submissions that a prohibition order under s. 161 was not "punishment" within the meaning of s. 11(i). Perhaps I need not conclusively decide the constitutional validity of an order under s. 161 for an offence committed prior to its enactment as there is another insurmountable legal impediment to the viability of the s. 161 prohibition order.

[133] Originally, a court only had the discretion to impose a prohibition order under s. 161 where an offender was found to have committed an offence enumerated in s. 161(1.1) in relation to a complainant under the age of 14 years (S.C. 1995, c. 45). The age limit was raised to 16 years of age by S.C. 2008, c. 6, s. 54(e).

[134] The conviction for the count under s. 271 will be quashed, leaving extant only the conviction for the s. 246.1 offence. As an aside, even if the s. 271 conviction survived on appeal, that offence was not in relation to a complainant under the age of 16 years since BKT was 19 years old as of the *commencement* of the time frame in that count (December 11, 1988), and hence would provide no legal foundation for a prohibition order under s. 161.

[135] As already noted, a prohibition order under s. 161(1) can only be made if the offender has been found guilty of one of the offences enumerated in s. 161(1.1) in relation to a person under the age of 16 years. Section 246.1 is not an offence listed in s. 161(1.1).

[136] The Crown argues that the absence of s. 246.1 from s. 161(1.1) "appears to be an obvious omission." The trial judge viewed it as such and simply read s. 246.1 into s. 161(1.1). The Crown offers no support for its "obvious omission" argument and provides no avenue for the trial judge to have read s. 246.1 into s. 161(1.1), aside from saying it was "reasonable" for him to do so. With respect, I am unable to agree. It may well have been an omission by Parliament, but it is up to Parliament to correct it. Section 161(1) is perfectly functionable without any need to read into it an offence under s. 246.1. I would allow the appeal from sentence to the extent of striking the prohibition order.

SUMMARY AND CONCLUSION

[137] The trial judge found as a fact that the complainant BKT was a reliable and credible witness. The exculpatory evidence of the appellant was disbelieved. Based on all of the evidence, he had no reasonable doubt that the appellant had sexually assaulted BKT. These were findings of fact that the trial judge was entitled to make and in doing so, he committed no legal error. The trial judge properly directed himself on the burden of proof, and there was no indication that

he misapplied that burden or in any way shifted it to the appellant. There was no improper use or reliance on similar fact evidence.

[138] BKT's evidence in direct was clear that he did not consent to any of the sexual incidents he described as happening from 13 years of age until he was approximately 18 or 19 years old. He was not cross-examined on his clear assertion that subjectively he did not consent. Despite the lack of significant protest in the vast majority of the myriad of sexual encounters, the evidence of the complainant was sufficient to establish the *actus reus* of the offence of sexual assault.

[139] Any lack of clarity due to the trial judge's reference to intoxication or of the appellant being in a position of authority fades to insignificance in light of the unchallenged acceptance by the trial judge of the complainant's evidence. The appellant himself in cross-examination of the complainant and in his own testimony did not suggest that the complainant consented to sexual activities, nor that the appellant had an honest belief that consent was present. His exculpatory explanation was simply that those sexual activities described by BKT did not happen. His claim was rejected that in late November 1988 a consensual sexual relationship spontaneously started. It is not the purview of this court, absent misapprehension of evidence, legal error or unreasonable findings that taint a verdict, to re-try the case and substitute our views for those of the trial judge.

[140] The trial judge's finding that the Crown had established beyond a reasonable doubt the second count in the indictment was unreasonable. The judge found that the sexual activities continued until the complainant was 18 or 19 years of age. The complainant turned 19 in April 1988. The second count alleged sexual assault commencing December 11, 1988. Furthermore, the complainant did not testify to any sexual encounters occurring within the time frame of this count.

[141] With respect to the appeal from sentence, the trial judge made no reversible error in selecting the period of incarceration, nor in relation to any of the ancillary orders with the exception of the prohibition order under s. 161 of the *Criminal Code*. That order should not have been made either on the basis that such an order would be contrary to s. 11(i) of the *Charter* or it was simply not legally available on the facts of this case.

[142] I would allow the appeal from conviction to the extent of quashing the conviction for the offence under s. 271(1), and the appeal from sentence by striking the prohibition order under s. 161(1) of the *Criminal Code*. In all other respects, I would dismiss the appeal.

Beveridge, J.A.

Concurred in:

Oland, J.A.

Fichaud, J.A.