

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *R. v. Fisher*, 2019 NSSC 378

**Date:** 20191216

**Docket:** CRH No. 479833

**Registry:** Halifax

**Between:**

Her Majesty the Queen

v.

Michael Oliver Fisher

**Restriction on Publication:** ss. 486.4 and 539(1)

**DECISION**

**Judge:** The Honourable Justice Darlene Jamieson

**Heard:** November 4, 5, 6, 7, 8, 19, 20, in Halifax, Nova Scotia

**Oral Decision:** December 16, 2019

**Counsel:** Mr. Eric Woodburn, for the Crown  
Ms. Michelle James, for the Defendant, Mr. Fisher

By the Court:

### **Introduction**

[1] Michael Oliver Fisher (“Mr. Fisher”) is charged with sexual assault (*Criminal Code*, s. 271) and being a person in authority or trust who touched a young person for a sexual purpose (*Criminal Code*, s. 153(1)(a)). The Crown is pursuing the s. 271 charge by alleging vitiated consent (s. 273.1(2)(c)). The Indictment alleges the events to have occurred between January 1, 2008 and July 1, 2008.

[2] Mr. Fisher pled not guilty to the charges on September 6, 2018.

[3] I will refer to Ms. R. as the “complainant” throughout this decision. I mean no disrespect in doing so. It is not disputed that the complainant was a young person under the age of 18, and that there was sexual contact for a sexual purpose in the timeframe of January 1, 2008 to July 1, 2008. There is dispute as to the nature and extent of the sexual contact in this timeframe. The key issues are whether Mr. Fisher was in a position of trust or authority when the sexual activity occurred (s. 153) and, if in a position of trust or authority, whether he abused his position when the sexual activity occurred (s.271).

### **The Position of the Crown**

[4] The Crown says that Mr. Fisher was not just the overseer of the Youth Group at Emmanuel Baptist Church, he was also the Youth Minister. The Crown says, as the Youth Minister, Mr. Fisher sat on the stage of the church during Sunday services and he preached. The Crown says that Mr. Fisher, acting as a mentor and spiritual advisor to the complainant, developed an emotional, physical and spiritual hold over her. The Crown submits that the whole of the evidence points to establishing the sexual activity occurred when Mr. Fisher was in a position of trust or authority towards the complainant, who was a congregant in the Church and a member of the Youth Group, and that he abused that position.

## **The Position of the Defence**

[5] The Defence says Mr. Fisher and the complainant were friends and, by early 2008, they were equals. Mr. Fisher says that a position of trust is not intended to catch this type of relationship. It is intended to catch a power imbalance and that, during the first part of 2008 when the sexual activity occurred, there was no power imbalance between Mr. Fisher and the complainant. Mr. Fisher says that, during the summer of 2007, the complainant was employed at the Church and, by the fall of 2007, was a member of the Youth Ministry Team. Mr. Fisher says that relationships can evolve over time and can begin and end differently. He says that a person's title, in and of itself, is not determinative of a position of trust, and when all of the evidence is considered it points to equality between Mr. Fisher and the complainant at the time of the sexual activity. He further says, with regard to the s. 271 charge, that there was no evidence of inducing, prevailing upon or persuading.

## **The Evidence Presented at Trial**

[6] Below I will review the evidence that was presented at trial. Although I will not set out all of the evidence in detail, I have carefully considered all of the evidence given by all of the witnesses.

[7] The Crown called the complainant, Reverend Sheila Ago, Reverend Lennette Anderson, and Detective Constable Michelle Dooks-Fahie. Mr. Fisher chose to testify. Ten exhibits were entered during the trial.

## **General Principles**

### ***Credibility/ Reliability Assessment***

[8] Fact finding requires that I assess both reliability and credibility. They are different. Reliability has to do with the accuracy of a witness's evidence. It involves an assessment of the witness's capacity to observe, recall and recount the events in issue. Credibility involves an assessment of the witness's believability and truthfulness -- in other words, his or her veracity.

[9] In reviewing and assessing the evidence and considering any inconsistencies, I refer to the following authorities. In *R. v. D.F.M.*, 2008 NSSC 312, Murphy, J. stated:

9. Assessing evidence is not a credibility contest. It is not a matter of which witness is believed, and who is disbelieved. The Court is able to accept some or

all of a witness' evidence. Those principles are highlighted by the Supreme Court of Canada in *R. v. S.* (J.H.), 2008 SCC 30 (S.C.C.). I also refer to *R. v. F.* (S.), 2007 PESCAD 17 (P.E.I. C.A.) and in particular, para. 31 where the Court said as follows with respect to the credibility issue:

A conviction can only come about if the Crown evidence is so reliable, so consistent and so believable that it proves beyond a reasonable doubt the guilt of the accused. There must be no other reasonable conclusion from the evidence. If there is any reasonable doubt remaining after you hear the evidence of the Crown, either because of inconsistencies, unreliability, a lack of credibility or anything else, the Court must acquit — no matter what you thought of the accused's evidence.

[10] The following, while not an exhaustive list, are helpful considerations when assessing the credibility of witnesses: the attitude and demeanor of witnesses, prior inconsistent statements, external consistency, internal consistency, motive to mislead, ability to record events in memory, and application of common sense to the evidence to consider, whether it suggests the evidence is impossible, improbable, or unlikely. (See *R. v. Ross*, [2006] N.S.J. No. 233, 2006 NSPC 20, and *R. v. D.F.M.*, *supra*). With regard to the demeanor of witnesses, I am cognizant of the caution I must use in considering the demeanor of the witnesses who have testified. There are endless variables that could explain a witness's demeanor when testifying. As noted in *R. v. D.D.S.*, [2006] NSJ No 103 (NSCA), at para. 77, demeanor can be considered when testing evidence, but standing alone it is hardly determinative.

[11] Our Court of Appeal said the following about assessing credibility and reliability in *R. v. D.D.S.*, *supra*,:

77 ... Experience tells us that one of the best tools to determine credibility and reliability is the painstaking, careful and repeated testing of the evidence to see how it stacks up. How does the witness's account stand in harmony with the other evidence pertaining to it, while applying the appropriate standard of proof in a civil or criminal trial?

[Emphasis added]

[12] The following statement in *Faryna v. Chorny*, (1951), [1952] 2 D.L.R. 354 (B.C.C.A.), at paras. 9 and 10, is a useful reminder of some of the factors a judge should keep in mind when making findings as to credibility. While this statement is made in the civil context, I am fully mindful of the different standard of proof that exists in a criminal matter as opposed to a civil matter:

9. If a trial judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection, it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility, *see Raymond v. Bosanquet* (1919) 59 S.C.R. 452, at 460. A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial judge and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth. I am not referring to the comparatively infrequent cases in which a witness is caught in a clumsy lie.

10 The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again, a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. ...

[13] Finally, in *R. v. M.G.*, (1994), 93 C.C.C. (3d) 347, 1994 CanLII 8733 Ont. C.A., the Court commented on the means of assessing credibility as follows:

[27] Probably the most valuable means of assessing the credibility of a crucial witness is to examine the consistency between what the witness said in the witness-box and what the witness said on other occasions, whether on oath or not. Inconsistencies on minor matters of detail are normal and are to be expected. They do not generally affect the credibility of the witness. This is particularly true in cases of young persons. But where the inconsistency involves a material matter about which an honest witness is unlikely to be mistaken, the inconsistency can demonstrate a carelessness with the truth. The trier of fact is then placed in the dilemma of trying to decide whether or not it can rely upon the testimony of a witness who has demonstrated carelessness with the truth.

[28] The effect of inconsistencies upon the credibility of a crucial witness was recently described by Rowles J.A. speaking for the British Columbia Court of Appeal in *R. v. B. (R.W.)* (1993), 40 W.A.C. 1 at pp. 9-10, 19 W.C.B. (2d) 260:

Where, as here, the case for the Crown is wholly dependent upon the testimony of the complainant, it is essential that the credibility and reliability of the complainant's evidence be tested in the light of all of the other evidence presented.

In this case there were a number of inconsistencies in the complainant's own evidence and a number of inconsistencies between the complainant's evidence and the testimony of other witnesses. While it is true that minor inconsistencies may not diminish the credibility of a witness unduly, a series of inconsistencies may become quite significant and cause the trier of fact to have a reasonable doubt about the reliability of the witness's evidence. There is no rule as to when, in the face of inconsistency, such doubt may arise but at the least the trier of fact should look to the totality of the inconsistencies in order to assess whether the witness's evidence is reliable. This is particularly so when there is no supporting evidence on the central issue, which was the case here.

### *Assessment of Evidence*

[14] When it comes to the testimony of the witnesses, as the trial judge, I must decide how much or how little I accept. I may believe some, none, or all of it. (*R. v. M. (R.E.)*, [2008] 3 S.C.R. 3 (S.C.C.) at para. 65; *R. v. François*, [1994] 2 S.C.R. 827 (S.C.C.) at para. 14).

[15] The testimony of all of the witnesses must be assessed in the context of the passage of time. Regardless of whether there are concerns about reliability based on the passage of time, some events are so memorable that even when surrounding details are beyond recall, due to the passage of time, the principal allegations can be accepted as having been proven beyond a reasonable doubt. The matters in issue here date back approximately 11 years.

[16] Similarly, any significance that might be attached to the passage of time, before coming forward to complain, must be assessed in the individual circumstances of the case. It is well understood that victims of sexual assault cannot be expected to act in any certain way. Each person's experiences and ways of dealing with such incidents are individual to them (*R. v. D. (D.)* (2000), 148 C.C.C. (3d) 41 (S.C.C.) at para. 65; *R. v. M. (P.S.)* (1992), 77 C.C.C. (3d) 402 (Ont. C.A.), at para. 22).

## Presumption of Innocence and Burden of Proof

### *Reasonable Doubt*

[17] A fundamental hallmark of our criminal justice system, is the principle of the presumption of innocence. Every individual who is charged with a criminal offence is presumed to be innocent, unless and until that person is proven guilty beyond a reasonable doubt. The burden of proof rests with the Crown throughout the case. The question before me is not whether I believe that the events alleged by the complainant occurred; rather, the question before me is whether the Crown has succeeded in establishing each and every one of the elements of each charge beyond a reasonable doubt.

[18] The meaning of “proof beyond a reasonable doubt” is set out in the decision of *R. v. Lifchus*, [1997] 3 S.C.R. 320 (S.C.C.), where Justice Cory discussed the history, essential components, and meaning of proof beyond a reasonable doubt at paras. 27-35, and provided a model jury instruction at para. 39:

39. Instructions pertaining to the requisite standard of proof in a criminal trial of proof beyond a reasonable doubt might be given along these lines:

The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the Crown has on the evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty.

What does the expression “beyond a reasonable doubt” mean?

The term “beyond a reasonable doubt” has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think that it needs no explanation, yet something must be said regarding its meaning.

A reasonable doubt is not an imaginary or frivolous doubt. It must not be based on sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.

Even if you believe the accused is probably guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the Crown has failed to satisfy you of the guilt of the accused beyond a reasonable doubt.

On the other hand, you must remember that it is virtually impossible to prove anything to an absolute certainty and the Crown is not required to do so. Such a standard of proof is impossibly high.

In short, if based upon the evidence before the Court, you are sure that the accused committed the offence, you should convict since this demonstrates that you are satisfied of his guilt beyond a reasonable doubt.

[19] In *R. v. Starr*, [2000] 2 S.C.R. 144 (S.C.C.), the Court pointed out that the burden of proof placed upon the Crown falls "much closer to absolute certainty than to a balance of probabilities." (para. 242). The standard of proof beyond a reasonable doubt applies to the final evaluation of guilt or innocence. I must not apply it piecemeal to individual items or categories of evidence. (*R. v. Menard*, [1998] 2 S.C.R. 109 at para. 23).

[20] I wish to note here that as Mr. Fisher gave evidence, I have considered the case of *R. v. D.(W.)*, (1991) 63 C.C.C. (3d) 397 (SCC). In that decision, Justice Cory of the Supreme Court of Canada set out the instructions that a trial judge should give herself where the accused has placed his credibility in issue. The three instructions are:

- (1) If I believe the accused, I must acquit;
- (2) If I do not believe the evidence of the accused, but I am left with a reasonable doubt by it, I must acquit;
- (3) If I do not believe the evidence of the accused and I am not left [with] a reasonable doubt by the evidence of the accused, am I, on the basis of the evidence I do accept, convinced beyond a reasonable doubt of the guilt of the accused. (para. 11)

[21] Abella, J., in *R. v. C.L.Y.*, [2008] 1 S.C.R. 5, 2008 SCC 2 provided further guidance:

[6] ... This Court has consistently warned that verdicts of guilt should not be based on "whether [triers of fact] believe the defence evidence or the Crown's evidence" (*W. (D.)*, at p. 757). Rather, the paramount question remains whether, on the whole of the evidence, the trier of fact is left with a reasonable doubt about the guilt of the accused ...

[7] ... The key is whether the correct burden and standard of proof were applied, not what words were used in applying them.

[8] ... This of course does not give trial judges licence to wrongly analyse credibility issues, but it does serve to remind that what *W.(D.)* offered was a helpful map, not the only route. Its purpose was to ensure that triers of fact — judges or juries — understand that the verdict should not be based on a choice between the accused's and Crown's evidence, but on whether, based on the whole of the evidence, they are left with a reasonable doubt as to the accused's guilt. (*R. v. Challice* (1979), 45 C.C.C. (2d) 546 (Ont. C.A.), at pp. 556 -57; *R. v.*



*MacKenzie*, [1993] 1 S.C.R. 212 (S.C.C.), at pp. 219 and 240). As Fish J.A. noted in dissent in *R. c. Levasseur* (1994), 89 C.C.C. (3d) 508 (Que. C.A.), at p. 532, in language approved by this Court ([1994] 3 S.C.R. 518 (S.C.C.)):

The trial judge must make it indisputably clear to the jury that reaching a verdict is not simply a question of choosing the more believable of the two competing stories ... To protect the innocent from conviction, we require proof beyond a reasonable doubt. The application of this standard to questions of credibility is an entrenched part of our law. The direction most consonant with this principle is a clear and specific instruction, where credibility is an important issue, that the jury must apply to it the test of reasonable doubt.

## **Evidence**

### **Evidence of the Complainant**

[22] The complainant is currently 29 years of age. She is a teacher, teaching grade two students in the Gulf region in the Middle East. She was 14 years old when she met Mr. Fisher.

#### ***Initial Meeting - Age 14***

[23] At age 14, the complainant was attending a church in Sackville with her father and also attending Youth Group at that church on Sunday evenings. The complainant's parents were divorced. The complainant was interested in her mother's church, Emmanuel Baptist Church, and decided to attend the Sunday service with her. During the service, people stood up to greet each other and Mr. Fisher, who was seated in front of her, said hello, asked where she went to school and encouraged her to join the Church Youth Group. She learned Mr. Fisher was the Youth Pastor at the Church. She indicated he held her hand for a long period during the handshake and recalled going home and asking her mother - who was this guy? On cross-examination she recalled thinking -who does this guy think he is?

[24] She described Mr. Fisher as the Youth Pastor at the Church and also the leader of the Youth Group. She testified that, occasionally on Sunday, he would preach in front of the entire congregation. She was not sure how often, but it was fairly often. She said, regardless of whether he was preaching, he sat on the stage with the other Pastors, Ministers and other guests. Pastor Lennette Anderson was the Lead Pastor at the Emmanuel Baptist Church.

### *Age 15*

[25] The complainant testified that she wasn't happy with the youth group at her dad's church because she wanted to be more involved, she wished to do more and to serve God more. She decided to go to the Emmanuel Baptist Church Youth Group after the summer she turned 15. Her current youth group met on Sunday evenings and the Emmanuel Baptist Church Youth Group met on Friday evenings and, initially, she attended both. She was invited to attend the startup barbecue for the Emmanuel Baptist Church Youth Group members. Mr. Fisher attended the barbecue.

[26] The complainant described the youth group as essentially a Sunday School for teenagers. She said Mr. Fisher was the leader of the Youth Group. There were also volunteer adult leaders. There were junior high and high school-aged youth members and also a few kids from upper elementary school. She indicated they would have Bible study at Youth Group, share and talk about their lives and what God wanted for them. She indicated that all of the events were led by Mr. Fisher, unless he wasn't available, and then there would be a volunteer leader. She indicated that when she started Youth Group, the volunteer leaders were adults in their thirties and forties. Later, a younger group of leaders were involved who were in their mid to late twenties.

[27] She testified that sometimes Mr. Fisher drove her home after Youth Group as well as, occasionally, the younger child of the Lucas family, with whom Mr. Fisher resided on weekends. She testified that either before or after Youth Group she and Mr. Fisher would hang out and would often stop for food.

[28] She testified that, when she was 15, she and Mr. Fisher began communicating through MSN Messenger (MSN). She said that during her 15<sup>th</sup> year they started to communicate every day. She testified that Mr. Fisher was often online on MSN until late hours. She said that she shared her whole life with him. Mr. Fisher asked her about school, her family life and encouraged her to share. She said she was instantly happy, as someone was paying attention to her. She described her life when she was 15 as being pretty rocky, as her mother and stepfather were arguing quite a lot and this was a struggle for her. She said Mr. Fisher was the only person she could talk to about the things that were going on in her life. She described him as a spiritual advisor and that her respect and admiration for him grew. She said he quickly became a "rock" in her life.

[29] She testified that during this time Mr. Fisher would make comments to her about being his girlfriend, calling her beautiful and kissing her on the cheek. She thought he must see her as special and important. She did not think of him as her boyfriend, just that he was being silly and goofy, making her feel like he was a big brother. She said she felt special and felt that she was within his inner circle. She indicated that, during this period, conversations with him would make or break her day because if he was in a good mood she was in a good mood. She said that she took every word and every look from him and held onto them “for dear life”.

[30] The complainant testified that she was struggling with her other youth group at her father’s church because her skills were not being utilized. Mr. Fisher asked her why she didn’t like the other youth group and she told him that God was calling her to be more involved. She wanted to lead her own little side ministry, being puppetry for the younger children in the church. She told him she wanted to be given a place to be appreciated and said, “Boom, he made it happen.” She said she started doing puppetry for the younger children at Emmanuel Baptist Church and also for the entire Church.

### *Age 16*

[31] The complainant testified that when she turned 16 there was a birthday party for her at her grandfather’s. Mr. Fisher attended the party and gave her a gift of a Bible.

[32] She testified that, during her 16<sup>th</sup> year, things got more confusing with Mr. Fisher. She said there was communication late into the night with Mr. Fisher. She testified she started to wonder if she was living to make Mr. Fisher proud of her versus making God proud of her. She said at that time she was dealing with problems with God and trying to figure out what everything meant. She said she was really struggling with her home life at this time and had started attending Emmanuel Baptist Church on Sundays which bothered her dad and created issues between them.

[33] She said Mr. Fisher’s flirtations increased when she was 16. She testified that, when she was 16, Mr. Fisher told her that the Lucases were hearing concerns from people at Church about how close they were. She referred to a group outing to Micmac Mall where Mr. Fisher mentioned to her that concerns were shared with him, and told the complainant that she had to stop acting like she cared so much about him. He told her it was because of his position that people would give him a hard time and that he was always being watched. She said she was concerned that

things would change but they didn't. She said everything stayed the same but it was just not as visible. She said Mr. Fisher ignored her in public situations and didn't hug her in public but she continued to share the difficult things in her life with him. During this time period she was failing tests and not studying when she should have been. She said, when she was 16, Mr. Fisher began tutoring her. She said he helped her with math and essay writing. She said the tutoring occurred at the Church, at her home, or at the Lucas family home.

[34] The complainant testified that almost every day she and Mr. Fisher communicated on MSN. During this time he also got a cell phone and asked her to call him to wake him up in the mornings. They also had conversations via webcam and things became more visual as they were able to see each other. She said they would talk until four or five in the morning. She testified she tried to share her whole heart and deepest, darkest problems with Mr. Fisher. She said that, as her Youth Pastor, he was like a counsellor figure she could go to for help. She said when she was 16 they also spent quite a bit of time alone driving.

### *Age 17*

[35] The complainant testified that she turned 17 in July and that summer she started her first job at the Church working in the Youth Drop-in Centre. Mr. Fisher advised her that she was the strongest candidate by far and that he was looking forward to getting to know her better, as they would be working in the same building. She said she was excited to get to know him better as well. She described it as a good summer.

[36] That fall (2007) she started grade 12 and the Youth Group was still meeting on Friday evenings. She said it was during this time that new volunteers, all in their mid to late twenties, became volunteer youth leaders at Youth Group. She said, in her grade 12 year, she was determined to get better grades. She testified that her home life remained rocky and she was trying to come to terms with the dynamics of her family, as there was a lot of fighting going on. She said sometimes Mr. Fisher would drop her off at home in the middle of a fight. At the time, she believed her mom and stepfather would get a divorce, as her mom and she and her siblings would pack their bags in the middle of the night and go to a hotel. She said she took on a protective role with her siblings, making them laugh so that they would not feel scared. She said she shared all of these issues with Mr. Fisher and he assured her that God was in control and it would be okay.

[37] The complainant testified she and Mr. Fisher would talk about boys and he asked her if there were any boys in her life. She said, on one occasion, she shared that there was someone of interest in her high school, which led to them discussing that she was saving herself for marriage and saving her first kiss. She testified that she talked often about purity with Mr. Fisher and how she wanted to stay away from sex and wanted to save as many firsts as she could for the man that she would marry. When asked why she was telling Mr. Fisher all of this, she responded that he was one hundred per cent her mentor and she saw him as her guide for all sorts of spiritual things. She said Mr. Fisher seemed quite interested in the physical feelings she had for this boy at school, asking why she felt them and did she want to feel them again. She said she had thought he would chastise her for this but he said it was normal to have these feelings. She testified that most of her conversations with Mr. Fisher at this time were video chats and phone calls and were at night and into the early morning.

[38] She testified that she relied on Mr. Fisher, trusted him with everything, considered him a gift from God, a powerful voice, and a blessing. She indicated that, although they were backing off in public, at night when they talked it would be completely different as he would speak normally and tell her she looked pretty. She described Mr. Fisher as “my Min”, meaning Minister. She said he also described himself as her Min.

[39] The complainant said that, in addition to being a member of the Youth Group, she also took on various responsibilities. She made PowerPoint presentations for lessons and started to be utilized more because she was a little older. She said she was invited to leadership meetings and to help plan events for the group when she was 17. She said that she was determined to have a leadership role and said that, when she was 16, she was named as the Youth Group delegate to represent them at conferences. She said she believed that the volunteer leaders saw her as just a youth member; however, she wanted to be seen as a leader.

[40] She testified that she and Mr. Fisher grew distant when he went home over Christmas (2007/2008). However, when he returned he said he missed her. Around this time, he also told her he had broken up with the person he was in an online relationship with and that he was happy and free of the situation. The complainant testified that, a couple of weeks into January, things were different as they were talking at least three hours every night until 4, 5 and 6 a.m. It was around this time that Mr. Fisher began telling her that he had feelings for her, that she was beautiful, that he loved spending time with her, and that he wanted to hug her. She recalled during this timeframe, while communicating via webcam, he had

a candy cane in his mouth saying that he wanted to share it with her. She described these discussions as confusing but interesting and exciting. She testified that his comments got more sexual as the months went on. She said that he would say that he was feeling “horny” and wanted her to come and massage him. She said that he implied a lot of sexual things.

[41] She testified that one evening when he went to her house to help her with math, they watched a movie and he asked her if she wanted to sit near him on the sofa. He laid down and invited her to lay with him. They laid together, with him asking her to scratch his neck and head, which she did. She described it as being very nice, intimate and relaxing and that they stayed cuddling most of the night and into the early morning. She said that she felt that he must really like her and, although it felt strange, it also felt very nice.

[42] She described this timeframe as being a strange cycle, saying that he would “come on” to her and share information and sexual thoughts and comments and they would see each other and be close but then he would change and be cold, nasty and mean. She said it didn’t make any sense from one night to the next. She said, at this point, she was grappling with whether she had feelings for him and finally started to admit to herself that maybe she did. She believed that obviously he cared for her or he wouldn’t act so close with her. But then they would have conversations to the effect that they couldn’t act like this because of Mr. Fisher’s position in the Church. She testified that Mr. Fisher would say, “We can’t do what you want to do; we can’t hug like you want to; we can’t go where you want to go” -- that he was putting it all on her. She said she would spend a few days in absolute mourning but then, after a few days had passed, he would tell her he missed her and really wanted a massage. She said she would try to share with him that she was confused and upset and when she had the strength to be articulate enough to speak with him about these things, Mr. Fisher would say that she was coming at him with a “victim attitude” and that she was doing it for his attention.

[43] She gave the following evidence:

... he knows me ... he knows that I don’t ... that I was terrified to be physical with anybody other than the person who wanted to marry me. And because he knew this I fully trusted that when he was being close with me that that meant something. That meant that, well if he wants to hug me or he’s implying he really wants to kiss me, well then next week at church we’re going to be holding hands and walking into the sanctuary like in a relationship. Because otherwise why would he be leading me in this way, leading me on in this way.

*February 2008*

[44] She testified that, in early February of 2008, after Youth Group he drove her to her stepsister's apartment where they were going to watch movies. They had rented three movies. Her stepsister was at home but later went to bed. She said while watching movies they were lying together, scratching each other's necks, caressing each others arms. After the movie was over she gave him a light kiss on the lips. She testified that it was like an explosion happened. He took over, saying that he wanted to teach her how. She described that there was a lot of tongue involved, that he licked her lips and kissed her face. She testified that he kissed her for a long time and her thought was that he must want to marry her because he kissed her.

[45] She testified that he organized for her to go to his room in New Minas where he stayed while attending Divinity College at Acadia University. She said her mother did not want her to go but she assured her mother that she would be staying in a different room. When she finally allowed the complainant to go, Mr. Fisher and she were both excited. They took the bus and went to Boston Pizza when they arrived. She said he asked her if she wanted a heart-shaped pizza and she thought that he loved her. When they went to his room there was a lot of kissing and massaging. She said that he massaged her whole body. She was not naked and had shorts on and he had not seen her chest at this point. Afterwards, at her request, he put on a song and they slow-danced.

[46] She described this as a new chapter, where things had turned physical. She said it was a big deal for her first kiss and she was excited about the future and how they would be together. She testified that, shortly after the night at his place, things were on a "linear line" that continued quite quickly from her first kiss, the French kiss, licking, massaging and then to full nakedness. She said he wanted to see her breasts, so on one occasion she was topless and he kissed her breasts and massaged her. She testified that he would pray with her about these events and then act as if nothing had happened, treating her like any other youth member, essentially like she was a kid. She said, when they saw each other publicly, he wouldn't talk to her and he wouldn't come near her unless he had to. She described being devastated because she had started exposing herself to him and was confused about why there was no substance to what was going on between them. She said she was confused, as he would ask her things like why she was stalking him. She said this made her feel that she was too emotional and too

young. She testified that then it would start all over again with him saying that he missed her and needed a massage.

[47] The complainant testified that, leading up to Valentine's Day, they had the house to themselves. Mr. Fisher had gone to her house to pick up a Valentine's card that she had made for him. She said they started watching a movie and snuggled and started kissing. She recalls that night he kept saying that he wanted her and missed her. She testified that he asked her if she wanted to go to the bedroom. In the bedroom, he took her clothes off and performed oral sex on her. She testified that, in addition to performing oral sex on her, he also penetrated her digitally. She testified that he kept saying to her, "don't hold back, it's just us." She testified that he told her he "wanted her" and she said that she wanted him but that they were not married. He then said that he had to go because he wanted her so badly, he couldn't stay. She testified that a few days later they had a "big conversation" about how this would never happen again. She recalled crying herself to sleep, but then things changed once again.

### *March 2008*

[48] The complainant testified that she again visited his apartment in New Minas where things got more physical. She said this was likely in March of 2008. On this occasion, when they were at his apartment, he directed her where to put her hands, what to do, what to rub. She said that at this point she had not yet seen Mr. Fisher fully naked, as it had been her only who had been fully naked to this point. She described lots of massaging, petting and touching and kissing and that he was trying to give her an orgasm. She described that he digitally penetrated her vagina. She testified he said to her that he wished he could be inside her, was telling her to relax, that it was just them and whatever happens, happens and not to hold back. She said these were things he would say continuously on these nights. She testified that he reassured her that she could trust him because she was alarmed and wasn't sure what she wanted. She described trusting him enough to go along with it.

[49] She said, on another occasion, he said that she owed him an orgasm because he had given her one. She said she gave him oral sex and he had an orgasm that night. She said, "It was the first time I'd ever seen anything like it. I was very weirded out." She said on another night they performed oral sex on each other, which she described as the "sixty-nine" sexual position. She testified that the above-described nights were not in a row; she said there was time in between the



incidents. She said that, after each time they were physical, he would then have a conversation with her about backing off and stopping and that these conversations would take place the morning after or a day or two later.

[50] She testified that she did not think there was any additional sexual activity in April 2008. In April she travelled to Cuba on holiday with her family.

### *May 2008*

[51] In May the complainant asked Mr. Fisher if he would chaperone a school trip and he agreed. Her teacher, Mr. Fisher and a person, whom she believed to be in their thirties, were the three chaperones for her high school trip.

[52] The complainant testified that, in May of 2008, the first incident of sexual intercourse occurred. She arranged to be at Mr. Fisher's apartment in New Minas. She recalled waiting for Mr. Fisher at the library and said she would often wait until he was finished events he had at Acadia, sometimes waiting for him until midnight. She testified they went to his apartment where there was touching, massaging, petting and several times he used his fingers to digitally penetrate her, saying he wished he was inside of her. She said that he said to her, "Say yes", and asked why she was playing "hard to get". She said she looked down, thinking his fingers were in her vagina, but that it was his penis rather than his fingers. She testified his penis was inside her vagina. She described being a bit alarmed but just laid there as he was talking her through it. She said he "pulled out" before he had an orgasm. She said he asked her if she was hurting and when she replied that she was not, he questioned whether she had been a virgin.

[53] She said that, after this timeframe, Mr. Fisher started being distant and mostly ignored her and no longer asked her about her family or about school. She said she was made to feel like she was a problem. She said there were a few more times that they were physical before her 18<sup>th</sup> birthday. She testified that he said to her that she would be "legal" soon but she didn't know what he meant. He said it a second time leading up to her 18<sup>th</sup> birthday. She testified that she thought he must mean "legal" in the sense of being able to get married without adult permission and she thought they would get married. The complainant turned 18 on July 1, 2008.

[54] In relation to questions about the number of times she visited Mr. Fisher's apartment in New Minas, the complainant refreshed her memory with her journals and testified that, from the end of January to March of 2008, she visited Mr. Fisher's apartment in New Minas five times. She said between March and May

2008 there were two overnights at Mr. Fisher's apartment. She further testified that, during the timeframe of May to June 2008, she spent two nights in a row at his apartment.

[55] The complainant testified on cross-examination that when she was 16 she was given additional responsibilities at Youth Group, but not "big ones", for making posters, PowerPoint presentations and helping with suggestions for social things and helping to plan certain things. She said by 2007 she was invited to give input into some Youth Group planning. At some point, she was copied on Youth Group planning emails. By January 2008, the Youth Ministry included Mr. Fisher as Leader, four adults from the Church and the complainant. She disagreed that she was being treated as an equal with the adult Youth Group Leaders.

[56] In the June 24, 2008 Emmanuel Baptist Youth Ministry Annual Report, submitted by Mr. Fisher, the complainant is listed as a Key Officer along with five other individuals. On cross-examination the complainant indicated all of the other individuals were in their mid-to-late twenties. She said that she was the only 17-year-old high school student on the Youth Group Leadership Team.

[57] On cross-examination, the complainant testified that when she came home in 2014 from teaching abroad, she discovered that Mr. Fisher had been in a relationship with her good friend, which upset her. The complainant complained to the Church about Mr. Fisher in 2014 and went to the police in 2016. She said that initially she thought that it was an ethical issue and that it would be better for the Church to report it to the police. She thought people might view it, coming from her, as being out of anger or revenge. She said she also felt a little semi-vicious about the fact that she thought the Church was initially covering up the situation.

### **Reverend Sheila Ago**

[58] Reverend Ago testified that she is an ordained Reverend at the Chester United Baptist Church. She is also a counsellor doing both personal and couples counselling. She has been pastoring since 2012 and counselling since 2014. She and her husband began attending the Emmanuel Baptist Church in July of 2007 and continued as part of the Church until 2017. She said that she came to know Reverend Fisher from the beginning of their church attendance, as he was seated on the stage with the other Ministers. She said the Ministers were very visible on the raised pulpit and she quickly got to know who they were. She testified that the Ministers in 2007 were Reverend Anderson, Reverend Fisher and Reverend Price.

She indicated the congregation consisted of between 300 and 400 people. She described Mr. Fisher as a very prominent figure in the Church. She said he was the Youth Pastor with oversight of young people. She described Mr. Fisher as Reverend Anderson's right-hand person in 2007 and 2008.

[59] Reverend Ago testified that she saw Mr. Fisher preach in 2007 and 2008 and her recollection is that he preached approximately one-third of the time. She did not know the complainant at that time, as she had nothing to do with youth at the Church at this time. She came to know her in March of 2014 when she was approached and advised that a young lady in the Church wanted to talk to her in her role as a female Minister. She and two other women from the Church spoke at length with the complainant about the events involving Mr. Fisher. She said they took notes and transcribed them and then allowed the complainant to review the notes to ensure they were accurate. The transcribed document was then given to Reverend Anderson.

[60] On cross-examination, Reverend Ago confirmed that Mr. Fisher would have been called "Reverend" only after he was ordained and prior to that he was called Minister Michael.

### **Reverend Lennette Anderson**

[61] Reverend Anderson is an ordained Baptist Clergyman who has been at Emmanuel Baptist Church since September 1999. He is the Lead and Senior Pastor. He explained the process for ordination. First, a local congregation affirms there is a call upon a person's life. Then there is a discerning process with theological training. The University of choice for Baptists is Acadia University. After attending Divinity College there is a one-year internship, followed by an Examining Council process and, if an individual passes this bar, they are deemed worthy of ordination.

[62] Reverend Anderson said he first met Mr. Fisher when he was an international student at Acadia University. Mr. Fisher then moved to Dalhousie University and sporadically attended church services in 2003. Reverend Anderson saw Mr. Fisher as gifted and talented and spoke to him about considering theology. In 2004, Reverend Anderson brought Mr. Fisher before the leadership of the Church and asked them to give him a Minister's license. He explained that this is the first step on the journey towards ordination and is necessary to enroll in Divinity College. He said it is not an authoritative degree but is a recognition of

being called for the Ministry -- an affirmation of a spiritual call. In 2004, people recognized Mr. Fisher as a Minister and people started calling him "Min".

[63] Reverend Anderson said that in 2005, Mr. Fisher became a full-time student at Acadia University Divinity College, taking a Masters in Divinity. The Church entered into an agreement with him whereby the Church would cover the cost of his university tuition and books. In return, the Church expected that Mr. Fisher would carry out a weekend Ministry assignment. He said they asked Mr. Fisher if he would oversee the development of the Youth Group and stay over on Sundays to help lead the worship, do prayers, etc. Reverend Anderson testified that Mr. Fisher would take the bus from Wolfville on Friday and a congregant would drive him back on Sunday.

[64] Reverend Anderson testified that Mr. Fisher started leading the Youth Group in 2005. In his role overseeing the development of the Youth Group, he was to establish a leadership team by finding individuals with a heart for youth, who wanted to come alongside and mentor youth. He said Mr. Fisher was to build the Ministry team and oversee the activities including Scripture readings, movies, outings, etc. Reverend Anderson testified that Mr. Fisher's main assignment was to establish, create and build a Youth Ministry. He said that, by 2006 and 2007, the Youth Ministry was up and running, with Mr. Fisher as the overseer.

[65] Reverend Anderson testified that Mr. Fisher's title during this time was "Minister". He said that he delegated the responsibility to Mr. Fisher to bring the structure and activities to the Youth Group. He explained there were three Heads of Ministry within the Church, called "HOMs". There was a Ministry of Men HOM, a Ministry of Women HOM, and a Ministry of Youth HOM. Mr. Fisher was the Minister of Youth HOM. In this role, Minister Fisher was in charge of the team and in charge of the youth. The Head of Ministry's whole emphasis was to build relationships with the youth. He said Mr. Fisher, in building relationships, would get to know the youth, provide fellowship, and journey with them by being involved in their schools and teams. He said this would have been more challenging when Mr. Fisher wasn't there full time.

[66] Reverend Anderson testified about the content of Youth Group meetings and said spiritually, there would be devotional time, praying with the kids, teaching them how to pray, teaching them about the Scriptures, about how they are relevant in their life, and applying them to Christian living. Reverend Anderson said the Youth Leaders would be in a mentorship role to the youth, would champion them

on, would journey with them through life by finding out what was going on in their school and home lives and acting as confidants.

[67] Reverend Anderson testified that Mr. Fisher would normally be on stage each Sunday but not in clergy robes until after ordination. He said that Mr. Fisher was a gifted speaker and orator. When asked whether Mr. Fisher preached at the Church prior to June 2008, he said that he couldn't see why he would not have used him in this timeframe, although he could not recall how regularly.

[68] Reverend Anderson explained that Emmanuel Baptist Church was one of 450 churches of the Convention of Atlantic Baptist Churches and each year they would prepare an Annual Church Report. He confirmed that the Annual Church Report at Exhibit 3 would have been sent to Convention Head Office in Saint John, New Brunswick by March 8, 2004. He said each year the report would include the official officers, HOMs, the number of baptisms, etc. Reverend Anderson confirmed that, in the March 8, 2004 report, under the heading "Officers for the Coming Year", Mr. Fisher is described as "Minister" and is listed as the Head Volunteer Youth Leader for grades 6 to 12. In addition, in the report under the heading "Field Treasurer & Additional Pastoral Staff", Mr. Fisher is listed as "Minister Michael Fisher" along with two Pastors.

[69] Reverend Anderson said that Mr. Fisher graduated from Acadia in May 2008 and became a full-time employee on June 1, 2008. Up until June 2008, he was not paid as a staff member. However, the Church, in lieu of payment, gave him tuition and books for establishing and heading up the Youth Group at the Church. He said that once Mr. Fisher was a full time staff member with the Church, he was able to do more high-level ministry with the youth. He said Mr. Fisher was ordained in November of 2009.

[70] Reverend Anderson testified about raising reported concerns with Mr. Fisher. He said he raised with Mr. Fisher that he had received a call expressing concern that the complainant was the only youth who had attended a youth event at the Wesleyan Church and when Mr. Fisher arrived she was overly excited to see him. He said that he would have spoken to Mr. Fisher about it being inappropriate for him to be at an event at that time of night alone with a youth member from the Church. Mr. Fisher's explanation was that the complainant was anxious because she was there by herself and, because they didn't know anyone else, they did hang out together that night. Reverend Anderson indicated he took this explanation at face value. Reverend Anderson had no recall as to when this conversation

happened. He testified that driving youth home alone would be discouraged by the Church and being alone in a house with youth would also be discouraged.

[71] Reverend Anderson gave evidence that the complainant was part of the children's church, being involved with the nursery. He confirmed she was also involved with a puppetry ministry. He was unsure whether this church work was under the Children's Ministry or the Youth Ministry. He confirmed that the report, authored by Mr. Fisher, for the Annual Provincial Baptist Youth Fellowship Conference dated June 24, 2008 (Exhibit 8) lists six key Youth Officers, including the complainant. He said there was a conference held every July and this report covered the period of July 2007 to June 2008 and listed their ministry events over the year. Reverend Anderson also confirmed sending an email in April of 2008, to these same six individuals and to Mr. Fisher, concerning the Youth Summit to be held May 30 to June 1, 2008.

[72] Reverend Anderson testified that he had not seen anything that caused him concern about the relationship between Mr. Fisher and the complainant. In the period of 2007, 2008 and 2009, Mr. Fisher never mentioned to Reverend Anderson that he was in a relationship with the complainant. Reverend Anderson said that he knew the complainant was a junior leader in the Youth Ministry but did not know anything of a relational, sexual content. He described being extremely close with Mr. Fisher. He said he was a confidant, a colleague in ministry, a close friend, and that it had been an absolute joy to serve with him.

[73] In relation to the complaint brought by the complainant, he was advised by members of the Church to bring the complaint forward. He identified Exhibit 4 as the statement Mr. Fisher provided to the Church. He said that the Church was advised to terminate Mr. Fisher's pastoral position for conduct unbecoming or inappropriate behaviour. Exhibit 5 is the termination letter signed by Reverend Anderson, terminating Mr. Fisher's employment. The letter states that Mr. Fisher was being terminated for serious breaches of trust as a Pastor. Reverend Anderson said that the breach of trust was having sexual relations with a congregant.

### **Detective Constable Michelle Dooks-Fahie**

[74] Detective Constable Dooks-Fahie was the Lead Investigator in this matter. She gave evidence concerning the events leading up to Mr. Fisher's videotaped interview, dated June 14, 2017, which was conducted at Halifax Regional Municipality Police headquarters on Gottingen Street in Halifax. She testified that Mr. Fisher was provided with an opportunity to speak to a lawyer before the

interview, was given his rights and was cautioned. The June 14, 2017 statement of Mr. Fisher (Exhibit 8) was admitted into evidence without the necessity of a *voir dire*.

**Mr. Michael Fisher**

[75] Mr. Fisher chose to testify.

[76] Mr. Fisher testified that his date of birth is September 25, 1978. He is currently unemployed. He has a Masters of Theology, a Masters of Divinity and a Bachelor of Science. He is a permanent resident of Canada, having come to Canada from Bermuda in 2001 to study at Acadia University. He switched to Dalhousie University after one year. He first became involved with Emmanuel Baptist Church when he was a member of the Acadia Baptist Choir in 2001. He began attending the Church more regularly in 2002. At that time, he volunteered to help out with the Youth Group when he could.

[77] He testified that, in the summer of 2005, after graduating from Dalhousie University, Reverend Anderson spoke to him about whether he had a calling in life. When he went home to Bermuda he had a discussion with his Bishop which led to his decision to pursue Divinity College. He said Emmanuel Baptist Church agreed to fund his education, which started in the fall of 2005, at Acadia Divinity College. He had a student permit but not a work permit.

[78] Mr. Fisher said that he had a conversation with Reverend Anderson about helping out Carmelita, Sherry and Linden Avery with the Youth Group on Friday nights. He said Reverend Anderson understood how much reading was involved at Divinity College and had said to make it to the Youth Group when he was able. He said that he got involved in terms of letting Reverend Anderson know what was going on with the Youth Group.

[79] He said he was given a Minister's license in 2004 because a Provincial Baptist Youth Fellowship was coming up in July and the Church wanted him to lead a workshop. He said in the fall of 2005 he had no idea how often he was at Youth Group. He said he had a lot of reading at Divinity College, played intramural soccer, was teaching karate class, and that these things would keep him in the valley. He said, if he was in Halifax, he would typically be there for the weekend. He said he was more full time at the Church toward the end of his third year, being 2008, and after he graduated.

[80] Mr. Fisher said that, while attending Acadia University, he lived in New Minas and, when in Halifax on the weekends, he stayed with the Lucas family. He said he would rarely have been in Halifax during the week unless there was a school break. When asked who was running the Youth Group in 2005 and 2006, he said it wasn't a matter of running the Youth Group, that there would be a conversation as to what to do the next week and that nobody was in charge at that point. He said for the rest of 2006 and 2007 the team volunteers did not change.

[81] Mr. Fisher testified that he recalled meeting the complainant at Baptist Emmanuel Church on a Sunday morning. He indicated that, generally, if there were first-timers at the Church they would stand. He introduced himself to the complainant. He knew of the family because the complainant's mother was good friends with the Lucases. He said he spoke with the complainant and asked where she went to school and, if she was ever around, that she should go to the Youth Group. He said the Youth Leaders went around and introduced themselves to everyone. He understood at that time the complainant was going to another church with her father. He said the complainant started going to Sunday service and got involved in Junior Church as a Junior Leader. He had no role with the Junior Church. He said he also attended a "welcome back barbeque" for the Youth Group at the Lucas home and the complainant was present but he could not recall the date. He said when the complainant started with the Youth Group she was also going to another church.

[82] Mr. Fisher testified there was no year in which he would have attended every Friday Youth Group meeting until he was a staff member at the Church in June 2008. He said the Youth Ministry Team was like a partnership -- someone would lead Devotion or Bible Study and then another week someone else would do it. He said in 2007, the complainant had come from doing puppetry Ministry in Children's Church and she and some others thought they should also do this in Youth Group and at other events. Mr. Fisher told them to "go for it". He said because the complainant was used to taking photographs and editing things with Adobe and was already a leader in the Junior Church, they said that she could become involved in a miniscule way with the Youth Group. He said that was in early 2007. In summer of 2007, the complainant worked with some of the young people at the church. He said that in the fall of 2007, when in grade 12, she said that she wanted to take a break from Youth Group and began going to Wesleyan Church in Hammonds Plains. Either in January of 2008 or before he went home to Bermuda for Christmas, she told him she wanted to go back for the second half. She said there were a lot of young kids at the Youth Group and that she would like



to take leadership in some part. He told her that he would have a discussion with the other leaders and that she could go to the meeting as well and tell them what she saw her role to be. He said in 2008 she began attending team meetings.

[83] Mr. Fisher gave evidence that, up until 2008, his relationship with the complainant was that they were friends in the same way he would describe his other friendships. When asked how the relationship developed, he initially said she wanted to be more involved in the church. For example, she and others wanted to paint the roof tiles so he said “go for it”. He said he got to know her better through the Youth Group when she was a member of the leadership team. He said the kids didn’t see him as a leader and didn’t see the other people as leaders.

[84] He said he was unable to say how often he was at the Youth Group in 2007 as he was on the soccer team at Acadia and travelled and played away at other universities. He said if they were playing in Halifax he would be at Emmanuel Baptist Church.

## **2008**

### ***The First Kiss***

[85] Mr. Fisher testified that he went to the complainant’s stepsister’s apartment for the first time in 2008. He said he believed it was after he returned from Bermuda in January, having been there for Christmas, and assumed it was in February. He and the complainant went to the apartment after Youth Group. The complainant had said her stepsister wanted to see him and that they would watch a movie. He, the complainant, and the complainant’s stepsister watched one movie and had started watching a second movie when the complainant’s stepsister got a call from her boyfriend. She left the room for approximately 15 to 20 minutes, during which time the movie was paused. He and the complainant talked while waiting. He said she told him what was going on with her and she asked him about the online relationship he was having. He then asked the complainant to check whether her stepsister was coming back. The complainant said she was not coming back and went to get him a ginger ale in the kitchen. When she returned she sat on the couch and reached over and kissed him. He said he did not know how to respond. He asked the complainant why she did that and she replied that she wanted to. He told her that she couldn’t just do that. He said he could not say whether or not he kissed her back. He said he didn’t know the complainant was interested in him. He said he got up and put his shoes on and said goodbye, as he

had soccer the next day. He said he may or may not have given her a hug and then left.

[86] He said it was likely three days later he told her that they needed to talk. Over MSN he asked her why the kiss happened. He discovered she liked him. He told her, "If you like a person, you should have a conversation before you kiss them." He said he couldn't recall her reaction to this. He said that, in his mind, after the discussion they were cool. He said he could not recall exactly when he next saw the complainant.

[87] Mr. Fisher testified that he still saw the complainant at Youth Group and they planned Youth Group things together. He said around March of 2008 they started talking more again and she told him that she liked him. He asked about another boy at school that she had told him she liked and she said she didn't like guys her age. He said they started communicating then but it wasn't anything intense. They would communicate by MSN or see each other on the weekend.

[88] He said he didn't recall any other sexual contact in February. He said he was busy with schoolwork and attending lectures. He said he did not recall seeing the complainant near Valentine's Day but after Valentine's Day he did pick up a Valentine's Day card from the complainant by dropping by her stepsister's apartment. Mr. Fisher said he could not recall any sexual contact with the complainant in March, but did not know.

[89] Mr. Fisher testified that he recalled having a conversation with Reverend Anderson about concerns expressed by the Pastor from the Wesleyan Church about he and the complainant. He said that he thought the discussion was before he and the complainant had sexual intercourse.

### *Sexual Activity at his Apartment in New Minas*

[90] When asked about the next sexual contact, he replied he didn't recall exactly but thought the next time was when the complainant went to his apartment because she wanted to sign a lease for an apartment, as she was planning to attend Acadia. Previously, the owner (a friend of Mr. Fisher), was unavailable so she asked if she could come down and stay overnight in order to sign the lease. He said it was "cool" with him if it was okay with her parents. He believes he spoke to her stepdad and advised she could sleep in his bed and he would sleep on the floor. He said he thinks they met at Acadia, took the bus to New Minas, and then had something to eat. He testified that he had been playing soccer and grabbed a

shower after he put the grey office chair at the edge of the bed so that they could play video games. He told the complainant to call her parents. He said they played video games but is unsure for how long. He said that he told the complainant he was sore from playing soccer. She told him that she gave her brothers massages all the time and offered to give him a massage. She said to lay down on the bed and said she couldn't properly give him a massage with his shirt on so he took his shirt off. He said she then started kissing his back. He turned around and they started kissing and this led to their clothes coming off. He said they were kissing and she was sitting on top of him. He took off her top and she took off her bra. He said he was not sure how their bottoms came off. He said they were kissing and touching each other and were close to having sex. He said that his hands were rubbing her legs and he began to fondle her, touching her vagina. He said he asked if she was sure she wanted to do this. At this point in his narrative of the sexual activity, he said the complainant had wanted to visit him because he was not going to see her for her 18<sup>th</sup> birthday. He then said that they were close to having sex. He said they began to have sex, he started to go inside her and then he said that she didn't look comfortable so he told her, "It's not something that we have to do." He said he had the impression she was hesitant because she wasn't verbally responding and looked worried. He said there was no further touching after this but doesn't recall if they cuddled that night, but that it was probable. He said he was on the left side of the bed, got up, put his shorts on and went downstairs. He said he could not remember if there was penetration but, to the best of his recall, there was no full stroking. He said he has tried his best to recall when this occurred and he is not quite sure but was fairly certain it was close to her 18<sup>th</sup> birthday.

[91] On cross-examination he said that he's unsure whether he placed his hand inside the complainant's vagina. He said he can't recall how much of his penis was inside her vagina but that he did not think all of it was. When asked if they talked after the sexual activity he indicated they talked briefly and said that he may have asked her whether she was being honest when she said she was a virgin.

[92] Mr. Fisher testified that the complainant was at his apartment in New Minas on two occasions.

[93] Mr. Fisher was asked whether there was any other sexual contact prior to her 18<sup>th</sup> birthday. He responded that he was not quite sure but there may have been one incident that he knows about. He said he remembered being at the complainant's home with the complainant and her younger siblings. He said he had not seen the younger siblings for a while and they had been to Youth Group so

he dropped them off, they had some food and then went downstairs to watch a movie. Later, around 10 or 10:30, their mother called them to bed. When the complainant returned she asked him if he wanted to see her bedroom, which was in the basement and had just been renovated. He said that she had a nice bed frame that went to the ceiling. The complainant got on the bed and he was still in the doorway. He said, "Let's watch the movie", and she said to him, "Come here." She then crawled to the edge of the bed and they kissed. He then said to her "You're going to get me in trouble." She left to get a drink and when she returned he was lying on the sofa. He told her she could sit on the sofa and curled up his legs. She sat on the sofa. He said he cannot recall what happened then but thinks he fell asleep and woke up at 2:30 a.m. saying, "Oh my gosh. I have to go." He said there was no other sexual contact before her 18<sup>th</sup> birthday, to the best of his recollection. He said the kiss occurred before she visited him in the valley. Mr. Fisher denied any incidents of oral sex or "actual intercourse" prior to the complainant's 18<sup>th</sup> birthday.

[94] Mr. Fisher testified that the 71<sup>st</sup> Annual Report - Emmanuel Baptist Youth Ministry, dated June 24, 2008 (Exhibit 6) which was submitted to the Church by him, lists the complainant along with the other leaders as Key Officers of the Youth Group. When asked if he made any distinction between the listed individuals, he indicated there was no distinction between the complainant and the other leaders.

[95] Mr. Fisher said that after a couple of weeks on staff, in June of 2008 he became Associate Pastor and Pastor of Student Ministries. He was an intern for one year and then was ordained in October or November of 2009.

[96] Mr. Fisher said after the initial kissing incident he would not have said to her that he would "teach her how". He said it's not something he would say as he doesn't speak like that. He testified that he did not have to talk the complainant into any of the sexual activity. He testified that his statement to the Emmanuel Baptist Church was before he knew there was a criminal complaint and, as a result, he was unaware of the timeframe in question in relation to the criminal complaint when he prepared the statement for the church. Similarly, he did not have a timeframe in mind when he spoke to the police. He said that the Church definitely says no one should have premarital sex, whether you are a Minister or not.

[97] Mr. Fisher said on cross examination that he and the complainant talked about relationships, issues she had at school, issues in her home life, that he

learned personal things about her and sometimes she became emotional. She told him about her family members drinking and fighting.

[98] Mr. Fisher said that he went to the movies with the complainant on more than one occasion and that the Lucases' son was with them. He said that he would also drive her home from the movies. He said that he picked the complainant up at work one or two times when she worked at Tim Horton's in Hammonds Plains. He said there were times he drove with her alone.

[99] On cross-examination, Mr. Fisher said that a lot of his communication with the complainant was through MSN. He gave evidence that the MSN chats started in 2007, either at the beginning of 2007 or over the summer, and continued in 2008. He said he and the complainant got to know each other over the summer of 2007 when she was working with young people at the Church. He said that they would have had conversations off hours, outside of the youth group and the conversations were probably mainly at night. He said that between January 2008 and June 2008 they talked fairly regularly during "off hours" and that their conversations could go late into the night.

[100] With reference to the late-night MSN chats with the complainant, Mr. Fisher said they discussed family, how school was going, but that they were not really conversations as he was doing work and she was doing work. They discussed who the complainant liked and who he liked, including his online relationship with Ms. Duncan and said that they talked about that kind of stuff all the time. He said that the complainant would sometimes be upset during their MSN chats. When asked if she would pour her heart out to him, Mr. Fisher said generally this would not happen on MSN. He said, for example, when he went to Tim Horton's to grab some food, she would tell him everything that was going on at home and he told her that her family would work it out. He said there were times she had family issues and was emotional and they would talk about the situation. He said the complainant felt pressure to be there for her younger siblings. He would tell her what he would do and he would tell her that she couldn't cry about it all the time.

[101] On cross examination, Mr. Fisher testified that in 2007 and 2008 he would almost always sit on the stage at Sunday church service and would sometimes preach and that the youth group members, including the complainant, would see this.

[102] Mr. Fisher said on cross-examination that, from the fall of 2007 through 2008, the Youth Group was opened with a prayer. Sometimes there would be

devotion, they would discuss the Bible and things that the youth members had heard in church, and they taught the children life lessons. He said that everything they did at Youth Group was to unite everyone under God.

### **Assessment of Mr. Fisher's Evidence**

[103] Without hesitation, I do not accept Mr. Fisher's evidence concerning his role at Emmanuel Baptist Church, which goes to the central issue of whether he was in a position of trust. The Defence argued that the evidence of Mr. Fisher was internally consistent and credible. I disagree. I will review some of the inconsistencies found in the accused's evidence which leads me to reject this characterization of his evidence.

[104] I find large portions of Mr. Fisher's evidence to be inconsistent, implausible and evasive. I refer to the following examples. Mr. Fisher admitted that he oversaw the Youth Group at Emmanuel Baptist Church but refused to describe himself as a spiritual advisor or mentor to the youth. He said he wouldn't describe himself in that way. He further said he didn't believe that the kids at Youth Group saw him as a leader nor saw the other people as leaders. In this timeframe, Mr. Fisher was between 25 and 28 years old and he oversaw the Youth Group. Naturally the members of the Youth Group, ranging from junior high to high school students, and some upper elementary students, would see him as a leader. It is implausible to suggest otherwise.

[105] Mr. Fisher described himself much differently in his statement to the police. When asked if he acted as a mentor to the kids in the Youth Group and talked to them outside of Friday night Youth Group meetings, he described the role as being pretty much everything -- literally everything -- and explained that if their parents were not involved and they were going through something, they would probably "come to any of us." Additionally, when describing to police his comments in his statement to the Church concerning advice to the complainant with regard to her parents fighting, Mr. Fisher said in his police statement that he considered himself to be more than just a mentor to the complainant. He said, "It wouldn't have been just as a mentor ... I would have considered us friends or more than that, I think ... more than just a mentor." Further, in his police statement, Mr. Fisher said that he fully understood he was in position of trust in the Church. When asked to describe what he understood this to mean, he said that he imagined people

depended on you for advice and counselling, etc. and he agreed the position would have a little bit of power.

[106] When asked on direct examination who was running the Youth Group in 2005 and 2006 his response was that it wasn't a matter of running the group, but that there were conversations as to who would do what next and that nobody was in charge at that point. When asked about his nickname "Min" being short for Minister, Mr. Fisher, on several occasions said that "Min" was not necessarily short for Minister. This is an implausible response. He offered no explanation as to what else this could possibly mean. On cross-examination, Mr. Fisher gave following evidence about his nickname, "Min".:

- Q. Right. And I understand that they had the nickname for you even then. The nickname was "Min".
- A. Yeah, but it's not ... they didn't give me nickname.
- Q. You gave it to yourself?
- A. No, I didn't.
- Q. Well somebody had to give it to you.
- A. Yes, my good friend, Larissa Downey, gave me the name.
- Q. All right. Is she a youth leader?
- A. No, not at the time. No.
- Q. Okay. And her name's not on here.
- A. No.
- Q. But the nickname stuck. People called you "Min".
- A. I guess. Yes.
- Q. Well you guess?
- A. No, I mean I guess it stuck because everybody started calling me Min after that.
- Q. Right. From 2004 on, that was your nickname for the youth group. They called you "Min". Min this, Min that, Min, can we do this.
- A. Sure.
- Q. Is that sure as in shrug-your-shoulders sure or yes, that's what they did.
- A. No, because I don't know if it was in 2004 that they actually started calling me Min.
- Q. Well when was it?

A. I ... it was ... she started calling me ... when we met at a provincial Baptist youth conference. I think (complainant) was there taking some pictures as well ...

Q. What day/date?

A. ... so she called me there.

Q. Date?

A. This would have been probably around 2004 or before ... 2003/2004 ... not quite sure.

Q. Well the date of that document's 2004.

A. Yes.

Q. So right around that time they started calling you Min.

A. I wouldn't say they started calling me Min. I would say she started calling me Min.

Q. Right on. And "Min" is short for Minister.

A. Not necessarily.

Q. Oh. Did you have ... is your ... Min's short for Michael?

A. Well we have a ... she called me Min Mike, and we have a lot of Ministers in our church but nobody else is called Min so Min wouldn't necessarily be short for Minister.

Q. Well what would it be short for?

A. I ... she would call me Min Mike. This is what I'm saying.

Q. Is it short for your middle name? Oliver?

A. No.

Q. Is it short for your last name?

A. No.

Q. Is it short for your first name?

A. No.

Q. So it would be short for Minister.

A. Not necessarily.

Q. All right. Fair enough.

[107] Throughout his evidence he referred to conversations with people where they called him "Min". For example, in relation to the complainant's mother and stepfather, Mr. Fisher said they had no issue with him being alone, driving the complainant and said they would say, "Okay, Min you're going to Youth Group. Drop her off at the house, or just give her a ride when you come there ...".



However, later on in this same exchange on cross-examination, he said her parents would not have called him Minister or Pastor or saw him in that light and that at no time would her mother have “referred to me as a Minister or Pastor Michael or anything like that.”

[108] Mr. Fisher gave evidence that he would not have used language like Youth Pastor to describe himself. However, when asked by police whether he had a title in 2005, he responded he thinks that it would have been Associate Pastor but pointed out that he would also have been Youth Minister at the same time. In his police statement, Mr. Fisher said he was a Certified Minister back home and confirmed that he had training back home. However, during his in-court evidence, Mr. Fisher had great difficulty with the title of Minister as noted above. He explained that being a Minister in Bermuda was simply some weekend training for an exhorter license and that there was no conferring of a title. He further said he had been given the title of Minister by the Emmanuel Baptist Church because the Church wanted him to lead a workshop at a Provincial Baptist Youth Fellowship. On cross-examination, Mr. Fisher said that the “Minister thing was just a nickname, not a title.”

[109] The reality of Mr. Fisher’s role was set out in the Church’s 2004 Annual Report. However, when presented with the Annual Church Report (Exhibit 3) which lists Mr. Fisher as Head Volunteer Youth Leaders for Grades 6-12, he would not confirm whether this was an accurate depiction, deferring the question to Pastor Anderson. The 2004 Report also lists “Minister M. Fisher” as an additional pastoral staff along with two named pastors. It further notes Mr. Fisher’s email address as being a church address of mfisher@ebchurch.ca.

[110] The differences in his prior police statement and his in-court evidence causes me concern.

[111] Mr. Fisher’s difficulty with titles continued throughout his evidence. While Mr. Fisher agreed that if he was over at the complainant’s home or on MSN and she had a question about math, etc., he would answer it and that this occurred more frequently in grade 11 or 12. He refused to describe this as “tutoring the complainant”. Similarly, when asked about being a chaperone for the complainant’s high school class, although he said he was asked because an adult was needed and acknowledged that a chaperone supervises students, Mr. Fisher had difficulty framing his role as one of having responsibility for the complainant and others on this high school trip. This trip occurred only a week or so prior to

their having sexual intercourse for the first time. Again, a theme emerges from the evidence of minimizing his role and responsibility during his in-court evidence.

[112] On various occasions, I found Mr. Fisher's evidence to be evasive and an attempt to minimize his position. For example, in relation to questions as to whether he considered himself an adult after two years of college in Bermuda and four years of university in Halifax (when he was age 25), his response was that he wouldn't classify himself as an adult or as a youth and that he would not use such terminology. This was evasive and minimizing, as were his answers to questions about "Min" being short for Minister and his role as a chaperone and tutor. This evidence was lacking in credibility.

[113] Mr. Fisher gave evidence that, by 2008, he and the complainant were equals at the Church. He said between January and July of 2008 he thought of himself as an equal to everyone else on the Youth Group Leadership team, including the complainant who was 17, whereas he was 28, and the other leaders were in their twenties. However, earlier in his evidence Mr. Fisher said in 2007 the complainant had come from doing puppetry Ministry in Children's Church and wanted to do this in Youth Group and he encouraged her to do so. He further said because the complainant was taking photographs, editing with Adobe and was already a Junior Leader, they said she could become involved in a minuscule way with the Youth Group. On direct examination he said that later in the fall of 2007 the complainant wanted to take a break from Youth Group and began going to the Wesleyan Church. However, on cross-examination, he said that due to her grade 12 year in the fall of 2007, the complainant wished to be involved with the Youth Group, but in a diminished capacity. He said this was discussed with the leadership team and they agreed she could come on as a Junior Leader of sorts because she only had a limited amount of responsibility. There is an inconsistency in his evidence as to whether the complainant was taking a break or was a Junior Leader in the fall of 2007. Regardless, I find his evidence to be internally inconsistent and implausible when he says that a 17-year-old, who he described as a "Junior Leader of sorts" in 2007 and whom he previously described as having minuscule responsibility, suddenly became his full equal in the leadership of the Youth Group by early 2008 at the time their sexual relationship began.

[114] In addition, in Mr. Fisher's statement to the Church he described the complainant as a Junior Leader saying:

... She later joined our Youth Group. Later she became a Junior Leader with our Youth Leadership team and assisted with posters, planning, etc. ... At some point

in our leadership,(the complainant) took a break from our Youth Leadership team; however, she offered to help with the design of some posters and logos ... primarily because she had the programs and knew how to do it ...

[115] Mr. Fisher freely acknowledged there was some sexual activity prior to the complainant's 18<sup>th</sup> birthday. Mr. Fisher recalled three events of sexual activity, all of which he says were initiated by the complainant: a first kiss at the complainant's stepsister's apartment sometime after January of 2008 when he returned from Christmas holiday in Bermuda; a second kiss in the complainant's bedroom doorway at her parents' home; and sexual activity that was close to sexual intercourse (which he described as penetration but not full stroking) at his apartment in New Minas.

[116] Mr. Fisher denied there was any oral sex in this timeframe and could not recall any other sexual activity in this timeframe. However, in his statement to the Church (Exhibit 4), under the heading "Intimacy", he describes the first kiss and then says, " The intimacy between us escalated very quickly and involved numerous sexual encounters." Mr. Fisher attempted to explain this statement of numerous sexual encounters by saying when he used this phrase there was no accusation of sexual assault at that time and that he was not referring to the timeframe of January to July 2008, but to the lengthier timeframe of their entire relationship. I find Mr. Fisher's evidence in this regard to be lacking in credibility because a single kiss after his return from Christmas vacation and then, months later, sexual intercourse (even with a second kiss somewhere in the intervening timeframe) does not fit the description in his statement that "intimacy between us escalated very quickly." I do not accept Mr. Fisher's evidence that the sexual activity was limited to kiss, kiss, sexual intercourse. In addition, this description by Mr. Fisher of a very quick escalation in sexual activity is similar to the evidence given by the complainant that after the first kiss they were on a "linear line" that continued quite quickly to full nakedness.

[117] I have concluded that Mr. Fisher was selective in how he presented his evidence concerning their relationship. He minimized evidence that supported the complainant's narrative and maximized any events supporting his narrative.

[118] Mr. Fisher said that, prior to their first kiss, a good friend had told him that the complainant had a crush on him and so he took precautions because this person may have seen things that he didn't. He said he only went to the complainant's stepsister's apartment (where the first kiss occurred ) because he knew she would also be there. However, he drove the complainant alone in his car from Youth

Group to the video store, where they rented a number of videos and also had something to eat alone before arriving at her stepsister's apartment. Despite testifying that the first kiss was followed by his protestations and that a second kiss initiated by the complainant was followed by him saying she was going to get him into trouble, he testified that he was not concerned in this context about allowing the complainant, a 17-year-old, to stay overnight at his apartment alone with him. He said no alarm bells went off. This is despite the fact that he acknowledged Reverend Anderson had a conversation with him, prior to this, about concerns being expressed about he and the complainant being alone while attending an event at another church. I find this evidence of Mr. Fisher to be concocted by him and not credible.

[119] Added to this was evidence Mr. Fisher relayed on cross-examination in response to questions around telling the complainant's parents he would give her his bed and he would sleep on the floor when she visited his apartment in New Minas. When he agreed that they actually slept together in his bed, he was asked if he thought her parents would have agreed to this. Initially he responded that he didn't think there would be a problem because the complainant had spoken to her mother about liking him and further said he understood she knew about the relationship and knew the complainant liked him in a romantic way. Later during cross-examination he denied having said there was a conversation about liking him in a romantic way. In response to a question about sleeping in the same bed, he tried to justify it by saying her parents would not have had a problem with it because they knew about the relationship -- a romantic relationship -- and then, at the end, said something contrary, implying the complainant may have discussed a platonic relationship with her mom. This evidence lacks credibility and is internally inconsistent. The evidence is as follows:

... In all honesty I don't think there would have been a problem because I knew (the complainant) had had conversations with her mom about liking me ... and her mother didn't say anything to me about it.

Q. So you felt her parents knew you had some sort of relationship going on?

A. ... To the best of my knowledge I think so.

Q. Tell me exactly what you believe her mother knew?

A. I think (complainant) had had discussions with her mom about liking me.

Q. And when you say liking what do you mean?

A. I would know what the conversations were I just knew she had conversations about liking me.

- Q. And had you ever had conversations with her mother about that?
- A. No ... I just ... they invited me on their trip to Cuba.
- Q. Do you think that they would approve of you having sex with their 17-year-old daughter?
- A. I don't ... I can't speak to ...
- Q. I said do you think.
- A. I can't speak to what they would have approved of or not.
- Q. So you are saying that in late May/early June of 2008 (complainant's) mother, as far as you knew, was aware that she liked you in a romantic way?
- A. Yes.
- Q. Now prior to her going up, so you knew that before she came up?
- A. Knew what?
- Q. That her mother ...
- A. I knew she had had conversations with her mother ...
- Q. That's right, prior to her staying overnight.
- A. Yes.
- Q. So you guys were obviously having conversations then about your relationship prior to her coming up then?
- A. No, I ... we were having conversations about conversations she had – not necessarily about our relationship.
- Q. How did it come up? How did it come up?
- A. I don't remember how it came up. Like, as I said, we talked about pretty much everything.
- Q. I know but how did it come up in conversation? I've told my mother ... this is (complainant) having a conversation ... I told my mother that I like you in a romantic way?
- A. I'm not sure that's how the conversation would have gone or she would have said it ... she probably would've just said 'hey I was talking with my mom about you' or whatever the case is.
- Q. Well that's a big difference
- A. Yes so I don't ... yeah.
- Q. Yes, that's a big difference.
- A. Yeah, so she would have said 'I was talking to my mom about you' or whatever or 'about liking you', etc. ... not 'hey I'm having a romantic relationship' with this person.

Q. Well that was my question earlier that you said yes to.

A. What was the question earlier ...

Q. That (complainant) had told you that she had conversations with her mother regarding her liking you in a romantic way and you said yes.

A. That's what I'm saying ... I don't think she would have said ... No I think I said that I don't think the conversation would've gone like 'hey I like him in a romantic way' ... I just knew she had conversations with her mom about liking me ...

Q. Yeah because...

A. Yeah but I didn't say anything about in a romantic way.

Q. You said nothing... In your testimony, in the last 10 to 15 minutes, you said nothing about her mother and romantic way?

A. I don't remember that I said she had a conversation with her mother that she liked me in a romantic way.

[120] On some occasions Mr. Fisher recalled, with exact precision, the circumstances surrounding the complainant's initiation of the first kiss including drinking ginger ale, that a first movie was finished and a second was paused for 15 to 20 minutes while the complainant's stepsister spoke to her boyfriend on the telephone, what he and the complainant talked about, and where each person sat in the room. However, he could not recall how often they spoke on MSN, or by webcam or by telephone. Mr. Fisher said he could recall exact details of where he and the complainant were in the basement for their second kiss, what was said by her to initiate the kiss and him saying that they should watch the movie and that she was going to get him in trouble. However, he was unable to recall whether he used his tongue, whether he touched the complainant, or whether they discussed the kiss afterwards by MSN. He was also unable to recall whether there was any sexual activity in March of 2008. Similarly, when describing the third sexual encounter which took place at his apartment, he described where he placed a grey office chair next to the bed so they could play video games. He recalled the complainant suggesting a massage and that he should take his shirt off and that she started kissing his back; however, he could not remember whether there was digital penetration or full penetration with his penis. While some of these examples alone are not problematic, when taken together, Mr. Fisher's exacting detail and then lack of recall causes concern.

[121] When describing the sexual activity during direct examination he interrupted his own narrative of the details of the sexual encounter to highlight that the complainant wanted to visit his apartment because he was going to miss her 18<sup>th</sup>

birthday. This was an unusual interjection and I conclude that Mr. Fisher was attempting to push the date of the sexual intercourse as close to the complainant's 18<sup>th</sup> birthday as possible.

[122] I have major concerns about Mr. Fisher's credibility.

[123] Mr. Fisher's evidence contained inconsistencies and unconvincing claims. The sum total of the inconsistencies in the accused's evidence results in my finding that much of his evidence lacks credibility and is unreliable.

### **Assessment of the Complainant's Evidence**

[124] I found the complainant to be believable, forthright and a compelling witness. I find her evidence to be both reliable and credible. She was able to recall her interactions with Mr. Fisher in detail and recount how this relationship evolved from when she was 15 to 17 years old. She was firm in her recollections and she had a clear recall of the events surrounding the evolution of the relationship and the escalation of the sexual activity. She struck me as a person who was careful to provide accurate evidence and details.

[125] There were, however, some inconsistencies in the complainant's evidence. I will review many of those now. To be clear I have considered any and all inconsistencies. The Defence submitted that the inconsistencies in the complainant's evidence were significant, that she was overly dramatic in presenting her evidence, was adversarial and borderline hostile.

[126] I find the inconsistencies in the complainant's evidence to be minor. They do not go to the basis of her narrative and none were indicative of an attempt to mislead. For example, on direct examination she referenced Mr. Fisher shaking her hand for a long period of time when they first met and later asking her mother, "Who is this guy?" On cross-examination she indicated she recalled thinking along the lines of, "Who does this guy think he is?", and that she wondered why he was paying so much attention to her. She acknowledged on cross-examination she did not tell the police that she thought this first meeting was odd or awkward. She simply told the police that she met him at that time.

[127] When asked on cross-examination whether Mr. Fisher treated her more like a Youth Leader than a youth she replied, "no". She then acknowledged that she did tell the police this in her statement. She said this was because she was a youth

member who wanted to be involved with the Youth Group and offered her skills and services beginning when she was 15 and into her 16<sup>th</sup> year.

[128] The complainant, on cross-examination, agreed that she had not told the police she was part of the Youth Group leadership or Ministry team. She said this was because she was considered a youth member who wanted to be more involved. She testified on cross-examination that, from Christmas of 2007 onward, she wanted to be recognized as offering more and doing more volunteering and she considered herself as both a Youth Member and part of the Youth Ministry Team for the Youth Group.

[129] The complainant said she attended Youth Group most Friday evenings. On cross-examination she said that, although she may have missed some Youth Group meetings due to school or being busy, she was always a member of the Youth Group. She did not recall expressing an intention to take a break from Youth Group in 2007, but said it was possible. When asked whether it was possible that she took a break from Youth Group in the early part of 2008 (in April and May), she said it was possible that she did not attend every Friday but would have attended when she could. She said she may have described it as a break while she studied or focused on other things. She said she was always a member of the Youth Group in 2007 and 2008.

[130] On cross-examination the complainant agreed she told the police that she allowed herself to remember a lot of things, through counselling, in the six months before her statement to police. She explained that by going to counselling she was finally “unpacking things”. She said her use of the word “remember” was part of the unpacking, reviewing and understanding that was allowing her to start to heal. She said it was through counselling she was able to start to digest everything that happened to her in her youth. She said she did not feel that her police statement was inaccurate by using the word “remember” because she felt the word “remember” meant the same thing as “unpack”.

[131] The complainant, on cross-examination, was presented with her statement to the police where she said that she remembered thinking his fingers were inside her vagina and then seeing his penis and saying to the police that vision kind of was just recently uncovered after taking away “the blockages and stuff”. The complainant explained that she always knew it was his penis inside of her which is why, at the time, he had to reassure her it was okay. She said the vision that was uncovered to her was that it was wrong. She said her vision was not of seeing his penis, it was seeing what the incident was, in its truth, without the blockages of



loyalty to and trust of Mr. Fisher. Mr. Fisher does not dispute on this occasion that some portion of his penis was inside the complainant's vagina.

[132] In her direct examination she indicated that, after sexual intercourse at his apartment, she cried herself to sleep. On cross-examination she agreed that she told the police she wrote in her journal, "Wow that was a really interesting night" because she thought for sure it meant they were going to get married. She said that her entry in her journal was made the next day.

[133] On direct examination the complainant said that, leading up to Valentine's Day, she and Mr. Fisher had the house to themselves and, at that time, Mr. Fisher performed oral sex on her and also penetrated her digitally. On cross-examination she agreed that this event was likely after Valentine's Day

[134] Some of the above examples were not inconsistencies, but rather the use of different words in an imprecise manner that did not conflict and other of the inconsistencies were explained. As noted above, I consider the inconsistencies in the complainant's evidence to be minor. Inconsistencies on minor matters of detail are to be expected. The inconsistencies did not affect my overall impression of the complainant's evidence as credible and reliable.

[135] During her evidence, the complainant was emotional and showed obvious signs of distress when asked to identify the particulars of the relationship and sexual activity. I find that this added to her credibility. While Courts must always view demeanor with caution, the complainant's demeanor reinforced the Court's view of her truthfulness and the reliability of her evidence. The complainant's evidence on the central issues was consistent.

[136] I did not find the complainant to be overly dramatic, as suggested by the Defence. I found that she relayed the events as she felt them when she was between 15 and 17 years of age. She described how she, as a 15 to 17-year-old perceived the events. I disagree with the Defence's submission that the complainant's evidence was adversarial and borderline hostile on cross-examination. The complainant was simply firm in her responses. She answered the questions, presented and defended her narrative.

### **Other Evidence**

[137] I found the evidence of both Reverend Ago and Reverend Anderson to be credible and reliable. They both were impressive witnesses and provided evidence

of Mr. Fisher's role within the Church during the relevant timeframes. They both corroborated the complainant's evidence that Mr. Fisher, who was called Minister Fisher, was a prominent figure in the Church. Reverend Anderson gave evidence that Mr. Fisher was Head of Ministry for Youth and, as such, his role was to build relationships with the youth.

### **Law and Analysis**

[138] I will address the charge pursuant to s. 153(1)(a) and then the s. 271 charge.

#### ***Section 153(1)(a)***

[139] Mr. Fisher is charged under *Criminal Code*, s. 153(1)(a), as a person in a position of trust or authority who touched a young person for a sexual purpose. Section 153(1) states:

153(1) Every person commits an offence who is in a position of trust or authority towards a young person, who is a person with whom the young person is in a relationship of dependency or who is in a relationship with a young person that is exploitative of the young person, and who

(a) for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of the young person ...

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

(a) the age of the young person;

(b) the age difference between the person and the young person;

(c) the evolution of the relationship; and

(d) the degree of control or influence by the person over the young person.

[140] The sexual exploitation provisions of s. 153 of the *Criminal Code* do not require proof of an absence of consent, as was confirmed in the Supreme Court of Canada decision in *R. v. Audet* [1996] 2 S.C.R. 171(S.C.C.) at para. 23:

Clearly, Parliament wanted to afford greater protection to young persons. It chose harsher means by criminalizing the activity itself, regardless of whether it is consensual (s. 150.1(1) of the Code), in so far as it involves a person who is in a position or relationship referred to in s. 153(1) with respect to the young person. As Woolridge J. eloquently stated in *Hann, supra*, at p. 36:

The implication from the wording of s. 153 is that notwithstanding the consent, desire or wishes of the young person, it is the adult in the position of trust who has the responsibility to decline having any sexual contact whatsoever with that young person.

[Emphasis added]

[141] When Parliament passed *Criminal Code*, s. 153, its explicit purpose was to protect young persons who are in vulnerable positions because of an imbalance inherent in the nature of the young person's relationship with another person. To obtain a conviction under this provision, the Crown must prove beyond a reasonable doubt that:

1. the complainant is a young person within the meaning of s. 153(2);
2. the Accused engaged in the prohibited activity referred to in s. 153(1)(a);
3. at the time the act/s in question was/were committed the Accused was in a position of trust or authority towards the young person or the young person was in a relationship of dependency with the Accused; and,
4. the Accused had the corresponding *mens rea* required for each element of the offence. (*R. v. Audet, supra*, at paragraphs 14 and 16).

[142] The Crown asserts that Mr. Fisher was in a position of trust or authority in relation to the complainant. LaForest, J. in *R. v. Audet, supra*, discussed the meaning of trust and authority:

34 In the absence of statutory definitions, the process of interpretation must begin with a consideration of the ordinary meaning of the words used by Parliament. *Le Grand Robert de la langue française* (2nd ed. 1986) defines the French word '*autorité*' as a [Translation] 'right to command, power (recognized or unrecognized) to enforce obedience', which is, at least in substance, quite similar to the definition proposed by Proulx J.A. It adds that another meaning of '*autorité*' is [Translation] 'superiority of merit or seductiveness that compels unconstrained obedience, respect, trust'. *The Oxford English Dictionary* (2nd ed. 1989) suggests similar definitions for the English word 'authority': 'power or right to enforce obedience' and 'power to influence the conduct and actions of others'. I am in complete agreement with Proulx J.A. that the meaning of the term must not be restricted to cases in which the relationship of authority stems from a role of the accused but must extend to any relationship in which the accused actually exercises such a power. As can be seen from these definitions, the ordinary meaning of the word 'authority' or '*autorité*' does not permit so restrictive an interpretation. Furthermore, the comments of Proulx J.A. are entirely appropriate in view of the express intention of Parliament, which, in declining to include in s. 153(1) a list of the cases in which a person must refrain from sexual contact with a young person, intended to direct the analysis to the

*nature of the relationship* between the young person and the accused rather than to their *status* in relation to each other. I will return to this.

35 The French word ‘*confiance*’, according to *Le Grand Robert*, is a belief in or firm expectation of something, or faith in someone, and the confidence that results therefrom. In English, the word “trust” can have various meanings, especially in a legal context. However, considering that Parliament used the word ‘*confiance*’ in the French version, I doubt that the word ‘trust’ as used in s. 153(1) refers to the concept as defined in equity. I therefore agree with the reservations expressed by Blair J. ‘Trust’ must instead be interpreted in accordance with its primary meaning: ‘[c]onfidence in or reliance on some quality or attribute of a person or thing, or the truth of a statement’. The word ‘confidence’ is defined as follows: ‘[t]he mental attitude of trusting in or relying on a person or thing; firm trust, reliance, faith’.

36 I would add that the definition of the words used by Parliament, like the determination in each case of the nature of the relationship between the young person and the accused, must take into account the purpose and objective pursued by Parliament of protecting the interests of young persons who, due to the nature of their relationships with certain persons, are in a position of *vulnerability* and *weakness* in relation to those persons.

[Emphasis added]

[143] The meaning and scope of position of trust is addressed in *R. v. Audet, supra*, where LaForest J., writing for the majority, said that a position of trust exists in a broad, societal and social context, where the nature of the interaction between a young person and an adult provides opportunity to persuade and influence. At para. 38, LaForest, J. observed that a position of trust is difficult to define or evaluate outside of a specific factual context:

It will be up to the trial judge to determine, on the basis of all the factual circumstances relevant to the characterization of the relationship between a young person and an accused, whether the accused was in a position of trust or authority towards the young person ... One of the difficulties that will undoubtedly arise in some cases concerns the determination of the times when the ‘position’ or ‘relationship’ in question begins and ends. It would be inappropriate to try to set out an exhaustive list of the factors to be considered by the trier of fact. The age difference between the accused and the young person, the evolution of their relationship, and above all the status of the accused in relation to the young person will of course be relevant in many cases.

[144] Justice Laskin, writing for the majority of the Ontario Court of Appeal in *R. v. Aird*, 2013 ONCA 447, addressed the difference between a position of trust and a position of authority:

34 Positions of trust and authority are related concepts. But they are different concepts and provide separate routes to the offence of sexual exploitation. An accused not in a position of authority towards a young person may nonetheless be found to be in a position of trust. Blair J. made this point in *S. (P.)*, at para. 37:

I take a 'position of trust' to be somewhat different than a 'position of authority'. The latter invokes notions of power and the ability to hold in one's hands the future or destiny of the person who is the object of the exercise of the authority: see, *R. v. Kyle* (1991), 68 C.C.C. (3d) 286 (Ont. C.A.). A position of trust may, but need not necessarily, incorporate those characteristics. It is founded on notions of safety and confidence and reliability that the special nature of the relationship will not be breached.

[emphasis added]

[145] In *Audet, supra*, the Court noted when setting out some of the items for consideration that "above all, the status of the accused in relation to the young person will of course be relevant in many cases."

[146] ***The Actus Reus:*** The Supreme Court of Canada indicated in *Audet, supra*, that for a conviction to be entered, pursuant to s. 153(1) of the *Criminal Code*, the Crown must prove:

1. that the victim is a "young person";
2. that the accused engaged in one of the activities referred to in the section; and
3. that at the time of doing so, the accused was in a position of trust or authority towards the young person (or in appropriate cases that the young person was in a relationship of dependency with the accused).

[147] ***The Mens Rea:*** The Supreme Court indicated in *R. v. Audet, supra*, that "the Crown must also prove the *mens rea* required for each of these elements." Thus, the Crown must prove beyond a reasonable doubt that the touching was for a sexual purpose.

### **Was the Complainant a Young Person?**

#### **Did Sexual Touching Occur for a Sexual Purpose?**

[148] Whether the complainant was a young person at the time of the sexual activity was not in issue. Mr. Fisher acknowledged that three incidents of sexual activity occurred before the complainant's 18<sup>th</sup> birthday. There is no doubt on the evidence that Mr. Fisher knew the complainant's age. The complainant's date of birth is July 1, 1990. Between January 1, 2008 and July 1, 2008 she was 17 years of age.

[149] The complainant and Mr. Fisher gave different accounts of the extent of sexual activity between January 1, 2008 and July 1, 2008. However, there is no dispute there was sexual activity, for a sexual purpose, before the complainant's 18<sup>th</sup> birthday.

[150] Mr. Fisher testified that his sexual relationship with the complainant included kissing, touching of the complainant's vaginal area, and penile penetration (but not full stroking) before she turned 18.

[151] The complainant gave evidence that the sexual relationship included kissing, full body touching, digital penetration of her vagina, oral sex performed both by Mr. Fisher and the complainant, and sexual intercourse. I accept the complainant's evidence that there were numerous incidents of sexual activity before her 18<sup>th</sup> birthday.

### **Was Mr. Fisher in a Position of Trust or Authority in the Period January to July of 2008?**

[152] Given that Mr. Fisher admits there was a sexual relationship before age 18, to prove Mr. Fisher guilty under s. 153(1)(a) the Crown must prove beyond a reasonable doubt that the sexual activity occurred when Mr. Fisher stood in a position of trust or authority to the complainant.

[153] I will first address whether Mr. Fisher stood in a position of trust toward the complainant.

[154] A position of trust creates an opportunity for all the persuasive and influencing factors that individuals have over young persons to come into play. A young person is especially vulnerable to the influence of these factors. A position of trust or authority must be founded on an assessment of all relevant facts. In **R.**

*v. Audet, supra*, the Court referenced a number of factors for consideration, emphasizing this was not an exhaustive list: the age difference between Mr. Fisher and the complainant, the status of Mr. Fisher in relation to the complainant, and the evolution of their relationship.

[155] *R. v. Audet, supra*, was decided prior to the amendment of s.153 adding subsection (1.2) which states a relationship of trust may be inferred from the nature and circumstances of the relationship, including the age of the young person; the age difference between the adult person and the young person; the evolution of the relationship; and the degree of control or influence by the adult person over the young person.

[156] The Ontario Court of Appeal in *R. v. Aird*, 2013 ONCA 447, summarized the considerations relevant to an assessment of whether a relationship of trust exists, including both those identified by the Courts and in subsection (1.2):

28 The considerations that bear on whether a relationship comes within s. 153 flow from the obvious purpose of this section: to protect a young person who is vulnerable to an adult because of the imbalance in their relationship. With this purpose in mind, the courts have identified several considerations relevant to an assessment of whether a relationship of trust exists. They include:

- The age difference between the accused and the young person;
- The evolution of their relationship;
- The status of the accused in relation to the young person;
- The degree of control, influence or persuasiveness exercised by the accused over the young person; and
- The expectations of the parties affected, including the accused, the young person and the young person's parents.

See *R. c. Audet; R. v. D. (C.)*, [2000] O.J. No. 1667 (Ont. C.A.). See also *R. v. E. (D.)*, [2009] O.J. No. 1909 (Ont. S.C.J.).

29 No one consideration is determinative. But each one may play a role. At bottom, 'trust', wrote LaForest J. for the majority in *Audet*, at para. 35, must be 'interpreted in accordance with its primary meaning: [c]onfidence in or reliance on some quality or attribute of a person or thing, or the truth of a statement.'

[157] There is no one factor that necessarily settles the question of position of trust. All factors can play a role in proving beyond a reasonable doubt that someone stood in a position of trust towards a young person.

[158] When the complainant met Mr. Fisher, she was 14 and he was 25 years of age. She came to know him as Minister Fisher, a Youth Pastor who, at Sunday service, sat on the Church's raised pulpit with the other Ministers and adults. He oversaw the Youth Group that the complainant joined.

[159] Reverend Ago described Mr. Fisher as a very prominent figure in the Church. She said he was the Youth Pastor with oversight of young people. She described Mr. Fisher as Reverend Anderson's right-hand person in 2007 and 2008.

[160] Reverend Anderson testified that in 2004, he brought Mr. Fisher before the leadership of the Church and asked them to give him a Minister's license. He explained that this is the first step on the journey towards ordination and is necessary to enroll in Divinity College. He said that by 2004, people recognized Mr. Fisher as a Minister and people started calling him "Min". He said as of 2004, Mr. Fisher was the Minister of Youth, Head Of Ministry. The Head of Ministry's whole emphasis was to build relationships with the youth. He said that in this role, Minister Fisher was in charge of the team and in charge of the youth at Youth Group.

[161] In deciding whether Mr. Fisher was in a position of trust at the relevant time of January to July 2008, I must consider all of the evidence in its totality. It is useful to set out individually some of the indicia of the relationship between the complainant and Mr. Fisher.



- a. His role at the Emmanuel Baptist Church was as a Youth Minister who preached at some Sunday services, and sat on the raised pulpit with other Ministers and adults. The complainant attended Sunday service and would have seen Mr. Fisher in this role.
- b. He was Head of Ministry (HOM) for Youth at Emmanuel Baptist Church. He was in charge of and oversaw the Youth Group. The complainant was a member of the Youth Group.
- c. He tutored the complainant with her school work.
- d. There was an age difference of 11 years between them.
- e. The complainant was a deeply-religious young person when she met Mr. Fisher. The Church was a huge part of her life. She volunteered in the Church nursery, she developed a puppetry Ministry for the young children and she expressed her desire to serve God and take on more responsibility, including with the Youth Group. Mr. Fisher made this happen.
- f. He was her spiritual advisor and mentor. He acted as an advisor/counsellor regarding difficult family and school issues the complainant was experiencing. The complainant relied on him and had confidence in him.
- g. He knew she was experiencing significant problems at home, was vulnerable and he provided comfort, advice and reassured her of God's plan. She described Mr. Fisher as a gift from God, a powerful voice, and a blessing.
- h. In the years leading up to the sexual activity Mr. Fisher fashioned a strong emotional bond with the complainant. He spent several years cultivating their special relationship by being her confidant, friend, spiritual advisor and mentor. She said she felt special, within his inner circle, and trusted him with everything.
- i. Mr. Fisher described himself to the complainant as 'your Min', meaning Minister and she in turn called him 'my Min'.

- j. While Mr. Fisher was a student at Acadia Divinity college at the time, he had already completed five to six years of college and university and was 28 years old at the time of the sexual activity.
- k. The relationship evolved from being a spiritual advisor, mentor and a big brother figure when she was 15 to regular late night discussions on MSN and later by webcam, and spending time alone with the complainant. As a result, he quickly became an integral part of her life. Then Mr. Fisher began to tell the complainant he had feelings for her and began to make sexual comments via webcam. The sexual relationship began by them laying together watching movies, scratching or caressing, then to kissing, oral sex and, ultimately, sexual intercourse.
- l. He knew the complainant was naïve and had no sexual experience. She told Mr. Fisher she was saving her sexual firsts for the person she would marry. As the relationship progressed to kissing, the complainant came to believe that he wanted to marry her.
- m. He took pro-active steps to hide his relationship with the complainant from church members who were asking questions about their closeness.
- n. He acknowledged that the complainant's parents trusted him.
- o. After inappropriate conduct, he would pray with the complainant and tell her this could not happen again. She described being in mourning and being confused as a result of this; however, it would then happen again.
- p. He chaperoned the complainant's high school trip in grade 12.

[162] The Defence says, by 2008, the complainant was a Youth Leader in the Youth Group, had worked at the Church over the summer of 2007 and was an equal with Mr. Fisher by January of 2008. There is no question that relationships can evolve over time and relationships that begin as a position of trust or authority

can end differently and move on to be relationships where individuals are on an equal footing. As indicated above, I do not accept the evidence that the complainant was an equal. She may have wanted to be an equal with the adults who led the Youth Group but she was not. She was 17, a Youth Group member and a Junior Leader. That is how Mr. Fisher described her role as of 2007 and also how Reverend Anderson described her role. The fact that Mr. Fisher, in his June 2008 Report, listed her as one of six Key Officers in the youth ministry did not elevate her status; it acknowledged her contribution as a Junior Leader. All leaders were listed, she as a Junior Leader and also all of the adult Leaders. This Report was prepared in June, shortly after they first engaged in sexual intercourse. If anything, I see the complainant's inclusion on the Report as a continuation of his grooming of the complainant, keeping her close and keeping her happy.

[163] Mr. Fisher was a Youth Minister, aged 28, who preached in the Church the complainant attended, who oversaw the Youth Group the complainant attended, and who tutored the complainant with her schoolwork. He chaperoned her high school class around the same time they first had sexual intercourse. He was her confidant and spiritual advisor. This gave Mr. Fisher significant status in relation to the complainant who, in 2008, was a 17-year-old high school student. The nature of the Youth Minister/youth congregant relationship created an opportunity for Mr. Fisher to use his status -- a persuasive and influencing factor -- to groom the complainant into a sexual relationship.

[164] The evidence of Mr. Fisher does not leave me with a reasonable doubt about his guilt. I do not accept much of Mr. Fisher's evidence nor do I think it raises a reasonable doubt. Further, nothing Mr. Fisher said caused me any doubt about the evidence that I do accept. On the totality of the evidence I am not left with a reasonable doubt.

[165] I find beyond a reasonable doubt that Mr. Fisher stood in a position of trust towards the complainant and that, while he did so, and while she was under 18 years of age, he engaged in a sexual relationship with her. Mr. Fisher, I therefore find you guilty of sexual exploitation pursuant to s.153(1)(a) of the *Criminal Code*.

[166] The facts in the present case highlight the intended purpose of this legislation -- the need for protection of vulnerable young people.

[167] Having found Mr. Fisher to have been in a position of trust toward the complainant, I see no reason to determine whether he was also in a position of

authority. The Crown's argument focused on position of trust and did not strenuously argue position of authority.

## Section 271

[168] Mr. Fisher is also charged with sexual assault under *Criminal Code*, s. 271. Section 271 states:

271 Everyone who commits a sexual assault is guilty of  
 (a) an indictable offence and is liable to imprisonment for a term not exceeding 10 years ...

[169] In *R. v. Ewanchuk* (1999), 131 C.C.C. (3d) 481 (S.C.C.), the Supreme Court of Canada indicated that the offence of sexual assault "is comprised of an assault within any one of the definitions in s. 265(1) of the *Code*, which is committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated." The *mens rea* element of the offence was described as "a crime of general intent." As a result, "the Crown need only prove that, the accused intended to touch the complainant in order to satisfy the basic *mens rea* requirement." Section 265(1)(a) of the *Criminal Code* indicates that the least touching of another person without their consent constitutes an assault (see *R. v. D. (M.)* (2010), 253 C.C.C. (3d) 493 (B.C. C.A.)).

[170] For the accused to be found guilty of the offence pursuant to s. 271 of the *Criminal Code* the Crown must prove all the essential elements:

- The accused intentionally applied force to the complainant;
- The issue of lack of consent need not be proven by the Crown in relation to s. 273.1 (2) (c) of the *Criminal Code*; and,
- The force applied took place in circumstances of a sexual nature.

[171] The Crown is pursuing the s. 271 charge solely via s. 273.1(2)(c). There is no dispute that there was sexual activity. The sole issue relates to consent and whether consent was vitiated as a result of an abuse of a position of trust, power, or authority. Section 273.1 (2) (c) states that for the purposes of s. 271 no consent is obtained if:

- (c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;

...

[172] While I have found Mr. Fisher stood in a position of trust to the complainant, the Crown must also establish beyond a reasonable doubt that the consent to sexual activity was induced by an abuse of that position of trust by Mr. Fisher.

[173] The Supreme Court of Canada in *R. v. Snelgrove*, 2019 SCC 16, said that the aim of this section is to protect the vulnerable and the weak and to preserve the right to freely choose to consent to sexual activity. The Court stated the following in relation to inducing consent by abusing a position of trust:

2 We would dismiss the appeal, substantially for the reasons of the majority of the Court of Appeal.

3 Section 273.1(2)(c) has as its aim ‘[t]he protection of the vulnerable and the weak and the preservation of the right to freely choose to consent to sexual activity’ (*R. v. Hogg* (2000), 148 C.C.C. (3d) 86 (Ont. C.A.) , at para. 17). Inducing consent by abusing the relationships set out in s. 273.1(2)(c) does not imply the same kind of coercion contemplated by s. 265(3)(d) of the *Criminal Code*, which speaks to consent obtained where the complainant submits or does not resist by reason of the "exercise of authority". Rather, as Justice Doherty observed in *R. v. Lutoslawski*, 2010 ONCA 207, 258 C.C.C. (3d) 1 (Ont. C.A.): ‘An individual who is in a position of trust over another may use the personal feelings and confidence engendered by that relationship to secure an apparent consent to sexual activity’ (para. 12).

4 On the facts of this case, we are of the view that it would have been open to the jury to conclude that by virtue of abusing his position of trust and authority, the accused took advantage of the complainant, who was highly intoxicated and vulnerable, by using the personal feelings and confidence engendered by their relationship to secure her apparent consent to sexual activity. An instruction under s. 273.1(2)(c) was therefore warranted. [*Emphasis added*]

[174] There is no need for the Crown to prove coercion. The question for determination is whether the accused incited or induced the complainant to engage in sexual activity by abusing a position of trust, power or authority. Establishing coercion or supplanting free will is not required

[175] In *R. v. Lutoslawski*, 2010 ONCA 207 (aff’d [2010] 3 S.C.R. 60 (S.C.C.)) the Ontario Court of Appeal said that s. 273.1(2)(c) addresses the kinds of

relationships where consent is rendered illusory by the dynamics of the relationship:

12 I agree with Crown counsel's submissions that s. 273.1(2)(c) is broader than s. 265(3)(d). Section 273.1(2)(c) speaks not only to the abuse of a position of authority but also to the misuse of a position of power or trust. The section addresses the kinds of relationships in which an apparent consent to sexual activity is rendered illusory by the dynamics of the relationship between the accused and the complainant, and by the misuse of the influence vested in the accused by virtue of that relationship. The term "exercise of authority" in s. 265(3)(d) suggests a coercive use of authority to overcome resistance to a consent. Inducing consent by abusing the relationships set out in s. 273.1(2)(c) does not imply the same kind of coercion. An individual who is in a position of trust over another may use the personal feelings and confidence engendered by that relationship to secure an apparent consent to sexual activity.

13 The distinction between s. 273.1(2)(c) and s. 265(3)(d) was also addressed in *R. v. Makayak*, 2004 NUCJ 5 (Nun. C.J.) at para. 70:

Section 273.1(2)(c) broadened the scope of criminal conduct to include breach of trust and power. However, the section also added the words 'induces the complainant ... by abusing a position of trust, power, or authority'. Does this mean there has to be some form of coercion? In my view, these words remove the need for coercion that may be present for section 265(3) (d). It is clear from *Matheson* [Citation omitted.] that it is the exploitation of the imbalance that is the key consideration. Section 273.1(2)(c) was passed a number of years after the courts had struggled with section 265(3)(d). Parliament had the opportunity to consider the case law that had developed up to that point. 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.

[Emphasis added]

[176] In *R. v. Snelgrove*, 2018 NLCA 59 the Newfoundland Court of Appeal referred to *R. v. Lutoslawski*, *supra* and said at paras. 23 and 25:

... I accept that section 273.1(2)(c) engages a more nuanced or subtle form of pressure or inducement which may be inferred from the circumstances...

25 In the absence of the complainant's direct evidence of inducement, the surrounding circumstances may provide an evidentiary basis for consideration by the trier of fact in determining whether consent was vitiated by the operation of section

273.1(2)(c). For example, in this case, a circumstance the jury may consider to be relevant is the vulnerability of the complainant who was intoxicated, in contrast to Mr. Snelgrove who was a police officer on duty, in a position of trust or authority in relation to the complainant, and not similarly impaired. This may be one factor the jury could consider relevant in assessing whether Mr. Snelgrove abused his position of trust or authority to induce the complainant to engage in the sexual activity.

[Emphasis added]

[177] Mr. Fisher took advantage of the complainant, who was vulnerable and dependent on him both spiritually and emotionally, by using the personal feelings and confidence engendered by their relationship to secure her apparent consent to sexual activity. He used his position of trust as a Minister and Youth Group leader to build a close relationship with the complainant and then he abused that position by taking advantage of the personal feelings, confidence and trust that had been built over several years to secure her consent to sexual activity. Any consent to sexual activity by the complainant was rendered illusory by the dynamics of the relationship between Mr. Fisher and the complainant, and by the misuse of the influence vested in him by virtue of that relationship. This is not consent. The complainant's consent was induced by an abuse of the position of trust by Mr. Fisher, thereby vitiating any consent.

[178] The Defence points to the Newfoundland Court of Appeal decision in *R. v. Snelgrove* and says that if the Court is satisfied the sexual activity was initiated by the complainant then s. 273.1(2)(c) has no application. The Court said, at para 28:

28 As applied here, I am satisfied that different interpretations may be drawn from the evidence which may affect factual determinations that may be made by the trier of fact, that is, the jury. For example, if the jury accepted the evidence of Mr. Snelgrove that the sexual activity was initiated by the complainant and was not induced by the abuse of his position as a police officer, and that the circumstances support that conclusion, the result would follow that, on the facts, section 273.1(2)(c) would not apply to vitiate the complainant's consent.

[179] I am satisfied beyond a reasonable doubt that Mr. Fisher induced the complainant to engage in the sexual activity by abusing his position of trust. Further, I do not accept Mr. Fisher's evidence that the complainant initiated all of the sexual activity. I accept that during the early 2008 period when Mr. Fisher escalated the relationship, the complainant initiated a first kiss only and then Mr. Fisher took over.

## Conclusion

[180] I have concluded that the Crown has proven Mr. Fisher committed the offences with which he is charged. I find that all of the essential elements of both offences have been proven beyond a reasonable doubt. I have reached this conclusion because I have concluded that Mr. Fisher touched the complainant for a sexual purpose, in circumstances of a sexual nature, while he was in a position of trust toward her, when she was a young person as defined in s. 153(2), contrary to s. 153(1)(a), and that Mr. Fisher induced the complainant to engage in sexual activity by abusing his position of trust, meaning no consent was obtained (s. 273.1(2) (c)) contrary to s. 271. I am satisfied that the totality of the evidence presented establishes the guilt of Mr. Fisher beyond a reasonable doubt for the offences with which he was charged.

[181] Before entering a conviction, I would ask counsel to address the application of the *Kienapple* principle in these circumstances (*R. v. Kienapple*, [1975] 1 S.C.R. 729; *R. v. Prince* [1986] 2 S.C.R. 480).

Jamieson, J.