IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Holly C. Beard
Mr. Justice Christopher J. Mainella
Madam Justice Janice L. leMaistre

BETWEEN:

HER MAJESTY THE QUEEN	)	***J. M. Mann*** ✓ *for the Appellant*
Appellant	)	***M. G. Enright*** *for the Respondent*
- and -	)	
SCOTT CHRISTOPHER ALCORN	)	*Appeal heard:* ***September 7, 2021***
(Accused) Respondent	)	*Judgment delivered:* ***December 9, 2021***

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On appeal from 2020 MBQB 183

MAINELLA JA

Introduction

[1] This appeal is about the fitness of a sentence for purchasing the sexual services of a child (often called child prostitution). In order to better legally protect children, it is necessary to turn a new page from the past and embark on a fresh sentencing approach which focusses on greater offender accountability through increased sentences.

[2] Section 286.1(2) of the *Criminal Code* (the *Code*) defines a form of sexual exploitation. It is typically a racialized and gender-inequality crime because victims of this offence are predominantly vulnerable Indigenous girls in the child sex industry and the offenders are primarily non-Indigenous adult men who take advantage of power imbalance for selfish, prurient reasons.

[3] Sadly, the facts of this case are too common. On June 30, 2015, the accused, then age 39, spoke to D.R. via social media. D.R. was two days past her 16th birthday; she told the accused she was "lonely." The two agreed to have sex if the accused gave her a bottle of alcohol. D.R.'s life unfortunately reflects the reality for many vulnerable Indigenous girls. She was a "very high-risk youth" in the child welfare system. She had several mental health challenges and "severe addictions" issues. She lost her sister to suicide in 2013 and was engaging in survival sex, trading her body for money or alcohol.

[4] The accused knew D.R. was under the age of 18 and that she had a relationship with Kevin Rose (Rose), a notorious pimp and convicted child pornographer. He met her at Rose's residence, which he described as a "flop house". She outwardly manifested further vulnerability to being lonely—she was intoxicated. He gave D.R. a 60-ounce bottle of rum, as agreed, and then the two had vaginal intercourse. Afterwards, D.R. asked the accused for "another $40." He told her he did not have any money on him.

[5] Rose had procured D.R. and other vulnerable girls to have sex with men, which he secretly recorded (see *R v Rose*, 2019 MBCA 40 at paras 6, 9, 15). Police found a recording of the accused and D.R. having sex.

[6] Once children get caught up in the child sex industry, they suffer an "erasure of agency" (Canada, National Inquiry into Missing and Murdered

Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, vol 1a (Ottawa: NIMMIWG, 2019) at 657 (the MMIWG Report)). Tragically, D.R. ultimately took her own life in July 2016.

[7] After a trial, the accused was convicted of one count of obtaining sexual services for consideration from a person under the age of 18. The judge sentenced him to a term of 15 months' imprisonment, less time served.

[8] The Crown seeks leave to appeal and, if granted, appeals the sentence. In my respectful view, the judge made errors in principle in her assessment of proportionality (see section 718.1 of the *Code*) which impacted the sentence. Application of the relevant objectives and principles of sentencing in light of the directions made in *R v Friesen*, 2020 SCC 9, called for a significantly higher sentence in these circumstances.

[9] For the following reasons, I would grant leave to appeal, allow the Crown's appeal and vary the accused's sentence to a term of five years' imprisonment, less time served.

Terminology

[10] Language is an important part of the discussion of sexual offences against a child; as was said in *Friesen*, "sentencing is a communicative process, the language that sentencing judges use matters" (at para 147). I have used the term "child" to describe D.R. and anyone else under the age of 18. I have refrained from using the terms "sex work," "sex worker," "sex trade," "customer" or "client" as such words blur the exploitative nature of the child sex industry.

Background

The Legislation

[11] Child prostitution laws address the "unique effects of prostitution on [children] in light of their inherent vulnerability and heightened need for protection" (*R v Ackman*, 2017 MBCA 78 at para 36).

[12] Section 286.1(2) of the *Code* was enacted as part of the *Protection of Communities and Exploited Persons Act*, SC 2014 c 25 at section 20 (the *PCEPA*). It is similarly worded to its precursor, section 212(4), except that the maximum punishment was doubled to ten years' imprisonment and a higher mandatory minimum sentence was added for a subsequent offence:

> **Obtaining sexual services for consideration from person under 18 years**
> **286.1(2)** Everyone who, in any place, obtains for consideration, or communicates with anyone for the purpose of obtaining for consideration, the sexual services of a person under the age of 18 years is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years and to a minimum punishment of imprisonment for a term of
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> **(a)** for a first offence, six months; and
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> **(b)** for each subsequent offence, one year.

[13] The *PCEPA* was Parliament's legislative response to the decision of *Canada (Attorney General) v Bedford*, 2013 SCC 72, which declared invalid three prostitution-related offences. The *PCEPA* makes both adult and child prostitution illegal.

[14] The preamble to the *PCEPA* provides insight into its purpose and object (see the *Interpretation Act*, RSC 1985, c I-21 at section 13). In it, Parliament declares that prostitution is an inherently exploitative and dangerous activity. The harms of objectification of the human body and the commodification of sexual activity are societal and disproportionality impact women and children. The *PCEPA* is designed to discourage, denounce and prohibit the demand for prostitution in order to protect communities, human dignity and equality, and to encourage victims to report violence and leave prostitution.

[15] The prostitution policy implemented by the *PCEPA* shifts the treatment of prostitution from a "nuisance" towards treating it "for what it is: a form of exploitation" (*House of Commons Debates (Hansard)*, 41-2, vol 147 No 101 (11 June 2014) at 6653). To reflect this change, most prostitution offences are now in Part VIII of the *Code*, Offences Against the Person and Reputation, when they were previously in Part VII, Disorderly Houses, Gaming and Betting. This new direction is part of the modern approach away from seeing sexual offences as being about "sexual propriety" (*Friesen* at para 55) and instead, recognizing that they are about "personal autonomy, bodily integrity, sexual integrity, dignity, and equality" (at para 56).

[16] The *PCEPA* was influenced by the Nordic model of prostitution laws, where the organizing principle is that prostitution is viewed as an inherently harmful activity. It is sexual exploitation which disproportionately and negatively affects women and girls (particularly from marginalized groups) and gives rise to gender inequality in society. Unlike jurisdictions where prostitution is regulated by way of decriminalization or legalization, the Nordic model seeks to abolish prostitution by the asymmetrical approach

of criminalizing demand, the purchase of sexual services, but not supply—those who sell their own sexual services (see Department of Justice Canada, *Bill C-36, An Act to amend the Criminal Code in response to the Supreme Court of Canada decision in Attorney General of Canada v Bedford and to make consequential amendment to other Acts (Protection of Communities and Exploited Persons Act)* (Technical Paper) Catalogue No J2-399/2014E-PDF, (Ottawa: DOJ 2014) at 3-4, 12-13).

The Harms of the Child Sex Industry

[17] In *Rose*, this Court acknowledged the pernicious scourge of the child sex industry. Burnett JA observed, "the sexual exploitation of young, vulnerable [children] is a problem of longstanding concern in Manitoba that requires denunciation by this Court and the community at large" (at para 37).

[18] The harm that the child sex industry causes is well-known; it is marked by a "culture of violence" (Department of Justice Canada, Research and Statistics Division, *Youth Involvement in Prostitution: A Focus on Intrafamilial Violence–A Literature Review* (Technical Report) TR1999-3E, by Steven Bittle (Ottawa: DOJ 1999) at section 3.4) amongst other serious ills. The nature of the harm, however, is not "limited to the direct victim" (*Friesen* at para 62). Victimization occurs not only to the children whose sexual services are sold, but also to their friends, family and society itself. These harms also have a temporal quality, as "[c]hildren are the future of our country and our communities" (*Friesen* at para 64).

[19] Discussion of the child sex industry also requires a frank talk about race and gender. As noted in *R v Barton*, 2019 SCC 33, to "better ensure Indigenous women and girls receive the full protection and benefit of the law"

(at para 204), it is necessary to talk "openly, honestly, and without fear" about the "biases, prejudices, and stereotypes against [them]" (*ibid*).

[20] In *Friesen*, the Supreme Court stated, "To effectively respond to sexual violence against children, sentencing judges need to properly understand the wrongfulness of sexual offences against children and the profound harm that they cause. Getting the wrongfulness and harmfulness right is important" (at para 50). Accordingly, courts have an obligation to understand the nature of child prostitution and adjust sentencing to "respond to the prevalence" (at para 49) of such crimes. Several notorious facts about the child sex industry provide, therefore, important context for sentencing:

1. The child sex industry is involuntary; it is a myth to conflate sexual exploitation with the legitimate provision of labour (see Robert Chrismas, *Sex Industry Slavery: Protecting Canada's Youth* (Toronto: University of Toronto Press, 2020) at 13).

2. The building blocks of the child sex industry are the most vulnerable. More than 70% of the children involved in the child sex industry in Manitoba are Indigenous, with the majority of them being girls. These children often have traumatic backgrounds (see Chrismas at pp 17, 39, 44, 48, 66, 72-74, 80-82, 86, 92, 102-105, 156-161, 179; the MMIWG Report at pp 659-60; Native Women's Association of Canada, *Sexual Exploitation of Aboriginal Children and Youth: Environmental Scan and a Meeting of Experts*, (Ottawa: NWAC Health, 2008) at 5-7, 10 (the Native Women's Report); and *R v Gudmandson*, 2018 MBPC 31 at paras 34-37, 39).

3. Historically, there has not been true accountability for the exploiters, who are often non-Indigenous, adult males. Racism, ignorance and stereotypical views about the promiscuity of Indigenous women and girls contribute to this impunity (see the Native Women's Report at pp 12-13; and *Barton* at paras 199-200).

4. Sexual offences against children have "life-altering consequences" to victims (*Friesen* at para 74). The child sex industry negatively impacts self-fulfillment and healthy and autonomous development, and puts children at risk for significant, and sometimes fatal, short-term and long-term consequences (see *Gudmandson* at paras 38, 40; *Friesen* at paras 14, 58; and the Native Women's Report at p 8).

5. The magnitude of the local child sex industry is disturbing (see Manitoba, Provincial Court, *The Fatality Inquiries Act: Report by Provincial Judge on Inquest Respecting the Death of Tracia Owen* (Winnipeg: Prov Ct, 2008) (Hon Judge John Guy); and Government of Manitoba, *Tracia's Trust: Collaboration and Best Practices to End Sexual Exploitation and Sex Trafficking in Manitoba* (Winnipeg: Gov't Man, 2019) at 15). Manitoba's child welfare system, which typically has in it 10,000 vulnerable children (90% of whom are Indigenous) provides ideal conditions for the child sex industry to flourish.

6. Sexual crimes against a child are often "hidden, unreported, and under-recorded" (*Friesen* at para 67). The child sex industry

> prospers because it is "strategically invisible" (Chrismas at p 31). It thrives on the abuse of technology; offenders can privately connect with victims (see *Friesen* at para 47). The problem is hidden from the consciousness of society, which does not see sexual exploitation of marginal populations as important (see the Native Women's Report at p 7).

The Judge's Decision—15-Month Sentence

[21] The judge acknowledged that Parliament had "increased [the] penalty" (at para 15) for child prostitution, recognized the conduct as "exploitive" and signalled for "harsher treatment" (*ibid*). She also agreed with the Crown that "the message" (*ibid*) from *Friesen* applied to sentencing the accused, but she disagreed as to "the impact of that decision on this case" (*ibid*).

[22] In crafting the accused's 15-month sentence, the judge relied heavily on the decisions of *Gudmandson* and *Rose*. She stated (at para 17):

> None of the aggravating factors present in the two Manitoba cases are present here. This was a single incident. D.R. was 16, not 14. [The accused's] actions appear opportunistic rather than predatory. He does not have a history of similar or related offences. However, very clearly this was a transaction. It is irrelevant that it was suggested by D.R. The age difference between [the accused] and D.R. was substantial. They may have known each other, but only in a passing way. Even his limited exposure to D.R. would have made it obvious to [the accused] that she had issues with alcohol and maybe drugs. That he believed his conduct was legal because D.R. was 16 is not significant.

The Parties' Submissions

[23] The Crown submits the judge made two material errors. It points to her comments during the sentencing hearing, arguing that she misunderstood section 286.1(2) of the *Code*. Alternatively, it says her departure from the directions in *Friesen* led to a faulty assessment of proportionality.

[24] The accused defends the judge's understanding of section 286.1(2) and *Friesen*. He relies on the deferential standard of review and asserts that she did not make an error in principle that impacted the sentence, nor can the sentence be said to be demonstrably unfit (see *Friesen* at para 26). Alternatively, he submits that it would not serve the ends of justice for him to be reincarcerated (see *R v Burnett*, 2017 MBCA 122 at paras 38-40).

Discussion

The Judge's Statements During the Sentencing Hearing

[25] The Crown relies on two passages from the sentencing hearing. The judge said that the accused had not "been charged with a sexual offence" like sexual interference. She also said that D.R. was 16 years old and, thus, "could consent to sexual intercourse."

[26] The Crown's submission is not persuasive.

[27] The Crown is basing its argument on the judge's comments at the sentencing hearing, not in her reasons for sentence. In our legal system, there is a well-established tradition of healthy interaction between the Bench and counsel during final submissions; this improves the quality of justice. As was said in *R v Hunter*, 2016 MBCA 2, "Questions from the Bench do not give

rise to a reversible error unless an error in the judge's reasoning is subsequently perpetuated in the reasons for judgment" (at para 5).

[28] The judge understood that the accused had committed a sexual offence involving exploitation. She said that "this charge [under section 286.1(2)] is all about a form of exploitation . . . and it's about utilizing or engaging a child in an activity which . . . the law . . . recognizes is a type of exploitation."

[29] The discussion about D.R. being of the age of consent was raised by the accused, not the judge. She then asked the Crown to address the accused's submission. This began a discussion of whether D.R. did consent to sexual intercourse. The Crown said that consent forms no part of the charge under section 286.1(2), the true issue being whether the statutory conditions of a form of sexual exploitation are proven, and the judge agreed.

[30] Without context, the judge's comment that the accused was not charged with a "sexual offence" would be surprising. However, it is not appropriate to parse her words in isolation. When the whole of the transcript is carefully examined, it is clear what occurred. The judge said, "of course" what the accused did was a "type of exploitation". She said she wanted to understand what distinguished section 286.1(2) from other sexual offences. She put to the Crown the accused's submission that the gravamen of the offence was "commercialization" of sex—nothing more—and, thus, analogy to sexual assault or sexual interference was inappropriate. All the judge did was engage Crown counsel in a discussion of the accused's submission; she clearly understood that section 286.1(2) is an offence of sexual exploitation.

Friesen and Its Significance

[31] The alternative submission of the Crown, that the judge erred in her assessment of the principle of proportionality, requires some commentary on *Friesen*.

[32] *Friesen* is a watershed decision. As Professor Stewart observes, "The importance of the case derives from the Court's comprehensive treatment of the applicable sentencing principles, some of which were not very relevant to the facts of the case before it" (Hamish C Stewart, *Sexual Offences in Canadian Law* (Toronto: Thomson Reuters, 2021) (loose-leaf updated 2021, release 3), ch 9 at 9-37).

[33] In *Friesen*, the Supreme Court explained "how to impose sentences that fully reflect and give effect to the profound wrongfulness and harmfulness of sexual offences against children" (at para 1). The Court sent an unequivocal "strong message" (at para 5) as to how sentencing objectives and principles are to be applied in any case involving a sexual offence committed against a child (see *R v KNDW*, 2020 MBCA 52 at para 38; *R v SADF*, 2021 MBCA 22 at paras 30-31; and *R v BAJN*, 2021 MBCA 32 at para 29). The necessity for the "strong message" was explained in these terms (*ibid*):

> . . . [S]exual offences against children are violent crimes that wrongfully exploit children's vulnerability and cause profound harm to children, families, and communities. Sentences for these crimes must increase. Courts must impose sentences that are proportional to the gravity of sexual offences against children and the degree of responsibility of the offender, as informed by Parliament's sentencing initiatives and by society's deepened understanding of the wrongfulness and harmfulness of sexual violence against children. Sentences must accurately reflect the wrongfulness of sexual violence against children and the far-

> reaching and ongoing harm that it causes to children, families, and society at large.

[34] As Chartier CJM explained in *KNDW*, by this guidance (at para 2):

> . . . [T]he Supreme Court pressed the reset button with respect to the approach to be used in sentencing for sexual offences against children and directed that these sentences should better reflect both the gravity of the offence and Parliament's intention in amending the [*Code*] provisions with respect to these offences.

Friesen and Section 286.1(2) of the Code

[35] The criminal law is a "system of values" that has the ultimate objective of "maintaining a just, peaceful and safe society" (*R v M (CA)*, [1996] 1 SCR 500 at paras 78, 81). Values such as the "harm principle, the autonomy principle, the culpability principle, and the equality principle" (Dennis J Baker, *Textbook of Criminal Law*, 3rd ed (London, UK: Sweet & Maxwell, 2012) at section 1-061 (footnotes omitted)) lay at the core of wrongs criminalized by the law to order society and manage the conflict which arises in it.

[36] These core values were discussed this way in *Friesen* in relation to sexual offences against children: "The prime interests that the legislative scheme of sexual offences against children protect are the personal autonomy, bodily integrity, sexual integrity, dignity, and equality of children" (at para 51). Section 286.1(2) of the *Code* engages all of these core values. Indeed, in *Friesen*, section 286.1(2) was identified as an offence to which the sentencing principles enunciated in the decision applied (see para 44, n 2).

[37] The Supreme Court's comments about equality are of particular importance to section 286.1(2) given, as mentioned previously, that the offence is typically both a "racialized" crime (at para 70) and a crime that "undermines gender equality" (at para 68) because such behaviour disproportionally sexually victimizes vulnerable Indigenous girls and the offenders are typically non-Indigenous adult men like the accused. Accordingly, sentencing judges should be mindful of their obligations under sections 718.01 and 718.04 of the *Code*:

> **Objectives — offences against children**
> **718.01** When a court imposes a sentence for an offence that involved the abuse of a person under the age of eighteen years, it shall give primary consideration to the objectives of denunciation and deterrence of such conduct.
>
> **Objectives — offence against vulnerable person**
> **718.04** When a court imposes a sentence for an offence that involved the abuse of a person who is vulnerable because of personal circumstances — including because the person is Aboriginal and female — the court shall give primary consideration to the objectives of denunciation and deterrence of the conduct that forms the basis of the offence.

The Judge's Approach to the Gravity of the Offence

[38] The judge was dealing with a case of first impression. The thorny problem before her was, as she put it at the sentencing hearing, the correct legal "framework" to sentence the accused. In dispute was whether the gravity of the accused's offence was the same as the offences of sexual assault, sexual interference and sexual exploitation.

[39] The sentence imposed by the judge evidences that, while she said the accused's conduct was serious, she rejected the Crown's position that the

wrongfulness and harmfulness of his actions were similar to that of other sexual offences. In my respectful view, by doing so, she erred in principle.

[40] The words in *Friesen* are apposite as a starting point (at para 76):

> Courts must impose sentences that are commensurate with the gravity of sexual offences against children. It is not sufficient for courts to simply state that sexual offences against children are serious. The sentence imposed must reflect the normative character of the offender's actions and the consequential harm to children and their families, caregivers, and communities (see *M. (C.A.)*, at para. 80; *R. v. Morrisey*, 2000 SCC 39, [2000] 2 S.C.R. 90, at para. 35). We thus offer some guidance on how courts should give effect to the gravity of sexual offences against children. Specifically, courts must recognize and give effect to (1) the inherent wrongfulness of these offences; (2) the potential harm to children that flows from these offences; and, (3) the actual harm that children suffer as a result of these offences. We emphasize that sexual offences against children are inherently wrongful and always put children at risk of serious harm, even as the degree of wrongfulness, the extent to which potential harm materializes, and actual harm vary from case to case.

[41] I agree with the comment of Juriansz JA in *R v Ramelson*, 2021 ONCA 328, when he said that "[o]btaining the sexual services of a [child] for consideration is an extremely grave crime" (at para 102). For sentencing purposes, the normative case for treating this crime as gravely as other sexual offences of violence or exploitation is persuasive.

[42] Child prostitution is a paradigm of serious wrongdoing. Like other sexual offences, child prostitution is a universally accepted wrong. There is no reasonable debate against the law taking a hard paternalistic approach to prohibit child prostitution. Such behaviour offends core societal values as to harm, autonomy, culpability and, because the victims are primarily of one race

and one gender, equality. The harmful consequences—physical, psychological and societal—that flow from child prostitution are justification to treat it as severely as other sexual offences of violence or exploitation.

[43] Moreover, children are not instruments to be bought for another's sexual desires. At its core, the wrongfulness of child prostitution is a denial of a child's humanity; the sexual relationship between the exploiter and the child is one of objectification where the powerful party, the exploiter, converts the child to an object to be sexually dominated. Such conduct is abhorrent and turns the fundamental value of protecting children "on its head" (*Friesen* at para 65). Thinking of child prostitution in this sense also allows a strong parallel to be drawn to other sexual offences. As Professors John Gardner and Stephen Shute argue, the wrongness of rape is "the sheer use of a person, and in that sense the objectification of a person, [which] is a denial of their personhood. It is literally dehumanizing" (John Gardner & Stephen Shute, "The Wrongness of Rape", *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford, NY: Oxford University Press, 2007) at 16).

[44] There is naturally an imbalance of power between adults and children. Children are sexually vulnerable and easily manipulated and, thus, ripe for exploitation. Modern laws regarding sexual offences against children, such as section 286.1(2) of the *Code*, are "child-centred" (*Friesen* at para 53) and designed to protect children from sexual relations with adults by reason of their "lack of maturity, judgment, and experience" (*ibid*).

[45] Given the language of *Friesen* and the legislative scheme created by the *PCEPA*, there is a principled rationale in favour of, for the purposes of

sentencing, treating section 286.1(2) of the *Code* in the same manner as other sexual offences against children, such as sexual assault, sexual interference and sexual exploitation. Indeed, if one applies the directions in *Friesen* and considers the inherent wrongfulness of child prostitution, the potential harm flowing from it, and the actual harm suffered by children who are objectified and commoditized, there is no reason why a gross violation of a child's autonomy and integrity should be treated differently merely because an offender's conduct transgressed the norm against sexual exploitation as opposed to the norm against sexual contact in the absence of consent.

[46] Following the path of equivalency is also consistent with the legislative scheme. In *Friesen*, the Supreme Court explained that maximum penalties help "determine the gravity of the offence and thus the proportionate sentence" (at para 96). The maximum punishment for section 286.1(2) of the *Code* is the same as for sexual assault (where the victim is age 16 or older) and roughly equivalent for sexual assault (where the victim is age 15 or younger), sexual interference and sexual exploitation. Parliament has "repeatedly increased sentences for sexual offences against children" (*Friesen* at para 98), which sends the message that the courts should treat offences whose penalty has been increased, more significantly (see para 99). Section 286.2(2) of the *Code* is an example of this "trend" (Clayton C Ruby, *Sentencing*, 10th ed (Toronto: LexisNexis, 2020) at section 23.960).

[47] Times have changed, so must the law. As Professor Benedet has explained, "The long history of sex discrimination in society has been reflected in the substantive law of sexual offences, as well as in the application of those laws in the criminal trial process, and in the sentencing of offenders" (Janine Benedet, "Sentencing for Sexual Offences Against Children and

Youth: Mandatory Minimums, Proportionality and Unintended Consequences" (2019) 44 Queen's LJ 284 at 287). With increased understanding of the wrongfulness and harmfulness of child prostitution, there is a need for judicial reflection as to whether or not the old ways of doing things can continue. As was said in *Friesen* (at para 35):

> . . . When a body of precedent no longer responds to society's current understanding and awareness of the gravity of a particular offence and blameworthiness of particular offenders or to the legislative initiatives of Parliament, sentencing judges may deviate from sentences imposed in the past to impose a fit sentence. . . .

See also *Friesen* at paras 110-14.

[48] Where possible, "appellate courts should take the lead" (*Friesen* at para 35) and chart the pathway forward (see also *R v Parranto*, 2021 SCC 46 at paras 22, 56). It is appropriate in this case to enunciate the harms arising from the offence under section 286.1(2) to provide guidance for sentencing courts in their assessment of proportionality for offenders (see *Parranto* at para 15).

[49] The upshot of treating section 286.1(2) of the *Code* as gravely as sexual assault, sexual interference and sexual exploitation will be to meaningfully increase sentences for obtaining sexual services for consideration from a person under the age of 18 from what they have been historically. In my view, to do so is not only consistent with Parliament's intent in relation to the *PCEPA*, but also with a faithful application of *Friesen*.

[50] Given the different maximum punishments for the two purchasing offences, it will likely be the case that offenders convicted of the child

purchasing offence (section 286.1(2) of the *Code*) will face higher sentences than those who commit the adult purchasing offence (section 286.1(1)). There is not a parity problem (see section 718.2(b) of the *Code*) with this result, given the differences in the legislation and the statement in *Friesen* that it is appropriate for higher sentences to be imposed for a sexual offence against a child victim than against an adult victim (see paras 116-17).

[51] With respect, the judge placed too much reliance on *Gudmandson* and *Rose* as to the appropriate range of sentence. Both decisions were decided prior to *Friesen*, and each had an important feature which the judge, unfortunately, overlooked.

[52] *Rose* dealt with a sentence under the previous legislation, section 212(4) of the *Code*, where the maximum punishment was one-half that of the current section 286.1(2) and the legislative scheme was premised on a different objective—the abatement of nuisance. These considerations had to be taken into account in terms of the decision's precedential value (see *R v Ferguson*, 2006 ABCA 261 at paras 71-72, aff'd 2008 SCC 6; and *R v Rhyason*, 2007 ABCA 119).

[53] In terms of *Gudmandson*, Devine PJ expressed grave reluctance in accepting the position advocated by the Crown (two years or less for each of seven counts of section 286.1(2) of the *Code*). She, rather charitably, described the Crown's position as "likely on the low end" (at para 73) and volunteered that she was restrained from "'jumping' sentence recommendations of the Crown" (at para 84). She called the total sentence of eight years "at the low end" (*ibid*) due, in part, to the accused pleading guilty to save vulnerable witnesses from testifying (at para 84). To use the

vernacular, *Gudmandson* is a decision where a judge held their nose in passing sentence and any persuasive effect of the precedent must be understood in that light.

[54] One final general comment on the gravity of the offence is important. There are two modes of liability under section 286.1(2) of the *Code*. Here, the accused actually obtained for consideration the sexual services of a person under the age of 18. The alternative is the preparatory crime of communicating for the purposes of obtaining the sexual services of a person under the age of 18 for consideration.

[55] Appropriately, the Crown conceded that the sentencing issues that arise when the allegation is communicating for the purposes of obtaining the sexual services of a person under the age of 18 for consideration are different. In that other scenario, while an accused has the intention of purchasing sex with a child, they have not yet done so. This alternative mode of liability has an "'inchoate' quality" (*R v Chiang*, 2012 BCCA 85 at para 18).

[56] It will be for another case to address the assessment of proportionality where the crime is communicating. The only comments necessary are that care should be taken before relying on pre-*Friesen* sentencing precedents and reference must be made to *Friesen* at paras 93-94, where the Supreme Court provides instruction as to addressing proportionality in a case involving a child sexual offence where there is no specific victim.

The Judge's Approach to Moral Culpability

[57] With respect, the judge also erred in attenuating the accused's moral culpability because his "actions appear[ed] opportunistic rather than

predatory" (at para 17). This reasoning is contrary to *Friesen*. There, the Supreme Court endorsed the view of Fairburn J (as she then was) in *R v JD*, 2015 ONSC 5857 at para 25, where she explained that it is irrelevant as to how an adult came to have sexual contact with a child: "Adults who see these situations as opportunities to satisfy their own sexual urges, are no better or worse than those who take steps to actively seek out their victims" (at para 154). As the Supreme Court stated, "Adults, not children, are responsible for preventing sexual activity between children and adults" (*ibid*).

[58] The point made in *Friesen* is that it is always "highly morally blameworthy" (at para 88) conduct to intentionally sexually touch a child. While the Court did acknowledge that predatory targeting is even more egregious (see para 90), it is an error in principle to say the absence of an aggravating factor (i.e., being predatory) somehow makes the exploitation less serious (see para 150; see also *R v SJB*, 2018 MBCA 62 at para 20).

Materiality of the Judge's Errors in Principle

[59] I am satisfied that the judge's errors in principle, in her assessment of the gravity of the offence and the accused's moral culpability, resulted in a faulty assessment of proportionality that impacted on the sentence. As a result, subject to her findings that are reasonably supported by the record, it is necessary to re-sentence the accused (see *Friesen* at paras 26-28).

Re-Sentencing the Accused

[60] As was noted in *Friesen*, "Protecting children from wrongful exploitation and harm is the overarching objective of the legislative scheme of sexual offences against children in the [*Code*]" (at para 42). The age of

D.R. and the fact she was a vulnerable person make it mandatory that primary consideration be given to the objectives of denunciation and deterrence (see sections 718.01, 718.04 of the *Code*).

[61] There is nothing in the background of the accused or his personal circumstances to reduce his moral culpability or to support the exercise of restraint in this case, other than this is his first lengthy term of imprisonment (see *Friesen* at paras 91-92; and section 718.2(e) of the *Code*).

[62] The aggravating factors in this case are:

1. The accused abused a person under the age of 18 years (section 718.2(a)(ii.1) of the *Code*).

2. The accused's willingness to exploit an at-risk person (see *Parranto* at para 70). He knew D.R. was connected to a pimp and thus was aware, or ought to have been aware, that his actions could profoundly harm D.R. (see *Friesen* at para 88).

3. The accused proceeded to have sexual intercourse with D.R. despite it being "obvious" that she had "issues with alcohol and maybe drugs" (at para 17).

4. The age difference was "substantial" (*ibid*; see also *R v Sidwell (KA)*, 2015 MBCA 56 at para 53).

5. The degree of physical interference included penile penetration (see *Sidwell* at para 53; and *Friesen* at para 138).

6. There is a strong link between prostitution and substance abuse (see *Bedford v Canada (Attorney General)*, 2010 ONSC 4264 at para 133; and *Gudmandson* at para 39). Providing an intoxicant to a person selling their own sexual services makes their exit from the sex industry less likely and perpetuates their cycle of misery.

[63] The judge found that this was not a situation of an abuse of trust or authority, nor was there any evidence of grooming (see section 718.2(a)(iii) of the *Code*; and *Friesen* at paras 125-30).

[64] D.R. died before the accused was convicted, so the specific impacts of the offence are unknown for the purposes of section 718.2(a)(iii.1) of the *Code*. While her suicide is illustrative of the harm of the child sex industry, the accused's sentence should not be increased because of it.

[65] While D.R. was age 16, as opposed to a young child, that does not attenuate the seriousness of the situation (see *Friesen* at para 136). The judge was correct to ignore the participation of D.R. in the offence as mitigating.

[66] The mitigating factors in this case are:

1. The accused has a limited, dated and unrelated criminal record.

2. The accused has a history of employment.

3. The accused had a "disrupted and traumatic childhood [which] is to some extent mitigating" (at para 18).

[67] The accused is a mature offender (he is now age 46). He is single with no dependents. The judge made no findings in respect of the accused's likelihood to reoffend (see *Friesen* at paras 122-24).

[68] The accused said this was the only time he has purchased sexual services, yet he could not "identify any precursors to his offending." However, he acknowledged that, without explanation, he was receiving invitations to purchase the sexual services of other children. The probation officer advised that, due to the lack of insight, it would be "difficult to safely supervise [the accused] in the community."

[69] The accused was assessed as a "medium risk to reoffend" generally and an "[a]verage [r]isk" to being charged or convicted of another sexual offence. He took no sexual offender counselling or treatment on his own initiative or, because his sentence was under 18 months, during his prior period of imprisonment. Given the lack of any evidentiary basis to have confidence that the risks he poses to society are manageable, this would not be an appropriate case to place emphasis on the objective of rehabilitation to reduce the length of the sentence.

[70] The wrongfulness and harmfulness as to the unique circumstances of the accused's conduct compound the seriousness of the situation. His actions were exploitative, dehumanizing and rooted in a power imbalance. In terms of potential harm, child prostitution is serious, often life-ending, and that harm to the victim manifests itself both in childhood and later in life. As D.R. died, it is necessary to look at the actual harm to her through the "lens" (*Friesen* at para 86) of the aggravating features of this case. Despite the extensive efforts of many, D.R. was unable to deal with her significant

personal issues. Giving alcohol to a child with a substance addiction who is lonely and associated with a pimp is direct evidence of actual harm to a specific victim as a result of the offence (see *Friesen* at para 85). Exiting the child sex industry is challenging under ideal conditions; behaviour which further ensnares the child in the life of misery is directly harmful to the child.

[71] It is also important to take into account the importance of ensuring equal protection and benefit of the law for victims such as D.R., who, like other vulnerable Indigenous girls, are the most frequent victims of the offence in question (see *Friesen* at paras 68, 70). It would undermine public confidence in the administration of justice if the perception is that sexual crimes against marginalized children are less serious based on the dubious premise that an accused only "bought" sex as opposed to "took" it; this ignores the inherent sexual exploitative reality of the child sex industry, its racialized and female nature, as well as respect for the personhood of the victim.

[72] I am also satisfied that the accused's moral blameworthiness for the offence is significant (see *M (CA)* at para 80). His risk-taking was intentional (*ibid*). His actions were not impulsive and he had time to change his mind, particularly given that it was manifestly obvious that D.R. was in distress before sexual relations commenced. As was said in *Friesen*, "the intentional sexual exploitation and objectification of children is highly morally blameworthy because children are so vulnerable" (at para 90).

[73] The consequential harm caused by the accused is disturbing. Any reasonable adult would know that perpetuating D.R.'s cycle of destruction was harmful to her best interests. It is trite, but "a wrongdoer must take his victim as he finds him" (*R v Nette*, 2001 SCC 78 at para 79). While the

accused played no role in bringing D.R. into the child sex industry, his deliberate, selfish actions helped keep her there.

[74] Finally, the normative conduct of the accused is serious. Making the reasoned choice to take advantage of a vulnerable child in obvious distress, for personal sexual gratification, constitutes egregious sexual exploitation (see *Parranto* at para 70).

[75] A sentence must speak out against the offence, but punish no more than is necessary (see *R v Nasogaluak*, 2010 SCC 6 at para 42). Here, the accused's high moral culpability provides little reason to temper punishment, given the gravity of the offence and the circumstances of its commission.

[76] I agree with the comment of Devine PJ in *Gudmandson* that "the sentencing jurisprudence under the previous regime [section 212(4) of the *Code*] does not apply" to sentencing offenders under section 286.1(2) (at para 2; see also *Parranto* at para 23). A clean slate is needed because the *PCEPA* is different legislation with an entirely different purpose and object. There are also no persuasive sentencing precedents under section 286.1(2) that have been decided since *Friesen*.

[77] Sentencing decisions must be arrived at in a "contextually sensitive" manner (*Friesen* at para 162) in light of a case's particular circumstances. Given the *PCEPA*'s increase of sentences for child prostitution offences, the wrongfulness and harmfulness of the accused's conduct, his significant moral culpability and the guidance in *Friesen* for more offender accountability for the commission of a sexual offence against a child, I see no reason why a "mid-single digit penitentiary [term]" (*Friesen* at para 114) should not be imposed, despite this being one incident with one victim. In my view, a "fair,

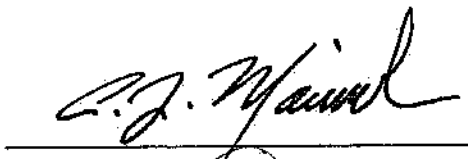
fit and principled" sentence (*Parranto* at para 10) in all of the circumstances would be one of five years' imprisonment.

Reincarceration

[78] The accused has not satisfied me that this is an appropriate case to stay the remaining custodial portion of his sentence (see *R v Siwicki*, 2019 MBCA 104 at para 70). In particular, the length of the remaining sentence to be served for a sexual crime against a vulnerable child is too significant.

Disposition

[79] In the result, leave to appeal is granted, the Crown's appeal is allowed and the accused's sentence is varied to a term of imprisonment of five years, less credit for 15 months of time served. The ancillary orders originally imposed will remain. A warrant of committal will issue at once.



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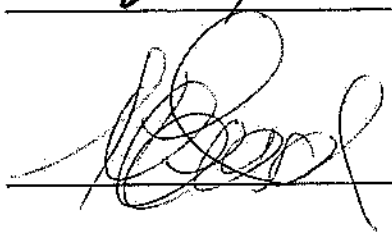

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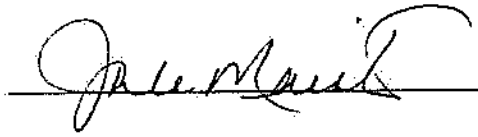

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