[Note from Sylvia: In compliance with the publication ban the names of all complainants have been removed and replaced with sets of initials]

WARNING

The President of the panel hearing this appeal directs that the following should be attached to the file:

An order restricting publication in this proceeding under ss. 486.4(1), (2), (3) or (4) or 486.6(1) or (2) of the *Criminal Code* shall continue. These sections of *the Criminal Code* provide:

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or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences;

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

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

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

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

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the complainant of the right to make an application for the order; and

(b) on application made by the complainant, the prosecutor or any such witness, make the order.

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community. 2005, c. 32, s. 15; 2005, c. 43, s. 8(3)(b).

486.6 (1) Every person who fails to comply with an order made under subsection 486.4(1), (2) or (3) or 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

(2) For greater certainty, an order referred to in subsection (1) applies to prohibit, in relation to proceedings taken against any person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any way of information that could identify a victim, witness or justice system participant whose identity is protected by the order. 2005, c. 32, s. 15.

CITATION: R. v. Cloutier, 2011 ONCA 484

DATE: 20110630

DOCKET: C51204

COURT OF APPEAL FOR ONTARIO

Weiler, Blair and Epstein JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Bernard A. Cloutier

Appellant

Brian H. Greenspan and Jill Makepeace, for the appellant

Kim Crosbie, for the respondent

Heard: April 20, 2011

On appeal from the conviction entered on July 16, 2009 and the sentence imposed on November 9, 2009, by Justice Paul B. Kane of the Superior Court of Justice, sitting without a jury.

Weiler J.A.:

I. OVERVIEW

[1] Following a ten-day trial before a judge sitting without a jury, the appellant, a Roman Catholic priest, was convicted of sexual offences in relation to four boys, JM, R.R., D.L. and L.B., between May 1974 and April 1983, and acquitted in relation to a fifth, R.L.[1] The appellant appeals his convictions and, in the alternative, seeks leave to appeal the global sentence imposed of five years' imprisonment.

[2] The appellant concedes that there was sufficient evidence before the trial judge that, if accepted, could form the basis for a conviction. In this regard, I note that the appellant did not testify in relation to any of the allegations of sexual offences by any of the complainants.

[3] The appellant submits that his trial was unfair having regard to the cumulative effect of errors in the trial judge's 217-page decision. Overall, the appellant submits that the trial judge "abandoned impartiality and adopted the role of an advocate", and that in doing so, he "seriously undermined the appearance of fairness". In addition, the appellant submits that the trial judge's reasons are inherently flawed in that he engaged in "result-oriented" reasoning. The principal specific errors alleged are that the trial judge: (1) misapprehended significant aspects of the evidence; (2) applied different standards of scrutiny to the evidence of the Crown and defence witnesses; and (3) relied on material not in evidence. The appellant seeks to have the convictions quashed and a new trial ordered.

[4] If the appeal from conviction is dismissed, the appellant seeks leave to appeal his sentence and asks that the sentence be reduced.

[5] For the reasons that follow I would dismiss the appeal from conviction and, while I would grant leave to appeal the sentence, I would dismiss the appeal from sentence also.

[6] In order to appreciate the submissions made, I will first outline the evidence of the Crown and defence witnesses and the trial judge's conclusion. I will also outline the defence and Crown applications at trial and the trial judge's disposition of those applications. Discussion of the alleged frailties of the complainants' evidence and the alleged errors respecting how the trial judge dealt with the evidence will be done in the course of dealing with the appellant's submissions. In dealing with these submissions I will follow the order of argument contained in the appellant's factum. In relation to the conviction appeal,

I deal with each of the appellant's arguments on a general basis, and then the plethora of fact-driven examples raised by the appellant in relation to those arguments are dealt with separately. My reason for doing so is that, although not jurisprudentially significant, the parties might wish to know some of the reasoning behind the broader conclusions. Many of the evidentiary points raised by the appellant were rebutted by the Crown in its factum and I have drawn freely from it in my response.

II. BACKGROUND

A. The evidence of the Crown and defence witnesses and the trial judge's conclusions

1. The charges relating to J.M. and R.R.

Crown witnesses

[7] The Crown called the complainants, J.M. ("M") and R.R. ("R"), and all four of their parents. The following summary is a combination of their evidence.

[8] The appellant became the parish priest for St. Mathieu's parish in Sudbury on July 1, 1979. At the time, M was nine years old and R was almost twelve. The appellant became close to them and to their families. M and R later became altar boys at the appellant's invitation.

[9] M and R testified that the appellant gave them "little pats on the bum" while they put on their robes for mass. R also alleged that the appellant would "rub his fingers on the outside of [his] pants between the crack of [his] bum", leave his hand on his "bum" for two seconds and hug him. R said that this was plainly visible to M.

[10] R alleged that the appellant told him that he was a doctor and performed "checkups" on him in the rectory. The appellant would have R undress and would do "pat downs" of his body, including fondling his testicles and penis. He told R not to tell anyone about these checkups. The checkups happened at least ten times and stopped when the appellant moved away to L'Annonciation parish in 1982.

[11] On one occasion, when M and R were approximately 11 and 13 years old, respectively, they and another alter boy, R.M., attended an overnight party at the rectory at St. Mathieu's. The appellant allegedly supplied them with beer and they became intoxicated. No sexual impropriety was alleged on this occasion.

[12] After the appellant moved to L'Annonciation, he sometimes picked R up after school. R would hang out with him at the rectory, smoking and listening to music on his stereo. In early 1983, the appellant invited M, then 12, and R who was 14, to a weekend party that spanned two nights. The appellant said that there were only two beds and that one of the boys would have to sleep with him each night. He supplied both boys with alcohol and they both got drunk. R did not recall how he got to bed that night but he remembered waking up naked in the appellant's bed. The appellant's penis was in R's mouth. He had ejaculated but continued to rub his penis along R's mouth and teeth. R also alleged that the appellant kissed him all over his face and fondled his genital area.

[13] The next day, R and M spent most of the day out of the rectory playing with friends in the neighbourhood. In the evening, both boys went back to the rectory and again got drunk. While they were lying at opposite ends of the couch with their hips parallel to each other, the appellant suggested a game. He reached

over from behind the couch and undid both boys' pants. With their penises exposed, the appellant put each boy's hand on the other's penis. The appellant placed his hands over theirs and moved their hands up and down. They were all laughing. R passed out on the couch. He woke up the following day still on the couch.

[14] The appellant helped M into bed and crawled in beside him. He fondled M's penis and told him "it's okay" in French. M could tell by the way the sheets were moving that the appellant was touching his own penis. When the appellant stopped, M tried to get out of bed but the appellant pulled him back and fondled him again.

[15] The next morning, the appellant left for mass. M went into the kitchen and told R what had happened. R said that something had happened to him, too. M got very upset at R for not having warned him. R said that he may have told M he thought he was dreaming. M testified that R said either that he thought it was a dream, or that he wished it was a dream.

[16] That afternoon, the appellant drove R and M home, dropping R off first. He went inside M's house and chatted with M's mother. When the appellant left, M told his mother that the appellant had touched him inappropriately. M's mother said that M would not be going over to the appellant's place anymore.

[17] R also told his mother that the appellant had done something to him, although not immediately. A while after the party, the appellant called R's house and asked if he could see R. R told his mother that he did not want to see the

appellant anymore. When she asked why, he said that something had happened. His mother started to cry.

[18] A short while later, M had a "fit" in the school yard and was sent to see the principal. M told the principal that something had happened when he was with the appellant. The principal called M's mother. She called the police and alleged that her son had been molested by the appellant.

[19] Both sets of parents and their boys met at the M residence. The main floor of the M house is "open concept". It is not a large house. According to their evidence, which was accepted by the trial judge, they met at the dining room table for a brief period with Officer Kingsley and his assistant, Constable Andrews.

[20] To everyone's surprise, the appellant and Bishop Dionne arrived. The Bishop took charge of the meeting. He told the appellant not to say anything and insisted on interviewing M and R individually and privately upstairs.

[21] Upstairs, the Bishop asked the boys to tell him what had happened, like in confession. After each boy had done so, the Bishop asked him if he had told anyone else the details. M said that he had told his parents that the appellant had touched him, but that he had not provided any details. R said that he had not told anyone the details of what happened. The Bishop told the boys not to tell anyone else. He then said that he would get help for the appellant and that they should pray for him.

[22] During the Bishop's interviews with the boys, the parents and the police officers sat downstairs with the appellant. Andrews may have left the table briefly

to have a cigarette. Mrs. R was very emotional. She confronted the appellant about what he had done to her son. The appellant mostly kept his head down and did not say anything. He may have been crying.

[23] The Bishop came downstairs and announced that he was satisfied nothing had happened, that both boys had just been drinking. He said that he would ensure the appellant received treatment. As the police were about to leave, they asked the M family if they wanted to press charges. M's father asked him if he wanted the appellant to go to jail. M had considered the appellant to be his best friend and told his father he did not want charges to be laid. The R family also decided not to press charges.

[24] One of the parents claimed that the theme of the discussion with Kingsley was that they were all Catholic and should try to forget the incident and not lay charges. Further, the parents testified that at the conclusion of the meeting one of the officers said that they would be advised of the appellant's treatment progress. However, no follow up was ever conducted by police or the parents.

[25] After this investigation, the appellant voluntarily went to Southdown facility near Aurora, Ontario for an assessment and therapy, where he stayed from May to November 1983. The Southdown facility offered therapy for addictions and counselling for nervous breakdowns and personal problems, and gradually sexual abuse and physical bullying. There was no evidence at trial whether Southdown offered sexual abuse therapy in 1983.

[26] In 2007, M decided that he would report what had happened to him to the police. He called a few people, including R, with whom he said he had not spoken

since the meeting at his home in 1983, and told him that he was going to be reporting the allegations to the police. R also decided to make a report. Soon after, the appellant, who was still a priest, was arrested.

Defence witnesses

[27] In relation to M and R's allegations, the defence called Officer Kingsley. Kingsley testified that he attended at L'Annonciation rectory in response to a reported allegation of sexual assault. He assumed the date was April 7, 1983 as he had a notebook entry on this date, but his foolscap notes on which he would have written the details had been destroyed. He testified that he found four to six male youths, aged 10 to 13, who were all red in the face as if they had been running around. He recalled seeing a "Texas Mickey" of what appeared to be whiskey. There was a quantity of whiskey missing from the bottle and he could detect liquor on the breaths of the youths. He spoke to the priest briefly and asked him to leave the room. Kingsley then spoke with the boys and recorded their information on his foolscap. He believed most of the boys reported having been fondled. No further investigation was done at this time, as he wanted to speak to the boys when they were sober. Kingsley said he recalled M's and R's names, but conceded that he may have remembered their names from the later meeting he had with them at the M residence.

[28] Kingsley's evidence in relation to the meeting at the M residence, as summarized in the appellant's factum at para. 19, is as follows:

> Sometime after the call to police, there was a meeting at the M residence. M and his parents, R and his parents, and two police officers, Sergeant Kingsley ("Kingsley") and Constable Andrews ("Andrews") were present. Kingsley

> believed that there were three or four sets of parents present. The meeting was convened at the dining room table. Kingsley stated that after a brief discussion among all present, he conducted individual interviews of each boy with their parents in private. The only private rooms in the M house were the bedrooms upstairs, however, Kingsley testified that he never went upstairs. Kingsley kept notes of these interviews on foolscap paper, and believed that Andrews also made notes of the information he relayed to him, as some of the interviews were in French, which Andrews did not speak. Kingsley recalled that the boys recanted what they had previously said to him at the rectory on April 7, 1983, and only claimed that they had been drinking. After the interviews were concluded, Kingsley stated that he resumed the conversation at the dining room table with all parents.

[29] According to Kingsley, the Bishop and the appellant arrived after he had completed his interviews and the Bishop took charge. The Bishop spoke to Kingsley in private but did not ask him not to proceed with charges. Kingsley did not recall the Bishop conducting any interviews of the boys. Kingsley testified that charges were not laid because he did not have evidence to support a charge relating to sexual impropriety.

[30] The defence also called M's aunt who cleaned the rectory at St. Mathieu's parish once a week, usually Tuesday or Wednesday, from about 9:00 a.m. to about 3:00 p.m. She testified that she never saw any young people at the rectory while she was there, never saw any empty beer bottles or any other kind of alcohol while she was there, never saw the appellant smoke, never saw signs that anyone else had been smoking in the rectory, never saw children's clothing and never saw signs that anyone but the appellant had slept at the rectory.

The trial judge's conclusion

[31] The trial judge acquitted the appellant in relation to the "bum pats" on M because he was not satisfied beyond a reasonable doubt that the touching was of a criminal nature. The trial judge found the appellant guilty of one count of indecent assault in relation to R corresponding to the "checkups" he performed while still at St. Mathieu's parish. The trial judge also found the appellant guilty of one count of sexual assault and one count of gross indecency in relation to each of M and R corresponding to the events at the second sleepover.

2. The charges relating to D.L.

Crown witnesses

[32] The Crown called the complainant, D.L. ("L"), and his father.

[33] L went to the police after receiving a newspaper article from his father about the appellant's arrest. L's family was also very involved with the church. In 1974, when the family was living in Espanola and L was 15, the appellant was the assistant parish priest. L saw the appellant at least three times a week for choir practices and weekly services. The appellant took L to some of his hockey games, and took him to Sudbury a couple of times where they went to movies and restaurants. The appellant would also come to L's home frequently for dinners, card games and get-togethers. Sometimes the appellant would stay overnight although the rectory was close by.

[34] L said that the first incident took place in his upstairs bedroom which he shared with his brother. One night the appellant undressed and crawled into bed beside L. He pulled L's underwear or pyjamas down, simulated intercourse

between L's legs and ejaculated. L was terrified and confused. He blamed himself. The incidents continued when L moved into the basement which had no walls or door. During some of the incidents, the appellant also fondled L's penis and there were times when he made him ejaculate. L was embarrassed and ashamed. At one point, shortly after the first incident, he decided to tell his mother. She went into a "rage" and told him that stuff like that did not happen.

[35] Sometime in 1976 the family moved to Massey, about 32 kilometres from Espanola. The appellant continued to visit the family and to occasionally take L on outings. According to L, the appellant sometimes stayed over and, when he did, the same type of incidents would occur. L's father, who was also called by the Crown, had no specific recollection of the appellant's staying overnight when the family lived in Massey.

[36] Although L said that the appellant ejaculated on most occasions, and ultimately conceded that there would have been ejaculate on the bed sheets, he agreed his mother never mentioned finding semen on his sheets, even after he claimed to have disclosed the incidents to her.

[37] At trial, L testified that the sexual incidents ceased when he was 16, 17 or older, while in cross-examination he admitted that he had given a different timeline to police such that the incidents ceased when he was 14 or 15 years old.

[38] In addition to the incidents in L's home, L testified that two incidents of sexual assault took place in the rectory of St. Louis de France church in Espanola. At trial he maintained that he had a clear recollection of two distinct incidents whereas at his preliminary inquiry he could not recall if anything sexual had

happened when he was at the rectory the second time. L also said that the frequency of the incidents was more than five and less than fifty times. He had earlier told police there were 18 to 20 incidents.

[39] L said he cared for the appellant and when he went away to college in Toronto he stopped by to see the appellant at his new parish in Sudbury. He said he hoped he could still have a friendship with him. L had a few drinks and decided to stay over. At trial, L said that the appellant ended up in the same bed with him and tried to do the same things as before. This time L stopped him and left. This was inconsistent with L's statement to police where he said that the appellant wanted him to stay but that he refused.

[40] L testified that he told his mother again as well as his father about the appellant in 1990 or 1991. L's father testified that his son told him that "something untoward" and sexually inappropriate had occurred.

[41] L provided the police with names of other persons whom the appellant socialized with, including L.B.'s name.

Defence witnesses

[42] The defence did not call any witnesses in relation to L's allegations.

The trial judge's conclusion

[43] The trial judge convicted the appellant of one count of indecent assault and one count of gross indecency for conduct occurring in the town of Espanola when L was 14 to 16 years of age. He acquitted the appellant of two counts in relation to conduct that took place after L moved to Massey, when L would have been 17

or 18 years old, as he was not convinced beyond a reasonable doubt that there was a lack of consent at that time.

3. The charges relating to L.B.

Crown witnesses

[44] The Crown called the complainant, L.B. L.B. testified that he got a call from Officer Delwo who was investigating other complaints of sexual abuse by the appellant. Although he had not really wanted to come forward, upon getting the call he decided to do so. The only person L.B. had ever told about his abuse, before being interviewed by the police, was his wife back around 1990.

[45] L.B. testified that between 1974 and 1979, when the appellant was assistant parish priest in Espanola, L.B. and his family lived in Espanola and he was an altar boy. The appellant was a part of their family, especially as L.B.'s father had been killed in a hunting accident in 1971. L.B. began to spend more time with the appellant as he got to know him. L.B. spent time with the appellant at the rectory as the appellant had a great stereo and L.B. liked to hang out and listen to music with him. L.B. was about 15 years old and the appellant was in his thirties. The appellant took L.B. on car rides and on trips to Sudbury and North Bay, and bought him shoes and a guitar. At least once the appellant gave L.B. some beer.

[46] The appellant also gave L.B. massages in his bedroom in the basement of the B. residence. The massages started off innocently enough at first but did not always end up that way. During some of the massages, the appellant touched L.B.'s penis and L.B. would get an erection. The appellant also got an erection. The appellant would sometimes rub himself against L.B. Once, the appellant

stroked L.B.'s penis until he ejaculated and on one occasion the appellant kissed L.B. on the lips. L.B. could not recall precisely the number of times that this happened, but he testified that there were many innocent massages, and fewer than five inappropriate massages.

[47] The sexual incidents ended after the appellant took L.B. on a weeklong trip to Quebec. On one of the two specific nights L.B. remembers, they each had their own single bed. L.B. was "nervous as hell" that something would happen. The appellant came over to L.B.'s bed. L.B. said he was not feeling well and the appellant left him alone. The second night, they both were drinking. L.B. was lying on the only bed in the room and the appellant gave L.B. a massage. L.B.'s penis was exposed. The appellant stroked it and then started to masturbate himself. He grabbed L.B.'s hand and put it on his penis. The appellant ejaculated. The next morning, L.B. felt horrible and ashamed. He told the appellant that he did not like what was happening and asked for it to stop. Nothing further ever happened.

Defence witnesses

[48] The defence called L.B.'s mother. After her husband was killed in a hunting accident in 1971 she got to know the appellant and he came to their home a lot. About every second week they would play cards in the evening. She did not recall the appellant ever leaving for any period of time to go downstairs to her son's bedroom. L's father, a witness who testified for the Crown and who was also in attendance at the card games, did not recall the appellant's excusing himself to visit L.B. or being absent for any extended periods, either, but he testified that he would not necessarily have noticed.

[49] L.B.'s mother testified that the appellant did, however, go to L.B's bedroom in the basement when he visited after school and he helped her son decorate his room.

Trial judge's conclusion

[50] The trial judge convicted the appellant of one count of gross indecency and one count of indecent assault in relation to the "massages" in the basement, and one count of gross indecency and one count of indecent assault in relation to the trip to Quebec.

B. Applications at trial

[51] Prior to the start of the trial, defence counsel (who is not counsel on this appeal) brought an application to have the charges concerning M and R stayed on the basis that Officer Kingsley's detailed foolscap notes, the general occurrence report and the occurrence card had been lost or destroyed.

[52] The only record of the 1983 investigation at the time of trial was a single page from Kingsley's notebook. He testified that it had been his practice to carry a binder with foolscap paper that he would use to keep detailed notes of his investigations, including informal statements. His practice was usually to staple these notes to the general occurrence report. In addition, he transcribed abbreviated highlights from his foolscap notes into his police notebook, such as the address he attended, the name of one or two people that he dealt with and the occurrence number. Kingsley also testified that there would have been a small occurrence card created at the time that Mrs. M's call was received by the police. This card would have contained information pertaining to the location, the type of

complaint, who made the complaint, the address, the telephone number, who was dispatched to the scene, how the investigation was concluded and the occurrence number.

[53] Sergeant Delwo, the officer in charge of the 2007 investigation, testified that because the complaint in 1983 was sexual in nature, a general occurrence report would have been created. This report would normally contain the name of the complainant and the victim, any suspect information and a narrative of the police officer's response and findings. Kingsley confirmed that the general occurrence report would include information on whether a decision was made not to prosecute. Kingsley further stated that the reason he remembered this incident so well was that it was his only investigation involving a member of the clergy. At the time of trial, Constable Andrews had Alzheimer's disease, and his notebooks could not be located. Records and notes produced as a result of a 1983 investigation, which did not result in charges being laid, could be destroyed as early as 1993.

[54] The trial judge dismissed the application for a stay in relation to M and R without prejudice to the appellant's right to renew it at trial.

[55] At the end of the trial, the defence renewed its motion for a stay of the charges relating to M and R and sought a further stay to prevent an abuse of process on the basis that the 1983 investigation resulted in a diversion resolution, which was an agreement not to prosecute the appellant. The trial judge dismissed those applications.

[56] The Crown brought a similar fact evidence application, requesting that the evidence from each count be applied to the other counts. With the exception of the evidence of R.L., a complainant in relation to whom the appellant was subsequently acquitted, the trial judge allowed the Crown's application.

III. ANALYSIS

A. The conviction appeal

[57] The appellant makes two overall submissions. First, he submits that the trial judge "abandoned impartiality and adopted the role of an advocate" and that in doing so, he "seriously undermined the appearance of fairness".

[58] The second overall argument counsel for the appellant raises is that the trial judge's reasons for judgment are "inherently flawed" and that the trial judge employed "result-oriented reasoning".

[59] The appellant also raises a number of specific grounds of appeal in support of his two overall arguments. In particular, the appellant submits that: (1) the trial judge misapprehended significant aspects of the evidence; (2) the trial judge applied a different standard of scrutiny to the evidence of the Crown and defence witnesses; and (3) the trial judge relied on material not in evidence. The appellant submits that these evidentiary errors tainted the trial judge's analysis with respect to the defence's two applications to stay the proceedings and the overall reasons for conviction. I will deal with these specific grounds of appeal first. I will then summarize my conclusions with respect to the two overall grounds of appeal.

1. Misapprehensions of the Evidence

[60] A misapprehension of the evidence may relate to a failure to consider evidence relevant to a material issue, a mistake as to the substance of the evidence, or a failure to give proper effect to evidence: *R. v. C.L.Y.*, [2008] 1 S.C.R. 5, at para. 19; *R. v. Lohrer*, [2004] 3 S.C.R. 732, at paras. 1-2; *R. v. Morrissey* (1995), 22 O.R. (3d) 514 (C.A.), at p. 538. To set aside a conviction on the basis that the trial judge misapprehended the evidence, the appellant must meet a stringent standard. The misapprehensions must be of substance rather than detail, they must be material rather than peripheral to the judge's reasoning and the alleged errors must play an essential part in the reasoning process, not just of the narrative. A mere misstatement or inaccuracy in the trial judge's treatment of the evidence does not constitute a reversible error: *Lohrer* at para. 2; *Morrissey* at p. 541; *R. v. T.(T.)* (2009), 68 C.R. (6th) 1 (Ont. C.A.), at para. 33.

[61] The appellant submits that the trial judge's reasons for judgment demonstrate that he misapprehended the evidence on a number of material issues. The list of impugned factual references appears to fall into three main categories: facts pertaining to the stay application for lost records; facts pertaining to the stay application for abuse of process because an agreement had been reached not to prosecute; and facts concerning the evidence of the four complainants. The majority of the alleged misapprehensions relate to Kingsley's evidence.

Alleged misapprehensions of fact pertaining to the lost records

[62] The appellant's position at trial was that the destruction of the police records prejudiced his ability to make full answer and defence and that, as a result, the charges should be stayed. In dismissing the appellant's application for a stay

based on lost records, the trial judge had to make numerous factual determinations regarding what material would actually have been created in 1983 and whether, if it existed, it would have impacted the appellant's right to make full answer and defence. The appellant submits on appeal that the trial judge made material misapprehensions of the evidence and in particular that he misapprehended Kingsley's evidence, and that this affected his reasoning process in dismissing the defence's stay application.

[63] First, the appellant challenges the trial judge's findings that any notes Kingsley took at the rectory would have contained "tombstone" information – the names of the boys, their dates of birth and whether the priest had done anything to them – and his finding that Kingsley did not conduct a formal interview of the boys. The record, however, shows that Kingsley said precisely what the trial judge attributed to him.

[64] Second, the appellant challenges the trial judge's conclusion that many complaints Kingsley attended upon did not result in a general occurrence report's being prepared even if he conducted interviews. In cross-examination, however, Kingsley agreed that if an allegation was unfounded or if it was a false alarm, etc., a general occurrence report would sometimes not be filled out.

[65] Third, the appellant impugns the trial judge's conclusion that Kingsley did not interview the priest at the rectory of L'Annonciation. Kingsley, however, said exactly that – that he only spoke "briefly" to the priest and that he did not ask the appellant for a statement even though his training taught him that it would have been a good time to have done so.

[66] Fourth, the appellant challenges the trial judge's finding that it was more likely that the second officer at the M residence, Officer Andrews, wanted to lay sexual assault charges against the appellant and not, as Kingsley said, charges for giving liquor to minors. This was also a conclusion founded on the facts. Kingsley agreed that officer Andrews wanted to lay charges. One of the parents, R's father, also testified that Kingsley had said the English officer wanted to lay charges against the appellant. Their entire reason for being at the M residence was to investigate the sexual assault allegations. The trial judge was entitled to conclude that the charges officer Andrews wanted to proceed on related to sexual assault.

[67] Fifth, the appellant questions the trial judge's conclusion that it was "extremely unlikely" that everything could have occurred within the time estimate Kingsley gave for the length of the meeting at the M house, namely 1 to 2 hours. Kingsley said he was aware at the time of the meeting that he should not rush the investigation; he would have sat down with everyone to help put them at ease; he would have had to interview all of the boys slowly and once the first boy proved to be reluctant, proceed with the interviews even more slowly; and that after the interviews, he sat around with everyone prior to the Bishop and the arrival of the appellant. The trial judge justifiably questioned whether all of this could be done within the time period Kingsley gave. Indeed, although he said he may not have taken as much time as he should have, Kingsley acknowledged that doing all of that would have taken a long time.

[68] Sixth, the appellant takes issue with the trial judge's finding that it was possible that Kingsley was mistaken about the boys' recanting their allegations.

The trial judge concluded that the Bishop's declaration that the appellant had said nothing happened, coupled with Kingsley's testimony that he was devoutly religious, was deferential to the clergy and had hoped he would not have to charge a priest, could have influenced the officer to now believe that the boys did recant back in 1983. Indeed, Kingsley admitted that it was possible he could have been so influenced.

[69] While the trial judge misapprehended the evidence in some minor respects concerning Kingsley's note-taking practice and whether pages were stapled to the general occurrence report, these errors do not affect the validity of his exercise of discretion not to grant a stay. Kingsley testified that he had an independent recollection of conducting this investigation and he gave his version of events. The trial judge reviewed all of the evidence. Faced with the evidence of the six Crown witnesses (R, M, and their parents) and the contradictory evidence of Kingsley, the trial judge gave many reasons why he accepted the evidence of the complainants. They provided significant detail; their parents acknowledged errors of judgment they had made at the time; they were credible; they admitted when they had memory gaps; and they were not shaken on cross-examination.

[70] Although the trial judge assumed Kingsley was impartial and said he was careful and frank, the trial judge was rightly concerned about his reliability. Many things that Kingsley said he did, did not make sense. For example, he said he went to the rectory to speak to the parish priest and saw young boys who had been drinking, boys who said that they had been fondled, yet he did not recall calling the Children's Aid Society, did not interview the boys, and did not interview the priest. At the same time, he testified that he had carefully interviewed each of M

and R at the M's home in a private room. The only private rooms in the home were the upstairs bedrooms. Yet Kingsley said he did not go upstairs. Kingsley testified that M and R were among the boys present at the rectory when he went to speak to the priest. He conceded in cross-examination, however, that it was possible he recalled their names from the meeting at the M residence as opposed to being at L'Annonciation.

[71] The appellant submits that the information recorded by Kingsley and Andrews during their investigation was very important and that the trial judge did not appreciate its nature and significance. The appellant's submissions are an indirect way of attacking the trial judge's refusal to stay the proceedings on the basis that the appellant's rights under section 7 of the *Charter of Rights and Freedoms* were breached. The legal principles for determining if there is a section 7 *Charter* breach in the context of lost information and the guidelines for determining the appropriate remedy can be briefly stated. When evidence is lost or destroyed the Crown must satisfy the trial judge that the evidence has not been destroyed or lost due to unacceptable negligence. Section 7 has been breached if the trial judge finds that the evidence was lost due to unacceptable negligence. If the trial judge finds that there was no unacceptable negligence then the Crown has not breached the duty to disclose. The onus then shifts to the accused. If the evidence was not lost due to unacceptable negligence then, in order to establish a breach of section 7, the accused must demonstrate that actual prejudice resulted from the loss of the evidence. If the trial judge determines that there has been a breach of section 7 (either through unacceptable negligence by the Crown or actual prejudice's being caused by the loss of the evidence), the trial judge must

then determine the most appropriate remedy under section 24(1). A stay of proceedings is only appropriate in the "clearest of cases" when the following conditions are met: (a) the prejudice caused will be manifested or perpetuated through the conduct of the trial or its outcome; and (b) no other remedy is reasonably capable of removing the prejudice. A stay of proceedings is a discretionary remedy and is ordinarily entitled to deference on appellate review. An appellate court will only be justified in interfering with the decision if the trial judge misdirected himself or herself on the law or if the decision is so clearly wrong as to amount to an injustice. See *R. v. Dixon*, [1998] 1 S.C.R. 244, at paras. 38-39; *R. v. Carosella*, [1997] 1 S.C.R. 80, at paras. 48-50; *R. v. La*, [1997] 2 S.C.R. 680, at paras. 16-28; *R. v. Sheng* (2010), 254 C.C.C. (3d) 153 (Ont. C.A.), at paras. 30-42. The appellant's submissions give me no reason to conclude that this stringent test has been met. Moreover, the trial judge's reasons indicate an appreciation of the nature and significance of the lost evidence.

Facts pertaining to the stay application for abuse of process

[72] As indicated, the trial judge dismissed the appellant's assertion that trying him on the charges in relation to M and R was an abuse of process because of an agreement not to prosecute him.

[73] Contrary to the appellant's assertion, there is no evidence that the police discussed with the parents of M and R the implications of laying charges, nor does the evidence indicate the boys' parents were aware of the extent of M and R's allegations. Kingsley said he had no basis to lay charges in relation to sexual abuse and he did not testify as to any conversation with the parents about whether to lay charges. M and his father testified that the police simply asked if they

wanted charges laid. The decision of whether "his best friend" would go to jail was left with 12-year old M. M understood the appellant would go to jail if he did lay charges, and he said no.

[74] Kingsley did not refrain from laying charges against the appellant because of any agreement. He said the boys recanted their evidence of sexual abuse and he had no basis on which to lay charges. The Bishop said that nothing happened and the appellant would go for treatment. He used his position to neutralize the investigation. While the appellant is critical of the trial judge's conclusion that the purpose of the Bishop's presence was to interfere in the investigation, the Bishop and the appellant came to the house uninvited, the Bishop took over, and, in addition to the Crown witnesses, Kingsley agreed that the Bishop was there to interfere.

[75] Although the appellant challenges the trial judge's finding that the police had not communicated to the appellant an agreement not to charge him if he sought treatment, there was no evidence the police spoke with the appellant that evening. Neither M's parents nor R's parents said that the police told them not to press for charges *because* the appellant would seek treatment.

[76] The appellant questions the trial judge's comment that the appellant remained silent during the meeting at the M home. That is exactly what the evidence indicated. Furthermore, the trial judge stated, when making this remark, that acceptance by the appellant of the agreement not to prosecute was not a precondition in the abuse of process analysis. The impugned comment can hardly be taken as a material misapprehension that tainted the reasoning process.

[77] There is no evidence that the appellant acknowledged the Bishop as his agent. Accordingly, there could have been no agreement to refrain from prosecuting if the appellant took treatment. Indeed, in relation to sentence, the appellant complains, and the Crown concedes, that the trial judge erred in finding that the appellant was a party to the Bishop's purpose in attending the meeting at the M home and in considering it to be an aggravating factor. The trial judge's error in his reasons for sentence, namely that the appellant was a party to the Bishop's interference in the investigation, would not have undermined his conclusion that allowing the charges to proceed to trial would not be an abuse of process. Indeed, it would have strengthened it.

[78] The impugned factual determinations in relation to the abuse of process application were all supported on the evidence and were determinations the trial judge was entitled to make on this evidence.

Facts concerning the evidence of the four complainants

[79] In this category, the appellant impugns six of the trial judge's findings. The Crown concedes two of them. Specifically, the trial judge appears to have been mistaken when he said that L was encouraged to touch the appellant's penis. It does not appear that the evidence supports this. The trial judge also mistakenly noted that it was R.R. who thought the appellant was masturbating by the way the sheets were moving during the sleepover at the L'Annonciation rectory – it was M who said this. However, having regard to the overall substance of their evidence, these mistakes are inconsequential. The trial judge did not repeat these mistakes anywhere else in his reasons. They did not contaminate his overall reasoning process.

[80] Although the appellant casts the next four impugned determinations as misapprehensions of evidence, they are more properly challenges to inferences the trial judge drew from the evidence. An appellate court will interfere with the inference-drawing process only if the appellant can demonstrate that the inference-drawing process was unreasonable or was based on some material misapprehension of the evidence: *R. v. Jones* (2006), 81 O.R. (3d) 481 (C.A.), at para. 7. That is not the case here.

[81] First, the appellant challenges the trial judge's determination that any financial motive the complainants would have had for fabricating these allegations would have faded over time. The trial judge observed that each of M and R could have started civil actions without going to the police at any time over the last 25 years and had not done so. Each of M and R had had full-time employment for a long time and there was no evidence of financial difficulty. In responding to defence counsel's argument and rejecting it, the trial judge did not demonstrate a material misapprehension of the evidence. Nor is there any reason to interfere with the inference he drew that M and R were not fabricating their complaints based on any profit motive.

[82] Second, the trial judge commented that M and R were clear in their testimony that they never attended another drinking party at L'Annonciation with two to five other boys during which police arrived and four of the boys communicated allegations of wrongful touching by the appellant. The appellant submits that the trial judge erred when he commented, "There is little reason in my opinion why M and R would not admit to this drinking night at L'Annonciation with three to four other boys, especially if M or R was being untruthful and

fabricating instances of wrongdoing against the defendant." The trial judge's comment was made in the course of rejecting Kingsley's evidence that they were among the boys who were at the rectory when he went to speak to the priest and in giving his reasons for so doing. The trial judge was troubled by how Kingsley could remember the two boys' names after all these years yet could not remember the name of any of the other boys. Nor could Kingsley say for sure that the appellant was the priest at the rectory when he attended. The trial judge's comment was not a misapprehension of the evidence. A trial judge is entitled to comment on the evidence.

[83] The trial judge did not misapprehend the evidence in finding that, given what happened the second night of the weekend party at L'Annonciation, it was likely the appellant did assault R the night before. This determination was made in the context of assessing R's evidence as a whole and the submissions of the defence that R was not worthy of belief. The trial judge's conclusion was a reasonable inference from the evidence.

[84] In relation to L.B., the trial judge reviewed the contradictions in his evidence as to what he wore when he went to bed. In chief he stated that he wore underwear to bed as a boy. In cross-examination, he said he did not remember wearing pyjamas to bed at the time of his relationship with the appellant but that he was not sure. In L.B.'s initial interview with police, he had said he probably wore pyjamas and added, "Again I don't, I don't really remember the details." After quoting this remark, the trial judge found that L.B. was consistent in his lack of memory as to this level of detail and did not find the evidence as to whether he wore pyjamas or underwear to be a contradiction or inconsistency. Again, this is

not a misapprehension of the evidence – it is an assessment of the evidence and a drawing of an inference. The trial judge was entitled to make that assessment.

[85] To summarize, the trial judge misapprehended the evidence on two points in relation to the evidence of the four complainants. Neither is a material misapprehension. Overall, the appellant has failed to establish that any misapprehensions of the evidence played an essential part in the trial judge's reasoning process. The other four impugned findings were inferences from the evidence that the trial judge was entitled to make.

2. Whether the trial judge applied a different standard of scrutiny to Crown and defence evidence

[86] Before dealing with this ground of appeal it is important to bear in mind that, in a trial which turns almost exclusively on an assessment of the credibility of the witnesses, the trial judge enjoys a significant advantage. The trial judge has the benefit of not only hearing what was said but also how it was said. In making his or her assessment of credibility, the trial judge has heard all of the evidence as well as the submissions of counsel. An appellate court simply has a transcript and is guided to a selective review of the trial record on which argument is made. In arriving at his ultimate credibility findings, the trial judge doubtless paid careful attention to what was said. . As this court stated in *R. v. Howe* (2005), 192 C.C.C. (3d) 480 (Ont. C.A.) at para. 59:

> It is not enough to show that a different trial judge could have reached a different credibility assessment, or that the trial judge failed to say something that he could have said in assessing the respective credibility of the complainant and the accused, or that he failed to expressly set out legal principles relevant to that credibility assessment. To

> succeed in this kind of argument, the appellant must point to something in the reasons of the trial judge or perhaps elsewhere in the record that make it clear that the trial judge had applied different standards in assessing the evidence of the appellant and the complainant.

See also *R. v. C.R.* (2010), 260 O.A.C. 52 (C.A.), at para. 66; *R. v. J.W.J.*, 2009 ONCA 791, at paras. 4 and 5; *T.(T.)* at paras. 31 and 74.

Scrutiny of Crown and defence witnesses

[87] In partial support of this submission, the appellant relies on a statement by the trial judge during the trial that he believed that witnesses were "presumed to tell the truth".

[88] The trial judge subsequently corrected his comment and his reasons must be examined in that context. During the examination in chief of L.B., the trial Crown posed questions that defence counsel objected to as "oath helping." After hearing initial submissions on point, the trial judge heard further submissions (not transcribed) and ruled, with reference to case law, in favour of defence counsel's objection. On a final note, the trial judge said:

> The presumption of this court is that this witness, and every other witness on the commencement of the exercise, is telling the truth. They are here to tell the truth that is the reason for the administration of the oath at the beginning of their testimony, and I am going to, as any court would, presume that they are credible until that is placed into question during cross-examination, upon which, these subjects are open for cross-examination, to the extent necessary, re-examination.

[89] Two days later, during submissions on another point, defence counsel raised a concern regarding the trial judge's prior comment that witnesses are

presumed to tell the truth. He presented the trial judge with a decision of this court, *R. v. Thain* (2009), 243 C.C.C. (3d) 230 (Ont. C.A.), and read out the following passage from para. 32:

> Witnesses are not "presumed to tell the truth". The evidence of each witness is to be assessed in the light of the totality of the evidence without any presumptions except the general and over-riding presumption of innocence.

The trial Crown agreed.

[90] During defence counsel's submissions on the merits of the case, he again stated at the outset that witnesses are not presumed to tell the truth. The trial judge agreed and explained what he had earlier meant to convey:

> Your point is very, very well taken, and you're a hundred percent right, and what I had meant by my comment was that I don't want to ever get to a position where when somebody comes up and swears on a bible or affirms, that I am starting off with the premise that they're lying but it's an important distinction that you're making.

[91] Contrary to the appellant's submission, the trial judge did not decide this case based on a presumption favouring the Crown witnesses.

[92] Unlike most cases in which this ground of appeal is advanced this is not a case in which it is alleged the trial judge applied different expectations to the evidence of the complainants and the accused. The appellant did not testify.

[93] The appellant's main complaint appears to be that the trial judge subjected the evidence of the complainants and the defence witnesses to different levels of scrutiny. In particular, the appellant argues that the trial judge did not assess the

testimony of the complainants critically and resolve inconsistencies whereas his treatment of Kingsley's evidence was generally critical. The appellant submits that the trial judge's treatment of Kingsley's evidence reflects his approach to tailor his findings to support a conviction. Despite the appellant's acknowledgment that police officers have no reason to lie, he submits that the trial judge applied a particularly harsh standard of scrutiny to Kingsley's evidence and found that he had an agenda and was not independent.

[94] I would disagree. The trial judge subjected the evidence of each complainant and the defence witnesses to careful and probing analysis, thoroughly and objectively reviewed their evidence, conducted a balanced and even-handed examination of their evidence, dealt with the alleged contradictions and improbabilities in their evidence, addressed defence counsel's submissions about the inconsistencies in each complainant's testimony and fully explained why he reached his conclusions. If the trial judge had applied a different level of scrutiny to the Crown and defence evidence and engaged in result-oriented reasoning, he would not have engaged in the careful, extensive examination of the evidence that he did. Further, the trial judge acquitted the appellant of all of the allegations made by another complainant, R.L., acquitted him of one count in relation to M, and acquitted him of two counts in relation to L. That same careful standard was applied to the evidence of Kingsley. So as not to interrupt the flow of these reasons, specific examples that refute the appellant's allegation that the Crown and defence witnesses were subjected to differing levels of scrutiny are included just prior to my conclusion on the conviction appeal.

Submissions that the trial judge took judicial notice of dubious subject matter

[95] The appellant also submits that the trial judge relied on judicial notice of dubious subject matter to resolve tensions in the evidence. The appellant submits that, as a result, the trial judge applied an unreasonably low standard of scrutiny to the complainants' evidence.

[96] I disagree. The trial judge did not rely on dubious subject matter by way of judicial notice when assessing the evidence of the complainants. Rather, he drew some common sense inferences. The decision of this court in *R. v. Robinson* (2009), 254 O.A.C. 171 (C.A.), at paras. 37-41, is instructive on this point. In *Robinson*, the appellant argued that the trial judge improperly took judicial notice of drug-related behaviour by concluding: "people don't just leave [half an ounce of crack cocaine] lying around for no reason at all". This court disagreed with the appellant's characterization of the trial judge's reasoning as improper judicial notice and held that the trial judge's comment was a rational observation.

[97] Overall, the reasons do not support the appellant's submission of speculative analysis. In addition to his own common sense, the trial judge relied upon multiple findings of fact that were supported by the evidence to draw the inferences he did and the impugned comments were either permissible or of no significance to his reasoning process.

[98] Specific examples are again set out just prior to my conclusion on the conviction appeal.

3. The trial judge's reliance on material not in evidence and its effect on his conclusions

[99] It is trite law that a trial judge must decide a case on the evidence and only on the evidence presented at trial.

[100] The appellant argues that the trial judge relied on police statements and preliminary inquiry transcripts that were never entered in evidence. During the course of the trial, defence counsel used transcripts of the Crown witnesses' police statements and preliminary inquiry evidence to cross-examine them. He provided copies to the trial judge for convenience. The reasons for judgment reveal that the trial judge consulted and utilized portions of those transcripts which were not in evidence in his reasons. The appellant submits that it is impossible to measure the extent to which the trial judge was influenced by this material and, further, that in consulting sources beyond the record, he improperly assumed the role of advocate.

[101] I disagree. I cannot accept the appellant's submission that the fact that the trial judge looked at a witness's police statement or portion of the preliminary inquiry he should not have looked at automatically translates into a conclusion that the appellant did not receive a fair trial in the absence of any indication that it somehow tainted his reasoning.

[102] This was not a jury trial. The trial judge's extensive reasons do permit us to review the extent to which he referred to material not in evidence. Having reviewed those reasons, I would conclude that in each instance the trial judge's reference to material not in evidence was either not central to his conclusions or else the substance of the impugned reference was already in evidence elsewhere.

Examples of the appellant's specific submissions as well as my comments are found below prior to my conclusion on the conviction appeal.

[103] What the impugned references do illustrate is the danger of a trial judge accepting a copy of the preliminary inquiry transcript or a prior statement of a witness which is being used in cross-examination and which, of course, is not part of the evidence unless the prior statement is specifically adopted by the witness. If counsel wish to assist the trial judge, it is preferable to give the judge a copy of the relevant portions of the pages used in cross-examination only and with the portions of the page that are not to be referred to in cross-examination blacked out.

[104] I would dismiss this ground of appeal.

4. Specific examples refuting arguments re differing standards of scrutiny, alleged improper judicial notice and reliance on material not in evidence

Whether the trial judge applied a different standard of scrutiny to Crown and defence evidence

[105] In the examples below, the appellant's submissions are italicized, while my comments are in ordinary type. Overall the allegation that the Crown's witnesses were subjected to inadequate scrutiny while those of the defence were stringently scrutinized is rebutted.

R.R.

> *(i) The trial judge failed to address the inconsistencies and sheer improbability that R awoke with the appellant's penis in his mouth, and his mouth filled with ejaculate.*
>
> The trial judge did not find that the appellant put R's penis in his mouth. He found that the appellant placed his penis to the mouth and face of R and in the process of doing so

ejaculated. Nor did the trial judge accept R's evidence that the appellant attempted to put his penis and finger in R's anus. This shows that the trial judge carefully assessed R's evidence.

(ii) The trial judge failed to address or resolve the inconsistencies exposed in cross-examination with respect to the check-ups adequately; he failed to question the reliability of R's evidence, given his inability to provide a more narrow estimate of the number of check-ups than between 10 and 50 times.

The trial judge addressed the variation in estimates R gave for how often the "check-ups" happened. He found the different estimations had to be understood in light of R having clearly stated that he did not recall the specific number of times they happened and in recognition of the difficulty R would have in recalling the exact number of times 25 years later. He applied similarly probing analysis to each inconsistency and improbability that defence counsel said existed in R's evidence. The fact that the trial judge did not accept all of R's evidence also supports the conclusion that he did not apply a different standard of scrutiny to the evidence.

This is not a case like *R. v. G. (M.)* (1994), 93 C.C.C. (3d) 347 (Ont. C.A.), in which the trial judge failed to pay careful attention to a significant inconsistency between the complainant's prior statement and her trial testimony in assessing her credibility. In that case the complainant first wrote in a letter that she had been sexually assaulted by way of intercourse regularly for over four years whereas at trial she said that there had been one sexual assault that did not involve intercourse. Nor was it a case like *R. v. Stark* (2004), 190 C.C.C. (3d) 496 (Ont. C.A.), where the trial judge failed to address inconsistencies that went to the core of the allegations. In the circumstances of this case, the exact number of times R submitted to check-ups by the appellant did not go to the core of the allegations.

(iii) The trial judge justified R's return to the rectory the second night after being allegedly sexually assaulted the

first night by finding that R knew he did not have to share a bed with the appellant, which was not R's explanation.

The trial judge was entitled to consider what R knew. R did know it was M's turn to sleep with the appellant. Further, the trial judge was responding to defence counsel's submission that it was suspect that R would return to the rectory the second night not "knowing" whether he would be assaulted again. In addition, there were other reasons why the trial judge did not find it incredible that he would go back to L'Annonciation the second night as defence counsel submitted: R had already been subjected to some "check-ups" and he would have been attracted to the lure of the alcohol, cigarettes and fun.

(iv) The trial judge found that R's evidence had a high level of credibility despite his conclusion that he was not a cautious, strong or careful witness when it came to "important details" or evidentiary detail and that he may have been susceptible to exaggeration.

The fact that the trial judge remarked that R was not overly careful with some details, yet still found him to be generally credible, does not demonstrate that the trial judge did not scrutinize his evidence. He did.

(v) Mrs. R's evidence was that one of the police officers went upstairs with the Bishop to interview the boys while the other parents and the boys testified that was not the case. The trial judge resolved the conflict presented by her evidence as more likely referring to the momentary absence of one of the officers during the meeting based on other evidence that Officer Andrews left for a cigarette.

Officer Kingsley testified that he did *not* go upstairs so this cannot be an instance of subjecting a Crown witness's evidence to less stringent scrutiny than that of the defence.

J.M.

(i) The trial judge found that the appellant prevented M from leaving his bed on the second night at L'Annonciation

without addressing M's prior inconsistent statement on this point.

(ii) He failed to reconcile M's claim that he awoke in the appellant's bed the morning following the alleged assault upon him, with his evidence that he left the bed during the night and slept in the living room.

A trial judge does not need to address each and every inconsistency in a witness's evidence so long as the basis for the trial judge's conclusions is apparent from the record: see *Stark* at para. 12. In that case, the trial judge failed to address inconsistencies that went to the core of the allegations. Whether M did or did not get out of the appellant's bed after the alleged sexual assault on him and go and sleep in the living room does not go to the core of the allegations.

(iii) The trial judge failed to apply appropriate scrutiny to the steps that M took prior to contacting police in 2007.

The trial judge addressed the defence submission that M's allegations were suspect because he had called a number of people before he spoke to the police in 2007. He explained why he did not view those calls with the degree of suspicion defence counsel would have liked him to. The persons with whom M spoke were persons such as his grade school principal, who provided some counterbalance to a potential challenge that his evidence had been recently fabricated.

The trial judge also addressed the submission that M was motivated by a possible civil suit and explained why he did not accept this as a factor that undermined M's credibility. The trial judge observed that each of M and R could have started civil actions without going to the police at any time over the last 25 years and had not done so. Each of M and R had had full time employment for a long time and there was no evidence of financial difficulty.

(iv) The trial judge found confirmation of M's evidence from the evidence given by his parents, without addressing

the evidence that the family discussed the case prior to trial.

The meeting at the M home was independent of the alleged events of sexual abuse. The trial judge noted that both M and R were cross-examined as to whether they were interviewed by police at the meeting at the M home. They were not cross-examined as to whether they told police at that meeting that the defendant had done nothing wrong to them. The only person who contradicted M's evidence as to what happened at the M meeting was Kingsley.

There was no need for the trial judge to consider "evidence that the family discussed the case prior to trial." In addition to the evidence of his parents, the trial judge found that M's evidence was also supported by R and his mother. M testified that he had not discussed his evidence with R prior to trial although he called R on the eve of reporting the matter to the police in 2007.

(v) The trial judge found the evidence of M's father "very credible" despite rejecting his inflammatory and inconsistent evidence regarding the confrontation of the appellant at the rectory.

After M's father learned that the appellant had allegedly sexually assaulted M, he and R's father went to the rectory and confronted the appellant. There, he said they saw a local lawyer whom they knew. M's father's evidence that the appellant admitted to teaching the boys how to masturbate was contradicted by R's father's evidence. Both fathers agreed that after confronting the appellant, they were asked to leave the rectory.

A trial judge is entitled to accept all, part, or none of a witness's evidence. The fact that the trial judge did so in relation to M's father, a Crown witness, in no way supports an inference that he subjected the defence witness's evidence to greater scrutiny.

(vi) The trial judge speculated that the parents in the van who attended to pick up the boys at the rectory in 1983

would have alerted the parents of M and R, if they had been present.

The context of the comment is Kingsley's evidence that M and R were among 4 to 6 boys who were at the rectory when he was called to investigate the complaint of sexual assault and that they were in an alcoholic state. He stated that the parents of the boys were called to take them home, and that he believed two men arrived in a van to pick up the boys.

Neither M's father nor R's father drove four to six boys home from the rectory after an incident at the rectory consistent with Kingsley's testimony. The trial judge stated: "Given the age of the boys and the allegation of sexual touching by a priest, one would expect the parents in the van would alert the parents of M and R. None of these four parents, Mr. and Mrs. R or Mr. and Mrs. M were ever so alerted of any such incident. Instead, Mrs. M testified that Father Cloutier drove her son home and came in the house for a brief visit after M's weekend at the rectory."

Viewed in context, the trial judge's comment was not speculation but a logical inference.

D.L.

(i) The trial judge failed to address the prior inconsistent statement regarding the allegation of sexual touching at the rectory.

(ii) He forgave L's failure to tell police that when he visited the appellant in College that he got into bed with him. The trial judge found this omission not to be "important given the otherwise credible and strong testimony of this witness, important parts of which were confirmed by his father's testimony".

(iii) He failed to question the reliability of L's evidence, given his inability to provide a more narrow estimate of the number of incidents than between 5 and 50 times.

(iv) He found no material conflict between L's trial evidence that the incidents occurred between 5 and 50 times, and his more precise statement to police that they occurred 18 to 20 times

(v) He failed to consider the improbability that L was sexually assaulted for the first time with his brother in the room.

(vi) He failed to reconcile L's explanation with respect to the positioning of his clothing during the alleged assaults and the presence of semen on his bed sheets.

(vii) He addressed the inconsistencies in L's evidence with respect to when and where he made a disclosure to his mother, with speculation that there were likely multiple discussions, and that if there were inconsistencies they were extremely minor.

(viii) He failed to resolve the gross discrepancy between his claim that he visited the appellant at a parish in Field, Ontario in 1980 or 1981, when the records indicate that the appellant was not at Field until 1985.

The appellant's list is mostly a reiteration of defence counsel's submission to the trial judge. In effect, we are being asked to substitute our view of the evidence for that of the trial judge.

The trial judge subjected L's evidence to a careful assessment. That he did so is evident in how the trial judge addressed defence counsel's assertions that, although L was a "believable" witness, there were a number of things that were suspect about his evidence. Three main examples support this point. First, the trial judge addressed and rejected the submission that it was improbable that the appellant would sleep over at the L home when he lived so close by. The trial judge had good reason for finding that it was not improbable. In addition to L's evidence he had confirmation from L's father that the appellant frequently slept over at their home.

Second, the trial judge addressed the fact that L twice visited the appellant after L went to college. That the trial judge did not agree with defence counsel that these visits made L's evidence as a whole incredible does not mean that he did not scrutinize this evidence – he did and he explained why he did not find the visits suspect. L testified that he still liked the appellant but that the sexual contact between them had caused him a lot of conflict in his life. The appellant continued to perform religious services for the family and to attend occasionally at family get-togethers. The trial judge concluded that it was not unreasonable that in this context L's residual feelings would lead him to visit the appellant after the intimacy between them had ended.

Likewise, the trial judge addressed the fact that L had not told the police that he got into bed with the appellant during one of those visits. The trial judge explained that, given the whole of the evidence and L's explanation for why he did not mention that to the police, the omission was of no particular or overall importance. In any event, the trial judge acquitted the appellant of allegations of sexual assault in relation to the later visits.

Third, the trial judge addressed defence counsel's concern over L's not being able to state an exact number of incidents of abuse. He went on to address the difference in numbers given by L at trial and in his statement to Sergeant Delwo. Specifically, L was asked in chief whether he had any idea how many times the sexual abuse occurred. He replied that he did not keep records of it, but he agreed with the Crown when she asked if it was "more than five" and "less than 50". In cross-examination, defence counsel asked L if he recalled having told Sergeant Delwo that it happened between 18 and 20 times. L said that although he knows exactly what went on, he could not reliably state a precise number of incidents beyond saying that it happened "a fair number of times". After referring to this evidence, the trial judge explained that he did not find the variance of great concern, especially since 25 years had passed. Again, the trial judge was justified in making this finding. The fact that he did not find the apparent inconsistency all that troubling does not mean he

did not scrutinize the evidence adequately – it just means he did not draw the inference the defence was hoping he would draw.

L.B.

(i) The trial judge accepted L.B.'s explanation that being a shy boy was a "plausible explanation for this change in certainty" in his inconsistent evidence regarding whether he initiated massages from the appellant.

(ii) He found confirmation in Mrs. B.'s evidence that although she did not recall seeing the accused go downstairs to the basement on the evenings of the card games, she recalled him being frequently in the home and at times went directly to the basement to visit L.B. However, the trial judge ignored her qualification that it was after school when he went directly into the basement.

(iii) He forgave the inconsistency in L.B.'s evidence regarding the number of times that he ejaculated in his bed following the sexual assaults.

As the appellant admits, the trial judge addressed the inconsistency between L.B.'s evidence at the preliminary inquiry and his trial evidence about whether he had asked the appellant for a massage or whether he was too "shy" to have asked.

He was entitled to find L.B.'s explanation plausible. Mrs. B. said that sometimes the appellant would come over after school and go down to the basement to see L.B. It was the appellant's idea to decorate L.B.'s room and he helped L.B. do so. The appellant was a priest and she trusted him. She also agreed that if, while playing cards, the appellant had said on a number of occasions he was going to go downstairs and say goodnight to L.B., there would be no reason for her to be suspicious and no reason for her to even remember that happening. The trial judge did not subject L.B.'s mother's evidence to a different standard of scrutiny. Similarly, the trial judge addressed the alleged variations in L.B.'s police statement and his evidence at trial about how many times he thought the appellant

brought him to ejaculation. The trial judge did not think it was of concern in light of L.B.'s admission that his memory was deficient on this detail, and that L.B. had testified the appellant would occasionally stroke his penis and stop just short of making him ejaculate. The trial judge properly scrutinized L.B.'s evidence.

Officer Kingsley

(i) The trial judge failed to reconcile evidence that tended to support Kingsley's evidence that an investigation was conducted in 1983, such as M's testimony that he may have been asked questions by police and that they were taking notes, R's mother's evidence that police may have attended upstairs with the Bishop, and the evidence that the police met with everyone at the dining room table prior to the arrival of the Bishop.

(ii) He found a lack of confirmation in Kingsley's evidence, namely that if he were telling the truth, there would be more complainants or witnesses to the parties at the rectory.

(iii) He held Kingsley's level of deference to the Catholic Church precluded his ability to investigate, without regard to his evidence that he had removed himself from an investigation in the past due to potential bias or conflict.

(iv) He criticized Kingsley's failure to lay a charge, yet failed to acknowledge that Kingsley questioned the reliability of the allegations at the rectory at L'Annonciation.

(v) He found that Kingsley admitted that the details of one investigation fade into another, yet ignored his evidence that this investigation was unique and memorable.

(vi) He ignored indicia of reliability in Kingsley's recollection of the 1983 investigation, while unfairly highlighting aspects which he did not recall.

Kingsley testified that one of the reasons he may not have laid liquor offences against the appellant was because of

his Catholic faith and deference to the clergy. The trial judge was hardly in error for considering this admission. Kingsley also testified he was very devout, deferential to the clergy, found it hard to believe such allegations against a priest, was uncomfortable with the allegations, had hoped he would not have to arrest a priest and may have carried this unease and deference into this investigation. Again, it can scarcely be said that the trial judge was in error for considering these acknowledgements. Despite this, the trial judge found Kingsley to be an honest witness but was concerned about several points in his memory. For example, Kingsley admitted in cross-examination that he could not say for sure whether the priest at L'Annonciation rectory with whom he spoke was the appellant.

The appellant also gives several examples of the allegedly more stringent standard the trial judge applied to Kingsley's evidence. The examples relate to Kingsley's evidence that M and R were present at the rectory when he went to investigate or to what Kingsley said and did at the meeting at the M home. Kingsley was testifying by memory beyond the one page of notes in his police notebook. He conceded in cross-examination that he was assuming that the April 7, 1983 reference in the book referred to the dispatch to the rectory because it was the only reference in the book, but that it was possible that the notation referred to the meeting at the M residence, and that that could explain why he only wrote down M's name. He also conceded that the reason he remembered the two names M and R could be from the meeting at the M residence rather than his visit to the rectory, and that there was no reason for him to remember those two names over the names of the other boys who were present at the rectory.

This is not a case like *R. v. Stewart* (1994), 18 O.R. (3d) 509 (C.A.), where the trial judge failed to seriously consider substantial evidence introduced by the defence to show the improbability that the appellant committed the offence in the manner suggested by the complainant. Having regard to the evidence as a whole, the trial judge was entitled to reject Kingsley's evidence that M was at the rectory when he arrived for the reasons he gave. That

> rejection was not as a result of subjecting Kingsley's evidence to a higher level of scrutiny than that of the Crown witnesses. It was as a result of consideration of Kingsley's evidence as a whole as well as the evidence of the six Crown witnesses. That is also true of the trial judge's rejection of Kingsley's evidence concerning what took place at the meeting at the M household.

Submissions that the trial judge took judicial notice of dubious subject matter

[106] As in the preceding section, the appellant's submissions are italicized while my comments rejecting them are in regular type.

> *(i) The trial judge justified R's return to the rectory the second night after being allegedly sexually assaulted the first night by finding that R knew he did not have to share a bed with the appellant, despite that not being R's explanation, and with the rhetorical question: "Do sexual partners break up or never return immediately when one of them exceeds the other's sexual preference?"*
>
> *(ii) He determined that it was reasonable that neither M nor R objected to the Bishop's conclusion at the 1983 meeting because it was not probable that 14- and 15-year-olds would speak up and contradict the Bishop.*
>
> *(iii) He used the fact that a complaint was made to bolster the credibility and veracity of the allegations by taking judicial notice of the disincentives for a male sexual assault complainant to come forward.*
>
> *(iv) He dismissed the improbability that L would sleep at the rectory on two occasions and visit the appellant in adulthood after allegedly having been sexually assaulted in his home as follows: "It is perfectly plausible that a child entering into an intimate first relationship forms strong bonds towards the other person and becomes extremely attached to that person. Feelings of teenagers are often intense. The intensity of that initial sexual connection and feeling of love towards another by a teenager can be intense and lasting. Many 14- and 15-year-olds are not*

fixed or formulated at that point in time as to their sexual identity".

(v) He forgave L's inconsistencies with respect to his age when the alleged assaults ended with the following rhetorical question: "How many of us 30 years after our first lengthy sexual relationship remember our specific age when that relationship ended? I suspect few absent a memorable event".

(vi) He dismissed the defence argument that their drunkenness would affect the reliability of the allegations made by M and R by citing the "heightened importance" and "novelty" of sexual contact to most 14 and 15 year olds.

(vii) He dismissed the significance of a lack of confirmation of semen stains on L's bed sheets as follows: "To which I ask, how many mothers would notice dried sperm on a sheet upon stripping a bed on wash day? I expect few. If a mother did notice and then identified it as dried sperm, how many mothers would confront their 15-year-old son rather than remain silent? I suspect identification is very problematic given what dried ice cream might look like. I cannot speculate as to the breakdown between confrontation versus silence by the mother. Based on the evidence however, Mrs. L. was living in dramatic denial in relation to D.L. and silence on her part to stained bedding would be consistent with her approach".

The trial judge's rejection of the defence assertion that it was unreasonable that R would have gone back to L'Annonciation the second night by saying he knew he did not have to share a bed with the appellant was one he was entitled to make. This was not the sole reason the trial judge gave. He also took into consideration the attraction of cigarettes, alcohol and fun. The trial judge's rhetorical question, while better left unsaid, was just that, a rhetorical question that went nowhere.

The trial judge's comment that neither M nor R would have spoken out against the Bishop during the 1983

meeting accords with common sense. Having regard to Kingsley's evidence about how he felt investigating this case as a Roman Catholic, the trial judge was certainly entitled to conclude that it would have been intimidating for two devout, young Catholic boys to have done so.

The trial judge's comment that there are disincentives for a male to complain about sexual assault was an inference that he could have drawn from the fact that all of the complainants waited a long time before coming forward. In any event, he did not make the comment to bolster the credibility and veracity of the complainants as the appellant suggests. Rather he made the comment in the context of refuting the defence submission that he should have a reasonable doubt as to whether the appellant sexually assaulted the complainants because they were motivated by the potential of financial gain from a future civil law suit. This was but one reason the trial judge gave for rejecting the suggestion that the complainants were motivated by financial gain.

Given L's evidence that he "loved" and "adored" the appellant, there was nothing wrong with the trial judge's finding that that bond was a factor in L's decision to stay over at the rectory despite the abuse. The trial judge's comments concerning the intense, lasting feelings of love teenagers can experience and his comment that many 14- and 15-year-olds are not fixed in their sexual identity were superfluous and did not affect his reasoning. As has been noted, the trial judge acquitted the appellant in relation to these later charges.

The trial judge's rhetorical question in relation to L's inconsistencies with respect to when the sexual assaults ended was preceded by solid reasons based on the evidence and, again, was merely a superfluous comment. The trial judge held, "There is not a great age difference when D.L. is saying on both occasions that he does not recall how old he was when it ended".

The trial judge's reliance on material not in evidence and its effect on his conclusions

[107] The appellant's submissions in his factum and additional oral submissions are italicized. As my comments in ordinary type indicate, the trial judge's usage was either not material to his assessment of credibility or the material was in evidence elsewhere.

> *(i) R was cross-examined both with the transcript of the preliminary inquiry and a transcript of his videotaped statement to police. The trial judge referenced all of this evidence and quoted from the preliminary inquiry and in that review, found that R told the police that there were six or ten check-ups. That information is not on the record.*
>
> At trial R testified that the number of "check-ups" was at least 10. The trial judge found that R did not recall the exact number of times the check-ups had occurred. Having regard to the lapse of more than twenty-five years, the trial judge found that the exact number of times R submitted to check-ups was not material to his assessment of R's credibility.
>
> *(ii) The trial judge stated, "In his statement to police, R.R. stated that he remembers awaking with the defendant's wet penis in his mouth, very, very gooey and slimy and that the defendant rubbed his penis on his mouth. … He stated that the defendant then attempted to penetrate R.R.'s rectum using his finger and penis". The description of the defendant's penis as being "very, very gooey and slimy" was not in evidence. The appellant also submits that there was no evidence of attempted finger and penis penetration.*
>
> R did testify that the appellant tried to insert his penis and finger into his buttocks. He was not cross-examined on this point. In any event, the trial judge did not find beyond a reasonable doubt that the appellant had attempted finger and penis penetration of R. The substance of the evidence, that the appellant had rubbed his penis on R's mouth, had been given at trial and in the circumstances the description

of what the appellant's penis was like was not material. The trial judge was entitled to find that the appellant had rubbed his penis to the mouth and the face of R and ejaculated sperm.

(iii) In discussing an alleged contradiction in the evidence of L as to the number of times he had been fondled, the trial judge stated that L apparently told police that he had been fondled 18 to 20 times whereas at trial he stated that the defendant had fondled him more than five times and less than 50 times. The trial judge then commented, "The defence points to the transcript at the preliminary inquiry on p. 80 when the witness refers to eight times. That answer was specifically in relation to the number of times the defendant rubbed D.L. to the point of ejaculation." This portion of the transcript had not been put to L.

While the pinpoint reference to this part of the preliminary transcript was not put to L, he was cross-examined with excerpts from page 80. Defence counsel specifically asked L if he had previously said the appellant rubbed him "eight times" to the point of ejaculation. Given that the exact passage was not used to cross-examine L, defence counsel's question of L perhaps explains how the trial judge's reference came to be made. While the trial judge's reference to the figure eight times is questionable, this error was in the appellant's favour.

(iv) In discussing the evidence of L in his reasons and another alleged contradiction of L's evidence, the trial judge quoted a slightly broader excerpt of L's from the police interview than had been referred to by counsel. The trial judge quoted L as telling the police that he asked the defendant about his actions and he said, "I'm just lonely and I won't do it again, and…". This portion of the statement had not been referred to by counsel.

L testified at trial that, "Father Cloutier said to me that he was lonely and the profession was lonely and that he didn't mean any harm or hurt".

In both instances, the evidence of L was to the effect that the appellant admitted his actions and said he had acted out

> of loneliness. Therefore, the substance of the impugned reference was already in evidence.
>
> *(v) The trial judge observed that the questions and answers in L.B.'s police statement were short with respect to the frequency with which he ejaculated. The appellant submits that the trial judge went through the statement and examined the questions and answers in an attempt to bolster L.B.'s evidence.*
>
> The preliminary inquiry transcript was put to L.B. on two occasions in his cross-examination. The trial judge's comment could have been a comment on the excerpts that were put to L.B. In any event, the trial judge's comment that the answers were short was innocuous.

5. Conclusion respecting the overarching allegations

[108] In effect, the appellant sought to have this court re-try the case. There is no basis for appellate intervention.

[109] Overall, the trial judge did not "abandon impartiality" or "adopt the role of an advocate", and the trial not only appeared to be fair, it was fair.

[110] The trial judge's decision is thorough and well-reasoned. In his 217-page reasons, the trial judge carefully considered each of the three applications as well as both parties' submissions on the merits of the case. He addressed the alleged inconsistencies in the complainants' evidence and explained in detail how he resolved those inconsistencies. The trial judge's findings of fact are supported by the evidence. While he did commit a few minor errors as outlined above, none of these errors was material to his decision. He did not commit the errors alleged in his reasoning process.

[111] I would dismiss the appeal with respect to conviction.

B. The Sentence Appeal

[112] The appellant submits that the trial judge erred in blaming him for interfering in the 1983 police investigation of the allegations respecting two of the victims, M and R. Inasmuch as this error played a central role in the trial judge's decision to sentence the appellant to a global sentence of five years' imprisonment, the appellant submits that the sentence ought to be reduced. The appellant also submits that the five-year sentence is disproportionate to the circumstances of the offence and the offender, having regard to such factors as the appellant's age and his "exemplary life" since 1983. The Crown concedes that the trial judge should not have treated the appellant's attendance at the 1983 meeting as an aggravating factor. The Crown submits, however, that this factor played little role in the overall sentence, which is fit and does not merit appellate intervention.

[113] Accepting the Crown's concession, I am of the opinion that the overall sentence imposed by the trial judge was nevertheless fit.

[114] The aggravating factor in regard to which the trial judge erred only applied to the charges relating to M and R. The trial judge also sentenced the appellant to five years' imprisonment each for one count of indecent assault in relation to L.B. and one count of indecent assault in relation to L, with these sentences to run concurrently.

[115] The primary considerations in the determination of a fit sentence for cases involving the sexual abuse of children are denunciation, deterrence and the need to separate offenders from society: *R. v. D.(D)*. (2002), 58 O.R. (3d) 788 (C.A.), at

paras. 34, 42-43. The trial judge correctly identified the primary considerations in this case as being denunciation and deterrence. While it is true that more than 26 years passed between the most recent offence and sentencing, these were serious sexual offences. Aggravating factors that were appropriately considered by the trial judge include the appellant's position of trust, respect and authority as a priest; the appellant's "grooming" of the boys through the provision of gifts, cigarettes and alcohol and the taking of trips; and the young age of the complainants. The sentence must reflect these factors.

[116] As stated out by Moldaver J.A. in *D.(D).* at para. 44, "when adult offenders, in a position of trust, sexually abuse innocent young children on a regular and persistent basis over substantial periods of time, they can expect to receive mid to upper single digit penitentiary terms". This sentence is at the low end of that range and is entirely appropriate in the circumstances.

IV. ADDITIONAL ISSUE RAISED BY THE CROWN

[117] The trial judge declined to order that the appellant register as a sex offender under the federal *Sex Offender Information Registration Act*, S.C. 2004, c. 10 ("*SOIRA*"). The Crown submits that a registration order is mandatory unless the impact of the order would be "grossly disproportionate" to the public interest in societal protection and that that is not the case here. I would give effect to the additional issue raised by the Crown.

V. DISPOSITION

[118] For the reasons herein, I would dismiss the appeal with respect to conviction. On the issue of sentence, I would grant leave to appeal, but I would

dismiss the appeal. I would also order that the appellant register as a sex offender under *SOIRA*.

RELEASED: June 30, 2011 "K.M. Weiler J.A."

"RAB" "I agree R.A. Blair J.A." "I agree Gloria Epstein J.A."

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[1] In these reasons references to "the complainants" refers to the four complainants in relation to whom the trial judge convicted the appellant and not R.L.