QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2013 SKQB 395**

Date: **2013 11 05**
Docket: Q.B.J. No. 68 of 2012
Judicial Centre: Battleford

BETWEEN:

HER MAJESTY THE QUEEN

- and -

PAUL MARY LEROUX

Counsel:

Michel L.J. Piché	for the Crown
Paul Mary Leroux	on behalf of himself

JUDGMENT
November 5, 2013

ACTON J.

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[1] The accused has been charged with 14 counts of indecent assault and three counts of gross indecency against 14 individuals, all of whom were boys who attended the Beauval Indian Residential School between January 1, 1959 and December 31, 1967. The residential school was located at Beauval in the Province of Saskatchewan.

[2] The accused was considered the golden-haired boy of the priests and nuns and was very popular with the boys at the Beauval Indian Residential School. The accused had an ability to interact and bond with the people in his life. In spite of a lack of significant post-secondary education and the loss of both of his parents at the age of 15, the accused had an amazing aptitude to relate to the boys at the school in a manner

which brought out their talents as both athletes and singers.

[3] During his time at the school, from September 1959 to June 1962 and September 1963 to June 1967, he developed the intermural hockey, competitive fastball and softball teams, and the Beauval Warriors, which was the regional champion hockey team through most of the years that he developed and coached the team. During these years he also started the boys' choir, developing the musical and vocal talents of many of the boys at the school. The choir travelled to and performed at various villages and towns in the vicinity. All of the members of the choir were especially proud to appear on television in Prince Albert at Christmas time in 1964 and cut an LP recording of their songs.

[4] The boys at the school looked up to the accused, who was the dorm supervisor, as a choirmaster, a sports coach, a mentor, a friend, and a parental figure in their lives.

[5] Most of the boys started school at the Beauval Indian Residential School at the age of six, seven or eight. This was generally the first time they had been away from home, where they had lived in small log cabins or tents, where their father was a hunter, trapper and fisherman, and where the means of travel was dog sled in the winter and boat in the summer. Their families' food supply was from the land. Most often they came from a family with numerous siblings and a large extended family.

[6] The huge four-storey brick dormitory with as many as 80 boys from ages six to 15 sharing one dormitory, one large bathroom and one playroom with lockers until 1963, and then sharing two dormitories with 30 or 40 boys, all between the ages of six and 15 years, was, to say the least, overwhelming to these young boys.

[7] To most of them, the accused was the one person who seemed to care for them and with whom they bonded.

[8] It is apparent that the accused truly did care for them and in many ways these boys were the most important people in his entire life.

[9] However, as time progressed and the closeness of the relationships of the accused with many of the boys in his care grew closer, there became times when the relationship with various boys crossed the line from appropriate and acceptable behaviour to become acts which were totally inappropriate. They were known at the time as acts of indecent assault and gross indecency. In today's terminology, these acts relate to offences now known as sexual assault and sexual interference.

[10] Most of the boys affected were between the ages of 11 and 15. By the time they realized what was occurring, the boys found there was no one to turn to for help. Some felt like prisoners of the accused.

[11] A few of the victims attempted to tell one of the priests or nuns what was happening. However, they were not believed and generally punished for making up such stories. As one of the victims stated, the accused was the golden-haired boy of the nuns and the priests and to them he could do no wrong. Others knew that there was no possibility of obtaining help from the priests or nuns and knew that even though they would be with their parents at Christmas (unless they were snowed in) and with them in July and August, their parents would not believe them either or understand what they were talking about.

[12] Beauval was a residential school in which the girls resided in one half of

the building and the boys in the other half but attended co-educational classes. There was a clear disconnect between the perceptions of life at school and life in the residence. The former teachers who testified were quite certain that no one was ever punished for speaking their native tongue or discouraged from doing so. The boys testified (all of whom are over 50 and many over the age of 60) adamantly that they were punished for speaking their own language and were only allowed to speak English.

[13] It became apparent to the court that while in class, the children were expected to speak English and only English and to speak Cree or Dené was an act of disobedience.

[14] However, in the playground, in the dorms, on picnics with the dorm supervisors and anywhere other than the classroom, speaking to your fellow students in Cree or Dené was permissible. In fact, some of the missionary priests were relatively fluent in either Cree or Dené, depending on which reserves they had spent time. Often part of Mass was delivered in Cree or Dené, with one of the hymn books being in English and one being in Cree and Dené.

[15] Discipline was not really an issue at the school and particularly with the accused due to his relationship with the boys that he supervised. Occasionally, an individual might receive a strap on the hand or a slap with a ruler, but normally discipline outside the classroom consisted of either kneeling on the floor by the ping-pong table for 15 to 20 minutes or missing one-half of the Sunday night movie. The Sunday night movie was a highlight of the week for all of the children at the school.

[16] To a small and often homesick boy, a slap with the ruler or the requirement to kneel by the ping-pong table for a period of time often seemed like cruel and unusual

punishment, which carried over through 50 years of memory to become brutal and cruel acts of physical abuse.

[17] There was evidence presented to the court of memories of: having to stand out in the -30˚ cold without proper clothing and being locked out for a considerable period of time; having to get up at 5:00 a.m. every day to serve Mass; or having your clothes taken away on the first day at school and not returned to you, or returned to you at the end of the school year when you had outgrown them.

[18] We all have childhood memories of mistreatment of one kind or another which may crystalize in our minds as the years pass. There was evidence before the court that in all likelihood, being locked out in the cold without proper clothing for hours on end was actually being outside with winter clothing on, but having the door locked for 15 minutes while the older boys mopped the floor of the playroom without the small boys running through and tracking up the hardwood floor.

[19] Mass was mandatory on Sundays and a few days during Lent. Otherwise, it was optional and seldom attended except for whoever volunteered to be the altar boys. The altar boys were awakened at 6:30 a.m. (which may have felt like 5:00 a.m.) to serve Mass at 7:00 a.m. There were rewards and recognition at the end of the school year for attending Mass more often than others. There was a protocol whereby if boys volunteered to be altar boys and learned Latin, they could work their way up to being Knights of the Altar.

[20] There are numerous photos of boys wearing their beaded jackets, moccasins and beaver mitts in spite of the accusations by some that these were taken away and never returned.

[21] The normal procedure upon arrival at the school was for all of the boys' clothes to be marked with indelible ink with their locker number so that when their clothes were sent to the laundry and were returned folded and left placed on the ping-pong table, each boy could find his pile of clothes by his locker number.

[22] It is also apparent that some of the testimony of being strapped at least 25 times on each hand every day for three years was an extreme embellishment which increased significantly in both numbers and vivid recollection over the last 50 years.

[23] Many of the victims attempted (with considerable success) to put these acts of sexual violation out of their minds for much of their adult lives. So much so that when the RCMP was sending letters out to former students in the late 1990s to determine if anyone had been sexually molested by the accused, only one individual responded. This was the result of the accused having been recently convicted of such activities with young men between the ages of 14 and 18 in the Northwest Territories where the accused had taken up employment after leaving Beauval. The individual was E.G. In spite of E.G.'s persistence, he was eventually advised by the RCMP that it did not have sufficient evidence to prosecute and the matter was being dropped.

[24] Then in approximately the year 2000, many of the complainants received letters from a law firm indicating that if they had been abused at residential school, they could in all likelihood obtain damages through the court system. Almost all of the complainants stepped forward and provided details of the various and numerous acts of sexual assault or sexual interference committed upon them by the accused. This was followed by an examination for discovery, and an IAP application with details of alleged abuse and an eventual out-of-court cash settlement.

[25] At no time did anyone report this to the RCMP. Then in approximately 2009, a Constable Joy, who had been the rookie RCMP officer transporting the accused to and from his trial in the Northwest Territories, had worked his way up to be with a special unit in Prince Albert, Saskatchewan. He came across the name of Paul Leroux. Constable Joy took on a personal project of attempting to locate individuals who attended Beauval Indian Residential School when Paul Leroux was there and who may have been subject to acts of sexual assault. Constable Joy spent months going back again and again and again to these individuals who refused to talk to him about such matters. Some of these individuals had lived their entire lives without bringing the matter totally before the public other than the civil lawsuits, examinations for discovery and IAP applications, all of which were settled out of court. Needless to say, most of these individuals were extremely reluctant when in their 60s, having been married for most of their adult lives, having had children and now grandchildren, to stand up in a public courtroom explaining sexual acts that were committed upon them when they were 11 to 15 years of age. Very few of the complainants felt any need at this point to get revenge or prosecute the accused. Some indicated to Constable Joy that they felt no obligation to the public to punish the accused further. He was now 72 years of age, and had been sentenced to 10 years in jail in the late 1990s for such acts. Why not leave him alone?

[26] Undeterred, Constable Joy continued to return and return and return, trying to get the individuals to talk about things that they had put out of their minds many years ago and had no need to make public at this stage in their lives.

[27] Eventually Constable Joy succeeded in accumulating the 14 complainants and had the charges laid in 2011. There was then the preliminary hearing in 2012 and now the trial in the fall of 2013.

[28] It is quite understandable that the testimony of each of the complainants varied substantially among each other and also among their own sworn statements. Often the original statement of claim was full of significant details and allegations. The examination for discovery often varied significantly from the statement of claim, with allegations made in the statement of claim completely forgotten in the examination for discovery and new allegations presented as well as contradictions between the two.

[29] This was further exasperated by the preliminary hearing which again was often substantially different from either of the first two. Testimony at the actual trial often did not correlate with the preliminary hearing, the examination for discovery and the statement of claim. In fact, on occasion, there was a complete denial of some of the primary allegations brought forth in the original statement of claim, examination for discovery and IAP application.

[30] It is accepted that after 50 years, and this trial reaffirms, that acts which occurred in our childhood often become embellished and distorted and blamed for many of our personal shortcomings or personal failures later in life.

[31] The complainants were in attendance for varying periods at varying times at the residential school. Some were there as early as 1957 and remembered when the accused arrived and left while he was still there. Others arrived after he was there and left about the same time. Others arrived toward the end of his tenure and left later. Some obtained a Grade 5 education and then left at the age of 13 to live a life of alcohol and drug addiction, violence and crime, incarceration, assaults and sexual assaults on spouses, children and grandchildren. Others excelled in hockey, others excelled in choir, others excelled in both. Many showed great scholastic and artistic talents. Some obtained their Grade 8 and went out to live a rather conventional and stable family life. Others went on

to other schools after obtaining their Grade 8 or 9 to attend other residential schools or boarding houses in larger towns to obtain their Grade 12 education.

[32] Some, although not near as many as were capable, had the advantage of pursuing further post-secondary education and becoming teachers and other professionals.

[33] There was much evidence before the court of physical and sexual abuse of many of the complainants by priests, nuns or other students. The allegations are not limited to the accused. With over 50 years having passed since the occurrence of some of these events and the contradictory evidence provided by individuals on four different occasions, it is extremely difficult to glean what is the factual truth of who did what to whom and when, as opposed to the "now" perception of those past events.

[34] Some of the complainants were very quiet, soft-spoken, respectful individuals who obviously lived a quiet life and had family support. This was apparent by their attendance in the gallery at court. Others were fine, well spoken, outstanding individuals who spoke clearly and concisely. Some had family support there. Others had clearly asked to have the family support remain outside the courtroom until their testimony was completed. Other individuals were loud, disrespectful of others, ignored direction and protocol and had had neither a stable life nor a family, but rather one filled with crime, addictions, violence, incarceration and instability. All gave their evidence to give to the best of their ability.

Prior Applications

[35] Originally, this trial was set to be heard by a judge and jury. The court was

required to make a decision respecting a pre-trial application for the admission of similar fact evidence by the Crown. This decision was rendered September 16, 2013, dismissing the application. *R. v. Leroux*, 2013 SKQB 336, [2013] S.J. No. 588 (QL) .

[36] Just prior to commencement of the trial, there was a re-election to judge alone. At the close of the case for the Crown, there was an application for the court to reconsider the issue of similar fact evidence as it relates to evidence provided in each of the separate counts of the indictment to allow the similar facts to be used to support the credibility of the complainants on the other counts in the indictment.

[37] The court reserved its decision respecting this application and undertook to render a decision on this issue at the time of its final judgment.

[38] Although the complainants attended the Beauval Indian Residential School at varying times for varying periods and obtained varying degrees of education, there are a number of commonalities also known as similar fact evidence. These included:

1) The initial touching involved the accused placing his hand under the covers and fondling the victim's genitalia over top of his pyjamas.

2) These activities occurred at night after the boys were asleep, normally between 9:30 or 10:00 p.m. and 1:00 a.m.

3) The touching would escalate on subsequent occasions to the accused waking the complainant from sleep and telling him to come to his office/bedroom.

4) The accused would take down the victim's pyjamas, fondle his penis, and would ask the victim to stroke his penis so that each would eventually have an erection.

5) As the number of times that the victim was awakened and taken to the office during the night would increase to the point where the accused and the victim were performing fellatio on each other and eventually laying on the bed with the accused behind the victim with his penis between the victim's legs simulating intercourse until ejaculation or performing acts of anal intercourse on the victim.

6) Often the victims were members of the choir or the Beauval Warriors midget hockey team.

[39] The court does accept that there is less likelihood of moral prejudice, reasoning prejudice and propensity reasoning in a judge alone trial as opposed to a jury trial.

[40] However, as stated by the Supreme Court in *R. v. Handy*, 2002 SCC 56, [2002] 2 S.C.R. 908, at para. 146:

> 146 Further, there is a risk, evident in this case, that where the "similar facts" are denied by the accused, the court will be caught in a conflict between seeking to admit what appears to be cogent evidence bearing on a material issue and the need to avoid unfairness to the right of the accused to respond. The accused has a limited opportunity to respond. Logistical problems may be compounded by the lapse of time, surprise, and the collateral issue rule, which will prevent (in the interest of effective use of court resources) trials within trials on the similar facts. Nor is the accused allowed to counter evidence of discreditable conduct with similar fact evidence in support

> of his or her credibility (as discussed in Sopinka, Lederman and Bryant, *supra*, at s. 11.74). Thus the practical realities of the trial process reinforce the prejudice inherent in the poisonous nature of the propensity evidence itself.

[41] The renewed application by the Crown is for the evidence that each of the 14 complainants to be considered and allowed is similar fact evidence on each of the other counts to bolster the credibility of each complainant. This is far too broad. To allow the evidence of all 14 complainants to apply to all 17 charges is far too prejudicial to the accused and reduces the ability of the court to compartmentalize charges, leading to propensitory reasoning.

[42] The court takes note of the recent decision of *R. v. Jesse*, 2012 SCC 21, [2012] 1 S.C.R. 716. In that decision, the Supreme Court of Canada allowed the Crown to introduce similar fact evidence showing that in 1995, a jury had convicted the accused of sexual assault. There was a high degree of similarity between the 1995 sexual assault and the one for which the accused was on trial and the similar fact evidence would be circumstantial evidence going to the issue of identity. In the current case before the court, identity is not an issue, however as stated by Moldaver J. writing for the majority of the Supreme Court of Canada at para. 52:

> 52 ... a prior conviction constitutes strong proof that the similar act conduct in question occurred. In that sense, it has greater probative value than an unproven allegation (see, e.g., D.M. Paciocco and L. Stuesser, *The Law of Evidence* (rev. 5th ed. 2008), at pp. 144-147). While a conviction may be harder to respond to than an unproven allegation, that does not make the conviction inadmissible. Just because a piece of evidence operates unfortunately for an accused does not of itself render the evidence inadmissible or the trial unfair (see *R. v. Corbett*, [1988] 1 S.C.R. 670, at pp. 724-25, *per* La Forest J., dissenting on other grounds).

[43] The court takes particular note of a decision of Binnie J. in *R. v. Handy*, *supra*, wherein he states at paras. 73 to 76:

> **73** The requirement to identify the material issue "in question" (i.e., the purpose for which the similar fact evidence is proffered) does not detract from the probative value/prejudice balance, but is in fact essential to it. Probative value cannot be assessed in the abstract. The utility of the evidence lies precisely in its ability to advance or refute a live issue pending before the trier of fact.
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> **74** The issues in question derive from the facts alleged in the charge and the defences advanced or reasonably anticipated. It is therefore incumbent on the Crown to identify the live issue in the trial to which the evidence of disposition is said to relate. If the issue has ceased to be in dispute, as for example when the fact is admitted by the accused, then the evidence is irrelevant and it must be excluded: *R. v. Clermont*, [1986] 2 S.C.R. 131, at p. 136; *R. v. Bosley* (1992), 18 C.R. (4th) 347 (Ont. C.A.), at p. 360; *R. v. Proctor* (1992), 69 C.C.C. (3d) 436 (Man. C.A.), at p. 447; *R. v. Hanna* (1990), 57 C.C.C. (3d) 392 (B.C.C.A.); and *B. (L.)*, *supra*, at p. 50. The relative importance of the issue in the particular trial may also have a bearing on the weighing up of factors for and against admissibility. Similar fact evidence that is virtually conclusive of a minor issue may still be excluded for reasons of overall prejudice.
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> **75** The "issues in question" are not, it should be emphasized, categories of admissibility. Their identification is simply an element of the admissibility analysis which, as stated, turns on weighing probative value against prejudice.
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> ...
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> **76** The principal driver of probative value in a case such as this is the connectedness (or nexus) that is established between the similar fact evidence and the offences alleged, particularly where the connections reveal a "degree of distinctiveness or uniqueness" (*B. (C.R.)*, *supra*, at p. 735). As stated by Cory J. in *Arp*, *supra*, at para. 48:
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> > ... where similar fact evidence is adduced to prove a fact in issue, in order to be admissible, the trial judge should evaluate the degree of similarity of the alleged acts and decide whether the objective improbability of coincidence has been established. Only then will the evidence have sufficient probative value to be admitted.

[44] It is also noted by Binnie J. in para. 78 that the issue is *actus reus* as is the issue in the current case before the court:

> 78 The issue in the present case is not identification but the *actus reus* of the offence. The point is not that the degree of similarity in such a case must be higher or lower than in an identification case. The point is that the issue is different, and the drivers of cogency in relation to the desired inferences will therefore not be the same. As Grange J.A. correctly pointed out 20 years ago in *R. v. Carpenter* (1982), 142 D.L.R. (3d) 237 (Ont. C.A.), at p. 244:
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> > The degree of similarity required will depend upon the issues in the particular case, the purpose for which the evidence is sought to be introduced and the other evidence.

[45] Binnie J. goes on further to set out the factors to be considered in connecting similar facts to circumstances, whereas in the current situation, the Crown wishes to use the similar fact evidence to support the credibility of each of the individual complainants. Binnie J. states at paras. 82 to 84:

> 82 The trial judge was called on to consider the cogency of the proffered similar fact evidence in relation to the inferences sought to be drawn, as well as the strength of the proof of the similar facts themselves. Factors connecting the similar facts to the circumstances set out in the charge include:
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> (1) proximity in time of the similar acts: *D. (L.E.)*, *supra*, at p. 125; *R. v. Simpson* (1977), 35 C.C.C. (2d) 337 (Ont. C.A.), at p. 345; *R. v. Huot* (1993), 16 O.R. (3d) 214 (C.A.), at p. 220;
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> (2) extent to which the other acts are similar in detail to the charged conduct: *Huot*, supra, at p. 218; *R. v. Rulli* (1999), 134 C.C.C. (3d) 465 (Ont. C.A.), at p. 471; *C. (M.H.)*, *supra*, at p. 772;
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> (3) number of occurrences of the similar acts: *Batte*, *supra*, at pp. 227-28;
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> (4) circumstances surrounding or relating to the similar acts (*Litchfield*, *supra*, at p. 358);

(5) any distinctive feature(s) unifying the incidents: *Arp*, *supra*, at paras. 43-45; *R. v. Fleming* (1999), 171 Nfld. & P.E.I.R. 183 (Nfld. C.A.), at paras. 104-5; *Rulli*, *supra*, at p. 472;

(6) intervening events: *R. v. Dupras*, [2000] B.C.J. No. 1513 (QL) (S.C.), at para. 12;

(7) any other factor which would tend to support or rebut the underlying unity of the similar acts.

83 On the other hand, countervailing factors which have been found helpful in assessing prejudice include the inflammatory nature of the similar acts (*D. (L.E.)*, at p. 124) and whether the Crown can prove its point with less prejudicial evidence. In addition, as stated, the court was required to take into account the potential distraction of the trier of fact from its proper focus on the facts charged, and the potential for undue time consumption. These were collectively described earlier as moral prejudice and reasoning prejudice.

84 This list is intended to be helpful rather than exhaustive. Not all factors will exist (or be necessary) in every case. A comparable approach is utilized in other common law jurisdictions, including England (see *Director of Public Prosecutions v. Kilbourne*, [1973] A.C. 729 (H.L.), at p. 758), and in the United States (see C. B. Mueller and L. C. Kirkpatrick, *Federal Evidence* (2nd ed. 1994 & Supp. 2001), vol. 2, at s. 161; *United States v. Enjady*, 134 F.3d 1427 (10th Cir. 1998), certiorari denied, 525 U.S. 887 (1998)).

[46] The court has also noted the references made in paras. 90 and 91 which state:

90 On the facts of *B. (C.R.)*, the majority concluded that the accused was shown to have a situation specific propensity to abuse sexually children to whom he stood in parental relationship, and there was a close match between the "distinct and particular" propensity demonstrated in the similar fact evidence and the misconduct alleged in the charge, although even the majority considered the admissibility to be "borderline" (p. 739). Similar fact evidence is sometimes said to demonstrate a "system" or "modus operandi", but in essence the idea of "modus operandi" or "system" is simply the observed pattern of propensity operating in a closely defined and circumscribed context.

> 91 References to "calling cards" or "signatures" or "hallmarks" or "fingerprints" similarly describe propensity at the admissible end of the spectrum precisely because the pattern of circumstances in which an accused is disposed to act in a certain way are so clearly linked to the offence charged that the possibility of mere coincidence, or mistaken identity or a mistake in the character of the act, is so slight as to justify consideration of the similar fact evidence by the trier of fact. The issue at that stage is no longer "pure" propensity or "general disposition" but repeated conduct in a particular and highly specific type of situation. At that point, the evidence of similar facts provides a compelling inference that may fill a remaining gap in the jigsaw puzzle of proof, depending on the view ultimately taken (in this case) by the jury.

[47] As in the current situation, it is not the sex acts themselves or the surrounding circumstances which are highly distinctive. Cogency is derived from the repetition rather than the distinctiveness.

[48] Considering the factors to be considered, the court does find as follows:

1) Proximity and time of the similar acts — The majority of the alleged acts occurred after the accused returned from Gravelbourg in September of 1963 and occurred between then and his departure in June of 1967.

2) Extent to which other acts are similar in detail to the charge conduct — The acts are extremely similar in that they all involve commencement by a touching of the victims by the accused while in their bunks at night when the lights are turned out. They escalate to being summoned by the accused to his office after all of the boys are asleep. These incidents then involve fondling the victim and encouraging the victim to fondle the accused, resulting in erections and ejaculations. Many of the assaults progressed to fellatio and attempts at anal intercourse.

3) Number of occurrences of similar acts — There appears to have been in the range of 15 or more victims with anywhere from one to approximately 30 occurrences with each individual.

4) All of the individuals were students at the Beauval Indian Residential School and all under the supervision of the accused, many of whom were members of the boys' choir or the Warriors hockey team or both.

5) Any distinctive features unifying the incidents — See para. 49(2).

6) Intervening events — All but one of the victims did not disclose the acts committed by the accused until approximately 2000, being anywhere from 35 to 40 years after the occurrence of the events.

7) The accused developed a close personal relationship with each of the victims.

[49] Considering these factors and the statement of Binnie J. in *Handy*, *supra*, at para. 134:

> 134 In the usual course, frailties in the evidence would be left to the trier of fact, in this case the jury. However, where admissibility is bound up with, and dependent upon, probative value, the credibility of the similar fact evidence is a factor that the trial judge, exercising his or her gatekeeper function is, in my view, entitled to take into consideration. Where the ultimate assessment of credibility was for the jury and not the judge to make, this evidence was potentially too prejudicial to be admitted unless the judge was of the view that it met the threshold of being reasonably capable of belief.

the court does allow the similar fact evidence as set forth in para. 38 as similar fact evidence in each of the complaints with the other as circumstantial evidence which I as gatekeeper may take into consideration allowing as much or as little weight to it as I consider appropriate.

[50] My decision is based on the fact that the gatekeeper and the trier of fact are the same individual in a judge alone trial. As stated in my earlier decision hearing the original application, my decision would be entirely different if the matter was before a jury.

The Charges

[51] The accused is charged with 14 counts of indecent assault, which were committed at or near Beauval in the Province of Saskatchewan in the time period between January 1, 1959 and December 31, 1967, upon 14 separate individuals:

> G.J.W., H.J.A., J.E., T.F., G.A.G., E.G., L.A.G., D.L., J.R.M., N.G.M., M.J.M., M.V.P., G.T., G.R.M.

[52] In addition, the accused is charged with acts of gross indecency during the same time, at the same place and with three of the same complainants, namely:

> T.F., M.J.M., G.R.M.

The Law

[53] The court must apply the law that existed between 1959 and 1967 at which time the following sections of the *Criminal Code*, S.C. 1953-54, c. 51 applied:

> **148.** Every male person who assaults another person with intent to commit buggery or who indecently assaults another male person is guilty of an indictable offence and is liable to imprisonment for ten years and to be whipped.
>
> **149.** Every one who commits an act of gross indecency with another person is guilty of an indictable offence and liable to imprisonment for five years.
>
> **132.** Where an accused is charged with an offence under section 138, 141 or 148 in respect of a person under the age of fourteen years, the fact that the person consented to the commission of the offence is not a defence to the charge.

[54] In the period between 1959 and 1967, the courts in Canada considered acts of gross indecency to be acts which are a marked departure from decent conduct and a crime against public morality which included but was not limited to anal intercourse, fellatio, and homosexual acts between two male persons of any age and whether consenting or not.

Ingredients of the Offence

[55] The offence of indecent assault as defined in s. 148 consists of any deliberate application of force that by its nature or circumstance has the quality of indecency. This is equivalent to various forms of what we now know as sexual assault, sexual touching or sexual interference. Under s. 132, if the person is under the age of 14 years, consent is not a defence.

[56] Some of the complainants were over the age of 14 years and under the age of majority being 21 years. All of the complainants were under the age of 18 years.

[57] For ease of understanding, the Supreme Court of Canada has stated in

R. v. Handy, *supra*, at para. 118, a short and concise definition of sexual assault which states:

> 118 A conviction for sexual assault requires proof beyond reasonable doubt of two basic elements, that the accused committed the *actus reus* and that he had the necessary *mens rea*. The *actus reus* of assault is unwanted sexual touching. The *mens rea* is the intention to touch, knowing of, or being reckless of, or wilfully blind to, a lack of consent: *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at para. 23.

[58] For the complainants 14 years of age and over, if the person is in a position of trust or authority, sexual touching by the person in authority is now the crime of sexual exploitation. The offence of gross indecency has no equivalent in the current *Criminal Code*, R.S.C. 1985, c. C-46. As stated earlier, an offence whereby all homosexual acts between consenting adults were made illegal, to amount to a gross indecency the act must have constituted a marked departure from decent conduct and public morality. Consent is no defence.

[59] It is also noted that there is a distinction in law between consent and submission. Every consent involves a submission but every submission does not involve consent. An agreement to engage in a sexual activity by reason of an individual's position of trust or exercise of authority may constitute submission but not consent. The relationship of authority is a relevant factor to determine whether a complainant does in fact consent or merely submits.

[60] It is apparent from the facts as stated above that each of the complainants identified the accused as the individual involved. The incidents occurred at Beauval in the Province of Saskatchewan. Each of the individuals viewed the accused as a person in a position of trust and authority.

[61] The court has also considered the question of collusion or collaboration between the witnesses or the tainting of evidence by the actions of Constable Joy so as to raise the question as to whether the testimony is that of the complainant or the police officer.

[62] After careful consideration of the fact that many of the complainants have lived their adult lives in close proximity to each other and have interacted on a regular basis and encouraged each other to file claims for financial recourse, I find no evidence to suggest collusion or collaboration among the complainants such that it would undermine the reliability of any particular witness's testimony. Nor do I find evidence that despite his good intentions, Constable Joy tainted their evidence by use of his knowledge of the trials in the Northwest Territories in which the accused was convicted of similar acts, and his continued pursuit over many visits to have the complainants step forward and make formal complaints against the accused.

[63] It is important to remember that it is the responsibility of the Crown to prove each of the elements of the offence. There is no obligation on the accused to prove that any of the elements of the offence did not exist.

[64] The first and most important principle of law applicable to every criminal case is the presumption of innocence. The accused enters the proceedings presumed to be innocent and the presumption of innocence remains throughout the case unless the Crown on the evidence put before me satisfies me beyond a reasonable doubt that he is guilty. The Crown bears the burden of proving his guilt. The guilt must be proved beyond a reasonable doubt. These rules are inextricably linked to the presumption of innocence and ensure that no innocent person is convicted. There is no burden on the accused to prove he is innocent. He does not have to prove anything.

[65] A reasonable doubt is not an imaginary or frivolous doubt. It is not based upon sympathy for or prejudice against anyone involved in these proceedings. Rather, it is based on reason and common sense. It is a doubt that arises logically from the evidence or from an absence of evidence.

[66] It is virtually impossible to prove anything to an absolute certainty and the Crown is not required to do so. Such a standard would be impossibly high, however, the standard of proof beyond a reasonable doubt falls much closer to absolute certainty than to probable guilt. I must not find the accused guilty unless I am sure he is guilty. Even if I believe he is probably guilty or likely guilty, that is not sufficient. In the circumstances, I must give the benefit of the doubt to the accused and find him not guilty because the Crown would have failed to satisfy me of his guilt beyond a reasonable doubt.

[67] Credibility of the witnesses is of major significance in this trial. Reasonable doubt applies to the issue of credibility. I may believe a witness, disbelieve a witness or I may not fully believe or disbelieve one witness or a group of witnesses. If I have a reasonable doubt about the accused's guilt arising from the credibility of the witnesses, then I must find him not guilty. The accused testified on his own behalf and I must as well assess his testimony the same as any other witness keeping in mind the credibility of witnesses. I may accept all, part or none of the accused's evidence. If I believe his testimony that he did not commit the offences charged, I must find him not guilty. Even if I do not believe his testimony and it leaves me with a reasonable doubt about his guilt or about an essential element of the offences charged, I must find him not guilty. If I do not know who to believe, it means I have a reasonable doubt and must find him not guilty. Even if his testimony does not raise a reasonable doubt about his guilt or about an essential element of the offence, if after considering all of the evidence I am not satisfied beyond a reasonable doubt of his guilt, I must acquit.

[68] In deciding the credibility of Crown witnesses, I must consider that most of the complainants issued a statement of claim involving the accused somewhere between the period from 1998 to 2004. The complainants testified under oath at the examinations for discovery, many of which occurred in 2002. Most of the complainants filed an IAP claim and have received financial settlements respecting their statement of claim and the IAP claim. The complainants also provided evidence under oath at the preliminary inquiry in 2012. Each of the complainants has now testified before me at the trial. This testimony relates to incidents which occurred when the complainants were boys at the Beauval Indian Residential School approximately 50 years ago. I must determine what effect any of the differences have on my overall assessment of the witnesses' credibility. They may have a huge effect or no effect or somewhere in between. Not every difference is important. I must consider the extent and nature of any difference. Was it a central point or something peripheral? I must consider any explanation the witness has given and whether the explanation was satisfactory. I must also consider the complainants' explanations as to why when they first revealed the alleged complaints against the accused in approximately 2000, they did not report the offences to the RCMP until, in the case of most complainants, 2009 and only after considerable coaxing from Constable Joy.

[69] I have heard 14 complainants testify about events that occurred when each of them was a child. I must remember that persons giving testimony in court, of whatever age, are individuals whose credibility and evidence must be assessed by reference to standards appropriate to their mental development, understanding and ability to communicate. When generally speaking, when adults testify about events that occur when they were a child, their credibility should be assessed according to standards that are applicable to them as adult witnesses. But when the evidence of such witnesses relates to events that occurred in their childhood, then the presence of inconsistencies, such as

those relating to time and location, I should take into account the age of the witnesses at the time those events happened. I must examine the testimony of each of the 14 complainants separately where it deals with events that happened when he was a child by taking into account the circumstances as a child at the time of those events.

[70] The only way I may use the evidence of extrinsic similar facts of one complainant to support the credibility of another complainant is if the evidence discloses a distinctive pattern of conduct of the accused and whether it would defy coincidence that two or more people independently would lie or be mistaken in their testimony about the conduct of the accused. If there is a distinctive pattern, then I may use the evidence in assessing the complainant's credibility. If I do not find a distinctive pattern of conduct, then I must consider each count separately to determine if the evidence in relation to the count proves the guilt of the accused beyond a reasonable doubt.

[71] The elements of the offence of indecent assault are as follows:

1) The accused is the person who actually committed the offence of indecent assault.

2) The offence of indecent assault occurred at the time and place set out in the indictment, namely Beauval, Saskatchewan, between January 1, 1959 and December 31, 1967.

3) The accused applied force to the complainant directly or indirectly.

4) The accused intentionally applied force to the complainant in circumstances which had the quality of indecency.

5) The complainant was under the age of 14 years at the time of the alleged offence or that the complainant was the age of 14 years or older and did not consent to the application of force or did not consent validly due to the accused inducing the complainant to engage in the activity by abusing a position of trust, power, or authority.

6) The complainant is a male person.

[72] With respect to the charge of gross indecency, the elements are:

1) The accused is the person who actually committed the offence of gross indecency.

2) The offence of gross indecency occurred at Beauval, Saskatchewan, between January 1, 1959 and December 31, 1967.

3) The acts of gross indecency were with the complainant either consensually or otherwise.

4) The acts committed are a marked departure from decent conduct expected of the average Canadian in the circumstances which existed at the time and a crime against public morality which includes but is not limited to anal intercourse, fellatio and other homosexual acts between two male persons of any age, whether consenting or not.

[73] I will now proceed to comment on each of the respective counts separately.

Count 1 - Indecent assault on G.J.W.

[74] G.J.W. was born in 1950 and attended Beauval Indian Residential School from September 1957 to June of 1966. G.J.W. testified at his examination for discovery that the first incident happened when he was nine years old. In his evidence to Constable Joy, he indicated he was seven, eight or nine years old and that the sexual assaults happened every week for a number of years. At the end of the examination for discovery, he indicated that when he left at the age of 15½, it had happened a few times. At the trial he indicated the indecent assaults never happened on the top floor, but rather in the second floor dorm. He remembers the accused calling him to the bedroom in the night and offering him coffee. He alleges the accused played with his penis until he got an erection. He was 10 or 11 years old. He tried to push the accused away. G.J.W. was often scared it would happen again when the accused would walk through the dormitory late at night. He indicated at trial that he was fondled five or six times in his bed. He testified that he could have been 11 or 12 years old. G.J.W. was sure that it was at least the fall of 1963 after the new construction. He would have been 13 years of age. He also indicated that the accused touched him in the bunks and played with his penis five or six times between the time he was 13 and 15 years of age.

[75] G.J.W. was a reserved, straightforward and credible witness. He may have been mistaken about the earlier years and whether he was indecently assaulted in the dormitory on the fourth floor and whether it was an elderly priest to whom he delivered lunch. However, his evidence respecting being fondled in his bunk by the accused five or six times in the final two years when he was between the ages of 13 and 15½ is most credible. A conviction shall be entered to Count 1.

Count 2 - Indecent assault on H.J.A.

[76] H.J.A was born in 1953 and attended Beauval Indian Residential School from 1960 to 1969, obtaining a Grade 9. H.J.A. testified that the accused would take him to his bedroom late at night, give him candies, lay him on his bed, fondle his penis and anus and put his finger up his anus. This would make it sore. He testified that the accused had him sleeping beside him in the accused's bedroom five or six times, being every second night for a month. He also testified that the accused took pictures of him and other former students in the shower. At the preliminary hearing, he testified that he slept with the accused five nights in a row, but that the accused was fully dressed. In his examination for discovery he indicated that the accused had sex with him for a month or a month and a half. He indicated to Constable Joy this occurred in 1962 and 1963, and he did not remember whether he touched the accused. Whereas at the preliminary he said that he did not touch the accused. In the examination for discovery he testified the accused took his jeans off part way through and kissed H.J.A. on the mouth. In the examination for discovery he also indicated that the accused had anal intercourse with him, touched his genitalia and he was required to touch the accused. H.J.A. told Constable Joy that the accused put his hand on the penis area of his pants for half a minute and then H.J.A. left.

[77] The testimony of H.J.A. was sufficiently inconsistent in his earlier sworn statements at the examination for discovery and preliminary hearing in comparison with the testimony at trial that the court has a reasonable doubt as to the guilt of the accused respecting this count. This count is dismissed.

Count 3 - Indecent assault on J.E.

[78] J.E. was born in 1949 and attended school at Beauval Indian Residential School from September of 1962 until June of 1965 when he finished his Grade 6. When he commenced Grade 1 he was 13 years of age. J.E. testified that he was only in the accused's office once when the accused took him there in the middle of the night, fondled him, gave him a beer, told him to take off his clothes, took him to his bed and had anal intercourse with J.E., which made him bleed. He believed that he was probably 15 years of age at the time. J.E. was a very credible witness. I accept his evidence with respect to the indecent assault. A conviction shall be entered on Count 3.

Counts 4 and 5 - Indecent assault and act of gross indecency on T.F.

[79] T.F. was born in 1950. He attended Beauval Indian Residential School from September of 1957 to June of 1968 when he obtained Grade 8, and then took Grades 9 and 10 in the "Anne of Green Gables Building" by the rectory. He attended North Battleford Composite High School for his Grades 11 and 12. T.F. made many statements in his testimony which the court accepts that he fully believes. However, many of these statements were proven to be factually untrue, particularly the cause of death of one P.J. and the name of the other individual who won the trip to Quebec. However, the court does accept his testimony respecting three boys being in the accused's office, being provided with an alcoholic drink, shown pornographic magazines of naked women, being taken into the accused's bedroom one at a time, having his pants pulled down and fondled. Also, that T.F. rebuffed further advances by the accused. The court does enter a conviction to Count 4.

[80] Based on the evidence accepted by the court, the court has reasonable doubt respecting the commitment of an act of gross indecency under Count 5 and does dismiss Count 5.

Count 6 - Indecent assault on G.A.G.

[81] G.A.G. was born in 1949 and started school at the Beauval Indian Residential School in fall of 1957 and attended until June of 1964 when he obtained his Grade 8. The witness was quite honest and open with the fact that he did not remember details of much that happened 53 years ago. The alleged indecent assault was thought to be a fatherly act at the time. It was not until he was much older and had discussed matters with other individuals who were filing claims did he come to believe that it was an indecent assault.

[82] The court has a reasonable doubt as to whether or not there was an indecent assault or a fatherly touching by a supervisor in G.A.G.'s early years at the school. The court does dismiss Count 6.

Count 7 - Indecent assault on E.G.

[83] E.G. was born in 1946. He attended Beauval Indian Residential School from August of 1954 to 1963. E.G. then attended other residential schools until he obtained his Grade 12 in 1967. Much of the peripheral evidence presented by the accused was obviously believed by him, but which the court does not accept. The court does accept the testimony of the witness relating to him having to masturbate the accused on more than one occasion and the attempted but failed attempt at sodomy.

[84] It is noted that E.G. is the first individual to file a complaint with the RCMP and did so prior to receiving any correspondence from a law firm suggesting he may be entitled to financial compensation.

[85] The court does enter a conviction on Count 7.

Count 8 - Indecent assault on L.A.G.

[86] L.A.G. was born in 1957. He went to Beauval Indian Residential School from September 1963 to June 1973. The witness has a good memory for his supervisors and which floor dormitory he was on, being the top floor, for the time during which the accused remained at Beauval. However, during that period of time, the accused was the supervisor on the second floor, not the fourth floor. Even though the accused did not supervise on the fourth floor, when L.A.G. woke up in the night he saw someone sitting in the office with the light on on the fourth floor, so it must have been the accused. The testimony of L.A.G. is vague on both details and number of times and strong on speculation. The court has a reasonable doubt respecting this count and does therefore dismiss this count.

Count 9 - Indecent assault on D.L.

[87] D.L. was born in 1953 and commenced school at Beauval Indian Residential School in September of 1960, leaving in December of 1965. He started at the age of seven and graduated with a Grade 4 education. Much of the testimony of the complainant is inconsistent with earlier sworn testimony and although I am quite sure the witness believed the truth of what he was testifying in court, much of it leaves considerable doubt about the reality, leaving the court with a reasonable doubt. Therefore,

Count 9 is dismissed.

Count 10 - Indecent assault on J.R.M.

[88] J.R.M. was born in 1951. He commenced school at the Beauval Indian Residential School in September of 1959 and continued to attend school there until June of 1965. He was in the boys' choir for five years commencing approximately six months after his arrival and played hockey in the intermural level. Although the witness was clear about much of what happened while at the residential school, the court has a reasonable doubt about an indecent assault having occurred, there being a lack of evidence of touching for a sexual purpose. Therefore, the court does dismiss Count 10.

Count 11 - Indecent assault on N.G.M.

[89] N.G.M. was born in 1951. He started school at Beauval Indian Residential School in September of 1959 and continued until June of 1966. Although the records indicate he has a Grade 8, his recollection is that he only had Grade 7 and left at Christmas at the age of 13½. The testimony of N.G.M. was quite credible, particularly with respect to T.F. and him when they were 11 years of age, being mixed a drink which they referred to as a martini in the office of the accused. Then the boys went to bed and later that evening, the accused stopped at his bunk, fondled his genitals under the blanket and told him to come to his room, where the accused fondled him and he fondled the accused. The witness was very credible and believable and the court accepts his testimony. Therefore a conviction is entered on Count 11.

Counts 12 and 13 - Indecent assault and gross indecency on M.J.M.

[90] M.J.M. was born in 1949 and commenced school at Beauval Indian Residential School in 1956. He was then diagnosed with tuberculosis and was in a sanitarium for 1957, 1958 and 1959, returning in the fall of 1960, obtaining his Grade 8 in June of 1967. He then continued his education in Meadow Lake, obtaining a Grade 11 and subsequently a commercial art course at Red River College. M.J.M. was a very straightforward and credible witness. He told of being given alcohol by the accused, was shown pornographic books to get aroused and then taken to his bedroom, where the accused involved him in both fellatio and anal intercourse on numerous occasions. It seemed like once a month for three years. I accept this evidence as to the facts he related. A conviction will be entered to both Counts 12 and 13.

Count 14 - Indecent assault on M.V.P.

[91] M.V.P. was born in 1949 and attended Beauval Indian Residential School from September of 1956 to June of 1965, obtaining a Grade 8 education. M.V.P. was a member of both the boys' choir and the Warriors hockey team of which the accused was the choir master and the hockey coach. Although M.V.P. had discrepancies in his testimony respecting peripheral issues, he was most believable and a credible witness. Whether there was an indecent assault of M.V.P. in the shower or whether there was only an attempt, the court accepts the evidence of M.V.P. that there was in fact an indecent assault in the bedroom of the accused when M.V.P. was approximately 15 years of age, and I find the Crown has proven the charge beyond a reasonable doubt and a conviction shall be entered to Count 14.

Count 15 - Indecent assault on G.T.

[92] The Crown has accepted that it has not proven the *actus reus*. Count 15 is dismissed.

Counts 16 and 17 - Indecent assault and gross indecency on G.R.M.

[93] G.R.M. was born in 1952. After spending two years in school at Onion Lake, he attended Beauval Indian Residential School from September 1962 to the end of 1963 before he returned to the Onion Lake Residential School for 1964 and 1965, returning to Beauval in September of 1965 until June of 1967. He received his Grade 7 education. G.R.M. was a very impressive, straightforward, and credible witness. The court has no doubt that G.R.M. was fondled by the accused and was involved in the acts of fellatio and mutual masturbation with the accused on numerous occasions after October of 1965 until they both left Beauval in June of 1967. A conviction is entered on both counts.

[94] In summary, convictions were entered on 10 counts and 7 counts were dismissed.

[95] In closing, I wish to remind all of you that a criminal trial must deal with specific facts on specific allegations.

[96] This is not a broad-ranging inquiry of abuses which may have occurred in the residential school system or even strictly in the Beauval Indian Residential School during the period 1959 to 1967. Much of this has already been done and most of the victims involved in this trial have already been through the other forums and obtained

some degree of financial compensation.

[97] I wish to remind you that a criminal trial is not a healing process. It is not equipped to heal victims of crimes.

[98] Victims can only be healed through their own efforts combined with the understanding, cooperation and assistance of their family and friends, supplemented by efforts of the entire local community.

[99] As stated many times herein, a criminal trial deals with specific offences and the only question is whether the facts respecting each alleged offence have been proven beyond a reasonable doubt.

[100] My findings in the verdicts rendered herein are my findings as to the facts that have been proven beyond a reasonable doubt.

J.
M.D. ACTON