

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. I.L., 2026 ONCA 329<sup>1</sup>

DATE: 20260508

DOCKET: COA-24-CR-0198

Roberts, Miller and Rahman JJ.A.

BETWEEN

His Majesty the King

Respondent

and

I.L.

Appellant

I.L., acting in person

Naomi Lutes, appearing as duty counsel

Jacob Millns, for the respondent

Heard: April 14, 2026

On appeal from the conviction entered by Justice Shaun S. Nakatsuru of the Superior Court of Justice, sitting with a jury, on September 21, 2023, and from the sentence imposed on January 8, 2024.

REASONS FOR DECISION

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<sup>1</sup> This appeal is subject to a publication ban pursuant to s. 486.4 of the *Criminal Code*, R.S.C. 1985, c. C-46.

## I. OVERVIEW

[1] On September 21, 2023, the appellant was convicted of sexual interference and of making and distributing child pornography ("CSAEM").<sup>2</sup> The offences involved a 14-year-old complainant with whom the appellant had been in a sexual relationship for several months between February and May 2015. The complainant became pregnant as a result of their relationship and gave birth to their child in January 2016. The appellant maintained that he thought she was almost 18 years old at the time of their relationship because she told him she was. On January 8, 2024, he received a four-and-a-half-year global custodial sentence, after an 18-month reduction because of Crown misconduct in bringing a knowingly meritless bail review application.

[2] For the reasons that follow, we dismiss the conviction and sentence appeals.

## II. ISSUES AND ANALYSIS

### a. Conviction Appeal

[3] With the very able assistance of duty counsel, the appellant argues that the following reversible errors require a new trial:

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<sup>2</sup> In October 2024, as a result of *An Act to amend the Criminal Code and to make consequential amendments to other Acts (child sexual abuse and exploitation material)*, S.C. 2024, c. 23, the term "child pornography" was replaced with "child sexual abuse and exploitation material" (CSAEM) in the *Criminal Code*, R.S.C, 1985, c. C-46. We will use this new terminology in these reasons: see: *R v. Elias*, [2026] O.J. No 592, 2026 ONCA 112, at para. 1.

1. The application judge erred in denying the appellant's pre-trial motion for a stay of proceedings because of the Crown's egregious misconduct that breached his rights under s. 7 of the *Canadian Charter of Rights and Freedoms*.
2. The application judge erred by failing to find a breach of the appellant's s. 10(b) *Charter* rights when he was not given a reasonable opportunity upon his arrest to contact his counsel of choice but could only speak to duty counsel. As a result, his statement to police ought to have been excluded.
3. The trial judge erred by failing to properly instruct the jury about the use they could make of the complainant's prior inconsistent statement to police for the purposes of assessing: (1) the complainant's credibility; and (2) the veracity of the appellant's belief that the complainant told him she was almost 18 years old. In the statement at issue, the complainant told the police that she told the appellant she was almost 18 years old.
4. The trial judge erred by not leaving with the jury the private use exception defence in relation to the CSAEM charges.

[4] We are not persuaded that there is any basis to interfere with the appellant's convictions.

**1. The application judge did not err in declining to stay the proceedings**

[5] With respect to the s. 7 *Charter* breach, there is no question that the conduct of Crown counsel (not appellate counsel) was egregious. Crown counsel knew of and failed to disclose evidence that undermined the basis for the bail review application. Nevertheless, he continued to seek to review certain conditions of the appellant's interim release order affecting his parenting rights with respect to his two children. These children were not involved with or affected by the charges involving the complainant.

[6] The appellant does not argue that the Crown's conduct in this case affected trial fairness. Rather, he submits that the Crown's conduct falls within the "residual" category of cases warranting a stay of proceedings, as that conduct "risks undermining the integrity of the justice process": *R. v. Babos*, 2014 SCC 16, [2014] 1 S.C.R. 309, at para. 31. He argues that the application judge erred in failing to recognize and give effect to the egregiousness of the Crown's conduct for which a stay of proceedings was the only appropriate remedy.

[7] It is well established that a stay of proceedings is "the most drastic remedy a criminal court can order" and will be granted only on "rare occasions", in the "clearest of cases": *Babos*, at paras. 30-31. Moreover, cases warranting a stay of proceedings within the residual category will be exceptional and very rare: *Babos*, at para. 44. It is only where "the affront to fair play and decency is disproportionate

to the societal interest in the effective prosecution of criminal cases” that a stay of proceedings will be warranted: *Babos*, at para. 44, citing *R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667.

[8] In *Babos*, at para. 32, Moldaver J. set out the three-part test to be followed in determining whether a stay of proceedings should be ordered:

(1) There must be prejudice to the accused’s right to a fair trial or the integrity of the justice system that will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome;

(2) There must be no alternative remedy capable of redressing the prejudice; and

(3) Where there is still uncertainty over whether a stay is warranted after steps (1) and (2), the court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against the interest that society has in having a final decision on the merits. [Citations omitted.]

[9] The application judge referenced and applied these governing principles. She fully recognized the seriousness of Crown counsel’s conduct, stating that “[a]t the bail review Crown counsel sought a remedy (supervised parenting) on the basis of a risk to [the appellant’s] children that counsel knew was not supported by the new information”. Further, she concluded that “the failure to disclose was serious and a breach of the Crown’s duty.” She therefore found that the Crown had violated the appellant’s s. 7 *Charter* rights by attempting to interfere with his parental rights. However, she was not persuaded that the Crown’s conduct

prejudiced the appellant's future trial nor was she satisfied that the Crown's conduct went so far "as to be properly characterized as 'offensive to societal norms of fair play and decency.'"

[10] This court will not interfere with a trial judge's decision under s. 24(1) of the *Charter* unless a trial judge misdirects herself on the law, commits a reviewable error of fact, or renders a decision that is so clearly wrong as to amount to an injustice: *Babos*, at para. 48. We see no reversible error in the application judge's reasoning, conclusions or her decision not to grant a stay of proceedings. They were open to her on this record.

## **2. There was no s. 10(b) *Charter* breach**

[11] The appellant argues that his s. 10(b) *Charter* rights to be informed of his right to retain and instruct counsel without delay were breached upon his arrest. We disagree.

[12] The arresting officer asked the appellant if he wished to call a lawyer. The appellant responded that he did not know of any lawyer and asked if the police had a list of lawyers he could call. The police told him they had no such list. The appellant was asked if he wished to speak to duty counsel and he agreed. The appellant spoke to duty counsel before he was interviewed by police. He also spoke to his mother. In response to the investigating officer's question, the appellant confirmed that he was content with the advice received from duty

counsel. In the course of the interview, the appellant indicated that duty counsel had counselled him not to say anything. He also said that he was not going to say anything because he wanted to retain “a good lawyer instead of duty counsel” and talk to them about the charges.

[13] We see no basis for any s. 10(b) *Charter* breach. The informational component of s. 10(b) was fulfilled in this case. The appellant was given the opportunity to call a lawyer of his choice. He could not name one and elected to speak with duty counsel. This was not the case where the appellant wished to speak to a specific lawyer and the police refused to facilitate that connection within a reasonable time or misled or coerced him into believing that his only option was to speak to duty counsel: *R. v. Edwards*, 2024 ONCA 135, 434 C.C.C. (3d) 225, at paras. 24-25, 27-28. Moreover, the appellant indicated that he was satisfied with his discussion with duty counsel, did not ask to speak to someone else before the police interview, and referred to duty counsel’s advice when he expressed his wish to remain silent during parts of the interview.

[14] We do not interpret the appellant’s comment that he wanted to speak with a “good lawyer instead of duty counsel” to indicate dissatisfaction with the advice that he received and understood. Indeed, there was nothing wrong with that advice and the appellant expressly indicated that he was satisfied with it. Rather, we understand that the appellant was referring to his intention to retain counsel going forward to assist him with the charges and the proceedings.

[15] We do not accept this ground of appeal. As there was no breach, there was no basis to exclude the appellant's police statement. As the application judge found, that statement was voluntary and admissible.

**3. There was no reversible error in the jury charge**

[16] The appellant argues that the trial judge failed to properly instruct the jury as to the use they could make of the complainant's prior inconsistent statement to police in their assessment of the credibility of her trial evidence and of the veracity of the appellant's belief that she was almost 18 years old. Contrary to her evidence at trial, the complainant told the police that she had told the appellant that she was almost 18 years old.

[17] The trial judge drew on a model jury instruction respecting the use of prior inconsistent statements in assessing the credibility of non-accused witnesses: David Watt, *Watt's Manual of Criminal Jury Instructions*, 2026 ed. (Toronto: Thomson Reuters, 2026), at pp. 306-7 (Final 25-A). The trial judge's instructions specifically referenced the complainant's inconsistent statement about what she told the police and cautioned the jury as follows: "It is always a serious matter to lie to the police and it reflects adversely on [the complainant's] credibility. Moreover, the lie she told to the police is about a very material issue at this trial, [the appellant's] knowledge of her true age."

[18] As for the use of the complainant's statement to police to assess the veracity of the appellant's belief, the trial judge correctly instructed the jury that, as the complainant did not accept the truth of her police statement that she told the appellant she was almost 18 years of age, the jury could not use that statement as evidence of what she actually told the appellant. However, they could use it to assess her credibility and disbelieve her evidence at trial that she told the appellant she was 14 years old: *R. v. K.K.M.*, 2020 ONCA 736, at paras. 53-54.

[19] Taking a functional approach to the charge, we see no reversible error. The jury was correctly instructed as to how to assess the complainant's credibility and the appellant's veracity in light of the inconsistency between her prior statement to police and her evidence at trial.

**4. The private use exemption defence has no application in this case**

[20] The appellant submits that the trial judge erred in finding that the private use exemption defence had no air of reality and in not leaving it with the jury as a defence to the CSAEM charges.

[21] As the Supreme Court instructed in *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45, at paras. 128-29, the private use exemptions in relation to CSAEM are:

(1) any written material or visual representation created by the accused alone, and held by the accused alone, exclusively for his or her own personal use; and

(2) any visual recording, created by or depicting the accused, provided it does not depict unlawful sexual activity and is held by the accused exclusively for private use. [Emphasis added.]

[22] The trial judge made no error in not leaving the private use exemption defence to the jury. It had no air of reality in this case because the visual images of the complainant in issue depicted unlawful sexual activity, given the complainant's age.

**b. The Sentence Appeal**

[23] The appellant argues that the four-and-a-half-year sentence was demonstrably unfit because the sentencing judge should have reduced his sentence by 24 months or more as a remedy for the s. 7 *Charter* breach caused by Crown counsel's egregious conduct. The sentencing judge is said to have erred by relying on the instruction in *R. v. Friesen*, 2020 SCC 9, [2020] 1 S.C.R. 424, at para. 114, that mid-single digit sentences are normal for sexual offences against children. The appellant argues that the sentencing judge failed to make the appropriate reduction for the s. 7 *Charter* breach so as to avoid imposing a sentence below that mid-single digit range.

[24] We disagree that a six-year global sentence for these offences is demonstrably unfit, or that the sentencing judge misapplied the governing sentencing instructions in *Friesen*. The sentencing judge imposed a five-and-a-half-year sentence for the sexual interference conviction, consecutive to the six-month concurrent sentences for the CSAEM offences. Both were clearly within the range for these offences involving children and reflected the proper emphasis given to the sentencing principles of denunciation and deterrence: *Friesen*, at paras. 95, 101-105 and 114; *R. v. Bertrand Marchand*, 2023 SCC 26, 487 D.L.R. (4th) 201, at paras. 31-32. Moreover, the sentencing judge properly considered the aggravating features of this case, including the length of the interference, the pregnancy, and the harmful effect of the interference on the complainant. The sentencing judge also accounted for the mitigating effect of the appellant's status as a first-time offender, his pro-social life, including his employment and role as a single father to two young sons, and his family support.

[25] We also do not accept that the 18-month reduction of the global sentence as a remedy for the s. 7 *Charter* breach indicates any reversible error. The 18-month reduction represents a significant decrease in the otherwise fit global sentence for these very serious offences. It was open to the sentencing judge to determine that an 18-month sentence reduction was the appropriate remedy in response to the *Charter* breach.

**III. DISPOSITION**

[26] Accordingly, we dismiss the conviction appeal. We grant leave to appeal the sentence and dismiss the sentence appeal.

“L.B. Roberts J.A.”

“B.W. Miller J.A.”

“M. Rahman J.A.”