NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. R.B.W.*, 2023 NSCA 58

Date: 20230823
Docket: CAC 516295
Registry: Halifax

Between:

His Majesty the King

Appellant

v.

R.B.W.

Respondent

Judge: The Honourable Justice Anne S. Derrick

Appeal Heard: May 16, 2023, in Halifax, Nova Scotia

Subject: Sentencing. Principles of sentencing. Whether the sentencing judge under-emphasized aggravating factors. Whether the sentence was manifestly unfit. Use of Impact of Race and Culture Assessments (IRCAs) in sentencing an African Nova Scotian offender. Availability of a conditional sentence for incest. Deference on appeal.

Summary: The respondent, an African Nova Scotian, pleaded guilty to incest, having had sexual intercourse with N.K., his 23-year-old biological daughter. N.K. became pregnant as a result of the offence and had a baby. Father and daughter both had an intellectual disability. The sentencing judge applied the principles of sentencing and concluded the fit sentence was imprisonment of two years less a day. At the time R.B.W. was sentenced, s. 742.1(3) of the *Criminal Code* prohibited conditional sentences for offences, like incest, that could attract a maximum penalty of 14 years' imprisonment. R.B.W. sought a constitutional exemption from the application of the provision. Applying *R. v. Proulx*, 2000 SCC 5, the sentencing judge determined the criteria for a conditional sentence (CSO) had been met. She then

proceeded to analyse whether she should decline to apply s. 742.1(3). She granted the constitutional exemption and imposed a CSO of two years less a day to be followed by 24 months' probation.

The appellant argued the sentencing judge committed reversible legal error by imposing a CSO. The appellant also argued the sentence of imprisonment of two years less a day was excessively lenient.

Issues: (1) Did the sentencing judge err in principle in ordering a CSO? (2) Did the sentencing judge err in principle by imposing a manifestly unfit sentence?

Result: Appeal dismissed; Farrar, J.A. dissenting. In the view of the majority, the sentencing judge's determination she could impose a CSO constituted an error of law but not an error that impacted her determination of a fit sentence. Her finding that s. 742.1(3) was overbroad and should not be applied in R.B.W.'s case was rendered invalid by the majority decision of the Supreme Court of Canada in *R. v. Sharma*, 2022 SCC 39 which held the provision was constitutional. As a result, the sentencing judge's conclusion she could decline to apply s. 742.1(3) to R.B.W. constituted legal error. However, although the sentencing judge's imposition of a CSO constituted legal error, it was an error that had no impact on the sentence she determined was a fit sentence—imprisonment of two years less a day. Concluding—as it turns out, incorrectly—that she could order the sentence to be served under a CSO had no bearing on her factual determinations and how she balanced the sentencing principles and factors, including denunciation and general deterrence, in her analysis of what was a fit sentence. She decided she could impose a CSO only after she had determined the length of the sentence and that the requirements for a CSO had been met. Her determination the fit sentence for R.B.W. was a sentence of imprisonment of two years less a day decision to be served as a CSO is owed significant deference on appeal. The sentence was not manifestly unfit.

Since the *Sharma* decision, Bill C-5 was given Royal Assent. Its reforms included the removal of the prohibition against conditional sentences for offences, such as incest. By operation of

law (*R. v. Dunn*, [1995] 1 SCR 226; *R. v. R.A.R.*, 2000 SCC 8; and *R. v. Poulin*, 2019 SCC 47) and s. 11(i) of the *Charter*, R.B.W. was eligible for a CSO at the time of this appeal. In accordance with the sentencing judge's reasons, a CSO should be imposed followed by probation.

In the view of the dissent, the sentencing judge committed a reversible error in principle by ordering that R.B.W.'s sentence could be served as a CSO. No deference is owed to the sentencing judge. The judge "reverse-engineered" the sentence to allow her to impose a CSO. The imposition of a sentence of imprisonment of two years less a day for this incest case was inappropriate. The sentence was inconsistent with the principles of denunciation and general deterrence and manifestly unfit. A fit sentence would be a penitentiary term of 48 months less any time served on the CSO imposed in the court below.

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Respondent

Restriction on Publication: Section 486.4 of the *Criminal Code of Canada*

Judges:	Farrar, Fichaud, and Derrick JJ.A.
Appeal Heard:	May 16, 2023, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Derrick J.A.; Fichaud J.A. concurring; Farrar J.A. dissenting
Counsel:	Erica Koresawa, for the appellant Lee V. Seshagiri and Brandon P. Rolle, for the respondent

Order restricting publication — sexual offences

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim 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, 171.1, 172, 172.1, 172.2, 173, 210, 211, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

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

Mandatory order on application

(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 victim of the right to make an application for the order; and

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

Reasons for judgment:

Introduction

[1] On June 13, 2022, R.B.W. was sentenced by Judge Ann Marie Simmons of the Provincial Court of Nova Scotia on a single charge of incest, contrary to s. 155 of the *Criminal Code*.[1] He had pleaded guilty to sexual intercourse with his 23-year-old biological daughter, N.K., between September 1, 2018 and June 25, 2019. N.K. became pregnant as a result of the offence and delivered a baby on June 25, 2019.

[2] Citing the seriousness of the offence and R.B.W.'s moral culpability, the Crown sought a penitentiary sentence of four to six years. The defence argued for a period of imprisonment of less than two years to be served as a conditional sentence in the community. As s. 742.1(3) of the *Criminal Code* did not allow conditional sentences for offences like incest that could attract a maximum penalty of fourteen years imprisonment, the defence asked the judge to grant R.B.W. a constitutional exemption from its application.

[3] In an oral unreported decision (Decision), the sentencing judge decided the fit sentence was a term of imprisonment of two years less a day. Having made that determination, she applied the Supreme Court of Canada's decision in *R. v. Proulx*[2] to assess whether a conditional sentence was appropriate in R.B.W.'s case. Having concluded the criteria for a conditional sentence had been met, she proceeded to analyse whether she should decline to apply s. 742.1(3) on constitutional grounds. Her constitutional analysis led her to resolve that s. 742.1(3) should not be applied. She imposed a conditional sentence of imprisonment (CSO) followed by two years' probation.

[4] The appellant argues the judge committed reversible legal error. The appellant says a CSO was not available to the judge as a sentencing option. Furthermore, the appellant says a sentence of imprisonment of two years less a day was an excessively lenient sentence. It is the appellant's position R.B.W. should be sent to prison for five years less the time he has served on the CSO.

[5] I agree the imposition by the sentencing judge of a CSO constituted error. However, I am not satisfied she committed errors of principle or law in concluding that two years less a day was a fit sentence for R.B.W. I would defer to her

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[1] R.S.C. 1985, c. C-46.
[2] 2000 SCC 5. [*Proulx*]

findings of fact and her analysis. And, as I will explain, while not an option when R.B.W. was sentenced on June 13, 2022, by virtue of subsequent legislative amendment a CSO is now available.

[6] I would grant leave to appeal and dismiss the appeal. I would uphold the sentencing judge's imposition of a sentence of two years less a day and order R.B.W. to continue to serve his sentence as a conditional sentence of imprisonment.

Facts

[7] The facts at sentencing were not in dispute. R.B.W. was born in 1964. His biological daughter, N.K., was born in 1995. They are African Nova Scotian. Both of them are intellectually disabled.

[8] N.K. became pregnant as a result of sexual intercourse with R.B.W. She was 23 years old at the time. She had been staying with R.B.W. on occasions when she ran away from her childhood home where she lived with her mother. In the ninth month of her pregnancy, her mother threw her out of the house.

[9] The baby was born with serious medical complications and significant developmental delays. A medical geneticist raised concerns about the baby which led to the police becoming involved. While visiting the baby in the hospital's neonatal intensive care unit, N.K. texted R.B.W. explicitly sexual messages. When questioned by police, she denied R.B.W. was the father.

[10] R. B.W. confessed to police when arrested. He admitted to a previous act of sexual intercourse with N.K. in 2015 when N.K. was 19 or 20 years old.

[11] N.K.'s intellectual disabilities deprived her of the ability to care for the baby who was placed into permanent care with foster parents.

The Sentencing Judge's Decision

[12] Determining R.B.W.'s sentence required the sentencing judge to first decide the process to follow in light of the defence request for a constitutional exemption from the restriction in s. 742.1(3) on conditional sentences. At the time of the sentencing on July 13, 2022, s. 742.1(c) precluded a CSO being imposed for the offence of incest. R.B.W. sought a constitutional exemption from the effect of s. 742.1(c) so that a CSO could be ordered in his case.

[13] The sentencing judge's approach has not been challenged:

> **In my view the most appropriate approach is to reach a determination as to the appropriate sentence before considering the constitutional challenge.** Should I reach the conclusion that the appropriate sentence to be imposed upon [R.B.W.] is two years imprisonment or more, there would be no need, nor would it be appropriate in my view as a Provincial Court Judge to delve into the constitutional fitness of the provision. **I will begin then with the principles and objectives of sentence.** (emphasis added)

[14] Determining a fit sentence was the judge's starting point.

[15] In her examination of the purpose and principles of sentencing set out in ss. 718 to 718.2 of the *Criminal Code*, the sentencing judge identified proportionality as the fundamental principle of sentencing. A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. The judge recognized the requirement for considering aggravating and mitigating circumstances. She noted the principles of parity and restraint. Parity requires consideration of similar sentences "imposed on similar offenders for similar offences committed in similar circumstances".[3] Section 718.2(d) "is a principle of restraint which requires the Court to consider that an offender should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances".[4]

[16] The sentencing judge next reviewed R.B.W.'s personal circumstances disclosed by several reports that had been filed for the sentencing: a Pre-sentence Report (PSR) dated December 8, 2020; an Impact of Race and Culture Assessment (IRCA) dated October 13, 2021; and a Comprehensive Forensic Sexual Behaviour Assessment dated April 29, 2021.

[17] The judge extracted the following information about R.B.W. from the PSR and the IRCA:

- He was raised by his mother with his three sisters in a rural community that had a long-standing history of racism and geographic segregation in relation to African Nova Scotians.

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[3] *Criminal Code*, *supra* note 1 s. 718.2(b).
[4] *R. v. R.B.W.* (June 13, 2022, Halifax 8421490 (N.S. Prov. Ct.)) [Decision]

- R.B.W.'s paternal family was from Africville in Halifax and experienced displacement from that community and re-settlement in public housing. The family was subject to intergenerational poverty, loss of community connections, and an increased exposure to criminogenic factors.

- R.B.W. identified specific criminogenic factors he experienced: school truancy, poor school outcomes, substance abuse, and petty thievery. Young Black men were groomed by other men to engage in criminal activity and were exposed to inappropriate adult culture.

- Both of R.B.W.'s parents were alcoholics who neglected their children. R.B.W. was exposed to domestic violence. His father finally abandoned the family when R.B.W. was four years old. R.B.W. was physically abused by a relative and sexually abused by a family friend. His paternal grandmother provided support to the family when she could.

- R.B.W. moved on a number of occasions with his family, including to other provinces. Safe housing and food security were elusive. His educational difficulties were exacerbated by the moves.

- Truancy from school resulted in R.B.W. being sent to the Shelburne School for Boys where he experienced physical, mental and sexual abuse. During a period on probation, he was sexually abused by the serial predator, Cesar Lalo. He received a damages settlement for the abuse he experienced while under the control of the state. R.B.W. told the author of the PSR he had given some of the money to family members.

- R.B.W. only completed Grade 4 and left school at the age of 14. He was functionally illiterate which negatively impacted his employability. He lost employment because of his limited reading skills, including as a cleaner, due to his inability to read labels on cleaning products. He reported having Attention Deficit Hyperactivity Disorder.

- R.B.W. has a limited, very dated and unrelated criminal record.

[18] The judge had information about R.B.W.'s employment as an adult and his family situation. He has worked as a manual labourer, a cleaner and a dishwasher. He has primarily subsisted on income assistance. At the time of sentencing, after a very long period of unemployment, he had recently secured landscaping work with his brother-in-law.

[19] The sentencing judge identified that R.B.W. has had a number of common law relationships, fathering two children from one and four from another. Another relationship led to the birth of N.K. Although R.B.W. acknowledged a party life as a younger adult, he reported that he has tried to help take care of his children, providing food and clothing and encouraging them to go to school and get good grades.

[20] The sentencing judge noted the offence has caused a rift in R.B.W.'s relationships with his children. He reported that he is "currently making amends" and some of them are starting to forgive him.[5]

[21] R.B.W.'s problems with alcohol were noted by the sentencing judge to have contributed to his offence. He started drinking at age 16 with the alcohol supplied by his mother. He drank regularly as a teenager and "frequently and at a problematic level" in his twenties and thirties.[6] The judge referred to the comments in the IRCA about R.B.W. becoming habituated to alcohol abuse and taking corrective action:

> Ms. MacLean[7] observed that it is not surprising given his upbringing and early exposure to alcohol and substance abuse, that he normalize his pattern of drinking and its impact on his life. [R.B.W.] reports that he has recently, which would have been recently in terms of when the report was authored, reduced his alcohol consumption substantially. He has changed his friend group and is staying away from friends who are drinking...[8]

[22] In addition to the PSR and IRCA, R.B.W. voluntarily participated in a Comprehensive Forensic Sexual Behaviour Assessment (CFSBA). The sentencing judge noted it was "lengthy and detailed…addressing issues of sexual deviancy, the risk for sexual reoffence, personality and mental health issues as well as treatment recommendations".[9]

[23] The CFSBA found no indication of sexual deviancy. It assessed R.B.W.'s risk of future violence in the third percentile, indicating that an average of 97 percent of incarcerated offenders would score higher. He was a below average risk of being charged or convicted of another sexual offence and in the moderate range in terms of dynamic risk measurement testing.

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[5] Decision, *supra* note 4.
[6] Decision, *supra* note 4, quoting from the IRCA.
[7] Author of the IRCA.
[8] Decision, *supra* note 4.
[9] *Ibid*.

[24] The sentencing judge took account of the "battery" of psychological testing R.B.W. underwent, noting:

> According to the test scores, [R.B.W.] was seen to lack insight into personal shortcomings. It was observed that he showed limited ability to reflect on his actions and decision making in the index matter. However, he was seen to have the capacity to recognize and talk about his internal processes but would require assistance in doing so.[10]

[25] In terms of cognitive functioning, R.B.W. was reported to be of borderline intellectual functioning.

[26] The sentencing judge reviewed the assessment's recommendations, based on R.B.W.'s assessed level of risk:

- The low to moderate intensity community-based treatment program offered by the Forensic Sexual Behaviour Program would be a good fit for R.B.W.

- Individual treatment may be more suitable to meet R.B.W.'s needs, given his level of cognitive functioning, which includes very low literacy. The assessment anticipated he would have difficulty keeping pace with group-based treatment and would require assistance with reading and written homework assignments.

- Treatment targets could include "skills for establishing and maintaining healthy relationships, and improving adaptive and problem focused coping".[11]

[27] The judge observed that the CFSBA indicated the recommended specialized sexual offence treatment required by R.B.W. "is available in the community via the Forensic Sexual Behaviour Program, but is not available within the Provincial jail system, nor is it likely to be available within the Federal Correctional system where treatment resources are typically devoted to treating moderate to high risk cases".[12]

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[10] Decision, *supra* note 4.
[11] *Ibid*.
[12] *Ibid*.

[28] The sentencing judge referenced further recommendations for R.B.W. from the CFSBA:

- Maintain abstinence from alcohol at least until treatment is completed;
- Engage with a trauma-informed therapist to process adverse events from his childhood; and
- Maintain some level of employment and/or structured activity in order to promote a sense of purpose and personal achievement.

[29] The sentencing judge next discussed cases provided to her by the Crown and defence which included penitentiary sentences,[13] incarceration in a provincial correctional facility,[14] and a conditional sentence.[15] She indicated she had considered these cases while "mindful that sentencing is a highly individualized process dependent on the circumstances of the offence and those of the offenders".[16] She immediately acknowledged the "general principles concerning the prohibition against incestuous relationships" and quoted from this Court's decision in *R. v. R.P.F.* describing incest as: "…unacceptable, incomprehensible and repugnant to the vast majority of people, and has been for centuries in many cultures and countries".[17]

[30] The sentencing judge began her application of the law to the facts before her with a statement about the central role of denunciation and deterrence in incest cases:

> …I'll begin with the principle of denunciation, which is without question an important consideration with respect to this offence. So, too, is deterrence both specific and general. These principles ought to be given paramountcy. I am satisfied that specific deterrence has been achieved here since the commission of the offence. I accept [R.B.W.]'s position, supported by his conduct since his arrest, that he understands that this sort of conduct cannot be repeated. Denunciation and general deterrence, however, should play a paramount role in my analysis.[18]

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[13] *R. v. D.R.*, 2020 NSPC 46 [*D.R.*]; *R. v. J.C.J.*, 2017 ONSC 6704; *R. v. W.N.*, 2018 ONSC 3443. [*W.N.*]
[14] *R. v. M.J.W.*, 2011 NSPC 33.
[15] *R. v. H.(D.A.)* (2003), 171 C.C.C. (3d) 309 (ONCA). [*H.(D.A.)*]
[16] Decision, *supra* note 4.
[17] 1996 NSCA 72, 149 N.S.R. (2d) 91, at para. 24.
[18] Decision, *supra* note 4.

[31] The sentencing judge found that R.B.W.'s unequivocal acceptance of responsibility and earnest expressions of remorse meant specific deterrence was a non-issue in this case. The appellant does not challenge that finding.

[32] The sentencing judge identified the harms the prohibition against incestuous relationships is intended to prevent: preservation of the integrity of the family; prevention of genetic defects; and the protection of vulnerable family members. She noted that, "[a] sufficiently denunciatory and deterrent message is required to address these concerns".[19]

[33] The judge's calibration of the principles of sentencing and aggravating and mitigating factors led her to conclude that: (1) denunciation and general deterrence warranted a period of imprisonment; and (2) a "just period of imprisonment" was less than two years.[20] Having made this determination, the judge went on to consider whether a conditional sentence of imprisonment was appropriate in the circumstances.

[34] The dissent of my colleague, Justice Farrar, has assumed the sentencing judge crafted her decision to achieve a conditional sentence of imprisonment. Had the judge embarked on her sentencing analysis by reverse-engineering, that is, determining a CSO was appropriate and then shoe-horning her reasons on the length of sentence into this objective, that would constitute an error in principle. This Court would be entitled to set her sentence aside without deference to her reasons. However, as I indicated earlier, the judge's reasons contradict this view. To reiterate, the judge stated at the start of her sentencing analysis:

> In my view the most appropriate approach is to reach a determination as to the appropriate sentence before considering the constitutional challenge.[21]

[35] The sentencing judge was explicit: she said that were she to conclude the appropriate sentence for R.B.W. was two years' imprisonment or more, she would not proceed to address the constitutional issue to determine whether a CSO was available. She then did what she said she was going to do: she first determined the appropriate sentence for R.B.W. and, after that analysis, examined whether that sentence could be served as a CSO.

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[19] *Ibid.*
[20] *Ibid.*
[21] *Ibid.*

[36] As the Supreme Court of Canada has said: "Trial judges are entitled to have their reasons reviewed based on what they say, not on the speculative imagination of reviewing courts".[22] I am satisfied the judge is entitled to be "taken at [her] word".[23]

[37] In determining whether a CSO was appropriate, the sentencing judge reviewed the statutory requirements, the judgment in *Proulx*[24] and the case of *R. v. P.B.K.*[25] relied on by the Crown. She noted the court in *P.B.K.* concluded a conditional sentence of imprisonment "would not adequately address the relevant sentencing principles and would not be reasonable in the circumstances."[26] She examined the facts in *P.B.K.*:

- P.B.K. was the biological grandfather of the victim, R.S. He perpetrated the incest over a period in excess of four years, commencing with touching and progressing to oral sex and sexual intercourse. The sexual intercourse occurred over 86 times.

- R.S. was 19 or 20 years old when the sexual contact began and a virgin. When P.B.K. thought R.S. might report the matter he threatened to inform her university that she was complicit in the same offence, suggesting she could be expelled from her program.

- P.B.K. was Indigenous, a residential school survivor who "suffered the trauma of a jail-like institution for almost seven years of his childhood".[27] At the time of the offence, he was married with seven children and fully employed.

- R.S. provided a devastating Victim Impact Statement that documented the loss of her post-secondary education.

- The judge in *P.B.K.* carefully considered *R. v. Gladue*[28] and *R. v. Ipeelee*.[29]

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[22] *R. v. O'Brien*, 2011 SCC 29, at para. 17.
[23] *Ibid*.
[24] *Supra* note 2.
[25] 2013 ONSC 427.
[26] Decision, *supra* note 4.
[27] *Ibid*.
[28] [1999] 1 S.C.R. 688. [*Gladue*]
[29] 2012 SCC 13. [*Ipeelee*]

[38] The sentencing judge followed her recital of the facts in *P.B.K.* with her assessment of its applicability to sentencing R.B.W.:

> …She [the judge in *P.B.K.*] considered denunciation and deterrence as relevant sentencing principles noting that the offence of incest is a violation of one of the most basic of society's taboos, which must be met with denunciation in strong terms. She imposed a sentence of 15 months to be followed by probation for 24 months. She concluded that a conditional sentence would not have adequately addressed the relevant sentencing principles.
>
> I agree that the analysis must focus on whether serving a sentence of imprisonment in the community in relation to the offence of incest can sufficiently address the principles of denunciation and general deterrence. The factual foundation in *P.B.K.* was entirely different than the case before me. There the conduct spanned over four years and involved an escalation to the point of intercourse which occurred approximately 86 times. When, on the verge of being discovered, rather than confess to police, as [R.B.W.] did, *P.B.K.* initially threatened his granddaughter with the possibility of disclosure to her university. The requisite denunciatory and deterrent message necessary to address those facts is far different than the message that must be sent here.[30]

[39] She concluded this aspect of her analysis by stating:

> Having considered all of this and the principles of sentencing, as I have discussed, I am satisfied that a lengthy conditional sentence of imprisonment with restrictive conditions can address all of the relevant principles here, including denunciation and general deterrence. I am also mindful that I can impose a period of probation in addition and thereby impose a lengthy period of supervision…[31]

[40] The next issue the sentencing judge tackled was the constitutional exemption being sought by R.B.W. It was R.B.W.'s submission that s. 742.1(c) was overbroad and therefore contrary to the principles of fundamental justice, violating s. 7 of the *Charter*. The judge described the argument in plain language: "Put another way, it is said the provision captures some conduct that bears no relation to its purpose".[32]

[41] The sentencing judge agreed, finding s. 742.1(c) to be overbroad. She granted R.B.W. a constitutional exemption from its application in his case.

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[30] Decision, supra note 4.
[31] *Ibid*.
[32] *Ibid*.

The Sentencing Judge's Error and Subsequent Changes to the Legal Landscape

[42] The sentencing judge relied on the Ontario Court of Appeal's decision in *R. v. Sharma*[33] which was subsequently overturned by the Supreme Court of Canada.[34] The Supreme Court held that s. 742.1(c) was not overbroad, reinstating its restrictions on the availability of conditional sentences for offences with a maximum penalty of fourteen years' imprisonment. As a result, the sentencing judge's constitutional exemption for R.B.W. and the imposition by her of a CSO amounted to an error.

[43] However, the legal landscape quickly changed again. Shortly after the Supreme Court's decision, Bill C-5[35] received Royal Assent. Its amendments to the *Criminal Code* included an expansion of the availability of conditional sentences, neutralizing the Supreme Court's decision in *R. v. Sharma*.

[44] The legislated change to the conditional sentencing regime is material to this appeal where R.B.W.'s sentence is under review.

[45] Section 11(i) of the *Charter* provides:

> 11. Any person charged with an offence has the right:
>
> […]
>
> i. if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

[46] As stated by the Supreme Court of Canada in *R. v. Dunn*:

> [27] …Where an amendment to a sentencing provision has been passed after conviction and sentence by the trial judge, but before the appeal has been "decided", the offender is entitled to the benefit of the lesser penalty or punishment...[36]

[47] Deciding this appeal required that Bill C-5, s. 11(i) of the *Charter*, and *Dunn* be taken into account. Bill C-5 allows for a CSO in R.B.W.'s case.

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[33] 2020 ONCA 478.
[34] *R. v. Sharma*, 2022 SCC 39. Hereafter, I will refer to the Ontario Court of Appeal decision as *Sharma* and the Supreme Court of Canada decision as *R. v. Sharma*.
[35] *An Act to amend the Criminal Code and the Controlled Drugs and Substances Act*, 1st Sess., 44th Parl. 2021 (assented to 17 November 2022), S.C. 2022, c. 15. [Bill C-5]
[36] [1995] 1 SCR 226. [*Dunn*]

The Issues

[48] The appellant sought leave to appeal and advanced two grounds of appeal:

> (1) The sentencing judge erred in principle in ordering a conditional sentence of imprisonment.
>
> (2) The sentencing judge erred in principle by ordering a manifestly unfit sentence.

Leave to Appeal

[49] The issues in this appeal are arguable.[37] I would grant leave to appeal.

Standard of Review

[50] Sentencing decisions are accorded a high degree of deference in appellate review. Intervention is warranted only if (1) the sentencing judge committed an error in principle that impacted the sentence or, (2) the sentence is demonstrably unfit. Errors in principle include "an error of law, a failure to consider a relevant factor, or erroneous consideration of an aggravating or mitigating factor."[38]

[51] In assessing the issue of demonstrable unfitness, appellate review must focus on whether the sentence is proportionate to the gravity of the offence and the degree of the offender's responsibility.[39] Proportionality is the fundamental principle of sentencing.[40]

[52] On appeal, "wide latitude" is to be given to sentencing judges who are,

> [11] …in the best position to determine, having regard to the circumstances, a just and appropriate sentence that is consistent with the objectives and principles set out in the *Criminal Code* in this regard. The fact that a judge deviates from the proper sentencing range does not in itself justify appellate intervention. Ultimately, except where a sentencing judge makes an error of law or an error in principle that has an impact on the sentence, an appellate court may not vary the sentence unless it is demonstrably unfit.

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[37] *R. v. Tamoikin*, 2020 NSCA 43, at para. 43.
[38] *R. v. Friesen*, 2020 SCC 9, at para. 26 [*Friesen*]; *R. v. Lacasse*, 2015 SCC 64, at para. 11. [*Lacasse*]
[39] *R. v. Parranto*, 2021 SCC 46, at para. 30. [*Parranto*]
[40] *Criminal Code*, *supra* note 1 s. 718.1.

> [12] In such cases, proportionality is the cardinal principle that must guide appellate courts in considering the fitness of a sentence imposed on an offender. The more serious the crime and its consequences, or the greater the offender's degree of responsibility, the heavier the sentence will be. In other words, the severity of a sentence depends not only on the seriousness of the crime's consequences, but also on the moral blameworthiness of the offender. Determining a proportionate sentence is a delicate task. As I mentioned above, both sentences that are too lenient and sentences that are too harsh can undermine public confidence in the administration of justice. Moreover, if appellate courts intervene without deference to vary sentences that they consider too lenient or too harsh, their interventions could undermine the credibility of the system and the authority of trial courts…[41]

Conditional Sentence of Imprisonment – the Framework

[53] It is helpful at this stage to set out the *Proulx* framework a sentencing judge is required to follow before a conditional sentence can be imposed.[42]

- In a preliminary determination, a penitentiary term and probation must be rejected as inappropriate.
- Having determined that the appropriate range of sentence is a term of imprisonment of less than two years, the judge should then consider if it is appropriate for the offender to serve their sentence in the community.
- It is a condition precedent to the imposition of a conditional sentence that the judge must be satisfied the safety of the community will not be endangered by the offender serving their sentence in the community. Two factors must be taken into account: (1) the risk of the offender reoffending; and (2) the gravity of the damage were the offender to reoffend.

[54] *Proulx* urged judges to give serious attention to the appropriateness of ordering a conditional sentence where the threshold requirements have been met:

> Once the prerequisites of s. 742.1 are satisfied, the judge should give serious consideration to the possibility of a conditional sentence in all cases by examining whether a conditional sentence is consistent with the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2. This follows from

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[41] *Lacasse*, *supra* note 38.
[42] *Proulx*, *supra* note 2, at para. 127.

> Parliament's clear message to the judiciary to reduce the use of incarceration as a sanction.[43]

Analysis

[55] The appellant says the sentencing judge erred in principle in three ways:

1. By inappropriately discounting relevant aggravating factors, which affected the first step in the conditional sentence analysis of whether to exclude a penitentiary term of imprisonment.
2. By failing to give effect to the fundamental purpose of sentencing and the applicable principles of sentencing, which affected both the decision to exclude a penitentiary term of imprisonment (first step of *Proulx*) and finding that a CSO prerequisite had been met (third step of *Proulx*).
3. By finding that s. 742.1(c) was overbroad, which affected the fourth step of the analysis, where the sentencing judge concluded a CSO was an available sentencing option.

The Sentencing Judge Did Not Underemphasize Aggravating Factors

[56] The appellant says that despite the sentencing judge correctly referencing relevant aggravating factors, she failed to give effect to them. In the appellant's submission, had she done so she would not have eliminated a penitentiary term as the appropriate sentence.

[57] The aggravating factors identified by the appellant as underemphasized by the judge were:

- The breach of trust perpetrated by R.B.W. in relation to his intellectually disabled daughter;
- The exploitation by R.B.W. of N.K.;
- The pregnancy and birth of the baby as a result of the incest;
- The risk of genetic impairment caused by the incest; and

[43] *Ibid*.

- The mitigation of R.B.W.'s failure to use contraception by considering that N.K. also did not use contraception.

[58] In the sentencing judge's approach to the aggravating factors relied on by the Crown to support a penitentiary sentence for R.B.W., she properly examined the facts to determine the context in which the incest was committed. She noted there was an absence of the aggravating factors found in the incest cases the Crown had referenced. The incest did not involve: sexual activity with children or teenagers, grooming, use of alcohol and/or threats to achieve the criminal purpose, nor was it committed "during the course of the family's life together".[44]

[59] The sentencing judge noted that N.K.'s mother and R.B.W. were "never a family unit" and had a relationship that was "never more than casual leading to N.K.'s birth". They never lived together. N.K. generally lived with her mother and R.B.W. saw her "off and on" during her childhood. The judge found this background did not change R.B.W.'s "status as a father", but they distinguished this case from ones where the incest was committed "in entirely different circumstances", that is, in the context of an intact and integrated family unit.[45]

[60] The sentencing judge recognized that just like the offence of incest itself, breach of trust must be assessed contextually. She undertook the necessary exercise of determining, on the facts, what constituted the breach of trust committed by R.B.W., as well as noting N.K.'s age—that she was not a child. She recognized that N.K.'s intellectual and social vulnerabilities were the vulnerabilities of an adult who had experienced incest. She properly took into account the Crown's express acknowledgment that neither R.B.W. or N.K. qualified as the instigator of the sexual activity. The judge found that R.B.W. not being identified as the instigator distinguished the case "from others where the breach of trust component of the offence is much more significant". [46]

[61] The appellant has criticized the sentencing judge's statement that the evidence did not support a finding that N.K. was exploited. This was a factual finding by the judge grounded in what was not present in the circumstances of this incest case. She was not overlooking N.K.'s vulnerabilities and how they made her susceptible to what occurred. In distinguishing this case from incest cases

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[44] Decision, *supra* note 4.
[45] *Ibid*.
[46] *Ibid*.

involving exploitation of the victim, the sentencing judge was keeping her focus squarely on the evidence before her:

> [R.B.W.] did not instigate the sexual activity, nor did he specifically use [N.K.'s] vulnerabilities to assist in committing the offence. Rather, N.K.'s vulnerabilities are a factor in terms of her reduced ability to decide that she would not participate in the sexual activity thereby placing more responsibility on [R.B.W.] to make that decision.

[62] The sentencing judge was dealing with incest that was not perpetrated through grooming, cajoling, threats, inducements, use of intoxicants or force. It was this kind of exploitative conduct the sentencing judge did not have in the facts before her. The incest did not involve a minor child. Crown counsel had told the sentencing judge that while there is no legal consent to incest, it was not being argued N.K. was incapable due to her disability of consenting to the sexual activity. It was in this context the sentencing judge described the participation of R.B.W. and N.K. in the sexual acts as "equal". In doing so she was not de-emphasizing N.K.'s vulnerabilities, which she recognized and addressed, she was contextualizing them.

[63] The appellant argues that N.K.'s low intellectual functioning meant she did not really appreciate the conduct was wrongful, making her akin to being a child. This does not accord with the information the sentencing judge had before her. The author of the Comprehensive Forensic Sexual Behaviour Assessment described watching the video-recording of N.K.'s police interview in which N.K. indicated her awareness that incest is socially proscribed. The Assessment states: "Specifically, she became defensive, denied having "sex" with a family member and stated that this was "gross", and terminated the interview without making any disclosure".[47] N.K. had significant vulnerabilities, but she did not lack the capacity to understand the societal prohibition against incest. It is clear she knew sexual intercourse with R.B.W. was prohibited.

[64] It is important to acknowledge the attention the judge paid to the facts before her. She was not dealing with an incest case involving a minor child.

[65] The judge agreed "the general principles" emphasized in *R. v. Friesen*[48] were applicable—"but only to the extent that N.K. has vulnerabilities." The judge observed that N.K. was an adult and "able to live independently, albeit with social

[47] CFSBA, Dr. St. Amand-Johnson, at page 20.
[48] *Supra* note 38.

supports in place."[49] Notwithstanding these factual observations, the judge did not displace R.B.W.'s responsibility. As *Friesen* held: "Adults, not children, are responsible for preventing sexual activity between children and adults."[50] This principle was applied by the sentencing judge in the context of incest involving an adult. Despite neither being the "instigator", she found it was R.B.W.'s responsibility to prevent the sexual activity with his daughter.

[66] The sentencing judge did not disregard R.B.W.'s culpability for the offence nor did she underemphasize the breach of trust. She took account of R.B.W.'s breach of trust in relation to the facts in this particular case. She recognized that the breach of trust arising from a father having sexual intercourse with his daughter has a context. She carefully identified but did not minimize that context:

> In keeping with the obligation to achieve a proportionate sentence, the breach of trust component of my analysis must be contextual. If breach of trust is seen on a continuum, the younger the child, the more egregious the conduct. The seriousness in duration of the criminal conduct is also relevant. So too are the personal circumstances of the offender, including his level of cognitive functioning, and the degree of trust in the particular relationship. [R.B.W.] was not N.K.'s primary care giver as she grew up. The extent and nature of their relationship when she was a child or teenager is not in any sense clear. I have no evidence that he was the person in the position of authority over her, other than the fact that from time to time she stayed in his home when there were issues between she and her mother. In terms of [R.B.W.] having committed a breach of trust as a father, notwithstanding his own vulnerabilities, he should not have participated in the sexual activity and bears responsibility for his decision to do so. He knew the conduct was impermissible.[51]

[67] As for the pregnancy and birth that N.K. experienced, the sentencing judge did not fail to take these harms into account and view them as aggravating. She noted that N.K. was emotionally harmed by becoming pregnant and having to give up the baby she delivered. She found this to have been an aggravating factor:

> It is an aggravating fact given the impact upon N.W. [N.K.] having to go through a pregnancy and then endure the loss of that child because she was unable to care for the baby. The full context of the pregnancy is important.[52]

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[49] Decision, *supra* note 4.
[50] *Supra* note 38, at para. 154.
[51] Decision, *supra* note 4.
[52] *Ibid*.

[68] The appellant says the sentencing judge's finding there was no evidence the incest caused the baby's impairments ignored the risk of genetic defects and as a consequence she underemphasized this aggravating circumstance. Again, the judge is being criticized despite sentencing R.B.W. in accordance with the facts. The judge found there was no evidence the medical complications experienced by the baby were connected to R.B.W. and N.K. being father and daughter.

[69] The prohibition against incest takes into account the risk of genetic defects. There is no authority for treating the risk as an aggravating factor in every incest case. The risk is one of the reasons incest, even between consenting adults, is criminalized.[53]

[70] Where the risk of genetic defects has an aggravating role in this case is in relation to the failure of R.B.W. to use contraception where pregnancy could result. The sentencing judge recognized this: "It is an aggravating fact that [R.B.W.] did not use contraception to prevent the pregnancy".[54]

[71] The appellant's criticism of the sentencing judge's weighing of the aggravating circumstances in this case amounts to an argument that the judge's decision not to impose a penitentiary term is evidence she underemphasized them. On appeal we are to accord significant deference to the sentencing judge's treatment of the aggravating factors in her proportionality analysis. It is not the role of an appellate court to recalibrate them.

[72] However, I do agree with the appellant's critique of one statement the sentencing judge made. When addressing R.B.W.'s failure to use contraception, the judge said she was taking into account that N.K. also did not use contraception to prevent a pregnancy. This was irrelevant and should not have been the subject of comment. Although the appellant says it had the effect of minimizing R.B.W.'s conduct and moral culpability, in examining the sentencing judge's reasons as a whole, I do not find evidence this one statement played a role in her assessment of proportionality. It was a statement that ultimately had no impact on the judge's conclusions about who was squarely to blame for the sexual activity—R.B.W.

[73] The sentencing judge may not have weighed the aggravating factors as the appellant prefers, but in the absence of showing how the judge's analysis was

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[53] *R.P.F.*, *supra* note 17.
[54] Decision, *supra* note 4.

unreasonable, in accordance with the Supreme Court of Canada's direction in *R. v. Nasogaluak*, deference must be given to her approach:

> …The weighing of relevant factors, the balancing process is what the exercise of discretion is all about. To maintain deference to the trial judge's exercise of discretion, the weighing or balancing of relevant factors must be assessed against the reasonableness standard of review. Only if by emphasizing one factor or by not giving enough weight to another, the trial judge exercises his or her discretion unreasonably should an appellate court interfere with the sentence on the ground the trial judge erred in principle.[55]

[74] A conditional sentence can be imposed, notwithstanding the presence of aggravating factors. *Proulx* makes this point:

> [115] Finally, it bears pointing out that a conditional sentence may be imposed even in circumstances where there are aggravating circumstances relating to the offence or the offender. Aggravating circumstances will obviously increase the need for denunciation and deterrence. However, it would be a mistake to rule out the possibility of a conditional sentence *ab initio* simply because aggravating factors are present. I repeat that each case must be considered individually.[56]

> *The Sentencing Judge Did Not Fail to Give Effect to the Purpose and Principles of Sentencing*

[75] Incest is a profound encroachment on society's shared and deeply-held values. Denunciation in a proportionate sentence for incest is intended to express condemnation for such transgressive conduct. It is "communicative and educative" and "reflects the fact that Canadian criminal law is a "system of values."[57]

[76] The appellant argues a sentence of two years less a day constitutes an insufficiently denunciatory sanction as denunciation and general deterrence are particularly pressing in incest cases.

[77] Instead of emphasizing denunciation and deterrence, the appellant says the sentencing judge's primary focus was on R.B.W.'s rehabilitation.

[78] The appellant relies on several cases to support its position that R.B.W. should have received a penitentiary sentence. It is the appellant's submission these

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[55] *R. v. Nasogaluak*, 2010 SCC 6, at para. 46, citing with approval *R. v. McKnight* (1999), 135 C.C.C. (3d) 41 (Ont. C.A.). [*Nasogaluak*]
[56] *Proulx, supra* note 2.
[57] *Friesen, supra* note 38, at para. 105.

cases share similarities with the facts here, even though they are not identical. The following is taken from the appellant's factum:

> 1. **W.N.** - The offender engaged in sexual acts, including intercourse, with his developmentally-delayed adult daughter approximately 15 times. The offender pleaded guilty and was himself a victim of sexual abuse. The offender did have a dated record for sexual offending and was at above-average risk to reoffend. Six years' jail imposed.
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> 2. **R. v. D.R.**, 2020 NSPC 46 – The offender had intercourse with his developmentally delayed adult daughter on five or six occasions. The offender pleaded guilty, was himself the victim of sexual abuse, was a low risk to reoffend, and had no prior criminal record. 42 months' jail imposed.
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> 3. **R. v. W.P.K.**, 2012 NSSC 299 – The offender had a sexual relationship with his developmentally-delayed adult daughter over several months. After trial, the judge found that the daughter often initiated the sexual intercourse, and the parties did not have a parental relationship. The offender had some cognitive difficulties, a lengthy criminal record, was a moderate-high risk, and did not accept responsibility for his actions. The offender had also been subject to severe bail conditions for 18 months, which contributed to the sentencing judge rejecting a four year sentence. 30 months' jail imposed.

[79] The appellant points out that although the conduct in the listed cases occurred on more occasions than in this case, there were no pregnancies or births that resulted.

[80] However there are other important factual distinctions between these cases and R.B.W.'s.

[81] In *W.N.*, the prosecution sought a six year penitentiary sentence. The defence argued for four years and three months with credit for time served. The exploitation of the vulnerable victim was a significant aggravating factor. The daughter had been afraid to refuse her father and was subject to inducements in the form of food and gifts. W.N. initiated the sexual activity, showed no remorse, denied responsibility and blamed his daughter. An earlier Sexual Behaviour Assessment identified a high level of hostility toward women, a moderate-high risk for sexual reoffending and a "dire need" of sex offender treatment.[58]

[82] Charged previously (and ultimately convicted) of sexually assaulting his nieces, W.N. had been deemed unsuitable for treatment as he had denied

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[58] *W.N.*, *supra* note 13, at para. 14.

committing the offences. W.N.'s pre-sentence report indicated anger management issues and a strong tendency to deny and/or minimize his behaviour, creating challenges for rehabilitative interventions. The judge observed it was "unfortunate [W.N.] managed to slip through the net on previous occasions when [he was] pointed in the direction of obtaining treatment and assistance."[59] The judge held that W.N.'s offending was "[more] than a surrender by a morally weak person to human temptation" and characterized his conduct as "a cynical and serial" breach of trust, exploitative, cruel and "unbelievably selfish".[60]

[83] In *D.R.*, the sexual intercourse, initiated by D.R., occurred on five or six occasions between November 2017 and October 2018 with an adult daughter he had not seen in twenty years. The prosecution sought a penitentiary sentence of four to six years. The defence asked for a suspended sentence. The judge noted that under s. 742.1(c) of the *Criminal Code* a conditional sentence was not available. He found the sentence range was three to five years. The daughter was intellectually disabled – D.R. was not.

[84] In *R. v. W.P.K.*, the prosecution recommended a sentence of four years. The defence sought a conditional sentence of two years less a day. The judge found the most serious aggravating factor was W.P.K.'s failure to accept responsibility and his lack of insight into the wrongfulness of his conduct. This led the judge to conclude: "Without insight into his wrongful behaviour, we have no assurance that he will not reoffend sexually."[61] W.P.K. had a lengthy criminal record that included a sexual assault conviction. A psychological assessment raised concerns about his acceptance of responsibility for the index offence, his ability to cooperate with treatment, and his misrepresentation of the previous sexual assault conviction.

[85] The *W.N.* and *D.R.* cases were before the sentencing judge and she reviewed them. Her reasons show she was not persuaded they were helpful guides.

[86] Sentencing ranges "are guidelines rather than hard and fast rules".[62] Where the issue is whether a conditional sentence should be considered an option, the sentencing range is not determinative. The assessment requires a more nuanced approach, as it did in R.B.W.'s case, where the judge was sentencing an African Nova Scotian offender.

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[59] *Ibid*, at para. 47.
[60] *Ibid*, at paras. 51-52.
[61] *R. v. W.P.K.*, 2012 NSSC 299, at para. 7.
[62] *Nasogaluak*, *supra* note 55, at para. 44.

[87] This Court's decision in *R. v. Anderson* provides guidance for the sentencing of an African Nova Scotian offender:

> [131] In assessing the probation/penitentiary issue and determining the range, systemic and background factors that could reasonably and justifiably impact the sentence imposed must be considered. IRCAs are a vital source of evidence for resolving these issues. The judge sentencing Mr. Anderson did not have the benefit of sentences for s. 95(1) offences that had been crafted with IRCA evidence taken into account. Cases such as *Nur* were decided without such evidence.
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> [132] The question of whether the range can include a sentence of two years less a day should be refracted through the prism of the factors addressed by the IRCA. It is not a matter of determining if deviating from the range for the offence is warranted. Determining the range itself must be informed by the factors addressed in the IRCA and the statutory prerequisites for a conditional sentence. As the ANSDPAD Coalition[63] submitted, IRCAs should be employed to individualize sentences, taking account of factors that have previously been absent from the analysis. Sentence ranges will have to be re-evaluated as they have been developed without the benefit of a fully contextualized analysis. As noted, a judge's determination of the applicable sentencing range needs to be accorded a high degree of deference.[64]

[88] The sentences for incest offences relied on by the appellant, such as *D.R.*, were not crafted with the benefit of an IRCA.

[89] The appellant's position does not allow for a conditional sentence ever being a proportionate sentence for incest. While a sentencing judge must balance the principles of sentencing to achieve a proportionate sentence, "…there is no such thing as a uniform sentence for a particular crime".[65]

[90] As indicated by the respondent, there is no established range for s. 155 offences. Sentences for incest have included custodial sentences of less than two years less a day, that is, non-penitentiary sentences, and, as indicated by the respondent, conditional sentences.[66] No cases involved an IRCA.

[91] The fundamental principle of sentencing is proportionality. It serves "a limiting or restraining function" such that "society's condemnation of the offence is always limited by the principle that an offender's sentence must be equivalent to

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[63] African Nova Scotian Decade for Persons of African Descent Coalition, an intervenor.
[64] 2021 NSCA 62. [*Anderson*]
[65] *R. v. M.(C.A.)*, [1996] 1 S.C.R. 500, at para. 92.
[66] *H.(D.A.), supra* note 15; *R. v. K.R.*, [2002] O.J. No. 605 (S.C.J.); *R. v. M.J.W.*, 2011 NSPC 33.

his or her moral culpability, and not greater than it." A sentence "speaks out against the offence" but punishes the offender "no more than is necessary".[67]

[92] I am satisfied the sentencing judge did what sentencing judges are required to do: she determined proportionality through an individualized lens. As held by the Supreme Court of Canada in *Parranto*, this was the correct approach:

> […] Individualization is central to the proportionality assessment. Whereas the gravity of a particular offence may be relatively constant, each offence is "committed in unique circumstances by an offender with a unique profile". (para. 53) This is why proportionality sometimes demands a sentence that has never been imposed in the past for a similar offence. The question is always whether the sentence reflects the gravity of the offence, the offender's degree of responsibility and the unique circumstances of each case (para. 58).[68]

[93] The sentencing judge did not treat R.B.W.'s rehabilitation as the primary sentencing objective. She appropriately took account of his strong rehabilitative prospects in her balancing of all the sentencing principles. Her approach reflects the importance of rehabilitation in the sentencing calculus, as articulated by the Supreme Court of Canada in *Lacasse*:

> [4] One of the main objectives of Canadian criminal law is the rehabilitation of offenders. Rehabilitation is one of the fundamental moral values that distinguish Canadian society from the societies of many other nations in the world, and it helps the courts impose sentences that are just and appropriate.[69]

[94] Again, as the Supreme Court of Canada directs, the sentencing judge's nuanced analysis reflected the balancing she was required to undertake:

> [43] The language in ss. 718 to 718.2 of the *Code* is sufficiently general to ensure that sentencing judges enjoy a broad discretion to craft a sentence that is tailored to the nature of the offence and the circumstances of the offender. The determination of a "fit" sentence is, subject to some specific statutory rules, an individualized process that requires the judge to weigh the objectives of sentencing in a manner that best reflects the circumstances of the case. No one sentencing objective trumps the others and it falls to the sentencing judge to determine which objective or objectives merit the greatest weight, given the particulars of the case. The relative importance of any mitigating or aggravating factors will then push the sentence up or down the scale of appropriate sentences for similar offences. The judge's discretion to decide on the particular blend of

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[67] *Nasogaluak, supra* note 55, at para. 42.
[68] *Parranto, supra* note 39, at para. 12 [citations omitted], citing *Lacasse, supra* note 38, at para. 58.
[69] *Lacasse, supra* note 38.

> sentencing goals and the relevant aggravating or mitigating factors ensures that each case is decided on its facts, subject to the overarching guidelines and principles in the *Code* and in the case law.[70]

[95] In applying the principles of sentencing to achieve proportionality in this case, the sentencing judge noted R.B.W.'s genuine remorse—expressed in his confession to police, his guilty plea, through submissions of his counsel, and in his interviews with the authors of the PSR and the IRCA. R.B.W.'s remorse and his acceptance of responsibility were unqualified. In the IRCA, R.B.W. took full responsibility for what he did,

> …and said he is very sorry. Due to the no contact order he is unable to express how sorry he is directly to N.K. He expressed to Ms. MacLean[71] not only remorse, but an appreciation of the impact of his choices on the life of his daughter and his family. The consequences of his conduct has also resulted in [R.B.W.] becoming unwelcome virtually anywhere except with his mother and sister. [R.B.W.] was clearly emotionally distressed when he spoke to the court concerning his behaviour, his expression of remorse, and the consequences of his conduct.[72]

[96] The Comprehensive Forensic Sexual Behaviour Assessment also noted R.B.W. expressed "remorse and disappointment in himself for the index offence."[73]

[97] It was "very significant" to the sentencing judge that R.B.W. entered a guilty plea at an early opportunity. She also found it mitigating that R.B.W. had been law-abiding for most of his adult life:

> It is mitigating that at 57 years of age, [R.B.W.] has but a very dated and completely unrelated criminal record. Given the passage of time and the gap principle, the prior convictions play virtually no role in my analysis. Further, there was no suggestion that he has not respected fully the terms of his release, including no contact with N.K…[74]

[98] The sentencing judge had information before her that R.B.W. had been a good father to the four children with whom he had had the most robust parenting role. His daughter, J.W., interviewed for the PSR, said R.B.W. was "a very caring

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[70] *Nasogaluak*, *supra* note 55, at para. 43 [citations omitted].
[71] IRCA, Lana MacLean at 179.
[72] Decision, supra note 4.
[73] CFSBA, Dr. St. Amand-Johnson at 137.
[74] Decision, supra note 4.

and strict parent", serious about house rules, schoolwork and curfews. J.W. said her father is a "wonderful grandfather" and a "shy, private person who keeps to himself."[75]

[99] I note there was evidence before the sentencing judge, which she mentioned, that R.B.W. has been experiencing denunciation of his other children and in the African Nova Scotian community of which he is a part. He carries the stain of stigma as a result of committing such a reviled offence. At the time of sentencing his only family supports were his mother and oldest sister. The IRCA notes that some of R.B.W.'s own children will not permit him to be around his grandchildren. The IRCA also reports:

> He has a long road to being re-integrated and welcomed back into the [ANS] community. The community may place their own sanctions on his capacity to be with vulnerable members (children and seniors) of the community. Presently, [R.B.W.] reports being impacted by social isolation from the larger community".[76]

[100] Drawing from the reports filed for the sentencing—the PSR, IRCA, and CFSBA—the judge found R.B.W. to be a low risk to reoffend:

> In terms of rehabilitation, [R.B.W.] has repeatedly accepted responsibility for his conduct, cooperated with the police, probation, the IRCA writer, as well as Dr. St. Amand-Johnson.[77] He is said to present as a low risk to reoffend and is prepared to engage in counselling and therapy. His expressions of remorse are consistent, and in my view, genuine. He has complied with the conditions of his release. He is, in my view, a very good candidate for rehabilitation.[78]

[101] R.B.W.'s low recidivism risk was relevant to the sentencing judge's proportionality analysis as well as her consideration of the prerequisites for a conditional sentence.

[102] The sentencing judge avoided the error of solely focusing on the gravity of the offence R.B.W. committed. She recognized that a fit sentence always reflects the totality of the circumstances and represents the appropriate sanction "[f]or *this* offence, committed by *this* offender, harming *this* victim, in *this* community".[79]

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[75] Lana MacLean, at page 119.
[76] *Ibid*, at page 179.
[77] The assessor who prepared the Comprehensive Forensic Sexual Behaviour Assessment.
[78] Decision, *supra* note 4.
[79] *Gladue*, *supra* note 28, at para. 80 (emphasis in the original).

Her analysis respected the principle that denunciation and deterrence "cannot be allowed to obliterate" other relevant sentencing objectives.[80]

[103] This Court held in *Anderson* that denunciation and general deterrence must be assessed contextually in the sentencing of African Nova Scotian offenders:

> [160] …They cannot be regarded as static principles to be applied rigidly in what is a highly individualized process. Judges should look to IRCAs to assist them in determining whether the objectives of denunciation and deterrence can be satisfied as effectively in the community under a conditional sentence order as in a jail. In making this determination, the judge will consider the nature of the conditions that could be imposed, the duration of the conditional sentence, "and the circumstances of the offender and the community in which the conditional sentence is to be served". All "relevant evidence" should be taken into account in the assessment.[81]

[104] The sentencing judge applied the guidance in *Anderson*. She gave careful consideration to R.B.W.'s moral culpability but did not confine her analysis of it to a singular focus on the wrongfulness of his engaging in sexual intercourse with his daughter. She situated that wrongfulness in R.B.W.'s individual circumstances, and recognized the requirement that she use the "valuable information" in the IRCA "to ensure relevant, systemic, and background factors are integrated into crafting a sentence."[82] She noted what *Anderson* said about the proportionality analysis in the case of an African Nova Scotian offender:

> [145] Even where the offence is very serious, consideration must be given to the impact of systemic racism and its effects on the offender. The objective gravity of a crime is not the sole driver of the sentencing determination which must reflect a careful weighing of all sentencing objectives.
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> [146] The moral culpability of an African Nova Scotian offender has to be assessed in the context of historic factors and systemic racism, as was done in this case. The African Nova Scotian offender's background and social context may have a mitigating effect on moral blameworthiness. In *Ipeelee*, the Supreme Court of Canada recognized this principle in relation to Indigenous offenders. It should be applied in sentencing African Nova Scotians. Sentencing judges should take into account the impact that social and economic deprivation, historical disadvantage, diminished and non-existent opportunities, and restricted options may have had on the offender's moral responsibility…[83]

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[80] *Parranto, supra* note 39, at para. 45, citing *R. v. Okimaw*, 2016 ABCA 246, at para. 90.
[81] *Anderson, supra* note 64 [citations omitted].
[82] Decision, *supra* note 4.
[83] *Anderson, supra* note 64.

[105] The appellant's criticism, as stated in its factum, that the sentencing judge conflated R.B.W.'s "negative personal experiences and socio-cultural hardships endemic to an equity-seeking group with reduced moral culpability"[84] misapprehends the approach to sentencing African Nova Scotian offenders. The judge correctly applied *Anderson* and its emphasis on an individualized analysis:

> [103] The highly individualized sentencing process that seeks to determine a fit and proportionate sentence for an African Nova Scotian offender must take account of the social context of racism and historical injustice. This context can be made available to sentencing judges through the use of IRCAs.[85]

[106] As held in *Ipeelee*: "…systemic and background factors may bear on the culpability of the offender, to the extent that they shed light on his or her level of moral blameworthiness". A causal link does not need to be established between the systemic and background factors and the commission of the offence before a sentencing judge can consider them.[86] The constrained circumstances of African Nova Scotian offenders may diminish moral culpability and the information in an IRCA can be used as "a foundation on which to build alternatives to incarceration for Black offenders and reduce the over-reliance on imprisonment".[87]

[107] The sentencing judge gave proper consideration to R.B.W.'s background and systemic factors and ensured they informed her reasoning. Her reasons reference factors identified in *Anderson* that were relevant to her task:

> Many of the factors identified in *Anderson* are at play in this case, including the fact that the [IRCA] report helps contextualize the gravity of the offence and the degree of [R.B.W.]'s responsibility. He has been impacted by historical deprivation, social and economic deprivation, as well as diminished and virtually non-existent opportunities. Unfortunately, [R.B.W.] was not only a victim of historical impacts of racism, but as a consequence he fell into the control of the State and was abused physically, emotionally, and sexually by persons in positions of authority. The information in the report informs the principles of sentencing and the weight that I should accord to denunciation and general deterrence.[88]

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[84] Appellant's Factum, para. 47.
[85] *Anderson*, *supra* note 64.
[86] *Ipeelee*, *supra* note 29, at paras. 73, 81; *Anderson*, *supra* note 64, at para. 118.
[87] *Anderson*, *supra* note 64, at para. 120.
[88] Decision, *supra* note 4.

[108] The judge took account of what the IRCA said about R.B.W.'s background and the frailties inherent in his judgment and insight:

> …[R.B.W.] was raised with limited social and parental supports providing him with the structure required to follow through on tasks to meet social, educational, and developmental outcomes. Not having consistency and accountability to authority, or the cognitive capacity due to trauma experiences may be a contributing factor to [R.B.W.]'s lack of demonstrating good judgment and insight…[89]

[109] The appellant says the sentencing judge's analysis of proportionality failed to consider N.K.'s socio-cultural circumstances and the intersecting inequalities she experiences—as a woman, with a disability, of African descent—which made her vulnerable.

[110] I do not agree that N.K.'s vulnerabilities were ignored by the sentencing judge. She referenced them a number of times in her reasons, placed them in context, and acknowledged their significance to her analysis. Their existence did not neutralize her obligation to consider how the systemic factors relevant to R.B.W. impacted his moral culpability.

[111] The sentencing judge described this as "a very unusual case." [90] She recognized it as very fact-specific and distinguished it from incest cases where there was: a child victim, the use of grooming, the plying of the victim with alcohol or drugs to facilitate the offence, the presence of threats, inducements or violence. She took account of relevant aggravating and mitigating circumstances. She kept her focus on the broad range of factors she had to balance, including but not limited to the gravity of the offence of incest. She paid proper attention to the information she had about R.B.W.'s systemic and background experiences as an African Nova Scotian and applied it to her reasoning.

[112] After balancing what the sentencing judge identified as significant aggravating and mitigating factors, and the totality of R.B.W.'s circumstances which she found "exposed his vulnerabilities and impact[ed] his level of moral blameworthiness",[91] she concluded that denunciation and general deterrence required imprisonment. In her view, imprisonment of less than two years satisfied proportionality. She found a lengthy conditional sentence of imprisonment with

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[89] *Ibid.*
[90] *Ibid.*
[91] Decision.

restrictive conditions of house arrest and curfew could address denunciation and general deterrence.

[113] The conditional sentence imposed by the sentencing judge was responsive to *Proulx*'s focus on:

- Parliament's objective in instituting conditional sentencing as a means for reducing "the problem of overincarceration in Canada".[92] (As the Supreme Court of Canada and Parliament have recognized since *Proulx*, overincarceration, particularly of Indigenous and Black offenders, has become an even more pressing societal issue.[93])

- The doubt that has been cast on the effectiveness of incarceration in achieving the goals intended by traditional sentencing principles, including the goals of denunciation and deterrence.[94]

- Parliament's intention, by way of the 1996 amendments to the *Criminal Code* that included conditional sentencing, "to give increased prominence to the principle of restraint in the use of prison as a sanction through the enactment of s. 718.2(d) and (e)" which provide, respectively, that "an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances" and "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders…"[95]

- The ability of a conditional sentence to provide "a significant amount of denunciation" and "significant deterrence if sufficiently punitive conditions are imposed and the public is made aware of the severity of these sentences."[96]

[114] I find the sentencing judge did not fail to properly account for and give effect to the purpose and principles of sentencing found in ss. 718 to 718.2 of the

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[92] *Proulx, supra* note 2, at para. 16. See also: *Gladue*, *supra* note 28, at para. 40: "The availability of the conditional sentence of imprisonment, in particular, alters the sentencing landscape in a manner which gives an entirely new meaning to the principle that imprisonment should be resorted to only where no other sentencing option is reasonable in the circumstances. The creation of the conditional sentence suggests, on its face, a desire to lessen the use of incarceration".
[93] *Ipeelee*, *supra* note 29, at para. 62; Bill C-5, *supra* note 35 .
[94] *Gladue*, *supra* note 28, at para. 57; *Proulx, supra* note 2 at para. 107; *R. v. Nur*, 2015 SCC 15 at para. 113.
[95] *Proulx, supra* note 2, at para. 17.
[96] *Ibid*, at paras. 102, 107.

Criminal Code. Her reasons communicated the messages of denunciation and general deterrence that should feature in sentencing for incest. She repeatedly identified these principles as significant in R.B.W.'s case and in the context of discussing decisions from other courts. Her decision not to use a penitentiary term as their voice is to be accorded deference.

[115] R.B.W.'s sentence emerged from the sentencing judge's careful analysis and her application of the relevant legal principles to the nuanced exercise of individualized sentencing. How she resolved the tensions inherent in the various principles of sentencing is entitled to a high degree of deference. It did not produce a manifestly unfit sentence.

A Conditional Sentence Was Not an Available Option When R.B.W. was Sentenced – An Error that Did Not Impact the Sentencing Judge's Analysis

[116] As I indicated at the start of these reasons, I agree with the appellant the sentencing judge's determination that she could impose a conditional sentence constituted an error of law.

[117] Following her analysis of the purpose and principles of sentencing, the judge considered whether R.B.W. satisfied the criteria for a conditional sentence. Having decided the criteria had been met, she then grappled with the remaining question: was a CSO an available sentence? Under s. 742.1(c) incest, punishable by up to fourteen years in prison, was excluded from the conditional sentence regime. At the time R.B.W. was sentenced, the Ontario Court of Appeal in *Sharma* [97] had found s. 742.1(c) was overbroad and a violation of s. 7 of the *Charter*. Taking account of *Sharma* and conducting her own analysis under the jurisdiction afforded her by the Supreme Court of Canada's decision in *R. v. Lloyd*,[98] the sentencing judge declined to apply s. 742.1(c). She found it prohibited her from imposing what she had assessed as a fit sentence for R.B.W.

[118] On November 4, 2022, the Supreme Court of Canada overturned the Ontario Court of Appeal's decision in *R. v. Sharma* and found s. 742.1(3) to be constitutionally valid.[99] As a result, the sentencing judge's conclusion that she could decline to apply s. 742.1(3) to R.B.W. constituted legal error. Despite

[97] *Sharma, supra* note 33.
[98] 2016 SCC 13, at paras. 15-16.
[99] *R. v. Sharma, supra* note 34.

appearances, a conditional sentence was not an option when R.B.W. was sentenced.

[119] The unavailability of a CSO at the time of R.B.W.'s sentencing however does not end the matter. Parliament has since expanded the scope of the conditional sentencing regime.

[120] Thirteen days after the Supreme Court of Canada decided *R. v. Sharma*, Bill C-5[100] was given Royal Assent. Its reforms included the removal of the prohibition against conditional sentences for offences, including s. 155 offences, that have a maximum sentence of fourteen years. The Supreme Court of Canada's decision in *R. v. Sharma* has been eclipsed by Bill C-5. Bill C-5 establishes that the imposition of a conditional sentence in an incest case can represent the proper application of the purpose and principles of sentencing, including denunciation and general deterrence.

[121] It is relevant to note the role Parliament intends Bill C-5's sentencing amendments to play in addressing systemic anti-Black racism and the well-documented over-incarceration of racialized offenders. In his factum, R.B.W. quoted the Parliamentary Secretary to the federal Minister of Justice on Bill C-5, describing the proposed amendments as "an important step in our…continuing efforts to make our criminal justice system fairer for everyone by seeking to address the overrepresentation of indigenous people, Black Canadians and members of marginalized communities".[101]

[122] R.B.W. is now eligible for a conditional sentence.

[123] To reiterate for convenience, s. 11(i) of the *Charter* provides:

> 11. Any person charged with an offence has the right:
>
> […]
>
> i. if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

[100] *Supra* note 35.
[101] *House of Commons Debates*, 44-1, Vol. 151 No. 016 (13 December 2021) at 1033 (Hon. Anthony Rota).

[124] The Supreme Court of Canada's decisions in *Dunn*,[102] *R. v. R.A.R.*,[103] and *R. v. Poulin*[104] establish that R.B.W. is eligible for the CSO, pursuant to s. 11(i) of the *Charter*. As I noted earlier, *Dunn* states that:

> [27] …Where an amendment to a sentencing provision has been passed after conviction and sentence by the trial judge, but before the appeal has been "decided", the offender is entitled to the benefit of the lesser penalty or punishment...

[125] The combination of Bill C-5, s. 11(i) of the *Charter*, and *Dunn* and related jurisprudence effectively neutralize the effect of the sentencing judge's legal error. This Court now has the option of considering a CSO for R.B.W. In this appeal, the issue is – in this Court's analysis of the CSO, what deference should be given to the sentencing judge's findings, and her weighing and balancing of the factors she assessed in finding that R.B.W.'s sentence of imprisonment could be served as a conditional sentence?

[126] This determination—that the sentencing judge's imposition of a conditional sentence constituted legal error—does not permit this Court to disregard the deference to which her sentencing analysis is entitled. Deference gives way only where the error had an impact on R.B.W.'s sentence.

[127] As the majority held in *Lacasse*:

> [44] In my view, an error in principle, the failure to consider a relevant factor or the erroneous consideration of an aggravating or mitigating factor will justify appellate intervention only where it appears from the trial judge's decision that such an error had an impact on the sentence.[105]

[128] Having applied the principles of sentencing, the sentencing judge found that a fit sentence for R.B.W. was imprisonment of two years less a day. Concluding—as it turns out, incorrectly—that she could order the sentence to be served under a CSO had no bearing on her factual determinations and how she balanced the sentencing principles and factors to arrive at what she concluded was a fit sentence. The judge only decided that she could impose a CSO after she had determined the sentence and that the requirements for a CSO had been met.

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[102] *Supra* note 36.
[103] 2000 SCC 8.
[104] 2019 SCC 47.
[105] *Supra* note 38.

[129] Applying the test in *Lacasse*, I find the trial judge's legal error had no impact on her findings, and the weighing and balancing of the factors she addressed in assessing the applicability of a CSO.

[130] I find the sentencing judge's determination that the fit sentence for R.B.W. was a sentence of imprisonment of two years less a day attracts deference and should not be disturbed.

[131] The sentencing judge was satisfied that the criteria for a CSO were met in R.B.W.'s case. Her determination that the fit sentence for R.B.W. was a sentence of imprisonment of two years less a day to be served as a conditional sentence is entitled to deference.

R.B.W.'s Current Circumstances

[132] A post-sentence report prepared on January 26, 2023 was filed by R.B.W. as fresh evidence on this appeal. The appellant consented to its admission "for the purpose of assessing the question of incarceration". As my reasons indicate, I would not incarcerate R.B.W. The report is a relevant source of reassurance that R.B.W. continues to be a suitable candidate for a conditional sentence. He remains very remorseful, is fully compliant with the terms of his conditional sentence order, including house arrest, is very motivated in his rehabilitation and has been wholly committed to the programming that promotes it. With the consent of the appellant, R.B.W.'s counsel at the appeal provided a further update: R.B.W. attends a weekly literacy program to improve his reading and has missed no sessions of the Forensic Sexual Behaviour Program.

Conclusion

[133] I am satisfied the sentencing judge's one error in principle was not an error that impacted R.B.W.'s sentence. Therefore, her analysis of the relevant sentencing principles and how they should be applied in relation to this offender for this offence is owed significant deference on appeal. Having thoroughly considered the circumstances in this case, she concluded the criteria for a conditional sentence had been met. This determination also attracts deference. By operation of the Supreme Court of Canada's decision in *R. v. Sharma*,[106] a CSO was not an available

[106] S*upra* note 34.

sentence for R.B.W. It is now and, in accordance with the sentencing judge's reasons, should be imposed.

Disposition

[134] I would grant leave to appeal, dismiss the appeal and order that R.B.W. serve the remainder of his sentence of two years less a day as a conditional sentence followed by 24 months' probation, each on the terms set out by the sentencing judge.

Derrick J.A.

Concurred in:

Fichaud J.A.

Dissenting Reasons:

Introduction

[135] I have had the benefit of reading the reasons of Derrick J.A., and, with respect, I cannot agree. For the reasons that follow, a Conditional Sentence Order (CSO) was not available to the sentencing judge at the time it was imposed. By sentencing R.B.W. to a CSO, she erred in principle. A review of the sentencing judge's decision leads me to conclude she essentially "reverse engineered" the sentence to allow her to impose a CSO. I do not agree that the imposition of two years less a day is an appropriate sentence in these circumstances.

[136] Having found an error in principle, no deference is owed to the trial judge, and I must conduct my own sentencing analysis.

[137] The majority, by failing to recognize the significance of the sentencing judge's error, proceeds to conduct an analysis of her decision on the wrong standard of review.

[138] I would grant leave to appeal, allow the appeal, and impose a custodial sentence of 48 months less any time served on the CSO.

[139] I will start by addressing the third issue considered by my colleagues. It is not necessary to address the first two issues based on my conclusion that the trial judge erred in finding s. 742.1(c) of the *Criminal Code* overly broad.

Did the sentencing judge err in finding s. 742.1(c) of the *Criminal Code* overly broad?

[140] Section 742.1(c) at the time of R.B.W.'s sentencing provided:

> **Imposing of conditional sentence**
>
> 742.1 If a person is convicted of an offence and the court imposes a sentence of imprisonment of less than two years, the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the conditions imposed under section 742.3, if […]
>
> > (c) the offence is not an offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 14 years or life; […]

[141] R.B.W. was charged pursuant to s. 155 of the *Criminal Code*. It provides:

> **Incest**
>
> 155 (1) Every one commits incest who, knowing that another person is by blood relationship his or her parent, child, brother, sister, grandparent or grandchild, as the case may be, has sexual intercourse with that person.
>
> **Punishment**
>
> (2) Everyone who commits incest is guilty of an indictable offence and is liable to imprisonment for a term of not more than 14 years […]

[142] Incest is an offence, which was prosecuted by way of indictment, for which the maximum term of imprisonment is 14 years. Therefore, a CSO was unavailable to the sentencing judge.

[143] Relying on the decision of the Ontario Court of Appeal in *R. v. Sharma*, 2020 ONCA 478,[107] the sentencing judge found s. 742.1(c) infringed s. 7 of the

[107] I will refer to the Ontario Court of Appeal decision as *Sharma* and the Supreme Court of Canada decision as *R. v. Sharma*.

Charter. Therefore, she reasoned a CSO was available to her. The court in *Sharma* concluded:

> [174] I conclude that the impugned provisions are contrary to s. 7 of the *Charter* because they resulted in the deprivation of Ms. Sharma's liberty in a manner that was not in accordance with the principle of fundamental justice of overbreadth. There is no rational connection between the impugned provisions' purpose and some of their effects.

[144] In her decision, the sentencing judge agreed with the reasoning in *Sharma*:

> [134] I agree with *Sharma* that linking seriousness of the offence exclusively to the maximum penalty results in the provision being overly broad. […]
>
> [136] I therefore conclude that Section 742.1(c) is overbroad and infringes [R.B.W.'s] Section 7 rights.

[145] The Supreme Court of Canada overturned *Sharma* in *R. v. Sharma*, 2022 SCC 39. It expressly disagreed with the reasoning of the Ontario Court of Appeal. The Supreme Court first set out the rationale for the exclusion of certain offences from a CSO:

> [100] Parliament identified certain offences for which conditional sentences would not be available. The exclusionary provisions are precise: only specific offences or categories of offences trigger their application. Thus, Parliament sought to impose bright-line limitations on the availability of conditional sentences.
>
> [101] It is clear, from the text, context, scheme and extrinsic evidence, that a desire to enhance consistency in the conditional sentencing regime by making imprisonment the typical punishment for certain serious offences and categories of offences was the object of these amendments. This is the *purpose* of the exclusionary provisions.
>
> [102] The *means* by which Parliament achieved this purpose was to remove the availability of a conditional sentence for certain offences and categories of offences. In doing so, Parliament left open the possibility that relatively less serious criminal behaviour can receive a non-carceral sentence (suspended sentence, probation, conditional discharge, etc.) or a flexible carceral sentence (intermittent sentence). Parliament made clear, however, that an offender should generally be sentenced to a term of imprisonment for offences listed in the exclusionary provisions.
>
> [103] Finally, the *effect* of the exclusionary provisions of s. 742.1 is to reduce the number of offenders who serve their sentences in the community.
>
> [Emphasis in original.]

[146] The Supreme Court then addressed, head on, the errors committed by the Ontario Court of Appeal, finding it erred in three ways:

> [104] The Court of Appeal found "no rational connection between the impugned provisions' purpose and some of their effects" (para. 174). Inasmuch as the impugned provisions prevent offenders who commit non-serious offences from receiving a conditional sentence, they are overbroad (para. 174). Maximum sentence, which the provisions use as a marker of seriousness, is not, in the Court of Appeal's view, a suitable proxy (para. 164).
>
> [105] As we have explained, in enacting the impugned provisions, Parliament intended to enhance consistency in the conditional sentencing regime by making imprisonment the typical punishment for certain serious offences and categories of offences. ***Given this purpose, the Court of Appeal erred in three ways. First, maximum sentence is a suitable proxy for seriousness. Second, the definition of a serious offence is a normative assessment in respect of which Parliament must be granted significant leeway. And finally, the Court of Appeal confused seriousness of an offence with the circumstances of an offender and their moral culpability.*** We explain each point in turn.
>
> [106] First, this Court has *repeatedly* accepted that the maximum sentence for an offence is a reflection of, and a proxy for, its seriousness (*R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at paras. 36 and 56; *R. v. Friesen*, 2020 SCC 9, at paras. 95-96; *R. v. Parranto*, 2021 SCC 46, at para. 60; *R. v. St-Cloud*, 2015 SCC 27, [2015] 2 S.C.R. 328, at para. 60; *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711, at p. 734). In many areas, Parliament has structured policies using maximum sentence as the measure for seriousness — e.g., the availability of absolute and conditional discharges (*Criminal Code*, s. 730(1)); record suspensions (*Criminal Records Act*, R.S.C. 1985, c. C-47, s. 4(2)(b)); and inadmissibility to Canada in the immigration context (*Immigration and Refugee Protection Act*, S.C. 2001, c. 27, s. 36(1)(a)). In the present case, Parliament's primary aim was to enhance consistency in sentencing. It determined that bright-line rules, drawn by reference to the maximum sentence, are the best way to achieve this goal. Deference towards Parliament is particularly apt given that the concept of "serious offences" is not subject to precise definition.
>
> [107] This leads us to the second error we identify in the Court of Appeal's overbreadth analysis. Reasonable people may disagree about which offences are "serious" enough to warrant jail sentences. These are judgment calls, and there is no obvious reason to prefer one or the other. Ultimately, as this Court has maintained, the call rests not with the preferences of judges, but with those collectively expressed by Parliament as representatives of the electorate. As explained in *R. v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130, at para. 45:
>
> > Parliament has the power to make policy choices with respect to the imposition of punishment for criminal activities and the crafting of

> sentences that it deems appropriate to balance the objectives of deterrence, denunciation, rehabilitation and protection of society.
>
> [108] ***Finally, to the extent the Court of Appeal pointed to Ms. Sharma's circumstances as demonstrative of Parliament's overreach, it collapsed the concept of seriousness of the offence into the concepts of circumstances of the offender and particulars of the crime.*** On this point, we endorse the sentencing judge's comments: "[Ms. Sharma] committed a serious offence in importing cocaine — a reality undisturbed by her personal culpability or mitigating factors" (para. 141 (emphasis added)). The Court of Appeal for Saskatchewan made a similar point in *R. v. Neary*, 2017 SKCA 29, [2017] 7 W.W.R. 730: "***The gravity and seriousness of the offences are not attenuated by the personal circumstances of the accused***" (para. 39). We accept entirely that the circumstances which led Ms. Sharma to import drugs are tragic and that her moral culpability was thereby attenuated (which was reflected in a sentence of 18 months rather than the six years initially proposed by the Crown). But those facts do not make importation of a Sch. I substance, particularly in the quantity she carried, any less serious.
>
> [109] ***Given the purpose of the impugned provisions articulated above and their effects, we conclude that they are not overbroad***.
>
> [Emphasis added.]

[147] The sentencing judge here did exactly what the Ontario Court of Appeal did in *Sharma* – she collapsed the concept of the seriousness of the offence into the concepts of the circumstances of the offender and particulars of the crime. She arrived at a sentence of under two years, taking into account the particular circumstances of R.B.W. and concluded she could impose a sentence of under two years. This is evidenced by her decision where she says:

> [16] In my view the most appropriate approach is to reach a determination as to the appropriate sentence before considering the constitutional challenge. Should I reach the conclusion that the appropriate sentence to be imposed upon [R.B.W.] is two years imprisonment or more, there would be no need, nor would be appropriate in my view as a [Provincial] Court Judge to delve into the constitutional fitness of the provision. I will begin then with the principles and objectives of sentence.

[148] Over the next forty paragraphs, she discussed R.B.W.'s personal circumstances which were derived from the IRCA, a Comprehensive Forensic Sexual Behaviour Pre-sentence Assessment, and a Pre-Sentence Report. She then discussed general principles of sentencing before concluding she could impose a sentence of imprisonment of less than two years.

[149] By failing to focus on the seriousness of the offence as opposed to R.B.W.'s personal circumstances, she erred.

[150] Her approach also led her to de-emphasizing certain factors in order to allow her to fit R.B.W.'s circumstances into a CSO.[108] The majority has gone down the same path by agreeing the sentencing judge was not in error. Her starting point was wrong which caused her to craft a sentence which was manifestly unfit and unavailable.

[151] The fact that Bill C-5 has removed the prohibition against conditional sentences for offences with a maximum sentence of fourteen years does not change the nature of the sentencing judge's error. She allowed the gravity and seriousness of the offence to be attenuated by the personal circumstance of the accused. By doing so, she came to a sentence that was disproportionate to the gravity of the offence (s. 718.1 of the *Criminal Code*).

[152] Having found the sentencing judge committed an error in principle, I will now turn to what I consider to be the appropriate sentence under these circumstances.

Is a CSO available on the facts of this case?

[153] Clause 14 of Bill C-5 has changed the text of s. 742.1 of the *Criminal Code* to remove the prohibition against imposing a conditional sentence in this case.

[154] Section 11(i) of the *Charter* provides:

> 11. Any person charged with an offence has the right:
>
> […]
>
> i. if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

[155] As a result, because I am sentencing R.B.W. anew, he is entitled to the benefit of a CSO if it is available on the facts (see *R. v. Poulin*, 2019 SCC 47 at ¶60).

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[108] I will address those factors in more detail when considering whether a CSO is now available to R.B.W. later in these reasons.

[156] Section 742.1 of the *Criminal Code* now reads as follows:

> **Imposing of conditional sentence**
>
> 742.1 If a person is convicted of an offence and the court imposes a sentence of imprisonment of less than two years, the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the conditions imposed under section 742.3, if
>
> > (a) the court is satisfied that the service of the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2;
> >
> > (b) the offence is not an offence punishable by a minimum term of imprisonment;

[157] Sections 718 to 718.2 outline the purposes and principles of sentencing:

> **Purpose**
>
> 718 The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
>
> > (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
> >
> > (b) to deter the offender and other persons from committing offences;
> >
> > (c) to separate offenders from society, where necessary;
> >
> > (d) to assist in rehabilitating offenders;
> >
> > (e) to provide reparations for harm done to victims or to the community; and
> >
> > (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.
>
> […]
>
> **Fundamental principle**
>
> 718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.
>
> **Other sentencing principles**

718.2 A court that imposes a sentence shall also take into consideration the following principles:

(a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,

(i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or gender identity or expression, or on any other similar factor,

(ii) evidence that the offender, in committing the offence, abused the offender's intimate partner or a member of the victim or the offender's family,

(ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,

(iii) ***evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim***,

(iii.1) ***evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation***,

(iii.2) evidence that the offence was committed against a person who, in the performance of their duties and functions, was providing health services, including personal care services,

(iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization,

(v) evidence that the offence was a terrorism offence,

(vi) evidence that the offence was committed while the offender was subject to a conditional sentence order made under section 742.1 or released on parole, statutory release or unescorted temporary absence under the *Corrections and Conditional Release Act*, and

(vii) evidence that the commission of the offence had the effect of impeding another person from obtaining health services, including personal care services,

shall be deemed to be aggravating circumstances;

(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;

> (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
>
> (e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.
>
> [Emphasis added.]

[158] In *R. v. Proulx*, 2000 SCC 5, Chief Justice Lamer outlined the analytical framework a court should follow when deciding to impose a CSO. First, the judge must exclude two possibilities: probationary measures and a penitentiary term:

> 58 A similar approach should be used by Canadian courts. Hence, a purposive interpretation of s. 742.1(*a*) does not dictate a rigid two-step approach in which the judge would first have to impose a term of imprisonment of a fixed duration and then decide if that fixed term of imprisonment can be served in the community. In my view, the requirement that the court must impose a sentence of imprisonment of less than two years can be fulfilled by a preliminary determination of the appropriate range of available sentences. Thus, the approach I suggest still requires the judge to proceed in two stages. However, the judge need not impose a term of imprisonment of a fixed duration at the first stage of the analysis. Rather, at this stage, the judge simply has to exclude two possibilities: (a) probationary measures; and (b) a penitentiary term. If either of these sentences is appropriate, then a conditional sentence should not be imposed.
>
> 59 In making this preliminary determination, the judge need only consider the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2 to the extent necessary to narrow the range of sentence for the offender. The submissions of the parties, although not binding, may prove helpful in this regard. For example, both parties may agree that the appropriate range of sentence is a term of imprisonment of less than two years.
>
> [Emphasis in original.]

[159] I am unable to exclude a penitentiary sentence. Incest is a very serious offence and R.B.W.'s moral culpability is high.

[160] There are significant aggravating factors present in this case, including a breach of trust (s. 718.2(a)(iii)).

[161] It was because of the relationship of trust between R.B.W. and his daughter that he was in a position – and had the opportunity – to commit the offence. His conduct is at the very extreme end of the continuum of breach of trust.

[162] Although I need not consider the sentencing judge's treatment of the breach of trust, it is clear that she underemphasized it, as does the majority on this appeal.

[163] The sentencing judge, after noting that R.B.W. was in a position of trust, suggests it needed to be put in context (¶80). She then said:

> [81] [R.B.W.'s] role as father to N.W. prior to the offence was limited. There was a low amount of contact during her teen years, but she did visit his home and stayed with him and her half-siblings on occasion. N.W. reported to the authorities that at times she didn't like to live with her mother as the latter's boyfriend was cruel, so she lived at times between her father's and her sister's houses. The evidence available to me makes it difficult to discern the time period or frequency of this contact . N.K.'s emotional and financial security were not dependent upon [R.B.W.]. Put simply, he was not in *loco parentis* with respect to his daughter when the offence occurred.

[164] The majority also underscores the severity of the breach of trust. In ¶63 and 66, the majority states:

> [63] The appellant argues that N.K.'s low intellectual functioning meant she did not really appreciate the conduct was wrongful, making her akin to being a child. This does not accord with the information the sentencing judge had before her. The author of the Comprehensive Forensic Sexual Behaviour Assessment described watching the video-recording of N.K.'s police interview in which N.K. indicated her awareness that incest is socially proscribed. The Assessment states: "Specifically, she became defensive, denied having "sex" with a family member and stated that this was "gross", and terminated the interview without making any disclosure". N.K. had significant vulnerabilities but she did not lack the capacity to understand the societal prohibition against incest. It is clear she knew sexual intercourse with R.B.W. was prohibited.
>
> [...]
>
> [66] The sentencing judge did not disregard R.B.W.'s culpability for the offence nor did she underemphasize the breach of trust. She took account of R.B.W.'s breach of trust in relation to the facts in this particular case. She recognized that the breach of trust represented by a father having sexual intercourse with his daughter has a context. She carefully identified but did not minimize that context:
>
> > In keeping with the obligation to achieve a proportionate sentence, the breach of trust component of my analysis must be contextual. If breach of trust is seen on a continuum, the younger the child, the more egregious the conduct. The seriousness in duration of the criminal conduct is also relevant. So too are the personal circumstances of the offender, including his level of cognitive functioning, and the degree of trust on the particular

> relationship. [R.B.W.] was not N.K.'s primary care giver as she grew up. The extent and nature of their relationship when she was a child or teenager is not in any sense clear. I have no evidence that he was the person in the position of authority over her, other than the fact that from time to time she stayed in his home when there were issues between she and her mother. In terms of [R.B.W.] having committed a breach of trust as a father, notwithstanding his own vulnerabilities, he should not have participated in the sexual activity and bears responsibility for his decision to do so. He knew the conduct was impermissible.

[165] These passages suggest the victim was somehow complicit in the commission of the offence, thereby reducing the moral culpability of R.B.W. and the seriousness of the breach of trust. Even if on some level N.K. knew it to be wrong, how does that mitigate against the seriousness of the breach of trust?

[166] The sentencing judge also downplayed the breach of trust based on the so-called consensual aspect of the sexual activity:

> (69] Without question, Section 155 is intended to protect vulnerable family members. Crown counsel was correct to say that N.K.'s vulnerabilities are an important factor in this case. Vulnerability is easily established in the case of a child victim, but the issue becomes more complicated when the other person is over the age of 16. Here, N.K. was about 20 years old in 2015, and 23 years old in 2019. On the basis of her age alone, and in the circumstances of consensual sexual activity where neither individual is described as "instigator", this case is distinguishable from others where the breach of trust component of the offence is much more significant.

[167] Any ostensible consent N.K. gave to the sexual activity was of no relevance as there is no legal consent to incest.

[168] The sentencing judge de-emphasized a significant aggravating factor which should, in and of itself, preclude this case from a CSO. Her decision suggests sexual intercourse with a child who is biologically an adult cannot amount to a significant breach of trust, no matter the circumstances of the child.

[169] Second, it implies that a child can "consent" to sexual intercourse with a parent.

[170] The imbalance between a parent and child is further complicated if the child has cognitive vulnerabilities.

[171] In *R. v. R.P.F.*, 1996 NSCA 72, this Court noted the difficulty with arguing consent in an incestuous relationship:

> [29] One of the difficulties with this argument by the appellants is that the consent given in an incestuous relationship may be mere acquiesence as pointed out by the expert authority quoted by Meredith, J. in **R. v. M.S., supra**, in the following passage:
>
> > In relation to the feasibility of "consensual" sexual intercourse between a parent and child at any age, I believe that there are factors which make it unrealistic to speak of true consent. My primary reasons for saying this relate to the fact that the balance of power between a parent and child is unequal, and because the relationship between a father and daughter does not begin at the age of majority but the dynamics begin earlier in childhood.
> >
> > There are frequently characteristics both in the parent, child and situation which detracts from the reality of consent. Many studies which have examined the adolescent girl victim have found that the incestuous father tends to be domineering, authoritarian, moralistic and demanding of obedience . . .
>
> [30] The dynamics of the relationship between a mother and her son are in my view, no less complex. Another difficulty with this submission of the appellants is, that on the facts of this case, the youngest son, who was not charged, was fifteen years old when he said he began having intercourse with his mother. Was he an adult capable of giving an informed consent? The problem is well summarized in the respondent's factum:
>
> > . . . The appellants claim they are consenting adults. It is clear, in their respective cases, they are adults. The question is, however, at what age does one become an adult? Is it the definition of "adult" in the Young Offenders Act? Does provincial age of majority legislation govern? Is it more appropriate to look at the age of consent in s.150.1 of the Code? What about s.16 of the Canada Evidence Act? The difficulties do not end at defining what is an "adult" for the purposes of determining what is a "consenting adult". For instance, is a 30-year-old mentally handicapped individual, who is a party to incest and does not resist, a "consenting adult"?
>
> [31] ***There are some activities which cannot be allowed, even with consent of the participants***, for example, assault causing bodily harm (Jobidon), assisted suicide (**Rodriguez**), sexual exploitation of a young person, s.153 (**R. v. Hann** (1992), 15 C.R.(4th) 355 (Nfld.C.A.)) and obscene performances, s.167(1) (**R. v. Mara**, 1996 O.J. No.364 (Q.L.) (Ont.C.A.)). ***Incest is one of those offences***. The denial of the defence of consent to the offence of incest does not, in my opinion, violate the principles of fundamental justice, nor have the appellants

> demonstrated that the operation of s.155 infringes their rights guaranteed by s. 7 of the **Charter**. It is therefore not necessary to deal with s.1 of the **Charter**. The appeals against conviction should accordingly be dismissed.
>
> [Emphasis added.]

[172] The extent of the breach of trust must be informed by N.K.'s vulnerabilities in addition to her biological age, not minimized because of it. Protection of vulnerable family members is one of society's objectives the offence aims to address (*R.P.F.*, at ¶25).

[173] The pregnancy and birth of the child is also a significant aggravating feature under s. 718.2(iii.1). First because of increased risk of harm to N.K. that arises from unprotected intercourse, because of the actual harm to N.K. (the loss of the child) and the genetic defects in the child born of such conduct.

[174] The sentencing judge noted that it was an aggravating factor that R.B.W. did not use a contraceptive, but then she again discounts this aggravating factor by taking into account that N.K. also did not use contraceptives:

> [83] It is an aggravating fact that [R.B.W.] did not use contraception to prevent the pregnancy, but given the particular facts in this case, in particular N.K.'s age, I should also take into account that she did not use contraception in order to prevent a pregnancy.

[175] A CSO, in these circumstances, fails to give effect to the fundamental purpose and principles of sentencing. Proportionality requires that a sentence be commensurate with society's condemnation of the offence and the offender's moral culpability. In *R. v. Nasogaluak*, 2010 SCC 6, the Supreme Court held:

> [42] For one, it requires that a sentence not *exceed* what is just and appropriate, given the moral blameworthiness of the offender and the gravity of the offence. In this sense, the principle serves a limiting or restraining function. However, the rights-based, protective angle of proportionality is counter-balanced by its alignment with the "just deserts" philosophy of sentencing, which seeks to ensure that offenders are held responsible for their actions and that the sentence properly reflects and condemns their role in the offence and the harm they caused (*R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 81; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at pp. 533-34, *per* Wilson J., concurring). Understood in this latter sense, sentencing is a form of judicial and social censure (J. V. Roberts and D. P. Cole, "Introduction to Sentencing and Parole", in Roberts and Cole, eds., *Making Sense of Sentencing* (1999), 3, at p. 10). Whatever the rationale for proportionality, ***however, the degree of censure required to express society's***

> ***condemnation of the offence is always limited by the principle that an offender's sentence must be equivalent to his or her moral culpability***, and not greater than it. The two perspectives on proportionality thus converge in a sentence that both speaks out against the offence and punishes the offender no more than is necessary.
>
> [Emphasis added.]

[176] R.B.W. committed an offence against one of the most vulnerable members of our society – an African Nova Scotian woman, living in the community with support, with significant cognitive vulnerabilities. It is not only an affront to societal values in general, it has a negative impact on the African Nova Scotian community. The effect of R.B.W.'s conduct is aptly summarized in the IRCA where the author states:

> [R.B.W.'s] behaviour is egregious. [R.B.W.] is clearly remorseful for his behaviours which have led to him being before the Court. He is mindful of the impacts of [*sic*] his behaviour continues to have on his, daughter, his children and extended family. He is also aware of the impacts his behavioural choices have had on him in the ANS community. He has a long road to being re-integrated and welcomed back into the community. The community may place their own sanctions on his capacity to be with vulnerable members (children and seniors) of the community. Presently, [R.B.W.] reports being impacted by social isolation from the larger community.

[177] A CSO in these circumstances fails to recognize the high moral culpability of R.B.W. and does not express the degree of censure required to express society's condemnation of the offence of incest.

[178] For all of these reasons, I am not satisfied that this is an appropriate case for a CSO.

What is the appropriate period of incarceration?

[179] There is no doubt that R.B.W. has encountered significant obstacles in his life, that he had maintained gainful employment, and he has participated in counselling to which he has been referred. These accomplishments are to his credit.

[180] The IRCA sets out those difficulties he has endured. However, there are occasions when the gravity of the offence requires a custodial sentence be served. This is one such case.

[181] There are a number of important mitigating factors present: R.B.W.'s guilty plea (albeit in the face of a strong Crown case), his remorse, and his compliance with bail. However, as I have outlined above, there are significant aggravating factors: the intersecting vulnerabilities of N.K., the breach of trust, the baby who resulted from the conduct, that this was the second time this conduct occurred. The gravity of the offence was significant, and R.B.W.'s moral culpability was high. Despite the respondent's good prospects for rehabilitation, a penitentiary sentence is required.

[182] The Crown in its factum has referred to sentencing decisions in other incest cases and summarized them as follows:

> [63] A review of similar – though not perfectly identical – cases demonstrates that a penitentiary sentence is appropriate in such circumstances:
>
> 1. *W.N.* [2018 ONSC 3443] – The offender engaged in sexual acts, including intercourse, with his developmentally-delayed adult daughter approximately 15 times. The offender pleaded guilty and was himself a victim of sexual abuse. The offender did have a dated record for sexual offending and was at above-average risk to reoffend. Six years' jail imposed.
>
> 2. *R. v. D.R.,* 2020 NSPC 46 – The offender had intercourse with his developmentally delayed adult daughter on five or six occasions. The offender pleaded guilty, was himself the victim of sexual abuse, was a low risk to reoffend, and had no prior criminal record. 42 months' jail imposed.
>
> 3. *R. v. W.P.K.,* 2012 NSSC 299 – The offender had a sexual relationship with his developmentally-delayed adult daughter over several months. After trial, the judge found that the daughter often initiated the sexual intercourse, and the parties did not have a parental relationship. The offender had some cognitive difficulties, a lengthy criminal record, was a moderate-high risk, and did not accept responsibility for his actions. The offender had also been subject to severe bail conditions for 18 months, which contributed to the sentencing judge rejecting a four year sentence. 30 months' jail imposed.
>
> Although the conduct in those cases occurred on more occasions than in the instant case, the conduct in *W.N.*, *D.R.*, and *W.P.K.* also did not result in a pregnancy and birth of a child as the Respondent's conduct did.

[183] In *R. v. J.C.J.*, 2017 ONSC 6704, the offender had sexual intercourse with his vulnerable 18-year-old daughter on one occasion. A five year sentence was imposed in that case and upheld on appeal (*R. v. J.C.J.*, 2020 ONCA 228).

[184] Although every case is different, the sentences range from thirty months (with strict bail conditions) to six years.

[185] A custodial sentence is consistent with the principles of denunciation and deterrence.

[186] Incest is a policy-driven offence. It is directed at preserving the integrity of the family and avoiding the increased risks of genetic defects in the children born of incestuous relations. In *R.P.F.*, this Court held:

> [25] In my view, the restrictions imposed by s. 155 of the *Criminal Code* are relevant to the societal objective of preserving the integrity of the family, prevention of genetic defects and the protection of vulnerable family members. As was found to be the case with assisted suicide in *Rodriguez*, *supra*, a blanket prohibition is preferable to a law which, if exceptions were allowed, could lead to other abuses and not adequately attain the societal objectives. […]

[187] It is societal condemnation of the act that is being denounced and generally deterred. General deterrence is, therefore, particularly pressing for this type of offence.

[188] Taking into account the principles of sentencing, the aggravating and mitigating factors, proportionality and denunciation, and R.B.W.'s personal circumstances as outlined in the three reports I referred to above, I am of the view that a 48-month custodial sentence is appropriate in these circumstances. R.B.W. should be given credit for the time he has served on the CSO.

Conclusion

[189] I would grant leave to appeal, allow the appeal, and impose a 48 month custodial sentence less time served while under the CSO.

Farrar J.A.