

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. L.P.*, 2022 NSPC 23

Date: 20220613

Docket: 8406207

Registry: Dartmouth

Between:

Her Majesty the Queen

v.

L. P.

Restriction on Publication: Section 486.4 and Section 486.35

Judge:	The Honourable Judge Theodore Tax,
Heard:	April 11, 2022, in Dartmouth, Nova Scotia
Decision	June 13, 2022
Charge:	Section 271 of the Criminal Code of Canada
Counsel:	Stephanie Morton, for the Nova Scotia Public Prosecution Service Drew Rogers, for the Counsel for Defence

A Ban on Publication of the contents of this file has been placed subject to the following conditions:

Section 486.4 & 486.5: Bans ordered under these Sections direct that any information that will identify the complainant, victim or witness shall not be published in any document or broadcast or transmitted in any way. No end date for the Ban stipulated in these Sections.

By the Court:

[1] Following a 3-day trial of this matter, the Court convicted Mr. L.P. of one count of sexual assault of C.M., on or about March 20, 2019, at or near Dartmouth, Nova Scotia, contrary to section 271 of the **Criminal Code**. The Crown had proceeded by way of summary conviction. The Court's decision was rendered on January 17, 2022, with the detailed reasons for judgement being reported at **R. v. L.P.**, 2022 NSPC 6.

Positions of the Crown and Defence:

[2] The Crown Attorney submits that the fit and appropriate sentence for this offence is a period of 18 months imprisonment in a provincial facility followed by 30 months on probation. It is the position of the Crown that a sentence of that length appropriately addresses the paramount principles of denunciation and deterrence, both general and specific. The probation following the term of imprisonment would address the need for intensive rehabilitation through programs and counselling, considering principles of proportionality, parity and rehabilitation.

[3] The Crown Attorney also seeks the following ancillary orders: (1) a DNA order pursuant to section 487.051 of the **Code** (section 271 is a primary designated offence); (2) a **SOIRA** order for 10 years pursuant to section 490.013 (2)(a) **Criminal Code**; (3) a firearms prohibition order for 10 years pursuant to section 110 of the **Code**; and an order pursuant to section 743.21 of the **Code** prohibiting L.P. from communicating with C.M. during his custodial sentence.

[4] For his part, Defence Counsel submits that the just and appropriate sentence in this case, taking into account all of the purposes and principles of sentencing, the very positive pre-sentence report for Mr. L.P. and the very low likelihood of any re-offence, would be a Conditional Sentence Order ("CSO") of a sentence of imprisonment in the community. Defence Counsel submits that the CSO should be followed by a period of probation. It is the position of the defence that a CSO is an available sanction, given the fact that the Crown elected to proceed summarily on the charge before the Court.

[5] Defence Counsel submits that, in all the circumstances of this case, there is no need to separate L.P. from society even for a limited period given the fact that specific deterrence and denunciation of the unlawful conduct have been achieved

through the stigma of the conviction, being under court ordered release conditions for about three years and the fact that there has been a complete rupture in the relationship between L.P. and C.M. Defence Counsel points out that the Crown recommends the maximum term of imprisonment for a sexual assault charge which preceded by way of summary conviction and an order of that length, given the facts and circumstances of this case, would be unduly long and harsh.

[6] Defence Counsel does not take issue with any of the ancillary orders sought by the Crown Attorney.

The Circumstances of the Offence:

[7] The offence occurred on or about March 20, 2019, in Dartmouth, Nova Scotia. The complainant, C.M. had only recently learned that she had a second cousin (L.P.) who was a little older than her and lived in a nearby community. C.M. is an only child and as she got to know L.P. very well through regular visits with him in his community or in her community and, for a period of time, with him staying at her residence when he worked in her community. She regarded L.P. as the brother that she never had. Since her boyfriend was away during the Spring Break, she and her cousin decided to spend a couple of days in the HRM. C.M. drove her vehicle to the HRM and he arranged for them to stay at his aunt's house in Dartmouth.

[8] On their second evening in the HRM, C.M. and L.P. consumed some alcohol and cannabis during the evening. This was the first time that C.M. who was 18 years old at the time, had ever consumed alcohol and cannabis at the same time. C.M. had changed into her pyjamas for the night and returned to the main area of the lower level in the house to watch a movie with him. The two of them were beside each other on the couch as they watched a movie. C.M. fell asleep or passed out on the couch from the consumption of those substances and from being tired at that late hour. In a brief "glimpse" of consciousness, she felt that L.P. had touched her bare breast under her top and also inserted his finger into her vagina, under her thong underwear which was under her pyjama bottoms.

[9] The next morning, as she was driving them back to her home, she confronted L.P. about what she believed to have occurred during the evening. He initially said that what she had said was not a dream, but then said that he only said that based on a bet that he could fool her for a period of time with a lie and in subsequent texts, denied that any inappropriate actions on his part.

[10] Once C.M. returned to her home community, she spoke with a friend about what had occurred in Dartmouth, and she went to the local hospital for evaluation by a Sexual Assault Nurse Examiner. The results of the DNA analysis were obtained from the laboratory analysis, and it confirmed that L.P.'s DNA was located on C.M.'s underwear. The laboratory analysis could not indicate the source of that DNA but did establish that his DNA had been on her thong underwear. During the trial, C.M. had indicated that she kept her underwear on under her pyjama bottoms when she got ready for bed and that, at no time, had her underwear come in contact with any of the sheets where L.P. had slept the previous evening.

[11] In addition to C.M.'s evidence and the DNA evidence, the Crown also introduced two voluntary interviews of L.P. conducted by police officers. During an initial interview conducted shortly after C.M. provided a statement to the police, L.P. had stated that nothing untoward had occurred while he and C.M. were in Dartmouth during the Spring break. During a subsequent interview with a different police officer, towards the end of the interview, L.P. stated that C.M. had taken his hand while they were on the couch and placed it under her clothes on top of her bare breast. He also acknowledged that a short time after that occurred, he inserted his finger into her vagina for a few moments before realizing it was his cousin, who was asleep and lying beside him, and he got up and went to the bedroom in the lower level of the house to sleep for the evening.

[12] The Court concluded that the Crown has established the *actus reus* and the *mens rea* of the offence of sexual assault contrary section 271 of the **Criminal Code** beyond a reasonable doubt and found L.P. guilty of the charge before the Court.

Victim Impact Statement:

[13] C.M. attended in court and read her Victim Impact Statement into the record. She indicated that L.P. was her second cousin and she felt close to him both in age and the fact that he had become like a brother to her and best friend, describing him as the "sibling I never had." She stated that the close family connection that she felt to Mr. L.P. ended on March 20, 2019.

[14] As a result of the incident before the court, she was unable to sleep for the first week or stay in darkness alone. She experienced nightmares and constant flashbacks from the incident and for a period of time was not able to focus at school. Since the incident, she has experienced regular panic attacks and she has

not been able to have the same relationship that she previously had with her own boyfriend. She has completely avoided the consumption of alcohol and cannabis and had been in therapy to be able to cope with what occurred in March 2019. She also stated that she is afraid to go home or be near the room where Mr. L.P. stayed while he resided at her house.

[15] In addition, the Probation Officer contacted the victim, C. M., who stated that she regarded the offender as a friend and confidant, and he violated her trust. She stated that she now has a difficult time trusting anybody in her life.

Circumstances of the Offender:

[16] The offender, Mr. L.P., is currently 22 years old. At the time of the offence in March 2019, he was 19 ½ years old. He has no prior adult criminal record or any history of Youth Criminal Justice Act Dispositions.

[17] The offender has had no contact whatsoever with his biological mother and no contact with his father in the last eight months. He was raised by his grandparents who became his legal guardians when he was adolescent as they had full care of him. They provided a stable parental relationship and a supportive home environment. They are aware of the offence before the court and continue to support L.P.. He had left the family home to attend an IT program at a nearby community college, but after the first semester, he quit the program due to the offence before the court. Since March 2020, he has lived with his grandparents to assist with their care.

[18] Mr. L.P. has been in a long-term dating relationship with his girlfriend for the last 18 months and she is aware of the offence before the court. She is aware of the stress in his life due to the poor relationship with his parents and the fact that his grandmother suffering from dementia. She stated that he is a kind and courteous person, and she supports his efforts to upgrade his education and employment skills.

[19] The offender completed grade 12 and one semester at the community college. He plans to attend the community college for training in the trades related profession in the fall of 2022. When the Pre-Sentence Report was prepared in mid-March 2022, Mr. L.P. was unemployed, but he advised the Probation Officer that he was applying for jobs in the fishery. Defence Counsel advised the Court, during his sentencing submissions, that Mr. L.P. had just obtained employment at the fish plant in the local community.

[20] Mr. L.P. advised the Probation Officer that he is in good physical health, but he has been prescribed medications for anxiety and depression. With respect to alcohol use, the offender stated that he has not used alcohol the past three years which was part of the court ordered release. In terms of use of cannabis/marijuana, Mr. L.P. advised the Probation Officer that he takes cannabis oil to help him relax and to help him sleep.

[21] In terms of the assessment of community alternatives and resources, the Probation Officer indicated that the offender could benefit from full-time employment and additional education. It was noted that the upgrading of his employment and education skills could be accomplished as the offender had indicated that he plans to attend the community college this fall. While the Probation Officer indicated that, as a sexual offence, a comprehensive sexual offender assessment may be required to determine the match of the offender risk level to treatment, Defence Counsel submits that treatment is probably not required as Mr. L.P. is a very low risk to reoffend.

[22] In the final analysis, the Probation Officer indicated that Mr. L.P. is considered suitable for community disposition.

Purposes and Principles of Sentencing:

[23] Pursuant to section 718 of the **Code**, the fundamental purpose of sentencing is to protect society and to contribute to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions which have one or more of the following objectives: denunciation, deterrence, separation of offenders from society where necessary, rehabilitation, reparation, and the promotion of a sense of responsibility and acknowledgement of harm done in the offender.

[24] The determination of a just and appropriate sentence is highly contextual and is necessarily an individualized process which depends upon the circumstances of the offence and the offender: see **R. v. Lacasse**, 2015 SCC 64 para.1. On this point, the Supreme Court of Canada had also stated, in **R. v. M. (C.A.)**, [1996] 1 SCR 500 at paras. 91 and 92, that the determination of a just and appropriate sentence requires the trial judge to do a careful balancing of the societal goals of sentencing against the moral blameworthiness of the offender and the gravity of the offence while, at the same time, taking into account the victim or victims and the needs of and current conditions in the community.

[25] Given the circumstances of the offences, I find that denunciation of the unlawful conduct and specific and general deterrence are the important purposes of sentencing in section 718 of the **Code** which must be emphasized in the context of this sexual offence which was perpetrated on a vulnerable young woman who also happened to be related to him as a second cousin. However, given the fact that Mr. L.P. has no prior record of any convictions, this sentencing decision should also consider his rehabilitation, promoting a sense of responsibility in him and at the same time, acknowledging the harm done to the victim, in determining the just and appropriate sentence.

[26] In the sentencing decision, the Court must also consider the fundamental sentencing principle found in section 718.1 of the **Code** that the sentence must be proportionate to the gravity of the offence(s) and the degree of responsibility of the offender. Parliament has assessed the objective gravity of the offence for which Mr. L.P. has been found guilty, by legislating that a sexual assault offence contrary to section 271 of the **Criminal Code**, prosecuted by way of summary conviction is liable to a maximum imprisonment of 18 months, where the victim is over the age of 16 years. There is no mandatory minimum sentence for this offence.

[27] I find that Mr. L.P. committed a serious offence that violated the sexual integrity of his cousin for his own gratification while she was essentially unconscious and completely vulnerable. The impact of the sexual assault on the victim has been significant and she continues to experience several traumatic effects to this day. In this case, the Crown elected to proceed by way of summary conviction and in terms of that offence, I find that the gravity or seriousness of this offence is certainly very high.

[28] In assessing Mr. L.P.'s moral blameworthiness for this offence, I find that he also bears a very high degree of responsibility for the offence. As a family member of the victim, whom she regarded as the brother that she never had, although he did not stand in an official position of trust, the offence occurred in circumstances where he had a very close familial/trust relationship with the victim. In addition, when I consider that the offence occurred while the victim was essentially unconscious and completely vulnerable, there can be no doubt that the offender bears very high degree of responsibility or moral blameworthiness for the offence.

[29] In terms of other sentencing principles which are to be considered by the Court in imposing a sentence, section 718.2(a) of the **Criminal Code** mandates that a sentencing court must take into consideration any relevant aggravating or

mitigating circumstances relating to the offence(s) or to the offender in considering whether the sentence should be increased or reduced.

[30] Parliament has also enacted section 718.2(a) (iii.1) of the **Code** to direct a court imposing sentence to consider evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, as an aggravating circumstance in the imposition of a just and appropriate sentence.

[31] Section 718.2(b) of the **Criminal Code** stipulates that the judge imposing a sentence consider the so-called “parity” principle which reminds judges that the sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.

[32] On this point, I note that it is often difficult to find those similar cases, as the sentencing process is highly individualized, and it is based upon the circumstances of the offence and on the circumstances of the offender. It is important to remember that the fundamental principle of sentencing is proportionality and given the highly individualized nature of sentencing, there may be considerable disparity between defenders so long as the sentence ordered is proportionate to the gravity of the offence and the moral blameworthiness or culpability of the offender: see **R. v. Lacasse**, *supra*, at para. 92.

[33] In addition, in sections 718.2(d) and (e) of the **Criminal Code**, Parliament has codified principles of restraint to remind sentencing judges that an offender should not be deprived of liberty if a less restrictive sanction may be appropriate in the circumstances. Furthermore, the sentencing judge is required to consider all available sanctions other than imprisonment that are reasonable in the circumstances, with particular attention to the circumstances of aboriginal offenders.

Aggravating and Mitigating Circumstances:

[34] As I previously mentioned, section 718.2(a) of the **Criminal Code** requires the Court to consider any relevant aggravating and mitigating circumstances which relate to the offences or to the offender in considering whether the sentence imposed by the Court should be increased or reduced.

[35] I find that the Aggravating Circumstances are as follows:

- The offender, in committing the offence, committed a serious violation of the human dignity and sexual integrity of the victim, who was a member of the offender's family - section 718.2(a)(ii) **Code**;
- The offender, in committing the offence, abused a position of trust as the victim, being an only child, regarded him as a best friend and brother - section 718.2 (a)(iii) **Code**;
- The offence has had a significant and ongoing traumatic impact on C.M., considering her age and other personal circumstances - section 718.2(a)(iii.1) **Code**;
- The offence occurred while the victim was completely vulnerable and essentially unconscious.

[36] I find that the Mitigating Circumstances are as follows:

- Mr. L.P. is a youthful first-time offender, who was 19 ½ years old at the time of the offence and is now 22 years old;
- He has no prior criminal record and there were no violations of his terms of release;
- He has positive community support from his grandparents, who have acted as his parents for some time and his long-term girlfriend;
- He has recently obtained employment and plans to return to a community college program in the fall;
- Given the circumstances of the offence as well as Defence Counsel's submissions that Mr. L.P. is likely a low risk to reoffend, the Pre-Sentence Report indicates that community-based programming could be provided.

Sentencing Precedents to Establish a Range of Sentence:

[37] As I indicated previously, the parity principle found in section 718.2(b) of the **Code** requires the Court to consider that a sentence imposed should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. A review of the sentencing precedents provided by counsel or reviewed by the Court may be considered to establish a range of sentence, as a guideline for the trial judge. It does not, however, create any hard and fast rules, nor does the consideration of an appropriate range preclude a greater sentence

where the emphasis is upon denunciation, deterrence and the gravity of the offence or a lesser sentence based upon special or significant mitigating circumstances.

[38] In support of the Crown Attorney's sentencing position, that the offender had committed a very serious offence and that his actions represented a high degree of moral blameworthiness for which a CSO would be inconsistent with the key sentencing principles applicable in this case, namely denunciation of the unlawful conduct and deterrence, she provided several recent cases which involved the same offence.

[39] In **R. v. J.J.W.**, 2012 NSCA 96, at para. 32, our Court of Appeal stated that persons convicted of serious sexual assaults must appreciate that the principles of sentencing include specific and general deterrence and denunciation, and such offences will attract serious consequences.

[40] The Crown Attorney also submits that courts have more recently recognized that the law needs to be brought into harmony with a new societal understanding of the gravity of sexual offences and the severity of the impact that sexual violence has on victims, their families and society at large. She submits that courts have started to consider the comments of the Supreme Court of Canada in **R. v. Friesen**, 2020 SCC 9 at para. 74-75 in applying the proportionality principle in cases involving adults. For example, in **R. v. Brown** 2020 ONCA 657 at para. 59, the Court stated that: "There is no reason to think that it does not also apply to sexual offences at large. Taking into account the harmfulness of the offences to ensure that they reflect the "life altering consequences" that can and often do flow from sexual violence."

[41] In this case, the Crown Attorney submits that Mr. L.P. committed a serious sexual assault and that his actions demonstrated a high degree of moral blameworthiness or culpability. The Crown Attorney submits that Mr. L.P.'s moral blameworthiness is elevated by the breach of trust, the familial relationship with C.M. and his intentional violation of her sexual integrity by touching her bare breast and digitally penetrating her while she was unconscious and completely vulnerable.

[42] In **R. v. Case**, 2021 ONSC 908, the co-accused Mr. Case and Ms. Loyer, digitally penetrated the victim while she was intoxicated and unconscious. The victim was 19 years old and had been friendly with Mr. Case but had just met Ms. Loyer for the first time that evening. The male accused was in his late 40s and the female accused was 22 years old. Both accused were first offenders, had

maintained their innocence and were found guilty following a trial. The Court stated that denunciation and deterrence were the paramount sentencing objectives in that case and sentenced each accused to 16 months in custody followed by two years probation.

[43] In **R. v. M.R.**, 2018 ONSC 583, at para. 32, Boswell J reviewed a number of cases involving sexual assault on unconscious or sleeping victims. He adopted comments of a colleague in an earlier case that found the usual range for an offender who has committed an invasive sexual assault on a sleeping or unconscious victim is between an upper reformatory and a penitentiary term of imprisonment, that is, 18 months to three years. In the **M.R.** case, the court imposed a sentence of 14 months in custody.

[44] In **R v. Rosenthal**, 2015 YKCA 1, the offender and the victim were socializing and consuming alcohol at a home where the offender often stayed. The victim asked to stay over and share the offender's bed rather than go home late at night. He agreed. The victim later woke to find the offender's finger in her vagina. She removed his hand and told him she was not interested in having sex and went home. The Crown sought a jail sentence of 14 to 18 months. Defence Counsel recommended a suspended sentence with probation for two years on various conditions. The trial judge had noted that the offender's actions constituted a serious, invasive sexual assault in ordering a suspended sentence.

[45] On appeal by the Crown, the Court of Appeal held, in **Rosenthal**, *supra*, at para. 12, that the suspended sentence ordered by the trial judge was a "significant departure" from the range of sentence previously established in other cases. In addition, the sentence did not serve the principles of denunciation and deterrence, which were especially important given the prevalence in the Yukon of sexual assaults on sleeping or unconscious victims and was not made appropriate by the offender's lack of a prior criminal record. They substituted an order of 14 months imprisonment.

[46] In support of Defence Counsel's sentencing recommendation, the following cases were drawn to the Court's attention.

[47] In **R. v. Hans**, 2016 BCPC 222, an indigenous offender had pled guilty to a sexual assault. The offence had occurred, after the victim and the offender had spent the night drinking together and she woke up in her home to find the offender, who was her neighbour and friend, having sexual intercourse with her. The offender had a limited work history and had not completed high school. His

childhood was marked by neglect by his alcoholic parents, and he was using alcohol to self-medicate his depression. He had a prior conviction for domestic assault but was assessed as a low risk for sexual recidivism. He had undergone intensive therapeutic counselling since the offence and had full family support. The Crown sought a custodial sentence of 15 to 18 months, and the offender sought a conditional sentence order, the Court ordered an 18-month conditional sentence.

[48] The Court in **Hans** recognized as aggravating factors the vulnerability of the victim, the breach of trust and the profoundly negative effect on the victim. Mitigating factors were the offender's guilty plea, his genuine remorse, his attempts to address the underlying issues to the offending behaviour, a dated criminal record and cooperation with the police. The Court held that the offence required a significant denunciation as well as specific and general deterrence but concluded that a conditional sentence could address the necessary punitive and rehabilitating sentencing objectives and not endanger the community. The sentence was an 18-month CSO, 26 months of probation to follow and ancillary orders.

[49] In **R. v. Andrews**, 2019 ONCJ 436, the offender was found guilty following a trial of committing a sexual assault on his girlfriend. The offender and the victim were in a romantic relationship for about three years, but each maintained their own residence. On the date of the offence, Mr. Andrews was intoxicated and expressed a desire to have sex with the victim. She told him, on several occasions, she did not want to have sex with him that evening. After they went to bed together, he started grabbing her breasts and putting his hands on top of her vagina, on top of her clothes. She again told him to leave her alone, pushed him away and then fell asleep. She woke up with him being on top of her with her pyjama bottoms pulled down to her knees. The Court concluded that if she had not pushed him off, he would have engaged in sexual intercourse with her.

[50] Mr. Andrews was 30 years old at the time of the offence and was 32 years old at the time of sentencing. He had recently started a relationship with a younger woman, was a full-time employee and described as a hard worker with the very positive attitude at his work. He had one prior conviction for driving under the influence of alcohol and for that offence, he had been fined and placed on probation for one year. The Court noted that the prior drinking offence and being intoxicated at the time of the sexual assault were of concern, but for the most part, the PSR was very positive, and that Mr. Andrews was a suitable candidate for future supervision.

[51] The Court concluded that the significant aggravating circumstances were that the sexual assault occurred in the context of a domestic intimate relationship, the offender had taken advantage of the victim being in a vulnerable state being sound asleep at the time, despite repeatedly telling him that she did not want to have sex with him. Another aggravating circumstance noted by the Court was the significant impact on the emotional well-being of the victim, who was experiencing anxiety and panic attacks and taking medications as well as counselling to deal with depression and was still on leave from her work after the offence.

[52] After reviewing sentencing precedents provided by counsel, the Court concluded that if a jail sentence was to be ordered, the appropriate range would be 4 to 6 months incarceration where there had not been any penetration of the victim of any kind. The Court concluded that the just and appropriate sentence in all the circumstances, with a focus on denunciation, would be a CSO with an electronic supervision program of 9 months with restrictive conditions involving house arrest and community service, followed by two years of probation and ancillary orders.

[53] In **R. v. A.**, 2019 NSPC 87, the offender pled guilty to the sexual assault which occurred at a time when their marriage was in difficulty, but they lived together to raise their children. On the evening in question, the offender returned from work, after the children and his partner were asleep in their bedrooms. She awoke at 2:30 AM to digital vaginal penetration by the offender and his hand around her neck. She screamed and the digital penetration which he believed to be of short duration ended and she ordered him out of the house, and he left.

[54] In that case, Judge Van der Hoek, noted that the indigenous offender was 50 years old and had been married to the victim for about 32 years and as result of the charge had not seen his children for over two years. There was a very positive **Gladue** report, he was a low risk to reoffend, was employed, he had already attended culturally appropriate counselling and treatment programs and had extended family and community support. The Crown sought a four-month sentence or a six-month CSO while the defence sought a six-month CSO. The Court ordered a six-month CSO followed by 18 months probation and ancillary orders.

[55] In **R. v. Jensen**, 2019 ABQB 873, the Court sentenced a 21-year-old offender who had pled guilty to sexual assault which had occurred three years earlier when the offender and the victim were both 18 years old. The offender invited the victim, who was a friend, to his apartment where they had dinner and

watched a movie. The victim fell asleep and woke up to find the offender's sexually touching her breasts and digitally penetrating her under her clothes. The offender had no prior record, had a steady work history and gave a prompt, full confession to the police and had expressed remorse. He was a low risk to reoffend.

[56] The Court concluded that it was more likely that the offender would be rehabilitated if he was able to maintain his family connections and employment in the community. The Court ordered an 18-month CSO including nine months of house arrest, followed by 12 months probation and the ancillary orders.

[57] In **R. v. Skinner**, 2021 ABPC 54, which was a post **Friesen**, *supra*, case, the offender was found guilty following a trial of a sexual assault, while the parties were in a domestic relationship, having lived together for about one year. The victim had fallen asleep after having consumed alcohol and drugs during the evening. The victim, who was undressed, woke to the sound of a screaming female in a pornographic video from a cellular device held by the offender who was on top of her and masturbating himself. The Crown sought 6 months incarceration and 18 months probation while defence sought a CSO of 6 to 12 months plus probation.

[58] The Court held that the circumstances of the offence were grave as they constituted a breach of trust, and the offender took advantage of an intimate partner while she was ill, intoxicated, and asleep. The offender was 31 years old, had no prior criminal record, mental health was a concern from PTSD and anxiety following the death of a friend. He had been a member of the Canadian military for the last five years and his friends and family spoke to positive personal qualities and a prosocial disposition.

[59] The trial judge had been referred to several similar cases which were all decided before **R. v. Friesen**, 2020 SCC 9 and found that the circumstances of the offence were grave in that the offender took advantage of an unconscious intimate partner for sexual gratification in a highly degrading manner. The Court determined that the offender's moral culpability was moderately high given his personal struggles with depression and anxiety and weighing the relevant aggravating and mitigating factors. The Court determined that the primary objectives of deterrence and denunciation could be met through a lengthy and strict term of imprisonment to be served in the community in ordering a 15-month CSO followed by 15 months probation and the ancillary orders.

[60] In **R. v. M.D.**, 2021 YKTC 24, which was a post **Friesen** sentencing decision. The Crown had initially proceeded by indictment but on the trial date,

about three years after the incident, the offender re-elected Territorial Court and the Crown re-elected to proceed summarily. The offender pled guilty to the sexual assault of his former common-law partner, who continued residing in the same residence after their relationship had broken down. On the evening in question, they had consumed alcohol, got into an argument and the victim passed out in the bed. The offender had masturbated on the victim while she was sleeping. Neither counsel recommended a custodial sentence.

[61] The Crown noted that this was a sexual assault, as it was a violation of the victim's sexual integrity while she was sleeping, but it was likely at the lower end of a range of sexual offences. The Crown recommended a suspended sentence with probation of 10 to 12 months, defence sought a conditional discharge.

[62] The Court noted that the offender, who was 66 years old, had accepted full responsibility for the offence, had no prior criminal record and ran his own business for many years before working with a local First Nation. There were several letters of support attesting to his character and the offence was totally out of character. The Court ordered a suspended sentence and probation for 12 months

The Just and Appropriate Sentence:

[63] As I have previously determined, the fundamental principle in sentencing is proportionality which is codified in section 718.1 of the **Code**. A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. I have found that the gravity or seriousness of the offence of sexual assault, proceeded by way of summary conviction in the circumstances of this case, was very high. In addition, in terms of Mr. L.P.'s degree of responsibility or moral blameworthiness for this offence, given the number of aggravating circumstances, I have also found that his degree of responsibility for this offence of sexual violence perpetrated on an unconscious and vulnerable relative for whom he essentially stood in a position of trust, is also very high.

[64] During their sentencing submissions, the Crown Attorney recommended the maximum of 18 months imprisonment for the offence of sexual assault contrary to section 271 of the **Code** which was prosecuted by way of summary conviction. On the other hand, Defence Counsel submits that a CSO is an available and the appropriate sanction in this case to allow Mr. L.P. to serve a sentence of imprisonment in the community under strict terms and conditions, given the low

risk to reoffend where community-based counselling and programs would be available without endangering the safety of the community.

[65] In **R v. Proulx**, 2000 SCC 5 and in **R. v. Wells**, 2000 SCC 10, the Supreme Court of Canada determined that section 742.1 of the **Code** required the judge to determine, at a preliminary stage to determine whether there were any provisions that excluded a CSO from being considered as an available sentencing option and to exclude two possibilities, probationary measures and a penitentiary term of more than two years.

[66] At the preliminary stage, the duration and venue of the sentence is not determined, the Court is required to consider the fundamental purpose and principles of sentencing set out in section 718 to 718.2 of the **Code** only to the extent necessary to narrow the range of sentence for the offender. In this case, neither the Crown nor Defence Counsel is recommending a suspended sentence and probation and given the fact that the Crown proceeded by way of summary conviction, the maximum sentence for this offence is 18 months and therefore, would not involve a penitentiary term.

[67] Furthermore, pursuant to section 742.1 of the **Code**, before determining whether a CSO is the appropriate sanction to order, the Court is required to confirm that there is no minimum term of imprisonment, and that the safety of the community would not be endangered by the offender serving the sentence in the community. There is no minimum sentence of imprisonment for this offence. As for the other criterion, while the gravity of damage that could ensue from the offender committing a similar offence is serious, at the same time, I find that the PSR and other information provided by Defence Counsel would indicate that there is a low risk of the offender reoffending.

[68] In **Proulx**, *supra*, at paras. 99-100 and again cited with approval in **Wells**, *supra*, at para. 31, the Supreme Court of Canada noted that a conditional sentence can incorporate traditionally punitive goals of sentencing while also providing an opportunity to further the goals of restorative justice. It affords the sentencing judge the opportunity to craft a sentence with appropriate conditions that can lead to the rehabilitation of the offender, reparations to the community and the promotion of a sense of responsibility in ways that jail cannot. However, it is also a punitive sanction, and it is that punitive aspect of strict conditions that distinguishes it from probation.

[69] In **Wells**, *supra*, at para. 33, the Supreme Court of Canada stated:

“The amount of denunciation and deterrence provided by a conditional sentence varies depending on the nature of the conditions imposed and the duration of the sentence. Since the imposition of any sentence is determined on an individual basis, each conditional sentence needs to be crafted with attention to the particular circumstances of the offence, offender and the community in which the offence took place. Consequently, conditions will vary according to these factors with it being generally true that “the more serious the offence and the greater the need for denunciation, the longer and more onerous the conditional sentence should be [Proulx, at para. 106].”

[70] In many respects, I find that this case bears a high degree of similarity in the facts and circumstances of the offender in **R. v. Jensen**, *supra*, who committed a very similar offence in very similar circumstances. In this case, like **Jensen**, *supra*, the offender is a youthful first-time offender with positive pre-sentence report, a low likelihood of reoffending and the opportunity to attend counselling and programming in the community. In both cases, the Crown had elected to proceed summarily. However, in **Jensen**, the offender had the additional mitigating factors of having pled guilty, accepted responsibility for the offence and spared the victim of having to testify in court as to details of the sexual assault.

[71] In this case, like the **Jensen** decision, I am required to consider the principle of restraint outlined in sections 718.2(d) **Code** that an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances. I am also required to consider the principle of restraint outlined in section 718.2(e) **Code** whether 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. In this case, like the Jensen case neither offender was an aboriginal offender.

[72] Mr. L.P. is a young man and, based upon the information in the Pre-Sentence Report, he appears to be a low risk to reoffend. The Pre-Sentence Report is quite positive but at the same time, there were several aggravating circumstances and I find that the Court should consider the recent comments of the Supreme Court of Canada in **R. v. Friesen** that life altering consequences can and often do flow from sexual violence, as a factor in determining proportionality of the gravity of the offence and the offender’s degree of responsibility.

[73] For these reasons, I find that this sentencing decision must emphasize denunciation of the unlawful conduct and specific and general deterrence with an appropriate balance of measures to reflect restraint given the fact that Mr. L.P. is a

very youthful first-time offender in order to assist in his rehabilitation, promote a sense of responsibility and acknowledge harm done to the victim and the community by his actions.

[74] In my opinion, taking into account the circumstances of the offence, the offender, the authorities cited with respect to the principle of parity, I am satisfied that the primary objectives of deterrence and denunciation can be met through a lengthy and very strict term of imprisonment to be served in the community and that such a sentence would not endanger the safety of the community. Indeed, the offender serving a CSO in the small community in which he lives is more likely to achieve the goals of denunciation and deterrence under strict conditions including house arrest and curfew.

[75] I also note that the ancillary orders sought by the Crown and not opposed by Defence Counsel including the 10-year **Sexual Offender Information Registration Act (SOIRA)** Order will contribute to the objectives of deterrence and denunciation of the unlawful conduct.

[76] In terms of the length of the conditional sentence of imprisonment to be served in the community, I hereby order Mr. L.P. to serve a conditional sentence of imprisonment in the community of 18 months, pursuant to section 742.1 of the **Criminal Code** and I find that he serving that 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 section 718 to 718.2 of the **Criminal Code**.

[77] In concluding that an 18-month CSO is just and appropriate in all the circumstances of this case, I have taken into account the comments made in **Proulx** and **Wells**, *supra*, by the Supreme Court of Canada, that where a sentence is being served in the community, the more serious the offence with a greater the need for denunciation, should result in a longer conditional sentence with more onerous conditions.

[78] Following the completion of the conditional sentence order in the community, I hereby order Mr. L.P. to be subject to a period of probation for 12 months.

Conditional Sentence Order:

[79] The terms and conditions of the Conditional Sentence Order of imprisonment in the community shall be served under the following conditions:

- keep the peace and be of good behaviour;
- appear before the Court as and when required to do so by the Court;
- notify the Court, probation officer or supervisor, in advance, of any change of name, address, employment or occupation;
- Report to a supervisor at Dartmouth today and thereafter as directed by the sentence supervisor;
- You are required to reside at a specified residence and not to move out of that address without the permission of the Court;
- remain within the province of Nova Scotia unless you receive written permission from your supervisor;
- you are not to possess, take or consume alcohol or other intoxicating substances;
- you are not to possess, take or consume a controlled substance as defined in the **Controlled Drugs and Substances Act** except in accordance with a physician's prescription for you or some other legal authorization;
- you are not to have in your possession any firearm, crossbow, prohibited weapon, restricted weapon, prohibited device, ammunition or explosive substance;
- you are not to have any direct or indirect contact or communication with C.M. and there are no exceptions to that;
- you are not to be on or within 200 m of the premises known as any home, school or workplace of C. M. and there are no exceptions to that;
- you are to attend for mental health assessment and counselling as directed by the supervisor or probation officer;
- you are to attend for such assessments, counselling or treatment as directed by your sentence supervisor, which may include sex offender treatment;
- you are to participate in and cooperate with any assessment counselling or program that may be directed by the sentence supervisor or probation officer

House Arrest and Curfew:

[80] For the first 9 months of the Conditional Sentence Order, you shall remain in your residence or within the four corners of the grounds of the residence 24 hours a day, seven days a week, except where specifically permitted otherwise by the terms of this Conditional Sentence Order.

[81] For the next 6 months of the CSO, you shall keep a curfew and remain in your residence or on its grounds between the hours of 10 PM and 6 AM, seven days per week, except where specifically permitted otherwise by the terms of this order.

[82] For the first 9 months of this CSO, you may only be absent from your residence for the following reasons:

- when at regularly scheduled employment which your supervisor knows about and travelling to and from that employment by direct route;
- when attending a regularly scheduled education program which your supervisor knows about or at a school educational activities supervised by a principal or teacher and travelling to and from the education program or the activity by a direct route;
- when dealing with medical emergency or attending a medical appointment involving you or member of your household, with advance notice to your supervisor and travelling to and from it by a direct route;
- when attending any scheduled medical, dental or health-related appointments with the prior written approval of your sentence supervisor, travelling to and from those meetings or appointments by a direct route
- when attending a scheduled appointment with your lawyer, your supervisor or probation officer and travelling to and from the appointments by a direct route;
- when attending court at a scheduled appearance or under subpoena and travelling to and from the court by direct route;
- when attending a counselling appointment, treatment program or meeting of Alcoholics Anonymous or Narcotics Anonymous at the direction of or with the permission of your supervisor and travelling to and from that appointment, program or meeting by a direct route;

- when attending a regularly scheduled religious service with the permission of your supervisor travelling to and from the service by a direct route;
- and while on the house arrest condition, you are not allowed to be out of your house for more than four hours per week, approved in advance by your sentence supervisor for the purpose of attending to personal needs; and
- such other exceptions as approved, in advance, by your sentence supervisor.

[83] During the ensuing six (6) month period when you will be subject to the terms of a curfew to remain in your residence between the hours of 10 PM and 6 AM the following day, you may only be absent from your residence for the same reasons listed under the exceptions to the house arrest condition.

[84] During the final three (3) months of the CSO, you will still be subject to all of the other general terms and conditions of the CSO, but not subject to the restrictions of either the house arrest or curfew conditions.

[85] Following the completion of the Conditional Sentence Order, you will be subject to 12 months probation with the following conditions:

- keep the peace and be of good behaviour;
- report to and be under the supervision of the probation officer at 277 Pleasant St., Dartmouth, NS, within two days of the completion of your CSO;
- you are not to have any contact or communication directly or indirectly with C.M., no exceptions;
- you are to not be on or within 200 m of any premises known as the home, school or workplace of C.M.;
- you are not to have in your possession any weapons, firearms, ammunition or any explosive substances
- you are to make reasonable efforts to locate and maintain employment or an educational program as directed by the probation officer;
- you are to attend for mental health assessment and counselling as directed by the probation officer;

- you are to attend for any assessment counselling program or treatment that may be recommended or directed by your probation officer;
- you are to participate in and cooperate with any assessment, counselling or program that may be directed by the probation officer.

Ancillary Orders:

[86] In addition, I hereby make the following ancillary orders which were sought by the Crown Attorney: (1) a section 110(1) **Criminal Code** weapons prohibition for a period of 10 years and (2) a section 487.051 **Criminal Code** order as a section 271 conviction is a primary designated offence for the purpose of securing a DNA sample; (3) there will be a **SOIRA** order pursuant to section 490.013 of the **Criminal Code** for a period of ten (10) years and finally (4) the payment of \$100 as a victim surcharge pursuant to section 737 of the **Criminal Code** as the offence was punishable by summary conviction within 18 months of today's date.

Theodore K. Tax, JPC