

SUPREME COURT OF NOVA SCOTIA

Citation: R. v. M.N.P., 2015 NSSC 158

Date: 2015-05-28

Docket: *Halifax*, No. CRH 395519/397763

Registry: Halifax

Between:

Her Majesty the Queen

v.

MNP

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

Editorial Notice: Identifying information has been removed from this electronic version of the judgment.

Judge: The Honourable Justice Arthur LeBlanc

Heard: May 5, 2015, in Halifax, Nova Scotia

Counsel: Susan MacKay and James Giacomantonio, for the Crown
Lee Seshagiri, for the Defence

By the Court:

Introduction

[1] This is a decision on sentencing for multiple offences. The offender, MNP, entered pleas of guilty to the following charges on May 3, 2013, before Justice Cindy Bourgeois. The first indictment, C.R. No. 395519, dated June 6, 2012, included the following:

- 1) that he between the 1st day of January, 1982 and the 3rd day of January, 1983 at, or near Halifax, in the County of Halifax in the Province of Nova Scotia, did indecently assault [SW], a female person, contrary to Section 149 of the Criminal Code.
- 2) AND FURTHER THAT HE between the 4th day of January, 1983 and the 30th day of June, 1989 did sexually assault [SW], contrary to Section 246.1, later Section 271 of the Criminal Code.

[2] A second indictment, C.R. No. 396773, dated June 20, 2012, included the following:

- 1) that he between the 8th day of November, 1989 and the 8th day of February, 2003 at, or near Halifax, in the County of Halifax in the Province of Nova Scotia, did unlawfully sexually assault [NF], contrary to Section 271 of the Criminal Code.
- 2) AND FURTHER THAT HE AT THE SAME TIME AND PLACE AFORESAID, did unlawfully sexually assault [WB], contrary to Section 271 of the Criminal Code.
- 3) AND FURTHER THAT HE AT THE SAME TIME AND PLACE AFORESAID, did for a sexual purpose touch [NF], a person under the age of fourteen years, directly with a part of his body, to wit: his hand, contrary to Section 151 of the Criminal Code.
- 4) AND FURTHER THAT HE AT THE SAME TIME AND PLACE AFORESAID, did for a sexual purpose touch [WB], a person under the age of fourteen years, directly with a part of his body, to wit: his hand, contrary to Section 151 of the Criminal Code.
- 5) AND FURTHER THAT HE AT THE SAME TIME AND PLACE AFORESAID, did for a sexual purpose invite or counsel [WB], a person under the age of fourteen years, to touch a part of his body, to wit: his penis, with a part of her body, to wit: her hand, contrary to Section 152 of the Criminal Code.

[3] Justice Bourgeois ordered the preparation of a presentence report. At the request of the Crown, she ordered an assessment under s. 752.1(2) of the *Criminal Code*, resulting in Mr. P being admitted to the East Course Forensic Psychiatric Hospital. In addition, the court requested an opinion as to whether or not Mr. P posed an imminent risk to the safety of the public if released. Mr. P was subsequently released pending sentencing.

[4] The Crown and Defence have made a joint recommendation to the Court with respect to the sentence and to the long term offender disposition. A joint recommendation may be rejected “not simply because [the judge] would have imposed a more severe sanction, but where the sentence is clearly unreasonable and then, only if the judge is satisfied there are no other compelling circumstances justifying, as in the public interest, a departure from an otherwise fit sentence”: *R. v. Cromwell*, 2005 NSCA 137, at para 21.

[5] Sentencing is not an easy task. It is one of the most difficult responsibilities of the Court. The court is required to determine whether and to what extent Mr. P should be separated from society. In some instances, as here, there is also the question of whether the offender should be subject to long-term supervision.

[6] The details of the events resulting in the charges are contained in the Agreed Statement of Facts. Crown and Defence counsel, as well as Mr. P, have agreed to its contents, and Mr. P confirmed that he signed the document voluntarily. Consequently, all of the facts as contained in the document presented are taken to have been proven beyond a reasonable doubt.

[7] In imposing sentence on Mr. P, I am obligated to apply the objectives and principles of sentencing found in the following provisions of the *Criminal Code*:

Purpose

718. The fundamental purpose of sentencing is 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;
- (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 and to the community.

Objectives — offences against children

718.01 When a court imposes a sentence for an offence that involved the abuse of a person under the age of eighteen years, it shall give primary consideration to the objectives of denunciation and deterrence of such conduct.

.....

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 any other similar factor,
 - (ii) evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner,
 - (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,
 - (iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization, or
 - (v) evidence that the offence was a terrorism offence
- 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 should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

The circumstances of the offences

[8] NF reported two incidents of touching by Mr. P, who was her uncle. The first occurred when she was five years of age and was in a parked car with Mr. P. They were both sitting in the front seat. Mr. P began caressing Ms. F's leg and inched his hand up higher on her inner thigh. He did not touch her vagina. The second incident occurred when she was around ten years old. She was at home with her father and Mr. P. Other members of her family were out. When her father went upstairs to use the washroom, and she was in the living room watching television, Mr. P put his arm around her, placed his hand in her pocket, and tried to touch her vagina. He was lying beside her and had one arm around her while the other hand was inside the pocket of her pants. When she tried to protest his attempts to rub her vagina, he covered her mouth and said "don't say nothing." She tried to remove his hand, without success. This stopped when her father returned.

[9] WB reported five incidents involving Mr. P. The first one occurred when she was five or six years of age. They were in a motor vehicle together on the way to pick up Ms. B's grandmother. Mr. P rubbed her vagina over her clothing for about ten seconds. When she told him that she would tell her grandmother, he stopped. The second incident occurred around the same time. She was at home when Mr. P came to play cards, accompanied by his mother and brother. Mr. P went upstairs and came into her room, shutting the door behind him. He opened his pants, showed her his penis and asked if she wanted to touch it. She said no. He tried to put her arm closer to him to initiate a touch but she pulled away and avoided contact. The incident ended when Ms. B's mother called upstairs to check on her.

[10] A third incident occurred when Ms. B was eight or nine years old. She was playing Nintendo in her parents' room. Mr. P came in and started touching her back while she was playing. When she asked what he was doing he said he was

counting her spine bumps. He then slid his hand down her pants, below her underwear, and began to massage her buttocks and area around her anus. She elbowed him and he stopped.

[11] On another occasion, Ms. B was with her mother and grandmother going to bingo. Mr. P was waiting outside in the car. Ms. B got tired and went out to the car to lie down in the front passenger seat. She fell asleep and woke up with Mr. P's hand underneath her pants but over her underwear, which was out of place. He was massaging her vagina. She left the vehicle went back to the Bingo hall.

[12] Ms. B reported the final incident as occurring when she was fifteen or sixteen years of age. She was at her grandmother's home waiting to go to dinner. Mr. P was present. Her grandmother left the room and Mr. P said, "you have something on your shirt." He approached her and rubbed her breasts over her clothing. He suggested that she had spilled food on her shirt, although she had not yet eaten.

[13] SW was Mr. P's niece. She estimated that between 1982 and 1988 Mr. P touched her in a sexual manner over a thousand times. She maintained that this was an estimate of the number of times that they were together, claiming that she could not remember a time when they were together alone when he would not have touched her. Although she could not recall specifics of each incident, there were some that stood out. She recalled an incident when she had been at a shopping mall around Christmas with her grandmother TP and Mr. P. There was a power failure at the mall and the room was dark. Mr. P put his hand on the outside of her pants and cupped her vagina with his hand, outside her clothes. This went on for about thirty seconds.

[14] Another incident occurred when Ms. W was in Grade 3 and living in Dartmouth, NS. She was in bed at home. Mr. P came into the room. He reached under the blankets, put his hand under her underwear, and digitally penetrated her for approximately five minutes. She recalled that she was wearing a nightshirt or dress. She said that such digital penetration occurred repeatedly. She recalled an incident occurring while she was sick in bed with the flu and vomiting. She also recalled him touching her vagina at a wedding reception at a hotel.

[15] Ms. W described an incident when Mr. P invited her into his room to see his "sock monkey" and to play video games. She told him that all she wanted to do was to play the game, but he told her that she had to do something for him. He had her lie down flat on the floor and he got on top of her. Although they both had their

clothes on, he simulated intercourse by pressing his erect penis against her vagina. When someone was about to enter the room, he jumped off her.

[16] On another occasion, when she was five years old, while swimming at a location two or three hours from Halifax, Mr. P was tossing the children into the water. As he was lifting her out of the water, he placed his hands on the outside of her bathing suit and touched her vagina. He repeated this type of conduct on the same trip while she was picking up rocks in the water. Another incident occurred at a pool party where he touched her on the outside of her bathing suit on her vagina.

[17] When Ms. W was in Grade 5, she had a friend visiting and Mr. P suggested that the girls play a “tickling game” with him. She and her friend stood while Mr. P ran his hand up and down the front of their bodies. When they told him to stop he would move his hand to their genital regions and touch their vaginas in a tickling motion over their clothing. On another occasion, she and her sister were playing hide and seek at home. She and Mr. P were sitting on a couch, under a blanket. Mr. P fondled her vagina. She could not recall whether this was above or under her clothing. Another incident occurred when she was in grade two. She was sitting on the couch with Mr. P. He grabbed her hand and forced her to stroke his penis above his clothing. Another time he took her hand and placed it on his penis, moving it up and down to masturbate him. She could not recall whether he ejaculated although his penis was erect. She also recalled a touching incident on her vagina above her clothing in a field behind her grandmother’s home.

[18] Ms. W recalled an incident involving attempted oral sex. She was sitting on the floor of Mr. P’s bedroom. He took out his penis and told her that he wanted her to lick it. She said no. Mr. P then cupped his hands on the back of her head and forced his penis into her mouth. Although she began gagging, he did not stop until she cried. This lasted for about a minute. He then removed his penis from her mouth and put her hand around it, moving it up and down. She could not recall whether he ejaculated.

[19] On at least one occasion, Mr. P told Ms. W that he would beat her father up if she disclosed the sexual assaults.

Circumstances of the Offender

[20] As mentioned, the court ordered in the preparation of a presentence report. Mike L. Warren, an adult probation officer, prepared a report dated December 6, 2013.

[21] Mr. P is 52 years of age, born June [...], 1962. He is unmarried. Mr. P's father passed away in 1980 and his mother is still living. She is presently 81 years of age. He has a good relationship with his mother with whom he is in daily contact. He has few memories of his father by those that he does retain are warm. He maintained that his relationship with his parents was good. He has a number of siblings, some of whom he has close contact with while others he has little or no contact at all.

[22] Mr. P completed grade nine, but was not academically strong. He attended school regularly and frequently had conflicts with both teachers and classmates, which he attributed to difficulties arising from ongoing sexual abuse he suffered. Mr. P claimed that he was bullied in school and subsequently he himself became a bully. He was not a problem child in terms of behaviour but when discipline became necessary, then them his parents would deal with it. He never complained of physical abuse. Mr. Warren reported that there was no familial history of substance abuse or conflict with the law.

[23] Mr. P reported that he was abused by as a child by multiple individuals. In one instance, the abuse lasted from the time he was 9 years old until he was 18. He was also a touched by a family doctor in a sexual manner. He stated that this eventually became a somewhat consensual sexual relationship. He was also touched by a member of the family when he was eight years old, and this went on for a couple of years. He was also touched by a teacher when he was eleven, for a period of a year. He did not report any of these incidents to authorities nor did he obtain counselling. He retained of these memories and kept them bottled up until he could not take it anymore. He attempts to block these memories as a means of coping with them.

[24] Mr. P is currently in a relationship with NC. He claims he has a loving and supportive relationship with her. He has known her for some three years. Prior to this, yet had no previous long-term relationship. NC confirmed that they started to date shortly after they met. She stated that Mr. P was very open in discussing the matters currently before the court. She said she does not view him as a sex offender. She said she has disassociated him from his past, claiming that he is a changed man. She did not believe him to be a risk to the community. She agreed that he would benefit from continuing with support programs.

[25] According to the pre-sentence report, Mr. P was unemployed and receiving Income Assistance Benefits. He was receiving \$325 per month plus an apartment,

a drug plan and a bus pass. He was looking for work but this had been a difficult challenge. He had previously worked as a cleaner in the 1980s. He had not been able to maintain full-time to work since the 1990s.

[26] Mr. P reported being in poor physical health, suffering from high blood pressure, high cholesterol, and having had three heart attacks, two of them minor while the last one was moderate event.

[27] Mr. Warren reported that, given his prior criminal record, Mr. P had a lengthy history of attending counselling and had completed three sexual offender programs, two maintenance programs and attended two support groups. He completed a moderate intensity sex offender program and volunteered to take high-intensity programs. He attended the Circle of Support and Accountability weekly, and was attending the Nova program for sex offenders every two weeks. He also met with Sister Pat Wilson, Chaplain with Correctional Services Canada, twice weekly. Although he admitted that he had been a sexual predator, he said he no longer feels this way, and he believed that these programs had helped him put the past behind him.

[28] Mr. Warren also received comments from Shirley Dixon, project coordinator with the Circle of Support and Accountability. She indicated that she had known Mr. P since 2010 and that he had been attending sessions since the spring of 2013. She said Mr. P had tremendous insight into his offence and problems and that he was doing well in the community. Although he had completed a lot of programming, he continued to seek and attend programs for support, which she deemed positive. She stated that Mr. P had been very forthcoming with issues and had embraced the truth and that he would do what he must to successfully integrate into the community.

[29] Cameron Stewart, a program officer with Correctional Services Canada, confirmed to Mr. Warren that he had worked with Mr. P in the Sexual Offenders Maintenance Program upon his release from incarceration (some three to four years prior to this sentencing) and that he was doing reasonably well. He believed that Mr. P was motivated to address problems and was benefiting from the program. To be eligible for this program, the offender must complete a moderate- or high-intensity sexual offender treatment program, which would have been completed within the penal institutions. Although Mr. P did not appear to have had any difficulty with anger or substance abuse, he might benefit from continued counselling such as a maintenance program or mental health counselling. Although

Mr. P did not appear to be a threat to himself, he still had the potential to be a threat to others.

[30] Sister Pat Wilson reported that she had known Mr. P since 2009. She met him in an institutional setting, and that they would have met a few times year. They began meeting on a weekly basis while he was attending the Maintenance Program. She noticed a change in Mr. P and believed that he began to appreciate the impact of his offences on others. He accepted responsibility and cooperated in the program. She noticed a change in his spirit and desire to change. She was continuing to offer monthly support, they were in contact more frequently via text messaging and telephone. Although no one can predict the likelihood of reoffending, she thought that Mr. P did not want to reoffend or harm anybody.

[31] Mr. Warren reported that Mr. P stated that he accepted responsibility for his actions and was indeed remorseful although in some instances, he attempted to minimize his actions, stating that “I never penetrated anyone. I touched them. It was touchy-feely.” Mr. P reported that his actions were wrong and terrible and that he did not know any better. He said he thought at the time that this behaviour was normal because he had been touched. He stated that he understood that his actions had affected his victims and that he felt awful about that. He said he was on a “power trip” and was attracted to children, but now understood that such behaviour is not normal and wanted to apologize to his victims. He also maintained that he did not have these abnormal urges anymore. He wished that he could go back and undo the harm he caused.

[32] Mr. P had served a period of incarceration for substantially similar offences after being sentenced in December 2007.

[33] Mr. Warren concluded that Mr. P appeared to be a suitable candidate for community supervision, but that he would have to be monitored and supervised closely with immediate consequences for non-compliance.

[34] Also before the court is an assessment report prepared by Dr. P. Scott Theriault of the East Coast Forensic Hospital. Dr. Theriault stated that the purpose of his assessment was to provide an opinion in relation to whether Mr. P should be determined to be a dangerous offender pursuant to s. 753 of the *Criminal Code*, or, alternatively, a long-term offender pursuant to s. 753.1. If the court does not find the individual to be a dangerous offender, the court may determine that the offender is a long-term offender if the court is satisfied that it would be appropriate to impose a sentence of imprisonment of two years or more, where there is a

substantial risk that the offender will reoffend, and where there is a reasonable possibility of the eventual control of the risk in the community.

[35] Dr. Theriault reported that he interviewed Mr. P on five occasions for a total of about five hours. In addition to discussions with Mr. P, he also spoke with Sr. Pat Wilson, Shirley Dixon, and Mr. P's partner. Dr. Theriault reviewed the offender's family history, educational and vocational background, and his developmental history. He also reviewed his psychosexual and relationship history.

[36] I will refer to certain portions of Dr. Theriault's report that are particularly relevant to the appropriateness of the joint recommendation. Dr. Theriault stated, at p. 7 of his report:

Mr. [P] does have a history of sexually deviant pedophilic urges and behaviors. It is not entirely clear when they developed; in his conversation with me, Mr. [P] indicates that they developed sometime in his 20s however I would note that this first sexual offence was in 1981 at which time he would have been 19 years of age...

...

Mr. [P] then to all intents and purposes, been subject to pedophilic urges for much if not all of his adult life. Mr. P was quite open in reporting this to me, much more so than had been the case in the past where he had resolutely denied such thoughts and feelings....

[37] At p. 8, Dr. Theriault wrote:

In conversation with me, Mr. [P] indicates that his primary sexual interest has been in females, age 10 to 12. He indicates that for many years he would seek out environments or opportunities where he could observe such individuals. He reports that in his 20s he had a high sex drive and was masturbating two to four times per day; curiously, he denies that he would masturbate to fantasies of prepubescent children – this seems unlikely and may represent a continuing cognitive distortion on the part of Mr. [P]... [At present] Mr. [P] denies any sexual thoughts or urges concerning children, he claims for the last 2 ½ years since completing programming. He does acknowledge however, that he needs to remain vigilant about monitoring his thinking in this regard....

....

Mr. [P] does report some paraphilic behaviors. When asked about Dr. Mitton's report he denies voyeurism. He does report that when young he would have liked to engage in voyeuristic activities but was afraid to do so. He does report some

instances of frotteurism (that is rubbing one's genitals against unsuspecting strangers). He reports that he would locate himself in a parade or other activity with the hope that he could press his genitals against children passing by.

[38] In respect of substance abuse, Dr. Theriault noted, at p. 9, that Mr. P denied any significant history of substance abuse, there was no indication that substance abuse was a risk factor here, and that there was no indication that any of the sexual activity with his victims occurred under the influence of substances.

[39] Dr. Theriault went on, at p. 17, to discuss aspects of the programming in which Mr. P had participated. He discussed a report arising from a specialized sexual offender assessment Mr. P underwent when he was admitted to a federal institution. The report, dated September 19, 2005,

reviewed Mr. [P]'s criminal history, and engaged him in various testing procedures. In reviewing this material it is noted that at the time of initial assessment Mr. [P] presented as quite rigid and defensive in his thinking and his accounting of his offenses at that time showed significant cognitive distortions, justifications and minimization of his actions. Mr. [P] during that initial assessment refused a phallometric assessment. His risk of sexual recidivism was assessed as being high. In conclusion the assessor noted, "*the undersigned is also of the opinion that the subject has very little insight into his problem areas. An early release certainly appears to be his priority. He strongly minimizes the seriousness of his sexual offending and also presented with several cognitive distortions. When the undersigned outlined to him some factors or issues he would become very defensive and did not appear to be ready to discuss the matter further. He did not express any remorse or regret for his actions or any acknowledgement of the impact on the victims.*"

It was recommended that Mr. [P] take a high-intensity program; however, because of the relatively short sentence and the timing of the program itself he was unable to do so. Mr. [P] completed a moderate intensity sex offender program at Westmorland Institution; CSC records indicate that he made limited gains and he was referred to the moderate intensity program at Dorchester Institution (where he had been transferred due to the change in his security status). Mr. [P] started the moderate intensity program at Dorchester in July of 2006; he did not complete the program, finishing in November 2006 when he was released on statutory release (even though he never really left Dorchester). The final report of that program notes that his overall participation in the program was very good and that his defensiveness diminished over time. At the beginning of the program his risk was estimated to be in the high-moderate range however during his detention new information came to light (that Mr. [P] had male victims) so his risk was reassessed as high. The program evaluators note, "*Mr. [P] made progress and*

gains with regard to his risk areas as he is now more aware of his risk factors. The areas where Mr. [P] has shown the most progress is in being more open and forthright with regards to sexual offending behaviour. More work is needed in emotion management, deviant arousal management, intimacy, relationships and social skills, building a strong community support system as well as challenging risk to reoffend thinking”. [Italics in Theriault report.]

[40] Mr. P underwent a second sex offender assessment in 2008, after his second federal sentence commenced. At that time, he was assessed as being a high risk for sexual recidivism. He was also assessed as having “a high need for sexual treatment and a moderate likelihood of responsivity to treatment” (Theriault report, p. 18). Mr. P entered the intensive sex offender program in September 2009 and completed it in February 2010. Dr. Theriault quoted the assessment report as follows, at p. 18 of his report:

Overall, Mr. [P] made some gains and progress in the program. He possesses a better understanding of the factors contributing to sexual offenses than he did at the onset of treatment. He seems to have developed a better understanding of how important it will be for him to more effectively manage his risk factors, particularly in the areas of attitudes and emotion management. He still needs to develop and practice skills to manage these areas as well as other areas such as: deviant sexual interest/preference, social and relationship skills and empathy.

Mr. [P]’s lack of emotional maturity, deviant sexual interests and poor social skills were the main contributing factors to his offenses and if they remain unchanged or unmanaged his risk will increase and become unmanageable.

Mr. [P]’s risk for sexual recidivism was reevaluated following his participation in the high-intensity sex offender program. Compared to other sexual offenders Mr. [P]’s static risk for sexual recidivism is estimated to be high and his dynamic risk for sexual recidivism is also estimated to be in the high range. Based on the combined influence of dynamic and static factors, Mr. [P]’s risk to reoffend sexually (and in a similar matter) is estimated to be in the high range compared to other sexual offenders. [Italics in Theriault report.]

[41] After the intensive sex offender program, Mr. P was briefly in the maintenance sex offender program at Dorchester Penitentiary. This ended in March 2011 when he was released to the community. In the community, Mr. P continued in programming. According to Dr. Theriault, the general thrust of the commentary in his community-based reports is more encouraging than his institutional reports. He added that Mr. P engaged in a national maintenance sex offender program cycle between March 29 and June 27, 2011. At p. 18, Dr. Theriault again quoted the assessment report:

[O]verall Mr. [P] has been viewed as making slow but steady progress during this cycle of the program. Since this is exactly the goal Mr. [P] has set for himself it is viewed as being ... very positive. Mr. [P] indicates that he does not wish to pressure himself to the point of becoming overly anxious or stressed out and he appears to be progressing at a comfortable pace and comfortable with his current situation. Mr. [P] has been encouraged to be wary of progressing too slowly and to perhaps challenge himself a little in terms of taking further steps such as looking for part-time work but he has stated that this would take him outside of his comfort zone at this point in time. [Italics in Theriault report.]

[42] Mr. P's last cycle of programming occurred between June 28 and September 20, 2011. This report was quite positive, Dr. Theriault quoted, at p. 19:

Overall there's little to report on in this case since the conclusion of the previous cycle. This is viewed as being very positive. Mr. [P] has been making steady progress since his release and with very few exceptions has shown a high degree of skill use on this release. His overall progress has continued during this cycle of the program with no major concerns noted. [Italics in Theriault report.]

[43] Although Mr. P's risk on STATIC 99 remained in the high category, his risk on the Stable 2007 "had fallen to the low interpretive range producing an overall risk in the moderate category", Dr. Theriault wrote. He continued, at p. 19:

In discussing his programming Mr. [P] indicates that he achieved significant results only after he entered the high-intensity program. He indicates that he found his first moderate intensity program difficult to understand and he claims that he did not have a good relationship with the program leader. However he reports that in his high-intensity program he came to a much better understanding of his offense cycle. He reports that he has come to understand the nature of his cognitive distortions and how he has used them to rationalize his offending behaviour. He reports that he has come to accept that he does have deviant sexuality and that he must strive to overcome this not merely by avoiding situations where children are present but actively working on other emotional issues such as loneliness and boredom which trigger emotional states that lead to offending behaviour. Mr. [P] opined that his coming to terms with his own sexual abuse and sharing it with others has helped him grow as a person and ... become more empathetic towards his own victims.

Mr. [P] repetitively focused on how he believes that he is becoming more socially outgoing. He reports that whereas previously he identified primarily with children he now identifies primarily with adults. Moreover he reports that he is now capable of approaching women in a comfortable fashion and indeed he reports he is now in a relationship of a sexual nature.

Mr. [P] reports that he has been working hard to garner community supports. He reports an ongoing positive relationship with his mother but as I have noted previously his mother, however well-intentioned she may be, should not be seen as a means to assist in the monitoring of Mr. [P] in the community. Mr. [P] reports that he is been active in the circle of support and accountability (CoSA) a community-based organization for sex offenders. There is a letter of support from CoSA in the file materials made available to me. I had the opportunity to discuss Mr. [P] with Ms. Shirley Dixon, from CoSA. She feels that Mr. [P] has demonstrated increased insight into his behaviour over the year she has [known] him and feels that he has “blossomed” with respect to his use of appropriate adult social skills. She indicates that she and CoSA remain supportive of Mr. [P] at this time. Mr. [P] also reports that he has an ongoing positive relationship with Sr. Pat Wilson. In my discussion with Sr. Wilson she indicates that she has seen a considerable amount of growth in Mr. [P] who she has known for the last several years. She reports that when he was in the community she remained in touch with him on a regular basis. She feels that he has been increasingly capable of expressing remorse for his actions and has a greater understanding of his previous offending behaviour. Sr. Wilson indicates that she believes that Mr. [P] is genuine in his attempts not to reoffend.

[44] Dr. Theriault’s assessment led him to diagnostic impressions that included pedophilia, nonexclusive type and avoidant personality traits, antisocial traits (p. 20). He discussed the various risk assessment tools, and said, at pp. 22-23:

Mr. [P]’s risk for violent and sexual recidivism was gauged utilizing the scheme of the SVR-20, the Static 99/Static 2002, and the SORAG [Sex Offender Risk Assessment Guide]....

... [T]he SORAG is an actuarial instrument that gauges the individual’s risk for violent recidivism (in sexual offenders) comparative to other groups of sexual offenders with known rates of violent recidivism based on static factors. Based on the assessment of risk factors individuals are placed in one of 9 ascending categories of risk and a range of probabilities for violent recidivism are attached to each of these categories. Mr. [P]’s score on the SORAG places him in the fourth of 9 ascending categories of risk. Individuals from this group with similar scores recidivated violently at rates of 39% over 7 years and 59% over 10 years at risk. In this instance “at risk” is considered to mean at risk in the community. Note should be made that the SORAG does not predict solely sexual violence but rather all episodes of violence. The SORAG also does not predict magnitude of violence (sexual or nonsexual) nor does it predict the likelihood of when in a period at risk violence will occur. However, in general, the higher the score on the SORAG the more likely it is that violence will occur early on in the period of risk. Mr. [P]’s relatively low score on the SORAG may reflect the fact that his history contains no violence outside of sexual offending.

[45] Dr. Theriault went on to discuss the Static 99-R and the Static 2002, at p. 23:

... I have chosen to use both; the Static 99-R as that is what was utilized in CSC (and can be combined with the Stable 2007), and the Static 2002, as that instrument allows for gradation of risk by age, an issue for Mr. [P] as he is now 51. These instruments utilize only static risk factors. Mr. [P]'s score on the Static 99-R places him in the high category of risk for sexual recidivism. The estimated 5-year sexual recidivism rates for individuals with Mr. [P]'s score is 13,4%. His relative risk ratio (that is the likelihood of his reoffending compared to the "average" sexual offender) is 3.77 – in other words, Mr. [P] is almost 4 times as likely to reoffend sexually as the average sexual offender.

On the Static 2002R, Mr. [P] scores in the moderate-high range. If he were to remain in custody until after the age of 60 his risk would fall further, in to the moderate range. Assuming release before the age of 60 his predicted recidivism is 4.6% and his relative risk is 1.9.

Recidivism rates do change over time and with different populations. It may be simpler, as a heuristic, to focus on the range of low-moderate-high. In Mr. [P]'s case, his scores on the Static 99/2002 place him on the moderate-high to high range. Given that the Static 2002 was designed to accommodate for age, I believe the Static 2002 score to be the more accurate... [Emphasis in original.]

[46] As to the SVR-2-, Dr. Theriault noted that it "is an example of a guided clinical judgment instrument" which he considered to generally "perform at a level between that of an actuarial instrument and unstructured clinical judgment..." He said, at p. 23:

... In my opinion, on the SVR-20, Mr. [P] scores in a moderate range for sexual recidivism. Indicators of increased risk on this instrument include his history of sexual abuse, his sexual deviance, his history of relationship problems, his history of high density offending, his multiple offence types (adult, child, male female) and use of a weapon. I would note that there are indications of improvement in several other domains such as his use of cognitive distortions, his minimization of offences and his attitude towards intervention, and some risk factors, such as substance use are not applicable. [Emphasis in original.]

[47] Dr. Theriault discussed the roots of Mr. P's behavior in his own abuse as a child, his identification with children, and his preference for deviant sexual behavior. The social situation was conducive to offending, and specifically the family situation that gave him opportunities for such conduct with nieces and (to a lesser extent) nephews. It was, therefore, generally incidents involving non-family victims that led to his being caught shortly afterward. That said, Dr. Theriault concluded that Mr. P "does not tend towards general anti-sociality. He has an

almost non-existent criminal record other than his sexual offenses and no record of nonsexual violence,” nor did he have a history of substance abuse that could constitute an acute dynamic risk factor (p. 24). Dr. Theriault added that “[t]here does appear ... to have been a general improvement over time in those factors that underlie his deviant sexual behavior” (p. 24). This was apparent in his progress in institutional and community-based programming. He noted as well that “despite convictions in 2007 and 2013, Mr. P’s last known offence occurred in 2004/2005” (p. 24). All of his programming had occurred after the last known offence.

[48] Dr. Theriault did not recommend antiandrogen medication for the reduction of sex drive, given the general age-related decline in sex drive, as well as because this could interfere with Mr. P’s “attempts to form a normative sexual relationship with an age-appropriate peer” (p. 25). He concluded that Mr. P had “generally shown himself to be amenable to supervision within the community”, with the qualification that Mr. P’s mother should not be made responsible for any supervisory activity (p. 25).

[49] In summary, Dr. Theriault concluded, at pp. 25-26:

1. Mr. [P] does show a pattern of repetitive sexually violent activity. Mr. [P] is clinically primarily a pedophile with historically, primary attraction to 10 to 12-year-old females. However, although he shows considerable density of offending with this age/sex group, he also shows more polymorphous offending with offenses against male children and adult females.
2. Mr. [P] shows a risk for sexual re-offense recidivism in the moderate high range compared to other sexual offenders.
3. Mr. [P]’s record shows pseudo-recidivism; therefore, there is no evidence to suggest that Mr. [P] has reoffended after receiving appropriate programming.
4. There is evidence both from file review and from my examination of Mr. [P] to suggest that he has made therapeutic gains over the course of his treatment. These gains, although hard to quantify statistically, should translate into a reduced risk of sexual recidivism for Mr. [P].
5. I would not support the use of antiandrogens in this case as it may inadvertently impact on other areas of Mr. [P]’s life which are supportive of decreased recidivism.
6. In my opinion Mr. [P]’s case shows the possibility of eventual control in the community.

[50] I have found Dr. Theriault’s report to be of significant assistance in this analysis.

[51] Ms. W and Ms. F submitted victim impact statements. Ms. F indicated that the sexual assaults caused her anxiety when she was of school age, and she indicated that she has suffered from post-traumatic stress disorder since her late twenties. She experienced flashbacks and nightmares. As a result, she missed work due to anxiety, stress, paranoia and depression, and also experienced a sleep disorder. She underwent counselling and she has learned coping tactics to deal with her anxiety. She no longer has a relationship with her grandmother, Mrs. P, as a result of these events.

[52] Ms. W related the trauma that she suffered from these events, and said certain places remind her of the accused's bedroom. She sometimes has intrusive dreams and nightmares of abuse and of Mr. P. She wakes up sweating and often crying. She is also very concerned about protecting her children from possible danger, specifically from men. She is concerned about her children having sleepovers because of her deep-seated feeling that someone might harm them. She added that when she was a child she thought that the abuse was her fault because no one ever stopped it. She has a poor relationship with her father because he continues to have a relationship with his mother (her grandmother), who she feels had the ability to step in and stop it.

[53] Even though she feels that Mr. P cannot reach her, or cause her harm, Ms. W said she still fears him, and she stated that "I do not think the feeling that he has some power to harm me will ever go away." She wrote that she is angered by the fact that she cannot fully express herself. Each stage of the process, having to hear updates and talking about it, leaves her with a sick feeling and stirs her emotions. She concluded by saying that she wants to move on and that she hoped or wished that these events had never happened. Her fondest wish is that she would be able to forget.

Aggravating and mitigating factors

[54] My duty is to give priority and emphasis to the principles of denunciation and deterrence. In particular, this is required because the victims were children, under the age of eighteen; in this case, as young as five years of age. I must give weight to the fact that the victims were extremely young. They were extremely vulnerable. They were innocent. They thought they could rely on their parents' brother, Mr. P to protect them and to love them and to play child games with them. The furthest thing from anyone's mind would be that they would be used as sexual

objects for Mr. P's sexual gratification. It never would have been thought that they would be endangered, psychologically and physically, by his conduct. Mr. P stood in a trust relationship vis-à-vis Ms. F, Ms. W and Ms. B.

[55] Mr. P has a significant prior criminal record, including convictions for similar conduct. However, I do note that the conduct addressed in the counts before the court today is conduct which occurred prior to his latest conviction in 2007. These offences are therefore dated. Counsel for the Crown and Defence have submitted that these circumstances militate against seeking a longer period of incarceration and long-term offender designation.

[56] Mr. P has taken steps to address his behavior. He has followed all the courses mandated by the correctional service. He has continued with such treatment and programs since his 2011 release from incarceration.

[57] Mr. P also elected to enter a plea of guilty, avoiding the need for the victims to testify at trial. This is of reduced significance, however, given that they all had to testify at the preliminary inquiry. It has less value as a mitigating factor than it would have had had the victims not been required to testify at all.

[58] Mr. P has the support of several members of the community. I have taken notice of letters from Kit Waters, of the St. Mary's University Department of Sociology and Criminology; Timothy Millar, of the Circles of Support and Accountability; as well as Sr. Pat Wilson and Shirley Dixon. These letters speak to the efforts that Mr. P has made to change his life and to maintain a healthy attitude towards adult sexual relations.

[59] I note as well that Mr. P has made an apology to his victims, which I accept as being meant honestly and in good faith.

Sentence

[60] Having considered the objectives and principles of sentencing; having taken into account the specific directive to give pre-eminence to the principles of denunciation and deterrence in the circumstances of this case; and having considered the various aggravating and mitigating factors, as well as the timing of the offences, I am prepared to accept the joint recommendation of Crown counsel and Defence counsel. I therefore impose a sentence of five years in a federal institution on the following counts:

[61] On Indictment C.R. No. 395519, in respect of offences against SW: **Count (1)** (*Criminal Code*, s. 149), five years, concurrent to Count (2); **Count (2)** (*Criminal Code*, s. 271), five years, concurrent to Count (1).

[62] On Indictment C.R. No. 396773, in respect of offences against NF: **Count (1)** (*Criminal Code*, s. 271), six months, concurrent to Counts (2) and (5) of this indictment, as well as to Counts (1) and (2) in Indictment C.R. No. 395519.

[63] On Indictment C.R. No. 396773, in respect of offences against WB: **Count (2)** (*Criminal Code*, s. 271), two years and six months, concurrent to Count (5) of this indictment, as well as to Counts (1) and (2) in Indictment C.R. No. 395519; **Count (5)** (*Criminal Code*, s. 152), two years and six months, concurrent to Count (2) of this indictment as well as to Counts (1) and (2) in Indictment C.R. No. 395519.

[64] Counts (3) and (4) in Indictment C.R. No. 396773 are stayed in accordance with the principle in *Kienapple v. R.*, [1975] 1 S.C.R. 729.

Long-term offender designation

[65] I will now deal with the Crown's request that Mr. P be designated a long-term offender pursuant to section 753.1 of the *Criminal Code*, notice of which was filed on April 22, 2014. Pursuant to the relevant provisions of the *Criminal Code*, the Crown is required to establish that the conditions precedent to the applications have been complied with and that the offender meets one or more of the two definitions of a long-term offender.

[66] Part XXIV of the *Criminal Code* deals with the application in question. Prior to 1997, provided an accused met one or more of the definitions of a dangerous offender, the court was required to make the designation. There was no discretion to impose either a finite or indeterminate sentence. In 1997, Parliament amended the *Criminal Code* to introduce the concept of long-term offender. The court was granted the discretion not to make a dangerous offender order, even though the offender could be included in one of the definitions; instead, the court can designate the offender a long-term offender and impose a determinate sentence followed by up to ten years of supervision in the community. The court's discretion was somewhat limited by the requirement to determine whether there was a reasonable possibility of eventual control of the accused's risk in the community. If the court declined to exercise its discretion, the default designation

of dangerous offender was mandated, and the offender would be sentenced to a mandatory term of indeterminate custody.

[67] Pursuant to a further amendment that came into force in 2008, the *Criminal Code* proscribed any discretion on the part of the court to declare the accused a long-term offender if the accused met the dangerous offender definition. In that instance, the court has no discretion and must declare that individual or accused a dangerous offender.

[68] Mr. P is being sentenced for offences that occurred between January 1, 1982, and June 30, 1989, with respect to Ms. W, and between November 8, 1989, and February 8, 2003, with respect to Ms. F and Ms. B. Counsel agree that the appropriate legislation is that in force between 1997 and 2003. Therefore the court retains the discretion to designate Mr. P a long-term offender. There are, however, a number of conditions precedent to the availability of this discretion.

[69] The first requirement is that the offender has been convicted of a serious personal injury offence, as defined in s. 752 of the *Criminal Code*:

“serious personal injury offence” means

(a) an indictable offence, other than high treason, treason, first degree murder or second degree murder, involving

(i) the use or attempted use of violence against another person, or

(ii) conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage on another person, and for which the offender may be sentenced to imprisonment for ten years or more, or

(b) an offence or attempt to commit an offence mentioned in section 271 (sexual assault), 272 (sexual assault with a weapon, threats to a third party or causing bodily harm) or 273 (aggravated sexual assault).

[70] The offences for which Mr. P has been convicted and sentenced include sexual assault.

[71] The Crown cannot make a long-term offender application unless it has first sought, obtained and filed an assessment report pursuant to section 752.1. Dr. Theriault’s report meets this prerequisite. I am satisfied that the Crown has fulfilled all of the conditions precedent.

[72] The *Criminal Code* provides two possible means by which an accused can be found to be a long-term offender. Subsection 753.1(1) provides (as it did between 1997 and 2003):

753.1 (1) The court may, on application made under this Part following the filing of an assessment report under subsection 752.1(2), find an offender to be a long-term offender if it is satisfied that

- (a) it would be appropriate to impose a sentence of imprisonment of two years or more for the offence for which the offender has been convicted;
- (b) there is a substantial risk that the offender will reoffend; and
- (c) there is a reasonable possibility of eventual control of the risk in the community.

[73] Subsection 753.1(2) sets out the meaning of “substantial risk”. Between 1997 and 2003 it provided:

(2) The court shall be satisfied that there is a substantial risk that the offender will reoffend if

(a) the offender has been convicted of an offence under section 151 (sexual interference), 152 (invitation to sexual touching) or 153 (sexual exploitation), subsection 173(2) (exposure) or section 271 (sexual assault), 272 (sexual assault with a weapon) or 273 (aggravated sexual assault), or has engaged in serious conduct of a sexual nature in the commission of another offence of which the offender has been convicted; and

(b) the offender

(i) has shown a pattern of repetitive behaviour, of which the offence for which he or she has been convicted forms a part, that shows a likelihood of the offender’s causing death or injury to other persons or inflicting severe psychological damage on other persons, or

(ii) by conduct in any sexual matter including that involved in the commission of the offence for which the offender has been convicted, has shown a likelihood of causing injury, pain or other evil to other persons in the future through similar offence.

[74] The Crown submits, and the Defence agrees, that the two paths to a long-term offender designation are through a predicate offence enumerated in section 753.1(2)(a), and a finding that the offender has fulfilled the requirements of section 753.1(2)(b)(i) or (ii), or both. The Crown submits that Mr. P meets the requirements of ss. 753.1(2)(b)(i) or (ii). In addition, Mr. P is guilty of several

counts of sexual assault and one count of invitation to touching for sexual purpose. Therefore the requirements of s. 753.1(2)(a) are met. I have specifically designated the counts relating to WB for this purpose.

[75] I am satisfied that the joint recommendation that Mr. P be declared a long-term offender for a term of 7.5 years should be accepted. In coming to this decision, I have considered the facts set out in the agreed statement of facts, the presentence report, and the report of Dr. Theriault. It is clear that Mr. P meets the requirements. He has shown the requisite pattern of repetitive behaviour and the likelihood of causing injury or severe psychological damage to other persons, as required by the legislation. By virtue of the same analysis the court can conclude that Mr. P's conduct has shown the likelihood of causing injury, pain, or other evil to other persons in the future through similar offences. I have also concluded that there is a reasonable possibility of eventual control of Mr. P's risk in the community.

[76] I therefore designate Mr. P as a long-term offender . I find that that the plea of guilty to the counts involving WB meets the requirement that Mr. P has been convicted of offences which carry the requisite term of imprisonment.

[77] I also grant ancillary orders under the *Sex Offender Information Registration Act*, S.C. 2004, c. 10, under which Mr. P shall register for life within seven days of his release from custody, in accordance with the order of May 5, 2015.

[78] As well, there will be a lifetime weapons prohibition order under s. 109(1) of the *Criminal Code*, prohibiting Mr. P from possessing any prohibited firearm, restricted firearm, prohibited weapon, prohibited device, or prohibited ammunition. He will also be prohibited for life from possessing any other firearm or ammunition, or any cross-bow, restricted weapon or explosive substance. He is further required to surrender any firearm, crossbow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance in his possession, and any authorization, license, or registration certificate he has for any of the prohibited things to a peace officer of the Halifax Regional Police within one day of the order of May 5, 2015.

[79] I also order a 15-year prohibition under s. 161 of the *Criminal Code*. In accordance with the order of May 5, 2015, Mr. P is prohibited during that time from

(a) attending a public park or public swimming area where persons under the age of fourteen years are present or can reasonably be expected to be present, or a daycare centre, school ground, playground or community centre; or

(b) seeking, obtaining, or continuing any employment, whether or not the employment is remunerated, or becoming or being a volunteer in a capacity, that involves being in a position of trust or authority towards persons under the age of fourteen years; or

(c) using a computer system within the meaning of subsection 342.1(2) for the purpose of communicating with a person under the age of fourteen years...

[80] In addition, in accordance with the order of May 5, 2015, I order Mr. P to provide a bodily substance sample for the purpose of DNA analysis in accordance with ss. 487.051(1) and (2) of the *Criminal Code*.

[81] The victim surcharge is waived.

Conclusion

[82] Accordingly, Mr. P is sentenced to a total sentence of 5 years plus a 7.5 year long-term offender order.

LeBlanc, J.