SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. W.G.L.*, 2020 NSSC 323

Date: 20201113
Docket: 489303
Registry: Truro

Between:

Her Majesty The Queen

v.

W.G.L.

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Restriction on Publication: *Criminal Code* s. 486.4

Judge:	The Honourable Justice Peter P. Rosinski
Heard:	February 18, 19, 20 & April 17, 2020, in Truro, Nova Scotia
Counsel:	Thomas Kayter, Crown Attorney David Mahoney, Defence Attorney
Subject:	Sentencing for historical sexual offences against a child.
Summary:	WGL acted as step-parent to the victim LM (born 1985) from early 1997 to 2005. Charged with s. 271 and s. 151 offences between 1995 and December 31, 2000 on allegations of one incident of digital penetration of vagina (early 1997); 25-30 instances of simulated sexual intercourse while clothed, including tongue in mouth kissing (June 1997-October 31, 1999); 2 instances of stand-alone tongue in mouth kissing during the same time interval Found guilty after trial – no remorse at sentencing.
Issues:	1. Effect of *R. v. Friesen*, 2020 SCC 9? 2. Which statutory provisions apply? Time of offences or time of sentencing? 3. *Kienapple* principle not applicable?

4. What is the proper sentence?

Result:

1. *Friesen* is premised on legislative changes in 2005 and 2015 which came after offences in question – therefore strictly speaking it is of restricted effect in case at Bar; however qualitative comments re proper appreciation of gravity of these offences and deepened understanding of harms occasioned is relevant;

2. *Criminal Code* punitive provisions from time of offences applied;

3. Modified *Kienapple* principle applicable here;

4. 3 years and 6 months incarceration (no prior record) on s. 151 offence – concurrent sentence on s. 271 stayed as matter of fairness. Orders granted s. 487.051, 109, 490.012, 743.21 but not for s. 161 as it is a "punishment", and insufficient evidence to order pursuant to applicable sections in 1995-2000.

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Decision

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By the Court:

Introduction

[1] I have found WGL guilty that he did commit a sexual assault contrary to section 271 of the *Criminal Code* ("*CC*") and committed sexual interference with a person who is less than 14 years of age (s. 151 *CC*) in relation to LM between the Fall of 1996 and December 31, 1999 (2020 NSSC 144).[1]

[2] The maximum sentences available for those offences during that time interval were 10 years imprisonment.

[3] Presently, the maximum sentences available for those offences are:

- (s. 271) 10 years, unless the complainant is under the age of 16 years in which case 14 years is the maximum, and there is a minimum one-year period of imprisonment; and

[1] As a point of clarification, while at paras. 28-9, I stated that "I have carefully considered" Justice Paciocco's article, which does reference *R v JJRD*, (2006) 218 OAC 37, I have also read the court's comments in *R v CL*, 2020 ONCA 258, in relation to the attempted inclusion of Justice Doherty's comments from paragraph 53 of *JJRD* in the jury charge given in *CL*. In *CL* at para. 30 the court endorses the substance of the *JJRD* instruction: "I accept the Crown's submission that *JJRD* endorses the proposition that a proper conviction can be arrived at even where exculpatory testimony has no obvious flaws if the Crown mounts a strong prosecution: *R v OM*, 2014 ONCA 503…at para. 40. In such a case a trier of fact may appropriately find that the incriminating evidence is so compelling that the only appropriate outcome is to reject the exculpatory evidence beyond a reasonable doubt and find guilt beyond a reasonable doubt. There may be exceptional cases where it is appropriate for a trial judge to explain this avenue of conviction to the jury. We need not decide whether this is so since the direction the trial judge provided in this case was an error, for the following reasons."

- (s. 151-sexual interference to a person who is less than 16 years of age) – a minimum punishment of imprisonment for one year and a maximum of 14 years imprisonment.

[4] Offenders are entitled "if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment" by virtue of section 11(i) of the *Canadian Charter of Rights and Freedoms*.[2]

[5] For purposes of this sentencing, WGL therefore faces a maximum sentence of 10 years imprisonment on each count.

[6] The Crown had sought a global sentence of 3-5 years imprisonment; but after reviewing the PSR and concluding that WGL continued to exhibit no remorse, revised its recommendation to 5 years imprisonment; and Orders/Endorsements pursuant to sections 109, 161, 487.051, 490.012, and 743.21 *CC*.

[7] WGL suggests that a 18 to 24 months period of incarceration is appropriate, which "leaves open the option for the court to impose a period of probation for up

[2] See also *R v Poulin*, 2019 SCC 47 at paras. 28-52; and *R v KRJ*, 2016 SCC 31; and regarding "purely procedural" amendments see *R v Chouhan*, [2020] SCJ No. 101.

to three years which would allow for us a sexual offender assessment and treatment if the assessment determined that treatment was required." He accepts that the sections 109, 161, 487.051, 490.012 and an endorsement under section 743.21 may all be imposed by the court.

[8] Having regard to the statutory principles of sentencing, and upon a review of the jurisprudence, in my opinion a fit and proper sentence is three years and six months imprisonment in a federal penitentiary on each charge, to be served concurrently. I conditionally stay the sentence for the s. 271 *CC* offence.[3]

What is the applicable statutory and jurisprudential law in this case?

[9] In imposing sentences judges are guided by the relevant statutory provisions, and the binding and persuasive jurisprudence, which they then apply to the facts of the case. In this case, a threshold issue presents itself. WGL was convicted in 2020 for offences he committed between 1996 and 2000. The statutory principles of sentencing contained in the *Criminal Code* have changed during that time interval.

[3] Convictions on both offences should be recorded. The *Kienapple* principle is inapplicable: see *R v RV*, 2019 ONCA 664 at paras 46-47; and in these circumstances: see Justice Hebner's reason in *R. v. Kissner*, 2019 ONSC 4872 at paras. 41-51. The sentencing decision was affirmed: 2020 ONCA 685, through that court stated: "Given that we view the sentence as reasonable and fit, we do not need to consider [the *Kienapple*] issue." I stay the sentence on the sexual assault as it otherwise may be misleading.

[10] Is WGL to be sentenced according to the statutory principles of sentencing at the time of his crimes or at the time of his sentencing? Whichever set of principles of sentencing are found to be applicable, will also in large measure determine which precedents in the jurisprudence should be given the most weight, since they will have been analysed through the lens of the statutory principles of sentencing that also apply in this case.

[11] A further complicating factor arises as a result of the reasons of the Supreme Court of Canada in *R v Friesen*, 2020 SCC 9. While it does enunciate general principles of application to adults who are sentenced for sexual offences against "children" (see footnote 1 in the Court's reasons at para. 1), it also specifically addresses to whether "sentencing ranges for sexual offences against children [are] still consistent with Parliamentary and judicial recognition of the severity of these crimes" (para. 23).

[12] The unanimous reasons of the court include:[4]

> 34 Appellate courts have a dual role in sentence appeals (Lacasse, at paras. 36-37). Correcting errors in sentencing ensures both that the principles of sentencing are correctly applied and that sentences are not demonstrably unfit. Appellate courts also have a role in developing the law and providing guidance. Usually, in keeping with the common law emphasis on precedent, appellate guidance reflects and summarizes the existing law. The appellate court will distill many precedents into a single statement, a range of sentences or perhaps a starting point, that the sentencing judge can more readily use.

[4] I appreciate that the lengthy excerpts from *Friesen* may not all be necessary, however I feel it important to fairly set out the thread throughout the reasons that is particularly relevant to the case at Bar.

35 Sometimes, an appellate court must also set a new direction, bringing the law into harmony with a new societal understanding of the gravity of certain offences or the degree of responsibility of certain offenders (R. v. Stone, [1999] 2 S.C.R. 290, at para. 239). When a body of precedent no longer responds to society's current understanding and awareness of the gravity of a particular offence and blameworthiness of particular offenders or to the legislative initiatives of Parliament, sentencing judges may deviate from sentences imposed in the past to impose a fit sentence (Lacasse, at para. 57). That said, as a general rule, appellate courts should take the lead in such circumstances and give sentencing judges the tools to depart from past precedents and craft fit sentences.

…

43 This case presents an opportunity for this Court to consider the sentencing principles for sexual offences against children. Sentencing is one of the most important and "most delicate stages of the criminal justice process" (Lacasse, at para. 1). It is at this stage that the judge must weigh the wrongfulness of sexual violence and the harm that it causes and give effect to both in imposing a sentence (C. L. M. Boyle, Sexual Assault (1984), at p. 171). It is important for this Court to provide guidance so that sentencing judges impose sentences that accurately reflect the nature of sexual offences against children and their impact on the victim (see P. Marshall, "Sexual Assault, The *Charter* and Sentencing Reform" (1988), 63 C.R. (3d) 216, at p. 219). …

44 Given the facts of this case, the guidance we provide is focused on sentencing principles for the offence of sexual interference and closely related offences such as invitation to sexual touching (Criminal Code, s. 152), sexual exploitation (Criminal Code, s. 153(1)), incest (Criminal Code, s. 155), and sexual assault (Criminal Code, s. 271). …

…

…Nonetheless, the criminal law in general and sentencing law specifically are important mechanisms that Parliament has chosen to employ to protect children from sexual violence, to hold perpetrators accountable, and to communicate the wrongfulness of sexual violence against children. It is our duty to give Parliament's sentencing initiatives their full effect.

…

51 The prime interests that the legislative scheme of sexual offences against children protect are the personal autonomy, bodily integrity, sexual integrity, dignity, and equality of children…

…

55 These developments are connected to a larger shift, as society has come to understand that the focus of the sexual offences scheme is not on sexual propriety but rather on

wrongful interference with sexual integrity. As Professor Elaine Craig notes, "This shift from focusing on sexual propriety to sexual integrity enables greater emphasis on violations of trust, humiliation, objectification, exploitation, shame, and loss of self-esteem rather than simply, or only, on deprivations of honour, chastity, or bodily integrity (as was more the case when the law's concern had a greater focus on sexual propriety)" (Troubling Sex: Towards a Legal Theory of Sexual Integrity (2012), at p. 68).

56 This emphasis on personal autonomy, bodily integrity, sexual integrity, dignity, and equality requires courts to focus their attention on emotional and psychological harm, not simply physical harm. …

…

(2) Sentencing Must Reflect the Contemporary Understanding of Sexual Violence Against Children

74 It follows from this discussion that sentences must recognize and reflect both the harm that sexual offences against children cause and the wrongfulness of sexual violence. In particular, taking the harmfulness of these offences into account ensures that the sentence fully reflects the "life-altering consequences" that can and often do flow from the sexual violence (Woodward, at para. 76; see also, Stuckless (2019), at para. 56, per Huscroft J.A., and paras. 90 and 135, per Pepall J.A.). Courts should also weigh these harms in a manner that reflects society's deepening and evolving understanding of their severity (Stuckless (2019), at para. 112, per Pepall J.A.; Goldfinch, at para. 37).

…

75 In particular, courts need to take into account the wrongfulness and harmfulness of sexual offences against children when applying the proportionality principle. Accurately understanding both factors is key to imposing a proportionate sentence (R. v. Nur, 2015 SCC 15, [2015] 1 S.C.R. 773, at paras. 43-44). The wrongfulness and the harmfulness impact both the gravity of the offence and the degree of responsibility of the offender. Taking the wrongfulness and harmfulness into account will ensure that the proportionality principle serves its function of "ensur[ing] that offenders are held responsible for their actions and that the sentence properly reflects and condemns their role in the offence and the harm they caused" (Nasogaluak, at para. 42).

(b) Gravity of the Offence

76 Courts must impose sentences that are commensurate with the gravity of sexual offences against children. It is not sufficient for courts to simply state that sexual offences against children are serious. The sentence imposed must reflect the normative character of the offender's actions and the consequential harm to children and their families, caregivers, and communities (see M. (C.A.), at para. 80; R. v. Morrisey, 2000 SCC 39, [2000] 2 S.C.R. 90, at para. 35). We thus offer some guidance on how courts should give effect to

the gravity of sexual offences against children. Specifically, courts must recognize and give effect to (1) the inherent wrongfulness of these offences; (2) the potential harm to children that flows from these offences; and, (3) the actual harm that children suffer as a result of these offences. We emphasize that sexual offences against children are inherently wrongful and always put children at risk of serious harm, even as the degree of wrongfulness, the extent to which potential harm materializes, and actual harm vary from case to case.

…

(3) Parliament Has Mandated That Sentences for Sexual Offences Against Children Must Increase

95 Parliament has recognized the profound harm that sexual offences against children cause and has determined that sentences for such offences should increase to match Parliament's view of their gravity. Parliament has expressed its will by increasing maximum sentences and by prioritizing denunciation and deterrence in sentencing for sexual offences against children.

(a) Increase in Maximum Sentences

96 Maximum sentences help determine the gravity of the offence and thus the proportionate sentence. The gravity of the offence includes both subjective gravity, namely the circumstances that surround the commission of the offence, and objective gravity (L.M., at paras. 24-25). The maximum sentence the *Criminal Code* provides for offences determines objective gravity by indicating the "relative severity of each crime" (M. (C.A.), at para. 36; see also H. Parent and J. Desrosiers, Traité de droit criminel, t. III, La peine (2nd ed. 2016), at pp. 51-52). Maximum penalties are one of Parliament's principal tools to determine the gravity of the offence (C. C. Ruby et al., Sentencing (9th ed. 2017), at s. 2.18; R. v. Sanatkar (1981), 64 C.C.C. (2d) 325 (Ont. C.A.), at p. 327; Hajar, at para. 75).

97 Accordingly, a decision by Parliament to increase maximum sentences for certain offences shows that Parliament "wanted such offences to be punished more harshly" (Lacasse, at para. 7). An increase in the maximum sentence should thus be understood as shifting the distribution of proportionate sentences for an offence.

98 Parliament has repeatedly increased sentences for sexual offences against children. These increases began in 1987 with Bill C-15. By abolishing the historic offences of indecent assault on a female and acts of gross indecency and creating the sexual interference offence, Parliament effectively doubled the maximum sentence from five to ten years for sexual offences against children that did not involve vaginal or anal penetration (see L. (J.-J.), at pp. 240-41; Bill C-15, s. 1). Parliament has repeatedly signalled society's increasing recognition of the gravity of sexual offences against children in the years that followed. In 2005, Parliament tripled the maximum sentences for sexual interference, invitation to sexual touching, and sexual exploitation in cases in which the

Crown proceeds summarily from six months to 18 months by enacting Bill C-2, An Act to amend the *Criminal Code* (protection of children and other vulnerable persons) and the Canada Evidence Act, S.C. 2005, c. 32. Finally, in 2015, Parliament enacted the Tougher Penalties for Child Predators Act, S.C. 2015, c. 23. This statute increased the maximum sentences of these three offences and sexual assault where the victim is under the age of 16 from 10 to 14 years when prosecuted by indictment and from 18 months to 2 years less a day when prosecuted by way of summary conviction (ss. 2-4). This statute also increased the maximum sentences for numerous other sexual offences against children as indicated in the Appendix to these reasons.

99 These successive increases in maximum sentences indicate Parliament's determination that sexual offences against children are to be treated as more grave than they had been in the past. …

100 To respect Parliament's decision to increase maximum sentences, courts should generally impose higher sentences than the sentences imposed in cases that preceded the increases in maximum sentences. …Sentencing judges and appellate courts need to give effect to Parliament's clear and repeated signals to increase sentences imposed for these offences.

(b)Prioritization of Denunciation and Deterrence in Section 718.01 of the Criminal Code

101 Parliament's decision to prioritize denunciation and deterrence for offences that involve the abuse of children by enacting s. 718.01 of the *Criminal Code* confirms the need for courts to impose more severe sanctions for sexual offences against children. In 2005, Parliament added s. 718.01 to the *Criminal Code* by enacting Bill C-2. In cases that involve the abuse of a person under the age of 18, s. 718.01 requires the court to give "primary consideration to the objectives of denunciation and deterrence of such conduct" when imposing sentence.

102 The text of s. 718.01 indicates that Parliament intended to focus the attention of sentencing judges on the relative importance of sentencing objectives for cases involving the abuse of children. The words "primary consideration" in s. 718.01 prescribe a relative ordering of sentencing objectives that is absent from the general list of six objectives in s. 718(a) through (f) of the *Criminal Code* (Renaud, at s. 8.8-8.9). …As Saunders J.A. recognized in *D.R.W.*, Parliament thus attempted to "re-set the approach of the criminal justice system to offences against children" by enacting s. 718.01 (para. 32).

103 Section 718.01 should not be interpreted as limiting sentencing objectives, notably separation from society, which reinforce deterrence or denunciation. The objective of separation from society is closely related to deterrence and denunciation for sexual offences against children (Woodward, at para. 76). When appropriate, as discussed below, separation from society can be the means to reinforce and give practical effect to deterrence and denunciation.

104 Section 718.01 thus qualifies this Court's previous direction that it is for the sentencing judge to determine which sentencing objective or objectives are to be prioritized. Where Parliament has indicated which sentencing objectives are to receive priority in certain cases, the sentencing judge's discretion is thereby limited, such that it is no longer open to the judge to elevate other sentencing objectives to an equal or higher priority (Rayo, at paras. 103 and 107-8). However, while s. 718.01 requires that deterrence and denunciation have priority, nonetheless, the sentencing judge retains discretion to accord significant weight to other factors (including rehabilitation and Gladue factors) in exercising discretion in arriving at a fit sentence, in accordance with the overall principle of proportionality (see R. v. Bergeron, 2013 QCCA 7, at para. 37 (CanLII)).

105 Parliament's choice to prioritize denunciation and deterrence for sexual offences against children is a reasoned response to the wrongfulness of these offences and the serious harm they cause. The sentencing objective of denunciation embodies the communicative and educative role of law (R. v. Proulx, 2000 SCC 5, [2000] 1 S.C.R. 61, at para. 102). It reflects the fact that Canadian criminal law is a "system of values". A sentence that expresses denunciation thus condemns the offender "for encroaching on our society's basic code of values"; it "instills the basic set of communal values shared by all Canadians" (M. (C.A.), at para. 81). The protection of children is one of the most basic values of Canadian society (L. (J.-J.), at p. 250; Rayo, at para. 104). As L'Heureux-Dubé J. reasoned in L.F.W., "sexual assault of a child is a crime that is abhorrent to Canadian society and society's condemnation of those who commit such offences must be communicated in the clearest of terms" (para. 31, quoting L.F.W. (C.A.), at para. 117, per Cameron J.A.).

(4) Specific Guidance on Sentence Increases

106 We would decline the Crown's invitation to create a national starting point or sentencing range for sexual offences against children. Generally speaking, this Court is reluctant to pronounce on the specific length of sentence. The appropriate length and the setting of sentencing ranges or starting points are best left to provincial appellate courts (R. v. Gardiner, [1982] 2 S.C.R. 368, at pp. 396 and 404). These courts "are in the best position to know the particular circumstances in their jurisdictions" (Lacasse, at para. 95). Indeed, a degree of regional variation for sentences is legitimate (M. (C.A.), at para. 92). We would nonetheless emphasize that the guidance we provide about Parliament's legislative initiatives and the contemporary understanding of the wrongfulness and harmfulness of sexual violence against children applies across Canada.

107 We are determined to ensure that sentences for sexual offences against children correspond to Parliament's legislative initiatives and the contemporary understanding of the profound harm that sexual violence against children causes. To do so, we wish to provide guidance to courts on three specific points:

(1) Upward departure from prior precedents and sentencing ranges may well be required to impose a proportionate sentence;

(2) Sexual offences against children should generally be punished more severely than sexual offences against adults; and,

(3) Sexual interference with a child should not be treated as less serious than sexual assault of a child.

(a) Upward Departure From Prior Precedents and Sentencing Ranges

108 Courts can and sometimes need to depart from prior precedents and sentencing ranges in order to impose a proportionate sentence. Sentencing ranges are not "straitjackets" but are instead "historical portraits" (Lacasse, at para. 57). Accordingly, as this Court recognized in Lacasse, sentences can and should depart from prior sentencing ranges when Parliament raises the maximum sentence for an offence and when society's understanding of the severity of the harm arising from that offence increases (paras. 62-64 and 74).

109 This guidance from Lacasse applies to sexual offences against children. As noted previously, Parliament's decision in 2015 to increase maximum sentences for sexual offences against children should shift the range of proportionate sentences as a response to the recognition of the gravity of these offences. Sentences should increase as a result of this legislative initiative (Rayo, at para. 175). In certain cases, a sentencing judge [TRANSLATION] "must feel free to impose sentences above" a past threshold (R. v. Régnier, 2018 QCCA 306, at para. 78 (CanLII)). As the Quebec Court of Appeal has reasoned, courts must give "the legislative intent its full effect" and should not feel bound to adhere to a range that no longer reflects Parliament's view of the gravity of the offence (para. 40). Such a range may in fact be "obsolete and must be revised upwards" (para. 30).

110 A second reason why upward departure from precedents may be required is that courts' understanding of the gravity and harmfulness of sexual offences against children has deepened, as we have sought to explain above. As Pepall J.A. observed in Stuckless (2019), there has been a considerable evolution in Canadian society's understanding of the gravity and harmfulness of these offences (para. 90). Sentences should thus increase "as courts more fully appreciate the damage that sexual exploitation by adults causes to vulnerable, young victims" (Scofield, at para. 62). Courts should accordingly be cautious about relying on precedents that may be "dated" and fail to reflect "society's current awareness of the impact of sexual abuse on children" (R. v. Vautour, 2016 BCCA 497, at para. 52 (CanLII)). Even more recent precedents may be treated with caution if they simply follow more dated precedents that inadequately recognize the gravity of sexual violence against children (L.V., at paras. 100-102). Courts are thus justified in departing from precedents in imposing a fit sentence; such precedents should not be seen as imposing a cap on sentences (see Stuckless (2019), at paras. 61-62, per Huscroft J.A.).

> 111 We thus wish to express our concern about sentencing ranges based on precedents that appear to restrict sentencing judges' discretion, for example, by imposing a cap of three to five years on sentences that can only be exceeded in exceptional circumstances. For instance, the British Columbia Court of Appeal has set a range for sexual interference of one to three years and has suggested that only in "rare circumstances" would a sentence above three years be justified (R. v. Williams, 2019 BCCA 295, at para. 71 (CanLII)). Similarly, the Newfoundland Court of Appeal has held that the range for sexual assault of a child involving both "intercourse" and abuse of a position of trust is three to five years and that "special circumstances" are required to depart from this range (R. v. Vokey, 2000 NFCA 14, 186 Nfld. & P.E.I.R. 1, at para. 19).

[13] In summary, the court emphasized that after its decision in *Friesen*, sentencing courts, which have a duty to respect the will of Parliament, are generally expected to treat the sentencings of offenders who commit sexual offences against children more seriously in future, to ensure sufficiently deterrent and denunciatory sentences are imposed as directed by s. 718.01 *CC*, and increased maximum sentences.

[14] Turning to the offences before this court, I conclude that some, but not all, of the reasoning in *Friesen* directly applies to this sentencing.

[15] The offences were committed between the Fall of 1996 and December 31, 1999.WGL was convicted on April 21, 2020. The statutory principles of sentencing have been repeatedly revised between the date of the commission of the offences and the sentencing date.

[16] WGL argues that: "WGL is both charged and is required to be sentenced in accordance with the criminal legislative provisions that existed at that time… conditional sentences pursuant to section 742.1 of the *Criminal Code* were not precluded as an option in the sentencing process, and the general purposes and principles of sentencing set out in section 718, 718.1 and 718.2 were applicable."[5]

[17] In *Friesen*, the court was addressing the present statutory principles of sentencing. It aptly demonstrated how Parliament has repeatedly revised those principles over time, and increased the maximum sentences applicable to sexual offences against children- yet although one would naturally expect these legislative changes would cause an increase in the severity sentences compared with those before the statutory revisions became effective – the court was not satisfied that sentencing judges appreciated the intended impact of these legislative changes.

[18] I conclude that WGL is entitled to be sentenced according to the sentencing provisions (statutory principles of sentencing; maximum sentences available) that existed during the time of the commission of the offences – and the statutory-

[5] I note that the logical extension of that position is that the relevant sentencing case law should therefore also be restricted to those cases which involve the same period in time, and therefore same legislative provisions as were in place, and which apply to WGL's sentencing. Otherwise one is comparing cases that are "apples" with cases that are "oranges".

revisions rationale for increasing sentences for sexual offences against children per *Friesen* is not applicable in WGL's circumstances (see *Friesen* para 169).

[19] On the other hand, in *Friesen*, the court also stated:

> "A second reason why upward departure from precedents may be required is that courts' understanding of the gravity and harmfulness of sexual offences against children has deepened, as we have sought to explain above." (para. 11)

[20] The latter comment is applicable to the sentencing of WGL, to the extent that this court can conclude that earlier precedents did not adequately reflect or recognize both the gravity and harmfulness of sexual offences to children.

The factual circumstances of the offences

[21] In convicting WGL, I stated:[6]

> 1. WL is charged that between January 1, 1995 and December 31, 2000 at or near Colchester County, Nova Scotia he did commit a sexual assault on LM, and furthermore did for a sexual purpose touch LM, a person under the age of 14 years directly with the part of his body, to

[6] Since the Indictment alleged offences between January 1, 1995 and December 31, 2000, and counsel were content to limit my consideration to whatever alleged conduct the court concluded fell within those dates, I therefore disregarded the allegations contained in para. 8 items 3(e) and (f). I note that LM turned 14 years of age in the first quarter of the year 2000. Moreover, at footnote 4 I discussed the frequency of the "sharing" incidents. I am satisfied beyond a reasonable doubt that they occurred more than 10 and less than 50 times as LM testified, and understood her evidence to be that her best estimate was an average thereof – ie. 25-30 times. I so conclude beyond a reasonable doubt.

wit his hands and body, contrary to sections 271 and 151 *Criminal Code* ["CC"].

2. I find him guilty of both offences.

Background

3. WL was born in 1956. Sometime between the Fall of 1996 and the spring of 1997, when he was living at his grandparents house in Wentworth, Nova Scotia, (see p. 191(21) Transcript) he met DL, (born in 1963) while she was living in Parrsboro, Nova Scotia. She had three children at that time living with her (whose father is MA, from whom she was then permanently separated):

    a. a daughter LM-DOB February XX, 1986;

    b. a son J1 -- who moved to live with his father within a couple of months after June 1997, and did not testify;

    c. a son J2 -- DOB September, XX, 1990, who did not testify.

4. In June 1997, WL and DL moved in together with her children. They lived in a small house in Great Village, where their own son J3 was born (DOB May XX, 1998, and who did testify). They lived there

until October/November 1998 when they moved to Bass River for approximately six months. They returned to the small house in Great Village, sometime between February and May 1999, where they lived until WL and DL (and all the children) separated in October 1999, until they resumed living together at a trailer in North River/Highway 311, in the late spring of 2002.

5. LM alleges sexual touchings by her stepfather WL while they lived together, in Great Village, at the trailer in North River/Highway 311, and at their next residence at Pictou Road, Truro where the evidence suggests they moved in the Summer/Fall of 2003.

6. The witnesses for the Crown were limited to LM and her mother DL. The witnesses for the Defence were limited to WL and his son J3, who lives with him.

7. In his testimony WL denied that any of the touchings alleged by LM happened at all.

The basic allegations by LM

8. In summary, LM testified that WL did the following things to her between January 1, 1995 and December 31, 2000 (i.e. while she was between 9 and almost 14 years of age):

a. "the car incident" -- (see p. 33 Transcript) while they were still living at Parrsboro, she came to be at WL's mother's house in Wentworth Nova Scotia, across from a hotel on the highway. WL took her for a short drive to a store approximately five minutes away. He asked her if she wanted to drive the car, and she agreed. He let her sit on his lap while he operated the gas and brake pedals. While driving in that fashion with her holding the steering wheel he put his right hand into her pants and underwear and placed a single finger into her vagina where he "wiggled it" for not very long -- she estimated less than a minute. His left hand was resting on her left leg and no one else was in the car. She said it ended when she turned around to see him, but he said nothing, yet smiled, laughed and raised his eyebrows (see page 35 transcript; in contrast to WL's testimony at pages 222 - 223). She recalled that there was no snow about and it was very sunny, so although she doesn't exactly know when it would happened her best estimate was that it was in the fall of 1995 or 1996 because it was before they initially moved in together as a family to the Great Village home. She also

based her estimate on her recollection that she had not yet taken the sex-education course, which she believed she had taken in the Spring of her Grade 5 year-which the evidence suggests likely was in the Spring of 1997 since she was anticipated to graduate from Grade 12 in June 2004. I accept that LM is correct when she says that she would've graduated in June 2004, but for her failing grade 11, and consequently graduated in June 2005 instead. In June 2004 she would've been 18 years of age. She would therefore have been in Grade 5 in September 1996 and graduated in June 1997. In September 1996 she would've been 10 years old, and on February 1, 1997 she turned 11 years of age. Moreover, they moved in together as a family at Great Village in June 1997;

b. the "sharing" incidents - she testified that these incidents happened only at the Great Village home and more than 10 times and less than 50 times, mostly while she was 10 to 11 years old and less so as she was 12 years old (i.e. February 1, 1996 -- January 31, 1999). She said that after the first occasion, WL gave these incidents the name, "sharing" - e.g.: "come

share with me". She says they all took place on the couch in the Great Village home while they were watching TV. Their frequency varied with his opportunity to do so, which she stated was "as often as we were alone together ... There were stretches that it was not that frequent". He would always first kiss her by putting his tongue in her mouth, and then grind his pelvis area against her pelvis area (which has been colloquially referred to as "dry humping") for some time, which always seemed to end with: "his breathing would change and he would always go into the bathroom". LM testified that these incidents usually took place after school and before her mother was in the household from work, and sometimes they happened after supper when her mom was not present;

c. the tongue-in-mouth kissing incidents (these are incidents in which there was no associated "sharing" activity, and LM acknowledged sometimes other people were in the house, but not in the specific room in question)-LM estimated these incidents happened;

d. at the family home in Great Village, twice in the kitchen (i.e. June 1997 -- October 1999 based on the dates they lived together as a family there, as testified to by WL and DL);

e. at the family home at North River/311 Highway, twice in the kitchen (i.e. late Spring 2002 -- summer 2003);

f. at the family home at Pictou Road, Valley, NS-once in each of the dining room, living room, and once to twice in the kitchen (i.e. summer 2003 -- summer 2005).

When did the parties live in Great Village, North River and Pictou Road?

9. Given that LM has referenced incidents occurring at the Great Village home, the mini-trailer at North River/ 311 Highway and house at Pictou Rd., I believe it contextually helpful to try to determine during which years LM and WL were present together in those various residences.

10. I conclude that there are some reliable touchstone dates as follow.

11. LM was born February 1, 1986. J2 was born September 15, 1990. DL said that she was pregnant with J3 when WL and she got married. J3 was born May 28, 1998.

12. WL testified that he met DL at the Bass River dance in the Fall of 1996, (DL testified that it was March 1997) while he was living in the Wentworth area at his grandparents' home. He says he worked for Jim Tanner for approximately two years and was still working for him when they moved into the Great Village house for the first time (June 1997). He claimed to have started working with Leland McNutt in the Spring of 1998. He testified that from June 1997 to October 1999 he was living with DL and the kids.

13. Both DL and WL agreed that they moved into the Great Village home for the first time in June 1997. They also both agree that they got married in November 1997, and that J3 was born while they were living there (May 28, 1998).

14. WL and DL agree that in either October or November 1998 they moved to Bass River, but stayed only for a short time (about 6 months) and that by approximately February -- April 1999 they had moved back to the same house at Great Village.

15. The evidence of WL and DL places their date of separation thereafter in October 1999, when DL and the children went to the transition

house in Bible Hill. After less than a week there, only DL and the children then moved back to the house at Great Village.

16. WL says that he lived in the Salmon River Road trailer court between November 1999 and November 2000, and then moved to the mini-trailer at North River/311 Highway around November 2000.

17. DL was certain her LPN diploma was issued in December 2001. She testified that it was a 15-month program -- therefore it started in September 2000; and that she and WL were separated during that time.

18. Both DL and WL agreed that they were separated between 2 to 2 1/2 years (October 1999 -- Spring 2002) while she took the LPN diploma course, although during that time, WL had sometimes helped her with childcare. Feeling that he had changed, after the completion of her LPN program, DL considered moving in with him again. She says she did so around the time school ended for the summer in 2002. They (DL, LM, J2 and J3) then moved into his mini- trailer at North River/Highway 311. DL recalled that LM, J2, and J3 were living there on May 28, 2002, because she distinctly remembers they were there

when her father died, because that was on J3's fourth birthday -- May 28, 2002.

19. Both DL and WL agree that (in the summer, and before the winter respectively) they bought the house at Pictou Rd. in 2003.

20. Further confirmed contextually relevant chronology includes that:

    a. LM graduated from high school in June 2005 and was living at the Pictou Rd. house at the time;

    b. LM and her partner C. moved to Moncton New Brunswick between 2005 and 2007- and returned and moved into their Londonderry, NS. house in the Spring of 2010;

    c. LM's daughter was born XX, 2012, and her christening was three months thereafter;

    d. While continuously living with WL, J3 had a very serious motor vehicle accident rendering him paraplegic on December XX, 2017;

    e. About 3 months after LM's daughter's birthdate (XX 2012), namely June 2012, LM told her mother for the first time that WL had molested her. This matter did not come to the

> attention of the police until the early part of 2018, (as a result of disconcerting information received by DL from another source which prompted her to approach LM as to whether she would agree to speaking to the police if they contacted her about what WL had done to her). LM agreed, and the police called her, and shortly thereafter, on April 5, 2018, she provided a statement to police accusing WL of committing the offences that formed the core of the allegations before the court.

[22] LM did not present a victim impact statement.[7] Neither did her mother who, in my opinion, is also properly viewed as a victim herein – *Friesen* at paras 85-6.

[23] During her testimony, she more than once alluded to herself as a very private person, and it appeared to me that she felt very uncomfortable discussing such private personal matters in open court before strangers to her.

[24] On the other hand, as the court noted in *Friesen*: (para. 126) "Any breach of trust is likely to increase the harm to the victim and thus the gravity of the offence. As Saunders JA reasoned in *DRW*, the focus in such cases should be on 'the extent

[7] The Crown cites my reasons in *R v CRH*, 2012 NSSC 233t para. 6 : "There is no victim impact statement from SG. The likelihood that psychological harm has resulted from Mr. H's perverse and inappropriate actions against SG may be inferred and I do so infer … *R v RTM*, 1996 NSCA 156 … *R v Powderface*, (1992) 73 CCC (3d) 550 (Alta CA)." There is no direct evidence of the actual harm LM has experienced as a result of the commission of the offences. As I am satisfied beyond a reasonable doubt thereof, I do so infer from the trial testimony.

to which [the] relationship [of trust] was violated' (para. 41).”; “The abuse of a position of trust is also aggravating because it increases the offender's degree of responsibility… enhances moral blameworthiness… exploits children's particular vulnerability to trusted adults, which is especially morally blameworthy… All other things being equal, an offender who abuses the position of trust to commit a sexual offence against the child should receive a lengthier sentence than an offender who is a stranger to the child.”; “Moreover, the long-term emotional and psychological harm to the victim can also become more pronounced where the sexual violence is repeated and prolonged… magnifies the severity of the offence. It also increases the offender's moral blameworthiness…” (para. 131); “the power imbalance between children and adults is even more pronounced for younger children, whose 'dependency is usually total' and who are 'often helpless without protection and care of their parents'…” (para. 134); “attributing intrinsic significance to the occurrence or non-occurrence of penetrative or other sexual acts based on traditional notions of sexual propriety is inconsistent with Parliament's emphasis on sexual integrity in the reform of the sexual offences scheme… Courts should not assume that there is any clear correlation between the type of physical act and the harm to the victim… Judges can legitimately consider the greater risk of harm that may flow from specific physical acts such as penetration. However, as

McLachlin J explained in *McDonnell*, an excessive focus on the physical act can lead courts to under-emphasize the emotional and psychological harm to the victim that all forms of sexual violence can cause…" (para. 142); … "We would emphasize that courts must recognize the wrongfulness of sexual violence even in cases where the degree of physical interference is less pronounced." (para. 145); "… It is in error to assume that an assault that involves touching is inherently less physically intrusive than an assault that involves fellatio, cunnilingus, or penetration." (para. 146); "to treat a victim's participation as a mitigating factor would be to circumvent the will of Parliament through the sentencing process… would undermine the wrongfulness of sexual violence against the child… A victim's participation should not distract the court from the harm that the victim suffers as a result of sexual violence. We would thus strongly warn against characterizing sexual offences against children that involve a participating victim as free of physical or psychological violence…" (para. 149-152).

[25] More specifically the court commented at length about the potential harm that sexual offences against children can cause.

[26] In the case at Bar there is no direct evidence as to whether LM experienced any "'life altering consequences' that can and often do flow from the sexual violence…" (para. 74).[8]

[27] However, as the court reiterated at para. 76:

> "We emphasize that sexual offences against children are inherently wrongful and always put children at risk of serious harm, even as the degree of wrongfulness, the extent to which potential harm materializes, and actual harm very from case to case. … the potential that these forms of harm will materialize is always present when ever there is physical interference of a sexual nature with the child and can be present even in sexual offences against children that do not require or involve physical interference. These forms of potential harm illustrate the seriousness of the offence even absent proof that they have materialized into actual harm (see McDonnell, at paras. 35-6)" (at para. 79)

[28] Significantly, they went on to elaborate at para. 80-81:

> "We wish to focus courts' attention on the following two categories of harm: harm that manifests itself during childhood, and long-term harm that only becomes evident during adulthood… These forms of harm can be so profound that children are 'robbed of their youth and innocence'… The following list of recognized forms of harm that manifest themselves during childhood makes this clear:
>
> > These effects include overly compliant behaviour and an intense need to please; self-destructive behaviour, such as suicide, self-mutilation, chemical abuse, and prostitution; loss of patience and frequent temper tantrums; acting-out aggressive behaviour and frustration; sexually aggressive behaviour; an inability to make friends and non-participation in school activities; guilty feelings and shame; a lack of trust, particularly with significant others; low self-esteem; an inability to concentrate in school and a sudden drop in school performance; an extraordinary fear of males; running away from home; sleep disturbances and nightmares; regressive behaviours, such as bedwetting, clinging behaviour, thumb sucking, and baby talk; anxiety and extreme levels of fear; and depression.
> >
> > (Bauman, at pp. 354 – 55)

[8] Where no victim impact statement is filed, "the court may consider any other evidence concerning any victim of the offence for the purpose of determining the sentence to be imposed" – s. 722(9) *CC*.

> Sexual violence against children also causes several forms of long-term harm that manifest themselves during the victim's adult years. First, children who are victims of sexual violence may have difficulty forming a loving, caring relationship with another adult as a result of the sexual violence. Second, children may be more prone to engage in sexual violence against children themselves when they reach adulthood…. Third, children are more likely to struggle with substance abuse, mental illness, post-traumatic stress disorder, eating disorders, suicidal ideation, self harming behaviour, anxiety, depression, sleep disturbances, anger, hostility, and poor self-esteem as adults…"

[29] In relation to future harms arising from their being a victim of sexual violence, the court stated at para.83-4:

> In many cases, it will be impossible to determine whether these forms of harm have occurred at the time of sentencing. If the victim is an adult at the time of sentencing, the court may be able to conclude that these forms of potential long-term harm have materialized into actual harm… As a result, courts must consider the reasonably foreseeable potential harm that flows from sexual violence against children when determining the gravity of the offence. Even if an offender commits a crime that fortunately results in no actual harm, courts must consider the potential for reasonably foreseeable harm when imposing sentence."

[30] In relation to actual harm the court stated at para. 85-6:

> "… Direct evidence of actual harm is often available. In particular, victim impact statements, including those presented by parents and caregivers of the child, will usually provide the 'best evidence' of the harm that the victim has suffered… Where direct evidence of the actual harm to the child is unavailable, courts should use the harm to the child as a lens through which to analyse the significance of many particular aggravating factors. Courts may be able to find actual harm based on the numerous factual circumstances that can cause additional harm and constitute aggravating factors for sexual violence against children, such as breach of trust or grooming, multiple instances of sexual violence, and the young age of the child. *We stress that direct evidence from children or their caregivers is not required for the court to find that children of suffered actual harm as a result of sexual violence*. Of course, we do not suggest that harm to the child is the exclusive lens through which to view aggravating factors."
>
> [My italicization added]

[31] I heard significant evidence regarding LM's life experiences between 1995 when she was nine years old and 2010 when she was 24 years old.

[32] When WGL came into her life she was 10 years old - she and her mother and siblings were still living in Parrsboro, their father having been permanently separated from their mother DL sometime earlier.

[33] Her father was sufficiently geographically distant and had his own issues which prevented him from providing her with healthy parenting, in any stable and ongoing fashion.[9]

[34] LM also described her relationship with her mother DL:

> "One of the things is that I have never felt like a priority to my mother. Time and time again I feel like she has chosen [WGL] over me and [J2]. I have also felt that [J3], [the son of WGL and DL and born 1998], was far more important to her than anyone else ever could or would be…. Then things started to change in our family dynamic. There were more rules and … Mom was different with him too… I found that her personality became less, and she began to put him first but more… More like she began to be afraid of him and then that got worse as the years went by… It hadn't been a long time when I'm going to say that [WGL] started to molest me and from that time … I disliked him and then I became very afraid of him." (pp. 6-9 Transcript)

[9] pp. 17-18 Transcript

[35] The “car incident” (digital vaginal penetration) happened either in the late Fall of 1996, or more likely in the Spring of 1997. This means that even before he lived with them, in what was a parenting role, her first impression of WGL was no doubt materially affected by his predatory commission of sexual offences against her during the car incident.

[36] They moved in together as a family in Great Village in June 1997. In mid-1998, J3 was born. They remained there (and Bass River briefly) together as a family until approximately October 1999, and then continued to live together with some breaks until the summer of 2005. LM turned 14 in the first quarter of 2000. The criminal offences herein ended by December 31, 2000.

[37] Notably, LM agreed that “WGL has always been generous with me. I always thought it was like a guilty conscience or maybe like a bribe, so I wouldn’t tell people what had gone on… I can’t think of anything he’s ever done for any of my brothers; this is only me… Yes, he’s been generous with me. He’s given me money several times over the years… When we [in 2010] did our roof, [WGL] helped us with the labour.” (pp. 15-18 Transcript).

[38] In 2010 she and her partner moved into a home together, and WGL saw fit to assist them with some roofing repairs etc.

[39] In 2012, LM became a mother to a young daughter. She told her mother what had happened to her at or around the time of her young daughter's christening. She told her that WGL was a child molester, and she did not want him around her daughter. According to the evidence presented, this was the first time she disclosed what had happened to her. She lived with this secret for at least 12 to 15 years, and I am satisfied beyond a reasonable doubt that it caused actual psychological harm during those years, and thereafter to the date of sentencing. I also am satisfied beyond a reasonable doubt that it will likely continue to cause her psychological harm.

The Pre-sentence Report

[40] WGL's family, education/training, employment, health, and lifestyle background are set out therein, and are unremarkable. He is presently 64 years of age and has one dependent, J3, who has lived with WGL from 2008 onward, and is now 22 years old. J3 has been confined to a wheelchair since December 2017, as a result of a single motor vehicle accident.

[41] WGL is no longer able to work, but his general health is good.

[42] He has no prior criminal record.[10]

[43] There is no hint of remorse indicated in the Report.

[44] For sentencing purposes, I keep in mind that WGL committed these offences 20 years ago.

[45] As Justice Beveridge stated in *R v AN*, 2009 NSSC 186 (affirmed 2011 NSCA 21):

> 82 Sentencing is a difficult task. It can be even tougher when it is in relation to conduct that decades old. That is because when an accused comes before the court and is to be sentenced for crimes from long in his or her past, the court is frequently dealing with not the same person that committed those offences. They have become different people. They may have overcome their problem or problems that have led them to commit the offences. *Here, in my opinion, the accused before me is very much the same man he was when he committed these offences*. I grant that more than a few birthdays may have passed, but he still blames his ex-wife as a justification and rationalizes his sick and depraved abuse of his daughters on the basis that J. understood his situation and was not really harmed or hurt by his actions. Instead he says he feels wronged by what he refers to as an attempt to extort money from him in 2003, taking him to court and exaggerating the abuse. If I have one thing to say to you sir that you might choose to remember, you and you only are to blame for your incredibly selfish and despicable behaviour.
>
> [My italicization added]

The respective positions on sentencing

[46] The Crown cites the following cases in support of its position:

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[10] The jurisprudence does not consider this to be a mitigating factor - Eg., see Justice Cacchione's reasons in *R v DAM*, [1996] NSJ No. 468 (SC).

- *R v S*, [2002] NSJ No 419- at paras 6-9
- *R v RM*, 2015 NSSC 189 at para. 13
- *R v WHA*, 2011 NSSC 246
- *R v McNutt*, 2020 NSSC 219
- *R v DC*, 2020 NLSC 78
- *R v RDDG*, 2014 NSSC 223
- *R v Poulsen*, 2020 ONCJ 440
- *R v Friesen*, 2020 SCC 9

[47] The Defence relies upon:

- *R v EMW*, 2011 NSCA 87
- *R v CFY*, 2019 NSSC 178
- *R v RT*, 2017 ONSC 3800 (which counsel describes as "strikingly similar to the case at bar" resulted in a sentence of 27 months imprisonment)
- *R v IPW*, 2016 ONSC 5919
- *R v GHE*, 2017 NSSC 281
- *R v JSM*, 2016 NSSC 158
- *R v RR*, 2016 ONSC 3684
- *R v GKN*, 2014 NSSC 150

- *R v JP*, 2013 NSSC 65
- *R v Friesen*, 2020 SCC 9

What is a fit and proper sentence?

A consideration of the effect on the sentencing decision in the case at Bar of the enactment of section 718.01 in 2005.

[48] Since the court is relying on the principles of sentencing, and offence maximums from the time interval between the Fall of 1996 and December 31, 2000, and the statements of Justice Cacchione in *R v DAM*, (1996) reflect the same considerations I must consider, I find the following helpful:

> 58 The common law principles of sentencing have been codified by s. 718 of the *Criminal Code* which describes the purpose of sentencing as follows:
>
> > "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."
>
> 59 Section 718. 1 describes the fundamental principle as being proportionality and the section reads:

> "A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender."

60 In imposing sentence a court must take into consideration under s. 718.2 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,
>
> 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 or;..."

That's not applicable in the present case. That relates to hate crimes.

> "(ii) evidence that the offender, in committing the offence, abused the offender's spouse or child,
>
> (iii)evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim, or"

That is applicable in the present case.

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

That is not applicable.

61 The *Criminal Code* also requires that:

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

It also requires that:

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

formerly known as the totality principle. The *Code* requires that:

> "(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances;"

and finally, it says that:

> "(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."

62 These principles are a codification of the common law principle that the purpose of sentencing is to protect the public. Protection of the public can be achieved through general deterrence, specific deterrence, reformation and rehabilitation or a combination of these.

63 In addition to these common law and codified principles the *Criminal Code* was amended in 1995 to provide for Conditional Sentences of imprisonment. Section 742.1 reads:

> "Where a person is convicted of an offence, except an offence that is punishable by a minimum term of imprisonment, and the court
>
> (a) imposes a sentence of imprisonment of less than two years, and
>
> (b) is satisfied that serving the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in s. 718 to 718.2
>
> the court may, for the purposes of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the offender's complying with the conditions of a conditional sentence order made under s. 742.3."

64 In cases involving sexual abuse of children certain principles have emerged from cases such as: *R. v. Hawkes* (1987), 81 N.S.R. (2d) 156 (C.A.); *R. v. Henderson*, 109 N.S.R. (2d) 349 (C.A.); *R. v. W.M.D.* (1992), 110 N.S.R. (2d) 329 (C.A.); *R. v. E.J.W.* (1993), 120 N.S.R. (2d) 66 (S.C.); *R. v. Fillis* (1986), 94 N.S.R. (2d) 356; *R. v. Richard* (1991), 106 N.S.R. (2d) 236; and *R. v. Cunningham* (1991), 108 N.S.R. (2d) 265.

65 These cases stand for the following propositions:

> That deterrence both specific and general is the primary sentencing consideration with emphasis on general deterrence when the offence involves children.

66 This is not to say that reformation and rehabilitation is not relevant to these types of cases.

67 Prior to the conditional sentencing provisions becoming law, the courts viewed as rare the cases involving a non-custodial sentence or a minimal sentence when children were

> sexually abused. These cases and others describe the sexual abuse of children by an adult as a reprehensible crime calling for a sentence of denunciation. The lack of a prior criminal record was held by these cases to not be unusual and to not militate against a sentence of lengthy incarceration. Our courts have also commented that an accused's unsatisfactory sexual history is not a mitigating factor.

[49] The court in *Friesen* emphasized that "sexual offences against children are violent crimes that wrongfully exploit children's vulnerability and cause profound harm to children, families, and communities. Sentences for these crimes must increase. Courts must impose sentences that are proportional to the gravity of sexual offences against children and the degree of responsibility of the offender, as informed by Parliament's sentencing initiatives and by society's deepened understanding of the wrongfulness and harmfulness of sexual violence against children." (para. 5)

[50] Importantly, its call for increased sentences is premised on changes to the *Criminal Code* in 2005 (s. 718.01) and 2015 (creation of minimum sentences and increases in the maximum sentences, for s 151 and s. 271 *CC* offences)- see para. 104.

[51] These legislative changes took place after the commission of the offences by WGL ended (December 31, 2000).

[52] Therefore, strictly speaking this court should not rely on the present section 718.01 in sentencing WGL. Section 718.01 reads:

> "Where in a court imposes a sentence for an offence that involved the abuse of a person under the age of 18 years, it shall give primary consideration to the objectives of denunciation and deterrence of such conduct."

[53] However, as cases such as *R v DAM*, [1996] NSJ No. 468 (SC) confirm, in Nova Scotia, the common law interpretation of the then extant principles of sentencing contained in *Criminal Code* sections 718, 718.1, and 718.2 *CC* was to the following effect (see more recently and after the effective date of s. 718.01 *CC*, the reasons in *R v EMW*, 2011 NSCA 87 at para 23):

> 65 These cases stand for the following propositions:
>
> > That deterrence both specific and general is the primary sentencing consideration with emphasis on general deterrence when the offence involves children.

[54] Thus, child victim sexual abuse sentencing cases from Nova Scotia before and after December 31, 2000, may presumptively be expected to have reflected what became Parliament's will, by its enactment of s. 718.01 in 2005- that is, they were to give primacy to "the objectives of denunciation and deterrence".

[55] For that reason, Nova Scotia sentencing cases from before and after the enactment by Parliament and the effective date of s. 718.01 in 2005, are likely

infused with a similar level of denunciation and deterrence that the enactment of section 718.01 specifically required after its effective date in 2005.

[56] The upshot of this is that for historical sexual offences such as in the case at Bar, the simple call for increased sentences is not as applicable to the Nova Scotia jurisprudence, unless a particular sentencing decision clearly reflects error, namely that the court clearly did not apply the principle that "deterrence both specific and general is the primary sentencing consideration with emphasis on general deterrence when the offence involves children", or did not reflect the "deepened understanding of the wrongfulness and harmfulness of sexual violence against children" (para. 5).

The application to the circumstances of this case of the sentencing regime in the *Criminal Code* between 1995 and December 31, 2000

[57] In *Friesen*, the court listed "significant factors to determine a fit sentence for sexual offences against children" (my paraphrasing, as taken from para. 121):

1. likelihood to reoffend – the greater the risk of re-offence, the greater the emphasis on the sentencing objective of separating the offender from society;

2. abuse of a position of trust or authority – an offender who abuses a position of trust should receive a lengthier sentence than one who is a stranger to the child;

3. duration and frequency – significantly higher sentences should be imposed on offenders who commit sexual violence against children on multiple occasions and for longer periods of time;

4. age of the victim – the age of the victim is a significant aggravating factor;

5. degree of physical interference – there are several dangers in defining a sentencing range based on the specific type of sexual activity at issue (ie. physically intrusive as opposed to not so, etc.);

6. victim participation – a child's participation is not a mitigating factor or legally relevant consideration on sentencing.

[58] I will briefly comment on that non-exhaustive list of significant factors:

1. likelihood to reoffend – there is no reliable (eg. expert) evidence to make a determination about this, although there is no evidence of any further offences since the year 2000;

2. abuse of a position of trust or authority-there was a prolonged and significant abuse of WGL's position vis-à-vis LM. It is noteworthy here that the first of these incidents took place in the car, as it no doubt indelibly damaged LM's feeling of security, privacy and dignity. She testified that while he had his finger inside her vagina: "I remember turning around and looking at him like questioningly, I would say… With a question like, 'what are you doing?' And then he stopped, he took his hand out… There were no words. He laughed, and like raised his eyebrows… He smiled and raised his eyebrows and he laughed, but there were no words."

3. duration and frequency-WGL's first sexual offence against LM was his digital vaginal penetration of her (likely during the first quarter of 1997) - thereafter once they moved to the Great Village home in June 1997 until WGL and DL separated in late October 1999, she testified there were more than 10 and less than 50 incidents of "sharing" or "dry humping", including kissing with his tongue in her mouth; he also put his tongue in her mouth in which there was no associated "sharing" activity on approximately two occasions during that time interval.

4. age of the victim – in that time interval she was 10 to 13 years old.

5. degree of physical interference – the car incident and the "sharing" and non-"sharing" incidents involved significant degrees of physical interference and violated LM's bodily and sexual integrity, as well as her autonomy and dignity.

6. victim participation – LM was trapped in the car after the ruse by WGL that he would let her "drive" the car – LM was effectively coerced into taking part in the "sharing" activity as WGL was the only adult person present in the home.

7. consecutive sentences and totality-in the circumstances it is appropriate to impose concurrent sentences since the same behaviour is properly characterized as sexual assault or sexual interference – yet the court should conditionally stay one of the sentences based on the *Kienapple* principle.[11]

[59] Precedents can be helpful insofar as they are the basis of attempting to ensure parity among similar offenders who commit similar offences in similar circumstances and in assessing the appropriate range of sentence that should apply

[11] See the reasons in R v *Kissner*, 2019 ONSC 4872 at paras 41-51, and in *R v RV*, 2019 ONCA 664 at paras. 146-7, which appeal is being heard today at the Supreme Court of Canada; which I agree with and apply here.

in any particular case. However, because cases can be generally similar yet quite dissimilar on their specific facts (whether that be the circumstances of the offences or the circumstances of the offender and victim), accurately ascertaining a range of sentences can be challenging.[12]

[60] Notably, given my earlier comments about the pre-2005 jurisprudence in Nova Scotia asserting that specific and general deterrence (which I believe fairly can be equated to the s. 718.01 *CC* statutory language of deterrence and denunciation) be given primacy when sentencing sexual offences against children, arguably cases such as *R v EMW*, 2011 NSCA 87 remain relevant to offences that occurred pre-2005. Justice Fichaud stated for the court:

> To similar effect *R. v. A.N.*, 2011 NSCA 21, para. 34:
>
> > Unless expressed in the *Code*, there is no universal range with fixed boundaries for all instances of an offence: *R. v. M.(*C.A.), para. 92; *R. v. McDonnell* ([1997] 1 S.C.R. 948), para. 16; *R. v. L.M.*, para. 36. The range moves sympathetically with the circumstances and is proportionate to the *Code's* sentencing principles that include fundamentally the offence's gravity and the offender's culpability.
>
> 30 Moving downward from the high end of the range in the cases, one sees incarceration sometimes more and sometimes less than two years, depending on the severity of the circumstances, for sexual assaults on children without intercourse:

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[12] As to what is properly considered to be the "range of sentence" see Justice Bateman's comments in *R v Cromwell*, 2005 NSCA 137 at para. 26: "… In my opinion the range is not the minimum to maximum possibilities for the offence but is narrowed by the context of the offence committed and the circumstances of the offender ("... sentences imposed upon similar offenders for similar offences committed in similar circumstances ..." per MacEachern, C.J.B.C. in *R. v. Mafi*, (2000), 142 C.C.C. (3d) 449 (C.A.)). The actual punishment may vary on a continuum taking into account aggravating and mitigating factors, the remedial focus required for the particular offender and the need to protect the public. This variation creates the range." While counsel will often cite numerous trial level sentencing cases to the court in order to buttress their argument that their recommended sentence is within the range of proper sentences, which can be useful to a sentencing court, it is particularly helpful if the Court of Appeal has specifically set out the range for a particular offence.

(a) Six years global for sexual offences, including digital penetration and attempted but unsuccessful intercourse with the offender's stepdaughter, committed over time while the victim was 10 to 14 years old [*R. v. J.B.C.*, 2010 NSSC 28]. The Court (para. 24) noted that, under the caselaw, for a crime of this nature the offender's prior clear criminal record "is not accorded undue significance".

(b) Five years for various sexual assaults including digital penetration, not involving intercourse, over a period of years on the offender's stepdaughter. *D.B.S.*

(c) Two sentences of three years each (counts 1 and 5) for indecent assault and gross indecency without intercourse against a child to whom the offender had a parental relationship. He was given additional sentences for other offences. The court (para. 17) adopted the statement of Justice Bateman in *R. v. Weaver*, [1993] N.S.J. No. 91 that a clean criminal record "does not relieve the requirement of a lengthy prison term for sexual offence against children". *R. v. R.H.*, [2005] N.S.J. No. 212 (S.C.).

(d) Three years for one incident of sexual assault without intercourse on offender's four year old daughter. *R. v. E.E.C.*, 2005 NSSC 3.

(e) Three years for indecent assault without intercourse with the offender's daughter over a period of three years when she was 8 to 11 [*R. v. I.* (Part 2), [1996] N.S.J. No. 153 (S.C.)]. The offender had no criminal record and was unlikely to reoffend.

(f) Sentences of thirty months and twelve months for two counts of sexual and indecent assault on the offender's two adopted sons. *R. v. A.P.S.*, [1999] N.S.J. No. 242 (S.C.).

(g) Two and one-half years each (concurrent) for two counts of sexual assault and sexual touching, including attempted but unsuccessful intercourse, of the offender's 15 to 18 year old stepdaughter. R. *v. N.J.B.*, [2003] N.S.J. No. 225 (S.C.).

(h) A larger global sentence (with remand credit) that included twenty eight months each (concurrent) for two offences of sexual touching and invitation to sexual touching over a period of time of an 11 to 14 year old girl who was unrelated to the offender. *D.W.B.*

(i) Two years exclusive of remand time plus three years probation for a number of incidents of sexual assault, without intercourse, over time on the offender's under aged daughter. The sentence was further to a joint recommendation after a guilty plea. The judge said that, if credit for remand had been considered, the sentence

before credit would have been two and one-half years (para. 38). *R. v. H.C.D.*, 2008 NSSC 246. The judge said:

> 40.The joint recommendation, in terms of denunciation and deterrence, is within the range for offences of this kind. It could have easily been much higher; it is unlikely it would have been less than two years as opposed to more than two and a half years.

(j) Four years and five years on several counts of sexual assault that included intercourse with his older daughter, plus eighteen months for sexual touching without intercourse of his 9 to 12 year-old younger daughter. G.O.H. The Court of Appeal said (para. 10):

> It is impossible to speak of these crimes without using pejorative adjectives. This Court, and others, has repeatedly emphasized that sexual abuse of near helpless children (which is the case when the abuse of each daughter began) by adults upon whom they should be able to rely for protection, should incur sentences which may deter not only the perpetrator but others who may be so inclined. This proposition is exacerbated when the perpetrator, as here, is a parent, in a position of trust. Society's revulsion of such conduct must be demonstrated. The fact that the appellant is a first offender, at least in respect to the older daughter and may not need specific deterrence is not to be granted undue significance in crimes of this nature. General deterrence must be emphasized.

(k) Six months incarceration plus two years probation for several incidents of sexual touching of offender's 9 to 11-year old granddaughter. The Court of Appeal said the sentence was not unfit under the appellate standard of review. *R. v. D.N.M.*, [1992] N.S.J. No. 356 (C.A.).

(l) Four months plus one-year probation for two counts of fondling the offender's daughter, aged 11 to 13. The offender was remorseful and accepting of treatment to overcome his psychological problem. *R. v. E.(E.B.)*, [1988] N.S.J. No. 425 (C.A.).

(m)Ten months by the sentencing judge, reduced to 90 days by the Court of Appeal for several incidents of vaginal touching the offender's 9 year old stepdaughter. The victim had not suffered psychological effects. The offender pleaded guilty and accepted responsibility. There was evidence that rehabilitation would have a positive effect. *R. v. R.H.S.*, [1993] N.S.J. No. 489 (C.A.).

(n) Three months incarceration plus two years probation for sexual touching of offender's 12 year old granddaughter. The offender was remorseful, and the psychologist said he was "on the right track" to rehabilitation. *R. v. W.M.D.*, [1992] N.S.J. No. 161 (C.A.).

> (o) Three years suspended sentence with probation for repeated sexual touching of offender's 14 year old niece. Offender was gentle and well intentioned but feeble-minded, childlike and psychologically ill. He was remorseful and willing to secure treatment. *R. v. R.T.M.*, [1996] N.S.J. No. 218 (C.A.).

31 In assessing the similarity of precedents for the parity principle, it is useful to recall Chief Justice Lamer's statements in *R. v. M.(C.A.)*, para. 92 [above para. 7]. The Chief Justice said "[t]here is no such thing as a uniform sentence for a particular crime", and "[s]entencing is an inherently individualized process, and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction". From a similar perspective, in *R. v. A.N.* this Court recently said:

> 30. An assessment of the gravity of Mr. N.'s offences with Mr. N.'s culpability for them is, as Chief Justice Lamer said, an inherently individualized process, not an exercise in academic abstraction. I say this here because Mr. N.'s parity submissions on this appeal appeared to assume that sentences in other cases established a binding matrix of precedent into which this case must be slotted.

To the same effect *R. v. LeBlanc*, 2011 NSCA 60, para. 26. The sentencing judge is not expected to idealize a sentence that perfectly conforms to a hypothetical symmetry in the body of precedent. That would be a futile assignment because the actual precedents are not always consistent. It is not uncommon to find similar sentences in cases with significant factual differences. The overarching factor is the Code's "Fundamental principle" of proportionality (s. 718.1) that the "sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender": *R. v. L.M.*, para. 36 (quoted above para. 8); *Nasogaluak*, para. 44.

32 At this point in his sentencing itinerary, a judge is prepared to apply the applicable sentencing principles to the circumstances of this offender and offence and fix a sentence within the appropriate range. Once the judge has reached this threshold without appealable incident, as is the case here, the judge's core analysis is guarded by a standard of review that mandates significant appellate deference.

[61] I find the following cases of particular use in establishing a range of sentence for the case at Bar.

[62] As Justice Fichaud noted in *EMW*:

> 34 To review -- there were repeated incidents involving E.M.W.'s digital penetration of his young daughter's vagina. These occurred while R. was in E.M.W.'s home, on access visits further to an Order of the Family Division of the Supreme Court of Nova Scotia. R. has suffered lasting psychological impact.

[63] In *EMW*, the incidents occurred when the victim was between 9 and 11 years of age. Her evidence was while at her father's house she would sometimes sleep in his bed, because she felt safer. Sometimes she would wake up and find his fingers inside her vagina. She would either get up or move without saying anything. She wasn't sure whether he was awake or asleep. She testified that this happened between 5 and 10 times. Judge Campbell, as he then was, sentenced EMW to two years in custody. The Court of Appeal upheld the sentence.

[64] In *R v DNM*, [1992] NSJ No. 356 (CA), the court stated:

> The appellant, then sixty-one years old, was convicted after trial by the Honourable Judge MacDonnell on an indictment charging that between June 1, 1988 and November 15, 1990 he committed a sexual assault on his granddaughter, then between the ages of nine and eleven years old, contrary to s. 271(1)(a) of the *Criminal Code*. He was sentenced to six months imprisonment to be followed by probation for two years.
>
> The appellant now applies for leave to appeal and, if granted, appeals against the sentence. He contends the trial judge overemphasized deterrence, underemphasized rehabilitation and reformation and imposed a sentence that is excessive and therefore erroneous.
>
> The victim was left in the care of her grandparents during a weekend while her parents were away from their home. The trial judge accepted the evidence of the victim which was to the effect that her grandfather, the appellant, was involved in four incidents of touching, two were vaginal and one of her breasts (all being under her clothes) and one where he had placed her hand on his penis. She also testified the appellant showed her a video of people involved in a sexual relationship. She said all of this caused her to become very disturbed and she left.

> The evidence at trial also indicated that these events have had a serious effect on the victim resulting in a deterioration in her school-work, the need for professional help, running away from home and much inter-family distress.

[65] The sentence of 6 months incarceration plus two years probation for several incidents of sexual touching of offender's 9 to 11-year old granddaughter on one weekend was upheld.

[66] In summary, Justice Fichaud in *EMW*, at para 30 concluded for such cases as in the case at Bar:

> Moving downward from the high end of the range in the cases, one sees incarceration sometimes more and sometimes less than two years, depending on the severity of the circumstances, for sexual assaults on children without intercourse.

[67] In *Friesen* the court declined to make specific statements as to the range of sentence for sexual offences against children, however they did say:

> 114 *D. (D.),* Woodward, S. (J.), and this Court's own decisions in *M. (C.A.)* and *L.M.* make clear that imposing proportionate sentences that respond to the gravity of sexual offences against children and the degree of responsibility of offenders will frequently require substantial sentences. Parliament's statutory amendments have strengthened that message. It is not the role of this Court to establish a range or to outline in which circumstances such substantial sentences should be imposed. Nor would it be appropriate for any court to set out binding or inflexible quantitative guidance -- as Moldaver J.A. wrote in *D. (D.),* "judges must retain the flexibility needed to do justice in individual cases" and to individualize the sentence to the offender who is before them (at para. 33). Nonetheless, it is incumbent on us to provide an overall message that is clear (*D. (D.),* at paras. 34 and 45). That message is that mid-single digit penitentiary terms for sexual offences against children are normal and that upper-single digit and double-digit penitentiary terms should be neither unusual nor reserved for rare or exceptional circumstances. We would add that substantial sentences can be imposed where there was only a single instance of sexual violence and/or a single victim, as in this case, *Woodward*, and *L.M.* In addition, as this Court recognized in *L.M.*, maximum sentences should not be

> reserved for the "abstract case of the worst crime committed in the worst circumstances" (para. 22). Instead, a maximum sentence should be imposed whenever the circumstances warrant it (para. 20).
>
> [My italicization added]

[68] Taking into account the qualitative sentiments of the court in *Friesen*, and the governing binding and persuasive jurisprudence in Nova Scotia, in my opinion the range of sentence applicable to the criminal conduct in the case at Bar lies on a continuum from two years and six months to five years in custody.[13]

[69] Where then on this continuum does this case lie?

[70] As Justice Bateman said for the court in *Cromwell* (2005):

> The actual punishment may vary on a continuum taking into account aggravating and mitigating factors, the remedial focus required for the particular offender and the need to protect the public.

[71] The aggravating factors here are numerous, and include:

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[13] This is somewhat consistent with what the Defence characterized as a "strikingly similar" case: *R v RT*, 2017 ONSC 3800 and resulted in a sentence of 27 months imprisonment. The facts there included that (paras. 5-14): "…over a period of about 10 years, beginning when she was about six, the accused would turn her on her stomach and get on top of her and rub his crotch area against her buttocks. This activity typically lasted five minutes or so… She testified that this occurred every few weeks, on the weekend when her mother was grocery shopping, and her siblings were not present… Both she and her father were fully dressed… She does not know if he had an erection or if he ejaculated. He did not use his hands – the point of contact was his crotch area and her buttocks… In the fall of 2010, when the complainant would have been 12 or 13 years of ages, she made a disclosure to her girlfriend… The friend did tell her mom and the Children's Aid Society became promptly involved… The complainant said that following the CAS visit, the abuse 'stopped for a bit… maybe a year.' Subsequently during the 2013 school year on a weekend when her mother and brother were home the accused came downstairs and entered the complainant's bedroom… Her father slid his hand under her pyjama bottoms and over her vagina… 'cupping' her vagina for about five seconds with a finger penetrating her vagina 'a little bit'. She told him to stop and she kicked him." In my opinion, the *Friesen* court would have increased this sentence on appeal had it been presented for review to that court.

1. WGL was standing as a parent in the family unit, and sexually abused a young child in that family unit;
2. WGL breached the trust of DL, LM's mother, and of LM who was entirely defenceless against his sexual abuse, and especially vulnerable;
3. I accept LM's testimony that WGL took virtually every opportunity as they became available to sexually abuse LM – and I infer this caused a feeling of hyper-vigilance, great anxiety, and fear for LM in an effort to avoid such potential opportunities;
4. WGL sexually abused LM (more than 10 and less than 50 times) over 3.5 years while she was between 10 and 13 years of age. (I have concluded that LM's evidence, seen in context of the other evidence, satisfies me beyond a reasonable doubt that these incidents happened between 25-30 times.);
5. WGL's abuse included one incident of digital vaginal penetration; between 10 and 50 incidents of "dry humping" which also involved him kissing LM with his tongue in her mouth, and after which, I accept LM's evidence that, they would end with a change in his breathing, followed by him going to the bathroom and usually having

a shower; and 2 incidents where he kissed LM with his tongue in her mouth at the family home without the usually coincident "sharing" abuse;

6. I am satisfied beyond a reasonable doubt, that LM suffered actual psychological harm as a child, and will likely continue to suffer actual psychological harm during her adulthood.

[72] The mitigating factors put forward in the oral and written submissions on behalf of WGL (paras. 21-23) are:[14]

1. no previous criminal record- [as the case law alluded to earlier makes clear, this is not a significant mitigating factor; however I acknowledge that he has been on release conditions without incident which is relevant to his general risk to re-offend.]

2. it is suggested that WGL's having no previous criminal record "addresses any concern the court may have about his risk of re-offending. These charges took place more than 20 years ago and

[14] WGL by his sexual abuse of LM, and his denial thereof not only militates against his rehabilitation, which I can properly consider, but also continues to reinforce the rift that developed between LM and her half brother J3, (which persists to this day) as a result of LM's allegations initially in 2012 and to the police in 2018. Thus, WGL's sexual abuse of LM has precluded an opportunity for the development of a normal sibling relationship between LM and J3, though I recognize J3 also made a choice to side with his father WGL rather than LM, and I bear in mind he has lived alone with, and relied upon, WGL since 2008. The rift between LM and J3 is a consequence of the sexual abuse upon LM and is a proper aggravating factor as it has been proved beyond a reasonable doubt.

[WGL] has not been convicted of any offence before or after the subject charges."- [there is no reliable evidence regarding his risk to sexually reoffend. Such evidence would usually be presented in the form of a sexual offender risk assessment by a recognized expert. The PSR indicates that "as these are sexual offences, a comprehensive sexual offender assessment [will] be required to determine the match of offender risk level to treatment." The community-based Provincial Sexual Offender Assessment and Treatment Program "is designed at low to moderate intensity and is not designed to accommodate the treatment needs of high risk, and entrenched sexual offenders – moderate to high intensity programs are appropriate for high risk offenders and are available primarily within federal facilities operated by Correctional Services of Canada. Community-based treatment includes cognitive behavioural relapse prevention programs and not individual therapy – treatment includes six months of structured weekly group sessions. Due to the volume of cases being processed, assessment/treatment could take 2 to 3 years to complete from the date of referral." I find this to be a neutral factor.]

3. WGL "is also supported by his sister and uncles with whom he has maintained a close relationship over many years." [The PSR does not bear this out- nor does it suggest that he does not have their support and have a close relationship with them. I find this to be a neutral factor.]

4. WGL is currently 64 years old and disabled from continuing to work. [This is a neutral factor. Although in some cases, exceptionally courts may consider advanced age or health conditions if they compellingly militate against a more onerous sentence, such is not the case here.]

5. WGL "has the support of… his 22-year-old son who was injured in a motor vehicle accident in 2017 and is confined to a wheelchair. He is a dependent of [WGL] and resides with him…[WGL] currently receives Canada pension disability benefits as well as Worker's Compensation income. These sources of income have allowed him to support himself and his son at their apartment …"

[Without hearing any evidence regarding this, I accept that J3 is dependent on WGL to some degree for both financial assistance and the assistance he requires as a result of his being confined to a wheelchair. This does reinforce that WGL generally has acted in a pro-social manner throughout his life. However, J3's

dependence is not a mitigating factor in this case. In some cases, exceptionally, and to a limited extent, courts may consider such consequences if they compellingly militate against a more onerous sentence, but that is not the case here. For example, this is not a case like *R v Suter*, 2018 SCC 34. In *Suter*, immediately after the offender (a suspected impaired driver) crashed into a restaurant causing a young child's death, patrons viciously attacked him. The court allowed for the limited consideration of "collateral consequences" *upon the offender* from the commission of a crime at their sentencing: "The sentencing judge found, correctly in my view, that the vigilante violence experienced by Mr. Suter could be considered - to a limited extent - when crafting an appropriate sentence." (para. 45) Courts send parents to jail, who have young children at home, and breadwinners of a family who have dependent remaining members in the community. The absence of the persons incarcerated is no doubt difficult in many ways for those remaining in the community. It is a sad reality for those who remain in the community, but it is not the courts, but rather the offenders who are responsible for these consequences – see also *R v Tower*, 2008 NSCA 3 at para. 70. Moreover, an expression of remorse even at this late stage could carry some weight as a mitigating factor- there is none in this case.]

Conclusion as to a fit and proper sentence

[73] Bearing in mind the relevant principles of sentencing, both statutory and common law from the jurisprudence, and given the circumstances of these offences and of the offender, and the impact on LM, I conclude a fit and proper sentence is three years and six months incarceration in a federal penitentiary.[15]

Ancillary orders

[74] I am also satisfied that the criteria have been met to permit me to make orders pursuant to the following sections of the *Criminal Code*:

1. DNA- s. 487.051 *CC*;
2. Firearms Prohibition etc- s. 109(1)(a) and (a.1) *CC*-duration per s. 109(2) CC;
3. SOIRA- duration per s. 490.013(2) *CC*;[16]

[15] I impose three years and six months in custody concurrent on each of the section 151 and 271 *CC* offences. I conditionally stay the sentence for the s. 271 offence. I have specifically considered and rejected the imposition of a conditional sentence. I conclude a conditional sentence is not available here, because a sentence of two years or more is required, and I am not satisfied that serving the sentence in the community would be consistent with the fundamental purpose and principles of sentencing set out in section 718 to 718.2 *CC* (in effect during the time of the commission of the offences).

[16] Although these orders were not available at the time of the commission of the offences, they are presently available, and were intended to be retrospective in application- see *R v Cross*, 2006 NSCA 30, cited with approval in *R v Poulin*, 2019 SCC 47 at para. 38.

4. Prohibition s. 161 *CC* – This sought-after order will not be issued by the court;[17]

5. I will also endorse the Warrant of Committal under s 743.21 *CC* requiring WGL to have no contact/communication with LM, her partner, or children.[18]

Rosinski, J.

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[17] I will not impose a section 161 *CC* order in this case because the onus is on the Crown to demonstrate an evidentiary basis upon which to conclude that in the foreseeable future, this particular offender poses a risk to children, which it has not done here. I also note that the Supreme Court of Canada found that s. 161(1) orders constitute a "punishment" (see the wording in the present section: "the court that sentences the offender…in addition to any other punishment…shall consider making …"), and specifically s. 161(1)(c) is unconstitutional. In *R v KRJ*, 2016 SCC 31, the court concluded that s. 11(i) of the *Charter of Rights* (benefit of the lesser punishment) constitutionally enshrines the fundamental notion that criminal laws should generally not operate retrospectively, because of the desire to protect the fairness of criminal proceedings and safeguard the rule of law – rules pertaining to criminal punishment should be clear and certain. The court found that the 2012 amendments to sections 161(c) and (d) qualify as punishment and therefore their retrospective imposition limits the right protected by s. 11(i) of the *Charter*. Under its section 1 *Charter* analysis, the court upheld subsection 161(1)(d) but found s. 161(1)(c) unconstitutional. More importantly, the court stated (paras 47-8: "… The design of section 161 is consistent with its purpose of protecting children from sexual violence. Section 161 orders… can therefore be carefully tailored to the circumstances of a particular offender. The discretionary and flexible nature of sections 161 demonstrates that it was designed to empower courts to craft tailored orders to address the nature and degree of risk that a sexual offender poses to children once released into the community.… *Section 161 orders can be imposed only when there is an evidentiary basis upon which to conclude that the particular offender poses a risk to children and the judge is satisfied that the specific terms of the order are a reasonable attempt to minimize the risk… These orders are not available as a matter of course*. In addition, the content of the order must carefully respond to an offender's specific circumstances." Notably in *R v LSN*, 2020 BCCA 109 at paras. 83-93 the court reversed the trial judge's decision not to grant such an order in circumstances where "the judge did not find that the respondent posed no risk of sexual reoffending against children and, as I have said, common sense suggests otherwise. Indeed, implicit in the judge's decision is acceptance of the proposition that the respondent poses some risk of sexual re-offence against children." In that case the offences were not historical (arising as they did in 2016 and he was sentenced in 2019) and the offender had a similar prior (2012) conviction. I accept that expert evidence is not always necessary for such orders to issue – however where no expert evidence is available, the remaining evidence from the trial and sentencing must be capable of being relied upon, and the onus is on the Crown. Given the historical nature of these offences, the court does not have sufficient evidence to conclude that WGL remains a sufficiently serious risk to issue these orders, pursuant to the previous sections effective at the time of the offences – s. 161(1)(a) and (b).

[18] Section 737 *CC* requires a $200 victim surcharge which should otherwise have been imposed on each offence, however I am satisfied it would cause undue hardship to the offender, and I excuse him from paying any amount of surcharge.