SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Fisher*, 2020 NSSC 325

Date: 20201110
Docket: CRH479833
Registry: Halifax

Between:

Her Majesty the Queen

v.

Michael Oliver Fisher

Restriction on Publication: s. 486.4 cc

SENTENCING DECISION

Judge: The Honourable Justice Darlene A. Jamieson

Heard: Trial: November 4, 5, 6, 7, 8, 19, and 20, 2019, in Halifax, Nova Scotia

Oral Decision: December 16, 2019, in Halifax, Nova Scotia

Oral Sentencing Decision: November 10, 2020

Counsel: Rick Woodburn, for the Provincial Crown
Michelle James, for the Offender

Order restricting publication — sexual offences

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

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

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

Mandatory order on application

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and

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

Victim under 18 — other offences

(2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

Mandatory order on application

(2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall

(a) as soon as feasible, inform the victim of their right to make an application for the order; and

(b) on application of the victim or the prosecutor, make the order.

Child pornography

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

Limitation

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community.

By the Court:

Overview

[1] On December 16, 2019, Mr. Fisher was convicted of touching J.R. for a sexual purpose, in circumstances of a sexual nature, while he was in a position of trust toward her, when she was a young person as defined in s. 153(2), and contrary to s. 153(1)(a). Mr. Fisher was also convicted of having induced J.R. to engage in sexual activity by abusing his position of trust, meaning no consent was obtained (s. 273.1(2)(c)) contrary to s. 271. The s. 271 conviction was conditionally stayed pursuant to the *Kienapple* principle (*R. v. Kienapple*, [1975] 1 S.C.R. 729; *R. v. Prince* [1986] 2 S.C.R. 480).

[2] Section 153 states:

> 153(1) Every person commits an offence who is in a position of trust or authority towards a young person, who is a person with whom the young person is in a relationship of dependency or who is in a relationship with a young person that is exploitative of the young person, and who
>
> (a) for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of the young person …
>
> (1.2) A judge may infer that a person is in a relationship with a young person that is exploitative of the young person from the nature and circumstances of the relationship, including
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> (a) the age of the young person;
>
> (b) the age difference between the person and the young person;
>
> (c) the evolution of the relationship; and
>
> (d) the degree of control or influence by the person over the young person.
>
> (2) In this section, "young person" means a person 14 years of age or more but under the age of eighteen years.

[3] The following is my decision concerning a fit and proper sentence for Mr. Fisher.

1. The Facts

(a) Circumstances of the Offence

[4] At age 14, J.R. was a deeply religious young person when she met Mr. Fisher, the youth pastor at Emmanuel Baptist Church. The church was the centre of her young life. She volunteered in the church nursery, she developed a puppetry Ministry for the young children, she attended youth group. As she stated at trial she sought out ways to better serve God within the church.

[5] Mr. Fisher, while not ordained until 2009, was Head of Ministry (HOM) for Youth at Emmanuel Baptist Church in 2008. He was in charge of and oversaw the Youth Group. J.R. was a member of his Youth Group. Mr. Fisher preached at some Sunday services and sat on the raised pulpit with the other Ministers and adults.

[6] Mr. Fisher quickly became her spiritual advisor and mentor. He knew she was a vulnerable young person who had been experiencing significant problems at home and in school. In fact, Mr. Fisher provided comfort and advice during these difficult periods and as she said 're-assured her of God's plan.' J.R. described Mr. Fisher as a gift from God, a powerful voice, and a blessing. She said she felt special, within his inner circle, and trusted him with everything.

[7] In the years leading up to the sexual exploitation, Mr. Fisher fashioned a strong emotional bond with J.R. He spent several years cultivating their special relationship by being her confidant, friend, spiritual advisor and mentor. The nature of the Youth Minister/youth congregant relationship created an opportunity for Mr. Fisher to use his status – a persuasive and influencing factor – to groom J.R. for a sexual relationship.

[8] The relationship evolved from him being a spiritual advisor, mentor and a big brother figure to regular late-night discussions on MSN when she was 15 and later video chats by webcam. During this time Mr. Fisher would make comments to her about being his girlfriend, calling her beautiful and kissing her on the cheek. J.R. turned 15 in July and Mr. Fisher turned 27 in September of the same year. There was almost a 12 year age difference.

[9] Mr. Fisher took pro-active steps to hide his relationship with J.R. from church members, who were asking questions about their closeness. Their relationship continued but he ensured it was not publicly visible. Reverend Anderson, the senior pastor at the church, received a call expressing concern about the relationship and

spoke to Mr. Fisher about it being inappropriate to be at church events at night alone with J.R.

[10] Mr. Fisher's flirtations with J.R. increased when she was 16. He began tutoring J.R. with school work and they continued to talk into the early hours, often until 4:00 or 5:00 AM.

[11] When J.R. was 17 Mr. Fisher began to tell J.R. he had feelings for her and began to make sexual comments via webcam. His comments became more sexual as the months went on. J.R. said that he would say that he was feeling "horny" and wanted her to come and massage him. She said that he implied a lot of sexual things.

[12] Mr. Fisher knew J.R. was naïve and had no sexual experience. She told Mr. Fisher she was saving her sexual firsts for the person she would marry. As the relationship progressed to kissing, J.R. came to believe they were girlfriend and boyfriend and that her Youth Minister wanted to marry her.

[13] The sexual exploitation occurred over a five month period, from January to July of 2008 when J.R. turned 18. Mr. Fisher was born in September of 1978 and when the sexual exploitation took place he was just shy of his 30th birthday, whereas J.R. was a 17 year old high school student. In February of 2008 the incidents of sexual activity quickly escalated from kissing, licking, massaging to full nakedness. J.R. testified that things were on a "linear line" that continued quite quickly from her first kiss, the French kiss, licking, massaging and then to full nakedness.

[14] Mr. Fisher, acting as a mentor and spiritual advisor to J.R., developed an emotional, physical and spiritual hold over her. Mr. Fisher would pray with her about these events and then act as if nothing had happened, treating her like any other youth group member, essentially like she was a kid. He would tell her this could not happen again. However, it did happen again. J.R. described the psychological torment that accompanied the sexual exploitation.

[15] The incidents of the sexual exploitation by Mr. Fisher included kissing, full body touching, digital penetration of J.R.'s vagina, oral sex performed both by Mr. Fisher and J.R., and sexual intercourse. J.R. described numerous incidents of sexual activity before her 18th birthday. She described kissing and massaging bodies, an incident where he kissed her breasts and massaged her, an incident close to Valentine's day 2008 where he performed oral sex on her and digitally penetrated her. In March 2008 there was an incident at his apartment in Wolfville where both were naked. She described lots of massaging, petting and touching and kissing and

that there was digital penetration of her vagina. He said to her that he wished he could be inside her, was telling her to relax, that it was just them and whatever happens, happens and not to hold back. She said these were things he would say continuously on these nights. She said that he reassured her that she could trust him because she was alarmed and wasn't sure what she wanted. She described trusting him enough to go along with it.

[16] In this same time frame, there was another incident of oral sex – Mr. Fisher told J.R. she owed him an orgasm because he had given her one. She said she gave him oral sex and he had an orgasm that night. She said, "It was the first time I'd ever seen anything like it. I was very weirded out." On another night they performed oral sex on each other.

[17] In May of 2008, Mr. Fisher chaperoned J.R.'s high school trip, along with two other adults. Shortly thereafter, the sexual activity progressed to sexual intercourse.

[18] In May of 2008 at his apartment in Wolfville, J.R. described touching, massaging, petting and several times he used his fingers to digitally penetrate her. She said she looked down, thinking his fingers were in her vagina, but that it was his penis rather than his fingers. She said his penis was inside her vagina. She described being a bit alarmed but just laid there as he was talking her through it. She said he "pulled out" before he had an orgasm. Mr. Fisher did not use a condom.

[19] J.R. said that there were a few more times that they were physical before her 18th birthday. He said to her that she would be "legal" soon but she didn't know what he meant. He said it a second time leading up to her 18th birthday. She said that she thought he must mean "legal" in the sense of being able to get married without adult permission and she thought they would get married. J.R. turned 18 in July of 2008.

(b) Circumstances of the Offender

[20] In advance of the sentencing hearing I received a Pre Sentence Report (PSR), prepared by probation officer Ms. Dawn Gillis and dated February 19, 2020; and an Impact of Race and Cultural Assessment (IRCA) prepared by Ms. Lana MacLean, MSW, RSW and dated May 19, 2020.

[21] Mr. Fisher was born in Jamaica. He moved to Bermuda when he was 21 and later moved to Canada (in 2001) to attend Acadia University. Mr. Fisher is a permanent resident of Canada.

[22] Mr. Fisher was raised by his mother and two maternal half-sisters. Mr. Fisher's parents were not in a relationship when he was born. His biological father moved to the United States when Mr. Fisher was in grade four. His contact with his father was sporadic after that, but presently he shares a positive relationship with him. Mr. Fisher has a great relationship with both his mother and stepfather, whom his mother married in 1994.

[23] Mr. Fisher did not have any behavioural issues growing up. He grew up within the church and was an active child, participating in various activities including soccer and karate. The PSR indicated that Mr. Fisher denied any substance-abuse concerns within the family home nor any type of physical or sexual abuse.

[24] Mr. Fisher had a brief relationship which resulted in the birth of his daughter, who at the time of the PSR was 18 months old. The PSR indicates that while Mr. Fisher's relationship with his daughter's biological mother was never serious, he resides with her and her brother in their apartment. She is fully supportive of Mr. Fisher.

[25] Mr. Fisher completed grade 12 in Jamaica in 1996. He then completed an associate degree in Arts and Science from Bermuda College in 2001. The PSR indicates he then attended Acadia University for one year before transferring to Dalhousie University where he obtained a Bachelor of Science degree in mathematics in 2005. He then obtained a Master of Divinity and Master of Arts in Theology at Acadia Divinity College. He commenced a PhD in education at St. Francis Xavier University in 2015, but stopped attending in 2017 due to his legal situation.

[26] Until recently, Mr. Fisher had been unemployed, last working at St. FX University in 2017 as a coordinator of students of African descent which was a full-time position from 2014 until 2017. He was dismissed from this position as a result of this legal proceeding. Prior to this he was an associate pastor at Emmanuel Baptist Church from June of 2008 to 2014. Prior to June of 2008, while he attended Acadia University, he was the youth pastor. In October of 2020 he began periodic employment as a Strategic Director and Project Manager for two separate employers.

[27] Mr. Fisher has a registered consulting company, but has yet to commence work due to his current legal situation. At the time of the PSR, Mr. Fisher did not have any source of income and was not financially stable.

[28] Mr. Fisher has always been in generally good physical health, however, the PSR notes he has been experiencing headaches on a daily basis. The PSR notes that with respect to his mental health, Mr. Fisher is suffering from anxiety but feels it is directly related to his legal situation. Mr. Fisher is not prescribed any medication and is not followed by a mental health professional. Mr. Fisher attended six counselling sessions at Archway Counselling in Truro, Nova Scotia, in 2015.

[29] Mr. Fisher does not consume alcohol nor has he had any experimentation with controlled or illicit substances.

[30] Mr. Fisher has been extensively involved in sports including helping to coach the St. FX University soccer team in 2015. He was a member of the Canadian team for karate in 2015 and travelled to Hungary for a world tournament. He has stepped away from the club that he had been affiliated with due to the court proceedings. He is volunteering with a new organization called the Institute for Sustainable Development, Peace and Security Studies of Africa. He is also on the board as a volunteer with the Anti Cancer Research Jamaica Foundation, and is managing donating partners.

[31] Two individuals contacted by the author of the PSR, a work colleague and the Director of the African United Baptist Association, both indicated surprise at the charges against Mr. Fisher. They also expressed support for Mr. Fisher.

[32] Mr. Fisher comes before this court with no prior criminal record.

[33] The PSR indicates "the subject has acknowledged responsibility for his actions and appeared remorseful." The PSR indicates that Mr. Fisher would benefit from an assessment and programming with the provincial forensic psychiatric service.

[34] Mr. Fisher has filed four letters of support from former work and sports colleagues and friends. They describe him as having good character, as being a mentor for racialized students, as having a heart for social issues concerning the African Nova Scotian Community, as being talented in coaching, and generally describe the esteem in which he is held by them.

Impact of Race and Cultural Assessment (IRCA)

[35] The IRCA (also referred to as a Cultural Impact Assessment or CIA) indicates its purpose at page 6:

> This CIA is meant to provide the court with a review of the impact of Mr. Fisher's social, cultural, and racial identity development within the context of worldviews. It also provides a review of the impacts of systemic racism and anti-black racism on the ANS/ABC community (defined by Ms. MacLean as African Nova Scotian and African Black Caribbean). Mr. Fisher's worldviews are impacted by the cultural nuances of Black male identity development which has a strong focus on gendered roles of Black men, and the avoidance/detachment from emotions as a protective factor to maintain positive self regard. Such emotional detachment when viewed from a critical race lens supports and maintains cultural codes as they relate to classism, colourism and self and cultural esteem. Additionally, Mr. Fisher experienced the impacts of poverty which played a role in community and family disruptions.

[36] The CIA provides information concerning the historical and contemporary impacts of racism within the ABC communities in Nova Scotia. With regard to Mr. Fisher's personal experience on moving to Canada, Ms. MacLean states:

> … Mr. Fisher reports, "it wasn't until I moved to Nova Scotia that I realized that I was Black. It was here that racism became a reality for me in my own life and I learned how systemic racism traumatized and left a negative scar on the lives of the youth I worked with at the church, especially in the school system."
>
> The historical and contemporary impacts of anti-Black racism are not lost on Mr. Fisher. Race matters within the North American Black experience and it has impacted on Mr. Fisher at a late stage in his life, and as such he has not been provided with the racial literacy- 'the talk' most African Nova Scotians have been exposed to in their early years. The talk is a protective factor that North American Black parents explain to children as a way to mitigate the psychological harms and model appropriate behavioural responses to manage daily micro-racial aggressions. Mr. Fisher's capacity to navigate systemic and anti-Black racism has been framed from his cultural lens (One people-mitigating race as a variable) and his moral upbringing (faith practice-forgiveness). He operates from a location of class privilege and presents with the level of immaturity which manifests in his unconscious psychological defensive intellectualizing through selective attention and theologizing his interactions with individuals and with systems. Mr. Fisher is more adept with navigating social constructs of classism and colourism which are more pronounced within the Caribbean culture than having a critical awareness of anti-Black racism as part of his cultural and intrapersonal narrative. (pp. 10-11)

[37] The CIA provides a social history for Mr. Fisher indicating he is the youngest of eight children born to his birthmother and the eldest of three children born to his birth father. His mother moved to Bermuda in 1994 when Mr. Fisher was 16. From birth to age 16 he was primarily raised by his mother along with his two older sisters. His mother worked long hours to support herself and the three children.

[38] Mr. Fisher was raised in an intergenerational home where independence as skill acquisition was required at an early age. He described the cultural significance of growing up in a family and community where faith-church attendance strongly influenced and shaped the social standing of an individual/family in the community and provided a circle of care and support for young Black men. "Growing up, "churched" is a strong protective factor as is having the capacity to be successful academically. Both have strongly impacted and shaped Mr. Fisher's worldview."

[39] Ms. MacLean further states:

> Mr. Fisher's sense of belonging has been guarded since his arrival in Nova Scotia. He had struggles to translate his own cultural values and the social and intrapersonal expression of them to match his settlement experience. He continues to default to his cultural worldview as a protective factor during the court process as a coping skill and mental health functioning. (p.17)

[40] Ms. MacLean also referenced her telephone interview with Ms. Kimberly Lawrence Plummer (who is a childhood friend of Mr. Fisher and social worker) and states:

> Ms. Lawrence Plummer's descriptions of the cultural codes of privacy, faith and leadership have impacted Mr. Fisher in terms of his capacity to pivot and navigate the social cultural norms of Canadian society. <u>The court may wish to consider Mr. Fisher's behavioural choices from the mental health lens of cognitive dissonance. It is reasonable to suggest that Mr. Fisher's lack of emotional affect(stoic), layered with poor interpersonal boundaries and worldview may have contributed to his poor decision-making and choices as they related to the matter before the court.</u> (pp.18-19)
>
> [Emphasis Added]

[41] Ms. MacLean provides a very helpful overview concerning the over-representation of African Nova Scotians/Canadians in the criminal justice system. She concludes:

> The impacts of over-representation of ANS people in provincial and federal institutions has a legacy based in systemic racism which will require a nuanced

> critical race lens into the criminogenic factors, the social and cultural influences, as well as the various social determinants that disproportionately impact the ABC communities. (p. 21)

[42] The conclusion to the CIA states:

> … This report was not written to absolve Mr. Fisher of his charges, but to provide reasonable understanding of Mr. Fisher's psycho-social cultural etiology. No single variable or event is comprehensive enough to address the social- cultural factors that influenced Mr. Fisher's development which may have contributed to the charges he has incurred.
>
> In short, the impacts of race and culture which present in Mr. Fisher's life include:
>
> - Historical and contemporary impacts of systemic and anti-black racism within the African, Black and Caribbean (ABC) community in Nova Scotia communities;
> - Impacts of poverty on cultural expectations and social emotional development;
> - Impacts of cultural codes on mental wellness;
> - The over-representation of African Canadians in prison and
> - services and resources that should be made available to Mr. Fisher to support his rehabilitation and community reintegration
>
> Each of these factors has independently and collectively had an impact on Mr. Fisher presenting before the court. Mr. Fisher does not present with conventional criminogenic factors that place him at risk to the general public. He has no prior convictions or history of conflict with the law. Although Mr. Fisher's choices and behaviours were unsavoury, he has, since his charges, held a position of trust at St. F.X. University with no infringements of his position. Mr. Fisher reports he is remorseful for his behavioural choices and the impacts on JR, the victim in this matter, and acknowledges his moral blameworthiness. (pp. 24-25)

[43] As was recommended in the PSR, Ms. MacLean also recommends Mr. Fisher would benefit from a referral to the Provincial Forensic Psychiatric Service including the community-based sexual offender treatment program. She further recommends that Mr. Fisher would benefit from attending individual counselling with a therapist who has demonstrated skills in working cross culturally with a high level of cultural competency. She makes specific recommendations with regard to the above.

[44] The CIA indicates Mr. Fisher:

> …acknowledges he would continue to benefit from attending counselling to assist with stress management and maintaining healthy relationship boundaries. Should Mr. Fisher attend counselling it is clinically significant for him to develop insight into his behaviours and choices with a willingness to develop cultural literacy reflective of Canadian context to mitigate any additional breaches of trust. (p. 25)

(c) Impact on the Victim

[45] I have little difficulty concluding beyond a reasonable doubt that J.R. has suffered and continues to suffer psychological and emotional trauma and symptoms as a result of Mr. Fisher's conduct, which has negatively affected many aspects of her life. J.R provided a Victim Impact Statement that details the harm she has endured. The harm described includes issues with school and failing tests and assignments, loss of friends, loss of sleep, panic attacks, bouts of depression, suicidal thoughts, relationship issues and impact on her religious faith.

2. Legal Parameters

[46] At the time of the offence, s. 153 carried with it a ten-year maximum sentence. Section 153 also had a 45 day minimum sentence. The Nova Scotia Court of Appeal in *R. v. Hood*, 2018 NSCA 18, found the mandatory minimum sentence in s. 153 to be unconstitutional and of no force or effect.

3. Positions of the Crown and Defence

Crown Position

[47] The Crown is seeking a sentence of three years incarceration plus ancillary orders. The Crown submits there are a number of aggravating factors: the incidents constitute a major sexual assault; this was a continuing offence, as the accused 'groomed' the victim over several months and years; J.R. was a vulnerable member of the church youth group and had an expectation of security and safety with her Youth Minister; in committing the offence, the accused abused a person under the age of eighteen years (s. 718.2(a)(ii.1) of the *Code*) and abused a significant position of trust with respect to the victim (s. 718.2(a)(iii) of the *Code*); and the psychological and emotional damage caused to J.R. The Crown argues that a stricter approach to sentencing offenders in cases of sexual exploitation and sexual assault of young people has been called for by the Supreme Court of Canada in *R. v. Friesen,* 2020 SCC 9.

[48] The Crown acknowledges Mr. Fisher has no prior criminal record. The Crown suggests that Mr. Fisher's good character and standing in the community were very much the basis that gave rise to his position of trust. The Crown says this can hardly aggravate and mitigate at the same time and should be given less weight. The Crown submits that Mr. Fisher's remorse (or lack of remorse) is neutral in this case.

[49] The Crown said in relation to the Cultural Assessment, that any described cultural naivete in relationships with women is not borne out by his actions of intentionally keeping his relationship with J.R. a secret. The Crown says the Cultural Assessment does not diminish Mr. Fisher's moral culpability.

Defence Position

[50] The Defence submits that the appropriate sentence for Mr. Fisher is a conditional sentence in the range of 12 to 15 months. The Defence says that while it recognizes that this offence is a serious one, it does not mandate the penitentiary term sought by the Crown. The Defence refers to the positive nature of the PSR, including Mr. Fisher's strong relationships with family and his young daughter, the strong support of community, and his history of community involvement. The Defence submits the limited time frame caught by the Indictment, J.R.'s age (closely approaching 18), and the still youthful age of Mr. Fisher at the time are all relevant considerations for the court.

[51] The Defence submits Mr. Fisher presents with a level of immaturity that casts a different light on his behaviour. The Defence highlights there are cultural differences relating to relationships which should be kept in mind when assessing where Mr. Fisher's behaviour lands on the continuum. The Defence says these factors negate the predatory picture painted by the Crown. The Defence also says the delay in these proceedings (the delay in reporting and delay in charging) should be considered.

[52] The Defence says the situation of Mr. Fisher is analogous to the situation in *R. v. Hood*, 2018 NSCA 18, because he too enjoys strong family and community support, has availed himself of counselling and made rehabilitative efforts and that there are extraneous issues that contributed to becoming involved in the offence-mental health issues for Ms. Hood, cultural background for Mr. Fisher. The Defence points to the IRCA report which suggests the court may wish to view Mr. Fisher's behaviour through a mental health lens of cognitive dissonance.

[53] The Defence also refers to the Saskatchewan Court of Appeal decision in *R. v. McLachlan*, 2014 SKCA 68, where the offender was sentenced to serve an 18 month conditional sentence. The offender was a 33 year old teacher and the victim 15. The sexual activity included multiple acts of sexual touching and intercourse spanning four or five months. The Defence refers to the court's comments concerning 'fall from grace' by the offender. They also further refer to a recent – as yet unreported – decision of Justice Lynch in *R. v. Collyer*, which also resulted in a 15 month sentence. That matter involved the former police chief in Bridgewater, Nova Scotia, sexually touching a 17 year old girl who had the intellectual capacity of a 10 to 12 year old child.

[54] The Defence says that a properly-crafted conditional sentence would achieve the denunciatory objective of sentencing, while achieving a proper balance with the rehabilitative goals. They say Mr. Fisher is clearly a low risk to remain in the community. Mr. Fisher has been in the community without issue since this complaint first came forward in 2014 and has been subject to conditions of release since his arrest.

4. Principles of Sentencing

[55] In imposing an appropriate sentence, the court is guided by the purposes and principles of sentencing set out in the *Criminal Code*.

[56] The general purpose and principles of sentencing are found in s. 718 of the *Criminal Code.* The purpose of sentencing is to protect society and to contribute to respect for the law and maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the objectives outlined in s. 718.

[57] The factors for consideration on sentencing include: denunciation; specific and general deterrence; separating offenders from society, where necessary; rehabilitation; reparations; and the need to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community (s. 718).

[58] Parliament enacted a special rule for those who abuse children under the age of 18. In these cases denunciation and deterrence are to be the primary objectives. This does not mean other sentencing objectives are to be disregarded, it means

denunciation and deterrence are given the highest ranking among all of the principles of sentencing (*R. v. Oliver*, 2007 NSCA 15). Section 718.01 provides:

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

[59] Parliament, through this legislation, has recognized the importance of the safety of young persons during their vulnerable and developmental teenage years. The Supreme Court of Canada in *Friesen, supra*, said the following about s. 718.01:

> [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 § 8.8-8.9). As Kasirer J.A. reasoned in *Rayo*, the word "primary" in the English text of s. 718.01 [TRANSLATION] "evokes an ordering of the objectives . . . that is . . . relevant in the [judge's exercise of discretion]" (para. 103). This ordering of the sentencing objectives reflects Parliament's intention for sentences to "better reflect the seriousness of the offence" (*House of Commons Debates*, vol. 140, No. 7, 1st Sess., 38th Parl., October 13, 2004, at p. 322 (Hon. Paul Harold Macklin)). 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.).

[60] In addition, s. 718.1 of the *Criminal Code* requires that a sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender. Section 718.2 identifies specific sentencing principles which must be considered, including that a sentence should be reduced or increased by mitigating or aggravating circumstances relating to the offence or the offender. Deemed aggravating factors include that the offender abused a person under the age of 18, and the offender, in committing the offence, abused a position of trust or authority in relation to the victim. Further, a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. An offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances and all available sanctions, other than imprisonment, that are reasonable in the circumstances should be considered for all offenders.

[61] Of course, in considering a fit sentence I am to take into account the nature and extent of the acts and all relevant circumstances relating to them. Any sentencing hearing requires a careful consideration of the unique circumstances of the offender and the offence. It requires a balancing of sentencing objectives, keeping in mind that denunciation and deterrence are to be the primary objectives.

5. Case Law

[62] As noted, it is a principle of sentencing that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. It is always difficult to find cases that are truly similar. Parity must respect individualized sentencing and is to be balanced with all other relevant

principles and circumstances, recognizing that in the present case denunciation and deterrence are of primary focus.

[63] The Crown referred to the following cases to support its position of a sentence of three years in custody:

- *R. v. Sandercock*, 1985 ABCA 218
- *R. v. Arcand*, 2010 ABCA 363
- *R. v. S.C.C.*, 2004 NSPC 41
- *R. v. W. (E.M.)*, 2011 NSCA 87
- *R. v G. (R.R.D.)*, 2014 NSSC 223

[64] The Defence referred to the following cases in support of a conditional sentence of 12 to 15 months:

- *R. v. Proulx*, 2000 SCC 5
- *R. v. Hood*, 2018 NSCA 18
- *R. v. McLachlan*, 2014 SKCA 68
- *R. v. Collyer (NSSC unreported)*

6. Analysis

[65] A position of trust creates an opportunity for all the persuasive and influencing factors that individuals have over young persons to come into play. A young person is especially vulnerable to the influence of these factors. The Supreme Court of Canada in *R. v. Snelgrove*, 2019 SCC 16, said that the aim of s. 153 is to protect the vulnerable and the weak and to preserve the right to freely choose to consent to sexual activity. The facts in the present case highlight the intended purpose of this legislation – the need for protection of vulnerable young people.

[66] The Supreme Court of Canada in *Friesen, supra*, emphasized that protecting children is one of the most fundamental values of Canadian society, stating:

> [46] Because protecting children is so important, we are very concerned by the prevalence of sexual violence against children. This "pervasive tragedy that has damaged the lives of tens of thousands of Canadian children and youths" continues to harm thousands more children and youth each year (Canada, Committee on Sexual Offences Against Children and Youths, *Sexual Offences Against Children: Report of the Committee on Sexual Offences Against Children and Youths* (1984), vol. 1, at p. 29 ("Badgley Committee")). In Canada, both the overall number of police-reported sexual violations against children and police-reported child luring incidents more than doubled between 2010 and 2017, and police-reported child pornography incidents more than tripled (Canada, Department of Justice Research and Statistics Division, *Just Facts: Sexual Violations against Children and Child Pornography*, March 2019 (online), at pp. 1-2). Courts are seeing more of these cases (*R. v. M. (D.)*, 2012 ONCA 520, 111 O.R. (3d) 721, at para. 25). Whatever the reason for the increase in police-reported incidents, it is clear that such reports understate the occurrence of these offences (*R. v. L. (W.K.)*, [1991] 1 S.C.R. 1091, at pp. 1100-1101).
>
> …
>
> [65] The protection of children is one of the most fundamental values of Canadian society. Sexual violence against children is especially wrongful because it turns this value on its head. In reforming the legislative scheme governing sexual offences against children, Parliament recognized that children, like adults, deserve to be treated with equal respect and dignity (Badgley Committee, vol. 1, at p. 292; Fraser Committee, vol. 1, at p. 24, and vol. 2, at p. 563). Yet instead of relating to children as equal persons whose rights and interests must be respected, offenders treat children as sexual objects whose vulnerability can be exploited by more powerful adults. There is an innate power imbalance between children and adults that enables adults to violently victimize them (*Sharpe*, at para. 170, per L'Heureux-Dubé, Gonthier and Bastarache JJ.; *L. (D.O.)*, at p. 440, per L'Heureux-Dubé J.). Because children are a vulnerable population, they are disproportionately the victims of sexual crimes (*George*, at para. 2). In 2012, 55% of victims of police-reported sexual offences were children or youth under the age of 18 (Statistics Canada, *Police-reported sexual offences against children and youth in Canada, 2012* (2014), at p. 6).
>
> [66] Children are most vulnerable and at risk at home and among those they trust (*Sharpe*, at para. 215, per L'Heureux-Dubé, Gonthier and Bastarache JJ.; *K.R.J.*, at para. 153, per Brown J.). More than 74% of police-reported sexual offences against children and youth took place in a private residence in 2012 and 88% of such offences were committed by an individual known to the victim (*Police-reported sexual offences against children and youth in Canada, 2012*, at pp. 11 and 14).

[67] The Supreme Court in *Friesen, supra,* highlighted the various *Criminal Code* provisions that indicate Parliament's determination that sexual violence against

children is deserving of more serious punishment than if the sexual violence were perpetrated against an adult:

> [116] While sexual violence against either a child or an adult is serious, Parliament has determined that sexual violence against children should be punished more severely. First, Parliament has prioritized deterrence and denunciation for offences that involve the abuse of children (*Criminal Code*, s. 718.01). Second, Parliament has identified the abuse of persons under the age of 18 as a statutory aggravating factor (*Criminal Code*, s. 718.2(a)(ii.1)). Third, Parliament has identified the abuse of a position of trust or authority as an aggravating factor; this is more common in sexual offences against children than in sexual offences against adults (*Criminal Code*, s. 718.2(a)(iii); *L.V.*, at para. 66). Fourth, Parliament has used maximum sentences to signal that sexual violence against persons under the age of 16 should be punished more severely than sexual violence against adults. The maximum sentence for both sexual interference and sexual assault of a victim under the age of 16 is 14 years when prosecuted by indictment and is 2 years less a day when prosecuted summarily. In contrast, the maximum sentence for sexual assault of a person who is 16 years or older is 10 years when prosecuted by indictment and 18 months when prosecuted summarily (see *Criminal Code*, ss. 151(a) and (b), and 271(a) and (b)). This is a clear indication in the *Criminal Code* that Parliament views sexual violence against children as deserving of more serious punishment. These four legislative signals reflect Parliament's recognition of the inherent vulnerability of children and the wrongfulness of exploiting that vulnerability.
>
> [Emphasis Added]

[68] The Supreme Court directed that sentencing must reflect the contemporary understanding of sexual violence against children and young people and take the harmfulness of the offence into account. At para. 74 the Court stated:

> 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).

[69] The court in *Friesen, supra*, emphasized that courts need to take into account the wrongfulness and harmfulness of sexual offences against children when applying the proportionality principle. They said that this will ensure that the proportionality principle serves its function of "ensuring 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." (para. 75). They further said that wrongfulness and harmfulness impact both the gravity of the offence and the degree of responsibility of the offender. The court then offered guidance on how courts should give effect to the gravity of sexual offences against children:

> [76] …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.

[70] With respect to assessing the degree of responsibility of an offender the Supreme Court said:

> [88] Intentionally applying force of a sexual nature to a child is highly morally blameworthy because the offender is or ought to be aware that this action can profoundly harm the child. In assessing the degree of responsibility of the offender, courts must take into account the harm the offender intended or was reckless or wilfully blind to (*Arcand*, at para. 58; see also *M. (C.A.)*, at para. 80; *Morrisey*, at para. 48). For sexual offences against children, we agree with Iacobucci J. that, save for possibly certain rare cases, offenders will usually have at least some awareness of the profound physical, psychological, and emotional harm that their actions may cause the child (*Scalera*, at paras. 120 and 123-24).
>
> …
>
> [90] The fact that the victim is a child increases the offender's degree of responsibility. Put simply, the intentional sexual exploitation and objectification of children is highly morally blameworthy because children are so vulnerable (*R. v. Morrison*, 2019 SCC 15, [2019] 2 S.C.R. 3, at para. 153). As L'Heureux-Dubé J. recognized in *R. v. L.F.W.*, 2000 SCC 6, [2000] 1 S.C.R. 132, "As to moral blameworthiness, the use of a vulnerable child for the sexual gratification of an adult cannot be viewed as anything but a crime demonstrating the worst of intentions" (para. 31, quoting *R. v. L.F.W.* (1997), 155 Nfld. & P.E.I.R. 115 (N.L.C.A.), at para. 117, per Cameron J.A. ("*L.F.W. (C.A.)*")). Offenders recognize children's particular vulnerability and intentionally exploit it to achieve their selfish desires (*Woodward*, at para. 72). We would emphasize that the moral blameworthiness of the offender increases when offenders intentionally target children who are particularly vulnerable, including children who belong to groups that face discrimination or marginalization in society.

> [91] These comments should not be taken as a direction to disregard relevant factors that may reduce the offender's moral culpability. The proportionality principle requires that the punishment imposed be "just and appropriate . . ., and nothing more" (*M. (C.A.)*, at para. 80 (emphasis deleted); see also *Ipeelee*, at para. 37). First, as sexual assault and sexual interference are broadly-defined offences that embrace a wide spectrum of conduct, the offender's conduct will be less morally blameworthy in some cases than in others. Second, the personal circumstances of offenders can have a mitigating effect. For instance, offenders who suffer from mental disabilities that impose serious cognitive limitations will likely have reduced moral culpability (*R. v. Scofield*, 2019 BCCA 3, 52 C.R. (7th) 379, at para. 64; *R. v. Hood*, 2018 NSCA 18, 45 C.R. (7th) 269, at para. 180).
>
> [92] Likewise, where the person before the court is Indigenous, courts must apply the principles from *R. v. Gladue*, [1999] 1 S.C.R. 688, and *Ipeelee*. …

[71] The court in *Friesen, supra,* also set out a number of significant factors to consider in determining a fit sentence for sexual offences against children. The court said:

> We also wish to offer some comments on significant factors to determine a fit sentence for sexual offences against children. These comments are neither a checklist nor an exhaustive set of factors. Nor are they intended to displace the specific lists of factors that provincial appellate courts have set out (see, e.g., *Sidwell*, at para. 53; *R. v. A.B.*, 2015 NLCA 19, 365 Nfld. & P.E.I.R. 160, at para. 26). Instead, our aim is to provide guidance on specific factors that require "the articulation of governing and intelligible principles" to promote the uniform application of the law of sentencing (*Gardiner*, at pp. 397 and 405).

[72] The court then discussed the following factors:

- Likelihood to Reoffend
- Abuse of a Position of Trust or Authority
- Duration and Frequency of Sexual Violence
- Age of the Victim
- Degree of Physical Interference

[73] It is with the comments of the Supreme Court of Canada in *Friesen*, *supra*, in mind that I turn to the principles of sentencing. Deterrence and denunciation are to be foremost in my mind.

Mitigating and Aggravating Factors

Mitigating Factors

[74] There are a number of mitigating circumstances present in this case:

- Mr. Fisher comes before this court as a first-time offender with no criminal record.
- The PSR is positive. He has been a contributing member of society, volunteering extensively in the community. However, I would add that Mr. Fisher's position in the community enabled his access to J.R.
- He has the support of family and a network of friends as is evident from the letters of support and individuals spoken with for both the PSR and CIA. The letters of support describe his good character and the high esteem in which he is held.
- Mr. Fisher has largely led a pro-social life. He is highly educated and has been employed in various capacities. He has availed himself of counseling and has indicated a willingness to attend further counselling. He has furthered his education since being terminated from his position at Emmanuel Baptist Church.
- Mr. Fisher's educational history is commendable. Mr. Fisher has worked very hard since leaving Jamaica to attain his considerable educational successes.
- Mr. Fisher presents with no alcohol or drug addiction issues and substance abuse was not a factor in this offence.

[75] In addition, Mr. Fisher addressed the court before sentencing, expressing remorse to the court and to J.R., apologizing to J.R. for his actions and the harm they caused. He also indicated remorse to the authors of both the PSR and IRCA reports.

[76] Counsel for Mr. Fisher submits that Mr. Fisher is a low risk to remain in the community. I accept that notwithstanding there has not been a formal risk assessment, there appears to be little risk to re-offend. Mr. Fisher has been in the community without issue since this complaint first came forward in 2014 and has been subject to conditions of release since his arrest with no issues that I am aware of.

[77] In addition to mitigating factors, I take into account the following factors that do not necessarily fall under mitigating circumstances.

[78] I fully recognize these events occurred in 2008 with Mr. Fisher being sentenced in 2020, and the intervening years have provided an opportunity for personal growth. Mr. Fisher stands before me still a relatively young man, a man who has lost much of what he worked very hard to attain, his profession and his position within his church. He found employment at St. FX University but due to this matter has been unemployed since 2017. He recently began periodic employment with two organizations. He has experienced the negative publicity arising from the charges, trial and finding of guilt.

[79] He has an infant daughter and is actively involved with her care.

[80] His church (and prior employer) has offered to assist him with counselling.

[81] On the facts that are before the court, Mr. Fisher has high prospects of rehabilitation.

Victim Participation is not a Mitigating Circumstance

[82] At trial Mr. Fisher painted the sexual incidents as all initiated by J.R.. The Defence said in submission, that the fact that the first sexual contact was initiated by J.R. is one of the factors negating the predatory picture suggested by the Crown. I disagree. Mr. Fisher was the adult, 29 years old at the time of the sexual exploitation. He cultivated the relationship and he used his position to take advantage of – to sexually exploit - a young person.

[83] At trial, Mr. Fisher did not appear to fully understand the effect of his conduct on J.R. At trial he continually downplayed his position as youth pastor attempting to justify his actions by asserting J.R. initiated the sexual activity. In other words, placing blame on the victim. While I found on the evidence that J.R. initiated a light kiss on one occasion, her participation simply does not matter. Mr. Fisher, as her youth pastor, youth leader and mentor, was responsible for J.R.'s well-being when she was with him, he was responsible for helping to mould her religious devotion in a positive way, he was responsible for leading her on the right path, not on a path to satisfy his own selfish sexual desires.

[84] The court in *Friesen, supra*, forcefully dismissed the myth that victim participation should somehow be a mitigating circumstance at paras. 149-154:

> [149] Despite this, courts have at times invoked the "*de facto* consent" of a child whom Parliament has determined to be legally incapable of consenting as a mitigating factor in sentencing. Like many provincial appellate courts, we agree that it is an error of law to treat "*de facto* consent" as a mitigating factor (see *Hajar*; *Scofield*, at para. 38; *R. v. E.C.*, 2019 ONCA 688, at para. 13 (CanLII); *R. v. Norton*, 2016 MBCA 79, 330 Man.R. (2d) 261, at para. 42). To treat a victim's participation as a mitigating factor would be to circumvent the will of Parliament through the sentencing process (*Hajar*, at para. 96). It would undermine the wrongfulness of sexual violence against a child, who is under the legal age of consent, to "tel[l] the offender that, although he is technically guilty . . ., he really isn't at fault or responsible," and that the victim is really to blame for his behaviour (Wright, at p. 100).
>
> [150] Some courts have, while acknowledging that a victim's participation is not a mitigating factor, nevertheless treated it as relevant to determining a fit sentence (see *Scofield*, at para. 39; *Caron Barrette*, at para. 56). This is an error of law: this factor is not a legally relevant consideration at sentencing. The participation of a victim may coincide with the absence of certain aggravating factors, such as additional violence or unconsciousness. To be clear, the absence of an aggravating factor is not a mitigating factor.
>
> [151] We would add the following to assist judges as they give practical effect to Parliament's decision that sentences for sexual offences against children must increase. First, some courts have seemed to equate a child's non-resistance with "*de facto* consent" (see *R. v. Revet*, 2010 SKCA 71, 256 C.C.C. (3d) 159, at para. 12). In addition to analogizing a child's participation to consent, this language hints at the belief that submission or a failure to resist constitutes consent, which is a pernicious myth even for adults. Judges' analyses need to be clear that there is no defence of "implied consent" in Canadian law and that a failure to resist or silence or passivity does not constitute consent (see *Barton*, at para. 98).
>
> [152] Second, 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, as some courts appear to have done (see *Caron Barrette*, at para. 46). Instead, as the majority held in *Hajar*, "Violence is inherent in [such offences] since [they] involv[e] an adult's serious violation of a child's sexual integrity, human dignity and privacy *even in cases of ostensible consent*" (para. 115 (emphasis in original)). The fact that additional forms of violence such as weapons, intimidation, and additional physical assault may not be present does not provide a basis to ignore the inherent violence of sexual offences against children (see Marshall, at p. 220).

> [153] Third, in some cases, a victim's participation is the result of a campaign of grooming by the offender or of a breach of an existing relationship of trust. In no case should the victim's participation be considered a mitigating factor. Where a breach of trust or grooming led to the participation, that should properly be seen as an aggravating factor (*R. v. P.M.* (2002), 155 O.A.C. 242, at para. 19; *R. v. F. (G.C.)* (2004), 71 O.R. (3d) 771 (C.A.), at paras. 7 and 21; *Woodward*, at para. 43). Adolescence can be a confusing and challenging time for young people as they grow and mature, navigate friendships and peer groups, and discover their sexuality. As Feldman J.A. wrote in *P.M.*, to exploit young teenagers during this period by leading them to believe that they are in a love relationship with an adult "reveals a level of amorality that is of great concern" (para. 19).
>
> [154] Finally, a victim's participation should never distract the court from the fact that adults always have a responsibility to refrain from engaging in sexual violence towards children. Adults, not children, are responsible for preventing sexual activity between children and adults (*George*, at para. 2; *R. v. Audet*, [1996] 2 S.C.R. 171, at para. 23). We would adopt the words of Fairburn J. (as she then was) in *R. v. J.D.*, 2015 ONSC 5857:
>
> > Nor is it a mitigating factor that a child appears to acquiesce or even seek out the sexual attention of an adult. Where children appear to be seeking out such attention, it is often an outward manifestation of the child's confusion arising from personal difficulties. It is the legal responsibility of adults who are faced with children who already exhibit signs of struggle, to protect them. Adults who see these situations as opportunities to satisfy their own sexual urges, are no better or worse than those who take steps to actively seek out their victims. [para. 25 (CanLII)]
>
> [Emphasis Added]

Cultural Background

[85] The Defence asks that I take into account Mr. Fisher's cultural background. A Cultural Impact Assessment is not the same as a Gladue Report. There is no statutory requirement imposed on a sentencing judge to consider the unique circumstances of African Nova Scotian and African Black Caribbean Canadians. However, CIA's are important documents and there are circumstances where they will be very helpful to the court during the sentencing process.

[86] I adopt the comments of Justice Campbell in *R. v. Gabriel*, 2017 NSSC 90, in relation to CIA Reports :

> 53 Sentencing involves attention to both incident and context. The seriousness and devastating consequences of a crime are considered in the context in which it was committed. The context may be narrow and it may be broad. The context may involve the capacity for moral judgment or regulation that is diminished by

> immaturity or intellectual deficit. Those are both examples of context that are easily related to the individual and the crime that he committed. A background of family dysfunction and childhood abuse may, in part, form the person who committed the crime and despite sometimes being less obviously related to the offence are widely considered as part of the relevant context in sentencing. What may be otherwise inexplicable may become understandable with the benefit of that contextual information.
>
> 54 A person's racial background is also a part of his identity. It does not determine his actions. It does not establish a lower standard for assessing moral culpability. It does not justify or excuse criminal behaviour. It may however help in understanding the broader circumstances that acted upon the person.
>
> 55 That is why the Cultural Assessment is both a fascinating and a challenging document. It provides information that makes it harder, not easier, to reach a conclusion. That is a good thing. The challenge comes from acknowledging the role that race plays in the prevalence of violent crime among young African Nova Scotian men while not falling into racist traps. It is hard to read because at every turn one has to question where the line is drawn between these general conclusions and generalizations based on assumptions from race.
>
> 56 The Cultural Assessment is not a single simple answer to a complicated question. It does not suggest that Kale Gabriel was destined by his race or his circumstances to find himself here. Like the *Gladue* report it provides important context and raises as many questions as it answers.
>
> 57 Sentencing judges struggle to understand the context of the crime and person being sentenced. To do that judges rely on our own common sense and understanding of human nature. Sometimes that isn't enough. Our common sense and our understanding of human nature are products of our own background and experiences. An individual judge's common sense and understanding of human nature may offer little insight into the actions of a young African Nova Scotian male. The Cultural Impact Assessment serves as a reminder of the fallibility of some assumptions based on an entirely different life experience.

[87] The question arises of what impact should the CIA have on this sentencing. I again refer to Justice Campbell's comments in *Gabriel*, *supra*:

> 91 It does serve to disrupt some comfortable certainties. It prompts a judge to struggle with difficult questions for which there may not really be entirely clear answers. The offender is an individual capable of exercising his free will in making decisions about his life. At the same time and like everyone else, his world view is shaped to some extent by his experiences in the community of which he is a part. There is a tension between those things and the Cultural Assessment serves as a reminder of that tension. The Cultural Assessment is a reminder that moral judgments are always complicated.

> 92 Sentencing is not a balancing. Synthesizing might be better word. It is not a matter of weighing one factor favouring a lighter sentence against another that favours a harsher one. It is a matter of bringing together a number of considerations some of which may compliment each other, some of which may militate toward different outcomes and some of which may help to inform and provide context for the others.

[88] I have considered Mr. Fisher's cultural background as an African Black Caribbean immigrant to Nova Scotia and have considered the impact of systemic racism. I fully accept that there is an overrepresentation of African Canadians (including those of Caribbean decent) in custody in Canada as a result of systemic discrimination (see *R. v. "X",* 2014 NSPC 95; *R. v. Gabriel*, 2017 NSSC 90; *R. v. Downey*, 2017 NSSC 302; and *R. v. Jackson,* 2018 ONSC 2527).

[89] I have reviewed the Cultural Impact Assessment and the contextual information provided therein. It provided valuable insight. It has provided me with an understanding of Mr. Fisher's background from a socio – cultural perspective.

[90] Unfortunately there are a number of aggravating circumstances here.

[91] The offence involved abuse of a person under 18 years of age (s. 718.2 (a)(ii.1).

[92] Mr. Fisher, as the youth pastor and youth leader, was in a position of trust to J.R. when the sexual exploitation occurred (s. 718.2(a)(iii)). The court in *Friesen, supra,* had the following to say about abuse of a position of trust:

> [125] We also wish to offer some comments on the factor of the abuse of a position of trust (*Criminal Code*, s. 718.2(a)(iii)). Trust relationships arise in varied circumstances and should not all be treated alike (see *R. v. Aird*, 2013 ONCA 447, 307 O.A.C. 183, at para. 27). Instead, it makes sense to refer to a "spectrum" of positions of trust (see *R. v. R.B.*, 2017 ONCA 74, at para. 21 (CanLII)). An offender may simultaneously occupy multiple positions on the spectrum and a trust relationship can progress along the spectrum over time (see *R. v. Vigon*, 2016 ABCA 75, 612 A.R. 292, at para. 17). In some cases, an offender's grooming can build a new relationship of trust, a regular occurrence in child luring cases where children are groomed by complete strangers over the Internet, or move an existing trust relationship along the spectrum. Even where grooming does not exploit an existing relationship of trust or build a new one, it is still aggravating in its own right.
>
> [126] <u>Any breach of trust is likely to increase the harm to the victim and thus the gravity of the offence</u>. As Saunders J.A. reasoned in *D.R.W.*, the focus in such cases should be on "the extent to which [the] relationship [of trust] was violated" (para.

> 41). The spectrum of relationships of trust is relevant to determining the degree of harm. A child will likely suffer more harm from sexual violence where there is a closer relationship and a higher degree of trust between the child and the offender (see *R. v. J.R.* (1997), 157 Nfld. & P.E.I.R. 246 (N.L.C.A.), at paras. 14 and 18). This is likely to be the case in what might be described as classic breach of trust situations, such as those involving family members, caregivers, teachers, and doctors, to mention a few.
>
> …
>
> [129] The abuse of a position of trust is also aggravating because it increases the offender's degree of responsibility. An offender who stands in a position of trust in relation to a child owes a duty to protect and care for the child that is not owed by a stranger. The breach of the duty of protection and care thus enhances moral blameworthiness (*R. v. S. (W.B.)* (1992), 73 C.C.C. (3d) 530 (Alta. C.A.), at p. 537). The abuse of a position of trust also exploits children's particular vulnerability to trusted adults, which is especially morally blameworthy (*D. (D.)*, at paras. 24 and 35; *Rayo*, at paras. 121-22).
>
> [130] We would thus emphasize that, all other things being equal, an offender who abuses a position of trust to commit a sexual offence against a child should receive a lengthier sentence than an offender who is a stranger to the child. …
>
> [Emphasis Added]

[93] Another Aggravating factor is the age difference between Mr. Fisher and J.R.. Mr. Fisher was 29 and J.R. was 17 when the sexual incidents occurred. Despite Mr. Fisher being a student at Divinity College, he was still an adult, 12 years her senior.

[94] Mr. Fisher used his position to build a close relationship with J.R. starting when she was 15. On the evidence it is clear Mr. Fisher groomed J.R. in order to sexually exploit her. His attention toward J.R. began when she was 15 and he was 27 and included long MSN chats late into the night and the early hours of the morning and progressed to video chats. They were lengthy, intimate calls where she confided everything about her life, including the difficulties she was having in her home life and at school. He knew she was vulnerable and trusted him, he used this trust to exploit her sexually. Mr. Fisher exploited J.R.'s vulnerability, leading her to be lured into what she believed was a boyfriend/girlfriend relationship, one that would lead to marriage, by a man in whom she had complete trust.

[95] Being in a position of leadership with youth at the church, Mr. Fisher took advantage of opportunities to engage with and sexually exploit a young person. J.R., a young person of teenage years, was at a fragile stage, and was seeking support and encouragement from her youth pastor – not sexual exploitation.

[96] Mr. Fisher ignored the warnings of others. At trial the evidence established that he was warned J.R. was infatuated with him. In addition, Reverend Anderson cautioned him as a result of a call from another church expressing concern about their closeness. If Mr. Fisher had any internal conflicts about the appropriateness of his actions they were clarified by Reverend Anderson. In fact, when Mr. Fisher realized people in the church were talking about their closeness, he took the relationship underground – telling J.R. they could not show affection in public as he would get in trouble.

[97] The sexual exploitation occurred over a period of five months from January to July of 2008 when J.R. turned 18. The sexual incidents included kissing, full body touching, digital penetration of J.R.'s vagina, oral sex performed both by Mr. Fisher and J.R., and sexual intercourse.

[98] Mr. Fisher's actions caused significant harm to J.R. as noted above. The psychological damage inflicted on J.R. by Mr. Fisher's selfish and criminal behavior is significant and impossible to quantify. It is clear Mr. Fisher's actions have had lasting effects on J.R. emotionally. She described in her VIS countless nights praying for death and the courage to take her own life, depression, anxiety, difficulty with relationships, panic attacks and utilizing various counselling services since 2014.

[99] In addition, the importance of faith in people's lives cannot be underestimated. To many, it is as important as the air we breathe. As the saying goes, faith nourishes the heart and soul. J.R. was a young person of great faith – she expressed her wish to find ways to serve God. The church was the centre of her young life.

[100] To be a person of such faith and to be preyed upon by the person she most trusted during her teenage years, her confidant and counsellor, her youth pastor, is hard to comprehend. When one faces great turmoil in life, those of religious faith turn to their god, she lost this because of the selfish actions of Mr. Fisher. A person's faith is a part of them, it guides them and to lose this for even a short period of time, can be devastating.

[101] I now turn to consideration of the factors applicable to sentencing in relation to sexual exploitation of a person under 18 years of age. I must give primary consideration to denunciation and deterrence (s. 718.01 of the *Criminal Code*). The sentence should seek to deter Mr. Fisher as well as "others from committing offences" (s. 718(b) of the *Criminal Code*). Of course, rehabilitation and reformation also play a role in crafting the correct disposition. Based on the evidence, I consider Mr. Fisher to have high rehabilitative prospects.

[102] I must also be mindful of the fundamental principle in sentencing found in s. 718.1 of the *Criminal Code* that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[103] I am also cognizant of the principle of restraint set out in s. 718.2(e) which states:

> (e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

[104] First, I will address whether a Conditional Sentence is appropriate in the present circumstances.

CONSIDERATION OF A CONDITIONAL SENTENCE (CSO)

[105] The Defence argues a CSO is appropriate in the present circumstances. There is no question that a CSO is punishment. It can also achieve both the objective of denunciation and of deterrence.

[106] Section 742.1 of the *Criminal Code* states:

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

[107] The principles applicable to conditional sentences are well known and were set out in *R. v. Proulx*, 2000 SCC 5. As the Supreme Court said, in proper circumstances, a conditional sentence can satisfy the primary factors of deterrence and denunciation. Conditional sentences can be considered for any offence that meets the statutory criteria in s. 742.1 being: where there is no statutory minimum

term of imprisonment, where a sentence of less than two years is appropriate in the circumstances, where the court is satisfied that such a sentence would not endanger the community and where the sentence would be consistent with the fundamental purpose and principles of sentencing that are contained in ss. 718-718.2 of the *Criminal Code.*

[108] In *Hood, supra*, the Nova Scotia Court of Appeal said that the minimum sentence in s. 153 was inoperable, thus allowing for conditional sentences:

> 163… With the minimum sentence rendered inoperable, as confirmed above, this disposition was available to the judge. Note, as well, s. 742.1(f) where Parliament took the time to list the offences for which this provision was not intended. Of the many sex-related offences in the *Criminal Code*, only sexual assault is listed. Ms. Hood was charged with, but not convicted of sexual assault. Had Parliament wished to exclude the three offences at play in this appeal, it surely would have listed them there.

[109] Although, I have concluded that a CSO is statutorily available in sentencing in relation to the s. 153 conviction (per *Hood, supra*), it is my opinion that a penitentiary term is necessary and that in the circumstances an appropriate range of sentence is in excess of two years.

[110] Mr. Fisher did not just make a single mistake based on a spontaneous opportunity, but groomed J.R. for several years, and continued the sexual conduct over a number of months, conduct that included oral sex, digital penetration and sexual intercourse. The offence is grave and Mr. Fisher's moral blameworthiness is high. There are a combination of factors that make a conditional sentence in the present circumstances inappropriate including the breach of trust, the lengthy period over which J.R. was groomed, the number and seriousness of the incidents. A conditional sentence of less than two years would not be enough to denounce the offence committed by Mr. Fisher, to punish him as the offender and to deter those who seek to prey on young people for their own selfish sexual gratification.

[111] Denunciation and deterrence are particularly pressing in the present circumstances and they are the primary considerations per s. 718.01. They are so pressing in fact that incarceration is the only suitable way to express society's condemnation of Mr. Fisher's conduct. As Justice L'Heureux-Dube stated at para. 29 of *R. v. L.F.W.,* [2000] 1 S.C.R. 132, "Courts have tended, even under the new sentencing principles adopted in Bill C-41…to find that the principle of denunciation weighs particularly heavy in cases of offences perpetrated against children by adults in positions of trust…" The actions of Mr. Fisher must be strongly denounced. This

case illustrates the need for a message of deterrence which must be strong enough so that others who stand in a position of trust to a young person can expect they will be dealt with harshly. Children and young people must be protected from sexual violence.

[112] While I have determined that a conditional sentence is inappropriate, I do wish to comment on some of the other considerations found in s. 742.1. Although I am of the view that service of a sentence in the community would not endanger the safety of the community, having considered all of the applicable principles, caselaw and circumstances of the offences, I am of the opinion that granting a CSO would be inconsistent with the purpose and principles of sentencing in the present circumstances. I could only impose a conditional sentence if, as s. 742.1 states, I were satisfied "that the service of the sentence in the community would... be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2". In my opinion, a CSO would not be consistent with these sections and principles.

[113] The Defence argued that the decision in *Hood, supra,* where there was a CSO of 15 months plus 24 months probation imposed, is on all fours with the present case. I disagree that it is on all fours. In that case there was expert evidence before the sentencing Judge that Ms. Hood suffered from a mental illness and a finding that there was a causal link between the illness and the criminal conduct. I do not consider the specific socio-cultural factors that the CIA says influenced Mr. Fisher's worldview to establish such a causal link in this case nor to have the same impact on sentencing. The sentencing Judge also found that Ms. Hood's actions did not equate to grooming.

[114] The sentencing Judge, Judge Del W. Atwood, in relation to symptoms of mental illness stated (2016 NSPC 78):

> 52 Although I found Ms. Hood not to have discharged the burden of proving that she suffered from a mental disorder so as to negative criminal responsibility at the time she committed the acts which gave rise to the charges against her, I find that I am persuaded by the thorough and detailed report prepared by Dr. Connors that Ms. Hood experienced Bipolar Disorder Type 1, and she was symptomatic at the time of her offending.
>
> …
>
> 55 I find persuasive Dr. Connors' conclusion that Ms. Hood's symptoms have a nexus with her crimes, in that her mania rendered her profoundly disinhibited and prone to risk taking, elevated by a sense of invincibility, and impaired by defective

> insight and inhibition; Ms. Hood regarded herself as a peer of her victims, and looked to them for approval and acceptance. Furthermore, it is not clear at all to me that Ms. Hood sought to groom G. and L. for sexual encounters, and I found particularly insightful Dr. Connors' observation:
>
> She was certainly persistent with respect to [G] and marijuana, which raises the question as to why she would not have been more active/assertive/aggressive in creating an opportunity for sexual contact rather than failing to inhibit herself when such an opportunity arose in the form of [L] asking for a blow job.
>
> 56 This supports a conclusion that Ms. Hood's actions were more crimes of spontaneous opportunity rather than malicious acts of calculation, grooming and planning.
>
> 57 I adopt what was stated by the Ontario Court of Appeal in *R. v. Prioriello* [2012 CarswellOnt 1508 (Ont. C.A.)]:
>
>> 11 In order for a mental illness to be considered as a mitigating factor in sentencing, the offender must show a causal link between his illness and his criminal conduct, that is, the illness is an underlying reason for his aberrant conduct: *R. v. Robinson*, [1974] O.J. No. 545 (C.A.).
>
> 58 I am satisfied that such a link exists in this case, and operates as a mitigating factor.
>
> 59 I would situate Ms. Hood's moral culpability at the lower end of a serious category of offence.
>
> [Emphasis added]

[115] In addition, in *Hood, supra,* (which involved two young people) while there was a significant volume of sexually explicit text messages, there was one incident of physical sexual abuse. In contrast, on the facts in this case, I consider Mr. Fisher's moral culpability to be high, he groomed J.R. over several years and there were multiple incidents of sexual activity. Here, a term of imprisonment is necessary, having regard to the principle of general deterrence and the need to express society's condemnation of such conduct.

[116] While the Defence referred to *R. v. McLachlan*, *supra,* in relation to its comments on the 'fall from grace' of the offender, I note in that case the Saskatchewan Court of Appeal upheld a CSO of 18 months, followed by probation where a 33 year old teacher became involved with a 15 year old student. However, the incidents in that case occurred in 1994 and 1995 when the maximum penalty under s. 153 was imprisonment for a term not exceeding five years. The maximum sentence applicable in the present circumstances is ten years.

[117] Given my determination that a conditional sentence order is not appropriate, I now turn to the question of what a fit and proper sentence should be.

[118] I recognize that Mr. Fisher, for the majority of his life, has been a contributing member of society, was relatively young at the time of the offence (not yet 30) and described as immature, had no prior criminal record and has suffered significant employment losses, including his position with the church and later position within the University. I have also given consideration to the IRCA report. However, given the serious nature of the sexual exploitation, the circumstances of the offender and the mitigating and aggravating factors, including the impact on J.R. and the primacy of denunciation and deterrence, a period of incarceration is necessary.

[119] In considering the range of sentences in the various cases and the aggravating and mitigating factors, the circumstances of the offence, and keeping in mind the circumstances of the offender, I find that a fit and proper sentence is 27 months incarceration in a federal prison. I find that the sentence adequately meets the primary objectives of denunciation and deterrence and also recognizes the prospects of rehabilitation.

[120] But for the mitigating factors in this case, a sentence in the range of three years as the Crown requested would be appropriate. The sentence proposed by Mr. Fisher of a conditional sentence of 12 to 15 months is not adequate considering all of the aggravating features, including the abuse of a position of trust, the grooming of J.R., the age of J.R, the frequency and seriousness of the sexual incidents, the harm to J.R. and the abhorrence that society has of sexual offences against young persons.

[121] As noted above, the IRCA Report indicates that Mr. Fisher would benefit from a sexual offender treatment program and associated individualized counselling. I fully support these recommendations. When this sentencing decision is transmitted to Correctional Services they will be made aware of the court's view, which is that Correctional Services should use all reasonable efforts to provide Mr. Fisher with the opportunity to engage in such programming.

7. Final Decision

[122] I believe that a sentence of 27 months in a federal penitentiary is appropriate. Mr. Fisher will receive a sentence of 27 months federal custody on the s. 153 conviction.

[123] Additionally, I impose the following orders:

- Primary-designated-offence DNA Order, in accordance with s. 487.051 of the *Criminal Code*;
- Firearms Prohibition Order for ten years in accordance with s. 109 of the *Criminal Code*. I adopt the reasoning of Gorman J.P.C. in *R. v. H. (L.)*, [2002] N.J. No. 59, and of the New Brunswick Court of Appeal in *R. c. B. (G.),* 2005 NBCA 72, that sexual crimes against minors are inherently violent. The NBCA said at para. 10 "… The child's sexual integrity has been compromised, and this form of sexual abuse can only be considered a form of violence in and of itself..." ;
- *Sexual Offender Registration Act* (SOIRA) Order (20 years) in accordance with s. 490.013(2.1) of the *Criminal Code*.

Jamieson, J.