SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. C.A.L.*, 2021 NSSC 365

Date: 20220215
Docket: CRY No. 492826
Registry: Yarmouth

Between:

Her Majesty the Queen
v.
C.A.L.

Restriction on Publication: s.486.4CC

Judge: The Honourable Justice Pierre Muise

Heard: November 18, 2021, in Yarmouth, Nova Scotia
Oral decision rendered November 18, 2021.

Counsel: Peter Craig, Q.C., for the Crown
Raymond Jacquard, for C.A.L.

Restriction on Publication: s.486.4CC

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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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).

By the Court (Rendered Orally November 18, 2021):

INTRODUCTION

[1] C.A.L. was convicted following trial of having, between July 19, 2013 and July 19, 2017: committed a sexual assault on EH, contrary to s. 271 of the *Criminal Code;* and touched EH, when she was under the age of 16 years, for a sexual purpose, contrary to s. 151 of the *Criminal Code*.

[2] The s. 271 offence was stayed in accordance with the principle against multiple convictions, commonly referred to as the *Kienapple* principle.

[3] He is being sentenced in relation to the s. 151 offence.

[4] I am rendering this decision orally. Should it be released in written form, I reserve the right to edit it for grammar, structure and organization, as well as to provide complete citations and references, without changing the reasoning or the result.

[5] There is a publication ban on the identity of the victim and any information that might disclose her identity.

[6] The Crown proceeded indictably on the sexual interference charge and some of the incidents post-date July 17, 2015. Therefore, it carries a maximum penalty of 14

years' imprisonment. The 1 year minimum penalty has been declared unconstitutional by our Court of Appeal in **R. v. Hood**, 2018 NSCA 18.

CIRCUMSTANCES OF THE OFFENCE

[7] The circumstances of the offence are as follows.

[8] On EH's 9th birthday, when C.A.L. was in his mid-thirties, EH and her mother went to C.A.L.'s home so that EH could share the excitement of her birthday gift with him and his family. They were met outside. On the way in the house, C.A.L. was walking behind EH and grabbed her buttocks.

[9] The second incident occurred within a year or so thereafter in the spare room of C.A.L.'s home. She was on the bed. C.A.L.'s child or children, who she was caring for, left the room and went upstairs. As they were leaving, C.A.L. put his hand on her shoulder, signalling that he did not want her to follow the children. He forced himself upon her, kissed her and put his hands down her pants.

[10] Her memory, which she had been working over the years to repress, only permitted her to describe in that much detail the first two incidents.

[11] However, she recalled the sexual violence occurring fairly frequently. She described it as being maybe a few times per month.

[12] Sometimes he would put himself on top of her. At other times, he would put an arm on her. Sometimes she would squirm away. At other times, she could not.

[13] When he would kiss her, it would be on the lips. He would touch her all over with his hands, including down her pants and on her groin. He did not penetrate her vagina but he did touch it beneath her underwear. He would also rub his hands down her arm.

[14] It also occurred two or three times in his office above his metal fabrication shop. On those occasions, she was sitting on the couch. He was sitting close to her and did the same things as in the spare room. That is, he put his hands down her pants and touched her vagina inside her clothing. However, there was not a lot of kissing there and he would not force himself on top of her.

[15] In 2016, when she was 12 years of age, she and her mother went camping at Kejimkujik National Park with C.A.L. and his family. They had their own tenting site. The L's had their own camper site. During that trip, EH visited the L. camper site and found C.A.L. there by himself. She ended up on the bed in the trailer and he pushed himself on top of her, doing the same thing he had done in the spare room, i.e. putting his hands down her pants, under her underwear and touching the outside of her vagina.

[16] C.A.L.'s wife testified, and I accepted, that the contact between EH and C.A.L. started to slow down after September 2016. That was consistent with EH's evidence, which I also accepted, as to when the sexual violence slowed, then eventually stopped.

[17] During the relevant period of time, EH's family and that of C.A.L. had become very close. They spent a lot of time at each other's homes. They spent holidays together, including exchanging gifts. They vacationed together. EH's mother saw C.A.L. as an uncle to EH. C.A.L. testified that EH was like part of his family. She spent a lot of time providing afterschool childcare to his firstborn, even though she was quite young, whenever he was on the property to provide some adult supervision while working in his shop or in the house.

[18] C.A.L. continued engaging in the sexual violence against EH in the face of repeated protests from his wife that she thought EH had too close a relationship with him. She protested despite being unaware of the sexual abuse. He kept justifying the continued closeness by telling his wife that EH was just a kid and was like one of their own.

SENTENCING RECOMMENDATIONS

[19] The Crown recommends the following sentence:

- 3.5 to 4 years' imprisonment;

- a SOIRA order for life;

- a DNA order;

- a s. 161 order (including clauses a, a.1, b and c) for 20 years; and,

- a s. 109 Firearms Prohibition Order.

[20] The Crown notes the Supreme Court of Canada decision in **R v Friesen**, 2020 SCC 9, was "game-changing" for sentencings involving sexual offences against children. It summarizes and relies upon the principles and guidelines laid out in **Friesen**.

[21] The Defence recommends 2 years' less a day imprisonment to be served in the community under a conditional sentence order ("CSO").

[22] It took no issue with the ancillary orders requested.

[23] The Defence acknowledges that **Friesen** may require an upward adjustment of sentences imposed in similar cases in the past. However, it submits that the recommended 2-year-less-a-day CSO is a proper increase from the 15-month CSO imposed in **R. v. Hood**, *supra*.

[24] Determining the appropriate range of sentence requires the Court to consider the objectives and principles of sentencing.

[25] **Friesen** addressed them in detail as they relate to sexual offences against children, with particular emphasis on denunciation, deterrence, proportionality, and how parity relates to proportionality. Prior to applying the objectives and principles of sentencing to the case at hand, I refer to the outline of the relevant points from **Friesen** contained in paragraphs 15 to 21 of my decision in **R. v. Wood**, 2021 NSSC 253, where I stated:

> [15] The main themes in **Friesen** are summarized at paragraph 5 as follows:
>
> > …we send a strong message 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. Sentences must accurately reflect the wrongfulness of sexual violence against children and the far-reaching and ongoing harm that it causes to children, families, and society at large.
>
> [16] Those themes are expanded upon in **Friesen** as follows:
>
> > • Precedent cases provide the body of sentences that judges use to determine what is a proportionate sentence. When done in a consistent manner, it satisfies the principle of parity: paras 32 and 33.
> >
> > • "Protecting children from wrongful exploitation and harm is the overarching objective of the legislative scheme of sexual offences against children in the *Criminal Code*": para 42.
> >
> > • "[S]entencing judges need to properly understand the wrongfulness of sexual offences against children and the profound harm that they cause": para 50.
> >
> > • "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": para 51.
> >
> > • "This … requires courts to focus their attention on emotional and psychological harm, not simply physical harm. Sexual violence against children can cause serious

emotional and psychological harm that … 'may often be more pervasive and permanent in its effect than any physical harm'": para 56.

• At paragraphs 57 and 58, the Court noted various forms of emotional and psychological harm resulting from such offences, and highlighted that they "are particularly pronounced for children".

• At paragraphs 60 and 61, it discussed the harm caused in the form of damage to the child's relationship with their families and caregivers.

• Paragraphs 62 to 64 describe the forms of harm that families, communities and society suffer. They include, among others:

  • Destruction of trust;

  • Feelings of guilt and powerlessness;

  • The financial and emotional costs of the child's need to recover and overcome behavioral challenges;

  • Resulting social problems;

  • Costs of intervention; and,

  • Medical costs.

• "Sexual violence against children is especially wrongful" because of their vulnerability: para 65.

• "Sexual violence has a disproportionate impact on girls and young women": para 68.

• Indigenous people and other groups that are marginalized or discriminated against, including youth in the care of a government agency, are disproportionately impacted by sexual violence against children, and thus particularly vulnerable: paras 70 to 73.

• "[C]ourts need to take into account the wrongfulness and harmfulness of sexual offences against children when applying the proportionality principle": para 75.

• In assessing the gravity of the offence, courts must "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": para 76.

• These must also be considered in determining the offender's degree of responsibility: para 87.

• The sexual exploitation of children, because of their vulnerability, and the interference with their sexual and psychological integrity, aggravates the wrongfulness: para 77 and 78.

• The fact that the victim is a child, and the offenders ought to know of the potential harm, increases their degree of responsibility: paras 88 to 90.

• Paragraphs 79 to 81 describe several potential forms of harm that can manifest themselves during childhood or only become evident in adulthood. Some can rob the child victim of their youth and innocence. Many result in relationship and trust challenges, fear, mental and psychological health issues, sleep disturbances, and anti-social or self-destructive behavior.

• At paragraph 84, the following is stated:

> … 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.

• Then, at paragraph 85, it is noted, however, that actual harm "is a key determinant of the gravity of the offence."

• Parliament has mandated that sentences for sexual offences against children must increase by: increasing maximum sentences where the child is under 16; and, requiring courts to give primary consideration to denunciation and deterrence where the victim is under 18: paras 95 to 103.

• Parliament's prioritization of denunciation and deterrence for sexual offences against children is reflective of their wrongfulness and the harm they can cause: para. 105.

[17] Friesen, at paragraph 110, stated that "Courts should … 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'".

[18] Friesen, at paragraph 107, stated:

> 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.

[19] At paragraph 114, it stated:

> …it is incumbent on us to provide an overall message that is clear … . 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.

[20] At paragraph 116, it noted that Parliament signaled that sexual offences against children are to be punished more severely than those against adults. It did so by way of the same provisions discussed in relation to increasing sentences, plus those making abuse of persons under 18, and abusing a position of trust or authority, aggravating factors.

[21] At paragraphs 121 to 154, the Court discussed significant factors to consider in determining a fit sentence. They include the following:

1. The greater the risk of re-offence, the greater the emphasis that should be placed on the sentencing objective of separating the offender from society. Though rehabilitation is to be encouraged, because it offers long-term protection, it can occur through programming within the prison, while ensuring short-term protection.
2. An offender who abuses a position of trust should receive a lengthier sentence than one who is a stranger to the child because the breach of trust is likely to increase the harm and thus the gravity of the offence, and it is aggravating because it increases the offender's degree of responsibility.
3. Significantly higher sentences should be imposed on offenders who commit sexual violence against children on multiple occasions and for longer periods of time.
4. The age of the victim is a significant aggravating factor because dependency and vulnerability are more pronounced in younger children,

which impacts both the gravity of the offence and the degree of responsibility.

5. There are several dangers in defining a sentencing range based on the specific type of sexual activity at issue. Significant harm can flow from all types of sexual acts. Friesen strongly cautions courts "against downgrading the wrongfulness of the offence or the harm to the victim where the sexually violent conduct does not involve penetration, fellatio, or cunnilingus, but instead touching or masturbation". There is no hierarchy of physical acts. However, an elevated degree of physical interference is still an aggravating factor.
6. The child victim's participation in the sexual activity is not a mitigating factor, nor even a relevant consideration at sentencing. It is an error of law to treat it as such, even though it "may coincide with the absence of an aggravating factor, such as additional violence or intimidation. It would "undermine the wrongfulness of sexual violence against a child" by shifting blame to the victim, and ignore the fact that sexual offences are inherently violent. It is always the adult's "responsibility to refrain from engaging in sexual violence towards children". Breach of trust or grooming leading to the participation is an additional aggravating feature.
…

PURPOSE AND PRINCIPLES OF SENTENCING

[26] The purpose, objectives and principles of sentencing in ss. 718 to 718.2 CC are to be considered.

[27] Ss. 718 and 718.01 provide:

> 718. The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
>
> (a) to denounce unlawful conduct;
>
> (b) to deter the offender and other persons from committing offences;
>
> (c) to separate offenders from society, where necessary;

(d) to assist in rehabilitating offenders;

(e) to provide reparations for harm done to victims or to the community; and

(f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

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.

THE OBJECTIVES OF SENTENCING

[28] The objectives of denouncing unlawful conduct, and, deterring the offender and other persons from committing offences, are of paramount importance when dealing with sexual offences, especially when committed against a person under the age of 18. In the case at hand, the victim was only between the ages of 9 and 12 or 13. Therefore, I am statutorily directed to give primary consideration to the objectives of denunciation and deterrence.

[29] Another objective is, where necessary, separating the offender from society. **Friesen** notes that "mid-single digit penitentiary terms for sexual offences against children are normal" and "substantial sentences can be imposed where there was only a single instance of sexual violence". The circumstances of the case at hand could easily require a sentence into the penitentiary range, to give effect to

proportionality, parity and the requirement that primary consideration be given to denunciation and deterrence.

[30] A further objective is to assist in rehabilitating the offender. C.A.L. has not accepted responsibility. He maintains his innocence. That is not an aggravating factor. It is the absence of a mitigating factor and diminishes the prospects of rehabilitation. He has not participated in, nor explored, sex offender assessment or counselling. In addition, despite taking medication for depression, and having found mental health counselling he attended "several years ago" helpful, he has not sought assessment or counselling to address his offending behaviour, and does not believe he has any problem requiring treatment. Further, his separated spouse, who was supportive of him, and testified on his behalf at trial, described him to the writer of the presentence report as being angry and manipulative, and that he scared her. She was of the view that he would benefit from counselling for anger management and mental health. She also described how he tests the limits of the requirement that he be supervised while visiting with his own children (which was imposed by the child protection agency), and that he threatens to keep the children. He, himself, told the writer of the presentence report that he does not believe he has any problem requiring treatment. These additional points, similarly, show some level of defiance

and resistance to accepting help from mental health professionals, and diminish the prospects of rehabilitation.

[31] Other objectives are: to provide for reparations for harm done to victims and the community; and, promoting a sense of responsibility in the offender, and acknowledging the harm done to the community. I will deal with these two objectives together.

[32] True reparation is likely impossible in relation to the victim and her family.

[33] Unfortunately, no sentence imposed will provide true and full reparation for the inevitable harm caused to the victim by having her sexual integrity violated.

[34] There is a victim impact statement from the victim's parents. It reveals the following significant actual harm suffered by EH:

1. She has withdrawn from activities she would normally enjoy.

2. She cries, explaining it is because she is fearful of what may happen next.

3. She has lost her innocence and childhood, which can never be replaced.

4. She will have to live with the trauma of the offence for the rest of her life.

[35] EH's mother also described other harm to EH when being interviewed by the writer of the PSR. She stated EH: has trust issues; is distant; can become angry; has

diminished self-worth; has difficulty being motivated and performing school work; and, can be guarded in her relationships, questioning people's actions.

[36] During her testimony at trial, EH also described or exhibited some of the actual harm caused to her. It included the following:

1. She has been trying to forget about it to ease the pain, as constantly remembering, and being angry or upset, did not help.

2. She had difficulty recalling supplementary detail. It is recognized that childhood sexual trauma negatively impacts memory.

3. She told very few people what happened because those who know look at you differently and she did not like the way they feel sorry for you or treat you.

4. As a child, at the time of the abuse, she did not recognize its wrongfulness. She only became aware of it during school classes in which sexual assaults were discussed.

5. Having to testify about the sexual activity evoked tears and genuine emotion which clearly demonstrated the pain caused by the offence.

6. As questioning dragged on she became withdrawn and apathetic.

[37] I must also take into consideration the reasonable potential for additional harm that is not yet apparent to the victim, as expressed in **Friesen**, some of which I have already outlined in the excerpt from my decision in **R. v. Wood**.

[38] There is still some hope for recovery. As stated at paragraph 59 of **Friesen**:

> In emphasizing the harmfulness of sexual offences against children, we do not intend to stereotype child victims of sexual violence as forever broken. To the contrary, it takes great "strength and courage" to survive sexual violence as a child …. Frequently, child victims make "valiant and repeated efforts to have someone believe their allegations … . Many victims go on to live healthy and meaningful lives with fulfilling and loving relationships. Offenders cannot rob children of their "strength, compassion, love for others and intelligence" and "resolve to take back their lives".

[39] EH displayed great courage, strength and maturity in presenting her testimony even though she did not want to be there and did not even want the matter reported to the police. Her explanations of how the abuse affected her showed great insight. It is hoped that these same attributes will help heal her psychological and emotional wounds. There are some indication in her father's VIS that her healing may already have started. He notes that, since she "has gotten this off her chest" he has seen a change for the better. She seems less angry and spends more time with them.

[40] A sentence involving imprisonment can serve to acknowledge the level of harm done, not only to the victim herself, but also to the community at large, and promote a corresponding sense of responsibility in the offender.

[41] C.A.L. has not pursued a sexual offender assessment, nor rehabilitative counselling. That may be futile given his denial of the offence. However, it still suggests he, likely, does not fully appreciate the level of harm this type of offence brings to victims, families and communities.

[42] As indicated in **Friesen**, in addition to the detrimental impact upon the victim, these types of offences also have a detrimental impact on the victim's family, the community at large, and society in general.

[43] The common impact they can have on an individual victim, such as depression, anxiety, anger, low self-esteem, and other mental health difficulties, can flow over to the community at large in the way of, among other things, social issues requiring intervention, diminished productivity and higher health care costs.

[44] It leads to distrust and fear, for the victim and the community at large, limiting our sense of security and freedom.

[45] EH's parents have, in their victim impact statements, described the extensive harm caused to them and their family. Their descriptions vary somewhat, but have significant overlap. The impact of the harm was amplified because: of the importance of family to them; EH is their only child; and, they were very close with C.A.L.'s family, sharing holidays and vacations with them, exchanging gifts and

[redacted]. At trial, EH's mother testified that C.A.L. was like an uncle to EH. Collectively, the harm described includes the following:

1. The offence had devastating effects on their social, mental and physical well-being.
2. It was shocking and difficult to comprehend, creating despair.
3. They suffered extreme distress, pain and suffering.
4. They felt preyed upon, betrayed, exploited and manipulated by C.A.L. who they trusted and thought was a cherished friend.
5. It has changed them and the way they interact with other people. They are distant and have walls up to protect themselves and the family.
6. It has negatively affected their marriage, their work, and their health.
7. They find it difficult to enjoy life. They have many dark thoughts and feelings of helplessness. They are on edge all of the time.
8. They have experienced psychological effects such as anger, depression, fear, sleepless nights, flashbacks and diminishment of the will to live.
9. They feel guilt and shame for having been unable to protect their child from such victimization.

10. It has created anxiety and worry about re-victimization, leading to loss of trust in the community and society, and resulting in limiting of social and community involvement.

11. That, in turn has led to feelings of isolation and loneliness.

12. They do not expect the damage to ever be fully repaired.

OTHER SENTENCING PRINCIPLES

[46] The following codified sentencing principles also apply:

> 718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.
>
> 718.2 A court that imposes a sentence shall also take into consideration the following principles:
>
> (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
>
> > ....
> >
> > (ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,
> >
> > (iii)evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,
> >
> > (iii.1) evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, …
> >
> > ....

shall be deemed to be aggravating circumstances;

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

….

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

(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders … .

Proportionality (s. 718.1)

[47] Given the circumstances of the offence, the inherent wrongfulness of sexual exploitation, the actual harm suffered, and the potential harm that may surface, it is a very grave offence.

[48] The same points establish a high degree of responsibility in the offender. He had to know that committing such acts on a 9 to 12 or 13-year-old, who was like a member of his family and/or like a niece, would have a detrimental impact on her, her family and the community.

[49] The victim was vulnerable because of her age and being under the supervision of C.A.L. at the times the abuse occurred.

[50] He was able to have frequent access to her, without another adult present, because: he was trusted to protect her as their families became close and the victim

was like a member of his family; she frequently provided after-school childcare for at least one of his children when he was present in the home or at the shop on the property; and, she did small jobs for him in his business. He took advantage of those circumstances for his own self-gratification, irrespective of the impact on the victim.

[51] There is no evidence establishing a diminished level of capacity on the part of the offender which would show diminished responsibility. Similarly, the Pre-sentence report indicates that, in his formative years, "he was well cared for and had a great childhood", sharing a good relationship with his parents. Therefore, there is an absence of a mitigating factor that is often present, being that of a difficult childhood.

[52] He acted alone in the illegal acts. They continued repeatedly and fairly regularly for years. The offence was not the product of a momentary lapse of judgement. There is no evidence of any diminished responsibility. He was solely and fully responsible for the offending behaviour.

Aggravating and Mitigating Circumstances in the Case at Hand

<u>Aggravating Circumstances</u>

[53] The aggravating circumstances in the case at hand include the following:

1. The offender abused a person under 18, a statutorily mandated aggravating factor under s. 718.2(a)(ii.1).

2. He was in a position of trust in relation to the victim, a statutorily mandated aggravating factor under s. 718.2(a)(iii). It approached the level of a parent as she was like one of his family. That augments the aggravating effect. In addition, during most of the incidents the victim was either providing childcare for him and/or doing some work in his business. Therefore, he was also in a position of authority in relation to her.

3. The victim was vulnerable because of her age and her frequent and close involvement with C.A.L. and his family.

4. The offence involved application of force to multiple parts of her body, including with his bare hand against her bare vagina, and including, at times, while having the weight of his body on hers and kissing her on the lips. Those are intrusive acts with a significant level of physical interference, which is an aggravating factor.

5. It is made even more aggravating by the fact that it occurred repeatedly, at times multiple times per month, over a period of about four years.

6. It is further aggravating that, as will be discussed further later, his application of force was such that, at times, it prevented her from, in her words, “squirming away”.

7. The offence had a significant impact on the victim, as revealed by the VIS’s filed, her evidence at trial, and the PSR, which impact has already been discussed. That is a statutorily mandated aggravating factor under s. 718.2(a)(iii.1).

Mitigating Circumstances

[54] The mitigating circumstances in the case at hand include the following:

1. He has no criminal record.

2. Prior to being charged with the offences before the court he was involved in pro-social community activities, including volunteering as a youth leader and sports coach, through his church.

3. He is the owner and operator of a successful business which generates good income and hires multiple employees.

4. He has a pro-social and supportive peer group.

5. He has the support of his father, extended family and the person with whom he has been in a romantic relationship with since November 2020.

6. As noted in the PSR, he suffers from Crohn's disease.

The September 10, 2021 sentencing date was adjourned because he was hospitalized for issues arising from that condition. During that adjournment request, the Defence provided further representations regarding C.A.L.'s Crohn's. It is severe. Several times per year he will suffer an obstruction and/or gastro-intestinal bleeding. The obstructions can commonly be cleared quite readily. However, the bleeding usually requires transfusions. His hospital stays range from two days to two weeks.

In a letter dated September 23, 2021, his long-time family physician expressed doubt that C.A.L. could receive the treatment he needs while incarcerated, without providing any indication of their level of knowledge of the health services available in institutions. That physician also stated C.A.L. would need "ongoing close observation as his medications are adjusted" and that "ongoing medical follow-up is essential". A letter dated November 8, 2021, from his long-time gastroenterologist, reveals a slightly different, but comparable, picture. He wrote:

> "This is to confirm that C.A.L. is currently being managed by myself concerning his underlying Crohn's disease, currently active.

> He is currently maintained on a biologic therapy with injection Humira for management of the same. The dosage of injection Humira was optimized to 40 mg subcutaneously every week earlier this month. Given this change in dosage, he will need close observation of his clinical status at least over the next 2-3 months. For the present, he does have an appointment to see me again in my office during the beginning of January 2022."

The Defence represented this was a doubling of dosage.

The Crown provided information regarding health services in federal and Nova Scotia provincial correctional facilities. It provided: the Correctional Services Canada document entitled "National Essential Care Framework"; the Nova Scotia Health document entitled "Correctional Health Services"; and, an email from Derek Leduc, of Nova Scotia Health. The email stated, among other things:

> "The healthcare unit [at the Central Nova Scotia Correctional Facility] operates from 0700-2300hrs with evening coverage 2300hrs-0700hrs provided by paramedics onsite. Typically if someone is well enough to live at home they could be

> accommodated within the facility. If someone becomes acutely ill, or requires care beyond the scope of our team, the would have to be transferred to the appropriate healthcare facility to receive care."

The documents provided describe a level of healthcare, in the institutions themselves, that is at least of level of accessibility and quality that one finds in the community. The services described in the federal institutions are particularly comprehensive. The institutions can accommodate access to health services outside of the institution where they are required and not provided in the institution, including for surgeries and treatment. That may, in some circumstances, include previously scheduled appointments with healthcare professionals in the community.

The Defence raises a concern about the speed of access, given that C.A.L. can sometimes bleed and require immediate attention. It notes the need, in a federal institution, of submitting a request for healthcare services.

The presence of onsite healthcare professionals would, more likely than not, facilitate the "close observation" C.A.L.'s gastroenterologist indicates will be required.

He currently self-injects the Humira. That may not be permitted in the institution. However, it is only a weekly injection and ought to be easily administered by onsite healthcare professionals.

C.A.L. has been, for many years, managing his Crohn's disease while running a successful business, raising a family and being physically active, such as in water activities and sports such as baseball or softball. He ought to be able to continue to do so just as easily, in a correctional facility, with onsite healthcare services and access to offsite services when required.

If he does start bleeding, that is something the institution ought to be able to address. He has been living some distance from a hospital. It is about 20 to 25 minutes away. Requests in federal institutions are prioritized according to urgency. With onsite personnel, the response time is likely to be as quick or quicker than in C.A.L.'s community.

However, his flare-ups would tend to make incarceration more difficult for him, which has a mitigating effect.

The PSR also notes that he takes medications for a suppressed immune system and depression. There is no indication those issues are not properly controlled by the medications, which he can receive in an institution.

Friesen Factors

[55] I will also address the relevant factors outlined at paragraphs 121 to 154 of **Friesen**, for determining an appropriate sentence for a sexual offence against a child, even though there is some overlap with points that I have already made in the course of discussing the objectives and principles of sentencing.

1. C.A.L. has not taken any rehabilitative initiative. This increases the risk of re-offence and militates in favour of placing greater emphasis on separating the offender from society. Both short-term protection of the community and rehabilitative programming can be accomplished and accessed through a period of imprisonment.

2. C.A.L. was in a position of trust in relation to the victim which approached that of a parent. It greatly increases his level of responsibility, as well as the likely harm and gravity of the offence, thus militating in favour of a lengthier sentence.

3. Unfortunately, the sexual violence against EH was repeated multiple times per month, over about 4 years, with some reduction of frequency towards the end. Therefore, the principle that a sentence increase should follow if the sexual violence had been committed on multiple occasions and for longer periods of time is a weighty factor in the case at hand.

4. EH was only 9 years old when it started, only 12 or 13 when it ended, and vulnerable for the reasons I have described. That increases the gravity of the offence and C.A.L.'s degree of responsibility beyond that which would obtain if the victim had been older, but still under 16.

5. As already indicated, the acts were intrusive with a significant degree of physical interference involved, which is an aggravating factor. As there was no penetration, there is a risk of the type of sexual act performed being improperly considered or treated as one less likely to cause harm, or its wrongfulness being downplayed. **Friesen** warned against that danger. It is clear that significant harm can flow from it, like all types of sexual acts. The acts in this case were at the highest level of intrusiveness short of penetration, cunnilingus, fellatio or reciprocal contact of sexual organs.

6. It could not be said that EH participated in the sexual acts. The fact that she did not fight him off does not make her a participant. Even if she had been a willing participant it would not be mitigating and not legally relevant on sentencing. She did, at times, squirm away. At other times, she could not because he would put himself top of her or put his arm on her. That constitutes the aggravating feature of additional violence

beyond the inherent sexual violence. Further, C.A.L. clearly knew the sexual violence against EH was wrong, and that, irrespective of whether she protested, it would cause her significant harm. Yet he repeatedly exploited his frequent unsupervised contact with EH for his own self-gratification, when he was trusted to keep her safe from such violence. That, combined with the absence of factors diminishing responsibility, reveals a high level of moral culpability.

Parity Principle (s. 718.2 (b))

[56] A sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. This principle, of course, recognizes that no two cases are identical, and that the Court is not to take a cookie-cutter approach to sentencing.

[57] Counsel have provided multiple comparison cases.

Defence Cases

[58] I will start with the cases presented by the Defence.

[59] It presented **R. v. W.(E.M.)**, 2011 NSCA 87, for the proposition that sexual touching of children generally attracts "sentences ranging from conditional

sentences to 2 to 3 years of incarceration", and to support its argument that the circumstances of the case at hand are at the lower end of the scale of sexual interference.

[60] **W.(E.M.)** was decided long before **Friesen**, which, as previously noted, emphasizes that significant actual harm can result from sexual contact of any level of intrusiveness, which, in turn, can greatly impact what constitutes a proportionate sentence. As such, the graduated approach to sentencing, based only on level of intrusiveness, is no longer proper. Further, **W.(E.M.)** describes the types of circumstances which are more likely to be toward the lower end of the range as including: "Where touching is over clothing or is a single incident or happens in an unplanned way in the context or [sic 'of'] wrestling or horseplay". The circumstances of the case at hand are far from that category. It included under-the-clothing violation. It occurred repeatedly and frequently over multiple years. C.A.L. took advantage of the frequent times during which he was the only adult supervising EH to abuse her. As such, it could not be said to have been unplanned. For these reasons, these arguments based on **W.(E.M.)** do not support the sentence recommended by the Defence.

[61] It also presented the following pre-Friesen cases:

1. **R. v. S.J.P.**, 2016 NSPC 50;

2. **R. v. O.(J.)**, 2013 NSCA 97; and,

3. **R. v. Hood**, 2016 NSPC 78, affirmed 2018 NSCA 18.

[62] They are of not helpful comparison cases. The approach to assessing proportionality is inconsistent amongst the cases and, to some extent, inconsistent with the directions and principles laid out in **Friesen**. As such, as already noted from **Friesen**, they cannot be relied upon to satisfy the principle of parity. In addition, **R. v. Lemay**, 2020 ABCA 365, dealing with a luring offence, at paragraph 51, stated that it is an error to rely on such earlier cases. Further, there are significant distinguishing features.

[63] **R. v. S.J.P.** involved a single incident of a first nations man dry humping his two-year old child wearing a diaper while he was fully clothed, half-asleep or passed out, and his thinking was clouded for a reason not shown to be fully self-induced. The victim suffered no actual harm. Despite those significant distinguishing features a sentence of 5 month's imprisonment was still imposed.

[64] **R. v. O.(J.)** involved a 70-year-old who committed offences against his grand-daughters. The contact with the 5-year-old involved him, over 9 months, touching her vagina with his hands and penis, and having her touch his penis with her hand. It occurred in bed and in the bathtub. Four times, over 4 months, he exposed his

penis to the 9-year-old and wiggled it on more than one occasion. He was sentenced to 90 days' imprisonment, followed by 3 years' probation for the sexual interference. That was upheld on appeal as not being unfit, even though it may fall "outside the regular range of appropriate sentences". The Court of Appeal substituted a 6-month CSO for the exposure offence, because the 9-month CSO imposed was an illegal sentence. Some of the activity was more intrusive than the case at hand, and there were two victims. However, the offender was much older and was the main support for his wife who was in ill health. He had immediately confessed and expressed great remorse. He had entered a guilty plea. A Comprehensive Forensic Sexual Behaviour Assessment characterized him as a low risk for future violence. There was no discussion of harm to the children. Even considering these distinguishing and mitigating factors, post-**Friesen**, the sentence imposed would be unfit.

[65] In **R. v. Hood**, a school teacher engaged in friendly texting which turned to sexting with two former students, one a 15-year-old, who had been her student 3 years prior, and the other, a 17-year-old, who had been her student 5 years prior. Subsequent to that, she drove the 15-year home from school, at his request. On the way, at his request, she performed fellatio on him. Ms. Hood subsequently sexted with him again. There was no other physical contact with either victim. A CSO

totalling 15 months, followed by 24 months' probation, was imposed for luring, sexual exploitation and sexual interference, and upheld on appeal. The physical interference was greater than the case at hand. However, there was only one incident. Though there was a trial, she admitted the factual allegations against her. The trial was to determine whether she was criminally responsible, given her diagnosis of bipolar disorder. The court accepted that there was a causal link between her mental illness and her criminal conduct as "her mania rendered her profoundly disinhibited and prone to risk-taking, elevated by a sense of invincibility, and impaired by defective insight and inhibition" and she "regarded herself as a peer of her victims, and looked to them for approval and acceptance". The court concluded that her level of moral culpability was at the lower end. **Friesen**, at paragraph 91, highlighted that such mental disabilities will likely reduce moral culpability, and have a corresponding mitigating effect. It cited **R. v. Hood** in support. The level of media attention that had surrounded the case had already provided "a significant deterrent and penalizing effect". She had lost her job as a schoolteacher. The Comprehensive Forensic Sexual Behaviour Presentence Assessment indicated that she was "highly unlikely to reoffend in a sexual manner again". Despite those mitigating features the court still saw fit to impose a 15-month sentence of imprisonment, albeit to be served in the community. There is no such

diminished moral culpability, nor evidence that recidivism is unlikely, in the case at hand.

[66] The Defence also advanced the following post-Friesen cases:

1. **R. v. Melrose**, 2021 ABQB 73; and,

2. **R. v. Wood**, *supra*;

[67] In **R. v. Melrose**, the 27-year-old offender had sexual intercourse with the 13-year-old victim on one occasion. They had exchanged messages discussing physical contact and use of condoms. He pled guilty to sexual interference and child luring. He was sentenced to 90 days' imprisonment to be served intermittently for the sexual interference. The passing of sentence for the luring offence was suspended and he was placed on probation for three years. The sexual violence was much more intrusive than the case at hand. However, it only occurred once. Much more important distinguishing features are that the offender's level of moral blameworthiness was at the lowest, and he was at a low risk to reoffend. He suffered from significant and permanent cognitive impairment. He had the mental age of a child of 8.5 to 11 years of age. He had cooperated with authorities, providing a confession to the police. He expressed remorse and that he would never repeat that type of behaviour. He was not in a trust relationship. He was not capable of appreciating that the incident could be damaging to the victim, nor to think of long-

term consequences. Expert evidence was presented that Mr. Melrose approached the experience as a childlike first love fantasy. There was no evidence of actual harm to the victim. Post-offence, his parents had retaken supervision of him and undertook to ensure his compliance. The circumstances of the case at hand are far different. There is nothing reducing C.A.L.'s level of moral culpability. He has not acknowledged responsibility. He did not plead guilty. He was in an elevated position of trust. As such, as recognized by the Defence recommendation, a sentence that low would be disproportionate in the case at hand. Also, a comparison with **Melrose** does not support the sentence proposed by the Defence.

[68] The Defence advances **R. v. Wood** in support of an argument that a much shorter sentence should be imposed in the case at hand because of the lower degree of physical interference involved. In that case, I imposed a sentence of 3.5 years' imprisonment for sexual interference, plus one-year of imprisonment consecutive for making child pornography, plus a further one month of imprisonment consecutive for a firearm possession offence, less credit for remand time. In that case the offender was 24 years of age and the victim was 15. They engaged in repeated and extensive sexual contact over at least 2 days on one weekend, and over at least 3 days on another weekend. It included multiple occasions of full unprotected intercourse. The two weekends were less than a month apart. The

offender photographed and video-recorded some of it, and stored it on one of his phones. Subsequent to being charged he and the victim were found together in breach of his release conditions. The victim was particularly vulnerable as a result of being in care and Indigenous. They had shared alcohol and marijuana, supplied by him, prior to the offences. The physical interference was more intrusive than the case at hand, and there were multiple incidents. However, the offending behaviour in the case at hand went on for 4 years, as opposed to less than 1 month. The victim in the case at hand was much younger and under C.A.L.'s supervision, thus more vulnerable. There is evidence of actual harm in the case at hand, which was lacking in **R. v. Wood.** Unlike Mr. Wood, C.A.L. was in an elevated position of trust and, given that EH worked for him providing childcare and doing things for his business, was in a position of authority as well. C.A.L. was not youthful. That is in contrast with Mr. Wood who was only 24. However, that factor is somewhat counterbalanced by C.A.L.'s Crohn's disease and the difficulties it may cause during a period of imprisonment. C.A.L. did not enter a guilty plea. Mr. Wood did. Mr. Wood did not exploit any trust his victim's parents put in him. C.A.L. clearly did. Balancing and comparing the relevant factors between the cases, I cannot find that the sentence imposed in **R. v. Wood** would be disproportionate in the case at hand.

Crown Cases

[69] The comparison cases presented by the Crown include the following:

1. **R. v. Hughes**, 2020 NSSC 376;

2. **R. v. SJM**, 2021 NSSC 235; and,

3. **R. v. B.J.R.**, 2021 NSSC 26.

[70] They are all post-**Friesen** cases.

[71] In **R. v. Hughes**, the offender, who was in his mid-60s, repeatedly sexually abused a young, vulnerable, indigenous person living in a foster-care-like environment. The abuse included multiple incidents of reciprocal oral sex, attempted anal sex on the victim on one occasion, and having the victim penetrate him anally on one occasion. The offender acted as the victim's caregiver during holidays and summer vacations. The victim referred to him as "grandpa", though there was no family relation. The family-like relationship was seen as something that could reasonably be expected to exacerbate the harm. The victim was between the ages of seven and 11 when the abuse occurred. Mr. Hughes had a dated criminal record, including for gross indecency. He was 71 years of age at time of sentencing. That, and his state of health, were mitigating factors. He was sentenced to six years' imprisonment for sexual interference and six years' imprisonment, concurrent, for

sexual touching. The acts committed by Mr. Hughes were more intrusive than those committed by C.A.L. In addition, since the victim lived with Mr. Hughes during holidays and summer vacations, the level of trust was even higher than that in the case at hand. Also, Mr. Hughes had a related record. Otherwise, there is a lot of similarity between the cases. As reflected in the Crown recommendation, the circumstances of the case at hand do not justify a sentence as high as that imposed on Mr. Hughes.

[72] In **R. v. SJM**, the offender pled guilty to having repeatedly committed horrendous acts of sexual violence on his stepdaughter over a five year period when she was between the ages of 13 and 18, including penetrating her mouth, vagina and anus on countless occasions, with his fingers, tongue, penis and sex toys. He ejaculated inside her without protection. She even had to make a deal with him not to disclose to get out of the need to swallow his ejaculate. He took countless photos of her in the course of the abuse. The sexual violence continued even after the victim's mother discovered it was occurring. She blamed the victim. The abuse caused serious harm to the victim, her mother, the family unit and their social circle. He had destroyed her childhood, disrupted her relationship with her mother and "derailed her normal emotional development". She blamed herself and thought it was her fault. She became suicidal. She used marijuana supplied by him to numb

herself. She and her mother were completely dependant on him. He was sentenced for sexual interference, sexual exploitation and sexual assault, during different timeframes, as well as making child pornography, to a total of 9 years' imprisonment, less credit for pre-sentence custody and a reduction for house arrest release conditions. C.A.L.'s actions were nowhere near that horrendous and the harm in the case at hand is more attenuated. Despite Mr. M having entered guilty pleas, and C.A.L. having not, considering and balancing the relevant factors in **R. v. SJM** with those in the case at hand, a proportionate sentence in the case at hand, as recognized by the Crown's recommendation, would be far less.

[73] In **R. v. B.J.R.**, the offender sexually assaulted his 16-year-old daughter by removing her shorts and performing cunnilingus. He, himself, disclosed to the authorities, expressed remorse and pled guilty despite having no recollection of the event. However, he had taken few steps towards rehabilitation. It caused significant actual harm to the victim and family, resulting in his other children having no contact with him. I imposed a sentence of three years' imprisonment. The Defence submits the sentence in the case at hand should be lower because of the higher level of interference involved in the act, the higher level of trust and the significant actual harm. That argument ignores the points which follow. C.A.L. subjected his victim to regular and repeated acts of sexual violence over four years. He did not plead

guilty. He did not express remorse. His level of breach of trust approached that of a father as he testified she was like one of his family. Both he and Mr. R forced themselves upon their victim. There is evidence of significant harm also suffered by EH and her family. Consideration of all of the relevant factors supports the proportionality of a sentence higher than that imposed in **R. v. B.J.R.**.

[74] The Crown also included a chart digesting further post-**Friesen** cases without providing copies of the actual cases, suggesting less reliance is placed on those. I will comment more briefly in relation to them.

[75] **R. v. McNutt**, 2020 NSSC 219, and **R. v. Mann**, 2020 NSPC (unreported), imposed sentences of 15 years and eight years imprisonment respectively. The circumstances of **R. v. McNutt**, and the purported, but unverified circumstances of **Mann**, are sufficiently distinct from those in the case at hand to make the range of sentence imposed in them disproportionate for the case at hand. Similarly, the sentencing decision from the Nova Scotia Supreme Court in **R. v. Murley** is unreported and I was not provided a transcript for verification purposes. However, it is advanced as involving a breach of trust, subsequent offences, and sexual violence over a span of nine years when the child was between the ages of five and 15, and including penetration. That would make it such that the six year sentence imposed would be disproportionate in the circumstances of the case at hand.

[76] The impact of race and culture in **R. v. Fisher**, 2020 NSSC 325, brought the sentence below where it would otherwise have been. In addition, the victim in that case was 17. EH was only between the ages of nine and 12 or 13, and thus more vulnerable. A higher sentence is justified in the case at hand.

[77] **R. v. K.M.**, 2020 NSSC 278, involved forced intercourse with a 15-year-old using physical force, aggression and a threatening manner, in the face of her pleading for it to stop. The circumstances in that case, compared to those in the case at hand, make the five year sentence imposed disproportionate for the case at hand.

[78] In **R. v. W.G.L.**, 2020 NSSC 323, the court imposed a sentence of 3 1/2 years' imprisonment for sexual assault by a stepfather, against a 10 to 12-year-old. It involved one incident of digital penetration, grinding her pelvic area, and tongue kissing. It occurred more than 10, but less than 50, times. There was no evidence of actual harm. The offence had been committed 20 years prior. There was no indication of remorse. He had been found guilty following trial. With the exception of the one incident of digital penetration, which is counterbalanced by the mitigating effect of the significant passage of time, and lack of evidence of actual harm, the circumstances in the case at hand are comparable. It supports a finding that a comparable sentence in the case at hand would give effect to proportionality and parity.

[79] **R. v. D.R.**, 2020 NSPC 46, is not a useful comparator, even though the sentence imposed is in an appropriate range for the case at hand, as it involves circumstances that could be said to be outside the realm of childhood sexual victimization, and there are significant mitigating factors that do not obtain in the case at hand. The offender engaged in incest with his daughter in her 20's (though she had the-mental age of a 16 year-old) after meeting her following about 20 years of absence. He pled guilty and expressed remorse and regret. He, himself and had a difficult childhood and been the victim of physical, emotional and sexual abuse by family members. He had been diagnosed with PTSD as a result. The Forensic Sexual Behaviour Assessment indicated he was at a low risk to reoffend.

Restraint (s. 718.2 (d) & (e))

[80] I have considered the principle that an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances, and that all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders.

[81] In my view, no sanction less restrictive than imprisonment is appropriate in the case at hand. However, the principle of restraint still applies in determining an appropriate length of sentence.

SENTENCE

[82] Considering the directions in **Friesen**; the objectives, principles and factors that I have noted; the comparison cases; and the circumstances of the case at hand, I find that a fit and proper length of sentence, for the sexual interference, is three years and six months' imprisonment.

[83] That length of sentence makes a CSO unavailable. Nevertheless, since the Crown and Defence both take the position that a CSO is otherwise an available sentencing option, I will address the issue of whether a CSO is unavailable for another reason.

[84] Effective July 17, 2015, and continuing now, s. 151 of the *Criminal* Code provides that the maximum sentence for sexual interference is 14 years' imprisonment if the Crown proceeds by indictment, which it did in the case at hand. Effective November 20, 2012, and continuing now, s. 742.1(c) provides that a conditional sentence order is not available where the offence is prosecuted by indictment and carries a maximum term of imprisonment of 14 years. Some of the incidents in the case at hand occurred after July 17, 2015. On its face, that indicates a CSO is not available in the case at hand.

[85] The Crown submits that it is available because it was imposed in **Hood**, *supra*, following the finding that the mandatory minimum sentence was unconstitutional. The offences in **Hood** occurred between March, 2013 and September 30, 2013. During that period of time, the maximum sentence for sexual interference was 10 years, and s. 742.1(c) excluded a conditional sentence order where the offence was prosecuted by indictment and carried a maximum term of imprisonment of 14 years or life. So, with the mandatory minimum having been declared unconstitutional, getting rid of the minimum sentence exclusion in s. 742.1 (b), a conditional sentence was an available sentencing option.

[86] The Defence submits that it is available to C.A.L. because he has the right, under s. 11(i) of the *Charter*, to "the most lenient punishment that existed for the offence at any point between its commission and sentencing". In support, it advances **R. v. Poulin**, 2019 SCC 47.

[87] In that case, Martin J., for the majority, at paragraphs 2 to 5, stated:

> [2] This appeal therefore asks to what an offender is entitled under s. 11(i) of the Charter. Based on the nature and purposes of this particular constitutional right, which punishments are to be considered when determining the "lesser" one to which the accused is entitled? Does s. 11(i) confer:
>
> - a "binary" right — which involves a comparison of the punishments under the laws in force at two set points in time (commission of the offence and sentencing) and the right to receive the lesser of these punishments; or

- a "global" right — which involves a review of all punishments that have existed for the offence between its commission and sentencing, and the right to receive the least severe punishment in that entire span of time?

[3] I conclude that, properly interpreted, s. 11(i) confers a binary right, not a global one. Section 11(i) entitles an offender to the lesser of (1) the punishment under the laws in force when the offender committed the offence, and (2) the punishment under the laws in force when the offender is sentenced, as these punishments are tethered to two meaningful points in time. The former reflects the jeopardy or legal risk the offender took by offending. That punishment established, in advance of the offender's conduct, the legal consequences that would flow from that chosen conduct. The latter is the punishment that society considers just at the precise moment the court is called upon to pass a sentence. It provides the contours for a sentence that reflects society's most up-to-date view of the gravity of the offence and the degree of responsibility of the offender. As these two punishments are clearly connected to the offender's conduct and criminality, there is a strong and principled basis for the offender to have the constitutional right to receive the lesser of the punishments at these two points in time.

[4] By contrast, there is no principled basis for offenders to enjoy the automatic constitutional right to a previous punishment which is lower than both the one to which they exposed themselves when they committed the offence and the one that reflects society's current sense of the gravity of the offence and the responsibility of the offenders. Reading s. 11(i) in a manner that would grant an offender the right to the most lenient punishment that existed for the offence at any point between its commission and sentencing would both exceed and distort the purposes of s. 11(i). As I will explain, these purposes are the rule of law and fairness. Far from supporting a global reading of s. 11(i), these purposes strongly militate towards reading s. 11(i) in a manner that sets the applicable punishment at the time of the offence as the ceiling, and entitles the offender to a more clement punishment under the laws in force at the time of sentencing, if one exists.

[5] As a result, I conclude that s. 11(i) does not resurrect any temporary reductions in punishment which came after the offence and which bear no connection whatsoever to the offender's conduct or to contemporary sentencing standards. By granting the offender specific retrospective access to the applicable punishment at the time of the offence, s. 11(i) need not and does not open the door to the lowest identifiable punishment that has ever applied to the offence since the offender committed it. Section 11(i) did not constitutionalize the right to past punishments that Parliament has since discarded or amended. The legal rights reflected in our Charter represent the core tenets of fairness in our criminal justice system. The right to comb the past for the most favourable punishment does not belong among these rights.

[88] So, C.A.L. is not entitled to the most lenient sentence at any point between the commission of the offence and sentencing. He is only entitled to the most lenient sentence available either at the time he committed the offence or at the time of

sentencing. The Defence is seeking to benefit from the 10 year maximum penalty in place during the relevant period of time preceding July 17, 2015. Though he did commit some of the acts that form the basis of the offence before July 17, 2015, he also committed some of the relevant acts after July 16, 2015. At that point, by continuing the sexual violence, C.A.L. took the risk of a CSO being an unavailable sentencing option. A CSO is not available under the laws in place now. It has also not been available at any time between his post-July 16, 2015 offending and now. The mere fact that he also committed some of the acts forming the basis of the sexual interference offence before July 17, 2015, during a period of time that a CSO was available, does not negate the application of the reasoning in **R. v. Poulin** that he should be subject to the jeopardy he placed himself in when he continued the offending behaviour at a time when a CSO was not available. To conclude otherwise would have the undesirable result of encouraging the Crown to lay multiple charges dividing the alleged timeframes based on available sentencing options. That would be contrary to public policy.

[89] Therefore, I conclude that a CSO is not an available sentencing option for C.A.L.

[90] Further, even if I am wrong in that conclusion, a sentence of less than 2 years would not satisfy the objectives and principles of sentencing, and serving his sentence in the community would not be “consistent with the fundamental purpose

and principles of sentencing" set out in sections 718 to 718.2 of the *Criminal Code*. Therefore, even if it was available, a CSO would not be a fit sentencing option in the circumstances of the case at hand.

[91] So, I sentence you, C.A.L., to three years and six months' imprisonment, consecutive to any sentence you may be serving.

Ancillary Orders

[92] In relation to the DNA order requested, sexual interference is a primary designated offence in subsection (a) of the definition in s. 487.04. Therefore a DNA order is absolutely mandatory. There is no discretion to decline to make the order on the basis of grossly disproportionate impact. So a DNA order will issue.

[93] There is a request for a s. 109 Firearms Prohibition Order. It is mandatory for a minimum period of 10 years, and for some specified items, for life. There is no indication C.A.L. was subject to any prior firearms prohibition. In the circumstances of this case, there is no need to extend the prohibition past the 10 year minimum. Therefore, as required by s.109, I grant the s.109 Prohibition, starting today and ending 10 years after his release from imprisonment, in relation to the items listed in s.109(2)(a), and, also as required by s.109, for life in relation to items listed in s.109(2)(b).

[94] There is a request for a SOIRA Order. S. 151 is a designated offence under s. 490.011(1)(a). Pursuant to s. 490.013 (2)(b), the SOIRA order is to be imposed for 20 years because the maximum penalty is 14 years, and conviction is only being entered on one designated offence, such that the operation of s. 490.013(2.1) is not triggered.

[95] The Crown is also seeking a s. 161 order including clauses a, a.1, b and c, for 20 years. Those clauses provide for prohibiting the offender from:

a) attending a public park or public swimming area where persons under the age of 16 years are present or can reasonably be expected to be present, or a daycare centre, schoolground, playground or community centre;

(a.1) being within two kilometres, or any other distance specified in the order, of any dwelling-house where the victim identified in the order ordinarily resides or of any other place specified in the order;

(b) seeking, obtaining or continuing any employment, whether or not the employment is remunerated, or becoming or being a volunteer in a capacity, that involves being in a position of trust or authority towards persons under the age of 16 years;

(c) having any contact — including communicating by any means — with a person who is under the age of 16 years, unless the offender does so under the supervision of a person whom the court considers appropriate.

[96] The Defence is not opposed to the order. There is clearly an evidentiary basis upon which to conclude that C.A.L. poses a risk to children if he has unsupervised contact with them, and that a s. 161 order will minimize that risk, including as it relates to the youth group work and the youth coaching work he did in the past. The Court in **R. v. SJM**, *supra*, imposed a s. 161 order to end 7 years after the offender's release from imprisonment, in circumstances that were even more disturbing than those in the case at hand, involved highly intrusive acts, which happened over a slightly longer period of time, and involved abuse of a step-daughter and creation of child pornography. On the other hand, the offender in **R. V. SJM** had entered guilty pleas, indicating better prospects of rehabilitation than C.A.L., and would be serving a longer period of custody, thus effectively increasing the total length of the prohibitions. The two offenders were of comparable ages at sentencing. In comparison with **R. V. SJM**, the imposition of a s. 161 order to end 6 years after his release from imprisonment would be fit and appropriate

[97] In the case at hand, C.A.L. communicated using text messaging. According to what his separated wife told the writer of the PSR, it was frequent. **Friesen**, at

paragraphs 46 to 49, expressed concern that such technologies give sex offenders easy access to victims to manipulate and exploit them. However, C.A.L. did not need to use technology to gain access to EH as she was frequently at his house, under his supervision. Therefore, the Crown is properly not seeking a prohibition from using the internet or other digital network, taking the view that an internet prohibition is not required. I agree. I find the s. 161 order requested is fit and proper in the circumstances, and impose it, with a termination date 6 years after his release from imprisonment [redacted], the prohibition under s. 161 (a.1) will prohibit C.A.L. from being within 750 metres of any dwelling-house where the victim ordinarily resides and 200 metres of any place where she attends for education.

[98] The Court considers any responsible adult aware of the offence for which C.A.L. is being sentenced today to be appropriate to supervise contact or communication with a person under 16.

[99] However, he may have unsupervised contact with his own children if not prohibited by direction of a child protection agency or a court of competent jurisdiction.

[100] After the Supreme Court of Canada, in the case of **R. v. Boudreault**, 2018 SCC 58, declared s. 737 of the *Criminal Code* (i.e. the victim surcharge provision)

unconstitutional, it was revised to make it Charter-compliant. The revised version has not been challenged. S. 737(2.1) gives the Court discretion to order no victim surcharge, or a reduced one, if the surcharge would cause undue hardship to the offender. There is also another enumerated ground that is not relevant to the case at hand. S. 737(2.3) provides that imprisonment alone does not constitute undue hardship. It requires, under subs. (2.2), inability to pay.

[101] In the case at hand, no fines are to be imposed, and the offence is indictable. Therefore the prescribed surcharge is $200. The PSR indicates C.A.L. has an annual income of about $140,000 and assets exceeding $600,000. Therefore, he does have the ability to pay that amount, and I impose the $200 victim surcharge.

Pierre Muise, J.