SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. AMB, 2022* NSSC 262

Date: 20221005
Docket: *CRH* No. 501843
Registry: Halifax

Between:

Her Majesty the Queen

v.

AMB

Restriction on Publication of any information that could identify the victim: s. 486.4 *C.C.*

Decision on Sentence

Judge:	The Honourable Justice Peter Rosinski
Heard:	May 18, 19, 20, 25, 30, 31, August 29 and September 2, 2022, in Halifax, Nova Scotia
Counsel:	Alicia Kennedy, for the Crown Jonathan Hughes, for Defence

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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.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

Introduction

[1] In my conviction decision, 2022 NSSC 169 I stated:[1]

> [1] AMB is charged that he did between July 1, 2018, and December 31, 2019, commit sexual assaults (s. 271 of the *Criminal Code* ["*CC*"]) against SM (a person under the age of 16 years); and instances of sexual interference (s. 151 *CC* – for a sexual purpose touch SM directly with his penis) at Lower Sackville and Hammonds Plains Nova Scotia.
>
> [2] I find him guilty beyond a reasonable doubt of each of the offences alleged.
>
> **General Background**
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> [3] AMB is presently 33 years of age. SM is presently 14 and ½ years of age.
>
> [4] AMB met SM's mother JM in late 2009.
>
> [5] JM was a single parent to SM until AMB moved in with them shortly thereafter.
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> [6] AMB and JM had two children together – sons DB (8 years old at present) and WB (11 years old at present). They remained living together as a family until November 2018.
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> [7] They lived together in Hammonds Plains in a four-bedroom home from the Fall of 2017 until the end of October 2018. AMB and JM split up at that time.
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> [8] He went to live with his cousin RB in the Hammonds Plains area, and JM and the kids moved to a two- bedroom apartment in Lower Sackville in January 2019, after a short stint with her parents.
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> [9] On January 12, 2020, SM disclosed to her mother that AMB had committed sexual offences against her. A complaint was made to the police that same day. SM gave a videotaped statement to police on January 13, 2020.
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> [10] On January 14, 2020, AMB was interviewed by police and gave a voluntary videotaped statement. He was charged with the offences shortly thereafter.

[1] There is also an agreed statement of facts - s. 655 *Criminal Code*.

> [11] SM alleges that between July 2018 and December 31, 2019, AMB committed the following sexual acts upon her: made her fellate his penis; had vaginal and anal intercourse with her; and manipulated her breasts.
>
> …
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> [119] I am satisfied beyond a reasonable doubt that AMB committed each of the four offences charged, and that the sexual abuse started while JM and AMB were still living at the Hammonds Plains home (i.e. at least three instances of "hand and mouth" abuse in the months just before October 31, 2018) and continued to as late as December 2019 (at both the residences of RB and JM in Lower Sackville, but much less so in the latter location).
>
> [120] I find him Guilty on all four counts.
>
> [121] To be more precise, I find beyond a reasonable doubt that AMB :
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> 1. over the course of these other abuses and ancillary thereto, regularly manipulated her breasts (including at JM's Lower Sackville residence, but much less so);
> 2. involved SM in so-called "hand and mouth" or simple fellatio incidents at least 30 times (and that he would ejaculate in her mouth) -most of those at RB's house;
> 3. that he had vaginal intercourse with her at least twice (at RB's house in AMB's bedroom); and
> 4. anal intercourse with her at least 5 times (always at RB's house in AMB's bedroom)

[2] Now, I am required to impose a fit sentence.

[3] In these circumstances, I find it appropriate to impose a judicial stay on the s. 271 (sexual assault) charges.

[4] The Crown and Defence agree that in relation to the two s. 151 charges (14 years imprisonment maximum punishment), I am required to impose following ancillary orders (I have exercised my discretion as to the duration and conditions as shown regarding the s. 161(2) *CC* orders):

1. s. 109(1)(a. ii) and 109(2) *Criminal Code* [“*CC*”] (firearms and explosives prohibition order starting today and ending 10 years after AMB’s release from imprisonment);

2. s. 487.051 *CC* (Primary DNA order);

3. s. 490.013(2.1) *CC* (lifetime sexual-offender registration order);

4. s. 161 *CC* [starting upon his release from imprisonment, (including release on parole, mandatory supervision or statutory release); and ending 20 years thereafter]:

   a. not to be in a position of authority or trust over, or have contact with, including communicating by any means with, a female person under the age of 16 years, if not directly supervised by **a responsible adult**) - relying on the reasons and principles articulated in *R. v. KRJ*, [2016] 1 SCR 906.[2]

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[2] The concern that this provision addresses arises when an offender is expected to continue to pose a risk to an articulable and an identifiable class of children. Thus, the assessment of the offender’s continued future risk is the basis for such orders. In Dr. St Amand-Johnson’s August 23, 2022 Comprehensive Forensic Sexual Behaviour Pre-sentence Assessment Report, under “Summary Statement of Risk”, she concludes: If AMB were to reoffend sexually, his history and current assessment results suggest it would most likely be against a female child or adolescent who is well acquainted with AMB and comfortable with or accustomed to being alone with him… A factor that would increase dynamic risk would be if AMB regained access to children without supervision… Risk to male children is believed to be less likely than risk to female children, but it is not ruled out. “ Under Recommendations, [Contact with minors] she stated: “It is recommended that AMB have no unsupervised contact with children under the age of 16 years, including biological relatives, and that he not be in a position of authority or trust over a minor,… This recommendation does not refer to incidental contact with children in public (for example on the street, in stores) as risk to strangers is not expected. However, it does include his minor aged sons, at least until such time as he has successfully completed specialized treatment… And his risk profile has been reviewed by

b. not being within two kilometres, or any other distance specific in the order, of any dwelling-house where the victim identified in the order ordinarily resides or of any other place specific in the order;

c. not 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; and

d. not using the Internet or other digital network, to access "child pornography" (s. 163).

5. s. 743.21 CC (non-communication order in relation to SM (with no exceptions); and JM (except through legal counsel or as otherwise permitted by a court of competent jurisdiction or the Nova Scotia Department of Community Services) - during the custodial portion of his sentence.

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his treatment providers… **Note that for supervision to be considered adequate for risk management purposes, it should be conducted by a responsible adult who is aware of AMB's offence history, remains within eyesight of him and/or the child(ren) at all times, and is willing and able to intervene to interrupt any high-risk behaviours or situations**."

[5] Bearing in mind the purpose and principles of sentencing, statutory and common law, what is a fit sentence for this offender, having committed these offences, in the specific circumstances of this case?

The appropriate custodial sentence

[6] The Crown argues AMB should be imprisoned for between 7 and 9 years (less remand- time credit since he was detained pending sentencing on July 7, 2022).

[7] Before his counsel had available the Comprehensive Forensic Sexual Behaviour Presentence Assessment [“sex offender assessment” – “SOA”] AMB had initially argued that the proper range of imprisonment is between 3 and 5 years (less remand time credit). With the benefit of the SOA his counsel advocates instead for a sentence of no more than 2 years in custody and 3 years probation.

[8] The maximum sentence available for a single count (s. 151 *CC*) is 14 years imprisonment.

[9] I am satisfied that before applying the mitigating and aggravating factors, the post-*Friesen* range of sentence for *similar offenders*[3] having committed *similar offences* in *similar circumstances* is **5-9 years**.[4]

[10] In an earlier decision, *R. v. RRDG*, 2014 NSSC 223, which bears similarity to the present case, I imposed a sentence of 5 years custody.[5]

[11] In *RRDG*, I stated at paragraph 48:

> **48** The range would appear to run, as succinctly suggested by the Ontario Court of Appeal from "mid to upper single digit penitentiary sentences" for similar offenders, having committed similar offences in similar circumstances. In *R. v. D.D.*, Moldaver JA (as he then was) stated for the Court:
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>> [39] **A question arises in this case whether the appellant should benefit from the fact that unlike Stuckless, he has not been diagnosed as a paedophile**. In particular, the appellant submits that because he has not been found to be a paedophile, this should be viewed as a mitigating factor weighing in his favour.

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[3] It is common to have adult offenders who sexually offend against children appear for sentencing who have unrelated, or no criminal record at all/"previous good character". As our Court of Appeal has stated, this factor has limited mitigation value in such offences – it should not be accorded "undue significance": *R. v. GOH*, (1996) 148 N.S.R. (2d) (NSSCAD).

[4] See *R. v. Friesen*, 2020 SCC 9, at paras. 113-14 and para. 44 of *R. v. DD*, (2002) 58 OR (3d) 788 (CA) per Moldaver JA (as he then was); as well as earlier decisions from our Court of Appeal: *R. v. EMW*, 2011 NSCA 87 and *R. v. AN*, 2011 NSCA 21. This range of sentence (see the court's recent comments regarding ranges of sentence in *R. v. Parranto*, 2021 SCC 46) is properly determined irrespective of whether an accused has pled guilty or has been found guilty. This means an offender who has been found guilty does not have the benefit of the mitigation within the range that someone who pleads guilty will have - see *R. v. Cromwell*, 2005 NSCA 137 per Bateman JA: "26 Counsel for Ms. Cromwell says this joint submission is within the range. He broadly defines the range of sentence, in these circumstances, as all sentences that might be imposed for the crime of impaired driving causing bodily harm. I disagree. In my opinion the range is not the minimum to maximum possibilities for the offence but is narrowed by the context of the offence committed and the circumstances of the offender ("... sentences imposed upon similar offenders for similar offences committed in similar circumstances ..." per MacEachern, C.J.B.C. in R. v. Mafi (2000), 142 C.C.C. (3d) 449 (C.A.)). **The actual punishment may vary on a continuum taking into account aggravating and mitigating factors, the remedial focus required for the particular offender and the need to protect the public. This variation creates the range."** [My bolding added]

[5] For a summary of the offences see para. 13.

[40] With respect, I disagree. **If the appellant is not a paedophile and he does not suffer from some other psycho-sexual disorder that could account for his reprehensible behaviour, then arguably his degree of moral culpability rises significantly. Surely, that cannot translate into a mitigating factor weighing in his favour.**

[41] My rejection of this aspect of the appellant's argument should not be taken as an indicator that had the appellant been diagnosed as a paedophile, I would have concluded that the nine-year global sentence selected by the trial judge was too high. It was not.

[42] In this respect, assuming that the appellant is a paedophile, I agree entirely with the views expressed by Abella J.A. at pp. 118-21 O.R., pp. 242-46 C.C.C. of Stuckless under the subheading "The Role of General Deterrence and Rehabilitation". In a nutshell, as my colleague points out, the sentencing objectives of denunciation, and general and specific deterrence, can and do play a significant role in the sentencing of paedophiles. Moreover, as Abella J.A. observes at p. 120 O.R., pp. 244 C.C.C.:

> Pedophilia is an explanation, not a defence. Society is entitled to protection no less from paedophiles than those who sexually abuse children without this tendency.

[43] I agree wholeheartedly with this observation and would only add that in the case of paedophiles, while their degree of moral culpability may be somewhat diminished by virtue of their psycho-sexual disorder, absent successful treatment, they remain dangerous and represent a very high risk to society. As such, in the case of paedophiles who have not been successfully treated, I believe that in addition to the sentencing objectives of denunciation and deterrence, serious regard must be had to the objective of separating such individuals from society to protect our children and spare them from the risk of irreparable harm.

[44] **To summarize, I am of the view that as a general rule, when adult offenders, in a position of trust, sexually abuse innocent young children on a regular and persistent basis over substantial periods of time, they can expect to receive mid to upper single digit penitentiary terms. When the abuse involves full intercourse, anal or vaginal, and it is accompanied by other acts of physical violence, threats of physical violence, or other forms of extortion, upper single digit to low double digit penitentiary terms will generally be appropriate. Finally, in cases where these elements are accompanied by a pattern of severe psychological, emotional and physical brutalization, still higher penalties will be warranted.** (See, for example, R. v. M. (C.A.), [1996] 1 S.C.R. 500, 105 C.C.C. (3d) 327 in which the Supreme Court restored the 25-year sentence imposed at trial and

R. v. W. (L.K.) (1999), 138 C.C.C. (3d) 449 (Ont. C.A.) in which this court upheld a sentence of 18 and a half years imposed at trial.) [my emphasis]
[Bolding in the original]

[12] Notably, similar to AMB in the result, Mr. G's PPG testing "results did not shed light on his sexual preferences – so it remains unknown the degree to which this particular variable (if at all) played a role in Mr. G's motivation to sexually offend against "J"" at para 38 – per Dr. Angela Connors' comments.

[13] The decision of the Ontario Court of Appeal in *R. v. DD,* (2002) 58 OR (3rd) 788 was specifically "approved" by the Supreme Court of Canada in *Friesen* (where a 6 year sentence for various offending conduct on one day only was charged as a sexual interference was upheld):

> 114 *D. (D.)*, *Woodward*, *S. (J.)*, and this Court's own decisions in *M. (C.A.)* and *L.M.* make clear that imposing proportionate sentences that respond to the gravity of sexual offences against children and the degree of responsibility of offenders will frequently require substantial sentences. Parliament's statutory amendments have strengthened that message. It is not the role of this Court to establish a range or to outline in which circumstances such substantial sentences should be imposed. Nor would it be appropriate for any court to set out binding or inflexible quantitative guidance -- as Moldaver J.A. wrote in *D. (D.)*, "judges must retain the flexibility needed to do justice in individual cases" and to individualize the sentence to the offender who is before them (at para. 33). **Nonetheless, it is incumbent on us to provide an overall message that is clear (*D. (D.)*, at paras. 34 and 45). That message is that mid-single digit penitentiary terms for sexual offences against children are normal and that upper-single digit and double-digit penitentiary terms should be neither unusual nor reserved for rare or exceptional circumstances. We would add that substantial sentences can be imposed where there was only a single instance of sexual violence and/or a single victim, as in this case, *Woodward*, and** *L.M.* In addition, as this Court recognized in *L.M.*, maximum sentences should not be reserved for the "abstract case of the worst crime committed in the worst circumstances" (para. 22). Instead, a maximum sentence should be imposed whenever the circumstances warrant it (para. 20).
> [My bolding added]

[14] In *RRDG*, I stayed the sentences in relation to the s. 151 offences for which the maximum sentence at the time was **10 years** imprisonment and sentenced him for the s. 271 offences which at the time of the offences had a maximum of 10 years imprisonment. In sentencing AMB, I note that the maximum sentence under section 151 is *now* **14 years** imprisonment.

[15] By its approval of the decision in *DD*, a closer reading of it may inform the Supreme Court of Canada's own words in *Friesen* in paragraph 114, specifically:

> "Nor would it be appropriate for any court to set out binding or inflexible quantitative guidance -- as Moldaver J.A. wrote in *D. (D.)*, "**judges must retain the flexibility needed to do justice in individual cases" and to individualize the sentence to the offender who is before them (at para. 33).**
>
> **Nonetheless, it is incumbent on us to provide an overall message that is clear (*D. (D.)*, at paras. 34 and 45). That message is that mid-single digit penitentiary terms for sexual offences against children are normal and that upper-single digit and double-digit penitentiary terms should be neither unusual nor reserved for rare or exceptional circumstances. We would add that substantial sentences can be imposed where there was only a single instance of sexual violence and/or a single victim…"**

[16] Paragraphs 34 and 45 in *DD* read:

> [34] **The overall message, however, is meant to be clear**. Adult sexual predators who would put the lives of innocent children at risk to satisfy their deviant sexual needs must know that they will pay a heavy price. In cases such as this, **absent exceptional circumstances**, the objectives of sentencing proclaimed by Parliament in s. 718(a), (b) and (c) of the Criminal Code, commonly referred to as **denunciation, general and specific deterrence, and the need to separate offenders from society, must take precedence over the other recognized objectives of sentencing.**
> **…**
>
> Conclusion

> [45] The appellant was prepared to risk the lives of innocent children to satisfy his sexual cravings. His conduct was reprehensible, and it must be condemned in the strongest of terms. The harm occasioned by the appellant and others like him is cause for grave concern. Children are robbed of their youth and innocence, families are often torn apart or rendered dysfunctional, lives are irretrievably damaged and sometimes permanently destroyed. Because of this, the message to such offenders must be clear -- prey upon innocent children and you will pay a heavy price!

[17] Absent exceptional circumstances, *Friesen* directs us to strongly emphasize denunciation, general and specific deterrence, and the need to separate offenders from society.

The Crown's position

[18] The Crown relies heavily on the Supreme Court of Canada's decision in *R. v. Friesen*, 2020 SCC 9, which it says "casts a serious pall on any sentencing decision that predates it and makes clear that if sentences imposed must increase to give effect to the gravity of these offences".[6]

[19] It relies specifically on the following statutory aggravating factors:

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[6] It also relies on: *R. v. DS*, 2020 MBQB 163, 43-year old Aboriginal step-father's multiple different sexual offences on 14 year old family member on one occasion- unrelated substantial record - 9 years custody); *R. v. BW*, 2022 ONSC 2399 - on one occasion, step-father rubbed his penis against clothed buttocks of 9 year old and over 7 weeks he rubbed his penis against her bare buttocks, performed cunnilingus on her and digitally penetrated her vagina, as well as having her masturbate him to ejaculation/also showed her pornography - 6 years custody; *R. v. Hughes*, 2020 NSSC 376, 6 years custody; *R. v. BJR*, 2021 NSSC 26 - guilty plea to performing cunnilingus on 16 year old daughter with some digital penetration on one occasion/no prior record - 3 years custody; *R. v. SJM,* 2021 NSSC 235, there I stated: "91 Although it can be difficult to state so with precision, as I look across the pre-*Friesen* jurisprudence as adjusted herein to reflect the "*Friesen effect"* and the post-Friesen jurisprudence and consider the words of the court in *Friesen* itself at para. 114 for similar offences committed by similar offenders in similar circumstances, I am well satisfied that the ranges for these sentences are as follows: 1. sexual assault/sexual interference/sexual exploitation: In relation to one vulnerable victim/stepdaughter while aged 12-17 years, living in the home with the offender-vaginal intercourse without a condom in which he would ejaculate inside her vagina, anal (involving the insertion by him of sex toys) and oral sex which all happened "for years". The range is from **7-12 years imprisonment**.

1. SM was less than 18 years of age at the time of the offences (ss. 718.01 and 718.2(a)(ii.1);

2. AMB was in a position of trust and authority in relation to SM (he exclusively and continuously lived with her, and had acted as her "father" from when she was two years old until the date of his arrest on January 14, 2020, when she was 12 years of age (s. 718.2(a)(iii) *CC*);

3. The commission of the offences over an extended period of time, and by their nature and circumstances have had/will continue to have significant negative consequences on SM (s. 718.2(a)(iv) *CC*);

and the following common law aggravating factors:

4. the duration and frequency of the abuse (paras. 131-33 *Friesen*);

5. the young age of SM at the time of the offences (para. 136 *Friesen*);

6. the fact that the offences were committed in the victim's homes, both those of her mother and AMB (para. 178 *Friesen*);

7. AMB repeatedly ejaculated and was not using condoms, which is aggravating not only by its disturbing nature, but also because such occurrences each carried a risk of exposure to STIs and STDs (that

even AMB may have been unaware he might have been infected by). I note there is no proof that he was a carrier at the relevant times.

[20] The Crown argues there are no material mitigating factors.

AMB's position

[21] Regarding the circumstances of AMB, he points out that he has no previous criminal record, has been a productive and responsible individual, and has much support in the community. This is borne out by the Pre-Sentence Report, the letters of support for him, and the incidental evidence I heard at trial.

[22] AMB also voluntarily took part in a Comprehensive Forensic Sexual Behaviour Assessment authored by Dr. Michelle St Amand-Johnson (Registered Psychologist - Clinical and Forensic; number R0498).

[23] AMB's counsel says that this willingness bodes well for his rehabilitative prospects.[7]

[24] In his July 29, 2022, brief, AMB's counsel states as his "Conclusion":

> In following with the principles of denunciation and deterrence; proportionality; parity; and restraint, it is respectfully submitted that [AMB] falls in the middle of the three – five year

[7] While AMB is entitled to continue to insist that he is innocent, however for purposes of sentencing him, his position to not accept responsibility tends to undermine his near future prospects of rehabilitation. Nevertheless, I recognize that his willingness to make himself available for the SOA and his having participated, provides those charged with his rehabilitation information that they would not otherwise have.

range for these offences. As stated above, as much as denunciation and deterrence are paramount considerations, proportionality is a balancing tool to determine the fit and appropriate disposition with those in mind. When the post-*Friesen* case law is reviewed from this province, **it is clear that offenders in circumstances close to AMB have almost unanimously received sentences of six years**.

Respectfully, each of those cases listed above have at least one distinguishing feature that would drive the sentence up from where [AMB] stands, whether this is a prior related record (*Hughes,* 2020 NSSC 376), a vastly more prolonged period of abuse (*APL,* 2021 NSSC 238 – 6 year sentence), or a higher degree of manipulation (*SFW,* 2021 NSSC 312 [I note that the Crown sought 6 years and the trial judge imposed 5 years and 233 days custody]). **When looking to the principle of parity, these cases show that something less than 6 years is appropriate for [AMB].** Given the incredibly positive Pre-Sentence Report… [AMB's] willingness to participate in the forensic sexual offender assessment and his prospects to lead a pro-social life following his period of custody, **AMB should fall proximate to the 3.5 years imposed in *CAL (*2021 NSSC 365** - [I note that the trial judge at para. 78 compared the circumstances to my decision in *R v WGL*, 2020 NSSC 323 - those circumstances are readily distinguishable from the case at Bar]).[8]

What is a fit and proper sentence in the circumstances?

[25] Even before the *Friesen* decision, our Court of Appeal (*R. v. EMW*, 2011 NSCA 87 per Fichaud, JA) had this to say about sentencing ranges for "**sexual assaults on children without intercourse**":[9]

29 The statutory maximum term of imprisonment for an offence under s. 271 of the *Code* is ten years. But that does not mean the effective "range" for parity purposes in

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[8] Recognizing that sentencing is an individualized and discretionary "complicated calculus", I note that the horrendous facts in *APL* (after trial) were summarized by the trial judge at paras. 65-78. Very respectfully, and with the disadvantage of not having been the sentencing judge and having all the information that he had, I find it difficult to reconcile the 6 year sentence imposed therein with the language from the Supreme Court of Canada in *Friesen* at para. 114 ["Nonetheless, **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 penitentiary terms should be neither unusual nor reserved for rare or exceptional circumstances. We would add that substantial sentences can be imposed where there was only a single instance of sexual violence and/or a single victim as in this case, *Woodward*, and *M(L)*.**"] when also read in conjunction with Justice Moldaver's reasons in *DD* at para. 44. [My bolding added]

[9] Moreover, it must be remembered that these comments were made while the maximum sentence was 10 years imprisonment, where as now, it is 14 years imprisonment.

E.M.W.'s sentencing has a ceiling of ten years. In *R. v. Cromwell*, [2005] N.S.J. No. 428 (C.A.), para. 26, Justice Bateman discussed the meaning of "the range":

a. [Counsel] broadly defines the range of sentence, in these circumstances, as all sentences that might be imposed for the crime of impaired driving causing bodily harm. I disagree. In my opinion the range is not the minimum to maximum possibilities for the offence but is narrowed by the context of the offence committed and the circumstances of the offender ("... sentences imposed upon similar offenders for similar offences committed in similar circumstances ..." per MacEachern, C.J.B.C. in *R. V. Mafi* (2000), 142 C.C.C. (3d) 449 (C.A.)). The actual punishment may vary on a continuum taking into account aggravating and mitigating factors, the remedial focus required for the particular offender and the need to protect the public. This variation creates the range.

To similar effect *R. v. A.N.*, 2011 NSCA 21, para. 34:

Unless expressed in the *Code*, there is no universal range with fixed boundaries for all instances of an offence: *R. v. M.(C.A.)*, para. 92; *R. v. McDonnell* ([1997] 1 S.C.R. 948), para. 16; *R. v. L.M.*, para. 36. The range moves sympathetically with the circumstances, and is proportionate to the *Code*'s sentencing principles that include fundamentally the offence's gravity and the offender's culpability.

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

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

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

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

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

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

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

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

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

(i)Two years exclusive of remand time plus three years probation for a number of incidents of sexual assault, without intercourse, over time on the offender's under aged daughter. The sentence was further to a joint recommendation after a guilty plea. The judge said that, if credit for remand had been considered, the sentence before credit would have been two and one half years (para. 38). *R. v. H.C.D.*, 2008 NSSC 246. The judge said:

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

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

> **It is impossible to speak of these crimes without using pejorative adjectives. This Court, and others, has repeatedly emphasized that sexual abuse of near helpless children (which is the case when the abuse of each daughter began) by adults upon whom they should be able to rely for protection, should incur sentences which may deter not only the perpetrator but others who may be so inclined. This proposition is exacerbated when the perpetrator, as here, is a parent, in a position of**

> **trust.** Society's revulsion of such conduct must be demonstrated. **The fact that the appellant is a first offender, at least in respect to the older daughter and may not need specific deterrence is not to be granted undue significance in crimes of this nature. General deterrence must be emphasized.**

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

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

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

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

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

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

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

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

[My bolding added]

[26] The Supreme Court of Canada in *Friesen* intended to send a strong message to sentencing courts that, for various reasons, they had significantly under-estimated the appropriate range of sentences for child victim sexual offences.

[27] It may be difficult in hindsight to confidently assess which Nova Scotian cases fall into that category, however the court clearly envisaged that, if sentencing courts take their comments seriously, the likely result would be an overall increase in the sentences that would have otherwise been imposed in such cases.

[28] Arguably, even some post-*Friesen* child victim sexual offences sentencing cases do not properly reflect the adjustments to such sentencings that the court has identified as appropriate. Such cases should not be relied upon when analysing for whether there is parity between the proposed sentence here and what was sentenced in those cases.

[29] In any event, as *Friesen* and our Court of Appeal in *EMW/AN* have stressed, the overarching factor is not parity, but proportionality in each individual case.

[30] In relation to the s. 151 offences, the maximum sentence for *each instance of offending* is 14 years imprisonment.

[31] To re-iterate, I concluded that AMB:

> 1. over the course of these other abuses and ancillary thereto, regularly manipulated her breasts (including at JM's Lower Sackville residence, but much less so);
>
> 2. involved SM in so-called "hand and mouth" or simple fellatio incidents at least 30 times (and that he would ejaculate in her mouth) - most of those at RB's house;
>
> 3. that he had vaginal intercourse with her at least twice (at RB's house in AMB's bedroom); and
>
> 4. anal intercourse with her at least 5 times (always at RB's house in AMB's bedroom).

[32] There are a number of statutorily and common law based aggravating factors present in the circumstances. I will not extensively comment on them, but make the following observations.

[33] Each of these offences required a fresh criminal impulse. SM was available because AMB was her step-father, and they shared a residence/room(s). From the age of two years she and her mother had grown to trust AMB as a father.

[34] SM was not safe in her own home or when alone with AMB, while these offences occurred between July 1, 2018, and December 31, 2019. AMB robbed her of an innocent and happier childhood and darkened her future.

[35] I find that SM likely realized that if, and when, she reported these offences, her decision would end her relationship with her "father" and his family, as much as it would with her younger step-brothers.

[36] I am satisfied that SM lived with a high level of anxiety and fear during this time period, and that it significantly negatively affected her mental health, and will continue to do so.

[37] The victim impact statements are consistent with the "harm" phenomena described by the Supreme court of Canada in *Friesen*. JM, as a parent, has also been tremendously impacted by AMB's sexual offending against SM. I infer she has significant guilt that she was not able to protect SM from AMB. She has serious trust issues in relation to SM (and her boys) as a result. Her pre-existing friendships and family connections have all suffered - some permanently so.

[38] They reveal psychological and emotional harms, which spill over into indirect harms like SM's reference that, to protect herself, it is now preferable to isolate herself socially.

[39] I conclude that the harmful consequences of AMB's criminal behaviour will materially affect both JM and SM for many years.

[40] The mitigating factors are few, and not compelling.

[41] AMB has otherwise been a pro-social contributor to the community, however, that AMB has no prior record is not to be accorded "undue significance (*R. v. GOH*):

> "The fact that the appellant is a first offender… and [therefore] may not need specific deterrence is not to be granted undue significance in crimes of this nature. General deterrence must be emphasized."

[42] Moreover, while a first-time offender is considered to be more capable of rehabilitation, which can have the effect of reducing the sentence that might otherwise be imposed, it is important to consider what are the fundamental underlying reasons why this proposition is put forward. Those reasons were neatly captured in the court's reasons in *R. v. RM*, 2019 BCCA 409 at paras. 17-25, and bear repeating in full:[10]

> **2. Did the judge err in his treatment of the lack of a criminal record?**
>
> 17 In considering whether R.M.'s lack of criminal record was a mitigating factor, the judge said:

[10] On the other side of the coin, why a prior record is relevant to later sentencings was neatly captured at para. 43 in *R. v. Sinclair*, 2022 MBCA 65, per Steel, JA.

> [21] This is not a mitigating factor, but rather an aggravating factor that is not present. Its absence does not automatically relegate [R.M.]'s behaviour to the lower end of the range of sentences. In fact, it is usually the absence of a record or tarnished background that enables offenders like [R.M.] to gain the trust of others when he is around children and enables him to carry out his crimes. As the Crown also aptly pointed out, for the past eight years, [R.M.] was abusing his daughter, hardly a person of good character. At best, the lack of criminal record gives me pause to hope that [R.M.] can find his way to be properly rehabilitated.

The judge thus gave little weight to this factor in determining where R.M. fell within the sentencing range for this type of offence.

18 **R.M. submits that, as a first-time offender, he was entitled "to be sentenced as such" and to be given full credit for his lack of criminal record as a mitigating factor.** He cites a number of cases in which courts have treated the absence of a criminal record as a mitigating factor even when the offences involved repeated sexual offences against a child: *R. v. S.S.S.*, 2018 BCSC 2470; *R. v. F.E.H.*, 2015 BCSC 175; *R. v. P.D.W.*, 2015 BCSC 660; *R. v. S.L.D.*, 2017 BCPC 349; *R. v. F.O.R.*, 2016 BCPC 223; *R. v. Cadman*, 2016 BCSC 474; *R. v. R.A.J.*, 2010 BCCA 304; *R. v. J.L.M.*, 2017 BCCA 258; *R. v. R.N.S.* (1997), 121 C.C.C. (3d) 426 (B.C.C.A.) and *R. v. Safaee*, 2009 BCCA 367.

19 R.M. acknowledges that there are also cases in which courts have held that previous good character is not a mitigating factor to be considered in sentencing for sexual assault on children: *R. v. C.L.*, [1998] B.C.J. No. 61 (S.C.); *R. v. G.M.* (1992), 77 C.C.C. (3d) 310 (Ont. C.A.); *R. v. R.S.H.*, 2005 BCSC 927, aff'd 2005 BCCA 566. **But he says, relying on *R. v. Akumu*, 2017 BCSC 1502 at para. 93, that first-time offender status should only be ignored when it is the absence of a record that has permitted an accused to assume a position of trust and gain access to the victim**. Defence counsel submits that R.M. had access to the complainant through his marriage to her mother, and not as a result of his unblemished criminal record. **In my view this distinction is not particularly helpful**, leading as it does to imponderables such as whether the complainant's mother would have married R.M. and given him access to her daughter if he had a previous conviction for sexual assault of children.

20 **In my view, it is helpful to begin with the principles that explain why the absence of a criminal record is generally treated as a mitigating factor. The first rationale is that lack of a prior criminal conviction can be indicative of otherwise good character**: *R. v. Horswill*, 2019 BCCA 2 at para. 18. As penal theorist Andrew Von Hirsch argues, the first time offender is making a "plea of self extenuation" -- saying that the criminal behaviour was not like him: *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals* (New Brunswick, NJ: Rutgers University Press, 1985) at 81-83.

21 **Second, a first-time offender has not had the benefit of the corrective effect of a previous conviction which "should call dramatically and personally to his attention**

that the behaviour is condemned" and may therefore be to some degree less culpable than someone who has already been censored for such behaviour: Andrew von Hirsch, *Doing Justice: The Choice of Punishments* (Boston: Northeastern University Press, 1976) at 85 [*Doing Justice*]; *R. v. Leasak*, 2007 ABCA 38. A lack of prior interaction with the criminal justice system, then, may reduce the severity of the sanction necessary to achieve the goal of specific deterrence.

22 **Even a modicum of reflection on these rationales leads to the inescapable conclusion that they will not apply equally to all first-time offenders.** A person without a prior criminal conviction will not necessarily be a person of good character. Consideration of the rehabilitative prospects and length of sentence necessary for specific deterrence and punishment of a first-time offender may be of little significance where the nature of the crime committed is of such gravity that it demonstrates a high degree of moral blameworthiness on the part of the offender. In such cases, denunciation and general deterrence are to be given primary emphasis, despite the absence of prior convictions: *R. v. Ng*, [2004] A.J. No. 1644 (Q.B.)

23 **This Court has long recognized that the absence of a criminal record may have little significance where the first offence occurred over the course of several years.** In *R. v. Spiller*, Robertson J.A. held as follows at 214:

> ... Good character may be a mitigating circumstance in some kinds of crimes, *e.g.*, an isolated case of criminal negligence or an unpremeditated assault in a fit of anger. But, in my opinion, this is not so, where the offence is a series of acts, planned and carried out over a lengthy period. The person of good character, who can appreciate to the full how wrong what he is doing is, seems to me to be just as culpable as a person of poor character who appreciates less clearly the wrongness of his acts. ...

[Emphasis added.]

To similar effect is Clayton C. Ruby et al., *Sentencing*, 9th ed. (Toronto: LexisNexis Canada, 2017) at s. 8.16:

> The absence of a criminal record is a mitigating factor on sentencing in that it reinforces the argument that the accused is of good character and reputation. Such a consideration is appropriate to an isolated criminal act or one that is committed on the spur of the moment in the context of an otherwise blameless record.

[Emphasis added.]

Ruby goes on to note that where the offending is repeated and occurs over a lengthy period of time, "the lack of criminal record loses much of its force": at s. 8.17.

24 In the present case, the offending occurred over eight years, at times on a daily basis. It is hardly open to R.M. to assert that his actions were out of character. The frequency and duration of his offending supports quite the contrary conclusion. **That being said, the second rationale for treating first-time offender status as a mitigating factor nonetheless continues to apply. R.M. had not yet had the wake-up call of a conviction.** In the words of Von Hirsch "he was, at the time he committed the crime, only one of a large audience to whom the law impersonally addressed its prohibitions" (*Doing Justice* at 85). The dissent of Martin, J.A. in *R. v. Leasak* reflects this reasoning:

> [27] The lack of a prior criminal record of convictions is usually an important factor in sentencing. Although the appellant was, in a manner of speaking, a "first offender", in the peculiar circumstances of this case, where the offence was repeated literally hundreds of times over a decade, that fact is of diminished significance. It would therefore be wrong to extend to the appellant the full benefit of leniency usually given to those convicted of a first offence or offences committed over a very short period of time.
>
> ...
>
> [30] **However, the fact remains that <u>those not previously convicted have not had the opportunity to demonstrate that exposure to the justice system has been of benefit, resulting in deterrence and rehabilitation. Accordingly, where, as here, the criminal activity persisted over a long time</u> and continued even while the appellant was on bail, <u>the significance of no prior criminal record, although diminished, should not be ignored completely</u>**.
>
> [Emphasis added.]

25 **In my view the absence of a prior conviction, even in cases involving offending over a long period of time, may be relevant to the particular moral culpability of the offender and the potential for a less onerous sentence to effect rehabilitation.** In the present case, the judge's reasons demonstrate that he gave some weight to R.M.'s status as a first-time offender on this basis. He stated (at para. 21) that "the lack of criminal record [gave him] pause to hope that [R.M.] can find his way to be properly rehabilitated".

[My bolding added]

[43] I see these comments as consistent with the approach of our Court of Appeal in *GOH*, that the lack of a prior criminal record, in cases of sexual abuse of children by persons with no criminal record, should not be “accorded undue significance”.

[44] Having said that, an offender's continued risk of committing such offences is itself a valid factor that may require them to be separated from society by imprisonment.

[45] I find that presently to be the case regarding AMB.

[46] While difficult to comprehend and shocking, it is helpful to recall the facts in the *Friesen* case that led the Court to reinstate his sentence of 6 years imprisonment, as imposed by the sentencing judge:

> *A. The Offences*
>
> 6 Friesen encountered the mother on an online dating website on June 29, 2016. On July 17, 2016, at about 1:00 a.m., the mother picked Friesen up from the bar where he had spent the evening and brought him to her residence. The mother's four-year-old daughter ("child") and her one-year-old son were also at the residence. The mother's friend was babysitting them for the evening.
>
> 7 Friesen and the mother engaged in consensual sexual intercourse in the mother's bedroom. The mother audio-recorded what happened next on her cellphone and the transcript of the recording was admitted at the sentencing hearing. Friesen told the mother to bring the child into the bedroom so that they could force their mouths onto her vagina and so that he could force his penis into her vagina. The mother brought the sleeping child up into the bedroom, removed her diaper, and laid her naked on the bed.
>
> 8 The child began to cry and tried to flee the bedroom. Friesen and the mother prevented her from escaping. As the child was in distress and screaming, Friesen repeatedly directed the mother to force the child's head down so that he could force his penis into her mouth.
>
> 9 The child's screams and cries awoke the mother's friend. She entered the bedroom, observed the sexual violence, and told the child to "come here" (A.R., at p. 97). In response, Friesen said "bring her here" (p. 97). Instead, the mother's friend removed the child from the room.

10 With the child gone, Friesen told the mother to engage in sexual activities with him. The mother expressed regret about the violent assault on the child. In response, Friesen threatened to tell the mother's friend that the mother had sexually abused her one-year-old son. When the mother said she did not want this to happen, he told her to "relax" and masturbate herself in front of him (p. 99).

11 Friesen then threatened the mother, repeatedly telling her that unless she brought the child back, he would tell the mother's friend that the mother had sexually abused her one-year-old son. Friesen told the mother that he intended to "fuck" and "rape" the child while "she's crying" (pp. 100 and 102). In response, the mother repeatedly asked why Friesen needed to do "that stuff" (p. 100). When the mother raised concerns about getting one of her children back from Child and Family Services ("CFS"), Friesen indicated that he would get one of her children back for her if she returned the child to the bedroom.

12 Friesen fled the residence when the mother's friend confronted him about the sexual violence.

B. Information About Friesen

13 Friesen pled guilty to sexual interference with the child (Criminal Code, R.S.C. 1985, c. C-46, s. 151) and attempted extortion of the mother (Criminal Code, s. 346(1)). At the time of sentencing, he was 29 years old and had no prior record.

14 Friesen's childhood was characterized by neglect and by physical and sexual violence. When he left CFS care, he became homeless and sold sex on the street to survive. He lacked a supportive social circle and experienced depression and anxiety. He told the author of the pre-sentence report that the trauma of sexual abuse that he experienced has affected him throughout his life. He said he wanted professional counselling to deal with his problems. At the sentencing hearing, he stated that he was sorry and had remorse (A.R., at p. 72).

15 The author of the pre-sentence report assessed Friesen as a high risk to re-offend. He scored in the 94th percentile of an actuarial measure of relative risk for sexual offence recidivism. The author concluded that Friesen's level of insight into his behaviour was "essentially nonexistent" (p. 94). He claimed to be blacked out during the offences and distanced himself from his conduct by saying it was not something he would do. He also stated that he enjoys being around children and wanted to be a role model for children. Despite reporting that he was under the influence of alcohol at the time of the offences, he also maintained that alcohol use was never a problem for him. As Friesen did not understand the risk factors that preceded the offences, there were no risk strategies in place to mitigate future risk.”

[47] Let me next then examine the six factors the court identifies in *Friesen* considered to be "significant factors to determine a fit sentence" - paras. 121-154.

The 6 Friesen factors

a) likelihood to re-offend [11]

[48] The SOA dated August 23, 2022, has been prepared by Dr. Michelle St Amand-Johnson, of The Nova Scotia Hospital's Forensic Sexual Behaviour Program ("FSBP").

[49] I am satisfied that she is so qualified to give the opinions contained therein.

[50] I am also satisfied that I can have sufficient confidence in the underlying information she received, and her opinions in relation to AMB, that I accept her opinion evidence.

[51] What then did she say about AMB's likelihood to reoffend and treatment recommendations?

[52] The 28-page report contains much information and opinion, and I have considered it all, however I will only reference some portions thereof:

---

[11] The Crown made reference that AMB had been charged with breaches of his release conditions involving allegedly going to areas where children might reasonably be present. As there have been no convictions yet registered, I must, and do, completely ignore those references by the Crown. The bolding in *Friesen* quotes throughout are added by me.

[p.1] "This assessment report will address issues of sexual deviancy, risk for sexual reoffending, personality and mental health issues, and treatment recommendations… This report is designed to address risk posed to public and rehabilitative potential and options.

[p.12] "To summarize, AMB… identified as exclusively heterosexual and indicated that partnered sex has been in the context of dating relationships, as the alleged to require an emotional connection with a partner in order to perform sexually… non-consent cues will suppress his arousal and that anxiety about crossing this boundary means he seeks verbal consent from partners. He denied possessing any deviant sexual arousal."
…
[p.16] "… In response to recommendations from the current assessment (found at the end of this report)… **He is receptive to participating in treatment and learning more about himself**. Even if the comment was motivated by impression management, it provides a starting point for psychotherapeutic engagement.

…

[Under **PPG (Penile Plethysmography) Assessment Results**]

The PPG is designed to provide indications of an individual's sexual arousal profile. **Evidence of deviant sexual arousal, particularly that which involves children, has been documented as an indicator of increased risk for sexual recidivism**… Therefore, [the Forensic Sexual Behaviour Program] conducts the PPG as a component of a comprehensive forensic sexual behaviour assessment.…

AMB completed the audio only, adult only stimulus series, but his sexual responses were of insufficient strength to allow for reliable interpretation as per FSBP scoring protocols requiring at least one category average of at least 10% of an estimated full erection. Moreover, **he did not fully complete the combined audio and visual stimulus series that is inclusive of child, teen and adult trials**. According to the PPG Technician, prior to this session, AMB reported feeling nauseated but stated he still wished to proceed with the assessment. However, he became visibly upset at the start of the stimulus series (flushed, jaw tight), and after the ninth stimulus trial he asked for pause and began to cry.… options were discussed, and AMB elected to try again to complete the PPG. However, he again showed emotional distress and hyperventilation after the 16th trial. After consulting with the undersigned, the Technician terminated the PPG assessment.

…

It was explained that the PPG was terminated at the clinical discretion of the undersigned and that **the larger risk assessment could still proceed. However, the absence of complete and interpretable PPG results means AMB's sexual arousal profile remains unknown beyond what he self-reported in interview**."

[My bolding added]

[53] In the next section entitled **Final Diagnosis DSM – 5**, at p. 16, the report states:

> Major Mental Disorders and Other Clinical Conditions:
>
> Perpetrator of parental child sexual abuse (index offence)
>
> Paedophilic Disorder (nonexclusive type; diagnosed based on indexed offending)
>
> …

[54] The SOA continues:

> [p.17] " … his categorical denial hinders identification of contributing factors, particularly internal factors such as fence specific cognitions and acute emotional states …
>
> …
>
> [p. 20]
>
> **… It may be queried whether a factor in AMB's offending (if not the onset than the maintenance of it over time) was frustration with women and dating, such that he turned to SM – to whom he had easy access as well as a strong emotional bond – to meet his sexual needs.**
>
> **AMB's PPG assessment was inconclusive… which means that sexual arousal specifically to pubescent children can be neither concluded nor ruled out as a motivating factor in the index offences, versus other factors being primary to AMB sexualizing his stepdaughter.(Note that it is not indicated in the file information provided to this writer whether SM had started puberty by the time the index offending began, nor was it clarified with AMB whether she was beginning to physically develop when he and her mother broke up; rather, same is speculated by this writer based on her age).**… As an example of other factors being relevant, during his interview, AMB did not verbalize offences supportive attitudes, but **the specific sexual acts disclosed by the victim are consistent with his sexual interests,** in addition to the abuse occurring at a time when AMB was not in the relationship and therefore did not have regular access to partnered sex, or it seems, some of the activities that he indulged with SM (see previous paragraph) . **It is therefore possible that the index victim served as a substitute 'partner' in the absence of a preferred (adult) partner. Still, it is unknown what AMB might have said to himself to facilitate or rationalize that substitution,**

> **particularly where he was firmly established in a parental role relative SM and therefore had to cross both age and relatedness boundaries in order to offend."**

[55] While Dr. St Amand-Johnson speculated about SM's physical development during the time of the offences, I note that regarding SM's physical development, Dr. Amy Ornstein testified that when she examined SM in mid-January 2020, she found SM was in Tanner stage IV (i.e. "almost adult stage") pubic hair development, and Tanner stage IV breast development.

[56] Dr. Ornstein also testified that her physical findings of SM in January 2020 were neutral and did not confirm or rule out sexual abuse, which she did not consider significant since the last incident of sexual abuse had been at least two weeks earlier.

[57] Dr. St Amand-Johnson's SOA went on to state:

> … During his assessment he did not make comments to suggest that he subscribes to implicit theories about children in general being sexually mature and therefore viable partners. However, it is possible that he saw SM as different. Again, however, without AMB's input, it is unclear how or why he was able to sexualize the 10-year-old SM and engage in quite intrusive sexual acts against her… AMB denied possessing sexual arousal to children, and unfortunately PPG results were incomplete…; inconclusive to verify or dispute same… conditions that enabled him to cross sexual boundaries remain unknown.
>
> [p.21] …
>
> **VII Risk for Recidivism**
>
> **…**
>
> **5. Summary Statement of Risk**

[p.25] Overall, …**AMB's baseline risk for sexual recidivism is similar to that of the "average" person adjudicated for crossing legal boundaries… poses a 'low' risk to reoffend in a non-sexually violent manner. If AMB were to reoffend sexually, his history and current assessment results suggest that it would most likely be against a female child or adolescent who is well acquainted with [him" and comfortable with or accustomed to being alone with him. Thus, a factor that would increase dynamic risk would be if AMB regained access to children without supervision. Note that during the current assessment process, AMB verbalized agreement with the strategy of not being alone with anyone under the age of 16 and claim that he does not want to be involved with any children except for his own sons… Risk to male children is believed to be less likely than risk the female children, but it is not ruled out.**

…

[p.27] Based on a combination of actuarial risk assessment and structured clinical judgement, **AMB's risk for sexual recidivism is in the 'average' range… Risk for non-sexual violence is low. If AMB were to reoffend in a sexual manner, it seems most likely to be against a female child or adolescent who is well acquainted with him and to whom he has access in an unsupervised setting. Risk to males is not expected but is not ruled out.** Based on his risk level and offending profile (as it is currently known) AMB is an **appropriate candidate for low – moderate intensity treatment,**… As such, the following recommendations are offered.

IX. Recommendations

1. Treatment: It is **recommended that AMB attend, actively participate in, and successfully complete a specialized treatment program for sexual offending, delivered at a low – moderate level of intensity** by professionals specifically trained in this field and followed by maintenance sessions unless recommended otherwise by his treatment providers.

Low to moderate intensity group-based treatment is available in the community via the FSBP, with groups usually commencing in the fall of each calendar year and continuing to take a total of 30 sessions (typically exceeding 30 calendar weeks due to holiday breaks and/or periodic weather-related cancellations is necessary). Should AMB receive a community-based sentence and it is appropriate to the terms of his sentence, referral for treatment may be sent by the supervisory officer to the FSBP Program Lead….

Low intensity treatment is not available within the federal correctional system, to the knowledge of this writer, as treatment resources are reserved for moderate and high-risk cases. Treatment (of any intensity) it is also not available in the provincial jail system of Nova Scotia.

2. Contact with minors

> **It is recommended that AMB have no unsupervised contact with children under the age of 16 years, including biological relatives, and that he not be in a position of authority or trust over a minor**, precluding him from working for volunteering with organizations or groups that higher, take as volunteers, or provide services to minors. This recommendation **does not refer to incidental conduct with children in public (eg. on the street, in stores), as risk to strangers is not expected.** However, it **does include his minor aged sons, at least until such time as he has successfully completed specialized treatment** (see recommendation #1) and his risk profile has been reviewed by his treatment providers in light of his progress and any additional information about his offence process that may come to light during the treatment process.
>
> Note that for supervision to be considered adequate for risk management purposes, it should be conducted by a responsible adult who is aware of AMB's offensive history, remains within eyesight of him and/or the child(ren) at all times, and is willing and able to intervene to interrupt any high-risk behaviour or situations.

[58] Summarizing the conclusions, I am satisfied that from a static risk factors' perspective, AMB"s baseline risk is that of an "average" paedophilic offender. Dynamic risk factors could increase this risk if he regains access to children without supervision, particularly before he has successfully completed the recommended specialized treatment. Overall, he is considered to be a low risk for non-sexual violence.

[59] I am satisfied that:

1. AMB's sexual preferences include primarily female, but could also include male, children between the ages of 9 and 16; and
2. without successful interventions, he will remain at risk to re-commit such offences.

[60] These conclusions inform my decision on sentence. I am also therefore satisfied AMB must be separated from society for some time to permit further assessments which will more specifically identify, and hopefully reduce this risk, coupled with effective treatments.

b) abuse of trust or authority

[61] As the court in *Friesen* stated:

> 126 **Any breach of trust is likely to increase the harm to the victim and thus the gravity of the offences**. As Saunders JA reasoned in *DRW* [2012 BCCA 454]., the focus in such cases should be on 'the extent to which [the] relationship [of trust] was violated' (para. 41).
> [My bolding added]

[62] The abuse of trust and authority by AMB is egregious.

[63] I had the benefit of seeing SM testify in a videotaped interview with police in January 2020 and testify from a room within the courthouse in 2022. I accept beyond a reasonable doubt from those video appearances, the evidence I have otherwise heard, and her and her mother's victim impact statements, that AMB's offending will have significant lasting, and possibly lifelong, negative effects on SM (and to a lesser degree for her mother JM).

[64] AMB was the only "father" she had ever known - he started in that role when she was two years old. He continuously lived with her mother and her from

that point on until the Fall of 2018. He had been very active in her life and the household.

[65] AMB was a good parent to SM - until in 2018 when he started to sexually abuse her.

[66] After AMB and JM (and children) split, AMB had access visits with her where he lived until the offences (which continued) were reported in January 2020, when she was 12 years old.

[67] She had trusted him and relied upon him.

[68] That trust was shattered when AMB committed the first offence.

[69] After that point in time, she knew she was no longer safe when alone with him.

[70] How is a young child to mentally process such a change, and as the abuse continues?

[71] How conflicted she must have felt – the man she had loved as a "father" for years, had then started to sexually abuse her.

[72] As time went on and more offences were committed by AMB, I infer that her anxiety and fear surrounding past and potential further offences, and maintaining the pretense that nothing was wrong, continued to plague her *each day* of the intervening period before she disclosed this abuse; and SM knew early on after these offences began to happen, that should she disclose AMB's abuse, her relationships with her step-brothers, AMB, and AMB's family would never be the same.

[73] I infer that her living with the continued abuse significantly affected her mental health until the offences were reported, and that it will continue to do so into the foreseeable future.

[74] Had AMB recognized his criminal misconduct early on, stopped it and sought help for SM and himself, and if he was charged and pleaded guilty at the earliest opportunity, it would have been a significant mitigating factor in his favour. However, he continued to choose his own self-interest over that of SM, JM, and even his sons.[12]

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[12] To be clear, that AMB did not self-report or plead guilty herein are properly characterized as "the absence of mitigating factors" – not as aggravating factors.

[75] AMB left it to SM, a child, to have to take it upon herself to reveal AMB's criminal conduct against her.

c) duration and frequency

[76] AMB's sexual misconduct was persistently ongoing for over one year. As the court in *Friesen* stated:

> The duration and frequency of sexual violence is a further important factor in sentencing. **The frequency and duration can significantly increase the harm to the victim. The immediate harm the victim experiences during the assault as multiplied by the number of assaults.** (para. 131)

d) age of the victim

[77] SM was between 10 and 12 years of age. As the court in *Friesen* stated:

> "The power imbalance between children and adults is even more pronounced for younger children, whose 'dependency is usually total' and who are 'often helpless without protection and care of their parents'... Their personality and ability to recover from harm is still developing... **Children who are victimized at a younger age must endure the consequential harm of sexual violence for a longer period of time than persons victimized later in life"**. (para.134)

e) degree of physical interference

[78] AMB repeatedly masturbated to ejaculation and placed his penis in SM's mouth just beforehand; had SM fellate him to ejaculation; had vaginal and anal intercourse with her (and I am satisfied beyond a reasonable doubt that he ejaculated); and manipulated her breasts.

[79] As the court in *Friesen* stated:

> **We acknowledge that the degree of physical interference is a recognized aggravating factor**... **The degree of physical interference also takes account of how specific types of physical act may increase the risk of harm**. For instance, penile penetration, particularly when unprotected, can be an aggravating factor because it can create a risk of disease and pregnancy... Penetration, whether penile, digital, or with an object, may also cause physical pain and physical injuries to the victim... **Specifically, we would strongly caution courts again to downgrading the wrongfulness of the offences or the harm to the victim with a sexually violent conduct does not involve penetration, fellatio, or cunnilingus, but instead touching or masturbation**. There is no basis to assume, as some courts appear to have done, that sexual touching without penetration can be 'relatively benign'... **Some decisions also appear to justify a lower sentence by labelling the conduct is merely sexual touching without any analysis of the harm to the victim... Implicit in these decisions is the belief that conduct that is unfortunately referred to as 'fondling'... is inherently less harmful than other forms of sexual violence... This is a myth that must be rejected**...." (paras.138-144); and
>
> ... There is no type of hierarchy of physical act for the purposes of determining the degree of physical interference... Physical acts such as digital penetration and fellatio can be just as serious a violation of the victims' bodily integrity as penile penetration... **It is an error to assume that an assault that involves touching is inherently less physically intrusive than an assault that involves fellatio, cunnilingus, or penetration**. (para.146)

[80] The degree of physical interference here was substantial — including when he regularly ejaculated, he did not protect SM therefrom by using a condom - this is an aggravating factor.

f) the victim participation

[81] As the court stated in *Friesen*:

> "**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... This is an error of law**... The participation of the 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... **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**..." (paras. 150-154)

[82] SM did participate in the commission of the offences. She is *not* responsible for any of them.

[83] She was vulnerable, and effectively coerced by AMB's manipulative conduct and breach of trust. That fact is an aggravating factor on its own.

[84] It was courageous for SM to have disclosed this abuse. She was right to do so and should know that she in no way is responsible for any of the abuse she suffered – all of the responsibility for it happening is on AMB.

[85] SM struck me as a bright, talented, and caring young person.

[86] In spite of what has happened to her, I encourage her to not let what AMB did to her, derail her plans and dreams for her own productive and happy life.

[87] The next question therefore is: where do AMB and his offences sit on the range of sentences?

Adjusting the range of sentence according to the aggravating and mitigating factors, so as to identify an appropriate sentence

[88] I have canvassed the aggravating factors otherwise herein; they are numerous, and material to the identification of a proper sentence. There are no strongly countervailing mitigating factors.

[89] With a last look, to ensure I act on proper bases and with restraint such that the aggregate sentence is not disproportionate, I am satisfied that on the 5 to 9 years range, AMB's sentence should be set as 7 years imprisonment, allocated as follows:[13]

1. Count 1 - s. 151 - 7 years' imprisonment;
2. Count 2 - s. 151 - 7 years' imprisonment to be served concurrently.

The pre-credit sentence of imprisonment

[90] AMB seeks only the 1.5 days for each day of custody credit he has served since July 7, 2022 to the sentencing date October 5, 2022, which is 137 days (91 days x 1.5) per s. 719(3) *CC* and the authority of: *R v. Carvery* (2014) 308 CCC (3d) 375 (SCC).

[91] Therefore, his remaining sentence is 7 years less 137 days of remand credit for a go forward sentence of 6 years, 7 months and 17 days (this includes the two days for leap years).

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[13] The **section 151 *CC* offences** were alleged on the indictment to be between July 1, 2018 and December 31, 2019: 1 - near **Hammonds Plains** (which would include the residence where JM and AMB lived on a 12 month lease from approximately the Fall of 2017 with the children prior to their breakup and departure from that residence on or about October 31, 2018; and which would also include AMB living with his cousin RB near **Hammonds Plains** between November 1, 2018 and December 31, 2019); and 2 - near **Lower Sackville** (which was the apartment to which JM moved with the 3 children in January 2019, after having spent some time living with her parents between November 1, 2018 and January 2019 - no offences were alleged to have happened at her parents' home). Ultimately, regardless of location, these offences continued from the summer of 2018 until December 31, 2019.

[92] The sentence of imprisonment that will appear on the Warrant of Committal will also include a s. 743.21 *CC* endorsement, prohibiting AMB from communicating, directly or indirectly, with SM and JM during the custodial period of the sentence; **except** in relation to JM regarding matters directly relevant to their two sons, and then only indirectly, including by: written (hard copy) correspondence, or through an intermediary, such as legal counsel, the Department of Community Services, or a court of competent jurisdiction.

[93] I decline to impose a victim surcharge, due to the hardship it would impose on AMB, given his financial circumstances – s. 737(2.1) CC.

Rosinski, J.