SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. W.F.*, 2023 NSSC 282

Date: 20230707
Docket: CRH-490540
Registry: Halifax

Between:

His Majesty the King

v.

W.F.

SENTENCING DECISION

Restriction on Publication: s.486.4, s.486.5, s.517(1), and s.539(1)

Judge:	The Honourable Justice John Bodurtha
Heard:	June 23, 2023
Oral Decision:	July 7, 2023
Written Decision:	August 31, 2023
Counsel:	William Mathers and Tiffany Thorne, Crown Counsel Patrick Eagan, Defence Counsel

By the Court (Orally):

Introduction

[1] During the proceedings in court, W.F. has expressed a preference of being addressed by first and last name. For the purposes of this decision and, in keeping with the publication bans in place, I will use initials only and gender-neutral pronouns throughout.

[2] On March 22, 2022, this Court found W.F. guilty of sexual assault and sexual interference against N.S., contrary to sections 151 and 271 of the *Criminal Code*, RSC 1985 c. C-46 (the "*Code*"). The charge of sexual assault was conditionally stayed pursuant to the *Kienapple* principle (see: *R. v. Kienapple*, [1975] 1 SCR 729).

[3] The parties disagree on the appropriate sentence. The Crown is recommending the maximum sentence at the time the offence was committed (ten years' incarceration). Defence counsel did not propose a range of sentence, although previous defence counsel had suggested a sentence of three and a half years.

[4] Sentences are and must be highly individualized. The case at bar is a particularly exceptional case in that W.F. has already been given the benefit of a rehabilitative sentence for five counts of related behaviour. Ultimately, the case law is clear that an upper-single-digit sentence is warranted and reasonable in the circumstances for these types of crimes.

[5] To quote Justice Moldaver in *R v. D.D.*, cited in *R. v. Friesen*, 2020 SCC 9 at para. 114:

> … 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.

[6] I must now determine a fit and proper sentence for W.F.

Position of the Parties

[7] It is the Crown's position that a ten-year sentence (the maximum) is the only fit and appropriate sentence in this case to appropriately address the common-law principles of denunciation and deterrence (both specific and general) and to comport with the principles of proportionality and parity. As for the principle of rehabilitation, the Crown argues that W.F.'s criminal history substantially lessens the weight that should be given to that principle.

[8] The Defence's initial position, put forth by previous counsel in their submissions, was that the appropriate sentence is 3.5 years. Current Defence counsel did not provide a range for sentencing at the hearing. Nonetheless, they did acknowledge that "…there is no question that the facts of the case are extremely serious and require a mid-single-digit penitentiary sentence"

[9] The Crown requested and the defence did not object to the following ancillary orders, respectively:

- A Weapons Prohibition Order (Section 109 of the *Code*);
- A DNA Order (Section 487.051 of the *Code*);
- A SOIRA Order (for 20 years), (Section 490.012 of the *Code*);
- A Prohibition Order (for 20 years), (Section 161 of the *Code*); and
- A Non-Communication Order (Section 743.21 of the *Code*).

Circumstances of the Offence

[10] The facts of this case can be found in the trial decision (2023 NSSC 279). They are, undoubtedly, serious, particularly because of W.F.'s past criminal record of committing sexual offences against children dating back to 1999.

[11] The victim in this case testified that she was 8 or 9 years old when W.F. began touching her "private parts" (her chest area and vagina) and was 13 years old when W.F. began having sexual intercourse with her and touching her with their penis. In 1999, W.F. pleaded guilty to five counts of sexual assault and one count of invitation to sexual touching before Justice Cacchione (see *R. v. DAM*, 1999 CanLII 18578 (NSSC). The circumstances of those prior convictions were summarized at pp. 10-11:

With respect to the first count on the indictment, sexual assault beginning when A.E.R. would have been 8 years old and continuing until she was 10 years old which consisted of repeated vaginal fondling both inside and outside her clothing and repeated incidents of fellatio.

On the second count of the indictment, when A.E.R. was between the ages of 10 and 12 years old three attempts at vaginal intercourse, incidents of cunnilingus and vaginal touching both inside and outside the complainant's clothing. The touching also consisted of the accused, while A.E.R. was lying naked on her stomach, placing his penis between her legs and stroking his penis until he ejaculated.

The third count consists of various acts of fellatio and of the complainant fondling the accused's penis. All of the sexual activity, save for the three attempts at intercourse, took place on hundreds of occasions. Most of these sexual activities took place while D.A.M. resided in the same house with A.E.R. and in various rooms within that house including her bedroom. The sexual activity also continued in the accused's own residences while he was supervising A.E.R.

A.E.R. was also shown pornography by D.A.M. and told that sexual activity was natural and not wrong. At some point, he also blamed her for initiating the sexual activity. The attempts at intercourse stopped when A.E.R. began to cry. The accused being A.E.R.'s maternal uncle was in a position of trust.

The fourth count on the indictment relating to J.A.D. consisted of a sexual touching where the accused put his hand inside J.A.D.'s bathing suit and touched her breast. This occurred on one occasion at the accused's residence.

The count involving R.A.E. consisted of the accused fondling R.A.E.'s breasts and buttocks every other weekend during the summer of 1997. These incidents occurred at the accused's residence while R.A.E. was visiting A.E.R. This activity occurred while R.A.E. was lying on the accused's bed and watching television.

The last count on the indictment relating to D.G.W. consists of regular fondling of D.G.W.'s breasts and buttocks over her clothing. This, as well, occurred at the accused's residence on a regular basis when D.G.W. was in the company of A.E.R.

The complainants range in age between 8 and 15 years old. The accused was between 35 and 36 at the time of the offences.

Victim Impact Statement

[12] There was no Victim Impact Statement presented to the Court. However, the effects of sexual assaults on children are well documented in *Friesen*.

Circumstances of the Offender
Pre-sentence Report ("PSR")

[13] W.F. is an only child who was born in Halifax, Nova Scotia. W.F. reports experiencing a "confusing time" throughout their childhood and upbringing due to their purported diagnosis and battle with Klinefelter syndrome, Obsessive Compulsive Disorder and various personality disorders. W.F. describes always feeling like they were "on the outside of the circle". W.F. had difficulty maintaining friendships and relationships throughout their life, reporting they often could only have one friend at a time, a trait that W.F. attributes to Klinefelter Syndrome. As a result of the diagnosis of Klinefelter Syndrome, W.F. reports receiving a pension of $860 a month.

[14] W.F. does not take responsibility for their actions or have any remorse and maintains the view that they are innocent. This is especially concerning after reading the PSR completed by Probation Officer, Gary Farmer, in 1999 and the conclusions of registered psychologists, Dr. Jason Roth and Dr. Brad Kelln (see PSR prepared November 25, 1999) at pp. 5-6. W.F.'s claim of innocence is also reflected in the PSR received on July 29, 2022.

[15] According to W.F., the PSR that was created by Probation Officer, Sheri Joyce-Robinson, intended to provide the Court with an update on W.F.'s current situation, was not accurate nor reflective of what W.F. said. W.F. denies the plea of guilt and claims that the PSR was full of misquotes/incorrect facts and should have "… no bearing on this sentence and should not have been included" (see: affidavit of W.F. filed August 25, 2022, at para. 2). In relation to the Forensic Sexual Behaviour Program, W.F. claims they were blackmailed into looking at the program and that they "certainly did NOT" say they would comply with any disposition from the Court" (see: Affidavit of W.F. filed August 25, 2022, at para. 6). W.F.'s parents (who are in their 90s) are dependent on W.F. to take care of their house, help them with chores and get them to and from medical appointments.

[16] Additionally, and contrary to what is stated in the PSR filed August 25, 2022, W.F. claims that they do not intend to sue their ex-partner and grandmother of the victim, E.S., and does "… not know why she included my separation with my ex-E.S. as it has no bearing on the sentencing" (see: affidavit of W.F. filed August 25, 2022, at para. 3).

[17] W.F. claims that their education exceeds what the writer mentioned in the PSR, referring to various mechanical certificates (for example, hydraulics

technician, small engine repair, mechanics, generator repair, electronics, etc.), attending the University of Waterloo through long distance learning/completing the first year of a BA, attending the Nova Scotia Community College ("NSSC") for an occupational health and safety program and graduating with high marks in 2018 (this provided them with "several hundred short courses and certificates related to that field"), in addition to having attended and graduated from "a school for business" (see: affidavit of W.F. filed August 25, 2022, at para. 12). W.F. did not complete the work term associated with the NSCC program but expressed their intentions in their affidavit to do so in the spring of 2023, if not incarcerated, to pursue a career in that field.

[18] Since the age of 10 years old, W.F. claims to have been doing part-time and full-time jobs prior to leaving school in 1980 (ranging from a technician to a warehouse person to a manager). In 1991, they started their own business and has had four businesses since that time (all in the repair industry) and referred to a having a successful business in Fall River in 2010. "Within a week of the mother of that girl the company hired, she was sending pamphlets all over Fall River calling me a pedophile and literally my company of 4 years closed overnight" (see: affidavit of W.F. filed August 25, 2022, at para. 13). In 2016, W.F. claims to have started doing repairs for a company who sent them on warranty repair jobs for fitness equipment and, in 2018, W.F. expanded into all three Atlantic provinces. Upon getting out of jail in March 2019, W.F. says they lost $160,000 in that 22-month period "and several more $100,000.00 since" (see: affidavit of W.F. filed August 25, 2022, at para. 13).

[19] W.F. is under the impression that they are innocent and will be cleared of all legal commitments. W.F.'s plans are to get their business running again, attempt to gain experience in the field of Occupational Health and Safety and travel to Poland to volunteer with a courier service to get food into Ukraine. W.F. claims to also know two individuals in Ukraine and would like them to join them in Poland; "I keep track of the war and if the war is getting close to them, being in jail will cut me off that entirely. Being isolated under normal circumstances is cruel enough but not knowing if your friends are dead or alive. I cannot imagine the torture that is going to be to me" (see: affidavit of W.F. filed August 25, 2022, at para. 14).

[20] W.F. claims to be appealing the verdict of guilty once they introduce new medical evidence, in addition to appealing the 2018 breach and the 2010 alleged breach to "clear" their name "for once and for all" (see: affidavit of W.F. filed August 25, 2022, at para. 17). They claim that they do not think they should get

any time because: 1) they committed no crime; 2) they have never breached any release conditions from 1999 to present; 3) the alleged Facebook breach was not a breach because the posts in question were not theirs; 4) they have spent 22 months in jail on remand (claiming that 18 of those months were in solitary confinement, 10 days of being "put in the hole with the heat stuck on high," (see: affidavit of W.F. filed August 25, 2022, at conclusion), nine months of forced segregation because they were different, while the remainder of their time was spent on safety because of mental health issues which prevented them from leaving their cell); and 5) they have been on " strict house arrest with no issues" since March of 2019 (see: affidavit of W.F. filed August 25, 2022, at conclusion).

Application of Sentencing Principles

[21] Sentencing is an individualized and discretionary exercise within the applicable confines of the *Criminal Code* provisions pertaining to the subject offences and specifically guided by the purpose, objectives and principles set out by Parliament in section 718 of the *Criminal Code*.

[22] The objectives of sentencing are codified in section 718 of the *Criminal Code*. They include the following objectives: the need to denounce unlawful conduct; to deter the offender and others from committing offences; to separate offenders from society where necessary; to assist in the rehabilitation of offenders; to promote a sense of responsibility and acknowledgement in offenders for the harm they have done; and to provide reparations for harm done.

[23] Section 718.1 directs that the sentence imposed must be proportionate to the gravity of the offence and the degree of responsibility of the offender. The Court must also apply the principle of parity codified in section 718.2(b).

[24] Section 718(d) sets out the objective of "assist[ing] in rehabilitating offenders." Rehabilitation can be seen to achieve the objective of protecting the public as it assists in preventing further offences. An offender's "positive potential for rehabilitation" should be to the benefit of the accused on sentence: *R v. Gouliaeff*, 2012 ONCA 690, at para 12. In certain cases, where there is a realistic possibility of rehabilitation, the Courts may opt not to impose a jail sentence where it would otherwise be appropriate: *R. v. Preston*, 1990 CanLII 576 (BCCA).

[25] In *R. v. Darby*, 2016 ABQB 352, the Court reviewed the principles of sentencing at paras. 49-51 and 53:

49 Section 718 sets out the fundamental purpose of sentencing: to contribute to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions. The sanctions have one or more of the following objectives:

> to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
>
> to deter the offender and other persons from committing offences;
>
> to separate offenders from society, where necessary;
>
> to assist in rehabilitating offenders;
>
> to provide reparations for harm done to victims or to the community; and,
>
> to promote a sense of responsibility in offenders, and acknowledgement
>
> of the harm done to victims and to the community.

50 A proper sentence fits both the offender and the offence; it should vary according to the circumstances of the offence and the circumstances of the offender. In *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500 (S.C.C.), the Supreme Court of Canada stated at para 82:

> ... In the final analysis, the overarching duty of a sentencing judge is to draw upon all the legitimate principles of sentencing to determine a *"just and appropriate" sentence* which reflects the gravity of the offence committed and the moral blameworthiness of the offender.
>
> [Emphasis in original]

…

51 Section 718.1 states that "a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender." The principle of proportionality is central to the sentencing process; it has a long history as a guiding principle in sentencing: *R. v. Nasogaluak*, 2010 SCC 6 (S.C.C.) at para 41. Proportionality is inherently linked to the moral blameworthiness of the offender. Lebel J stated at para 42 of *Nasogaluak*:

> ...the degree of censure required to express society's condemnation of the offence is always limited by the principle that an offender's sentence must be equivalent to his or her moral culpability, and not greater than it. The two perspectives on proportionality thus converge in a sentence that both speaks out against the offence and punishes the offender no more than is necessary.

…

53 Section 718.2 requires the court to consider a number of aggravating and mitigating factors, as well as to consider the sentences imposed on similar offenders for similar offences. Common aggravating and mitigating factors

> include planning and deliberation; association with a criminal organization; weapons; vulnerability of the victim; post-offence conduct; previous good character of the accused; potential for rehabilitation; age of the offender; remorse; and, guilty plea: Clayton C Ruby et al, *Sentencing*, 7th ed, looseleaf, (Markham, Ont: LexisNexis Canada, 2008), ch 5.

Relevant Criminal Code Provision

> Sexual interference
>
> 151 Every person who, for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of a person under the age of 16 years
>
> > (a) is guilty of an indictable offence and is liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year; or
> >
> > (b) is guilty of an offence punishable on summary conviction and is liable to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of 90 days.

[26] On January 20, 2012 (the start of the date range on the Information) the maximum sentence under section 151 of the *Criminal Code* was 10 years.

[27] The Crown argues that a crucial point of the Court's decision in *Friesen* was to "… 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" and that "sentences for these crimes must increase". The Crown submits that Parliament and the Courts must evolve as society evolves to understand the significance of bodily autonomy, personal autonomy, sexual integrity, dignity, etc., by upholding sentencing regimes that recognize the wrongfulness and harmfulness of sexual crimes against children; "the wrongfulness and the harmfulness impact both the gravity of the offence and the degree of responsibility of the offender." This is particularly explained through Parliament's evolution and enactment of the 2015 *Tougher Penalties for Child Predators Act*, SC 2015, c. 23, s. 2, which amended section 151 of the *Criminal Code* to increase the maximum penalty for indictable offences to 14 years.

[28] Referencing *Friesen*, the Crown argues that, when considering the gravity of the offence and recognizing the wrongfulness of sexual offences against children, this must also include "the inherent physical and psychological violence that the physical contact of a sexual nature entails and the exploitative nature of the power imbalance between children and adults". Section 718.01 of the *Criminal Code* was

enacted by Parliament because they, too, have directed Courts to impose more severe sanctions for sexual offences against children. This requires the Court to give primary consideration to the objectives of the principles of denunciation and deterrence when sentencing an offender for the abuse of a person under the age of 18 years old.

[29] Section 718.01 reads as follows:

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

[30] It is the Crown's position that, in regarding the degree of responsibility of the offender, "intentionally applying force of a sexual nature to a child is highly morally blameworthy because the offender is, or ought to be, aware that this action can profoundly harm the child".

[31] Put simply, the Crown reiterates *Friesen* at para. 114 that "… upper single digit and double-digit penitentiary terms should not be unusual or reserved for exceptional circumstances." In other words, "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 … Instead, a maximum sentence should be imposed whenever the circumstances warrant it".

[32] In *Friesen*, the Court did not set specific sentencing ranges but said that mid-single digit penitentiary terms for sexual offences against children should be the "new norm" and that upper-single-digit and double-digit penitentiary terms should not be unusual or reserved for exceptional circumstances.

[33] In *Friesen*, the Court offered the following non-exhaustive list of significant factors Courts can use as guidance in determining a fit sentence for sexual offences against children:

- likelihood to re-offend;
- abuse of a position of trust;
- duration and frequency of the abuse;
- age of the victim, and

- the degree of physical interference.

[34] I will now address the reviewing factors outlined in *Friesen* and apply them to W.F.'s sentencing.

Likelihood to Reoffend

[35] Where the offender has an increased likelihood to reoffend, "the imperative of preventing further harm to children calls for emphasis on the sentencing objective of separating the offender from society" (see: para. 123). The principle of rehabilitation is also imperative; however, "… depending on the offender's risk to reoffend, a lengthy prison sentence with such treatment or programming as is available within a penitentiary may be the best way to achieve both short-term and long-term protection of society" (see: para. 124).

[36] W.F.'s most recent events, in addition to W.F.'s related criminal record, demonstrate a very high risk of reoffending.

[37] The fact that W.F. does not believe they did anything wrong and does not want to participate in any sort of rehabilitative programs or the Sex Offender Assessment increases W.F.'s risk of reoffending.

[38] W.F. maintains their innocence, demonstrating a clear lack of remorse and blaming the victim's family. There is nothing in either the PSR of 2019 or the PSR update of 2022 that demonstrates that W.F. has any prospect of, or any interest in, rehabilitation.

Abuse of Position of Trust or Authority

[39] It is statutorily an aggravating factor under s. 718.2(2)(iii) of the *Criminal Code* for an offender to abuse a position of trust or authority in committing an offence. In *Friesen*, the Court found that there is a spectrum of positions of trust and authority such as family members, other caregivers, doctors, teachers, etc., and that an abuse of position or trust can increase the gravity of the offence and the responsibility of the offender (see: paras. 126-129), "…The abuse of any trust relationship should result in a lengthier sentence than an offender who, all other things being equal, is a stranger to the child victim" (see: paras. 125 and 130).

[40] In *Friesen*, the Court recognized that "the higher the trust relationship along the spectrum, the more harm the child victim will likely suffer from its abuse" (see:

para. 126). In this case, W.F. was already in a position of trust and authority over the victim upon their first meeting because of their relationship with the victim's grandmother. This relationship was further escalated when the victim went to live with W.F. and her grandmother for several months when the victim and her mother were not having a good relationship. W.F. employed grooming tactics to further escalate their position of trust with the victim, such as buying her boots and treats at Tim Horton's. The victim shared secrets with W.F., would hold their hand (when W.F. did not do this with the victim's brothers) and testified that her feelings towards W.F. were "more than a grandfather" because she had feelings of love. W.F. testified at trial that they would buy intimate feminine products for the victim throughout their relationship.

[41] I find W.F. knew about the victim's poor home life with her mother and exploited that opportunity, increasing the victim's vulnerability and choosing to cultivate a relationship with her over the course of several years. Exploiting a child's vulnerability increases the moral blameworthiness of the sexual offence (see: para 129).

[42] It should also be noted that there was a potential for relational harm in this case because of the very nature of the relationship between W.F. and the victim's grandmother. This relational harm could have been not only between the victim and her grandmother but also between the victim and any possible caregiver (see: paras. 60-61).

[43] Finally, because of W.F.'s position of trust and authority, this inhibited the victim from reporting the assaults earlier because it presented significant barriers that discouraged her from reporting (this refers to the victim's initial reluctance to speak with the police and the fact that it was only in a subsequent statement to police that she was able to disclose the assaults). In *Friesen*, the Court acknowledged this by saying, "… Barriers to reporting can be particularly pronounced where the perpetrator of the sexual violence resides with the victim and is a parent or caregiver" and may produce "feelings of fear and shame" that discourage reporting (see: paras. 125-126).

[44] 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*, the focus in such cases should be on "the extent to which [the] relationship [of trust] was violated" (para. 41). (see: *Friesen*, at para. 126).

[45] W.F. was already in a position of trust because of their relationship with the victim's grandmother. This is important because the victim had stayed with her grandmother and W.F. for a period of time. W.F. groomed the victim to further escalate the position of trust.

[46] W.F. knew about the victim's vulnerable home life and bad relationship with her mother and chose to build/create a relationship of trust with the victim over several years.

Duration and Frequency

[47] The prolonging of sexual crimes against children increases the immediate harm the victim experiences and the possibility of long-term emotional and psychological harm which, in turn, increases the gravity of the offence and "the offender's moral blameworthiness because the additional harm to the victim is a reasonably foreseeable consequence of multiple assaults" (see: para 131).

[48] It is aggravating that the sexual touching of the victim's chest and vagina started when she was eight or nine years old, with vaginal penetration occurring at the age of 13 years old because it increases the long-term emotional and psychological harm and because "repeated and prolonged assaults show that the sexually violent conduct is not an isolated act, a factor which increases the offender's degree of responsibility" (see: para. 131).

[49] W.F. began touching the victim's breasts when she was eight to nine years old, continuing until vaginal penetration at 13 years old (a span of four to five years). This occurred on multiple occasions over a period of seven years between 2012-2018.

Age of the Victim

[50] This factor also relates to the gravity of the offence and the degree of responsibility of the offender. "The power imbalance between children and adults is more pronounced for younger children, and younger children must endure the harm of sexual violence for a longer period of time than those who are victimized later in life" (see: paras. 134-135). "Courts must be particularly careful to impose proportionate sentences in cases where the victim is an adolescent. Historically, disproportionately low sentences have been imposed in these cases, particularly in cases involving adolescent girls, even though adolescents may be an age group that is disproportionately victimized by sexual violence" (see: para. 136).

[51] *Friesen* emphasizes that children are "some of the most vulnerable members of our society" and must live with the consequential harm of sexual violence for much longer than other victims or are victimized later in life" (see: para. 1).

[52] In this case, "the victim testified (in adopting her video statement) that she was eight or nine years old when W.F. began touching her "private parts" (her chest area and vagina) and was thirteen years old when W.F. began having sexual intercourse with her and touching her with W.F.'s penis. W.F. was an adult and an adult figure in a house that the victim lived in for a period of time.

Degree of Physical Interference

[53] This is as well an aggravating factor because it "reflects the degree of violation of the victim's bodily integrity"; however, "courts should not establish particular sentencing ranges based solely on the degree of physical interference because the harm to the victim is not dependent on the degree of physical interference" (see: paras. 138 and 140-147).

[54] While all forms of sexual violence against children are serious, vaginal penetration is a high degree of physical interference. It reflects an even higher degree of violation of the victim's bodily autonomy and integrity.

[55] The victim was vaginally penetrated at 13 years old; this is a high degree of physical interference. The victim was also physically touched in the chest and vaginal areas.

Aggravating Factors

[56] The following are aggravating factors in this case: (1) the age of the victim, (2) the offence in question involved an abuse of W.F.'s position of trust and authority over the victim, (3) the frequency and duration of the sexual offence, (4) the degree of physical interference, and (5) W.F.'s prior convictions for related offences.

[57] The first four factors have been elaborated on in discussing the significant factors from Friesen in relation to sentencing. The fifth aggravating factor is as follows:

W.F.'s Prior Convictions for Similar Offences

[58] The Crown's submissions on aggravating factors outline Justice Cacchione's summary of W.F.'s prior convictions in 1999 for five counts of sexual assault (contrary to section 271(1)(a) of the *Criminal Code*) and one count for invitation to sexual touching (contrary to section 152 of the *Criminal Code*). According to the Crown, "W.F.'s prior convictions for similar offences is relevant as an aggravating factor because it goes directly to W.F.'s likelihood to reoffend. […] W.F. first began committing sexual offences against previous victims in 1993 – the offending continued until 1998 when the matter came to light" (see: Crown submissions at para. 43). W.F. is now before the court again, despite intensive treatment from 1998-2000, for sexually assaulting a child on multiple occasions – over a period of 7 years between 2012-2018 – when the child was between the ages of 8 and 14. According to the Crown, W.F. demonstrates the highest risk of reoffending and the need to separate them from society for as long as possible is crucial. During 2000 and January 2012 when W.F.'s reoffending began, W.F. breached their community supervision order (section 161 of the *Criminal Code*) which, in the Crown's position, further emphasizes the need to separate W.F. from society. I agree with the Crown's position. This is an aggravating factor and W.F. is at risk to reoffend.

Mitigating Factors

Victim Participation

[59] *Friesen* put to rest victim participation as a mitigating factor and that a breach of trust or grooming activity should properly be seen as aggravating if it led to the victim's participation at paras. 150-153:

> 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.

[60] W.F. employed grooming tactics on the victim. The victim claimed to have feelings of love towards W.F. because of those actions. This is properly seen as an aggravating factor.

[61] At W.F.'s sentencing in 1999, W.F. raised the issue of their mental health issues and Klinefelter syndrome. The Court in *Friesen* recognized mental health

issues may play an important factor in determining an offender's culpability; however, based on the evidentiary record before me, these issues do not rise to the level of W.F. not being aware of the "profound physical, psychological, and emotional harm that their actions may cause to the child" (see: para. 88). In the 1999 convictions, evidence was called regarding W.F.'s Klinefelter Syndrome as well as their various personality disorders that they have had since the age of 15 or 20 years old; W.F.'s prospects for rehabilitation were significantly emphasized due to their engagement in psychological treatment and played a fundamental role in W.F. being deemed a low risk to reoffend. Based on the facts before me this is no longer the case.

[62] Medical conditions can be mitigating factors in two ways, (1) where they go to a diminished moral culpability and (2) where difficulties in accommodating within the institution would pose a particular hardship on the offender (see: *R v Aquino*, [2002] OJ No 3631; *R v HS*, 2014 ONCA 323, at paras 34-40; *R v Heickert*, 2020 NSPC 9, at paras 69-71; *R v Comeau*, 2017 NSSC 208, at paras 59-60. There is no evidence before the Court which would persuade me to apply as a mitigating factor W.F.'s medical condition.

[63] There are no mitigating factors in this case.

House Arrest Release Condition as a Credit and a Mitigating Factor

[64] The Defense seeks mitigation for strict house arrest conditions and references *R. v. Gibbons*, 2018 NSSC 202.

[65] The Crown references the Nova Scotia Court of Appeal decision in *R. v. Knockwood*, 2009 NSCA 98, to state that there must be some information before the sentencing court that would ultimately describe the particular and substantial hardship that was actually suffered by the offender while on release because of the conditions of that release (see: para. 34). The impact of the particular conditions of release upon the accused must be demonstrated in each case; in *Knockwood*, the accused had served 19 months on various house arrest conditions, only being able to leave for employment purposes (see: paras. 34-35). The Court in that case held that Mr. Knockwood's lawyer's argument fell short from establishing a legitimate substantial hardship because the sentencing judge had to infer from the conditions themselves that the appellant suffered hardship, which then had to be deemed a mitigating factor (see: para. 36). The Court concluded by saying, "… In my opinion, the mere reference to the terms of pre-trial release will not satisfy the onus

to demonstrate actual hardship as a result of those pre-trial conditions. I see no error on the part of the sentencing judge" (see: para. 36).

[66] W.F.'s bail conditions were as least restrictive as possible. W.F. was initially released on nothing more than a curfew. W.F.'s conditions were only restricted more after they breached the terms of their release in 2018. W.F. was released from Burnside at the beginning of the COVID-19 pandemic as part of a large-scale operation by the Public Prosecution Service to reduce the number of individuals in custody. At that time, W.F.'s release conditions were fairly limited with exceptions for medical emergencies, legal matters and five hours of personal time each week. On July 16, 2020, more exceptions were added to W.F.'s house arrest conditions, allowing W.F. to have an additional five hours of personal time each week and to work to attend school/school-related activities. I note the Crown also offered more exceptions to W.F.'s bail restrictions, which W.F. refused to accept. For example, on October 14, 2020, W.F. filed a brief with the Court to change some of W.F.'s conditions, including removing house arrest as a condition, but abandoned the application in Court on November 2, 2020 (the day of the hearing). Regarding house arrest, W.F., in Court, before Justice Boudreau advised that they did not use the exceptions to the conditions because they did not trust the authorities to look at the exceptions to the conditions to their house arrest which could result in their return to Burnside. Therefore, W.F. strictly followed the conditions and did not use the exceptions.

[67] Despite Court decisions holding that Courts can infer the impact and hardships of pre-trial liberty restrictions on a person even in the absence of direct evidence (see: *R v Gibbons*, 2018 NSSC 202, at para 70; *R v SJM*, 2021 NSSC 235, at para 127), I find that it would not be appropriate to infer hardships when W.F. has chosen not to exercise the exceptions to their house arrest. Since July 16, 2020, W.F. has been permitted to: (1) attend school and school-related activities, (2) work, (3) engage in unsupervised personal activities for 10 hours per week, (4) go outside on their property and (5) attend medical appointments.

[68] There has been a myriad of delays and adjournments relating to these proceedings. The length of time that W.F. has spent on house arrest is largely of their own making and there is no evidence before the Court that W.F.'s particular conditions of release have had an impact or caused W.F. hardship that was not self-imposed.

Proportionality

[69] Section 718.1 reads: "A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender."

[70] It requires that a sentence not be more severe than what is just and appropriate given the seriousness of the offence and the moral blameworthiness of W.F. The Supreme Court of Canada in *R. v. Lacasse*, 2015 SCC 64, described it as:

> [12] … In other words, the severity of a sentence depends not only on the seriousness of the crime's consequences, but also on the moral blameworthiness of the offender. Determining a proportionate sentence is a delicate task. As I mentioned above, sentences that are too lenient and sentences that are too harsh can undermine public confidence in the administration of justice.

[71] The Supreme Court of Canada in *Lacasse* further explained the principles of proportionality and parity at paras. 53-54:

> 53 This inquiry must be focused on the fundamental principle of proportionality stated in s. 718.1 of the *Criminal Code*, which provides that a sentence must be "proportionate to the gravity of the offence and the degree of responsibility of the offender". A sentence will therefore be demonstrably unfit if it constitutes an unreasonable departure from this principle. Proportionality is determined both on an individual basis, that is, in relation to the accused him or herself and to the offence committed by the accused, and by comparison with sentences imposed for similar offences committed in similar circumstances. Individualization and parity of sentences must be reconciled for a sentence to be proportionate: s. 718.2(a) and (b) of the *Criminal Code*.
>
> 54 The determination of whether a sentence is fit also requires that the sentencing objectives set out in s. 718 of the *Criminal Code* and the other sentencing principles set out in s. 718.2 be taken into account. Once again, however, it is up to the trial judge to properly weigh these various principles and objectives, whose relative importance will necessarily vary with the nature of the crime and the circumstances in which it was committed. The principle of parity of sentences, on which the Court of Appeal relied, is secondary to the fundamental principle of proportionality. This Court explained this as follows in *M. (C.A.)*:
>
> > It has been repeatedly stressed that there is no such thing as a uniform sentence for a particular crime.... Sentencing 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. [para. 92]

Parity And The "Jump Principle"

[72] Judges must calibrate the demands of proportionality by referencing sentences imposed in other cases. Regarding W.F.'s convictions in 1999 (five counts of sexual assault and one count of invitation to sexual touching on victims between the ages of 8 and 15 years old), a sentence of 10 years would, *prima facie*, violate the "Jump Principle" as well as the principle of parity in common law. Nonetheless, the Crown argues in their submissions three reasons why this current sentence is different than W.F.'s past conviction:

1. In 1999, W.F. plead guilty and accepted responsibility for their actions, sparing the victims involved of having to testify (one of whom who had already attempted suicide and the other who has contemplated it because of W.F.'s actions).
2. In 1999, certain mitigating factors existed that are not present or before the Court for these new proceedings; W.F. had no prior criminal record, W.F. proactively sought treatment after being charged with the offences and after all of the evidence, including expert evidence, W.F. was deemed a low risk to reoffend and it was found that incarceration would have been detrimental to W.F. because of their ongoing treatment at the time. W.F. is no longer considered a low risk to reoffend because W.F. was already given the benefit of a rehabilitative sentence and reoffended with the current sentence.
3. Lastly, since W.F. was last sentenced, society's definition and understanding of the wrongfulness of sexual violence against children has significantly evolved. Parliament has increased the maximum penalties relating to the crimes of sexual interference, sexual touching and sexual exploitation (summarily from 6 months to 18 months in 2005 and by indictment from 10 years to 14 years).

[73] I find that W.F.'s personal circumstances have changed significantly since 1999. There is no evidence before me that W.F. has any rehabilitative prospects or has made any rehabilitative efforts since their arrest on this offence. I find the "Jump Principle" has no applicability.

[74] In *R. v SJM*, 2021 NSSC 235, Justice Rosinski analyzed the principle of parity post-*Friesen*. In *SJM*, the offender began sexually touching the victim when she was 12 years old, a few weeks after she moved in with her mother and SJM (the victim's stepfather). The sexual touching escalated over the course of

approximately one year to digital vaginal penetration, making the victim masturbate SJM, penetrative vaginal intercourse, and anal penetration with objects. The assaults continued until the victim was 17 years old when she left SJM's home and disclosed the sexual assaults to the police. SJM had also taken nude photographs of the victim, provided her with drugs and alcohol, and discouraged her from having a boyfriend her own age. The victim believed at times that she was in love with SJM and was afraid to report SJM and ruin her and her mother's lives in Canada; she was embarrassed and blamed herself.

[75] Many of the facts of this case and W.F.'s are similar (although the offender in *SJM* only had a prior criminal record for breaching a house arrest condition). The Crown and defense in *SJM* argued similar sentences to the case at bar (nine years suggested by the Crown and three and a half years by the Defense). The final sentence imposed by Justice Rosinski was nine years.

[76] Justice Rosinski said the following which are applicable to the case at bar:

> [78] *Friesen* resoundingly tells us that it is an error in principle to not adequately appreciate and factor into such sentencings the gravity (wrongfulness) and harmfulness of sexual offences to children. However, rarely is this factor so clearly addressed and articulated in pre-*Friesen* jurisprudence.
>
> [79] *Friesen* nevertheless tells us to be sceptical of earlier sentencing cases if they do not expressly reference a deepened understanding of the gravity and harmfulness of sexual offences against children. Generally, the *Friesen* court expressly directs us to adopt their conclusion- that *in the past courts generally have failed to give these factors sufficient weight, resulting in sentences that were not sufficiently deterrent.*
>
> …
>
> [82] The *Friesen* case is distinguishable from the case at Bar - nevertheless the tenor of its words ring loudly in the trial courts of Canada.
>
> …
>
> [85] …
>
> The Crown cited:
>
> > *R v Hughes*, NSSC 2020 376 - between 2002 and 2013 Mr. Hughes befriended DB, eventually acting as is caregiver during holidays/summer vacations until he was 12 years old. Hughes was in his early to mid 60s and was convicted of having had repeated sexual contact with DB including oral sex and anal sex. He had stale dated convictions: for gross

> indecency in 1983 - 90 days imprisonment in two years probation where the victim was a 10-year-old girl; and keeping a common body house in 1994 for which he received six months imprisonment and one-year probation involving several young women who he pimped out. DB was under the age of 16 when the abuse occurred Mr. Hughes was in a position of trust. DB was especially vulnerable. The Crown sought 6 to 7 years imprisonment; the Defence sought 3 years probation. The Crown cited only Friesen, and particularly paragraph 114. The court sentenced him to 6 years in custody.
>
> *R v McNutt*, 2020 NSSC 219 - on a plea of guilty this teacher spared his student victims from participating in what would likely have been a very long and complex trial. The sentencing judge stated: "the facts of this case are a catalogue of depraved predation. Michael McNutt was a sexual predator and pedophile." He had a prior conviction in 1994 for sexually assaulting a 15-year-old boy in 1987. What is noteworthy is that for offences where Mr. McNutt performed oral sex and/or engaged in masturbation with a male student on multiple occasions the sentencing judge held 6-7 years was an appropriate sentence. Ultimately, he was sentenced to a 15-year sentence in total. Although distinguishable, again we see for a single complainant and abuse of trust and authority, multiple sexual assaults on a teenaged victim in the range of 6 to 7 years sentence.
>
> *R v Galatas*, 2020 MBCA 108 - convictions were entered from multiple sexual offences against two vulnerable female children were 13 and 14 years of age. The 62-year-old paid the victims that have sex with him in his home and to fellate him in his vehicle. He also directed them to have sex with another man in his home and filmed and took photographs of his sexual offences. He was sentenced to 16.5 years custody. The Court of Appeal was not satisfied that the sentence imposed was demonstrably unfit as he argued it was in totality "harsh and crushing" - there are some differences and some similarities, but again the tenor is that for a single vulnerable complainant, with child pornography an 8-year sentence is in the range.

[87] Moreover, there is pre-*Friesen* guidance from our Court of Appeal in *R v EMW*, 2011 NSCA 87, and from the Supreme Court of Canada in *Friesen*.

[88] In *EMW*, Justice Fichaud stated:

> 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 JBC*, 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".
>
> …
>
> (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.

[89] Let me then briefly restate range of sentence comments from *Friesen*:

> 113 Much like the offence of impaired driving causing death, sexual offences against children can cover a wide variety of circumstances (see *Lacasse*, at para. 66). Appellate guidance should make clear that sentencing judges can respond to this reality by imposing sentences that reflect increases in the gravity of the offence and the degree of responsibility of the offender. In *M(CA)*, for instance, this Court upheld the sentencing judge's determination that the objectives of deterrence, denunciation, and the protection of society required a 25-year global sentence for an offender who committed several sexual offences against multiple children (see para. 94). Likewise, in *M(L)*, this Court upheld a 15-year global sentence for multiple sexual offences against a single child victim as necessary to advance these same sentencing objectives (see para. 30). We would also commend the decisions of the Ontario Court of Appeal in *D(D)*, *Woodward*, and *S. (J.)* as examples of appropriate appellate guidance, with the caution that the 2015 statutory amendments were not yet in effect at the time of the offences in these cases.

> 114 *D(D), Woodward, S. (J.),* and this Court's own decisions in *M(CA)* and *M(L).* 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 *M. (L.).* In addition, as this Court recognized in *M. (L.),* 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).

[90] As the *Friesen* court prominently cited the Ontario Court of Appeal decision in *R v DD* 2002 [OJ] No. 1061 (CA), it is particularly instructive to reference Justice Moldaver's reasons therein:

> 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 (CA),* [1996] 1 SCR 500 (SCC) in which the Supreme Court restored the 25-year sentence imposed at trial and *R v W (LK)* (1999), 138 CCC (3d) 449 (ONCA) in which this court upheld a sentence of 18 and a half years imposed at trial.)
>
> [Bold emphasis removed from original]

[77] I find that, even in some pre-*Friesen* cases that are involving the sexual abuse of children (without intercourse), an upper-digit sentence is required. In

W.F.'s situation, the crimes began occurring when the victim was eight to nine years old, with intercourse happening at 13.

[78] W.F.'s moral blameworthiness is high. W.F. expressed no remorse for their actions.

Range of Sentence

[79] The appropriate sentencing range for this offence is wide, and heavily fact specific. I have reviewed the Crown and defence authorities (submitted from W.F.'s current and previous counsel). The Crown relies heavily on *Friesen* which I have comprehensively discussed already. I note that Defense counsel referred to *R v M(CA)*, [1996] 1 SCR 500, to state that "sentencing 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. As well, sentences for a particular offence should be expected to vary to some degree across various communities and regions in this country, as the 'just and appropriate mix of accepted sentencing goals will depend on the needs and current conditions of and in the particular community where the crime occurred" (see: para. 2). They did not rely on other quotes or information provided for in this case.

[80] In *R. v. Suter*, 2018 SCC 34, defense referenced this case at the beginning of their submissions to state that "the principle of proportionality is the fundamental principle of sentencing". No other information is provided about the case.

[81] The facts of this case involve a two-year old, Geo Mounsef, who was killed when the appellant, Richard Suter, drove his vehicle onto a restaurant patio where Geo and his family were eating. Mr. Suter was initially charged with three offences relating to this accident, impaired driving causing death and impaired driving causing bodily harm, but the impaired driving charges were dropped when Mr. Suter pled guilty to one count of refusing to provide a breathalyzer sample, pursuant to section 255(3.2) of the *Criminal Code*. Mr. Suter received legal advice from his lawyer instructing him not to provide a breathalyzer sample at the police station which is why he did not do so. As such, the Court in this case conducted its own analysis to determine a fit sentence because both, the Court of Appeal and the sentencing judge committed errors in principle in arriving at their sentence. This case, like *M(CA)*, seems to have been used in a general sense to discuss proportionality in sentencing.

[82] The defences previous counsel references *R v Nasogaluak*, 2010 SCC 6, at the beginning of their arguments to state that "… In effect, this principle [proportionality] balances the principle of restraint and deterrence by holding offenders accountable while not punishing them more than is necessary". However, no other information is provided for this case as the facts are considerably different than the case at bar. However, in my analysis in determining W.F.'s sentence I have reviewed paras. 39-45 of the decision.

[83] In *R v CAL*, 2021 NSSC 365, the defence argues that the circumstances of this case are similar to the case at bar because the accused was not willing to participate in the forensic Sexual Offender Assessment. The offender was sentenced to three years plus six months custody.

[84] In *CAL*, EH and her mother went to visit CAL to share the excitement of her birthday gift with his family. For the first incident that was remembered, EH testified that when they arrived at CAL's house, he grabbed her buttocks when he was walking behind them. A year later, the second incident occurred in the spare bedroom of CAL's home where he put his hand on her shoulder, forced himself on her and put his hand down her pants. The victim was only able to remember those two incidents but recalled that the sexual violence occurred frequently; when he would kiss her, it would be on the lips. He did not penetrate her but would touch her all over with his hands, including down her pants and on her groin (touching her vagina inside her clothing). This happened at his metal fabrication shop two or three times; however, there would be no kissing or forcing himself onto her there. In 2016, at 12 years old, EH and her family went camping at Kejimkujik National Park with CAL and his family. At one point, EH and CAL ended up in his trailer alone where he ended up doing the same thing (putting his hands down her pants, forcing himself onto her). CAL testified that EH was like part of his family; she spent a lot of time providing afterschool childcare to his firstborn, despite being quite young herself. Even in the face of repeated protests from CAL's wife that the two were too close, the sexual violence continued, and he justified the continued closeness with the fact that EH was just a kid and was like one of their own.

[85] A significant difference from this case and the case at bar relies in recidivism. W.F. committed sexual crimes against young children in 1999 which CAL did not. In this case, there was also no penetration as it was cunnilingus, fellatio or reciprocal contact of sexual organs, unlike for the case at bar where there was vaginal penetration in addition to sexual touching. The level of trust comparing these two cases is not the same; in the case at bar, N.S went to visit her

grandmother and W.F. when she was having a bad relationship with her mother. W.F. took advantage of that. It was not simply just a family friend like in the case of CAL. The offending behaviour in W.F.'s case also lasted over six years, whereas in CAL, it was just over a period of less than one month.

[86] The Defence referenced *R v McCrimmon*, 2022 YKCA 1. This case is about possession of child pornography pursuant to section 163.1(4) of the *Criminal Code*. The facts of this case are irrelevant to the case at bar as it is dealing with an entirely different situation involving the sexual abuse of children. There are also several mitigating factors in this case that are not present in the case at bar (e.g., the accused showing remorse and having prospects for rehabilitation).

[87] In *R v SFW*, 2021 NSSC 312, the defense argues that there was a higher degree of manipulation by the accused such as showing the victim pornography and telling her what he wanted her to do to him. Aside from that, the defense claims that the facts of this case are similar such as the fact that in both cases, the accused were standing as parents to their victims. In this case the accused received a six-year sentence (the Crown suggested six years whereas the defense suggested four years and seven months).

[88] In *R v APL*, 2021 NSSC 238, the defense referenced this case to argue that it is more egregious than the current case before the court because it took place over a period of nine years. The defendant had a previous record for drug trafficking (not for related offences) and was sentenced to six years' imprisonment.

[89] The victim in this case had a genetic disorder that caused her both intellectual and physical challenges. The accused took advantage of that for his own sexual needs. The sexual relations began when the victim was 12 years old and the accused was in a position of trust and authority (sexual touching and sexual assault) when they occurred. The accused's propensity to reoffend was not nearly the same as the case at Bar. In fact, it is similar to W.F.'s propensity to reoffend back in 1999 (involvement in education, aspirations to go to college/find employment in field of study, etc.).

[90] In *R v DC*, 2020 NLSC 78, DC was found guilty of having committed several sexual offences (sexual assault, invitation to sexual touching, touching for a sexual purpose, and touching for a sexual purpose between Jan. 1, 2007 and Dec. 31, 2012) against his step-daughter, RW. The conduct ranged from rubbing her vagina at the age of five or six years old to full intercourse when she was 11 years old. The imprisonment totalled seven years.

[91] W.F.'s previous criminal history related to sexual offences against children is worse than most offenders in most cases.

[92] Lastly, in *R v BJR*, 2021 NSSC 26, the victim ("S.R.") was sexually assaulted by BJR ("Mr. R") on August 9, 2017. On the day of the offence the victim was 16 years old; Mr. R was a father figure to SR since she was a small child. Mr. R followed SR into the trailer at a campground and eventually took off her pants and began performing cunnilingus on her. She was crying and he eventually stopped and broke down in a chair asking himself what he had just done. The Crown sought two to four years' imprisonment; the defense initially recommended an 18–22-month conditional sentence order but instead noted that it was seeking a three-year period of probation with conditions to make it comparable to a conditional sentence order with house arrest. Mr. R. accepted responsibility and expressed remorse but did not want to partake in the Sexual Offender Assessment nor rehabilitative counselling and still consume alcohol even though it contributed to the event. Nonetheless, Mr. R wrote an apology letter, entered a guilty plea, reported himself to the Department of Community Services, had no prior record and was gainfully employed earning a good income. Mr. R was sentenced to three years' imprisonment.

[93] These cases demonstrate that a 3.5-year sentence as suggested by the defense is certainly not enough for the case at bar, particularly for the nature and duration of the offence, the age of the victim and W.F.'s continued denial of their actions.

Restraint and Totality

[94] Section 718.2 requires that I consider the principles of restraint and totality. The principle of restraint is that the least intrusive form of punishment appropriate should be imposed in the circumstances consistent with the harm done to victims or the community. The principle of totality comes into play where there is a sentence for multiple offences. The principle requires the Court to craft a global sentence of all offences that is not excessive. Totality is not applicable because W.F. is only being sentenced on one offence. I have considered both principles and find the total sentence to be given is fit and proper.

Delayed Eligibility for Parole

[95] The Crown seeks an order pursuant to section 743.6(1) of the *Criminal Code* requiring that W.F. serve one-half of their respective sentence before being

released on full parole. The decision on whether to delay parole is twofold; first, the appropriate punishment with no consideration towards parole eligibility must be determined and second, the Court prioritizes the principles of denunciation and deterrence in determining whether delaying parole eligibility is required. The process was laid out by the Supreme Court of Canada in *R. v. Zinck*, (2003), 171 C.C.C. (3d) 1, at para. 33:

> ... [C]ourts must perform a double weighing exercise. First, they must evaluate the facts of the case, in light of the factors set out in s. 718 of the Code, in order to impose an appropriate sentence. Then, they must review the same facts primarily in the perspective of the requirements of deterrence and denunciation, which are given priority at this stage, under s. 743.6(2). The decision to delay parole remains out of the ordinary, but may and should be taken if, after the proper weighing of all factors, it appears to be required in order to impose a form of punishment which is completely appropriate in the circumstances of the case. This decision may be made, for example, if, after due consideration of all the relevant facts, principles and factors at the first stage, it appears at the second stage that the length of the jail term would not satisfy the imperatives of denunciation and deterrence. This two-stage process, however, does not require a special and distinct hearing. It should be viewed as one sentencing process, where issues of procedural fairness will have to be carefully considered.

[96] The Crown argues that the statutory prerequisites for the order were met (section 151 of the *Criminal Code* is a designated offence as set out in Schedule I to the *Corrections and Conditional Release Act*; and the offence was prosecuted by way of indictment).

[97] Ultimately, the Crown submits that, with the need to emphasize denunciation and deterrence in this particular case for W.F., these objectives could not be satisfied without delaying their eligibility for full parole.

[98] I have reviewed the authorities regarding parole ineligibility (*R. v. Zinck*; *R. v. Smith*, 2008 SKCA 20, *R. v. LeBlanc*, 2011 NSCA 60, *R. v. Farrow*, 2018 NSSC 242) and find that this is not one of those cases where I should exercise my discretion. The maximum sentence at the time for the offence was 10 years. I have taken guidance from the Supreme Court of Canada in *Friesen* in determining what is a fit and appropriate sentence for W.F.. I find a sentence of eight years in custody to be a fit and proper sentence. Notwithstanding the severity of the offence, I find that the ordinary period of parole ineligibility in the *Corrections and Conditional Release Act* adequately serves the sentencing objective of

denunciation and deterrence and refuse to exercise my discretion under s. 743.6 of the *Criminal Code*.

Conclusion

[99] In 1999, W.F. was given the benefit of rehabilitation and received a lower-end sentence for five counts of sexual assault towards children. W.F continues to deny their most recent actions despite being found guilty. This behaviour is dangerous and demonstrates that the treatment/therapy that W.F. was provided in the past was not effective and shows the need for separating W.F. from society. Primary consideration must be given to denunciation and deterrence for sexual crimes committed against children; too many young, innocent victims have already been impacted by W.F.'s actions.

[100] W.F.'s lack of remorse and acceptance of the offence today (notably, W.F. blames the victim and others for W.F.'s actions, W.F. has a very limited appreciation for the harm caused, W.F. minimizes the offence/what happened, W.F. is no longer a low risk to reoffend because of it and has a complete lack of willingness to go to rehabilitation or partake in the Sexual Offender Assessment).

[101] Psychological and emotional damage caused by sexual abuse is a well known and accepted consequence of the physical abuse associated with it. Psychological trauma often lasts much longer than the physical injuries associated with the abuse. The trauma you have caused the victim in this case is immeasurable and the effects of your actions will be everlasting. Your actions are indefensible and will not be tolerated.

[102] Based on the relevant authorities, the aggravating and mitigating factors in this case and the common law principles of sentencing, a global sentence of eight years' (which is 2,922 days) imprisonment should be imposed.

[103] Sentencing is a highly-individualized process. In this case, W.F. has a very serious and related criminal record (which most offenders in other cases cited by the Crown and Defense do not have). This individual, like the defense stated in their brief, has been found guilty of horrible offences and "must pay a steep price". The case law is clear that an upper-single-digit sentence is warranted and reasonable in the circumstances for these types of crimes.

[104] I order the following ancillary orders, respectively:

- A Weapons Prohibition Order (Section 109 of the *Criminal Code*);
- A DNA Order (Section 487.051 of the *Criminal Code*);
- A SOIRA Order (for 20 years), (Section 490.012 of the *Criminal Code*);
- A Prohibition Order (for 20 years), (Section 161 of the *Criminal Code*); and
- A Non-Communication Order (Section 743.21 of the *Criminal Code*).

Credit for Time Served in Pre-Trial Custody

[105] W.F. spent from September 20, 2022, to July 7, 2023, on remand in Burnside which is 291 days. This is added to the previous 579 days of remand time that W.F. had accumulated which brings his total remand credit to 870 days. The Crown does not oppose a credit of 1.5:1. With 1.5:1 enhanced credit, that would be 1,305 days on remand. I agree with applying the enhanced credit under section 719(3) of the *Criminal Code*.

[106] W.F. will be imprisoned on a go-forward basis for four years and 156 days.

Bodurtha, J.