SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. SPP*, 2024 NSSC 42

Date: 20240214
Docket: CRH No. 520301
Registry: Halifax

Between:

His Majesty the King

Appellant

v.

SPP

Respondent

DECISION ON SUMMARY CONVICTION APPEAL

Restriction on Publication of any information that could identify the victim or witnesses: s. 486.4, s. 486.5 C.C.

Judge:	The Honourable Justice Peter P. Rosinski
Heard:	January 5, 2024, in Halifax, Nova Scotia
Written Decision:	February 14, 2024
Counsel:	Cory Roberts, for the Appellant Ronald Pizzo and George Franklin for the Respondent

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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.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

Order restricting publication — victims and witnesses

486.5 (1) Unless an order is made under section 486.4, on application of the prosecutor in respect of a victim or a witness, or on application of a victim or a witness, a judge or justice may make an order directing that any information that could identify the victim or witness shall not be published in any document or broadcast or transmitted in any way if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice.

Justice system participants

(2) On application of the prosecutor in respect of a justice system participant who is involved in proceedings in respect of an offence referred to in subsection (2.1), or on application of such a justice system participant, a judge or justice may make an order directing that any information that could identify the justice system participant shall not be published in any document or broadcast or transmitted in any way if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice.

Offences

(2.1) The offences for the purposes of subsection (2) are

> **(a)** an offence under section 423.1, 467.11, 467.111, 467.12 or 467.13, or a serious offence committed for the benefit of, at the direction of, or in association with, a criminal organization;
>
> **(b)** a terrorism offence;
>
> **(c)** an offence under subsection 16(1) or (2), 17(1), 19(1), 20(1) or 22(1) of the *Security of Information Act*; or
>
> **(d)** an offence under subsection 21(1) or section 23 of the *Security of Information Act* that is committed in relation to an offence referred to in paragraph (c).

Limitation

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

Application and notice

(4) An applicant for an order shall

> **(a)** apply in writing to the presiding judge or justice or, if the judge or justice has not been determined, to a judge of a superior court of criminal jurisdiction in the judicial district where the proceedings will take place; and
>
> **(b)** provide notice of the application to the prosecutor, the accused and any other person affected by the order that the judge or justice specifies.

Grounds

(5) An applicant for an order shall set out the grounds on which the applicant relies to establish that the order is necessary for the proper administration of justice.

Hearing may be held

(6) The judge or justice may hold a hearing to determine whether an order should be made, and the hearing may be in private.

Factors to be considered

(7) In determining whether to make an order, the judge or justice shall consider

(a) the right to a fair and public hearing;

(b) whether there is a real and substantial risk that the victim, witness or justice system participant would suffer harm if their identity were disclosed;

(c) whether the victim, witness or justice system participant needs the order for their security or to protect them from intimidation or retaliation;

(d) society's interest in encouraging the reporting of offences and the participation of victims, witnesses and justice system participants in the criminal justice process;

(e) whether effective alternatives are available to protect the identity of the victim, witness or justice system participant;

(f) the salutary and deleterious effects of the proposed order;

(g) the impact of the proposed order on the freedom of expression of those affected by it; and

(h) any other factor that the judge or justice considers relevant.

Conditions

(8) An order may be subject to any conditions that the judge or justice thinks fit.

Publication prohibited

(9) Unless the judge or justice refuses to make an order, no person shall publish in any document or broadcast or transmit in any way

(a) the contents of an application;

(b) any evidence taken, information given or submissions made at a hearing under subsection (6); or

(c) any other information that could identify the person to whom the application relates as a victim, witness or justice system participant in the proceedings.

By the Court:

1 - Introduction

[1] This Court is sitting as a Summary Conviction Appeal Court in relation to a sentence appeal per ss. 813 and 822(6) of the *Criminal Code* ["*CC*"].

[2] SPP pled guilty to two summary conviction offences that took place between January 31 and March 7, 2020:

1. s. 271(1)(b) CC – "sexual assault"; and
2. s. 172.1(1)(b) CC – "child luring", "by means of telecommunication, communicates with … a person [who is or an accused believes is under the age of 16 years] for the purpose of facilitating the commission of an offence under section … 271 … with respect to that person …". [1]

[3] Judge Sarson summarized the facts:

> The victim was 14 years old and a Grade 9 student at the local Junior High School. SPP was her teacher, or one of her teachers. He had also taught her when she was in Grade 8. Between January 31 and March 7, 2020, SPP kissed the victim on the mouth on two separate occasions, with each of the kisses lasting approximately two seconds, leading to the charge under section 271. He also sent her a number of texts, ["over roughly a five week period." - AB Vol. 1 of 3 Documents, p. 62] leading to the charge under section 172.1(1)(b). The texts in question were read into the record by the Crown Prosecutor ….
>
> SPP was arrested on March 17, 2020, after friends of the victim brought the text messages to the attention of the school administration …. SPP advised that he knew the victim was suffering from significant mental health issues, the victim had been cutting herself for a while, and that her family life was terrible. He reported being aware that her cutting was moving further down her arm and was becoming deeper. As a result of being aware of this information, SPP gave the victim his personal cell

[1] That is, (as referenced in s. 35 of the *Interpretation Act*, RSC 1985, c. I-21: "*telecommunications*", means the emission, transmission or reception of signs, signals, writing, images, sounds or intelligence of any nature by any wire, cable, radio, optical or other electromagnetic system, or by any similar technical system; (*télécommunication*)"). In this case, SPP communicated with D by way of mobile phone, which is a "telecommunication".

> phone number and the two began texting which eventually turned to sending texts of a sexual nature.
> Although SPP advised that he did not know who initiated the sexually explicit text messages, he believed that it was probably him. 2

[4] He was sentenced by Judge Sarson to an eight-month conditional sentence order ["CSO"] (strict house arrest) and three years' probation.

[5] The Crown appeals that sentence.

[6] The outcome of this appeal largely turns on whether:

1. The preconditions for imposing a CSO were present (i.e. specifically the SPP's service of the sentence of imprisonment in the community "would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in section 718 to 718.2";
2. Judge Sarson erred in finding the SPP's sentencing on December 9, 2022, had not taken place "within a reasonable time" after his guilty plea on April 28, 2021, and that that was a breach of s. 11(b) of the Charter of Rights for which Judge Sarson granted SPP a "sentence reduction"; and
3. Judge Sarson imposed a sentence that was manifestly unfit in all the circumstances?

[7] I dismiss the appeal.

2 - The standards of review

[8] Every appeal involves standards of review.

[9] In the case of sentencing appeals, the following statements from the respective Courts address this issue:

I. ***R. v. Marchand***, 2023 SCC 26, per Martin J.:

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[2] Screenshots of the text messages can be found at AB Vol. 3 of 3 Evidence, p. 1008.

[50] According to *Lacasse,* sentencing judges are afforded broad discretionary powers in crafting a fit sentence (para. 39). Appellate intervention is justified only if a sentence is demonstrably unfit or if the judge committed an error in principle that impacted the sentence imposed (para. 44). The sentencing judge committed errors in principle that impacted the assigned sentence of five months' imprisonment that she ordered be served concurrently to the sexual interference sentence. Specifically, she erred by (1) minimizing the harm caused to the victim by failing to recognize the grooming that did occur; (2) misconstruing the offender's actions; and (3) assigning a concurrent sentence for the luring offence. These errors in principle warranted appellate intervention that the majority of the Court of Appeal below failed to undertake. I would thus substitute the 5-month sentence imposed by the sentencing judge with the 12-month sentence sought by the Crown.

[My underlining added]

II. ***R. v. Lacasse***, 2015 SCC 64, per Wagner, J. (as he then was):

[1] Sentencing remains one of the most delicate stages of the criminal justice process in Canada. Although this task is governed by ss. 718 et seq. of the Criminal Code, R.S.C. 1985, c. C 46, and although the objectives set out in those sections guide the courts and are clearly defined, it nonetheless involves, by definition, the exercise of a broad discretion by the courts in balancing all the relevant factors in order to meet the objectives being pursued in sentencing.

[2] For this purpose, the courts have developed tools over the years to ensure that similar sentences are imposed on similar offenders for similar offences committed in similar circumstances - the principle of parity of sentences - and that sentences are proportionate by guiding the exercise of that discretion, and to prevent any substantial and marked disparities in the sentences imposed on offenders for similar crimes committed in similar circumstances. For example, in Quebec and other provinces, the courts have adopted a system of sentencing ranges and categories designed to achieve these objectives.

…

[10] This appeal affords this Court, first of all, an occasion to clarify the standard on the basis of which an appellate court may intervene and vary a sentence imposed by a trial judge. The Court must determine, inter alia, the extent to which a deviation from a sentencing range that is otherwise established and adhered to may justify appellate intervention.

[11] This Court has on many occasions noted the importance of giving wide latitude to sentencing judges. …The fact that a judge deviates from the proper sentencing range does not in itself justify appellate intervention. Ultimately, except where a sentencing judge makes an error of law or an error in principle that has an impact on the sentence, an appellate court may not vary the sentence unless it is demonstrably unfit.

[12] In such cases, proportionality is the cardinal principle that must guide appellate courts in considering the fitness of a sentence imposed on an offender. The more serious the crime and its consequences, or the greater the offender's degree of responsibility, the heavier the sentence will be. 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….

…

[41] In *Proulx*, this Court, per Lamer C.J., discussed these same principles, which continue to be relevant:

> In recent years, this Court has repeatedly stated that the sentence imposed by a trial court is entitled to considerable deference from appellate courts: see *Shropshire*, *supra*, at paras. 46-50; *M. (C.A.)*, *supra*, at paras. 89-94; *McDonnell*, *supra*, at paras. 15-17 (majority); *R. v. W. (G.)*, 1999 CanLII 668 (SCC), [1999] 3 S.C.R. 597, at paras. 18-19. In *M. (C.A.)*, at para. 90, I wrote:
>
> > Put simply, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit. Parliament explicitly vested sentencing judges with a discretion to determine the appropriate degree and kind of punishment under the *Criminal Code*. [First emphasis added; second emphasis in original.]
>
> . . .
>
> Although an appellate court might entertain a different opinion as to what objectives should be pursued and the best way to do so, that difference will generally not constitute an error of law justifying interference. Further, minor errors in the sequence of application of s. 742.1 may not warrant intervention by appellate courts. Again, I stress that appellate courts should not second guess sentencing judges unless the sentence imposed is demonstrably unfit. [paras. 123 and 125]

…

[44] **In my view, an error in principle, the failure to consider a relevant factor or the erroneous consideration of an aggravating or mitigating factor will justify appellate intervention only where it appears from the trial judge's decision that such an error had an impact on the sentence.**

…

[49] For the same reasons, **an appellate court may not intervene simply because it would have weighed the relevant factors differently**. In *Nasogaluak*,

LeBel J. referred to *R. v. McKnight* (1999), 1999 CanLII 3717 (ON CA), 135 C.C.C. (3d) 41 (Ont. C.A.), at para. 35, in this regard:

> To suggest that a trial judge commits an error in principle because in an appellate court's opinion the trial judge gave too much weight to one relevant factor or not enough weight to another is to abandon deference altogether. The weighing of relevant factors, the balancing process is what the exercise of discretion is all about. To maintain deference to the trial judge's exercise of discretion, the weighing or balancing of relevant factors must be assessed against the reasonableness standard of review. Only if by emphasizing one factor or by not giving enough weight to another, the trial judge exercises his or her discretion unreasonably should an appellate court interfere with the sentence on the ground the trial judge erred in principle. [para. 46]
>
> …

[51] **Furthermore, the choice of sentencing range or of a category within a range falls within the trial judge's discretion and cannot in itself constitute a reviewable error**. An appellate court may not therefore intervene on the ground that it would have put the sentence in a different range or category. It may intervene only if the sentence the trial judge imposed is demonstrably unfit.

[52] **It is possible for a sentence to be demonstrably unfit even if the judge has made no error in imposing it**.…

[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 principle of parity of sentences, on which the Court of Appeal relied, is secondary to the fundamental principle of proportionality**. …

[My bolding and underlining added]

III. R. v. RBW, 2023 NSCA 58, Justice Derrick stated for herself and Justice Fichaud (Farrar JA dissenting):3

> [48] The appellant sought leave to appeal and advanced two grounds of appeal:
>
> (1) The sentencing judge erred in principle in ordering a conditional sentence of imprisonment.
>
> (2) The sentencing judge erred in principle by ordering a manifestly unfit sentence.
>
> …
>
> **Standard of Review**
>
> [50] Sentencing decisions are accorded a high degree of deference in appellate review. **Intervention is warranted only if (1) the sentencing judge committed an error in principle that impacted the sentence or, (2) the sentence is demonstrably unfit. Errors in principle include "an error of law, a failure to consider a relevant factor, or erroneous consideration of an aggravating or mitigating factor**."
>
> [51] **In assessing the issue of demonstrable unfitness, appellate review must focus on whether the sentence is proportionate to the gravity of the offence and the degree of the offender's responsibility**. Proportionality is the fundamental principle of sentencing.
>
> [52] On appeal, "wide latitude" is to be given to sentencing judges who are,
>
> [11] … in the best position to determine, having regard to the circumstances, a just and appropriate sentence that is consistent with the objectives and principles set out in the *Criminal Code* in this regard. The fact that a judge deviates from the proper sentencing range does not in itself justify appellate intervention. Ultimately, except where a sentencing judge makes an error of law or an error in principle that has an impact on the sentence, an appellate court may not vary the sentence unless it is demonstrably unfit.
>
> [12] In such cases, proportionality is the cardinal principle that must guide appellate courts in considering the fitness of a sentence imposed on an offender. The more serious the crime and its consequences, or the greater the offender's degree of responsibility, the heavier the sentence will be. In other words, the severity of a sentence depends not only on the seriousness

[3] An application for leave to appeal by the Crown, is pending determination before the Supreme Court of Canada.

> 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, both sentences that are too lenient and sentences that are too harsh can undermine public confidence in the administration of justice. Moreover, if appellate courts intervene without deference to vary sentences that they consider too lenient or too harsh, their interventions could undermine the credibility of the system and the authority of trial courts…
>
> [My bolding added]

[10] With these standards of review in mind, I will examine the merits of the Crown's appeal.

3 - The background to the appeal

i - General

[11] On April 28, 2021, SPP pled guilty to having between January 31- March 7, 2020, committed two sexual assaults (s. 271(1)(b) *CC* - i.e. specifically each being a kiss on the lips for two seconds) [4] and repeated use of a telecommunication device to facilitate the commission of the sexual assaults, also known as "child luring" (s. 172.1(1)(b) *CC*) in relation to D, a female person under the age of 16 years (14 years old), who had been the year previous, and still was, his student in school.

[12] He sought a CSO and lengthy probation as an appropriate sentence.

[13] His counsel stated to Judge Sarson during the arguments in relation to whether there was an unreasonable delay between the time of plea and sentencing (s. 11(b)) and whether the six-month mandatory minimum sentences for the s. 172.1(1)(b) and 271(b) *CC* offences was unconstitutional:

> We would also say you could look to the Nova Scotia Court of Appeal case of *Hood* [2018 NSCA 18] as well for an example of a teacher… All of that together, we say, considering the circumstances of the offence, the circumstances of the offender, and the case law that we provided, demonstrates that a fit and appropriate sentence, in this case, is the suspended sentence, conditional sentence, or possibly a 90 days intermittent sentence, all of which would be grossly disproportionate to the 6 month sentence [the mandatory minimum sentence]. (p. 287 AB Vol. 2 of 3 Evidence)

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[4] See AB Vol. 2 of 3 Evidence , pp. 339 and 589.

[then at the sentencing submission itself Mr. Pizzo stated]:

> … during the Section 12 [*Charter*] hearing … you determined that a fit and proper sentence would be somewhere in the range between 90 days in prison and … six months … with probation. And you also left the possibility open that this may be a sentence that could be served in the community. We're going to focus our submissions on whether this sentence should be served in the community or not, primarily … (AB Vol. 2 of 3 Evidence, p. 674) 5

[14] Judge Sarson sentenced SPP to an eight-month (strict house arrest) CSO to be followed by three years' probation.

ii - The Crown's position 6

[15] **At trial**, the Crown's sentencing position was characterized by Judge Sarson at AB Vol. 2 of 3 Evidence, pp. 724-725 as:

- he should impose "the longest period of incarceration that I deem to be a just and appropriate sentence";

- and that a CSO was unavailable because SPP had **not** shown that a CSO "would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2" per s.742.1 *CC*.

[16] The Crown having elected to proceed summarily, the maximum sentence for each of the offences was imprisonment for <u>two years less a day</u>. The Crown's position in its written brief of September 2021 read:

> For reasons outlined below, the Crown asserts that the Court may dispose this matter summarily by declining to engage in the question of s. 12 of the Charter, on

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[5] I note that the suggested intermittent sentence recommendation was later withdrawn from consideration because SPP "is taking care of his elderly father-in-law in Ontario. So, you know, ability to travel intermittently back and forth from Ontario to Nova Scotia is a problem. … Now I do expect that after *Friesen* there are going to be upward… that the sentences will be moving upward? I surely do… But if a CSO, given all the factors meet the requirements of denunciation and deterrence, given this particular offender, and given all the other factors you consider, then if you want to make an upward departure, maybe it's for a longer CSO. However, it wasn't a 'must'. It's a 'may' [that is, the specific language used by the Supreme Court of Canada in *Friesen* at para. 107: (p. 692)]." … "Upward departure from prior precedents and sentencing ranges <u>may</u> well be required to impose a proportionate sentence" (AB Vol. 2 of 3 Evidence, at p. 697-8).

[6] The Crown Attorney on appeal was not the Crown Attorney at trial.

> the basis that **an appropriate sentence for this accused includes a penalty of 18 - 24 months of incarceration for each offence, to be served consecutively, followed by a three year period of probation** [relying on *Friesen* 2020 SCC 9]. (AB Vol. 3 of 3 – Evidence, p. 913)
>
> [My bolding added]

[17] SPP sought a CSO.

[18] On December 9, 2022, Judge Sarson sentenced him to an eight-month (4 months + 4 months consecutive) CSO with strict "house arrest", to be followed by 3 years of probation.

[19] SPP has finished serving his eight-month CSO on or about August 8, 2023, and is presently on probation.

[20] **In its June 29, 2023, brief**, the Crown asserts that Judge Sarson erred (as summarized in my words):

1. in law by concluding that the sentence-process delay breached SPP's s. 11(b) *Charter* rights, and for which reason Judge Sarson reduced what would otherwise have been the appropriate sentence;
2. in principle and in law (i.e. he was not legally permitted to impose a CSO); and
3. in imposing a sentence that is demonstrably unfit.

[21] The Crown then argued that this Court should re-sentence SPP to a period of imprisonment for between 12-15 months.

[22] **At this hearing**, the Crown argued that given the passage of time, it is now appropriate to credit SPP on a 1:1 basis for having served the eight-month CSO under strict house arrest, as if he had served eight months in jail, which should be deducted from the proposed sentence of re-incarceration (imprisonment for between 12-15 months). This would require SPP to further serve four months of imprisonment in a jail.

[23] However, the Crown is no longer requesting that he be re-incarcerated. It requests this Court to stay any sentence of imprisonment this Court would otherwise consider appropriate to substitute at this time. 7

[24] Doing so would result in this appeal process having produced no meaningful result.

[25] From SPP's perspective, he is equally successful regardless of whether the Court dismisses the appeal or allows the appeal and re-sentences him to an increased sentence, that he will not be ordered to serve.

iii - Why this Court should deal with the merits of the (sentence) Appeal

[26] Let me make some preliminary comments.

[27] Courts have limited resources.

[28] Providing timely access to justice for all litigants is of great importance.

[29] Courts have therefore developed an aversion to "deciding" hypothetical or moot legal issues - because they will have no real effect in the specific case presented.

[30] Nevertheless, somewhat reluctantly, I will address the merits of the Appeal.

[31] Exceptionally I do so, because I believe it is in the interests of justice.

[32] In my opinion, Judge Sarson's s. 11(b) decision has triggered the application of the horizontal *stare decisis* principle - *R. v. Sullivan*, 2022 SCC 19.

[33] Thus, his decision may well be interpreted as presumptively binding on all other Provincial Court Judges in Nova Scotia.

[34] I addressed this principle recently *in Diggs v. Nova Scotia (Attorney General)*, 2024 NSSC 11:

> [115] My colleague Justice Patrick Murray recently set out a helpful summary thereof in *Roach v. Nordic Insurance Co. of Canada*, 2023 NSSC 342:

[7] Per *R. v. Livingstone*, 2020 NSCA 5. I also note that this Court does not have the authority to remit the determination of a proper sentence back to the trial court – *R. v. Montesano* (2019) 373 CCC (3d) 399 (Ont. CA) - leave to appeal to SCC refused.

[36] The rule of "horizontal *stare decisis*" was recently addressed in R. v. Sullivan, 2022 SCC 19 (see paras 73-77). Kasirer J. said, for the Court:

> [73] **Horizontal *stare decisis* applies to decisions of the same level of court. The framework that guides the application of horizontal stare decisis for superior courts at first instance is found in [*Re Hansard Spruce Mills*, 1954 CanLII 253 (BC SC), [1954] 4 DLR 590 (BCSC)]**, described by Wilson J. as follows (at p. 592):
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> . . . I will only go against a judgment of another Judge of this Court if:
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> (a) Subsequent decisions have affected the validity of the impugned judgment;
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> (b) it is demonstrated that some binding authority in case law, or some relevant statute was not considered;
>
> (c) the judgment was unconsidered, a *nisi prius* judgment given in circumstances familiar to all trial Judges, where the exigencies of the trial require an immediate decision without opportunity to fully consult authority.
>
> ....
>
> [75] **The principle of judicial comity - that judges treat fellow judges' decisions with courtesy and consideration - as well as the rule of law principles supporting stare decisis mean that prior decisions should be followed unless the *Spruce Mills* criteria are met**. Correctly stated and applied, the *Spruce Mills* criteria strike the appropriate balance between the competing demands of certainty, correctness and the even-handed development of the law. Trial courts should only depart from binding decisions issued by a court of coordinate jurisdiction in three narrow circumstances:
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> 1. The rationale of an earlier decision has been undermined by subsequent appellate decisions;
>
> 2. The earlier decision was reached per incuriam ("through carelessness" or "by inadvertence"); or
>
> 3. The earlier decision was not fully considered, e.g. taken in exigent circumstances.

> [37] As the defendant points out, the court made clear that exceptions to stare decisis are narrow: "**mere personal disagreement between two judges is not a sufficient basis to depart from binding precedent**" (para 74).
>
> [38] As to decisions taken per incuriam, the court said:
>
> > [77] ... [A] judge can depart from a decision where it was reached without considering a relevant statute or binding authority. In other words, the decision was made per incuriam, or by inadvertence, a circumstance generally understood to be "rare"... The standard to find a decision per incuriam is well-known: the court failed to consider some authority such that, had it done so, it would have come to a different decision because the inadvertence is shown to have struck at the essence of the decision. It cannot merely be an instance in which an authority was not mentioned in the reasons; it must be shown that the missing authority affected the judgment...
> >
> > [My bolding added]

[35] In my position as a Summary Conviction Appeal Court, the principle of vertical *stare decisis* gives this Court's pronouncements on matters of law precedence over, and cause them to be binding upon, those relevant decisions that might otherwise be taken by Judges of the Provincial Court.

[36] If I do not consider the merits of this appeal, Judge Sarson's adoption of the reasons in *Charley* and the five-month presumptive maximum period of sentence-process delay for purposes of s. 11(b) of the *Charter* analysis, may well be considered as binding by his fellow Provincial Court Judges (and Justices of the Peace in their role as triers of fact) in Nova Scotia.

4 - Did Judge Sarson err regarding his conclusions: that SPP was not a danger to the community while serving a CSO and in relation to the claimed mitigating factors he relied upon in sentencing SPP?

[37] A Conditional Sentence Order ["CSO"] is generally an available sentencing option for each of the s. 172.1(1)(b) and 271(1)(b) offences provided the Court is satisfied of the pre-conditions for a CSO set out in s 742.1:

> **if** a person is convicted of an offence and the court imposes a sentence of imprisonment of less than two years, the court may …order that the offender serve the sentence in the community… **if**…

> the court is satisfied that the service of the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2;
>
> the offence is not an offence punishable by a minimum term of imprisonment [not applicable - nor is the remainder of the section]

[38] Each of these summary conviction offences carries a maximum sentence of imprisonment of "not more than two years less a day".

i - Judge Sarson accepted SPP was not a danger to the community.
(AB Vol. 1 of 3 Documents, pp. 68, 69, 72(13), 127 and 131)

[39] When I apply the deferential standard of review to his conclusion, I cannot say he erred in that respect.

[40] *Inter alia*, he specifically accepted Dr. Abramowitz's opinion that:

> Rather than being primarily driven by sexual preference, it appears more likely that SPP's behaviour, during the index offences, was motivated by socio-emotional factors… It is likely that SPP's strong identification with his job and being the helper of disadvantaged students put him at risk for the index offences… It is likely that the absence of physical/emotional/sexual connections with his wife, in addition to his suboptimal level of general social and emotional support, accentuated SPP's risk of becoming involved with someone who he found it easy to relate to. He shared a chaotic and disadvantaged background with the victim.… In part due to the negative events and messages from his upbringing, it appears that he had difficulty experiencing a strong sense of mastery or competency in primarily adult worlds. This was likely compounded by the stress of his job whereby he was assigned to teach a program that was reportedly still being developed, i.e., without many instructions available… It is likely that this perfect storm of factors placed SPP at a high risk of boundary and rule violating behaviour. Of note, he was consistently described by collateral sources as a strong rule follower and very boundaried in his interpersonal relationships. As a result, his current behaviour was universally characterized as 'very out of character for him' by collateral sources.
>
> [My underlining added]

ii - Judge Sarson's conclusions in relation to mitigating factors generally follow.

[41] He stated:

> The Crown also submitted that SPP's degree of responsibility or level of moral culpability is high and that cases where offenders have been found to have a

> reduced degree of responsibility or level of moral culpability are limited to those cases where the offender has had significant mental health issues or issues related to cognitive development.
>
> I do not agree with this proposition. An offender's moral culpability may be reduced by a number of factors, including mental health issues; cognitive development issues; intoxication in some, not all, cases; cultural factors such as systemic racism and overt racism; and an offender's background, for instance being a victim of abuse.
>
> In the present case, SPP was the victim of physical emotional and sexual abuse as a child. In addition, Dr. Abramowitz outlined a number of other factors that created what she termed a 'perfect storm', including a strong identification with his job and being a helper of disadvantaged students, the partial breakdown of his relationship with his wife, and a more generalized lack of support social support and connection, his chaotic and disadvantaged background, and the stress of his job.
>
> Although I find SPP's degree of responsibility to be fairly high in light of his knowledge of the victim's particular vulnerability, as he was aware of her circumstances at home and her mental health issues, I do find that it is somewhat reduced by his own background and personal circumstances at the time of the offences, which included dealing with the death of one of his brothers from liver cancer in January 2020 which contributed to SPP's level of distress at that time. (AB Vol. 1 of 3 Documents, pp. 113(21)-115(6))
>
> [My underlining added]

[42] I agree with the Crown that generally an offender must have suffered at the relevant times from significant mental health or cognitive development issues before their degree of responsibility or moral culpability can be considered diminished thereby so as to be a material mitigating factor on sentencing - see most recently Justice Derrick's reasons in *R. v. Wrice*, 2024 NSCA 3, at paras. 72-76, wherein the Court had to sentence afresh the offender; and her reasons in *R. v. R.B.W.*, 2023 NSCA 58, at paras. 7, 16, 17, 22, 26, and 112.

[43] I note that Chief Justice MacDonald and Justice Beveridge stated in their joint reasons in *R. v. Hood*, 2018 NSCA 18, under the title "Was the sentence demonstrably unfit?": 8

[8] Ms. Hood suffered from a bi-polar mood disorder at the relevant times she committed her offences against two students.

> [180] Judge Atwood imposed a 15-month conditional sentence with strict conditions to be followed by two years probation.… These were serious offences that must be denounced and deterred. At the same time, Ms. Hood suffered from mental illness which does not pardon her but was a legitimate factor for the judge to consider on sentencing. She has already paid dearly; for example, by losing her teaching career along with the inevitable public humiliation. Her sentence is punitive. It adequately addresses and deterrence and denunciation. We would defer to it and allow it to stand.
>
> [My underlining added]

[44] The *Hood* decision had been cited in *Friesen*, and in *R. v. Marchand*, 2023 SCC 26, at para. 67, and elsewhere. The Supreme Court's following commentary in *Marchand* is also generally instructive 9:

> [70] **These errors mean this Court is now tasked with setting a fit and proportionate sentence for Mr. Bertrand Marchand**. I agree with the Crown that given the particular circumstances of the luring in this case, **there was no justification for departing from the existing sentencing range of 12 to 24 months for luring cases proceeding by indictment** (*Morrison*, at para. 177, citing *Jarvis*, at para. 31; *A.F.*, at para. 75).
>
> (1) Significant Factors to Determine a Fit Sentence
>
> [71] **In addition to determining the gravity of the offence, determining the moral blameworthiness of the offender is key to setting a proportionate sentence. This requires identifying both mitigating and aggravating factors**. Here, in order to examine Mr. Bertrand Marchand's blameworthiness and set a

[9] Firstly I note that, **in Québec**, there is an "**existing sentencing range of 12 to 24 months for luring cases proceeding by indictment"**. In the present case, the maximum summary conviction penalty is two years less a day imprisonment. The initial **Crown position** after the guilty pleas to these two summary conviction offences was set out in its **September 2021 brief** (AB Vol. 3 of 3 Evidence, p. 911): "For the reasons outlined below… an appropriate sentence for this accused includes a penalty of **18 to 24 months of incarceration for each offence, to be served consecutively, followed by a 3-year period of probation** [relying on *Friesen*, 2020 SCC 9]". In its **June 29, 2023, Appeal brief** the Crown argued that the Court should re-sentence SPP to a period of imprisonment for between **12 and 15 months in total, plus probation**. I noted from paragraph 70 in *Marchand*, 2023 SCC 26, that Justice Martin references **Ontario** Court of Appeal decisions in ***Jarvis*** (**indictable child luring sentencing range 12 – 24 months** per Rosenberg JA) **and** (indirectly by referencing its own *Morrison* decision) in ***Woodward*** (indictable child luring sentencing ranges suggested to require increases to possibly arrange of 3 to 5 years in a federal institution per Moldaver JA). One could conclude that, having not expressly referenced *Woodward* in its *Marchand* decision, the Supreme Court of Canada was content with the **12-24 months** sentencing range for **indictable** offences in Ontario and Québec. I reiterate that the Crown agreed to accept guilty pleas to the summary conviction offences herein. Furthermore, **in *Marchand***, the trial judge sentenced him to 5 months in custody for child luring concurrent to the 10-month sentence for sexual interference. The Québec Court of Appeal dismissed the appeal. **The Supreme Court of Canada re-sentenced him afresh and substituted 12 months in custody for the child luring** to be served consecutively to his 10-month sexual interference sentence.

proportionate sentence, **I provide a non-exhaustive list of aggravating and mitigating factors that have particular relevance in the context of luring**.

(a) ***Mitigating Factors***

[72] Sentencing judges must consider the mitigating factors that arise on the facts of the particular case before them. **Mitigating factors that commonly appear in luring cases include whether the offender pleaded guilty … whether the offender has expressed genuine remorse or gained insight into the offence … and whether the offender has undertaken rehabilitative steps such as counselling or treatment. ... Here, in her analysis of the sentence for the sexual interference count, the sentencing judge considered the pre-sentence report and rightly accounted for Mr. Bertrand Marchand's guilty plea, lack of prior convictions, honesty and cooperation throughout the sentencing process, factors which were also relevant to the luring offence**.

[73] **The personal circumstances of the offender can also have a mitigating effect on blameworthiness (*Friesen*, at paras. 91-92). In the context of determining the appropriate sentence overall, the sentencing judge in this case accounted for Mr. Bertrand Marchand's age at the time of the events, his stable family life, and the fact that he had maintained stable employment for around three years. Mr. Bertrand Marchand overcame a substance use disorder during adolescence. At the time, this caused him health problems and panic attacks (sentencing reasons, at para. 22). An offender might have a mental disability or substance use disorder that imposes serious cognitive limitations, such that their moral culpability is reduced (*Friesen*, at para. 91; see, e.g., *Hood*, at para. 180**; … However, this factor is not as mitigating in Mr. Bertrand Marchand's circumstances as his substance use did not overlap with the material time period (unlike *Sinclair*, at para. 67; *Wolff*, at para. 65).

…

[116] **For the purposes of the constitutionality analysis for the one year mandatory minimum sentence as outlined in s. 172.1(2)(a), the first scenario** is as follows:

- The representative offender is a first-year high school teacher in her late 20s with no criminal record. The offender has been diagnosed with bipolar disorder. One evening, she texts her 15-year-old student to inquire about a school assignment. Feeling manic, she directs the conversation from casual to sexual. The two meet that same evening in a private location where they both participate in sexual touching. The offender does not engage inappropriately with the student on any further occasions. The offender pleads guilty and expresses remorse on sentencing. See *Hood*, at para. 150.

…

(1) A Fit Sentence for Luring in the First Reasonably Foreseeable Scenario

[124] **In *Hood*, when the Nova Scotia Court of Appeal considered a scenario similar to that of the first scenario proffered here, it concluded that the hypothetical crime would likely attract a suspended sentence with probation or, *at most*, a brief period of incarceration (para. 154). Instead, the court found that a global fit sentence for the representative offender would be a suspended sentence with a term of probation. However, *Hood* was decided before this Court's decision in *Friesen*. The fit sentence assigned by the Court of Appeal in *Hood* is not reflective of the directive from Friesen** that sexual offences against children are violent crimes that "wrongfully exploit children's vulnerability" and as such "[s]entences for these crimes must increase" (para. 5). Interestingly, in *Friesen*, this Court cited *Hood* as an example of an offender whose serious cognitive limitations would likely reduce her moral culpability at sentencing (para. 91).

[125] **In the unique circumstances of this hypothetical scenario, the inherent wrongfulness and severity of the offence must be balanced against the offender's mental illness, remorse, and prospects of rehabilitation. A fit sentence for the luring offence committed by the representative offender in the first scenario is a 30-day intermittent sentence**.

[126] The representative offender is a high school teacher in her late 20s who committed a serious breach of her professional duties and inappropriately directed a conversation with her 15 year old student towards sexual matters with the intention of facilitating the secondary offence under s. 151 of the *Criminal Code*. Although this teacher would presumably be relatively junior as compared to her colleagues, she holds a position of trust and authority in relation to her student per s. 718.2(a)(iii). A breach of trust is "likely to increase the harm to the victim and thus the gravity of the offence" (*Friesen*, at para. 126). The severity of such a breach is not to be taken lightly: teachers are entrusted to educate and serve as role models for children, not to sexualize them for their own purposes. In this case in particular, the representative offender exploited her position of authority in the commission of the offence, including by using her relationship to the victim to gain access by texting him under the guise of discussing homework. This element increases her moral blameworthiness and serves as an aggravating factor. As well, the wide age gap between the offender and the victim is further aggravating: as the offender was in her late 20s, there is at least a 10 year age difference.

[127] At the same time, it is important to acknowledge that while the representative offender's conduct was serious, it likely falls at the lower end of the range of gravity in all the circumstances. All offences of this type have the potential to cause substantial harm to victims. However, it remains significant that this

offender's actions were spontaneous and of short duration, rather than malicious and calculated. Unlike in many other child luring cases that are typically associated with prolonged contact, and thereby far greater harm, in this case there is no evidence of grooming or long-term planning. While these factors are not mitigating, they do provide insight into the overall gravity of the offence and culpability of the offender, which is comparatively lower than in other cases. It is well established that spontaneous or spur of the moment crimes should be punished less severely than planned or premeditated ones (see, e.g., *R. v. Laberge* (1995), 1995 ABCA 196 (CanLII), 165 A.R. 375 (C.A.), at para. 18; *R. v. Murphy*, 2014 ABCA 409, 593 A.R. 60, at para. 42; *R. v. Vienneau*, 2015 ONCA 898, at para. 12 (CanLII)). Furthermore, the representative offender entered a guilty plea, expressed remorse on sentencing and has no prior criminal record - all of which *are* significant mitigating factors.

[128] **Finally, in assessing the offender's moral culpability, it is significant that the representative offender in the first scenario was diagnosed with bipolar disorder and her symptoms were similar to the actual offender described in *Hood***. At trial, Ms. Hood's criminal responsibility was an issue of real controversy (*R. v. Hood*, 2016 NSPC 19, 371 N.S.R. (2d) 324; see also the reasons for sentence in *R. v. Hood*, 2016 NSPC 78). Although the trial judge did find her to be criminally responsible, he accepted that Ms. Hood experienced bipolar disorder type I. **As a result, Ms. Hood's "mania rendered her profoundly disinhibited and prone to risk taking, elevated by a sense of invincibility, and impaired by defective insight and inhibition"** ((*Hood* (sentencing reasons), at para. 55 (CanLII)). **The sentencing judge in Hood found that her symptoms had "a nexus with her crimes"** (para. 55). **Similarly, in the instant case the representative offender's bipolar diagnosis, though it serves as no justification or excuse for her behaviour, attenuates her degree of responsibility and acts as a mitigating factor on sentencing** (*R. v. Ayorech*, 2012 ABCA 82, 522 A.R. 306, at paras. 10 13; *R. v. Tremblay*, 2006 ABCA 252, 401 A.R. 9, at para. 7; *R. v. Belcourt*, 2010 ABCA 319, 490 A.R. 224, at para. 8; *R. v. Resler*, 2011 ABCA 167, 505 A.R. 330, at para. 14). **Where a mental illness existed at the time of the offence and contributed to the offender's behaviour, sentencing judges should consider prioritizing rehabilitation and treatment through community intervention (***R. v. Lundrigan*, 2012 NLCA 43, 324 Nfld. & P.E.I.R. 270, at paras. 20-21; *R. v. Ellis*, 2013 ONCA 739, 303 C.C.C. (3d) 228, at para. 117). This is especially the case given that offenders with mental illnesses are often distinctly negatively affected by imprisonment (see *Ruby*, at §§5.325 and 5.332).

[129] **Even so, while rehabilitation must be prioritized for this offender, a non-custodial sentence is not appropriate given the seriousness of the offence. In the result, I find a 30 day intermittent sentence is a fit sentence for the representative offender at bar**. Such a sentence recognizes the inherent seriousness and potential harms associated with the offence and appropriately

> denounces her conduct, while also being mindful of her diminished moral blameworthiness and the mitigating factors at play.
>
> [My bolding added]

[45] During his s. 12 *Charter* analysis, Judge Sarson stated, while speaking of an appropriate sentence range regarding SPP's case:

> I conclude that, in ensuring that I impose a sentence that is proportionate to the gravity of the offences and the degree of responsibility of the offender, the significant aggravating factors of breach of trust and the age of the victim, as well as primary consideration being given to the principles of denunciation and deterrence, and the significant psychological harm caused to the victim by the actions of SPP, are balanced by the circumstances of the offences and the mitigating factors of SPP's guilty pleas and, to a lesser extent, his loss of employment, his background and personal excerpts that is, his lack of a prior criminal record and the breach of his right under section 11 (b) to be sentenced within a reasonable period of time. (AB Vol. 1 of 3 Documents, p. 93)
>
> [My underlining added]

[46] In my opinion, SPP's loss of employment in these circumstances could properly be considered as a "collateral consequence" (which is akin to a mitigating factor on sentence), but only to an appropriate degree.

[47] As the joint reasons in *Hood*, 2018 NSCA 18, at para. 150, stated:

> … She has already paid dearly; for example, by losing her teaching career along with the inevitable public humiliation.

[48] Later that same year, in *R. v. Suter*, 2018 SCC 34, Justice Moldaver stated:

> [3] That said, the circumstances of this case are unique. As we shall see, the fatal accident was caused by a non-impaired driving error, and Mr. Suter refused to provide the police with a breath sample because he received bad legal advice. The lawyer he called from the police station expressly told him not to provide a breath sample, and Mr. Suter demurred. Added to this, sometime after the accident, **Mr. Suter was attacked by a group of vigilantes who used a set of pruning shears to cut off his thumb**. His wife was also attacked in a separate incident.
>
> [4] Sentencing is a highly individualized process. A delicate balancing of the various sentencing principles and objectives is called for, in line with the overriding principle that a "sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender" (s. 718.1 of the *Criminal Code*). **Accordingly, there will be cases where the particular circumstances of the**

offence and/or the offender call for a sentence that falls outside of the normal sentencing range. This is one such case.

…

[45] **The sentencing judge found, correctly in my view, that the vigilante violence experienced by Mr. Suter could be considered - to a limited extent - when crafting an appropriate sentence**. With respect, the Court of Appeal erred in concluding otherwise. This error also contributed to the 26-month custodial sentence it imposed.

[46] … **Tailoring sentences to the circumstances of the offence and the offender may require the sentencing judge to look at collateral consequences. Examining collateral consequences enables a sentencing judge to craft a proportionate sentence in a given case by taking into account all the relevant circumstances related to the offence and the offender**.

[47] **There is no rigid formula for taking collateral consequences into account. They may flow from the length of sentence, or from the conviction itself**:… In his text *The Law of Sentencing* (2001), Professor Allan Manson notes that they may also flow from the very act of committing the offence:

> As a result of the commission of an offence, the offender may suffer physical, emotional, social, or financial consequences. **While not punishment in the true sense of pains or burdens imposed by the state after a finding of guilt, they are often considered in mitigation**. [Emphasis added; p. 136.]

I agree with Professor Manson's observation, much as it constitutes an incremental extension of this Court's characterization of collateral consequences in Pham. In my view, a collateral consequence includes any consequence arising from the commission of an offence, the conviction for an offence, or the sentence imposed for an offence, that impacts the offender.

[48] Though collateral consequences are not necessarily "aggravating" or "mitigating" factors under s. 718.2(a) of the *Criminal Code* - as they do not relate to the gravity of the offence or the level of responsibility of the offender - they nevertheless speak to the "personal circumstances of the offender" (*Pham*, at para. 11). The relevance of collateral consequences stems, in part, from the application of the sentencing principles of individualization and parity: *ibid*.; s. 718.2(b) of the *Criminal Code*.[2] **The question is not whether collateral consequences diminish the offender's moral blameworthiness or render the offence itself less serious, but whether the effect of those consequences means that a particular sentence would have a more significant impact on the offender because of his or her circumstances**. Like offenders should be treated alike, and collateral consequences

> may mean that an offender is no longer "like" the others, rendering a given sentence unfit.
>
> [49] **Collateral consequences do not need to be foreseeable, nor must they flow naturally from the conviction, sentence, or commission of the offence. In fact, "[w]here the consequence is so directly linked to the nature of an offence as to be almost inevitable, its role as a mitigating factor is greatly diminished**" (*Manson*, at p. 137). Nevertheless, **in order to be considered at sentencing, collateral consequences must relate to the offence and the circumstances of the offender**.
>
> [My bolding added]

[49] My overall conclusion is that Judge Sarson was not in error when he made the aforementioned references to factors that could mitigate/reduce SPP's sentence.

5 - Did Judge Sarson err: in his decision regarding whether there was a breach of s. 11(b) of the *Charter* and consequently effecting a reduction of SPP's sentence? [10]

i - Section 11(b) *Charter* - The applicable standard of review and conclusions

[50] My colleague Justice Brothers captured well the state of the jurisprudence in her reasons from *Robb v. R.*, 2023 NSSC 313 (paras. 8-11), although I bear in mind this was in relation to the period of time between laying of the charge and the end of trial evidence per *Jordan*, as opposed to a sentence-process delay.

[51] She stated in summary: [11]

> [11] The issues to be determined on this appeal therefore attract two different standards of review:
>
> 1. The characterization, attribution and/or deduction of delay should be examined through the lens of the standard of deference; and,

[10] The Crown's position was that the sentencing judge "misidentified and overemphasized mitigating and personal factors and imposed a CSO in the absence of exceptional circumstances" – Appellants factum filed June 29, 2023.

[11] Her summary of the applicable principles was endorsed by Justice Jamie Campbell in *R. v. Cox*, 2023 NSSC 383. I have also carefully considered Justice Derrick's reasons for the Court in *R. v. Pearce*, 2021 NSCA 37, particularly at paras. 53-63.

2. The determination of whether the total delay was unreasonable should be examined through the lens of the standard of correctness.

ii - Judge Sarson erred, but not in a material manner

[52] Judge Sarson erred by relying on the reasoning and result in *R. v. Charley*, 2019 ONCA 726; however, on a proper analysis, Judge Sarson's conclusion remains valid: the delay between SPP's guilty pleas and his sentencing date was a violation which exceeded the "within a reasonable time" standard per s. 11(b) of the *Charter*. 12

[53] The Crown appeals claiming that Judge Sarson erred in finding that the time it took to sentence [SPP] constituted a breach of s. 11(b) of the *Canadian Charter of Rights and Freedoms* between the date when SPP pleaded guilty (**April 28, 2021)** and the date his sentence was imposed (**December 9, 2022**), and therefore erred when he reduced the sentence as a remedy.

[54] That total time interval was 19 months.

[55] Let me briefly set out the factual background.

[56] Judge Rickola Brinton was considered seized with the matter after she accepted the guilty pleas on April 28, 2021 and dealt with pre-sentencing matters on September 29, 2021, which were adjourned to December 3, 2021.

[57] Counsel were first advised, on November 25, 2021, that Judge Brinton was off on leave indefinitely.

[58] It was not until April 22, 2022, that Chief Judge Williams advised the parties that a new Judge would have to be appointed to continue the case - the matter was put over to July 13, 2022, and decisions on preliminary issues (i.e. arguments that the offences' mandatory minimum sentences violated s. 12 of the *Charter*; and excessive delay violated s. 11(b) of the *Charter*) and sentence submissions were anticipated for September 6, and possibly also on October 26, 2022.

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[12] The Pre-Sentence Report and Psychological/Risk Assessment Report, and Victim Impact Statements were prepared and available in advance of the September 29, 2021, sentencing date. The 9.5 months of delays ultimately appear to have arisen from delays in designating a replacement Judge pursuant to section 669.2 *CC*, which was the responsibility of Chief Judge Pamela Williams.

[59] Pursuant to s. 669.2 *CC*, Judge Sarson only took over this case on July 18, 2022.

[60] According to Judge Sarson, **SPP argued** that of the **19 months overall delay** "… even deducting delay caused by or attributable to the defence, the total delay is between **14 and 15 and a half months**"; whereas **the Crown argued** the "**net delay** … **is 178 days** …" [6 months] and the Judge "… should conclude the 178-day delay does not violate SPP's 11(b) rights". (AB Vol. 1 of 3 Documents, pp.13-15)

[61] Judge Sarson concluded there was **9.5 months of net delay**. When I apply the deferential standard of review to his conclusion, I cannot say that he erred in that respect.

[62] He adopted the reasoning of Justice Doherty in *R. v. Charley*, 2019 ONCA 726, which specifically concludes that: whether the sentencing was completed "within a reasonable time" as required by s. 11(b) of the *Charter*, should be measured from date of guilty plea/finding of guilt to the sentencing date; (para. 58); and that in Ontario, a five-month presumptive (reasonableness of delay) ceiling was appropriate, absent exceptional circumstances (paras. 85-87). 13

[63] Judge Sarson placed the onus on the Crown to justify delays that exceeded the 5-month ceiling. (AB Vol. 1 of 3 Documents, p. 20)

[64] He then examined **the total period of delay between April 28, 2021, and December 9, 2022**, with a view to characterizing periods of delay as "institutional", Crown delay, Defence delay, or "exceptional circumstances" delay. (AB Vol. 1 of 3 Documents, p. 21)

[65] The Record reflects that on April 28, 2021, at the time of his pleas of guilty, SPP sought both a Pre-Sentence Report ["PSR"] and a Forensic Sexual Behaviour Assessment. (AB Vol. 2 of 3 Evidence, p. 177(11) and p. 179(12))

[66] He had already been living in Ontario for some time and remained there on April 28, 2021. He intended to continue to live in Ontario at least until the date of his sentencing.

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[13] I note that thereafter in *R. v. Hartling*, 2020 ONCA 243, (usual remedy for breach of ceiling for sentencing delay is mitigation of sentence not a stay), and *R. v. Adu-Bekoe*, 2021 ONCA 136, the Court remained consistent in its approach.

[67] The parties agreed that there was Defence waiver of delay on September 29, 2021, but disagreed for how long that waiver was effective (see Mr. Pink's words, AB Vol. 2 of 3 Evidence, p. 187(10) and later at p. 190(4)) - did SPP waive delay: to October 25, 2021 when the Court was informed that Judge Brinton was on leave and the parties expected the December 3 sentencing date would have to be adjourned; or, to November 25, 2021,on which date the sentencing actually was adjourned because of the unavailability of Judge Brinton; or, to December 3, 2021 which was the date originally set for the sentencing hearing?

[68] Judge Sarson concluded (AB Vol. 1 of 3 Documents p. 23):

> I find that this ambiguity is a non-issue in light of how I intend to treat the next relevant time period, that ending on either April 12th, 2022, which was the defence date or April 22, 2022, the Crown date. … **I accept the Crown's submission that the time that Judge Brinton was unavailable to continue with the matter while she was still seized meets the definition of exceptional circumstances set out in the *Jordan* decision, and that time will be deducted from the period of delay**… With respect to the differing positions on the end date for the aforementioned [exceptional circumstances] time period, the defence argues April 12th is the relevant date. That is the date that Chief Judge Williams was advised that Judge Brinton was on an indefinite leave. The Crown argues that April 22nd [2022] is a relevant date. That is the date that the parties appeared before Chief Judge Williams in Dartmouth Provincial Court and confirmed that they wished for a new judge to be appointed under section 669.2 of the *Criminal Code*. On this point, I agree with the Crown position. … The Crown then submits that the delay between May 16th, 2022, and July 13th, 2022, should be attributed to the defence… The difficulty I have with the Crown submission on this point is that … Without more information or an evidentiary foundation, I cannot agree with the Crown on this point. As a result, the time between **April 22, 2022, and July 13, 2022, will be attributed to institutional delay**. The parties are in agreement with respect to the period between July 13th, 2022 and September 6, 2022 [Defence waiver]… The parties are also an agreement with respect to the time between **September 6, 2022, and October 26, 2022, that is institutional delay**. As a result, the **total delay** that I have calculated to be **institutional delay is 286 days**: **154 days** from **April 28th to September 29, 2021**; **82 days** from **April 22, 2022, to July 13, 2022**; and **50 days** from **September 6, 2022, to October 26, 2022**. This is the equivalent of approximately **9 and one-half months**. This is clearly above the presumptive five- month ceiling, as set out in the *Charley* decision that I have adopted… I find that the delay is unreasonable and [SPP]'s rights under Section 11(b) of the *Charter* have been violated… With respect to remedy, the defence submits that the appropriate remedy is a stay in the imposition of sentence or a stay in the enforcement of sentence. I am not prepared to grant either of those remedies. … **in all the circumstances, I find that the**

> **appropriate remedy for the violation of [SPP]'s rights under Section 11(b) of the *Charter* is a reduction in his sentence**." 14. (AB Vol. 1 of 3 Documents, p. 25-27)

[69] The clear implication is that Judge Sarson found as a result of Judge Brinton's unavailability while being seized with the matter, that the time interval constituted neutral "exceptional circumstances", and these existed between September 29, 2021, and April 22, 2022.

[70] Judge Sarson did not specify the sentence that he would have otherwise considered appropriate in the circumstances - or by how much time he "reduced" that sentence, as a result of the breach of s. 11(b) of the *Charter*.

[71] While I appreciate that the Provincial Court dockets are extremely busy, a better practice would be to expressly identify what sentence the trial judge otherwise finds is "fit" in all the circumstances, and then to expressly identify by how much the sentence will be reduced for what the trial judge has found to be a s. 11(b) *Charter* violation - see in the appeal context: *R. v. Hartling*, 2020 ONCA 243, at paras. 120-123.

[72] Later in his sentencing decision, he stated:

> The bottom line of those decisions was that **I found the appropriate remedy for the Section 11(b) violation was a reduction in sentence. [After applying the reduction] I held that a proportionate sentence in this case would be a jail sentence of 90 days on the low end and six months on the high end or a conditional sentence order plus a lengthy period of probation**. (AB Vol. 1 of 3 Documents, p. 99)
>
> [My bolding added]

[73] Judge Sarson used the 5-month presumptive reasonable delay ceiling from the Ontario Court of Appeal decision in *Charley*, 2019 ONCA 726.

[74] His use of that reasoning is subject to a correctness standard of review.

[75] Judge Sarson's error of law arises from his adopting the reasons and result from *Charley*.

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[14] Strictly speaking even further delay accumulated between October 26 and the sentencing decision on December 9, 2022.

[76] He found that the offending delay period herein was nine and a half months, and merely because it was greater than 5 months, that therefore a sentence reduction (not precisely identified) was appropriate.

[77] However, with all due respect, given the qualitative statutory language in s. 720 CC - "as soon as practicable" - it would seem counter to Parliament's legislative intention to impose a 5-month presumptive sentence process delay ceiling.

[78] After all, s. 11(b) of the *Charter* itself uses similar qualitative language:

> Any person charged with an offence has the right…(b) to be tried within a reasonable time.

[79] The use of qualitative language, to set limitations on the time interval within which procedural matters must be completed in criminal cases, allows for greater flexibility, and nuanced consideration to be given to the relevant contextual factors.15

[80] Violations of s. 11(b) of the *Charter* have been identified and distinguished within the 3 discrete stages of a trial level criminal proceeding:

1. From the laying of a criminal charge to the end of the trial ("charge to trial" time) - R. v. Jordan, [2016] 1 SCR 631, per Moldaver J. - presumptively up to 18 months is considered "reasonable" delay at the Provincial Court trial proceedings level;
2. From the end of the trial to a decision regarding guilt ("verdict deliberation time") - R. v. K.G.K., 2020 SCC 7 at paras. 65-6 per Moldaver J. - the accused must establish that "verdict deliberation took markedly longer than they reasonably should have in all of the circumstances… The reason the threshold is so high - 'markedly longer' rather than just 'longer' or some lesser standard - is because of the 'considerable weight' that the presumption of [judicial] integrity carries. Stays in this context are significant and although distinct from stays

[15] I recognize that in *Charley*, Justice Doherty, who is a jurist very respected by this Court and others, allowed for "exceptional circumstances" such as a dangerous offender application in that case.

below the ceiling, they too are likely to be 'rare' and limited to 'clear cases' (Jordan, para. 48)"; 16

3. From the plea of guilty/finding of guilt to the end of the sentencing ("sentencing-process" time).

[81] In relation to sentencings, Provincial Court Judges and Supreme Court Justices alike are required by s. 720 *CC*, to, "**as soon as practicable** after an offender has been found guilty, conduct proceedings to determine the appropriate sentence to be imposed".

[82] In the *Encyclopedic Dictionary of Canadian Law*, Kevin P. McGuinness, Lexis-Nexis Canada Inc. 2021 - "practicable" is defined as:

> 1. That which is capable of being done or put into effect: the plan was expensive, yet practicable;
>
> 2. Capable to be done or put into practice successfully or of being effected or accomplished. In contrast, 'practical' pertains to something that is sensible, practicable pertains to that which is possible.

[83] The word "practicable" in s. 720 suggests no fixed maximum delay ceiling for sentencings would have been intended by Parliament. Parliament intended a contextual approach is required to assess whether a sentencing was completed "as soon as practicable after an offender has been found guilty".

[84] After *Charley* was decided in 2019 (and *Hartling* in April 2020) the Supreme Court of Canada issued its decision in *R. v. K.G.K.*, 2020 SCC 7, on September 25, 2020.

[85] Therein, at paras. 65-6,the Court stated that, if an accused wishes to establish a violation of s. 11(b) *Charter* regarding post-verdict delay, they must establish that "verdict deliberation took markedly longer than they reasonably should have in all of the circumstances… The reason the threshold is so high - 'markedly longer' rather than just 'longer' or some lesser standard - is because of the 'considerable weight' that the presumption of [judicial] integrity carries."

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[16] Under the *Judicature Act*, RSNS 1989 c. 240 as amended, Justices of the Supreme Court of Nova Scotia are permitted six months after reserving their decision, to deliver them. This legislation may be most relevant to Supreme Court Justice's verdict deliberation time.

[86] The Supreme Court of Canada did not pick a fixed reasonable maximum "verdict deliberation" delay ceiling, 17 but rather endorsed a qualitative test of whether there was "verdict deliberation" delay.

[87] They did so because of the presumption of judicial integrity.

[88] The presumption of judicial integrity continues during the sentence-process time interval.

[89] Typically, in contrast to verdict-deliberation time (there was none here because of the guilty pleas/although there was deliberation time required in relation to the ss. 11(b) and 12 *Charter* applications) there are other matters not within the Judge's exclusive control after a finding of guilt or plea of guilty - e.g.: the filing of expert and other reports (Pre-Sentence Reports/*Gladue* Reports/IRCAs (Impact of Race and Cultural Assessment - in relation to African Nova Scotian offenders, as developed by Robert S. Wright, MSW, which were initially endorsed by Judge Anne Derrick, PCJ, (as she then was) in *R. v. "X"*, 2014 NSPC 95 (see more recently *R. v. Anderson*, 2021 NSCA 62)).

[90] Such delay is tethered to the specific judge who has responsibility for the matter (usually who either has heard the trial or conducted the s. 606 *CC* enquiry) which is different than "institutional" delay under the *Jordan* principles.

[91] Under the *Jordan* "date of charge-to end of trial, institutional delay" analysis, one examines the actions or inactions of one or more judges, an accused person (and their counsel), Crown counsel (and its agents, including offence investigators) and other "institutional" factors.

[92] This involves a much broader context, and the fundamental importance of doing so, as a matter of fairness to an accused, to the Crown, witnesses including victims, and the public.

[93] With all due respect to the Ontario Court of Appeal, but in light of the wording in s. 720 *CC* and the reasoning in *K.G.K.*, sentencing-process delay is more appropriately assessed using a qualitative rather than a numerical standard of what is "within a reasonable time" - particularly where presumption of judicial integrity remains relevant.

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[17] Such as applicable to civil matters by s. 34(d) of our *Judicature Act*, RSNS 1989, c. 240 (which permits up to six months to deliver a decision).

[94] I add here that in *Hartling*, the Ontario Court of Appeal recognized that, in any event, historically, the jurisprudence has consistently properly considered excessive (but not so much so as to constitute a violation of s. 11 of the *Charter*) delay to be a mitigating circumstance in sentencings:

> 117 The process of sentencing is highly individualized with reference to the offender. It also involves discretion on the part of the sentencing judge particularly when a sentence is reduced to reflect relevant mitigating circumstances. **One such mitigating circumstance is delay from conviction to sentence**.
>
> 118 Delay in sentencing that does not rise to the level of a *Charter* breach has long been considered a factor in mitigation of sentence: *R. v. Cooper (No.2)* (1977), 35 C.C.C. (2d) 35 (Ont. C.A.), *R. v. Bosley* (1992), 59 O.A.C. 161.
>
> 119 Delay in sentencing that breaches an offender's *Charter* rights should also be considered a mitigating circumstance. But it is one that should result in more than standard mitigation; it should result in enhanced mitigation. This would meet the objectives and principles of sentencing codified in s. 718 of the *Criminal Code* while also providing a meaningful remedy for the *Charter* breach.
>
> 120 Delay was not considered when the appellant was sentenced to 30 months incarceration. The delay which led to a *Charter* breach is a circumstance giving rise to enhanced mitigation.
>
> 121 I conclude that the appellant is entitled to enhanced mitigation to reduce the sentence.
>
> 122 **As with mitigating circumstances generally, there can be no automatic or formulaic calculation of the reduction in sentence**. Nor can a firm principle be established based on one case. **The jurisprudence will - as always - develop with each case determined on its own particular facts, considering the offence, the offender, the length of the delay, the circumstances of the delay and any other relevant factors**. Here, the offence was serious. The appellant did nothing to contribute to the delay. The delay was caused by a failure to provide adequate services to a vulnerable segment of society. The appellant was required to wait over a year to have his future determined. These are serious factors which caused a significant *Charter* breach.
>
> 123 In the circumstances here, I would reduce the sentence by five months.
>
> [My bolding added]

[95] Generally, there should be no material difference in outcomes when assessing sentence-process delay cases, whether one uses the s. 720 *CC* "as soon as

practicable" criterion, or the *K.G.K.* "took markedly longer than they reasonably should have in all of the circumstances".

[96] I am inclined to the view that, if asked, the Supreme Court of Canada would likely reject a national *Jordan*-like presumptive fixed maximum time interval for sentencing-process delay, such as was preferred in *Charley*.

[97] On the other hand, the Supreme Court of Canada would likely defer to Provincial and Territorial Courts of Appeal who choose to do so, much like it would defer to those Courts setting sentencing ranges, depending on their jurisdictional circumstances.

[98] I find more consistent with the tenor of the Supreme Court of Canada's position to date, what the Quebec Court of Appeal stated in *R. v. DeBlois*, 2021 QCCA 1093, per Rancourt JA: [18]

> 131 In the present case, the judge calculates a total period of 40 months and 11 days. In doing so, it incorrectly includes the length of its deliberations. I note that, at the time of his decision, however, the judge did not have the benefit of the light of *R. v. K.G.K.*, **J.B. c. R**. and *R. v. Rice*.
>
> 132 However, he was correct in excluding the post-conviction period from his calculation. To date, the Supreme Court has not ruled on how section 11(b) of the Charter should be applied in assessing the reasonableness of delay after conviction.
>
> 133 As a result of the Supreme Court's deliberate deferral of the issue of the time between verdict and sentencing to another time, appellate courts across the country have taken different approaches in the application of section 11(b) of the *Charter*.
>
> 134 The Ontario Court of Appeal used *Jordan* as a basis for setting a 5-month ceiling beyond which the time between conviction and sentencing is presumptively unreasonable. **This Court has so far taken a more flexible and modulated approach, stating that section 11(b) of the *Charter* will only apply "if the sentencing procedures ... drag on unduly, leaving aside the issue of ceilings"**.
>
> 135 That being the case, the delay of 11 months and 28 days between the appellants' conviction and sentencing is due in large part to the complexity of the issue of mandatory minimum sentences before the judge. In the light of these particular circumstances, I am of the view that the sentencing proceedings have not been

[18] See also *R. v. Harker*, 2020 ABQB 603.

> unduly lengthy. Accordingly, the delay following the appellants' conviction is not unreasonable under section 11(b) of the *Charter*.
>
> [My bolding added]

[99] Although Judge Sarson erred in law in adopting the reasoning from *Charley*, on my own examination of the circumstances, I agree with his conclusion that there was a breach of s. 11(b) of the *Charter*.19

[100] The nine and one half months sentencing-process delay was not completed "within a reasonable time" - or conversely, it "took markedly longer than it reasonably should have in all the circumstances".20

[101] I agree that a sentence reduction was appropriate, and although he did not numerically specify the reduction amount, I am satisfied that I should defer to his decision in that regard.

6 - Was the sentence imposed (Eight months CSO plus 3 years' probation) demonstrably unfit?

[102] Although the sentence on its face could be characterized by some as lenient, especially after the Supreme Court of Canada's decision in *Friesen*, 2020 SCC 9, on closer examination I am satisfied that the sentence is not demonstrably unfit.

[103] I reiterate here what Justice Derrick stated in *R.B.W.:*

> [51] **In assessing the issue of demonstrable unfitness, appellate review must focus on whether the sentence is proportionate to the gravity of the offence and the degree of the offender's responsibility**. Proportionality is the fundamental principle of sentencing.
>
> [52] On appeal, "wide latitude" is to be given to sentencing judges who are,
>
> > [11] … in the best position to determine, having regard to the circumstances, a just and appropriate sentence that is consistent with the

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[19] As Judge Sarson found, and I give deference to his findings, the period of time between April 22 and July 13, 2022, (82 days of the total 286 days institutional delay), was institutional delay, arising before his assignment to the case. From Judge Sarson's assignment to the matter on July 13, 2022, until the sentencing on December 9, 2022, was 5 months.

[20] It must be borne in mind that the PSR, Dr. Abramowitz's Report, and the Victim Impact Statements, were all prepared and ready by September 29, 2021.

> objectives and principles set out in the Criminal Code in this regard. The fact that a judge deviates from the proper sentencing range does not in itself justify appellate intervention. Ultimately, except where a sentencing judge makes an error of law or an error in principle that has an impact on the sentence, an appellate court may not vary the sentence unless it is demonstrably unfit.
>
> [12] In such cases, **proportionality is the cardinal principle that must guide appellate courts in considering the fitness of a sentence imposed on an offender**. The more serious the crime and its consequences, or the greater the offender's degree of responsibility, the heavier the sentence will be. 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, both sentences that are too lenient and sentences that are too harsh can undermine public confidence in the administration of justice. Moreover, if appellate courts intervene without deference to vary sentences that they consider too lenient or too harsh, their interventions could undermine the credibility of the system and the authority of trial courts…
>
> [My bolding added]

[104] It is also helpful to recall Justice Moldaver's comments in *R. v. Suter*, 2018 SCC 34:

> [24] In *Lacasse*, a majority of this Court held that an appellate court could only interfere with a sentence in one of two situations: (1) where the sentence imposed by the sentencing judge is "demonstrably unfit" (para. 41); or (2) where the sentencing judge commits an error in principle, fails to consider a relevant factor, or erroneously considers an aggravating or mitigating factor, *and* such an error has an impact on the sentence imposed (para. 44). In both situations, the appellate court may set aside the sentence and conduct its own analysis to determine a fit sentence in the circumstances.
>
> [25] A sentence that falls outside of a certain sentencing range is not necessarily unfit: see *Lacasse*, at para. 58; *Nasogaluak*, at para. 44. Sentencing ranges are merely guidelines and are just "one tool among others that are intended to aid trial judges in their work" (*Lacasse*, at para. 69). It follows that deviation from a sentencing range does not automatically justify appellate intervention (*ibid.*, at para. 67).

[105] As of December 9, 2022, there was no post-*Friesen* established range of sentence for (summary conviction) child luring in Nova Scotia.

[106] Regarding the range of sentences for (summary conviction) sexual assaults on children in circumstances similar to the case at Bar, (two kisses on separate occasions, lasting two seconds each), I have been unable to find any cases which specifically involve such freestanding circumstances, as opposed to, kisses in association with other sexually assaultive behaviour.

[107] As of December 9, 2022, there was no post-*Friesen* established range of sentence for (summary conviction) sexual assaults on children in similar circumstances.

[108] However, the majority's reasons in *Marchand* (para. 116), wherein their first reasonable hypothetical involving a female teacher in her late 20s who has bipolar disorder, which is implicated in her texting a student to facilitate a later sexual interference offence in relation to her student, does provide some guidance.

[109] Justice Martin for the majority stated:

> [124] In *Hood*, when the Nova Scotia Court of Appeal considered a scenario similar to that of the first scenario proffered here, it concluded that the hypothetical crime would likely attract a suspended sentence with probation or, *at most*, a brief period of incarceration (para. 154). Instead, the court found that a global fit sentence for the representative offender would be a suspended sentence with a term of probation. However, *Hood* was decided before this Court's decision in *Friesen*. The fit sentence assigned by the Court of Appeal in *Hood* is not reflective of the directive from *Friesen* that sexual offences against children are violent crimes that "wrongfully exploit children's vulnerability" and as such "[s]entences for these crimes must increase" (para. 5). Interestingly, in *Friesen*, this Court cited *Hood* as an example of an offender whose serious cognitive limitations would likely reduce her moral culpability at sentencing (para. 91).
>
> [125] **In the unique circumstances of this hypothetical scenario, the inherent wrongfulness and severity of the offence must be balanced against the offender's mental illness, remorse, and prospects of rehabilitation. A fit sentence for the luring offence committed by the representative offender in the first scenario is a 30 day intermittent sentence**.
>
> [126] The representative offender is a high school teacher in her late 20s who committed a serious breach of her professional duties and inappropriately directed a conversation with her 15 year old student towards sexual matters with the intention of facilitating the secondary offence under s. 151 of the Criminal Code. Although this teacher would presumably be relatively junior as compared to her colleagues, she holds a position of trust and authority in relation to her student per

s. 718.2(a)(iii). A breach of trust is "likely to increase the harm to the victim and thus the gravity of the offence" (*Friesen*, at para. 126). The severity of such a breach is not to be taken lightly: teachers are entrusted to educate and serve as role models for children, not to sexualize them for their own purposes. In this case in particular, the representative offender exploited her position of authority in the commission of the offence, including by using her relationship to the victim to gain access by texting him under the guise of discussing homework. This element increases her moral blameworthiness and serves as an aggravating factor. As well, the wide age gap between the offender and the victim is further aggravating: as the offender was in her late 20s, there is at least a 10 year age difference.

[127] At the same time, it is important to acknowledge that while the representative offender's conduct was serious, it likely falls at the lower end of the range of gravity in all the circumstances. All offences of this type have the potential to cause substantial harm to victims. However, it remains significant that this offender's actions were spontaneous and of short duration, rather than malicious and calculated. Unlike in many other child luring cases that are typically associated with prolonged contact, and thereby far greater harm, in this case there is no evidence of grooming or long-term planning. While these factors are not mitigating, they do provide insight into the overall gravity of the offence and culpability of the offender, which is comparatively lower than in other cases. It is well established that spontaneous or spur of the moment crimes should be punished less severely than planned or premeditated ones (see, e.g., *R. v. Laberge* (1995), 1995 ABCA 196 (CanLII), 165 A.R. 375 (C.A.), at para. 18; *R. v. Murphy*, 2014 ABCA 409, 593 A.R. 60, at para. 42; *R. v. Vienneau*, 2015 ONCA 898, at para. 12 (CanLII)). **Furthermore, the representative offender entered a guilty plea, expressed remorse on sentencing and has no prior criminal record - all of which are significant mitigating factors**.

[128] Finally, in assessing the offender's moral culpability, it is significant that the representative offender in the first scenario was diagnosed with bipolar disorder and her symptoms were similar to the actual offender described in *Hood*. At trial, Ms. Hood's criminal responsibility was an issue of real controversy (*R. v. Hood*, 2016 NSPC 19, 371 N.S.R. (2d) 324; see also the reasons for sentence in *R. v. Hood*, 2016 NSPC 78). Although the trial judge did find her to be criminally responsible, he accepted that Ms. Hood experienced bipolar disorder type I. As a result, Ms. Hood's "mania rendered her profoundly disinhibited and prone to risk taking, elevated by a sense of invincibility, and impaired by defective insight and inhibition" ((*Hood* (sentencing reasons), at para. 55 (CanLII)). The sentencing judge in *Hood* found that her symptoms had "a nexus with her crimes" (para. 55). Similarly, in the instant case the representative offender's bipolar diagnosis, though it serves as no justification or excuse for her behaviour, attenuates her degree of responsibility and acts as a mitigating factor on sentencing (*R. v. Ayorech*, 2012 ABCA 82, 522 A.R. 306, at paras. 10 13; *R. v. Tremblay*, 2006 ABCA 252, 401

> A.R. 9, at para. 7; *R. v. Belcourt*, 2010 ABCA 319, 490 A.R. 224, at para. 8; *R. v. Resler*, 2011 ABCA 167, 505 A.R. 330, at para. 14). **Where a mental illness existed at the time of the offence and contributed to the offender's behaviour, sentencing judges should consider prioritizing rehabilitation and treatment through community intervention** (*R. v. Lundrigan*, 2012 NLCA 43, 324 Nfld. & P.E.I.R. 270, at paras. 20-21; *R. v. Ellis*, 2013 ONCA 739, 303 C.C.C. (3d) 228, at para. 117). This is especially the case given that offenders with mental illnesses are often distinctly negatively affected by imprisonment (see Ruby, at §§5.325 and 5.332).
>
> [129] **Even so, while rehabilitation must be prioritized for this offender, a non-custodial sentence is not appropriate given the seriousness of the offence. In the result, I find a 30 day intermittent sentence is a fit sentence for the representative offender at bar**. Such a sentence recognizes the inherent seriousness and potential harms associated with the offence and appropriately denounces her conduct, while also being mindful of her diminished moral blameworthiness and the mitigating factors at play.
>
> [My bolding added]

[110] Let me next examine what Judge Sarson stated about his choice of sentence.

i - Judge Sarson's starting-point sentence was higher than his ultimate sentence, because he reduced the former by way of the s. 11(b) *Charter* breach sentence-reduction

[111] It is extremely important to properly contextualize Judge Sarson's sentencing and his ss. 11(b) and 12 *Charter* decisions, in order to assess whether the sentence he imposed was demonstrably unfit.

[112] The sequence of his decisions is important.

[113] He issued his s. 11(b) *Charter* decision on **September 29, 2022**. He found there was unreasonable delay, **and that a sentence reduction was appropriate**.

[114] He issued his s. 12 *Charter* decision regarding the constitutionality of the minimum mandatory sentences regarding both s. 172.1(1)(b), and 271(1)(b) on **October 20, 2022** (AB Vol. 1 of 3 Documents, p. 98(16)).

[115] Thus, when he was speaking in his s. **12 *Charter* decision** of a **90 days to 6 months' imprisonment** plus lengthy probation as being a "proportionate sentence" (AB Vol. 1 of 3 Documents, p. 93), and in his sentencing decision of **December 9, 2022**, as follows:

> **If I had sentenced SPP to serve his time in an institution**, a just and appropriate sentence would have been one of **4 months - 2 months in relation to each of the offences served consecutively**… based on… including the breach of SPP's rights under section 11(b) of the *Charter*…;

I conclude that in each case, he had already applied the sentence reduction arising from the s. 11(b) *Charter* violation.

[116] However, Judge Sarson never identified what his original starting point sentence was before the s. 11(b) *Charter* violation - sentence reduction was applied thereto, nor what was the amount of the sentence reduction itself.

[117] In assessing whether the sentence he imposed was demonstrably unfit, it is his starting point sentence that should be assessed, not his sentence after the application of the s. 11(b) *Charter* sentence reduction.

[118] To better understand whether his sentence was demonstrably unfit, or not, one should assess his grossed-up references to "4 months" imprisonment, to get a closer approximation of his original starting point sentence.

[119] It is reasonable to infer, that Judge Sarson consequently reduced his original starting-point "just and appropriate" sentence of imprisonment in jail, by as little as 2 months, or by as much as 4 months.

[120] Therefore, his starting point sentence may have been as high as 8 months' (4 + 4 months) imprisonment, and as low as 6 months' (4 + 2 months) in an institution.

[121] Judge Sarson applied, what I would accept to be a common "2 days CSO:1 day in jail" factor, to come up with his (post-sentence reduction) eight-month CSO. (AB Vol. 1 of 3 Documents, p. 130(17))

[122] This analysis leads to my conclusion that his original starting point sentence therefore likely was between 6 months to 8 months' imprisonment before applying the s. 11(b) *Charter* sentence reduction.

[123] Using a 2:1 ratio, this translates to a 12-16 months CSO, before applying the s. 11(b) *Charter* sentence reduction.

[124] The original starting-point sentence is the proper comparator in relation to which one should assess whether the "sentence" imposed was demonstrably unfit.

[125] The following references confirm the sequence of Judge Sarson's decisions, and inform the reasoning behind my grossing-up of his "after sentence-reduction" four months' imprisonment.

[126] Judge Sarson specifically referenced his **s. 12 *Charter* decision** in his sentencing decision. (AB Vol. 1 of 3 Documents, p. 98)

[127] In his s.12 *Charter* decision he stated (AB Vol. 1 of 3 Documents, p. 30):

> As the Crown elected to proceed summarily in this matter, the mandatory minimum sentences in relation to both of the previously referenced Sections is imprisonment for a term of six months.
>
> …
>
> I do find that SPP's knowledge of the victim's particular vulnerability as a result of her personal circumstances, is an aggravating factor. It is the Crown's assertion that SPP took advantage of the victim's vulnerability for his personal sexual gratification.
>
> That, I do not accept, based on Dr. Abramowitz's opinion expressed in her report. **I also find that Dr. Abramowitz's opinion as set out above, is relevant in determining SPP's degree of responsibility and moral culpability, which I find to be reduced by virtue of his personal circumstances at the time he committed the offences, as well as his personal background - the perfect storm of circumstances that in the opinion of Dr. Abramowitz's placed SPP at greater risk of acting out of character.**
>
> **However, I am mindful that this factor does not play a large role in the determination of a proportionate sentence given the need to emphasize the principles of denunciation and deterrence and the warning that appellate courts have placed on not overemphasizing the circumstances of the offender in determining a just and appropriate sentence.**
>
> (AB Vol. 1 of 3 Documents, pp. 73-74)

[128] He went on to speak of an appropriate sentence:

> **I find that a conditional discharge or a suspended sentence would not be proportionate**. … **Rather I find that, based on** the circumstances of the offences, the background circumstances of SPP, all of the aggravating and mitigating factors, the breach of SPP's rights under section 11 (b) to be sentenced within a reasonable time, and taking into account the purpose and principles of sentence, **a proportionate sentence would be a jail sentence of 90 days on the low-end and 6 months on the high end, or a conditional sentence order, either of which**

> **would be followed by lengthy probation order of two or three years in duration. As an aside, I will say that I conclude that a conditional sentence order is within the range of a proportionate sentence**, even although denunciation and deterrence are to be given primary consideration in this case… I make this finding with respect to a proportionate sentence as **I conclude that, in ensuring that I impose a sentence that is proportionate to the gravity of the offences and the degree of responsibility of the offender, the significant aggravating factors of the breach of trust and the age of the victim, as well as primary consideration being given to the principles of denunciation and deterrence and the significant psychological harm caused to the victim by the actions of SPP are balanced by the circumstances of the offences and the mitigating factors of SPP's guilty pleas and, to a lesser extent, his loss of employment, his background and personal circumstances, his lack of a prior criminal record and *the breach of his right under section 11(b) to be sentenced within a reasonable period of time***." (AB Vol. 1 of 3 Documents, p. 93)
>
> [My bolding and italics added]

[129] Later during the sentencing submissions, he interjected to confirm that:

> … I determined [s. 12 *Charter*-decision] that a proportionate [total] sentence in this case [after the s. 11(b) *Charter* sentence reduction] was between **90 days and 6 months of actual jail time or a conditional sentence order plus 2 or 3 years' probation**. (AB Vol. 2 of 3 Evidence, p. 575).

[130] In his sentencing decision, Judge Sarson further stated:

> I find that **if I had sentenced SPP to serve his time in an institution**, [after the s. 11(b) Charter sentence- reduction] **a just and appropriate sentence would have been one of 4 months- 2 months in relation to each of the offences served consecutively**.
>
> **Again, this conclusion is based on** the nature and circumstances of the offences; the background circumstances of SPP; the fundamental purpose and principles of sentencing, including parity; all of the aggravating and mitigating factors, including the breach of trust, the age of the victim, as well as the guilty pleas, **and the breach of SPP's rights under section 11(b) of the *Charter***.
>
> However, as the Supreme Court of Canada stated in *Proulx*, in order to address the principles of denunciation, it may be **appropriate to extend the length of the conditional sentence order beyond the length of the jail sentence that would have ordinarily been imposed**. This is in keeping with the practice in this jurisdiction to impose lengthier conditional sentence orders based on the principle that a day in custody does not equal a day on house arrest.

> As a result, SPP if you'd stand for a minute, please, Sir.
>
> **I sentence you to imprisonment for 8 months, but I am satisfied that your serving this sentence in the community will not endanger its safety and is consistent with the fundamental purpose and principles of sentencing. That's going to be 4 months consecutive in relation to each of the two counts. There will be a sentence of house arrest for the duration of the 8 months**… I want to point out for those who think that this may be a lenient sentence that a conditional sentence order is a sentence of imprisonment served in the community. Any breach of the conditions of that order could very well lead to the remainder of the sentence being served in jail.
>
> In addition, unlike a sentence of imprisonment served in an institution, there is no remission time, frequently referred to as time off for good behaviour, on a conditional sentence order. SPP will be on house arrest for every day of that eight-month sentence.
>
> **I conclude that this sentence is consistent with the message from the Supreme Court of Canada in *Friesen*** [2020 SCC 9].
>
> It is a significantly longer sentence than I would have imposed if the victim had been an adult, and the harm done to [D] is reflected by the fact that SPP, a first-time offender who has pled guilty to the offences before me, is receiving a significant period of custody to be served in the community under condition of house arrest which will be followed by a period of probation for 3 years with conditions that I will also outline momentarily. (AB Vol. 1 of 3 Documents, pp. 130-132)
>
> [My bolding added]

[131] Firstly, while to some the ultimate sentence of 8 months' CSO (equivalent to 4 months' imprisonment) may appear to be lenient, however, taking into account the purpose and principles of sentencing (s. 718.01, s. 718.1 and s. 718.2 *CC*) and considering the original starting-point sentence [**12-16 month CSO/6-8 months' imprisonment**] - I cannot say that the sentence was not reasonably "proportionate to the gravity of the offences and the degree of responsibility of the offender".

[132] Secondly, in relation to range of sentence.

[133] It is difficult to say in relation to the child luring - s. 172.1 (2) (b) *CC* and sexual assault - s. 271 *CC* offences with confidence and precision, what in the present circumstances would be the sentencing range for (or otherwise stated "parity with") similar offenders having committed the similar offences, in similar

circumstances, as referenced by Justice Bateman in *R. v. Cromwell*, 2005 NSCA 137:

> [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), 2000 BCCA 135 (CanLII), 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.

ii - There are no clearly discernible sentence ranges for summary conviction s. 271 (sexual assault/the 2 kisses) and s. 172.1(2)(b) (child luring)

[134] The Crown's position that the child luring/sexual assault sentence herein is demonstrably unfit, is substantially grounded upon the reasons from the Court in *Friesen*, 2020 SCC 9, and latterly those in *R. v. Marchand*, 2023 SCC 26.

[135] In oral argument the Crown clearly stated its broader position that in the case of sexual offences in relation to children, but for perhaps for those offenders who are cognitively impaired/diminished, the Supreme Court of Canada reasons *in R. v. Friesen*, 2020 SCC 9 necessarily lead to the conclusion that CSOs would not "be consistent with the fundamental purpose and principles of sentencing set out in section 718 to 718.2".

[136] No court to my knowledge has taken such a definitive position on that issue, although the majority in *Marchand* acknowledges that significant mental illness associated with the commission of the offences can be a material mitigating factor. Notably, in *R. v. R.B.B.*, 2024 NSCA 17 at paras. 2, 25 and 40, in Justice Scanlan's reasons, speaking in relation to an indictable offence of child luring, he confirms that while custodial sentences are the norm, consideration of a CSO is not limited to "the rarest of cases, where exceptional circumstances exist".

[137] Judge Sarson specifically and repeatedly referred to the importance of the reasons in *Friesen*.

[138] The Crown relies on the post- *Friesen* reasoning in cases such as: *R. v. M.M.*, 2022 ONCA 441 and *R. v. P.R.J.*, 2023 BCCA 169. I found a helpful summary of such cases in *R. v. L.A.*, 2023 SKCA 136 (released December 29, 2023).

[139] However, in *R. v. Marchand*, 2023 SCC 26, the majority stated between paras. 46 and 48, under the title "Parliament has mandated that sentences for luring must increase":

> *Friesen* urges courts to consider Parliament's legislative initiatives in sentencing offenders for sexual offences against children (para. 107).
>
> …
>
> **These legislative changes should be regarded as a sign of Parliament's view of the offences' gravity**… They make clear that **proportionate sentencing** that responds to the gravity of the luring offence and the degree of responsibility of the offender **will *often* require substantial sentences of imprisonment**. As a result, courts should depart from dated precedents that do not reflect society's current awareness of the impact of sexual violence on children in imposing a fit sentence (*Friesen*, at para. 110). *Friesen*'s analytical approach necessitates an understanding of the inherent wrongfulness and distinct harms of luring and Parliament's sentencing goals. **Understanding the wrongfulness and harmfulness of the luring offence is integral to properly assessing the gravity of the offence and the degree of responsibility of the offender, as well as to avoiding stereotypical reasoning and the misidentification of aggravating and mitigating factors** (para. 50).
>
> [My bolding and italics]

[140] Mr. Marchand pleaded guilty to indictable sexual interference s. 151 and child luring s. 172.1(1)(b).

[141] Mr. Marchand was a 22-year-old, who met the victim in person when she was 13 years old. For the following 2 years they were in contact on social media and met in person and had illegal sexual intercourse four separate times.

[142] He was sentenced to 5 months' imprisonment on the child luring to be served concurrently to the sentence imposed for sexual interference.

[143] The Crown appealed the fitness of his sentence for luring. The Supreme Court of Canada increased his sentence from 5 months to **12 months' imprisonment** and ordered that it should be served consecutively, not concurrently, to his sentence for sexual interference.

[144] The Crown's sentence appeal in relation to *HV*'s case was taken not in relation to the fitness of sentence (summary conviction/s. 172.1(1)(a)), but rather the mandatory minimum sentence.

[145] *HV* sent sexual text messages to the victim who was 16 years old over a period of 10 days. He had pleaded guilty.

[146] The sentencing judge imposed a sentence of 2 years' probation and 150 hours community service. The Superior Court varied the sentence to **4 months imprisonment** which was upheld by the Québec Court of Appeal.

[147] Absolutes and overly formulaic approaches are eschewed by courts in matters of sentencings.

[148] Contextual considerations are key - whether they involve the context within the case at Bar, or the differing contexts between the case at Bar and cases involving similar offenders having committed similar offences in similar circumstances.

[149] Courts are mandated in sentencings to take particular account of the circumstances of the offence(s) and the circumstances of the offender.

[150] Several post-*Friesen* Nova Scotia cases help inform this Court's perspective as to "a sense of what might be" the range of sentence for the summary conviction offences.

[151] In *R. v. C.M.S.*, 2022 NSSC 166, after trial finding of guilt regarding two indictable offences [s. 151 CC (sexual interference) and sexual assault s. 271 (judicially stayed)] Justice Bodurtha imposed a sentence of **24 months**' **imprisonment** and 3 years' probation.

[152] He stated:

> [11] Over the period of June 1, 2005, to September 1, 2005, C.M.S., on four occasions, committed sexual acts on M.C. who was under 14 years of age at the time. The following facts are agreed on between the Crown and Defence:
>
> - C.M.S. had a relationship with M.C's mother, A.C, when they were teens. Years later, they ran into each other at the Yarmouth Mall as adults. A short time after running into each other at the mall, A.C. went to stay at C.M.S.'s house located at ### Highway ### in Digby County, Nova Scotia. A.C. brought her two children M.C and N.C with her. C.M.S. and A.C. resumed their romantic relationship.

- M.C was under the age of 14 years when this occurred. She was mostly raised by her grandparents but this was the first summer she spent with her mother.
- It is agreed that A.C. and her two children M.C and N.C spent at least three nights at C.M.S.'s home.
- C.M.S. showed M.C attention and affection while they were in Richfield. He tried to teach her to play guitar and wrote her a song called "M.'s Seasons".
- The first incident of sexual assault occurred after an evening walk with the entire household. After the walk, C.M.S. took M.C., alone, to a collapsed building, which was C.M.S.'s former residence. On this occasion C.M.S. kissed M.C.'s neck, stomach and hips. He hinted to her that he wanted her to kiss his neck and bite his ear.
- The second incident of sexual assault occurred the following day. C.M.S. took M.C and her brother for a drive. They arrived at a boardwalk near a shoreline with a gazebo type structure. C.M.S. walked up to M.C while she was laying on the dock sunbathing. He stood over her and told her to lower her skirt and he leaned down to kiss M.C on the mouth. After this, her brother returned from having to pee.
- The third incident occurred the Saturday evening following the drive. C.M.S. brought M.C back to the collapsed building. C.M.S. kissed her lips, neck, hips and stomach. He insinuated she should kiss his neck and bite his ear. He then started touching her over her pants and used his hands to play with her hips. He rubbed her vagina over her clothes.
- The fourth incident was the Sunday evening and occurred in the yard of C.M.S.'s parents' residence. C.M.S. took M.C. into a teepee on the property. While inside the teepee, he kissed her neck, nibbled her ear and French kissed her. He asked her to do the same to him. His erect penis was pressed up against her. He also reached down and unbuttoned her pants and put his hands down her pants and started touching and rubbing her clitoris under her pants.
- C.M.S. indicated to M.C after these incidents it was "their secret" and that she was "the best teenager daughter he could have asked for."

…

A. Aggravating

- The abuse of a child (s.718.2(a)(ii.1))
- There was a breach of the position of trust in relation to the victim (s.718.2(a)(iii))
- The victim's vulnerabilities due to her family circumstances and Indigeneity (Indigenous women are particularly marginalized in society and more likely to be targets of sexual offending as a result)

- Repetitive and grooming nature of the incidents.

B. Mitigating Factors

- No prior criminal convictions.

…

[54] *Friesen* and section 718.01 of the *Criminal Code* demand that I give primary consideration to denunciation and deterrence when it comes to sentencing C.M.S.

[55] In ***R. v. R.A.***, 2022 ONSC 1161, the accused was convicted of two counts of sexual interference contrary to s. 151 of the *Criminal Code*. The victim was his stepdaughter. The accused on one occasion started hugging and kissing the victim using his tongue. **He kissed her on the lips and put his hands down her pyjama shorts. He touched her vagina on the "inside". This incident lasted around ten seconds and the victim immediately texted her mother. The accused had kissed her twice earlier on the lips when she was alone with him in the car; once at a grocery store, and once at a pet store**. The sexual touching came to the attention of authorities when the victim's teacher saw cuts on her arms. She told her teacher that her step-father touched her.

[56] The accused in that case was 41. He immigrated to Canada with the victim and her mother in April 2017 and had no criminal record. In the pre-sentence report, he continued to vehemently deny that he committed the offences. **He was sentenced to 6 months jail on count 1, dealing with kissing**, and sentenced to 2 years jail on count 2, to be served concurrently to count 1, followed by 3 years probation.

…

[64] Defence counsel did rely on ***R. v. Scott***, 2021 NSPC 42, **a post-*Friesen* decision where the accused received a conditional sentence of six months after he pled guilty to two counts of sexual assault on twin boys, J. and D., aged 13 or 14 years old. In this case, the accused met the boys at a convenience store and asked them to go for a walk. They were strangers to the accused. The accused then proceeded to hug and touch J's buttocks approximately three times and afterwards started to rub his own penis through his pants. The accused attempted to hug D. before he pulled away, and he touched D.'s buttocks**. At the time of the offences, a mandatory minimum was in effect, however, in sentencing the accused to a conditional sentence order, the court determined that the mandatory minimum was representative of cruel and unusual punishment and would be grossly disproportionate. In sentencing the accused, Judge Burrill reviewed and considered the factors under Friesen and stated at para. 30:

> …an offender should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances, and all available sanctions other than imprisonment that are reasonable in the circumstances and consistent with the harm done to victims or the community should be considered for all offenders, with particular attention to Aboriginal offenders. **Mr. Scott identifies as Aboriginal and African Nova Scotian in this case**. The latter issue is informed by the decision of our Court of Appeal in R. v. Anderson, 2021 NSCA 62, which this Court considers as well.

[65] I find that there are many factors which distinguish Scott from C.M.S.'s situation, namely:

- In *Scott*, the Crown proceeded by way of summary conviction.
- Mr. Scott entered a guilty plea, which is a significant mitigating factor in cases of sexual assault as it saves victims from having to retraumatize themselves through testimony.
- Mr. Scott was in his mid-70's and had a significant intellectual/cognitive impairment. He lived with his family his whole life, with his brother having a power of attorney to manage his affairs. His condition was deteriorating. His cognitive function may have caused him to misinterpret cues that he was receiving during the interaction that he was having with the victims. His moral culpability for the offences was diminished.
- Mr. Scott was not in a position of trust.
- Mr. Scott underwent a comprehensive risk assessment through the Forensic Sexual Behavior Program and a detailed report was prepared for sentencing.

[My bolding and underlining added]

[153] Mr. Scott was sentenced to a 6 month (3 months' consecutively in relation to each victim) CSO (without house arrest) and 3 years' probation.

[154] In *R. v. T.K.B.*, 2021 NSSC 221, Justice Norton sentenced an offender who was living in the home with the victim, for six incidents of sexual assault/sexual touching of the 14-15 year old girl, which were in the nature of butt slapping or pinching, bra strap pulling, and licking her face and neck area.

[155] The Crown, which had proceeded by way of indictment, sought 12 months' imprisonment and 3 years' probation, whereas the Defence sought a CSO.

[156] Justice Norton imposed a sentence of 12 months' imprisonment and 3 years' probation.

[157] In *R. v. Hood*, 2018 NSCA 18, the Court dismissed a Crown appeal from sentence.

[158] The circumstances are set out in the Court's summary page:

> The appellant [high school teacher] started texting some of her former students. The texts became sexual. Explicit images were sent. She performed a sex act with one of them. The psychiatrists were unanimously of the view that she was affected by bipolar mood disorder (BMD). The appellant admitted she committed the offences but advanced the defence that she was not criminally responsible due to mental disorder (NCR). Two forensic psychiatrists opined that her condition rendered her NCR. The Crown's forensic psychiatrist said it did not. The trial judge preferred the Crown's expert and convicted the appellant of sexual touching, exploitation and luring by telecommunication. The judge found the mandatory minimums for these offences to be unconstitutional and imposed 15 months' incarceration to be served in the community under a conditional sentence order. Probation and other ancillary orders were made.

[159] At para. 124, the Supreme Court of Canada in *Marchand* questioned, in light of *Friesen*, the conclusion that the hypothetical teacher/offender circumstances in *Hood* "would likely attract a suspended sentence with probation, or *at most*, a brief period of incarceration (para. 154)" on indictable child luring/sexual interference and exploitation charges.

[160] Chief Justice MacDonald and Justice Beveridge stated:

> ***Was the Sentence Demonstrably Unfit?***
>
> [179] **Here, the Crown's submissions do not contemplate a conditional sentence, presuming instead a term of institutional incarceration. It recommended 18 to 24 months**:
>
> > 137. The Appellant submits that it should be unnecessary for this Court to decide on the fitness of sentence here in light of the foregoing. The Appellant adds that the numerous legal errors, regardless of which one is resolved in favour of the appeal, invite appellate intervention**. Considering the gravity of the offences, and overall moral culpability of the offender, including any mitigation for her mental health issues, the appropriate sentence should be in the range of 1.5 to 2 years' incarceration**. In the event that the Court concludes that none of the MMPs

> are unconstitutional, **the sentences could be calculated, after a "last look" as**:
>
> **(i) 1 year for the s.172 offence against L.G.;**
>
> **(ii) 1 year for the s.153 offence against L.G., concurrent;**
>
> **(iii) 1 year consecutive for the s.151 offence against J.L.; 1 year for the s.172 offence against J.L., concurrent.**
>
> **Alternately, the Court could conclude that all sentences should run concurrent to each other. 1.5 to 2 years' incarceration would be just and appropriate.**
>
> 138. In the event that this Court concludes that any or all of the MMPs offends s.12, and are not saved by s.1, the same sentencing submissions would apply. It is to be kept in mind that when sentences are ordered to run concurrently at the first stage of the "Adams'" methodology, the least serious of the offences can be considered as aggravating to the more serious of the offences in order to properly capture the offender's overall culpability. [See, for example, R. v. F.(D.G.), 2010 ONCA 27, at paras.18-20; R. v. Borecky, 2013 BCCA 163, at para.23; R. v. Downey, 2012 NSSC 351, at paras.51-53.]

> [180] Judge Atwood imposed a 15-month conditional sentence with strict conditions to be followed by two years probation. He was careful and thorough in his analysis. These were serious offences that must be denounced and deterred. **At the same time, Ms. Hood suffered from mental illness which does not pardon her but was a legitimate factor for the judge to consider on sentencing. She has already paid dearly; for example, by losing her teaching career along with the inevitable public humiliation. Her sentence is punitive. It adequately addresses deterrence and denunciation. We would defer to it and allow it to stand**.
>
> [My bolding added]

[161] In SPP's case, he pleaded guilty to the lesser and included summary conviction offences. The maximum sentence for child luring and sexual assault are "not more than 2 years less a day" imprisonment, and his ultimate sentence was an 8-month (4 + 4 months) CSO (house arrest) and 3 years' probation.

[162] However, Judge Sarson had already deducted a "sentence reduction" as a result of the s. 11(b) *Charter* violation.

[163] His original starting-point sentence was likely 6 to 8 months' imprisonment - or a 12-16 months CSO + 3 years' probation.

[164] In *Hood*, the Crown proceeded by *Indictment*. The maximum sentence for child luring (indictable) is 14 years' imprisonment.

[165] The joint reasons of the Court of Appeal included:

> [135] Here, the Judge found the one-year minimum to be grossly disproportionate for Ms. Hood personally, and therefore felt no need to test its constitutionality against a hypothetical offender. Having reviewed the circumstances of these offences, the offender's profile and relevant case law, the judge concluded:
>
> > [75] Based on my review of the authorities, the mandatory minimum one-year terms of imprisonment statutorily prescribed for Ms. Hood's offences would be grossly disproportionate to the seriousness of her crimes and her degree of responsibility. **Sentences in the range of three-to-nine months would, in my view, operate as lawful sentences for each count**. Accordingly, I find that defence counsel has discharged the burden of proving that the mandatory minimum penalties applicable in this case violate the constitutional protection against cruel and unusual treatment or punishment.
>
> [136] Respectfully, **we would reject this proposition. Instead, for the following reasons, we conclude that a one-year sentence would be constitutional in Ms. Hood's circumstances**.
>
> [137] Firstly, these were very serious offences that took place over a period of months, with a lot of planning on Ms. Hood's part. The age gap and the fact that the victims were Ms. Hood's former pupils made them even more serious.
>
> [138] **Secondly, the judge acknowledged that a prison sentence approaching nine months would be appropriate**. If so, it is hard to imagine how an additional three months would "outrage our standards of decency" or be considered "abhorrent or intolerable".
>
> [139] **Thirdly, the judge's ultimate 15-month conditional sentence is instructive. He felt it necessary to impose a period of imprisonment in excess of one year, albeit to be served in the community**. While a conditional sentence is generally less stringent than a term in jail, it is considered to be imprisonment nonetheless. See *R. v. Proulx*, 2000 SCC 5 at paras. 40-44.

> [140] **Therefore, in our view, a one-year minimum sentence is not unconstitutional vis-à-vis Ms. Hood's particular circumstances**.
> …
>
> [My bolding added]

[166] I am not persuaded that Judge Sarson's choice of sentence was one that is "demonstrably unfit".

Conclusion

[167] I dismiss the appeal.

Rosinski, J.