SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Fardy*, 2024 NSSC 211

Date: 20240716
Docket: CRK-507778
Registry: Kentville

Between:

His Majesty the King

v.

Jakob M. Fardy

SENTENCING DECISION

Restriction on Publication: By court order made under subsection 486.4 of the *Criminal Code*, information that may identify the person described in this decision as the complainant may not be published, broadcasted or transmitted in any manner.

Judge:	The Honourable Justice Joshua Arnold
Heard:	June 26, 2024, in Halifax, Nova Scotia
Final Written Submissions:	July 9, 2024
Date of Decision:	July 16, 2024
Counsel:	Robert Kennedy and Erica Koresawa, for the Crown Zeb Brown, for Jakob Fardy

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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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

By the Court:

Overview

[1] Jakob Fardy was convicted of sexual assault in relation to J.M., R.B., and S.M., and of assault in relation to R.B. The Crown suggests that a total sentence of seven (7) years in custody is the appropriate disposition, in addition to the following ancillary orders: a DNA (primary) order, a firearms prohibition, a communication prohibition, and a SOIRA order. The defence recommends 24 months in custody followed by a 17-month conditional sentence, in addition to the following ancillary orders: communication prohibition, firearms prohibition, and a DNA order. The defence is opposed to a SOIRA order. For the reasons that follow, Mr. Fardy will be sentenced to 48 months (four years) in custody, with the ancillary orders, as will be detailed below.

Facts

[2] The facts are detailed in the trial decision (2023 NSSC 252). Mr. Fardy was convicted of crimes in relation to three women, S.M., R.B. and J.M. I will briefly summarize the details of the offences.

S.M.

[3] Mr. Fardy was found guilty of one count of sexual assault for vaginally penetrating S.M., either with his fingers or his penis, while she was intoxicated and asleep in May 2016:

> **203** S.M. said she went to a get-together of about ten people at a friend's apartment, arriving after dark, around 9:00 PM. People were drinking, listening to music, and socializing. She was drinking alcohol, but could not remember what, "guestimating" that she had five or six beer or coolers, which she said was not usual for her at that time. She was not well acquainted with Mr. Fardy but had seen him around and spoken to him a couple of times.
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> **…**
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> **241** S.M. testified that in the middle of the night she woke up and Mr. Fardy was penetrating her vagina with either his fingers or his penis. She and Mr. Fardy did not know each other well and she did not consent. She said that afterwards she sent him a Snapchat asking him why he had done it, and he apologized and said he was "really high and really horny." Mr. Fardy denied that sexual activity occurred, as described by S.M. He alluded to "positive interactions" with S.M. the next morning in direct examination, and on cross-examination clarified that the

> next morning he and S.M. had consensual intercourse. S.M. was not questioned about this alleged consensual intercourse with Mr. Fardy. She said that when she woke up around 10:00 AM, Mr. Fardy was not in the bedroom.
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> **…**
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> **261** … I am convinced beyond a reasonable doubt that Mr. Fardy, who was "really high and really horny", climbed uninvited into the small bed in which S.M. was sleeping, and then, without her consent, while she was intoxicated and asleep, put either his finger or his penis, into her vagina. When she woke up and looked back into his face, Mr. Fardy stopped and S.M. went back to sleep. The Crown has proven this charge beyond a reasonable doubt.

R.B.

[4] Mr. Fardy was found guilty of one count of common assault of R.B. for grabbing and pushing her by the throat/neck, and one count of sexual assault by attempting to force R.B. to perform oral sex on him.

Common assault in March 2017

> **131** On March 17, 2017, R.B. was in a relationship with Mr. Fardy. She was living with him in his room in his mother's basement. They attended a large St. Patrick's Day indoor/outdoor party on a rural property together.
>
> **…**
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> **193** I am sure that Mr. Fardy, in a drunken rage because he thought R.B. was cheating on him, grabbed her by the throat and pushed her back about six feet, thereby assaulting her, on March 17, 2017.

Sexual assault in April 2017

> **196** R.B. testified that during intercourse, Mr. Fardy stopped, got up, and stood by the bed with his penis in her face and hips thrust toward her, implying that he wanted oral sex. When R.B. refused, Mr. Fardy told her she had to because she was his girlfriend, held her head for one and a half to two minutes and tried to force her face into his penis. Almost immediately after that, while still naked, the couple had a physical altercation in which Mr. Fardy threw R.B. to the floor, pinned her there by her wrists, and held her down until she stopped resisting. This partially accords with one detail of Mr. Fardy's own testimony (which I do accept), namely, that he thought R.B. had been unfaithful to him, thought he had seen her on her knees being intimate with another man at the St. Patrick's Day party, and it was on his mind.
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> **…**

> **200** Considering the evidence noted above, I am sure that in the midst of intercourse, Mr. Fardy stopped, stood next to the bed, and tried unsuccessfully to physically force R.B. to perform oral sex on him. The *actus reus* and the *mens rea* of sexual assault have been proven by the Crown beyond a reasonable doubt. Jakob Fardy is guilty of sexual assault.
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> **201** In relation to the additional charge of an assault, immediately following the struggle about oral sex, Mr. Fardy pinned R.B. down while they were both still naked. In my opinion, this was part of the same incident. While such behaviour is an assault, it is encompassed within and inseparable from the charge of sexual assault. As a result, in relation to the April incident, Mr. Fardy is guilty of sexual assault, with all facts of the evening included in that event and is not guilty of a separate assault that night.

J.M.

[5] On March 26-27, 2020, the parties were in a romantic relationship and living together. After a night of heavy drinking and belittling J.M., Mr. Fardy joined her in bed at around 6:00 A.M., and told her "You're getting fucked whether you like it or not":

> **46** J.M. said that at this point she was exhausted and did not have much "fight in me," and, without her consent, Mr. Fardy placed his penis in her vagina. She was on her back, and he was on top of her. She did not say anything. This went on, she estimated, for about five minutes. She said he had one arm across her chest or neck area. She stayed motionless the entire time. Mr. Fardy ejaculated in her vagina, rolled over and went to sleep.
>
> **66** Mr. Fardy agreed that he was verbally abusive to J.M., that he created an ongoing and unpleasant disturbance for many hours throughout the night and the early morning hours, and that he asked T.O. to come down and fight him there. He accepted the possibility that he had used "mean" and insulting language and might have used words like "slut" or "whore." He agreed that he was yelling and that he continued to drink…
>
> **120** Mr. Fardy's evidence does not leave me with a reasonable doubt. I am sure that Mr. Fardy had vaginal intercourse with J.M. without her consent at approximately 6:00 AM on March 27, 2020. I do not believe Mr. Fardy when he says no sex occurred and that if it did, it was consensual. And I do believe J.M. when she says she told Mr. Fardy "no" and he then had forced intercourse with her. As noted above, J.M. refused his sexual advances. Mr. Fardy told her that she was "getting fucked" whether she wanted to or not. And then he went ahead and had intercourse with her.

Criminal Record

[6] Mr. Fardy has one prior conviction for impaired driving in 2018.

Employment History

[7] Mr. Fardy has been steadily employed his entire adult life. His employers say positive things about his character and his work ethic. Considering his substance abuse issues and lifestyle at certain points in his life, his solid employment history is a significant positive in Mr. Fardy's life.

Victim Impact Statements

[8] S.M., R.B. and J.M. chose not to file victim impact statements.

Forensic Sexual Behaviour Program Assessment

[9] Following his convictions, Mr. Fardy consented to a detailed Forensic Sexual Behaviour Program Assessment. The assessment, conducted by Dr. Michelle St Amand-Johnson, consisted of written tests and about five hours of clinical interviews. In its submissions, the Crown briefly references the assessment:

> [46] Mr. Fardy's conduct in the offences is consistent with Dr. St Amand-Johnson's observations that Mr. Fardy might be "inclined to seek immediate gratification, possibly at the expense of others" and that he may "feel a need to dominate women".
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> …
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> [48] Dr. St Amand-Johnson's testing indicated that Mr. Fardy's prospects for treatment may be "somewhat poor". This finding coincides with both Mr. Fardy's continued denial of responsibility and his support network's rejection of the Court's findings: the efficacy of treatment will be negatively impacted by a lack of acceptance of responsibility and desire to change.

[10] Mr. Fardy referenced the Forensic Sexual Behaviour Program Assessment more extensively in his own submissions:

> 7. Dr. St Amand-Johnson described Mr. Fardy as cooperative and thoughtful during the assessment. She said that despite maintaining his innocence he was "nondefensive to feedback at the end of the assessment regarding risk and dynamic factors to address.

8. Dr. St Amand-Johnson commented positively on the steps taken by Mr. Fardy in response to the allegations:

> Again, he has reportedly been respectful and appropriate in his current relationship, which suggests that, regardless of his denial of the index offences, he has responded appropriately to corrective consequences by enacting a more mature and less self-indulgent general lifestyle with a prosocial partner, with less potential opportunity or ability to dismiss or rationalize sexually abusive behaviour.

9. Dr. St Amand-Johnson assessed Mr. Fardy as being at "low" risk for future violence, including sexual violence, associated with psychopathy (24). She concluded that static risk measurement tools indicate that Mr. Fardy poses a "moderate" risk for future violence (SORAG) and he is at "above average" (Static-99R) or "average" (Static-2002R) risk of being charged with another sexual offence.

10. She found that dynamic risk measurement tools indicate that Mr. Fardy has "moderate" crimogenic needs. However, she commented that this risk may be mitigated by various protective factors that appear to be in place for Mr. Fardy:

> When considering dynamic variables that contribute to risk, it is useful to consider whether any protective factors are in place to potentially mitigate risk for violence. Therefore, the undersigned used …an instrument developed …to identify potential protective factors in male offender populations. Mr. Fardy received scores on several items, key ones being a current prosocial relationship that he wants to maintain, external controls (court conditions) having moved him into sobriety that he seems to now internally value as well, and ability to assert self-control (cross-referenced with the sobriety).

[11] Other significant points stated in the Report include the following:

> According to his test results, Mr. Fardy might be impulsive, immature, and inclined to seek immediate gratification, possibly at the expense of others as it seems that he is also rather egocentric. His response patterns further suggested that he is competitive, might be interpersonally intolerant and insensitive, and may emphasize traditional masculinity and feel a need to dominate women…
>
> …
>
> Based on his behavioural history, that loss of composure might be particularly likely to manifest when Mr. Fardy is also under the influence of alcohol or drugs, therefore less able and/or inclined to contain his behaviour to socially desirable responses. Related to same, Mr. Fardy also earned an elevated score for addiction

proneness on personality testing, in addition to his results indicating that substance use is part of immature, stimulus-seeking behaviour.

…

It is interesting that Mr. Fardy's personality test profiles align with past behaviour rather than with his current partner's description of him. This could indicate that he is indeed striving to move away from the attitudes and behaviours that characterized him up to the index convictions (e.g., hedonism, sensation-seeking, behaviour suggesting sexual entitlement and/or use of sex to dominate) but that he is early in that change process.

With regard to treatment, Mr. Fardy's personality test results predicted a "somewhat poor" prognosis due to tending to blame others for his problems, hence having low motivation to change. He may enter treatment at someone else's request, to avoid or reduce external pressures. However, persons with his pattern of test scores tend to think that they can work things out on their own.

…

2. Measurement of Psychopathy:

…

Mr. Fardy received a total score on the PCL-R at the 6th percentile, indicating that an average of 94% of incarcerated offenders would score higher. Research that has investigated the predictive utility of psychopathy scores has generally considered scores in this range of the PCL-R to indicate **low** risk for violence associated with psychopathy (e.g., see Harris, Rice and Cormier, 1990; Hart and Hare, 1997), keeping in mind that psychopathy is only one pathway to violent behaviour and should not be considered in isolation when assessing an individual for risk.

3. Actuarial Risk Measurements:

…

Mr. Fardy's score on the SORAG indicates that he is at the 31st percentile; therefore, one could expect an average of 69% of incarcerated forensic sexual offenders to score higher. This score places Mr. Fardy in the fourth of nine possible categories and at the low end of a score range indicating **moderate** risk for future violence relative to other adult men who have been convicted of sexual offences.

On the Static instruments, Mr. Fardy's score places him in Risk Level IVa ("**above average risk**" for being charged or convicted of another sexual offence) on the Static- 99R and Risk Level Ill ("**average risk**") on the Static-2002R. Individuals at these levels are expected to have **similar_to twice the rate** of recidivism as the average individual convicted of a sexually motivated offence.

For reference, in routine samples of sexual offenders the average five-year sexual recidivism rate is between 5% and 15% (see Phenix, Helmus, & Hanson, 2016).

4. Dynamic Risk Measurement:

…

Mr. Fardy's score on the Stable-2007 was at the 45th percentile and placed him in the **moderate** density range of criminogenic needs at the time of the current assessment. This score is in the expectable range for individuals who score as Mr. Fardy did on the Statics, and when combined with his Static-99R/Static-2002R scores **leaves him within Level Ill to IVa**, which is associated with possessing criminogenic needs in several areas requiring meaningful engagement in treatment. See Summary Statement of Risk for identification of dynamic factors relevant in Mr. Fardy's case specifically.

…

5. Summary Statement of Risk:

Overall, a combination of the Static and Stable instruments indicates that Mr. Fardy's baseline risk for sexual recidivism is one to two times that of the average person adjudicated for crossing legal sexual boundaries (Risk Level Ill to IVa). As for violence in general, considering results on the SORAG (which incorporates the PCL-R), Mr. Fardy poses "moderate" risk for recidivism.

If Mr. Fardy were to reoffend sexually, his history and current assessment results suggest that it would be against an adult female partner or acquaintance. Risk could also extend to post-pubescent adolescent females if encountering same in a "party" setting, but Mr. Fardy is not considered likely to deliberately target a teen as a potential sexual partner. At present, Mr. Fardy's risk appears to be well-managed, as he is abstaining from substance use, is focussed on positive activities like employment and time with his partner (with same *not* being centered around "partying"), and is reportedly content in his current relationship. Risk to reoffend would be considered elevated should Mr. Fardy resume "partying" or associating with a crowd that encourages or enables substance use and/or other self-indulgence, or at times of relationship conflict or dissatisfaction such that Mr. Fardy might feel motivated to seek intimacy (sexual or emotional) elsewhere. Strengthening non-entitled attitudes and understanding of consent and healthy sexual boundaries is also something for therapeutic attention, in the interests of Mr. Fardy maintaining the improved lifestyle to which he has reportedly pivoted since the index charges.

Presentence Report

[12] A presentence report was also prepared. It states, in part:

FAMILY BACKGROUND

Ms. Melanie Hobbs, mother of the subject, was contacted by telephone. Ms. Hobbs stated her son was a great child growing up and he was always well behaved. She said he is warm hearted and a wonderful person. He's always been very social and loves being in social settings. She stated he was an active child in athletics, playing ice hockey and soccer at a high level.

She was asked about his teen years regarding his use of substances and his relationships with peers. Ms. Hobbs said she clearly remembers the day when he first drank alcohol, as she picked him up from a hockey party in grade 10, recalling her being angry at another parent for allowing this. She also recalled when he was in Grade 12; she received a call from his high school principal stating that his peer group changed to a more negative social circle which had a bad influence on him in terms of substance use.

She was asked about his relationships with girls growing up. She said he had a few relationships, recalling in grade 12 he and his girlfriend were both lifeguards, and they spent a lot of time together and she once joined the family on a vacation trip. She stated he still has female friends, even after the matter before the Court.

She wanted the Court to be aware that he's always treated her and his grandmother with utmost respect. He's never been abusive, as she heard the testimony said he was towards them. She further clarified that she's never noticed him make any disrespectful comments directed at women, nor have she never seen him act aggressively towards any woman. He (the subject) grew up with positive role models, a high achieving woman in his family and other positive role models, her bother (the subjects uncle) is an RCMP officer.

Ms. Hobbs stated he (the subject) has a great work ethic, which he learned from his parents. He's never missed a day of work since the arrest. She feels if he is incarcerated, it would take a skilled young tradesman out of the work force.

…

Ms. Elysia Fournier, girlfriend of the subject, was contacted by telephone for this report. Ms. Fornier stated she first met the subject five years ago, though they became closer friends last summer when they started socializing more online leading to their first date five or six months ago.

…

She said he always has been a super nice guy, one of the best people in her life. He has always treated women with respect and has been great with his mother, which she believes is a great sign. He has been wonderful with all her friends, who also consider him to be a good person.

She stated since they started socializing, he has shown no issues with substance use nor has he had any issues with anger. She described his mental health as very strong, and 'he's been the rock for her'.

Ms. Fornier said she suffers from health issues, noting she has a movement disorder. She explained being with him(the subject) has helped her get over a lot

of her hurdles. ‘He took away her worries' and she is 'no longer scared’ about how her disorder is progressing. She stated he’s been a tremendous help to her. He is a carpenter, and he is helping renovate their home, he is researching how to modify their bathroom, for better mobility, if her disorder worsens.

Ms. Fornier stated she hopeful his sentence will not be too long; as he has been a big help for her emotionally and physically around the home. She is afraid that her medical condition will worsen, and he won’t be there. She stated he has ‘shown her unconditional love’ and she will wait for him.

EDUCATION/TRAINING

Jakob Fardy graduated from Central Kings Rural high school in 2016. He attended the Coldbrook and District school from grade six to eight, and prior to that he attended elementary schools in British Columbia. He said he was always a good student and was on the honour roll every year until grade 12. His favourite subjects in school were Ancient History and Phys Ed. He also like Calculus, which he found enjoyable though tough.

…

Following high school, he attended the carpentry program at the Kingstec Campus of the NSCC in Kentville and finished the program in 2019. His eventual goal is to earn his Red Seal in carpentry.

EMPLOYMENT

Jakob Fardy has worked as a carpenter since he’s been an adult. For the last two months he has been working for Hill Top Homes. He earns $25 an hour and works up to 45 hours a week, depending on the weather. The subject stated his previous employment was with Enserinks Construction, he said they liked him as an employee though after his conviction his employment was terminated. Other prior jobs consisted of three years with Peter Spicer Contracting in Wilmont and he was also a self-employed carpenter for eight months. He plans on continuing his career as a carpenter.

…

Mr. Brandon Milligan, employer of the subject, was contacted by telephone. Mr. Milligan confirmed the subject’s employment for the last four or five months. He stated Mr. Fardy has been a reliable worker who’s never missed a day of work. He has shown a great attitude towards work, and he is a ‘super laidback’ member of the crew, who gets along well with all his co-workers.

…

HEALTH AND LIFESTYLE

…

Regarding substance use, Mr. Fardy reported he first tried alcohol when he was 16, while at a Christmas party for his grade 10 hockey team. He stated alcohol

> started to be a concern in the year following high school. He had a ‘gap year’ in 2017, the year before college. During that year he moved out of his mother house and lived with a friend; his house became a 'party house'. He acknowledged it was 'wild few years of partying', though this all stopped after he was charged.
>
> Regarding drug use, Mr. Fardy said he started using marijuana in grade 10, around the same time he tried alcohol. He experimented with harder drugs later when he was in grade 12, noting his use depended on the peer group he was with at the time. All illicit drug use ended after he was charged. The subject informed he uses marijuana daily, prior to bed to relax. The subject does not gamble.
>
> The subject stated he received treatment for substance use from Adam Lewis, which started in 2020 and regularly met with him for almost three years. He also noted that he attended Alcoholics Anonymous for nine months, though stopped last summer when he did not feel he needed it anymore.

Sexual Assault Education

[13] Mr. Fardy completed, on his own, a course through the Department of Community Services entitled “Supporting Survivors of Sexual Violence” that addresses some of the legal issues surrounding sexual assaults.

Alcohol Treatment

[14] Mr. Fardy was using cannabis when he sexually assaulted S.M. He was impaired by alcohol, cannabis, and cocaine when he assaulted R.B., but was sober when he sexually assaulted her. Mr. Fardy was heavily intoxicated by alcohol when he sexually assaulted J.M.

[15] He sought alcohol treatment through a private counselor, Adam Lewis, following his arrest and has done well in controlling his substance abuse issues. There have been no reported instances of his using alcohol, or having any substance related issues, since his arrest in 2020.

Character Reference Letters

[16] Mr. Fardy filed 14 letters of support/character reference letters. I have read all of them. Generally, Mr. Fardy is described as a hard working, considerate, thoughtful, generous, sensitive, and productive member of society by his supporters. His partner says he has improved her life many times over. However, in intimate situations with S.M., R.B., and J.M., Mr. Fardy was the opposite of the considerate, sensitive, and pro-social individual described by his supporters. He

was completely focused on his own gratification, was dismissive of the notion of consent, and was intent on violating the physical integrity of his three victims.

[17] Following counsel's oral submissions on June 26, 2024, the court sent them an email which referenced two cases dealing with these issues and asked for further submissions:

> As a separate issue, Mr. Brown submitted and referred to character reference letters during his submissions at the sentencing hearing on June 26, 2024. Justice Arnold would like counsel to address the following two cases:
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> - *R. v. Profit*, [1993] 3 SCR 637
> - *R v. Shrivastava*, 2019 ABQB 663
>
> Please provide any submissions regarding those two cases by 4:00 PM on Thursday, July 4, 2024.

[18] Counsel for both parties submitted further written submissions on this issue on July 4. The Crown summarized the content of the two cases:

> 2. In *Profit*, the Supreme Court of Canada held that a trial judge is entitled to find that the prior good character evidence of an accused is diminished in cases of sexual assault involving children. The Court observed that, "as a matter of common sense, but not as a principle of law, a trial judge may take into account that in sexual assault cases involving children, sexual misconduct occurs in private and in most cases will not be reflected in the reputation in the community of the accused for morality".
> 3. This common sense consideration of the value of prior good character has been applied in the context of sentencing for sexual offences, including those involving adult victims. One such case in *Shrivastava*.
> 4. In the sentencing context, the reasoning in *Profit* means that an offender's prior good character may have less or no weight as a mitigating factor. Prior good character has long been accepted as a potential mitigating factor at sentencing. The rationale being that "good character" may influence the weighing of sentencing objectives:
>
> - An offender with no other criminal record may be deterred by a lighter sentence and the principle of restraint may have particular prominence; or
> - In some circumstances, "an offender of prior good character will require less punitive measures to prevent recidivism" which may be of particular influence in less serious offences. Framed a different way, "good character" may show an offence was out of

character and, therefore, that the offender has good prospects for rehabilitation.

5. Good character may, however, be of limited value in sentencing some types of offences. This is the rationale of *Profit*: "many sexual offences are committed by persons of prior good character" and "'often to the surprise of people who thought they knew the perpetrator best'". Therefore, prior good character may not warrant the weight it might be given in sentencing other kinds of offences.
6. Finally, good character should also be considered with caution so that it is not used as a "cloak for privilege and prejudice".

[19] The Crown went on to advance the following position:

7. The weight to be assigned to the mitigating effect of prior good character is for the sentencing judge.
8. Mr. Fardy's prior good character should be given limited weight in these circumstances. The offending conduct here was not a single "out of character" instance; it occurred against multiple victims over a number of years.
9. While Mr. Fardy's good deeds and prosocial activities are indeed positive, they arise in the context of an offender who has enjoyed the privileges that many others have not: positive family relationships, opportunities for education and employment, relative financial stability, an upbringing free of abuse.
10. Mr. Fardy's prior good character is not particularly probative in the face of serious offences committed in private.
11. The character references are still relevant to the extent that they show Mr. Fardy has a network of support, which can positively impact his prospects of rehabilitation, as noted in the Crown's sentencing brief.

[20] Mr. Brown said:

R. v. Profit, 1993 CanLII 78 (SCC) affirms the "common-sense conclusion" reached by the dissenting judge in the Ontario Court of Appeal (1992 CanLII 7513 (ON CA)) that evidence of good character is not probative of the accused's propensity to commit sexual assault. This observation pertained only to the process of adjudicating a contested allegation of sexual assault, but the judge in ***R. v. Shrivastava***, 2019 ABQB 663 extrapolated and applied it to sentencing and, aided by academic commentary rather than jurisprudence, developed her argument that character evidence is essentially irrelevant when sentencing for sexual assault. As set out at paras. 95-97, she excluded consideration of virtually all the evidence of the offender's character. She found nothing "exceptional or relevant" in his "status, aptitude, employment or education" nor his "lack of prior convictions, lack of remorse, loss of reputation or altered career path;" she gave

only small or limited weight to his youth and "positive conduct witnessed by others;" and she stated that "I am unable to treat good, or exemplary, character as mitigating."

Thus according to *Shrivastava*, ordinary evidence of an offender's character and circumstances should receive no weight in the sentencing analysis. This case is an outlier and it appears to have never been cited or referenced by a court in Nova Scotia, where character evidence is routinely considered during sentencing. The *Criminal Code* requires the court to consider "any relevant information placed before it" during sentencing (s. 726.1) and specifically requires that character evidence be included in presentence reports (s. 721(3)(a)). A judge is directed to consider character evidence in various aspects of sentencing, including when deciding whether to suspend sentence (s. 731(1)(a)), whether to impose probation after custody (s. 731(1)(b)), whether to order intermittent custody (s. 732(1)), and when setting the parole ineligibility period in cases of second degree murder (s. 745.4). ***R. v. Angelillo***, 2006 SCC 55 holds that "information needed to assess the circumstances, character and reputation of the accused" is essential to achieving the objectives of sentencing:

> 22 The principles of sentencing are now codified in ss. 718 to 718.2 Cr. C. These provisions confirm that sentencing is an individualized process in which the court must take into account not only the circumstances of the offence, but also the specific circumstances of the offender (see Gladue; Proulx, at para. 82). Thus, the objectives of sentencing cannot be fully achieved unless the information needed to assess the circumstances, character and reputation of the accused is before the court. The court must therefore consider facts extrinsic to the offence, and the proof of those facts often requires the admission of additional evidence.

Sentencing cannot be highly individualized without evidence of the offender's background, previous deeds, disposition, etc. Justice Rowe discussed the relationship between individualization and proportionality in his concurring reasons in ***R. v. Parranto***, 2021 SCC 46:

> [113] In order to produce proportionate sentences, sentencing must be a "highly individualized exercise" … Sentencing judges must decide a profoundly contextual issue: ". . . For this offence, committed by this offender, harming this victim, in this community, what is the appropriate sanction under the Criminal Code?" … They must determine which objectives of sentencing merit greater weight and evaluate the importance of mitigating or aggravating factors, to best reflect the circumstances of each case…
>
> [114] Individualization flows from proportionality: a sentence that is not tailored to the specific circumstances of both the offender and the offence will not be proportional to the gravity of the offence and the degree of

> responsibility of the offender… Simply stated, [translation] "[a] proportional sentence is thus an individualized sentence…
>
> [115] Parliament vested sentencing judges with "a broad discretion" to craft individualized and proportionate sentences… "Far from being an exact science or an inflexible predetermined procedure, sentencing is primarily a matter for the trial judge's competence and expertise. The trial judge enjoys considerable discretion because of the individualized nature of the process" … It is possible that, in a given case, more than one particular sentence would be appropriate and reasonable… "Proportionality will be achieved by means of a 'complicated calculus' whose elements the trier of fact understands better than anyone"... Thus, flexibility is essential to meet the needs of individual justice. In short, discretion is the means to achieve proportionality in sentencing.

[21] Defence counsel goes on to argue as follows:

> As stated by Justice Derrick for a five-judge panel in ***R. v. Anderson***, 2021 NSCA 62, "Sentencing is an inherently individualized process. It is a fundamental duty of a sentencing judge to pay close attention to the circumstances of all offenders in order to craft a sentence that is genuinely fit and proper" (at para. 115, citation omitted).
>
> *Shrivastava* is completely at odds with the above jurisprudence. It is a rogue, misguided decision.
>
> The letters submitted on behalf of Mr. Fardy should not be construed too narrowly as good character evidence. Rather, they are intended to help the court situate his offending behaviour within the overall trajectory of his life. They provide insight into his antecedants, relationships, supports and past choices. The purpose of the letters is not to score points in the "mitigating factors" column but rather to help the court understand his character and circumstances and craft an individualized sentence.
>
> As a final point, the Crown has specifically asked the court to characterize Mr. Fardy as generally "a misogynst" and to sentence him more harshly because of it. A substantial amount of bad character evidence was adduced by the Crown at trial. Mr. Fardy is entitled to show that the trial evidence created an incomplete and misleading impression of his character.

[22] It should be noted that Rowe J. was concurring in *Parranto*, not speaking for the majority or the court.

[23] In *R v Shrivastava*, 2019 ABQB 663, the complainant had fallen asleep at a friend's house after drinking heavily at a party. She awoke to find the offender, whom she did not know, having intercourse with her. On sentencing, the defence

emphasized the offender's "lack of convictions, family and community support, education and employment history, long-term stable romantic relationship, positive personal traits, and service to the community" (para. 70). The sentencing judge considered the character refences and said:

> 77 Mr. Shrivastava's references speak emphatically of his caring and moral nature. However, character traits displayed in public are of questionable relevance to offences committed in secrecy. In particular, since sexual offences are "usually perpetrated in private, out of sight and knowledge of friends and associates", evidence of community reputation has "little probative value": [Allan Manson, *The Law of Sentencing* (Toronto: Irwin Law, 2001)] at 132. Sexual offences "are committed by people from all walks of life, out of the public eye, clandestinely and secretly, often to the surprise of people who thought they knew the perpetrator best": *R v Hepburn*, 2013 ABQB 520 at para 37; see also: *R v M(CF)*, 2006 NWTSC 59 at paras 138-139.

[24] In *R. v. Profit*, [1993] 3 SCR 637, Sopinka J., there dealing specifically with sexual assault against children, noted that "sexual misconduct occurs in private and in most cases will not be reflected in the reputation in the community of the accused for morality. As a matter of weight, the trial judge is entitled to find that the propensity value of character evidence as to morality is diminished in such cases." These words apply equally to Mr. Fardy's behaviour as a young adult interacting with other young adults.

[25] I have no doubt that Mr. Fardy can be a pleasant, considerate, thoughtful and hardworking person, but the significance of such evidence about his morality is diminished, not eradicated, when the facts of his crimes are considered. His moral culpability for these crimes is high. He sexually assaulted three women, was verbally abusive, and used force to overpower two of his victims. Mr. Fardy's behaviour with the female complainants is very different than his behaviour as observed by his supporters. That does not mean that his pro-social behaviour, contribution to society, and positive relationships outside of his crimes are meaningless. But some crimes have such a high level of moral culpability that the significance of good character references is diminished.

The Offences

[26] Sections 266 and 271 of the *Criminal Code* describe the offences of assault and sexual assault of which Mr. Fardy stands convicted:

> **266** Every one who commits an assault is guilty of

> **(a)** an indictable offence and is liable to imprisonment for a term not exceeding five years…
>
> **271** Everyone who commits a sexual assault is guilty of
>
> **(a)** an indictable offence and is liable to imprisonment for a term of not more than 10 years or, if the complainant is under the age of 16 years, to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year…

[27] Therefore, both crimes have significant potential penalties attached to them and the range of sentence available is very broad.

Sentencing Objectives

[28] Both R.B. and J.M. were intimate partners of Mr. Fardy. S.M. was a recent acquaintance but was asleep and vulnerable when he sexually assaulted her. Sections 718.04, 718.201 and 718.3(8) of the *Criminal Code* came into force in 2019. They state:

> **718.04** When a court imposes a sentence for an offence that involved the abuse of a person who is vulnerable because of personal circumstances — including because the person is Aboriginal and female — the court shall give primary consideration to the objectives of denunciation and deterrence of the conduct that forms the basis of the offence.
>
> …
>
> **718.201** A court that imposes a sentence in respect of an offence that involved the abuse of an intimate partner shall consider the increased vulnerability of female persons who are victims, giving particular attention to the circumstances of Aboriginal female victims.
>
> …
>
> **718.3(8)** If an accused is convicted of an indictable offence in the commission of which violence was used, threatened or attempted against an intimate partner and the accused has been previously convicted of an offence in the commission of which violence was used, threatened or attempted against an intimate partner, the court may impose a term of imprisonment that is more than the maximum term of imprisonment provided for that offence but not more than
>
> **(a)** five years, if the maximum term of imprisonment for the offence is two years or more but less than five years;
>
> **(b)** 10 years, if the maximum term of imprisonment for the offence is five years or more but less than 10 years;

> **(c)** 14 years, if the maximum term of imprisonment for the offence is 10 years or more but less than 14 years; or
>
> **(d)** life, if the maximum term of imprisonment for the offence is 14 years or more and up to imprisonment for life.

[29] The offences involving S.M. and R.B. took place in 2016 and 2017. In *R. v. Milne*, 2020 BCSC 2101, the court held that the 2019 amendments could be applied to offences occurring before they came into force:

> [105] I acknowledge that this statutory provision did not exist at the time of this offence. However, it is not a penalty provision. Rather, it represents a codification of the jurisprudence on the primacy of deterrence and denunciation in cases like this.

Rehabilitation

[30] As noted by Mr. Brown on behalf of Mr. Fardy, in *R. v. Waterhouse*, 2020 NSSC 78, Bodurtha J. commented on the role of rehabilitation as a sentencing objective:

> [51] Even in cases requiring that denunciation and deterrence be emphasized, rehabilitation continues to be a relevant objective. Rehabilitation of offenders continues to be one of the main objectives of Canadian criminal law and it helps the courts impose just and appropriate sentences. (*R. v. Lacasse, supra*, at para. 4).
>
> [52] Our Court of Appeal has recognized the importance of rehabilitative sentencing for youthful offenders. In *R v. Bratzer*, 2001 NSCA 166, a youthful offender convicted of three counts of robbery was given a conditional sentence. The Court of Appeal upheld the sentence and said at para. 40:
>
> > 40 There is ample authority for the proposition that sentences for youthful offenders should be directed at rehabilitation and reformation, not general deterrence. … This is common sense. A youthful offender, particularly one such as Mr. Bratzer, who has an interest in a vocation and can be equipped with the tools to earn an honest living, is more likely to be diverted from a life of crime than would a career criminal.
>
> [53] Mr. Waterhouse is an excellent candidate for rehabilitation. He has excellent prospects for employment, he is a first-time offender with no prior criminal record. He accepts full responsibility for his actions. He has an extremely positive PSR and works full-time as an auto mechanic. He is a productive member of the community and has the support of his family.
>
> [54] Sentencing is not an exact science, and it is incumbent upon the Court to view the circumstances of each offender and the circumstances of the offence. Each case is different and in Mr. Waterhouse's circumstances, after

> taking into consideration deterrence and denunciation as the primary factors for his crime, as a secondary factor, I must consider rehabilitation regarding this somewhat youthful offender. Is there an opportunity for the Court to be lenient if there is something positive weighing in the offender's favour (see: *R. v. Bratzer*, 2001 NSCA 166 at para. 41).
>
> [55] I agree with Judge Buckle's comments in *Ruston, supra,* at para. 66:
>
> > …In the case of a youthful offender, rehabilitation has to be given real consideration; in many cases, it is more than a theoretical objective, it is a reasonable and viable hope.

[31] On appeal, at 2021 NSCA 23, Derrick J.A. stated:

> [42] I find the judge's description elsewhere in his decision of Mr. Waterhouse as "a youthful first offender" did not represent a reliance on an irrelevant factor. The judge used this terminology in the context of considering the objectives to be emphasized when sentencing a first offender. He noted those objectives – individual deterrence and rehabilitation – being relevant to "youthful first offenders" and referred to the *Priest* decision. As he embarked on this discussion in his decision, he identified Mr. Waterhouse as having "excellent prospects for rehabilitation" (para. 37). While the language of "youthful first offender" is more properly applied to younger offenders, such as Messrs. Priest, Bratzer and Rushton, taking Mr. Waterhouse's age into account as a mitigating factor in the manner in which he did, was appropriate.

[32] Similarly, when discussing youthful adult offenders, in *R. v. Thurairajah*, 2008 ONCA 91, the court said:

> [41] Generally speaking, sentences imposed on young first offenders will stress individual deterrence, where necessary, and rehabilitation. General deterrence will play little, if any, role in fashioning the appropriate sentence in this category of offender in most cases: … Serious crimes of violence, particularly sexual assaults, do provide an exception to the general rule described above. While all of the principles of sentences remain important, including rehabilitation, for serious crimes involving significant personal violence, the objectives of denunciation and general deterrence gain prominence…
>
> [42] The emphasis to be placed on denunciation and to a lesser extent general deterrence, grows with the seriousness of the particular circumstances surrounding the sexual assault for which an accused, even a young accused, is being sentenced. As is hopefully clear from the recitation of the facts of this case, this was a very serious sexual assault. I do not propose to repeat all of the aggravating factors. I would, however, stress the following in the context of explaining the need for a strong denunciatory sentence:
>
> > -- the age and vulnerability of the victim;

> -- the respondent committed this crime in the presence of other members of the victim's peer group, no doubt adding to her long-term humiliation and the need for general deterrence…
>
> -- the significant emotional harm done to the victim and potential long-term ostracization of the victim in her ethnic community, the risk of which was known to the respondent; and
>
> -- the respondent's stunningly callous and highly life- threatening treatment of the helpless victim after the rape.

[33] Therefore, while rehabilitation and reformation are significant sentencing considerations for youthful adult offenders, denunciation and deterrence are still prominent considerations, particularly in the case of serious crimes of violence, especially sexual assault.

Mitigating Factors

[34] Section 718.2 of the *Criminal Code* requires the sentencing court to take into account "any relevant aggravating or mitigating circumstances relating to the offence or the offender…" (s. (718.2(a)):

> **718.2** A court that imposes a sentence shall also take into consideration the following principles:
>
> > **(a)** a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
> >
> > > **(i)** evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or gender identity or expression, or on any other similar factor,
> >
> > > **(ii)** evidence that the offender, in committing the offence, abused the offender's intimate partner or a member of the victim or the offender's family,
> >
> > > **(ii.1)** evidence that the offender, in committing the offence, abused a person under the age of eighteen years,
> >
> > > **(iii)** evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,
> >
> > > **(iii.1)** evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation,
> >
> > > …

> shall be deemed to be aggravating circumstances;
>
> **(b)** a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
>
> **(c)** where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
>
> **(d)** an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
>
> **(e)** all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

[35] Mr. Fardy was arrested on July 30, 2020. His sentencing is taking place almost four years later. Delay is a factor to be considered in determining the appropriate sentence. In *R. v. Hartling*, 2020 ONCA 243, Benotto J.A. discussed the need to consider mitigating circumstances in sentencing, particularly delay:

> [115] On the other hand, delay in sentencing causes prejudice to the offender and to society. The offender is unable to begin rebuilding a life, rehabilitation is impacted, and the offender lives with the anxiety of an uncertain future ... Likewise, society "has a keen interest in ensuring that those guilty of committing crimes receive an appropriate sentence promptly": *R. v. MacDougall*, [1998] 3 S.C.R. 45, [1998] S.C.J. No. 74, at para. 36.
>
> …
>
> [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…

[36] Mr. Fardy has been living with the spectre of being held accountable for these crimes, and therefore the impending possibility of imprisonment, and other interventions into his life, for four (4) years. This goes into the mix in determining the appropriate sentence.

Job Loss

[37] In *R. v. J.J.W.*, 2012 NSCA 96, the court stated that loss of employment is a mitigating factor on sentence:

> [39] I turn then to the second reason the judge gave for reducing sentence, namely the respondent's loss, as a result of conviction, of his long-time employment as a firefighter. Clayton C. Ruby et al., *Sentencing*, 7th ed. (Markham, Ont: LexisNexis, 2008) at § 5.230 - 5.231 reads:
>
> > **§5.230** Loss of employment is a serious blow for anyone, and it may mean the destruction of an entire family. It is, therefore, always serious, and must be considered as part of the circumstances in which penalty is being imposed ... Any job loss is mitigating.
> >
> > **§5.231** A loss of employment is a frequent result of criminal conviction for persons in every walk of life, particularly for those in the public service such as police, school teachers, firefighters and professionals. The possibility of future loss of employment may be taken into account. Loss of a pension would be significant. Bankruptcy as a result of the arrest is a mitigating factor.
>
> [40] Loss of employment as a mitigating factor is reflected in the case law. … However, while it may mitigate the need for specific deterrence for a guilty plea, it does not displace general deterrence and denunciation. … Moreover, an error in assessing mitigating circumstances, such as job loss, may offend the principles of proportionality and parity and lead to an increased sentence on appeal…

[38] According to Mr. Fardy, he lost his job as a result of these charges but obtained new employment very quickly thereafter. Like the issue of the length of time he has been on release conditions, his brief loss of employment will go into the mix regarding sentence.

Restrictive Release Conditions

[39] Restrictive release conditions can be considered when determining sentence. In *R. v. Wournell*, 2023 NSCA 53, Derrick J.A. explained, for the court:

> [117] Strict release conditions may be taken into account in sentencing. This Court has not gone as far as Justice Rosenberg in *R. v. Downes* where he concluded that "time spent under stringent bail conditions especially under house arrest must be taken into account as a relevant mitigating circumstance". In *Knockwood*, Justice Saunders' canvas of various appellate authorities led him to conclude that:

> [33] …the present state of the law to be such that the *impact* of strict release conditions may be considered or "put in the mix", together with all other mitigating factors, in arriving at a fit sentence.
>
> [118] *Knockwood* held that information describing the "substantial hardship" suffered by the offender was required for the sentencing court to take the strict release conditions into account: "…the impact of the particular conditions of release *upon the accused* must be demonstrated in each case".
>
> [119] Since *Knockwood*, sentencing courts in Nova Scotia have either given credit for time spent on stringent pre-sentence release conditions or factored it into the mix of mitigating circumstances.
>
> [120] In *R. v. Campbell*, this Court upheld the sentencing judge's determination that 3.5 months credit was appropriate for the 18 months of strict release conditions the offender had been under.
>
> [121] In crafting the appellant's sentence it is appropriate to take into account the significant restrictions on his liberty as a result of house arrest prior to being sentenced and then jail, time totally slightly more than three years. We do not have information on how the house arrest imparted "substantial hardship" on the appellant but I find it would be unfair to deprive him of the mitigation that should be factored into crafting a proportionate sentence. [Emphasis added]

[40] Mr. Brown says that Mr. Fardy has been on strict release conditions that have had an impact on him over the past four years. Citing *Wournell*, he submits:

> 49. Restrictive release conditions can cause hardship to the offender which should be recognized by mitigating sentence. …
>
> 50. The amount of credit for restrictive conditions can be significant. For example:
>
> (a) 3.5 years house arrest with work exception; credit 2 years — ***R. v. Thornton***, 2015 ONSC 5280
>
> (b) House arrest with work exception 4.5 years, credit 11 months — ***R. v. Battista***, 2011 ONSC 6394
>
> (c) About 4.5 months strict house arrest without work exception; no specific information about impact; credit 11 months plus 11 days remand credit rounded up to 12 months — ***R. v. Storey***, 2021 ONSC 1760
>
> (d) 18 months house arrest without employment exception; given "relatively little weight" due to lack of evidence of impact. Credit 5 months — ***R. v. Downes***, 2006 CanLII 3957 (ON CA)
>
> 51. Mr. Fardy has been subject to a 10 pm curfew at a designated residence since August 4, 2020 and he has not been permitted to leave the province.

> The impact of a late curfew is less than full house arrest; however, Mr. Fardy has experienced the following hardships as a direct consequence of his release conditions:
>
> (a) He has been unable to continue visiting his father and other extended family in British Columbia. He previously visited each summer and over Christmas holidays for as long as 2-3 months per year. The inability to spend time with family is one of the most punitive consequences of incarceration. Mr. Fardy has already suffered that consequence for four years.
>
> (b) As amply documented in the letters of support and confirmed by trial evidence, Mr. Fardy is a sociable person whose friendships and interactions with family are highly important. He is fully occupied with employment during the day. The curfew has curtailed his ability to see friends and attend social events in the evening, or participate in overnight activities such as camping.
>
> (c) The requirement to return to his designated residence every night has prevented Mr. Fardy from making temporary moves to be closer to his job sites, and, along with the prohibition on interprovincial travel, it has inhibited his ability to take on more lucrative employment elsewhere in the province and across the country.
>
> 52. It is impossible to precisely quantify these hardships due to their nature; the relate to interpersonal relationships and financial opportunities that did not materialize. It would nonetheless be unfair to Mr. Fardy to entirely deny the impact and deprive him of credit for these consequences of his conditions.

[41] The Crown says Mr. Fardy has not put forward any evidence of *substantial hardship* due to his release conditions, and notes that he had his release conditions amended many times in order to accommodate his personal circumstances. As such, the Crown submits, he should not receive any credit in this regard:

> [4] There is no evidence of the actual impact of these conditions on Mr. Fardy. Mr. Fardy asks the Court to infer that not being able to leave the province and having a curfew condition have impacted him. *R. v. Wournell* should not be read as alleviating the requirement that "there must be some information before the sentencing court which would describe the substantial hardship the accused *actually suffered* while on release because of the conditions of that release". Not only would such a reading be contrary to *Knockwood* when there is no indication that the Court sought to overrule *Knockwood*, it would also be contrary to legislation. *Knockwood* confirms that asking the Court to draw an inference of hardship based on the existence of a bail condition is insufficient. There must be

> an evidentiary basis of an actual hardship suffered as a result of the release conditions.
>
> [5] Further, Mr. Fardy has been on bail since August 20, 2020. At the time, a global pandemic severely restricted non-essential travel and gathering. Even without bail conditions, the pandemic likely would have played a role in restricting his ability to travel to BC for leisure purposes.
>
> [6] Mr. Fardy has also obtained multiple variations since his release, including:
>
> > 1. Extending his curfew to permit him to play hockey (on February 1, 2021);
> >
> > 2. Varying his residence (on February 22, 2021, May 5, 2022, June 21, 2022, September 9, 2022, December 6, 2022, March 1, 2023, and July 18, 2023); and
> >
> > 3. Substituting his surety.
>
> [7] Many, if not all, of these variations had been obtained with the consent of the Crown, eliminating the need for a formal hearing.
>
> [8] Mr. Fardy never applied to further vary his curfew nor seek an exception to his "remain in Nova Scotia" condition.
>
> [9] Mr. Fardy's bail conditions have had some impact on his liberty; that is their purpose. However, they have not been so restrictive and inflexible that they have caused hardship warranting mitigation in sentence. He has been able to "maintain[] fulltime employment as a carpenter, roofer and general tradesman" since June 2019. He has been able to maintain contact with friends and family. He has been able to embark on, and maintain, a personal relationship. He is able to enjoy his preferred leisure activities. There has been no court-imposed prohibition on socializing after his curfew hours at his own home. He has, instead, been permitted to vary his residence and supervision (surety) when sought.
>
> [10] These bail conditions have not been so onerous as to warrant mitigation in sentence.

[42] I do not agree with the Crown on this point. For the past four years, Mr. Fardy, a young man in his twenties, in addition to other conditions, has been on a curfew requiring him to be in his residence every night by 10:00 PM, and required to remain in Nova Scotia. Despite the Crown's suggestions, Mr. Fardy was clearly on conditions that were restrictive, and I do not understand our Court of Appeal to have prohibited a sentencing judge from acknowledging that four years of a curfew for someone in their twenties would have had an impact on them. That said, Mr. Fardy was not subject to the most restrictive of release conditions, and therefore is entitled to 1.5 months credit for each year he has been subject to the curfew, for a

total of six-months credit in relation to the (approximately) 48 months he has been on a curfew.

[43] Additionally, over the past four years he has abided by strict release conditions including his curfew, along with all of the other conditions, without incident. His ability to comply with strict conditions is a positive indicator, and when directly combined with the length of time it took to complete the trial and sentencing, goes into the mix regarding the crafting of an appropriate sentence.

Charter Breach

[44] During the course of this investigation the police violated Mr. Fardy's s. 8 *Charter* rights (see 2023 NSSC 28). In that decision, I found the following:

> [64] The ITO supported the inference that there were reasonable grounds to believe that Mr. Fardy's Apple iPhone would afford evidence of anything on or in respect of which any offence against this Act or any other Act of Parliament has been or is suspected to have been committed, and/or would afford evidence with respect to the commission of an offence.
>
> [65] The ITO supported the issuance of a warrant allowing the search of Mr. Fardy's phone for messages (SMS, MMS, etc.); call logs; and social media application messages (Facebook, Instagram, etc.) between Mr. Fardy and the complainants, Mr. Fardy and related witnesses, as well as Mr. Fardy and his friends. The search and seizure of those items did not violate s. 8 of the *Charter*. There is no constitutional violation regarding that evidence.
>
> [66] However, on the basis of the facts presented in the ITO, no reasonable inference was available to the issuing justice allowing a search of Mr. Fardy's phone for photos, videos or emails, and as conceded by the Crown, Mr. Fardy's internet history. Therefore, those items were seized in violation of s. 8 of the *Charter.*
>
> [67] The parties asked to have a separate hearing regarding a remedy under s. 24(2) of the *Charter*, once my decision was rendered regarding s. 8 of the *Charter*.

[45] No application for a *Charter* remedy under s. 24(2) was requested by Mr. Fardy following my decision regarding the search. There was some confusion in relation to the party's sentencing submissions on this point, and on July 4, the court sent the following correspondence to counsel:

> During submissions it became clear that counsel were not in agreement regarding whether a remedy for the s. 8 *Charter* violation was granted, and how the s. 8 *Charter* violation should be factored into Mr. Fardy's sentence.

Following the release of Justice Arnold's s. 8 decision in January 2023, there were several discussions about the s. 24(2) remedy application, including the following on January 26, 2023:

THE COURT:	...I've given you a decision in relation to the Section 8 motion. And you had indicated that you may want to argue 24(2), depending on what my decision was on section 8 and, so, where are we with that? Or do you know yet?
MR. KENNEDY:	Yes, thank you, my Lord, it's Rob Kennedy for the Crown. Um, I'll just refer to paragraph 65 and 66 of your decision. Um, so, 65 deals with matters that you found no violation of section 8, and then 66 are matters where you found violation of section 8 of the *Charter*. Um, certainly, and I think…I think I alluded to this during oral submissions. If not, in written submissions. **The nature of the content that's referenced in paragraph 66, there's nothing probative or relevant in the Crown's view, in terms of that type of media. Um, so, we would simply concede that…that those matters can be excluded under 24(2). We're not looking to argue that issue.**
THE COURT:	Mr. Brown, do you have instructions on this point?
MR. BROWN:	Uh, no, I think we'll have to, uh, give it a little bit further thought and advise…advise in due course of what we would be looking to do in terms of remedy.
…	
THE COURT:	THE COURT: … **And also, Mr. Brown, pick a date by which you're going to let everybody know what you've decided to do in relation to the s. 8 decision and 24(2), considering the Crown's concession in relation to that evidence and section 24.**
…	
THE COURT:	…Okay, and then a week after that for you to let us know what's going on in relation to the 278 stuff and also the s. 8, you might as well also tell us about 24(2) at that time.
MR. BROWN:	That's what I had in mind, yeah, so, I'll do that.
THE COURT:	Is that good for the Crown?
MR. KENNEDY:	It is, thank you.

[46] I asked counsel to advise of the date, if any, where remedy was addressed. It appears that this issue was not raised subsequently in the trial, however.

[47] Mr. Fardy provided a host of cases whereby *Charter* violations resulted in sentence reductions. For example, he referred to the dissent in *R. v. Sabiston*, 2023 SKCA 105, where Tholl J.A. (in dissent) said:

> [133] As noted above, a reduction in sentence does not automatically flow from the finding of a *Charter* breach: *Beaver* at para 22. As always, the circumstances of the individual offence and the individual offender, which would include the facts surrounding the *Charter* breach, must be central to the sentencing decision. It is important to observe that the trial judge did not consider these *Charter* breaches to be egregious. In my view, given the nature of the breaches, the unusual factual circumstances, the inevitability of the discovery of the shotgun, the exceedingly short period of time that passed before lawful grounds to arrest Mr. Sabiston emerged, the polite and respectful interactions with Mr. Sabiston by the police, and the required emphasis on denunciation – considered in the context of this offender and this offence – there was no reason to grant a reduction in sentence.

[48] Of course, it does not automatically follow that where there has been a *Charter* violation, there must be reduction in sentence. As the court said in *R. v. Collins*, 2023 ONSC 5768, a sentence reduction as a s. 24(1) remedy "is a relatively rare *Charter* remedy. It arises most often in cases where the police have used excessive force or lengthy arbitrary detention or repeated unnecessary strip searches in the course of an arrest or detention. These kinds of Charter violations have some punitive or degrading effect on the accused. It is these kinds of effects that clearly relate to the principles of sentencing, in the sense that the accused has already been subjected to some form of punishment, hardship, harm, or prejudice" (para. 69).

[49] Mr. Fardy says that due to the significance of the *Charter* violation, his sentence should be reduced. In supplemental submissions he said:

> The Crown has now filed a further supplemental written submission dated July 5, 2024 asserting that the police misconduct that resulted in the *Charter* breach was "careless, rather than flagrant" (para. 9). This contradicts the *Charter* decision dated January 25, 2023, which stated at para. 62:
>
> > I agree that the search of his phone for photos, videos, and emails <u>equated to scouring or rummaging through his phone looking for evidence on a hunch or mere suspicion</u>. Mr. Fardy's s. 8 *Charter* rights were violated in that regard. [emphasis added]

> Police embarked on an intentional effort to search the entire content of the phone. There was no evidence of carelessness or inadvertance. To the contrary, there was strong indication that police had simply taken no interest in the jurisprudence relating to phone searches, in that they failed to take notes of the search and they brazenly exceeded the warrant by also searching Mr. Fardy's internet browsing history.
>
> In both the July 2 and July 5 submissions, the Crown urges the Court to limit Mr. Fardy to the exclusion of evidence remedy sought in the original *Charter* notice. The notice predated the Crown's concession that the photo, video, email and internet browsing history evidence had no probative value such that this evidence would be inadmissible in any event. The Crown asserts that it "conducted its case with the understanding that the impugned content would not be used" (July 2, para. 6), implying that it somehow relied on the *Charter* notice, but offers no specifics of how it might otherwise have made use of evidence that had no probative value. By repeatedly returning to the strict content of the *Charter* notice, the Crown is elevating an inconsequential formality above judicial contemplation of two vital interests, *i.e.* the deprivation of Mr. Fardy's liberty and the vindication of his *Charter* rights. The Court should instead focus on the issues of substance.
>
> Finally, the Crown asserts that the police intrusion into Mr. Fardy's photos, videos and emails "had no clear impact" (July 5 submission, para. 9) but this is unsupportable. The Supreme Court of Canada has affirmed multiple times in the cases cited in the original Defence brief — including *Spencer*, *Bykovets*, *Fearon* and *Vu* — that searches of electronic devices are among the most intrusive searches possible; the privacy interests involved warrant strong protection; and the impact of a *Charter*-breaching search of a device is serious. Consider, for example, the forceful words used by Chief Justice McLachlin in ***R. v. Marakah***, 2017 SCC 59 in relation to a search of text messages:
>
> > Mr. Marakah had a reasonable expectation that the fact of his electronic conversation with Mr. Winchester, as well as its contents, would remain private. The *Charter*-infringing actions of police obliterated that expectation. The impact on Mr. Marakah's *Charter*-protected interest was not just substantial; it was total.
> >
> > [para. 67, emphasis added]

[50] The Crown says that because Mr. Fardy was successful on his *Charter* application, and because the evidence in question was essentially excluded as a result, there is no further credit owing to him:

> [14] Mr. Fardy says that the s. 8 *Charter* violation should mitigate his sentence. He cites *R. v. Nasogaluak, R. v. Lemus,* and the dissenting opinion in *R. v. Sabiston* in support.

[15] The weight of authority appears to provide for a mitigation in sentence where a *Charter* violation – or state misconduct not quite rising to a *Charter* violation – both: (a) relates to the circumstances of the offence or offence and, (b) has not otherwise resulted in a remedy prior to sentencing.

[16] Here, Mr. Fardy sought *Charter* relief and, where his *Charter* right was violated, he obtained relief: the evidence was excluded.

[17] The *Charter* violation here warrants no additional remedy at sentencing.

[51] On July 5, 2024, the Crown further stated:

2. In *R. v. Nasogaluak*, the Supreme Court of Canada confirmed that state misconduct – whether it amounts to a *Charter* violation or not – may be taken into account at sentencing, where such conduct is related to one or more of the relevant sentencing principles. The Court went on to note, "[a]s mitigating factors, the circumstances of the breach would have to align with the circumstances of the offence or the offender, as required by s. 718.2 of the *Code"*.

3. As noted in the Crown reply brief, where state misconduct has had an impact on sentence, the misconduct has usually been unremedied prior to sentencing: the misconduct was not raised until after a guilty finding or the offender sought a remedy under s. 24(1) or (2) which was not granted at trial.

4. Some Courts have relied on the following excerpt, attributed as a statement of law by Justice Watt, to find that an offender may be obtain both formal *Charter* relief and mitigation on sentence:

> The error involved a mischaracterization of the request for sentence reduction as a request for two remedies for the same constitutional infringement. No principle forecloses multiple remedies for the same infringement, provided the requisite conditions precedent have been satisfied. But more importantly, sentence reduction is available without demonstration of a *Charter*-infringement predicate.

5. The cases that cite this quote for this proposition have not commented on the fact that this quote falls under the heading "The Arguments on Appeal", where Justice Watt is describing the positions of the parties on appeal. Nor do those cases include this further quote from Justice Watt, found under the heading "The Governing Principles": "I need not decide whether the trial judge's "one breach-one remedy" rule for *Charter* breaches is correct… The correctness of the rule, if such there be, is not material to my decision".

Application

> 6. Here, the state misconduct at issue did amount to a *Charter* breach. However, no formal determination of a *Charter* remedy was made. The parties simply proceeded without the evidence that had been the subject of the application for an exclusion under s. 24(2).
>
> 7. This Court should consider whether the state misconduct should impact sentence. However, consideration does not automatically equate to a reduction in sentence.
>
> 8. Courts have given little or no weight to state misconduct where there was a lack of any clear connection between the *Charter* breach and the circumstances of the offence and offender, or where there was little impact on the offender.
>
> 9. In this case, the state misconduct should not reduce the sentence. The misconduct was careless, rather than flagrant. There has been no clear impact on Mr. Fardy. Other than the general proposition that a message should be sent to the state actor – a premise that would apply in all situations of state misconduct – there is no connection between the misconduct and the principles of sentencing. And, while Mr. Fardy did not formally obtain relief during the trial, he received the benefit of the relief he originally sought: the evidence obtained was not relied upon at trial.

[52] On this issue, I agree with Mr. Brown. The misconduct was not merely "careless" as characterized by the Crown. The police unconstitutionally rummaged around in Mr. Fardy's phone, accessing his photos, videos, and internet browser history.

[53] Mr. Fardy was partially successful in bringing a *Charter* application at trial. I found that his s. 8 rights had been violated. The Crown conceded that the evidence that had been improperly examined by the police should be excluded, but no remedy was ever requested in accordance with s. 24(2). Police looking at photos, videos and internet browser history without proper prior judicial consent is serious. In *R. v. Bykovets*, 2024 SCC 6, Karakatsanis J. stated, for the majority:

> [54] This principle is especially clear where there is a search of digital information. Computers are different. These devices store immense amounts of information — some of which is automatically generated and retained unbeknownst to the user — which can touch the biographical core of personal information (*Vu*, at para. 41). These privacy interests can be even more palpable if the device is used to connect to the Internet (*Cole*, at para. 47). Indeed, "it is difficult to imagine a more intrusive invasion of privacy" than searches concerning an individual's use of the Internet (*R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253, at para. 105).

[55] The unique and heightened privacy interests in personal computer data flows from its *potential* to expose deeply revealing information. In *Vu*, this Court found that the search of a computer requires specific pre-authorization because computers are a repository for an almost limitless universe of information (at para. 41); and information relating to the user's Internet activity "can also enable investigators to access intimate details about a user's interests, habits, and identity" (para. 42). Even though police in that case were merely trying to determine who lived in the home, the Court still concluded there were serious privacy interests engaged by the search.

[56] Similarly, in *Reeves*, the severity of the privacy concerns arising from the seizure of a computer was unaffected by the police's specific intention to search the computer for child pornography. Rather, these concerns stemmed from "the personal or confidential nature of the data that is preserved and potentially available to police through the seizure of the computer" (para. 33 (emphasis added), citing *Marakah*, at para. 32). The Constitution should protect against the seizure of a computer because, in doing so, police "obtained the means through which to access [highly private] information" (*Reeves*, at para. 34).

…

[58] Moreover, in applying a normative standard, it is not helpful to focus on the narrowest interpretation of the expert evidence. Rather, we must assess the evidence in its broader context, including the prevailing social realities and the impact of our decision in other circumstances. This Court has frequently taken judicial notice of these broader "social facts" to "construct a frame of reference or background context for deciding factual issues crucial to the resolution of a particular case . . . [;] they help to explain aspects of the evidence" (*R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458, at para. 57; see also P. W. Hogg and W. K. Wright, *Constitutional Law of Canada* (5th ed. Supp.), at § 60:8). In my view, the ever-increasing intrusion of the Internet into our private lives must be kept in mind in deciding this case. It is widely accepted that the Internet is ubiquitous and that vast numbers of Internet users leave behind them a trail of information that others gather up to different ends, information that may be pieced together to disclose deeply private details. And, as the expert evidence describes, an IP address is attached to all online activity; it is a fundamental building block to all Internet use. This social context of the digital world is necessary to a functional approach in defining the privacy interest afforded under the *Charter* to the information that could be revealed by an IP address.

…

[62] These purchases may "broadcas[t] a wealth of personal information capable of revealing personal and core biographical information about the [purchaser]" (*Marakah*, at para. 33), from the restaurants they frequent, the destinations they visit, the hobbies they enjoy, to the health supplements they use. Internet users may even have "an acute privacy interest in the *fact* of their

> electronic [purchases]", especially as our marketplaces rapidly migrate online (para. 33 (emphasis in original)).
>
> [63] Other online activities can reveal information that goes directly to a user's biographical core. Websites offering dating services or adult pornography can give the state a depiction of the user's sexual preferences. An Internet user's history on medical, political, or other similar online chatrooms can reveal their health concerns or political views. If an IP address is not protected, this information is freely available to the state without the protection of the *Charter* whether or not it relates to the investigation of a particular crime.
>
> …
>
> [67] A great deal of online activity is performed anonymously (*Spencer*, at para. 48; *Ward*, at para. 75). People behave differently online than they do in person (*Ramelson*, at para. 5). "Some online locations, like search engines, allow people to explore notions that they would be loath to air in public; others, like some forms of social media, allow users to dissimulate behind veneers of their choosing" (para. 46). We would not want the social media profiles we linger on to become the knowledge of the state. Nor would we want the intimately private version of ourselves revealed by the collection of key terms we have recently entered into a search engine to spill over into the offline world. Those who use the Internet should be entitled to expect that the state does not access this information without a proper constitutional basis.
>
> …
>
> [70] Consequently, an IP address may betray an intensely private array of information, touching directly on the intimate details of the lifestyle and personal choices of an individual user (*Marakah*, at para. 32; *Spencer*, at para. 27).

[54] There is no formula for reducing a sentence due to a *Charter* violation such as in these circumstances. I am satisfied that due to the seriousness of the violation, Mr. Fardy is entitled to a four-month reduction in his sentence because of the *Charter* violation in these circumstances.

Fundamental Sentencing Principles

[55] Sections 718 and 718.1 of the *Criminal Code* set out the fundamental purpose of sentencing and the requirement of proportionality:

> **718** The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

> **(a)** to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
>
> **(b)** to deter the offender and other persons from committing offences;
>
> **(c)** to separate offenders from society, where necessary;
>
> **(d)** to assist in rehabilitating offenders;
>
> **(e)** to provide reparations for harm done to victims or to the community; and
>
> **(f)** to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.
>
> …
>
> **718.1** A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[56] The concept of proportionality was discussed by Saunders J.A. in *R. v. White*, 2020 NSCA 33:

> [30] The "fundamental purpose" of sentencing is found in s. 718 of the *Criminal Code*…
>
> [31] In furtherance of this fundamental purpose of sentencing, Parliament has directed that proportionality is the fundamental principle of sentencing…
>
> [32] Imposing a sentence obliges trial judges to address the "fundamental principle" of proportionality (*Lacasse*, para. 53)). The sentence must be proportionate to the gravity of the crime and the offender's culpability in its commission. The gravity of the offence and its consequences will be informed by the range of sentence prescribed in the applicable legislation. …

[57] As stated in *R. v. Friesen*, 2020 SCC 9, the specific harm suffered by a victim is relevant to this determination:

> [75] In particular, courts need to take into account the wrongfulness and harmfulness of sexual offences against children when applying the proportionality principle. Accurately understanding both factors is key to imposing a proportionate sentence (*R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773, at paras. 43-44). The wrongfulness and the harmfulness impact both the gravity of the offence and the degree of responsibility of the offender. Taking the wrongfulness and harmfulness into account will ensure that the proportionality principle serves its function of "ensur[ing] that offenders are held responsible for their actions and that the sentence properly reflects and condemns their role in the offence and the harm they caused" (*Nasogaluak*, at para. 42).
>
> …

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

[58] Here, no Victim Impact Statements were filed, and no evidence was presented regarding the specific harm suffered by each victim. As noted by Mr. Brown with regard to S.M.:

> 38. Factors that would tend to increase the gravity of the offence were not established beyond a reasonable doubt: it was not proved that Mr. Fardy penetrated Ms. S.M. with his penis, nor was there any evidence of prolonged touching or other forms of sexual gratification. The offence may have consisted of very brief digital penetration which stopped as soon as Ms. S.M. looked at Mr. Fardy.
>
> 39. Ms. S.M. testified that the morning after the incident she had a highly positive interaction with Mr. Fardy and did not want him to leave the residence. Crown counsel elicited from Mr. Fardy that he and Ms. S.M. engaged in consensual sexual activities that morning. Ms. S.M. expressed to the other complainants her disappointment that a relationship did not develop with Mr. Fardy. These facts are consistent with an inference that the gravity and impact of the offence on Ms. S.M. was at the lower end of the spectrum.

[59] Mr. Brown also noted that J.M. may have considered the sexual assault out of character for Mr. Fardy:

> 41. The sexual assault was not prolonged; it lasted about five minutes. It did not involve extraneous violence. Mr. Fardy did not apply significant force to hold Ms. J.M down. The utterance "you're getting fucked whether you like it or not" should be assessed in the context of Mr. Fardy's grossly intoxicated ranting and raving that had gone on all night; it was not a thoughtful or calculated threat. Ms. J.M. appears to have accepted that the assault was impulsive and out of character; she considered it to have been caused by Mr. Fardy's abuse of alcohol and remained in the relationship while he worked on his alcohol issue. She did not express any particular sentiment about the assault, despite numerous other acrimonious exchanges with Mr. Fardy as the relationship ended.

[60] With regard to J.M., while it is clear that she was hopeful that Mr. Fardy would reform himself and supported him in their relationship for a few months after the sexual assault, Mr. Brown's submissions on this point require comment. Mr. Fardy's statement that "You're getting fucked whether you like it or not", was, contrary to Mr. Brown's submissions, a calculated threat. Immediately after he made that statement he had forced, unprotected, vaginal intercourse with J.M. until he ejaculated. While J.M. may have mistakenly felt that Mr. Fardy's sexual assault of her was out of character, we know objectively that her belief was wrong. He was angry with her due to his jealousy of her communications with T.O. and felt entitled to violate her sexual integrity. Just as he did with R.B. And just as his sense of sexual entitlement led to his sexual assault of S.M.

[61] The proportionality assessment requires a two-part inquiry: 1) an assessment of the gravity of each offence and 2) the culpability of the offender. Any violation of the sexual integrity of another person is serious. That said, courts at all levels have categorized the gravity of assaults and sexual assaults in various ways and on various scales depending on the specifics of each crime. In terms of gravity and culpability, the sexual assault on J.M. was the most elevated. The sexual assault on R.B., combined with the assault on her during the incident, is serious, but not on the level of the crime involving J.M. The sexual assault of S.M. is also not on the level of that of J.M. The defence notes the "positive" interactions between S.M. and Mr. Fardy after the crime, which should not be over-emphasized. Mr. Fardy's culpability, reflected by his moral blameworthiness, in relation to the sexual assault on S.M. is high. He excused his own behaviour by saying he was *just* "high and horny". His moral blameworthiness in relation to the sexual assault of R.B. is high. He was jealous and angry and used protracted physical force in an effort to receive oral sex. In relation to the assault on R.B. and the sexual assault of J.M., Mr. Fardy was very intoxicated on both occasions. This reduces his moral blameworthiness slightly based on the facts of those two crimes. Even without specific evidence of the individual effects on the complainants, these were grave offences of violence for which the offender's culpability is high. The range of sentence contemplated by the *Criminal Code* of up to ten years imprisonment will also inform the assessment of what constitutes a proportional sentence.

Parity

[62] In discussing the concept of parity in sentencing, Saunders J.A. said in *White*:

[67] All Canadians, no matter where they reside in this country, are subject to the same criminal law as enshrined in the *Criminal Code* … and the *Controlled Drugs and Substances Act*…Of course the sentencing process is highly contextual and meant to address the specific circumstances of the offence and the offender. Yet consistency in sentencing is also an important objective. Accordingly, after taking into account all of the features of a particular case, similar offences and similar offenders should be treated alike at sentencing, whether the conviction arose in Vancouver or Winnipeg, Halifax or Charlottetown. This is the principle of parity mandated in s. 718.2(b) of the *Criminal Code*:

> a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.

[68] One of the functions of parity is to ensure fairness and guide our responsibility as judges to impose a sentence that is just and appropriate:

> **§2.31** This principle of parity has developed to preserve and ensure fairness by avoiding disproportionate sentences among convicted persons where, essentially, the same facts and circumstances indicate equivalent or like sentences. …

See for example, Ruby, C.C., Chan. G.C. & Hasan, N.R., *Sentencing*, 9th Edition (Toronto: LexisNexis, 2012) at §2.31 & §2.35).

[69] In conducting a parity analysis, sentencing judges are required to focus on both the "fundamental principle" of proportionality and the "secondary" principle of parity (*Lacasse*, paras. 53-54). Judges must also understand that while the proportionality and parity analyses are separate and distinct inquiries, there will always be a connection and interplay between the two. That is because proportionality not only involves a consideration of the individual features of an accused and his or her crime(s) but also a comparison with sentences for similar offences committed in much the same circumstances. As Wagner, J. directed in *Lacasse*:

> [53] …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* …
>
> [Underlining is mine]

[70] Regrettably, despite being presented with numerous precedents to guide his analysis, the trial judge in this case made no attempt to review sentences in similar situations in order to achieve parity with comparable sentences in other jurisdictions. The judge never reconciled the "individualization and parity of sentences" to ensure the respondent's sentence was proportionate.

[63] As noted above, the range of sentence for assaults and sexual assaults across Canada is very broad. This is underscored by the number of cases provided by counsel. Crown counsel referenced *R. v. J.J.W.*, 2012 NSCA 96, as well as the following cases (and within each of those cases are references to many other cases):

Case Name	Summary of Facts and Circumstances	Sentence
R. v. Percy, 2021 NSSC 353	Guilty plea to sexual assault. Accused assaulted his close friend and forced vaginal intercourse, pinned her down, slapped her in the face and hit her arm. The victim could not free herself as the accused was physically much larger and stronger than she was. Aggravating factors included that offence was major sexual assault, accused restricted victim's breathing, victim was assaulted in her own home, victim had expectation of security given that she had been very close friends with accused for 15 years, and victim experienced physical and emotional harm. Mitigating factors included that accused had no criminal record prior to this offence, he pleaded guilty, and recognized seriousness of the offence. Risk of sexual re-offending is in the moderate to moderate-high range.	5 years imprisonment (consecutive to time serving on another sexual offence). Joint recommendation.

R. v. T.J.S., 2021 NSSC 328	Guilty plea to sexual assault. Accused assaulted his close friend and forced vaginal intercourse, pinned her down, slapped her in the face and hit her arm. The victim could not free herself as the accused was physically much larger and stronger than she was. Aggravating factors included that offence was major sexual assault, accused restricted victim's breathing, victim was assaulted in her own home, victim had expectation of security given that she had been very close friends with accused for 15 years, and victim experienced physical and emotional harm. Mitigating factors included that accused had no criminal record prior to this offence, he pleaded guilty, and recognized seriousness of the offence. Risk of sexual re-offending is in the moderate to moderate-high range.	4 years imprisonment
R. v. J.A.W., 2020 MBCA 62	Accused penetrated the victim's vagina with his penis while she was asleep in his bedroom after a night of partying with friends. The accused and victim had known each other for a long time. The accused was Indigenous.	39 months imprisonment
R. v. S.F.M., 2022 NSSC 90	Accused was convicted after trial of two counts of sexual assault and one count of assault in relation to his wife. During the course of the marriage, there were a number of instances in which the accused ignored the clear communication of a lack of consent or was reckless or wilfully blind to the lack of consent by the victim to acts of sexual intercourse. In his view, he had the right to have intercourse with her and she had the obligation to engage in this activity. This was a form of coercive manipulation. This occurred greater than ten times over the course of a four year marriage.	3 years and 3 months imprisonment

	There was also a single act of oral sex that was non- consensual. There were also two incidents of assault where the accused struck the victim causing a black eye and kicked her in the hip causing her to fall off the mattress onto the floor. Residual psychological damage to the victim. Accused's potential for rehabilitation was brought into question by his lack of insight into his wrongdoing. The IRCA indicated that the accused had a long history of gainful employment and was a successful entrepreneur. Demonstrated commitment to volunteerism in the community. Positive pre-sentence report. Numerous positive reference letters. Eight years prior to sentencing, the accused was conditionally discharged for two assault and two breach convictions related to domestic violence.	
R. v. Simpson, 2017 NSPC 25	Convicted of sexual assault after trial. Victim went on first date with accused and during that date she consensually performed oral sex on him. Several months later the accused contacted her and they went out for dinner and then went to accused's house. Victim allowed accused to remove some of her clothing and she performed consensual oral sex on him. However, despite her objections, he had unprotected vaginal intercourse with her. Accused was 43 years old, married and was father of young daughter. He was employed with the navy. No prior criminal record. Subject to release conditions for three years.	3 years imprisonment

R. v. Campbell, 2022 NSCA 29	Accused was convicted after trial of sexually assaulting a female victim. This offence involved non-consensual vaginal intercourse. Sentence of two years imprisonment imposed. This offence was not the subject of this appeal. The accused committed another sexual assault against a different female victim 8 days later. He entered a guilty plea to s. 271. He was in a dating relationship with the victim that ended, but they started communicating again. Accused stayed at the victim's home, they engaged in consensual vaginal intercourse, but then the accused forced the victim to have anal intercourse after she refused, and he ejaculated into her anus without a condom. The sentencing judge imposed a two year concurrent sentence. This was overturned on appeal and a sentence of three years' consecutive was imposed.	3 years imprisonment (consecutive to 2 year sentence already served)
R. v. Deveau, 2023 NSSC 429	Accused convicted after trial of sexual assault and entered guilty plea to additional sexual assault in relation to separate victim. In the first instance, the victim was a participant in an employment workshop that the accused was running. They engaged in sexually suggestive discussions. They both knew it was improper to develop a personal intimate relationship outside of the program. They met for coffee and then went to a more private location. He asked her if she wanted to kiss. She declined. He began to kiss her aggressively without her consent. He started pulling her over to him. He reclined his seat. He unzipped his pants, pulled out his penis and pushed her head in his lap. In an effort to try to have her perform oral sex on him, he kept trying to pull and push her. She kept saying "no" repeatedly. The second incident involved a separate victim. While on an undertaking for the first matter, a second victim went to the accused for therapy	3 years imprisonment (1 year and 2 years consecutive)

	sessions. He was becoming flirtatious during sessions. He arranged for her to come to his residence. They smoked cannabis. While watching a movie, he pulled down his pants and exposed his penis. He made a motion indicating that he wanted her to perform oral sex on him. She performed oral sex on him as he pulled her towards himself. She did not provide informed communicated consent. The accused had no related prior criminal record. "Guarded remorse" for his behaviour. Supportive family.	
R. v. Preston, 2021 NSSC 316	Accused and victim were on date and being intimate consensually. Accused then forced unprotected vaginal intercourse on victim. Accused was 19 years old, had no prior criminal record and otherwise had been pro-social member of society and had not been in trouble since. Accused was assessed at moderate risk to reoffend. He acknowledged that he had mental health issues and sought treatment long before events that gave rise to the offence. He did not take his treatment as seriously as he should. He had supportive mother.	2 years imprisonment and 2 years probation.

R. v. Burton, 2017 NSSC 181	Victim had broken up with accused but agreed to go to his Super Bowl party. After consuming alcohol and sleeping pills, she fell asleep in the accused's bed. The accused had unprotected sexual intercourse with her and masturbated in her hands. Convicted after trial. Accused acknowledged guilt and expressed remorse, had no prior criminal record, had community support, and the pre-sentence report was positive. "Vulnerable people need to be protected from sexual predators. R.P. could not have been more vulnerable than she was when Burton violated her" (para. 23). "If Burton is sentenced to two years in prison in a federal penitentiary, I can order up to three years probation, thereby giving the criminal justice system control over him for five years" (para. 28).	2 years imprisonment and 3 years probation
R. v. Al-Rawi, 2020 NSSC 386	Accused cab driver, who was resident of Germany at time of sentencing, picked up intoxicated victim and brought her to his apartment. He had non- consensual sexual intercourse with her. Convicted after trial. Accused would have suffered negative collateral consequences from period of imprisonment. His residency permit for Germany was in question, he would have been separated from his wife and child when child was born, and his business was likely to suffer or fail. Severe collateral consequences inclined to lower end of sentencing range in hope that some consequences would be alleviated by shorter period of imprisonment.	2 years imprisonment

R. v. J.A.M., 2018 NSSC 285	The accused penetrated the victim's anus with his penis when she was highly intoxicated and asleep. Convicted after trial. The pre-sentence report was positive and the accused had support from his family. 39 years old. Self-employed as electrician. Married with 3 children. Two prior convictions for impaired driving.	2 years imprisonment and 3 years probation
R. v. S.L., 2020 NSSC 381	Accused was convicted of sexual assault, which took place when the victim was lying unconscious in her own bed. She was incapable of consenting and in a highly vulnerable state. At the time of the offence, the accused and victim were residing in the same home but were otherwise separated and not intimate during this time. They had two children together. Accused had no prior criminal record. Low risk to re-offend. 41-years-old. Employed in the construction industry. Numerous letters of support for the accused.	2 years imprisonment
R. v. Murray, 2023 NSSC 62	Summary conviction appeal. Accused was found guilty of putting his penis inside complainant's mouth without her consent. He pulled her head towards his penis. Crown appeal of sentence of 90 days intermittent custody and 2 years probation allowed. Accused had no prior criminal record. Full-time employment. Supported a young family. Under community supervision for 2 years without breaches. Underwent counselling.	18 months imprisonment and 2 years probation. Maximum penalty for summary conviction election.

R. v. Lapierre, 2022 NSCA 12	Accused convicted after trial. Youthful offender with no prior criminal record, a positive work history and a positive PSR. Accused and victim met online ten months before the incident. She met him during his break from work because the accused was angry with her and she proposed to talk in person. During this meeting, he put his hand down her shirt and up her dress. He turned her around and attempted to put his penis in her vagina but the victim prevented him from doing so by keeping her legs together. He proceeded to kiss her.	1 year imprisonment and 30 months probation.

[64] Counsel for Mr. Fardy also referenced ***J.J.W.***, and provided the court with the following additional cases (and within each of those cases are references to many other cases) that he says should guide the court as to the appropriate disposition:

> ***R. v. Tuffs***, 2012 SKCA 6 — Placed hand down the sleeping victim's pants touching her vagina, grabbed her hair to force her head around to kiss her saying "I know you say no, but I know you want it." Age 37, no previous criminal record. 1 year custody.
>
> ***R. v. A.***, 2019 NSPC 87 — Digital penetration, hand around the victim's neck. Short duration, ended with victim yelling. Custody 4 months would be appropriate; but CSO 6 months ordered in light of *Gladue* factors.
>
> ***R. v. L.P.***, 2022 NSPC 23 — Brief digital penetration of the sleeping victim. CSO 18 months. A review of cases beginning at para. 37 indicates typical sentences of about 14-18 months including some CSOs.
>
> ***R. v. Holland***, 2022 ONSC 1540 — Sentence of 9.5 month CSO in consideration of all factors including 2-year delay in sentencing. Brief digital penetration of an awake victim who had been enticed to the back of a nightclub. Determined at para. 30 that the range for relatively brief digital penetration is 8-12 months.
>
> ***R. v. Deveau***, 2023 NSSC 429 — Repeated effort to force vulnerable complainant to perform oral sex in a parked car. Abuse of client-counsellor relationship. Devastating victim impact. One year.
>
> ***R. v. Patel***, 2023 ONSC 890 — Threatened 14-year-old and tried to push his head to perform oral sex, brief touching over the clothes of the victim's anal region. Offender was in a position of trust and maintained his innocence. Joint submission 2 years concurrent with a second similar incident involving another victim a few weeks later.

> ***R. v. J.A.***, 2024 NSPC 5 — Ten instances of touching, including some penile and digital anal penetration. The offender had a poor understanding of consent. CSO two years. A review of cases involving primarily penile penetration of sleeping victims beginning at para. 31 indicates a range of about 14-36 months.

[65] Of the cases provided, there are several that are most instructive considering the instant circumstances in relation to each crime. I will consider the most relevant cases in respect of each complainant.

S.M.

[66] The sexual assault of S.M. started while she was asleep and ended when she woke up and turned to look Mr. Fardy in the face. At trial, I found that he had either inserted his finger or his penis into S.M.'s vagina. Because the insertion of a penis is considered aggravating, and because the Crown cannot prove that Mr. Fardy inserted his penis as opposed to his finger, for the purpose of sentencing, the facts are that he inserted his finger.

[67] In *R v Holland*, 2022 ONSC 1540, [2022] OJ No 1611, the accused was found guilty of inserting either his finger or his penis into a vulnerable and intoxicated victim without her consent. Schreck J. reviewed the facts:

> **5** The facts of the offence are set out in detail in my reasons for judgment, reported as *R. v. Holland*, 2020 ONSC 846. In 2008, Mr. Holland was a very successful nightclub promoter. On February 7, 2008, he was a promoting a night club called the Century Room, which had a "VIP" area which patrons could enter by invitation only. N.K., who was at the time in her mid-20s, attended the club and was invited into the "VIP" area, where she consumed alcohol to the point of intoxication. At some point, Mr. Holland invited N.K. for a "VIP tour" of the back of the nightclub. He brought her to an isolated area, where he grabbed her and began to kiss her neck. He then pulled down her pants and penetrated her vagina from behind with what she believed was either his penis or a finger. N.K. immediately said something like "stop" or "no" and he stopped. N.K. estimated that the length of time between when she was first grabbed and when the penetration stopped was about 10 to 15 seconds.
>
> **…**
>
> **20** It is also aggravating that the sexual assault included penetration of the victim's vagina. N.K. was unable to say whether she had been penetrated by Mr. Holland's finger or his penis, and the parties accept that Mr. Holland should be sentenced on the basis that it was his finger. Penile penetration, particularly where no condom is used, is more aggravating than digital penetration because of the risk of pregnancy or a sexually transmitted disease: *Friesen*, at para. 139.

> However, I note that in this case, N.K. did not know if Mr. Holland had used his penis and as a result underwent the stress of not knowing if she had contracted a sexually transmitted disease until she received the results of testing she underwent for that purpose.

[68] Justice Schreck reviewed numerous cases submitted by counsel regarding the appropriate range of sentence, found the range to be eight to 12 months in custody, and imposed an eight-month conditional sentence order:

> **30** I have considered all of these cases. Not surprisingly, none are factually identical to this case. Many are trial decisions which are not binding on me, and the sentences in some of those are more or less than I would have imposed had I been the sentencing judge. In my view, the appropriate "discerned range" for offences such as this involving relatively brief digital penetration is eight to 12 months.

[69] In determining that a conditional sentence was appropriate in *Holland*, Schreck J. explained:

> [64] Having concluded that a conditional sentence is statutorily available, I must consider whether it would be appropriate in this case. Section 742.1(*a*) of the *Criminal Code* sets out two prerequisites for such a sentence. The first is that service of the sentence must not endanger the safety of the community. In this regard, the Crown points out that Mr. Holland fled the jurisdiction in breach of his bail conditions. I agree that this is a cause for concern. However, this occurred in 2017 and there is no suggestion that Mr. Holland breached any further conditions of his bail since that time. He has no criminal record other than the conviction for which he is being sentenced. I am satisfied that this prerequisite has been satisfied.
>
> [65] The second prerequisite in s. 742.1(*a*) is that a conditional sentence must be "consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2." Denunciation and deterrence are paramount sentencing objectives in sexual assault cases. However, conditional sentences have both a denunciatory and deterrent effect, even where those objectives are paramount: *Sharma*, at para. 110, *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, at paras. 41, 67; *R. v. Wells*, 2000 SCC 10, [2000] 1 S.C.R. 207, at para. 35. While the Crown has cited a number of cases in which it was concluded that a conditional sentence was inappropriate, all of these involved significant aggravating factors that are absent in this case, such as a breach of trust or taking advantage of an incapacitated complainant…
>
> [66] Having considered the aggravating and mitigating factors in this case, I conclude that a conditional sentence would not be inconsistent with the fundamental purpose and principles of sentencing.

[70] In *R. v. Jensen*, 2019 ABQB 873, Dunlop J. described the facts:

> [3] Mr. Jensen and MP had been friends in high school but had been out of touch with one another in the year prior to May 26, 2016, when they met at the Kingsway bus terminal in Edmonton. MP was looking for shared accommodation to rent, and Mr. Jensen had a room that he wished to rent. They went to Mr. Jensen's apartment, where they had dinner and sat down on the couch together to watch a movie. Then they both lay down on the couch and MP fell asleep. She awoke to find Mr. Jensen stroking and massaging her legs and arms. She pretended to continue sleeping. Mr. Jensen then put his hands under MP's clothes and rubbed her breasts and vagina. He inserted his fingers into her vagina. She did not consent to any of the sexual touching. MP then pretended to wake up. She got up and she and Mr. Jensen walked to the bus stop with little conversation except Mr. Jensen asked MP whether she was okay and she said she was. Later that evening Mr. Jensen messaged MP on Facebook. MP did not respond. Mr. Jensen then said he was sorry in another Facebook message. MP then blocked Mr. Jensen on Facebook. At the time of these events both Mr. Jensen and MP were 18 years old.

[71] In imposing an 18-month conditional sentence order, including nine months of house arrest followed by nine months of curfew, all of which would be followed by 12 months of probation, Justice Dunlop noted several mitigating factors:

> [12] The mitigating circumstances are:
>
> - Mr. Jensen had a difficult childhood.
> - Mr. Jensen gave a full confession to the police promptly after he was arrested and he expressed remorse to the police. He also expressed remorse to the author of the presentence report.
> - Mr. Jensen pled guilty, saving MP the additional trauma of testifying, which would have been particularly difficult for MP because she is living with significant mental health challenges.
> - Mr. Jensen is a young adult, 18 years old at the time of the offence and 21 years old now. He has no criminal record, up to this conviction, and no violations of his terms of release on this charge.
> - Mr. Jensen lives a prosocial life, both before and after his arrest. He works full time and maintains good relationships with his brother and sister and their families and his own infant son. His mother and step-father were in Court for the sentencing submissions on August 21, 2019.

[72] In. *R. v. Tuffs*, 2012 SKCA 6, in imposing a 12-month custodial sentence (a CSO was not statutorily available at that time), the court stated:

> [13] We are satisfied in the circumstances of this case and, in particular, the limited force, the short duration, the lack of penetration and the immediate reaction of the respondent that he had gone too far, a sentence of one year incarceration satisfies the sentencing principles and, in particular, does not offend the principle of parity. See, for example, *R. v. Iron*, 2005 SKCA 84, 269 Sask. R. 51 where the accused, with a prior record including two assault convictions, fondled and digitally penetrated the victim and refused to stop until the victim pretended to cooperate was sentenced to 20 months incarceration which sentence took into account the accused having served part of the conditional sentence imposed by the lower court.

[73] The Crown says Mr. Fardy should receive three years' imprisonment for his sexual assault on S.M. Mr. Fardy argues for an eight-month conditional sentence:

> 70. The gravity and circumstances of the offences and principles of sentencing generally indicate a total sentence in the range of 3 to 4 years custody. However, significant credit should be extended in relation to the duration of the criminal process, time on release conditions, and the *Charter* breach. With these factors taken into account, a fit sentence is custody for the following periods:
>
> (a) S.M.: 8 months
>
> (b) R.B.: 3 months (assault), 6 months (sexual assault)
>
> (c) J.M.: 24 months
>
> 71. A penitentiary sentence is required with respect to Ms. J.M., but a conditional sentence order is appropriate for the offences involving Ms. S.M. and Ms. R.B., having particular regard for their lesser gravity and Mr. Fardy's youth, lack of criminal antecedents and demonstrated progress over the past four years. In appropriate circumstances "it is not illegal for an offender to be subject to a custodial sentence and a conditional sentence at the same time, the effect of the conditional sentence being suspended until the custodial sentence is served" (***R. v. Hill***, 1999 NSCA 118 at para. 14). Supervision of Mr. Fardy's behaviour in the community through the conditions of his release order has proven to be highly effective in preventing the commission of further offences and supporting his strong progress toward rehabilitation. Conditional sentence orders in relation to Ms. S.M. and Ms. R.B. would enable this supervision and support to continue, would not endanger the safety of the community, and would be consistent with the fundamental purpose and principles of sentencing. A blended sentence provides the best means of realizing the rehabilitative objectives of sentencing while also achieving denunciation and general deterrence through an immediate, substantial period of incarceration in relation to Ms. J.M.

[74] The prerequisites for a conditional sentence are set out at s. 742.1 (a) of the *Criminal Code:*

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

[75] With regard to the first prerequisite for a conditional sentence, Mr. Fardy has been on strict release conditions for the last four years without incident. But he is considered by the agreed upon expert as a *moderate* risk to reoffend. I am only satisfied that a CSO *might* not endanger the safety of the community.

[76] The next prerequisite is whether a sentence in the community would be consistent with the purposes and principles set out in ss. 718 – 718.2 of the *Criminal Code*? I am satisfied that the range of sentence for the offence against S.M. is between six months and two years. So, regarding the length of sentence, it could fall within the scope of a conditional sentence. Additionally, as noted, the length of time it has taken to bring this matter to its conclusion, and his four years on conditions without incident, show that Mr. Fardy can be a pro-social member of society. This mitigates the length of sentence required to achieve denunciation and deterrence, when blending and balancing these principles with rehabilitation and reformation. However, Mr. Fardy was convicted of sexually assaulting S.M. and he is also being sentenced for sexually assaulting two other women. The Forensic Sexual Behaviour Program Assessment rates him as a moderate risk to reoffend.

[77] Considering the purposes and principles of sentencing, a sentence in the community is simply not appropriate for Mr. Fardy, especially taking into account the need for denunciation and deterrence as set out in the *Criminal Code* and the directions of the Supreme Court in *Friesen*.

[78] In light of the circumstances of the sexual assault on S.M., combined with Mr. Fardy's age at the time of the offence, his ability to abide by strict release conditions, and his efforts at rehabilitation, the appropriate sentence for Mr. Fardy

in these circumstances is eleven (11) months in jail, consecutive to the other sentences he will receive today.

Common Assault of R.B.

[79] The assault of R.B. occurred at a large outdoor party. Mr. Fardy and R.B. were in an intimate relationship. Mr. Fardy was intoxicated by voluntary ingestion of alcohol, cannabis and cocaine. He mistakenly believed that he saw R.B. giving oral sex to one of his friends and very publicly grabbed her by the throat and pushed her while holding her throat. R.B. was not injured.

[80] The Crown says Mr. Fardy should receive a three-month custodial sentence for the common assault on R.B. Mr. Fardy submits that a three-month conditional sentence would be appropriate.

[81] In *R. v. Hanlon*, 2016 NSPC 32, the accused was before the court in relation to a number of domestic violence-related charges, all of which were summary conviction offences. Judge Tax described the facts:

> [6] On June 5, 2015, Ms. Brautigam and Mr. Hanlon were in a relationship for about a week; however, they had dated for a year. During that evening, Mr. Hanlon became very agitated with Ms. Brautigam and their verbal altercation escalated into a physical confrontation. Ms. Brautigam sent a Facebook message asking for help, as Mr. Hanlon had taken her cell phone and would not give it back to her. When the altercation escalated and became physical, Mr. Hanlon either pushed or hit his girlfriend causing her to fall onto their bed, where he continued to push her down with one hand in the area of her abdomen with the other hand on her neck, so she could not move. Ms. Brautigam was attempting to resist Mr. Hanlon by scratching at him. Shortly thereafter, Mr. Hanlon got up and started punching the walls, then he grabbed a nightstand and threw it against a wall. The nightstand broke into pieces and a piece of the broken nightstand hit Ms. Brautigam in the ankle. A neighbor heard the commotion and contacted the police. When the police arrived, they noticed that Ms. Brautigam had red marks and bruising on her throat. At the time of this incident, Ms. Brautigam was about 15 weeks pregnant with Mr. Hanlon's child and he was under the terms and conditions of a Probation Order.
>
> …
>
> [8] On August 24, 2015, Ms. Brautigam was then about 26 weeks pregnant, when she and Mr. Hanlon were seen together in a public store. While in the store, Mr. Hanlon became angry with her and got very close to her, so she pushed him away from her. Mr. Hanlon reacted with a forceful push to the body of Ms. Brautigam, which caused her to fall to the floor. Mr. Hanlon was charged

> with committing a section 266 Criminal Code assault on Ms. Abigail Brautigam. At the time of this incident, Mr. Hanlon was under the terms of an Undertaking given by Justice on June 8, 2015, following the first assault incident. The Undertaking contained the condition that he was not to have any direct or indirect contact or communication with Abigail Brautigam, except through a lawyer. As a result of the fact that Mr. Hanlon and Ms. Brautigam had been together in a public store at the time of the assault incident, he failed to comply with the condition in that Undertaking which was an offence contrary to section 145(3) of the Criminal Code.

[82] In sentencing Mr. Hanlon to one (1) month in jail for the common assault, Tax Prov. Ct. J. undertook a thorough review of sentencing cases with factual situations similar to the common assault of R.B.:

> [35] In my review of similar cases which involved spousal assaults or partner-related violence, I reviewed **R. v. Hillier**, [2010] N.J. No. 203 (NLPC). In that case Judge Porter sentenced an accused who had pled guilty to a number of offences (theft, mischief, assault of his girlfriend, and four breaches of Undertakings). The accused had assaulted his girlfriend by striking her in the face. The Court ordered a total sentence of nine months of imprisonment, after taking into account pre-sentence custody, to be followed by 12 months on Probation. Judge Porter ordered a period of three months incarceration for the assault of the girlfriend, one month incarceration for three of the breach of Undertaking offences and a further three months incarceration on the final breach of Undertaking offence.
>
> [36] In **R. v. Brenton**, [2010] N. J. No. 210 (NLPC), Judge Gorman accepted the joint recommendation and imposed a period of six months incarceration for an offender who pled guilty to assaulting his spouse and a breach of Probation. In that case, the facts were quite similar to the instant case as the offender had held his spouse down on the floor and caused scratches to her neck. He had a previous conviction for having assaulted his spouse and was subject to a Probation order at the time as a result of the earlier assault.
>
> [37] In **R. v. Gardner**, [2011] N. J. No. 41 (NLPC), which is also quite similar to the facts of this case, the Court imposed a six-month Conditional Sentence Order of imprisonment in the community to be followed by 12 months on Probation where the accused pled guilty to offences of breach of Recognizance contrary to section 145(3), a threats charge contrary to section 264.1(1), an assault of his girlfriend contrary to section 266(b), an assault of a peace officer contrary to section 270 and a mischief charge contrary to section 430(4) of the **Criminal Code**. At the time of the offences, the accused was 18 years old and had no prior convictions.
>
> [38] In **R. v. Squires**, 2012 NLCA 20 (CanLii), the offender was convicted of a number of offences including the assault of his common-law partner. In relation

to that offence, the Court noted that, during the assault, the offender had grabbed the complainant's neck and pulled her hair. The Court of Appeal concluded that a period of three months' imprisonment was an appropriate sentence for that offence.

[39] In other cases that I have reviewed, which involved either the more serious offence of an assault causing bodily harm or an assault with a weapon and confinement charges, such as **R. v. Gill**, 2007 BCSC 1216, **R. v. Antle**, 2013 CanLii 29 (NLPC), **R. v. Hart**, 1997 CarswellNB 556 (QB) and **R. v. Jardine**, 2014 NSPC 59, the Court ordered sentences in the range of 12 to 24 months in custody followed by a lengthy period of Probation; however, in most of those cases, the offenders had prior convictions for spousal assaults on the same victim, which represented very serious aggravating circumstances in those cases.

[40] In **R. v. Marsh**, [2011] N.J. No. 440 (NLPC), Judge Gorman reviewed several sentencing precedents in the context of intimate relationships where common assaults were committed by an offender with no prior criminal record resulted in Conditional Sentence Orders of imprisonment in the community or an intermittent sentence followed by Probation, while assaults causing bodily harm resulted in a range of six to 12 months of imprisonment.

[41] Looking at those cases, there is no doubt that as the courts have become increasingly aware of the prevalence of violent offences which occur in the context of intimate relationships, I find that the more recent sentencing precedents certainly reflect the view of Parliament in section 718. 2(a)(ii) of the **Code** that an offender who has abused a common-law partner or spouse is deemed to be an aggravating circumstance. Moreover, our Court of Appeal has also made it clear that denunciation of the unlawful conduct and specific and general deterrence should be the primary sentencing purposes considered by the sentencing judge in these situations, and the sentence should be proportionate to the gravity of the offence where the spouse or partner has been the victim of serious violence in an intimate relationship.

…

[43] As for the second assault of Ms. Brautigam, which was a common assault of his intimate partner contrary to section 266(b) of the **Code**, also precipitated by Mr. Hanlon's uncontrolled anger, there was a disproportionate response, which could not be regarded as self-defense, in relation to Ms. Brautigam's push of Mr. Hanlon to get him "out of her face" so to speak. Mr. Hanlon's intentional application of force caused his intimate partner, who was then approximately 26 weeks pregnant to fall to the ground. Clearly, as indicated previously, the gravity of the second offence would probably militate towards the lower end of an objective assessment in relation to a continuum of assaultive behavior; however, given the fact that Ms. Brautigam was Mr. Hanlon's intimate partner, who was in the later stages of carrying their child, I find that, in the circumstances of that offence, the gravity of the offence is elevated and his degree of responsibility is also relatively high.

[83] Because this assault occurred in the context of a domestic situation, s. 718.2(a)(ii) of the *Criminal Code* makes this an aggravating factor.

[84] Again, for the reasons stated above, I do not believe that Mr. Fardy is a candidate for a conditional sentence. He is, however, a youthful offender, with no significant record, and strong community support. He was under the influence when he committed this crime and has taken real steps to address his substance abuse issues. Considering the circumstances of the assault on R.B., combined with Mr. Fardy's age at the time of the offence, his ability to abide by strict release conditions, and his efforts at rehabilitation, a sentence of one (1) month in jail, consecutive to his other sentences, is appropriate in relation to the common assault.

Sexual Assault of R.B.

[85] R.B. was Mr. Fardy's partner when the sexual assault occurred. Mr. Fardy was sober this time. During consensual intercourse, Mr. Fardy demanded R.B. give him oral sex and, when she said no, he tried to physically force her to do it. After a couple of minutes of struggling, they continued to argue and eventually Mr. Fardy pinned R.B. to the floor.

[86] The Crown says that Mr. Fardy should receive an 18-month custodial sentence for the sexual assault on R.B. Mr. Fardy seeks a six-month conditional sentence. He argues, as he does in respect of the charges regarding S.M. and the assault on R.B., that this "would enable this supervision and support to continue, would not endanger the safety of the community, and would be consistent with the fundamental purpose and principles of sentencing. A blended sentence provides the best means of realizing the rehabilitative objectives of sentencing while also achieving denunciation and general deterrence through an immediate, substantial period of incarceration..."

[87] In *R. v. Murray,* 2023 NSSC 62, Gogan J. (as she then was) dealt with a summary conviction appeal in respect of sexual assault, where the main issue was consent:

> [5] Before going further, a review of the decision under appeal is required for context. There is no appeal from Murray's conviction and no issue taken with the findings made at trial. The parties agreed that sexual activity had taken place. The main issue was consent. The trial judge considered the evidence, including an agreed statement of facts, and found that the sexual activity was not consensual. He accepted the following facts:

> She says he walks behind her, locks the door as they go through the porch into the archway, and then he proceeds to pull her hair. In his mind, he says they are going to finish off what they were doing before and that she was doing so willfully … and she agreed to it. There were no words to that effect. She says that he pulled her down and then she pulled away, she ran towards the picture window where they could be seen from the outside. He has his pants down by this time and is pulling her head down with both hands. She has her hands on his hands and is able to push herself away from him … push back away from him.
>
> He continues to proceed. They are back to the couch, they are both sitting on the couch and … by that time he's got his shirt off as well as his pants down around his ankles. At all times, (the complainant) says that Mr. Murray has, except for that time in front of the window, he has one hand on her head and then he's pulling her head down to his penis.
>
> He gets his penis around her face then in her mouth. She's saying no each and every time he attempts to do so. He breaks off, she pushes away, he breaks off, he goes to the bathroom and ejaculates, wipes himself up, and the tissue he wipes himself off with is found in the garbage later by police and identified that he's the maker of the semen as a result of the ejaculate being found on the tissue paper.
>
> …
>
> When she contacted 911 immediately or within very short order after the event had taken place and when the police arrived as a result of that dispatch, she was still distraught as to what had taken place.
>
> …
>
> I am convinced beyond a reasonable doubt, I am sure that what she says happened happened … He grabbed her by the back of the hair, forces her head down to his penis and he put his penis in her mouth. That's the sum total of the sexual act, as horrendous as it was, an unrequired, unrequested, and undesired.

…

[40] In its sentencing submission at trial, the Crown sought an 18-month custodial sentence. In support of its position, the Crown referenced a number of aggravating factors. These included that: (1) the offence took place in the victim's home over her repeated protests, (2) Murray continued his assault until he was satisfied, (3) the nature of the assault was inherently violent and constituted a major sexual assault, (4) there was physical force used in the course of the assault, (5) the victim was targeted, and (6) the assault had a significant and lasting impact on her. The sentencing reasons do not place these factors anywhere in the overall assessment of the gravity of the offence or offender

> responsibility. The sentence imposed is a basis to say that these factors did not receive due weight.

[88] In determining that the original sentence of 90 days was demonstrably unfit, and replacing it with an 18-month sentence – though she determined that, in the circumstances, the offender should not be reincarcerated to serve the remainder of his sentence - Gogan J. considered the seriousness of sexual assault offences, as emphasized by the Supreme Court of Canada in *Friesen*:

> [41] In ***Friesen***, the Supreme Court of Canada directed a modern recognition of the wrongfulness and the harmfulness of sexual violence when determining the degree of offender responsibility. Although focused on sexual offences against children, the following general observation was made at para. 89:
>
> > [89] All forms of sexual violence, including sexual violence against adults, are morally blameworthy precisely because they involve the wrongful exploitation of the victim by the offender – the offender is treating the victim as an object and disregarding the victim's human dignity (see *R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584, at paras. 45 and 48). As L'Hureaux-Dube J. reasoned in *L. (D.O.)*, "the occurrence of child sexual abuse is one intertwined with the sexual abuse of all women" precisely because both forms of sexual offences involve the sexual objectification of the victim (p. 441). Courts must give proper weight in sentencing to the offender's underlying attitudes because they are highly relevant to assessing the offender's moral blameworthiness and to the sentencing objective of denunciation (Benedet, at p. 310, *Hajar*, at para. 67).
>
> [42] In ***R. v. Brown***, 2020 ONCA 657, the Ontario Court of Appeal referenced ***Friesen*** as a basis to say that sexual offences in general raise particular considerations in the proportionality analysis. In the present case, the sentencing reasons noted the offender's attitude as "disdainful", that he targeted the victim in her home and forced his penis into her mouth over her protests until he was gratified. There was explicit force and both immediate and enduring impacts. These facts did not find any significant consideration in the sentencing reasons.
>
> …
>
> [49] I am mindful of the directions given in ***Friesen*** where an analytical caution was conveyed as part of a new approach:
>
> > [146] … it is an error to understand the degree of physical interference factor in terms of a type of hierarchy of physical acts. The type of physical act can be a relevant factor to determine the degree of physical interference. However, courts have at times spoken of the degree of physical interference as a type of ladder of physical acts with touching and

> masturbation at the least wrongful end of the scale, fellatio and cunnilingus in the mid-range, and penile penetration at the most wrongful end of the scale (see *R. v. R.W.V.*, 2012 BCCA 290, 323 B.C.A.C. 285, at paras. 19 and 23). This is an error — there is no type of hierarchy of physical acts for the purposes of determining the degree of physical interference. As the Ontario Court of Appeal recognized in *Stuckless (2019)*, physical acts such as digital penetration and fellatio can be just as serious a violation of the victim's bodily integrity as penile penetration (paras. 68-69 and 124-25). Similarly, it is an error to assume that an assault that involves touching is inherently less physically intrusive than an assault that involves fellatio, cunnilingus, or penetration. For instance, depending on the circumstances of the case, touching that is both extensive and intrusive can be equally or even more physically intrusive than an act of fellatio, cunnilingus, or penetration.

[89] Justice Gogan went on to consider *J.J.W.*:

> [46] In ***R v. J.J. W.***, 2012 NSCA 96, our Court of Appeal dealt with a sentence appeal. The appellant had been convicted of sexual assault and two other assaults against his wife. In finding a five-month sentence unfit for a major sexual assault involving forced anal intercourse, the court noted that the broad discretion of a sentencing judge is fettered in part by decisions that give effect to the parity principle. That said, it was recognized that finding factually similar cases is a notoriously difficult exercise. After extensively reviewing a range of cases, Oland, J.A., for the Court concluded:
>
> > [32] I agree with the Crown that a five-month sentence for this sexual assault, forcible anal intercourse, is demonstrably unfit. In doing so, I recognize that sentencing judges are entitled to considerable deference from the appellate courts, and that ranges as established by case law are only guidelines intended to assist sentencing judges. However, the discrepancy between the sentence here imposed for a grave sexual assault, one committed by the appellant to dominate and control his wife, namely five months imprisonment, and the next lowest sentences found in the case law for similar major sexual assaults in comparable circumstances, namely two years less a day, is simply too large to ignore. The sentence contravenes the principle of parity. Persons convicted of serious sexual assaults must appreciate that the principles of sentencing include specific and general deterrence and denunciation, and such offences will attract serious consequences. The five month sentence for sexual assault on a spouse does not send that message. In my view, considering the principles of sentencing as set out in the *Criminal Code*, it is clearly unreasonable.

[90] In *R. v. Lapierre*, 2022 NSCA 12, the complainant went to see the appellant while he was on a break from work, as he was angry with her and she wanted to speak in person rather than texting. Derrick J.A., for the court, detailed the facts:

> [7] Upon A.G.'s arrival at the appellant's workplace he got into her car. She testified he immediately told her how good she looked and, putting his hand down the front of her dress, touched her breasts. She told him to stop, she was not there for sex, she was only there to talk. The appellant did not want to be in full view of his workmates so A.G. moved her car.
>
> [8] A.G. testified she drove behind a nearby recycling depot and parked. The appellant put his hand down her dress again and used the flashlight on his phone to "get a good look". He became angry when A.G. told him to stop and repeated she was only there to talk. The appellant complained she was trying to make his life hard and he got out of the car saying his back hurt.
>
> [9] A.G. also got out of the car. She said she was then subjected to the appellant putting his hands up her dress and turning her around to bend her over. She told him to stop and again emphasized she was there to talk. She testified the appellant became really angry and was yelling at her, saying he hated her and "needed a stress reliever".
>
> [10] A.G. testified she felt bad for the appellant who was saying how stressed he was. At his request, she hugged him and kissed him. He pushed her against the car and continued to put his hands up her dress, pulled down the shorts she was wearing and his own clothing. She said: "I could feel him on my thigh". He was trying "really hard" to put his "hand and his fingers" inside her.
>
> [11] A.G. said the appellant was not deterred by her continuing to tell him she was there only to talk, not for sex. She described what happened next:
>
> > He bent down and tried really hard to pull my legs apart. It didn't work because I kept my legs really tight together. So he started kissing me again and then pushing his penis in between my legs. And he started to thrust and he kept asking me if it was in. And I said no, I wasn't there for sex.
>
> [12] A.G.'s reaction made the appellant angry. He pulled up his pants and told her to take him back to work. She said the encounter had left her in a state of "complete shock". She dropped the appellant off at his workplace.
>
> [13] The next day A.G. sent the appellant a text. Neither Crown nor defence objected to her evidence about its content or to the text being entered as an exhibit.
>
> [14] Asked by the Crown to go into aspects of the encounter with the appellant in more precise detail, A.G. described feeling the appellant's penis against her thigh when he had pulled his boxer shorts down. He had grabbed her hand and put it on his erect penis and told her to touch it. A.G. testified: "And I did. But I stopped".

> [15] When asked by the Crown what part of her body the appellant had been trying to thrust into with his erect penis, A.G. said it was her vagina. She was not asked if the appellant actually penetrated her.

[91] In upholding the imposition of a 12-month custodial sentence to be served in jail, Derrick J.A. stated:

> [114] The judge used his factual findings at trial as the basis for sentencing. In making those findings he referred to the "increasingly aggressive manner" of the appellant's "sexual advances". He noted what a difficult sentencing it was, involving – a "serious sexual assault that has had a profound effect on the victim…" and "a youthful offender with no prior record, a positive work history, and a positive PSR". He reviewed the pre-sentence report in detail. He recited the purpose and principles of sentencing from ss. 718, 718.1 and 718.2 of the *Code* and expressly considered the principle of restraint reflected in ss. 718.2(e) and (f) noting: "offenders should not be deprived of liberty if the least restrictive sanctions may be appropriate in the circumstances; all available sanctions other than imprisonment that are reasonable in the circumstances should be considered…" He concluded the sentence needed to send "a strong message" of denunciation to the community and the appellant.
>
> [115] The judge obviously did not accept a community-based sentence (the defence was asking for a suspended sentence) would be appropriate. He did however impose a sentence that was considerably less than had been sought by the Crown. His ultimate determination that the serious offence committed by the appellant warranted a jail sentence to be tempered by restraint is to be accorded deference. There is no justification for appellate intervention.

[92] In *J.J.W,* Oland J.A., for the court, summarized the facts:

> [70] In the first assault, in order to engage another person, the respondent shoved the victim aside and onto the ground. This sudden and public assault demonstrates his callous disregard for her personal safety. The respondent committed a reprehensible sexual assault by forcing anal intercourse on his victim. He responded to her saying "no", which she was entitled to do, by domineering and humiliating her. He damaged her psychological health. The respondent then committed a further assault by kicking his victim following the sexual assault.

[93] *J.J.W.* involved several domestic assaults and a major sexual assault. The similarity is the previous domestic assault by Mr. Fardy on R.B. and then, once R.B. said no to his demand for oral sex, his efforts of humiliating and dominating her.

[94] Again, because this assault occurred in the context of a domestic situation, s. 718.2(a)(ii) of the *Criminal Code* makes this an aggravating factor.

[95] Considering the circumstances of the sexual assault on R.B., combined with Mr. Fardy's age at the time of the offence, his ability to abide by strict release conditions, and his efforts at rehabilitation, the appropriate sentence is ten (10) months in jail. For the same reasons a conditional sentence was not appropriate for the sexual assault of S.M., I also determine that Mr. Fardy should not serve his sentence for crimes he committed on R.B. in the community.

J.M.

[96] Mr. Fardy was living with J.M. at the time he sexually assaulted her. After spending hours drinking and verbally abusing her in front of her friends, Mr. Fardy joined her in bed, attempted to have sex with J.M. and when she refused, he put his arm across her chest and said, "You're getting fucked whether you like it or not". He then proceeded to have forced, unprotected intercourse with her until he ejaculated.

[97] The Crown says that Mr. Fardy should receive a three (3) year custodial sentence for his sexual assault on J.M. Mr. Fardy says a 24-month penitentiary sentence would be appropriate.

[98] As noted above, the facts in *J.J.W.* are similar to those involving the sexual assault by Mr. Fardy on J.M. In *J.J.W.*, Oland J.A. explained the original sentence:

> [55] The judge sentenced the respondent to a five month jail sentence for the sexual assault on his former spouse, an eight month conditional sentence with house arrest for the assault on her the same night, and a three month conditional sentence for the earlier assault. The sentences were consecutive. The respondent has served the term of imprisonment for sexual assault, the conditional eight month sentence with house arrest for the assault that same night, and the final conditional three month sentence for the first assault. There have been no reporting problems.

[99] Justice Oland then detailed what the appropriate sentence would have been:

> [75] I have given the determination of an appropriate sentence and whether such a sentence should include reincarceration most anxious consideration. The reincarceration aspect is a close call. Having reviewed the case law, I agree with the Crown's position that, for this offender and these offences, a fit sentence for the sexual assault and two assaults would have been two and one-half years in

> custody. However, while the sentence imposed was demonstrably unfit, in my opinion it is no longer in the interests of justice to reincarcerate the respondent.

[100] *J.J.W.* was decided pre-*Friesen*. As noted by the Crown, a number of more recent cases involving forced intercourse have imposed lengthier sentences including:

- *Percy* – five (5) years in prison;
- *T.J.S.* – four (4) years in prison;
- *Campbell* – two (2) years in prison;
- *Preston* - two (2) years in prison;

[101] Because this assault occurred in the context of a domestic situation, s. 718.2(a)(ii) of the *Criminal Code* makes this an aggravating factor.

[102] Here, considering all of the circumstances, the appropriate sentence for Mr. Fardy's sexual assault of J.M. is three (3) years in custody.

Totality

[103] The appropriate custodial sentences for Mr. Fardy on their own are:

- S.M. – 11 months
- R.B. (common assault) – 1 month
- R.B. (sexual assault) – 10 months
- J.M. – 36 months

[104] As noted above, Mr. Fardy will receive a six (6) month reduction in sentence as credit for the four years he has spent on strict conditions. He will also receive a four (4) month reduction in sentence for the *Charter* violation. This results in a 48-month custodial sentence for Mr. Fardy. Considering the principle of totality as explained in *R. v. Adams,* 2010 NSCA 42, taking one last look at the aggregate sentence of 48 months in prison, considering the other reductions, I do not believe that the total exceeds what would be a just and appropriate sentence for Mr. Fardy. Therefore, the total sentence going forward from the date of sentencing will be 48 months in prison.

Ancillary Orders

[105] The defence consents to an order prohibiting Mr. Fardy from communicating with any of the three complainants (S.M., R.B., and J.M.) during any period he is in custody.

[106] The defence likewise concedes that the mandatory firearms prohibition should issue, pursuant to ss. 109(1)(a) and (a.1) of the *Criminal Code*, in the terms set out in the Crown brief. Mr. Fardy will be prohibited from possessing any firearm, cross-bow, restricted weapon, ammunition, and explosive substance for ten years after the end of his release from imprisonment. He will also be prohibited from possessing any prohibited firearm, restricted firearm, prohibited weapon, prohibited device, and prohibited ammunition for life.

[107] It is undisputed that a DNA order is mandatory, pursuant to s. 487.051(1) of the *Criminal Code*.

[108] The only dispute in respect of ancillary orders relates to the Crown's request for an order under the *Sex Offender Information Registration Act*, S.C. 2004, c. 10 (SOIRA). Section 490.012(3) sets out a rebuttable presumption regarding the imposition of a SOIRA order on the basis of the enumerated grounds:

> Order — other circumstances
>
> (3) Subject to subsection (5), when a court imposes a sentence on a person for a designated offence ... it shall make an order in Form 52 requiring the person to comply with the *Sex Offender Information Registration Act* unless the court is satisfied the person has established that
>
> > (a) there would be no connection between making the order and the purpose of helping police services prevent or investigate crimes of a sexual nature by requiring the registration of information relating to sex offenders under that Act; or
> >
> > (b) the impact of the order on the person, including on their privacy or liberty, would be grossly disproportionate to the public interest in protecting society through the effective prevention or investigation of crimes of a sexual nature, to be achieved by the registration of information relating to sex offenders under that Act.

[109] Section 490.012(4) sets out the factors for the court to consider to determine whether the presumption has been rebutted, and whether a SOIRA order should be imposed:

> Factors

> (4) In determining whether to make an order under subsection (3) in respect of a person, the court shall consider
>
> (a) the nature and seriousness of the designated offence;
>
> (b) the victim's age and other personal characteristics;
>
> (c) the nature and circumstances of the relationship between the person and the victim;
>
> (d) the personal characteristics and circumstances of the person;
>
> (e) the person's criminal history, including the age at which they previously committed any offence and the length of time for which they have been at liberty without committing an offence;
>
> (f) the opinions of experts who have examined the person; and
>
> (g) any other factors that the court considers relevant.

(a) the nature and seriousness of the designated offence;

[110] Mr. Fardy was convicted of three sexual assaults. S.M. was a sleeping victim and R.B. and J.M. were intimate partners. They are all serious offences, however, the sexual assault of J.M. is at the higher end of the scale.

(b) the victim's age and other personal characteristics;

[111] The victims were all young, adult women in their late teens or twenties. None of the victims belong to vulnerable segments of society.

(c) the nature and circumstances of the relationship between the person and the victim;

[112] S.M. was a recent acquaintance of Mr. Fardy. R.B. and J.M. were both intimate partners of Mr. Fardy. Mr. Fardy was not in a special position of trust or authority in relation to any of them.

(d) the personal characteristics and circumstances of the person;

[113] Mr. Fardy is a youthful offender. At the time of the offences he struggled with alcohol and drug abuse. He has taken counseling and has been sober for the past four years. He has worked steadily as an adult. He is in a stable relationship. He has strong community support.

(e) the person's criminal history, including the age at which they previously committed any offence and the length of time for which they have been at liberty without committing an offence;

[114] Mr. Fardy has a record for impaired driving. He has no related criminal record. He committed these offences when he was in his late teens and early twenties, and has been at liberty for the past four years without incident.

(f) the opinions of experts who have examined the person

[115] As noted above, the Forensic Sexual Behaviour Assessment describes Mr. Fardy as moderate risk to reoffend. The report also describes him as having challenges regarding his prospects for rehabilitation.

SOIRA Analysis

[116] A SOIRA order applies for life if the offender has been convicted of two or more designated offences and "the court is satisfied that those offences demonstrate, or form part of, a pattern of behaviour showing that the person presents an increased risk of reoffending by committing a crime of a sexual nature": s. 490.013(3)(a) and (b). Otherwise, the order has a duration of 20 years from the time it is made: s. 490.013(2)(b) and (4). Section 490.013(2) and (3) state:

> **Duration of order — s. 490.012(1) or (3)**
>
> **(2)** An order made under subsection 490.012(1) or (3)
>
> > **(a)** subject to subsections (3) and (5), ends 10 years after it was made if the offence in connection with which it was made was prosecuted summarily or if the maximum term of imprisonment for the offence is two or five years;
> >
> > **(b)** subject to subsections (3) and (5), ends 20 years after it was made if the maximum term of imprisonment for the offence is 10 or 14 years; and
> >
> > **(c)** applies for life if the maximum term of imprisonment for the offence is life.
>
> **Duration of order — offences in same proceeding**
>
> **(3)** An order made under subsection 490.012(1) or (3) applies for life if
>
> > **(a)** in the same proceeding, the person has been convicted of, or a verdict of not criminally responsible on account of mental disorder is rendered

> for, two or more designated offences in connection with which an order under any of subsections 490.012(1) to (3) may be made; and
>
> **(b)** the court is satisfied that those offences demonstrate, or form part of, a pattern of behaviour showing that the person presents an increased risk of reoffending by committing a crime of a sexual nature.

[117] As the Crown points out, a SOIRA order is presumptive, unless the offender establishes that the conditions in ss. 490.012(3)(a) and (b) are met, based on the considerations listed in s. 490.012(4). In arguing that no order should be made, Mr. Fardy submits that the nature and seriousness of the offences are not such as to "necessarily overwhelm" all other factors; that he did not "prey on vulnerable victims or women who he could expect to control or silence", in that the complainants are all "mature, articulate, self-possessed individuals"; that he was known to, and easily identified by, the victims; that he was between 18 and 22 years old, immature, and abusing drugs and alcohol at the time of the offences, and has since rejected the "partying lifestyle"; that his only previous offence was an impaired driving conviction at the age of 20, and he has been at liberty following the current charges for almost four years without reoffending; that Dr. St Amand-Johnson concluded that if he were to re-offend it would be against an adult female partner or acquaintance, unless he returned to a partying lifestyle, when a risk to other females could arise; and that he has strong support of family, partner, and friends.

[118] As such, the defence submits, Mr. Fardy is unlikely to re-offend, and if he did, it is unlikely that his identity would be concealed or unknown to the victim. A SOIRA order would therefore impose long-term, and potentially permanent, obligations, but would be unlikely to provide investigative assistance. Its impact, he submits, would be grossly disproportionate to its "minimal or non-existent" benefit to the public interest.

[119] Given the pattern of offences, against multiple complainants, I am not satisfied that the defence has met the burden under 490.012(3). The multiple offences were very serious ones. Mr. Fardy submits that the complainants were not "vulnerable victims or women who he could expect to control or silence", but there was clearly a degree of control or power involved in his assaults on all three complainants, which included taking advantage of a sleeping victim. The fact that his victims "knew" him is of limited significance here; even Mr. Fardy agreed that he and S.M. were not well-acquainted. Further, Dr. St Amand-Johnson's opinion that a risk to females who were not an adult partner or acquaintance would only be

a risk if Mr. Fardy returned to a "partying" lifestyle is far from a strong recommendation. In any event, the legislation's scope is not limited to offenders who prey entirely on strangers: E.G. Ewaschuk, *Criminal Pleadings & Practice in Canada*, 3d edn (Westlaw: online, looseleaf) at §16:654.

[120] Given the number of offences, the order will be for 20 years, pursuant to s. 490.013(3). This may seem draconian, but it is mandated by the statute.

Conclusion

[121] Mr. Fardy is sentenced to 48 months, or four-years, in custody going forward. As detailed above, he will also be subject to a non-contact order, DNA order, a firearms prohibition order and a 20-year SOIRA order.

Arnold, J.