

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *R. v. Comeau*, 2017 NSSC 208

**Date:** 20170712

**Docket:** CRH451437

**Registry:** Halifax

**Between:**

Her Majesty the Queen

v.

Joseph Elizee Comeau

**Restriction on Publication: Section 486 C.C.C. – Identity of Victim**

**Judge:** The Honourable Justice Patrick J. Duncan

**Heard:** May 16, May 18, June 23, and July 12, 2017,  
in Halifax, Nova Scotia

**Release of  
Written Decision:** August 3, 2017

**Counsel:** Matthew Kennedy, for the Provincial Crown  
Jonathan Hughes, for the Offender

**By the Court:**

**The Offence**

[1] Joseph Comeau was found guilty, following trial, of the charge that he, on or about the 22<sup>nd</sup> day of May 2015 at or near Halifax, Nova Scotia, did unlawfully commit a sexual assault on Ms. W., contrary to s. 271 of the **Criminal Code**.

[2] The relevant **Criminal Code** provision in effect in May 2015 states that:

271 Everyone who commits a sexual assault is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding 10 years ...;

[3] There is no minimum prescribed penalty and therefore the available sentences include the granting of a discharge, imposition of a fine, a period of probation with conditions, and/or a period of imprisonment (s. 731 CC).

[4] A conditional sentence is not available to Mr. Comeau because of the exception set out in s. 742.1(f)(iii) of the **Criminal Code**.

[5] The court is required to determine what is a fit and proper sentence to impose having regard to the circumstances of the offence, the circumstances of the offender, and the principles of sentence as set out in s. 718, 718.1, and 718.2 of the **Criminal Code**. The Court must also look to the decisions of other courts, especially the appeal courts, for guidance in the application of these principles to the facts of a case.

**Circumstances of the Offence**

[6] The trial decision, reported at *R. v. Comeau*, 2017 NSSC 62, sets out the facts of the offence. For ease of reference I include here paragraphs 37-40, and 82-83 of that decision:

37 Mr. Comeau told D/Cst Wagner that he was about to finish mopping the floor when Ms. W. approached him, took him by the arm and told him that she had not seen him in a long time. He corrected her by saying that it had only been two days since they had last seen each other. She told him that he looked good and that he smelled nice. She then asked him to go into her room and so he did. Ms. W. asked him to sit on the edge of the bed which he did. Ms. W. sat on a chair facing him and pointed at his penis asking "can I see it?". For reasons that he was unable to explain

he took his penis out at which point she bent over and kissed it, without saying anything to him.

38 According to Mr. Comeau, Ms. W. then pulled her top up. She was wearing a bra. She said "I usually do not wear one of these. I do not know why I am wearing one today". She did not ask him to touch her although he thought that perhaps she wanted him to. He did not touch her.

39 He said that he then got up and went toward the bathroom with his penis still hanging out of his pants. She approached him as he got to the bathroom door and asked to see it again. Mr. Comeau said that he had to go. He then asked her whether she would like to kiss his penis. She said yes and so he allowed her to kiss his penis and then put it away and left. He estimated that the time in her room was about 10 minutes.

40 Mr. Comeau could only remember Ms. W. telling him that he looked good and that she liked him and that he smelled good.

...

82 In the totality of the circumstances that Mr. Comeau was aware of including the characteristics of the residents on Ms. W's unit, of Ms. W's memory, her social deficits, and her apparent mental health issues it was incumbent on Mr. Comeau to take reasonable steps to ensure that Ms. W. had the capacity to provide informed consent to the sexual activity that the couple engaged in. He did not do this. He made no reasonable inquiries that were clearly indicated to be necessary by the circumstances as he knew them. He engaged in the most superficial short conversations with a total stranger. He ignored warnings to stay out of her room with the door closed and he ignored the warnings that were in contravention of the facility policy.

83 I conclude that given Mr. Comeau's own admissions of the wrongfulness of his conduct seen against the totality of the circumstances as they appeared to him at the time, that he turned a wilfully blind eye to the question of Ms. W's capacity to consent and that he did so to gratify himself when the opportunity presented itself at the instance of a disinhibited Ms. W. He failed to take reasonable steps in the circumstances known to him at the time to ascertain that Ms. W. gave informed consent to the sexual activity.

### **Circumstances of the Offender**

[7] Mr. Comeau is a 59-year-old first offender. He was raised in a poor family in southwestern Nova Scotia. There was no history of abuse in his family.

[8] He began working at an early age and did not return to school after Grade 9. Mr. Comeau left home at the age of 17 and since that time has demonstrated himself to be a good and hard worker who is well liked and respected by those in the workplace.

[9] He lost his job at Northwood because of this incident, but was able to find another job where he was also appreciated for his excellent work ethic. This is commented upon in the Presentence Report.

[10] Between the date of the verdict and the first date set for sentencing, Mr. Comeau suffered a heart attack and subsequent cardiac related issues. He is under the care of an internal medicine specialist, Dr. Cliff McCarville, who has filed a brief letter in which he states that he last saw Mr. Comeau on June 19<sup>th</sup> and that he was:

... doing well from a cardiac point of view.

He hadn't had any chest discomfort since he was hospitalized in early June. He was gradually increasing his activity as recommended. His blood pressure and heart rate were stable and his cardiac exam was normal.

[11] Mr. Comeau's work history is confined to positions involving physical labor. Because of his health problems, he has been unable to return to work, and it is not clear from the letter of Dr. McCarville as to when he may be able to do so, or in what capacity.

[12] He does have some prospects for employment once he is healthy enough to do so. Erika Smeltzer, of Integrated Staffing Limited wrote the following letter:

Joseph would be an eligible candidate for employment if he had a criminal record, however the opportunities would be limited. We have a number of clients who require clear criminal records but Joseph would be considered for any opportunity he [is] qualified for where a criminal record were [sic] not an issue. Joseph was a very reliable employee for us at his last placement and there would be no hesitation to consider him for future employment.

[13] Mr. Comeau has been married twice, the first time for 13 years and then to his current wife whom he has known for almost 30 years. They have two sons, one of whom is struggling with drug addiction. Mr. Comeau's wife is not well and so Mr. Comeau is called upon to provide material and personal support to his wife and children. As with his work reputation, he is highly regarded as a husband and father. I note that Mrs. Comeau is here today and has attended court throughout with her husband, notwithstanding her obvious health issues which I have noted from time to time included her having to bring portable oxygen to court.

[14] All who know him, including the people who contributed to the Presentence Report and former co-workers who testified in the trial made it very clear that his conduct came as a shock. Mr. Comeau's behaviour was obviously atypical and appears not to have been premeditated. Even as it was taking place Mr. Comeau understood at some level that it was inappropriate, if not illegal.

[15] The only explanation that I have been given for his lapse of judgement is that he was observed prior to the incident by his wife and a long-time friend to have been behaving oddly. There is a suggestion that he was in some form of mental crisis at the time. The nature of it and the extent of it were not expanded upon in the evidence nor in his counsel's sentencing submissions.

[16] Following the incident, Mr. Comeau attempted suicide, and has repeatedly expressed his sincere remorse and hope that he did not cause Ms. W. harm.

### **Position of the Crown**

[17] The Crown recommends a sentence of 15 months in jail, followed by 24 months of probation together with a series of ancillary orders.

[18] The Crown's submission correctly points out that an important sentencing principle to consider in such a case is the need to emphasize general deterrence, that is, to deter those who are in positions of trust to vulnerable persons from taking advantage of them. The sentence must also reflect society's denunciation of this conduct.

[19] The Crown cites the following aggravating factors:

- that Mr. Comeau was in a position of trust and that his conduct was an abuse of that trust;
- that the offence occurred in what, effectively, was Ms. W's home; and
- that he was motivated by his own desire for sexual gratification.

### **Position of the Defence**

[20] Counsel for Mr. Comeau seeks that the offender be discharged on conditions to be included in a Probation Order as provided for by s. 730(1) CC. No issue is taken with the requested ancillary orders.

[21] In addressing penalty, I will speak to the mitigating circumstances offered by Mr. Hughes' in his submission. The question of a discharge though, I will address now.

[22] The case of *R. v. Fallofield*, [1973] B.C.J. No. 559, offered a guide for the exercise of discretion in determining an application for a discharge:

21 From this review of the authorities and my own view of the meaning of s. 662.1, I draw the following conclusions, subject, of course, to what I have said above as to the exercise of discretion.

- (1) The section may be used in respect of any offence other than an offence for which a minimum punishment is prescribed by law or the offence is punishable by imprisonment for 14 years or for life or by death.
- (2) The section contemplates the commission of an offence. There is nothing in the language that limits it to a technical or trivial violation.
- (3) Of the two conditions precedent to the exercise of the jurisdiction, the first is that the Court must consider that it is in the best interests of the accused that he should be discharged either absolutely or upon condition. If it is not in the best interests of the accused, that, of course, is the end of the matter. If it is decided that it is in the best interests of the accused, then that brings the next consideration into operation.
- (4) The second condition precedent is that the Court must consider that a grant of discharge is not contrary to the public interest.
- (5) Generally, the first condition would presuppose that the accused is a person of good character, without previous conviction, that it is not necessary to enter a conviction against him in order to deter him from future offences or to rehabilitate him, and that the entry of a conviction against him may have significant adverse repercussions.
- (6) In the context of the second condition the public interest in the deterrence of others, while it must be given due weight, does not preclude the judicious use of the discharge provisions.
- (7) The powers given by s. 662.1 should not be exercised as an alternative to probation or suspended sentence.

[23] A discharge is available in this case, however, there are two factors which, in my view, operate against the exercise of the court's discretion to make such an order.

[24] The first is that the elements of general deterrence and denunciation weigh against such a result in cases of sexual assault on vulnerable persons by those who are entrusted with caring for them. As such, it would generally not be in the public interest to grant a discharge in the circumstances of this offence. This is sufficient in my view to refuse the grant of a discharge.

[25] The second is the question of the weight to attach to Ms. Smeltzer's letter that speaks to the adverse repercussion Mr. Comeau *may* suffer if he did not receive the benefits of a discharge. The evidentiary threshold need not be high, but there must be, in my view, something put forward to identify a repercussion that is different for the offender than those repercussions that all offenders suffer by the entry of a conviction against them. Mr. Comeau remains employable - in fact I'm told may have employment available to him - subject to his health, although his opportunities will be more limited. Generally, "significant adverse repercussions" speak to the loss of unique opportunities such as employment in the military, or the ability to cross international borders as a condition of employment, or the loss of a job.

[26] In the circumstances of this offence and this offender I am not prepared to grant a discharge.

### **Analysis and Conclusion**

[27] The offence is considered, by its nature, to be one of violence. Having said that the direct contact between the accused and Ms. W. was brief, without actual or threatened physical harm. The evidence is that the acts did not result in either physical or mental suffering to the resident. No weapons were used. There were no elements of confinement or other intimidation present.

[28] The incident appears to have been spontaneous, brought on by the approach of Ms. W. to Mr. Comeau, and his own willingness to accept her invitation. In my decision, I stated:

29 Dr. Meehan differentiated between the capacity to appreciate conduct and the capacity to give consent. In Ms. W's case it was her lack of an appreciation of the consequences of her activity which formed the basis for Dr. Meehan's conclusions. Therefore, a person such as Ms. W. can say that "yes this is what they want to do but they cannot appreciate the outcome of it". She agreed that this would not necessarily be visible to a lay person who does not have access to the medical records or experience that she does.

[29] So, the circumstances in this case are unusual in that Ms. W. had the appearance of someone able to consent to the sexualized behaviour and did, by her words and conduct, express her willingness to participate in this behaviour. However, medical opinion evidence showed that she lacked the necessary capacity that the law requires for her consent to be an excuse for the accused where he should have been alert to the issue.

[30] Mr. Comeau takes full responsibility for the fact that the onus was on him in these circumstances to remove himself from the situation. The facts of this case show the risks that can exist for society's vulnerable persons in Ms. W's circumstances, whether their vulnerability is a result of physical or mental infirmity. Caregivers, and persons like Mr. Comeau who perform a subsidiary role of support to them, have opportunities to take advantage of those vulnerable persons. This is what Mr. Comeau did. It is in the societal interest to ensure that those in similar positions understand that there is a serious consequence for this type of behaviour.

[31] Having said that, the loss of his job, the damage to his own sense of self, the damage to his family and the damage from the loss of respect from those who held him in such high regard should present a significant deterrent, both to Mr. Comeau and to others in similar circumstances. His sense of shame, which resulted in his attempt to take his own life, also sends a significant message to caregivers and others who work with the infirm, about the consequences of this conduct.

[32] This was an isolated offence. The offender was apparently undergoing some personal crisis that was observed by family and friends.

[33] It is my impression that Mr. Comeau is a person who has led a simple life, and is not a sophisticated person. When I commented that he engaged in this behaviour for sexual gratification, that should not be taken as suggesting he is a sexual predator. The evidence suggests that this incident resulted from a congruence of factors that would seem unlikely to recur. Mr. Comeau has no history of this behaviour and he is unlikely to have the opportunity to work in a similar position in the future.

[34] He was fully cooperative with his employers and the police investigation. His statements and his testimony were full of admissions of responsibility and remorse.

[35] It has been more than two years since the offence occurred during which time he has complied with the terms of his release from custody.

[36] Mr. Comeau's removal from society by way of a period of imprisonment is not, in my opinion, necessary to accomplish his personal deterrence. Nor do I see jail as a positive factor in his rehabilitation. He has good insight to the wrongfulness of his conduct. He has a demonstrated ability to form long-lasting constructive relationships. He has been a good family man. He does not have substance abuse issues.

[37] As is often the case there is collateral damage to family members in these situations. He is relied upon for material and personal support by his wife and family, both of which can be further undermined by a period of incarceration. At 59 years of age, he was fortunate that he found another job, and more impressive is that he succeeded in that work. A lengthy period of imprisonment, in addition to having a criminal record, will further add to his difficulties in obtaining employment. I do not see the imposition of a jail sentence as speaking to issues of specific deterrence or rehabilitation.

[38] The pre-sentence report writer suggests that he would seem to be a good candidate for supervision and correctional treatment. There is some indication of mental health issues that should be addressed more formally. Mr. Comeau can benefit from professional counselling I believe. The court can order treatment and mental health counselling through the conditions of a probation order.

[39] In my view, Mr. Comeau is a person who has a high degree of likelihood of living the rest of his life without coming into conflict with the law again.

[40] However, the principles of general deterrence and denunciation are significant factors and the courts, including the courts of appeal, have repeatedly taken the view that in some situations it is necessary to sacrifice the rehabilitation of the offender in favor of an emphasis on the principles of deterrence and denunciation.

[41] Sexual assaults in continuing care homes would, I expect, be difficult to police and more difficult to prosecute. If Mr. Comeau denied any wrongdoing then prosecuting him would have been unlikely. So, when someone is apprehended it offers an opportunity to send a message to those who might be tempted by the opportunity to take advantage in what appears to be circumstances where there is a low risk of apprehension.

[42] It is these latter principles of sentence that weigh heavily in favor of incarceration.

[43] The Crown and defence have referred me to a series of sentencing cases to assist in determining a fit and proper sentence in this case. During an adjourned period, I provided counsel with a series of other cases that I have considered. It is common ground that there is very little caselaw that approximates the circumstances of the offence and of the offender in this matter.

[44] The Crown has referred me to *R. v. Ashley-Pryce*, 2004 BCCA 531, where the offender received a sentence of 18 months' imprisonment and 12 months of probation in relation to an offence of sexual exploitation of a person with a disability contrary to s. 153.1(1) of the **Criminal Code**. The offender was a food service worker in a seniors' home. He entered a guilty plea admitting that he went into the room of an Alzheimer's patient. The patient was clearly incompetent. She inadvertently reached up and touched the offender's penis. He sat her up in bed, pulled down his undershorts and masturbated while holding the patient's hand. The sentencing judge rejected the application for a conditional sentence on the basis that denunciation and deterrence were "so pressing" as to require a period of incarceration.

[45] The Court of Appeal noted that the offender was "approaching the date of his release on parole" and that "no real explanation" was provided as to why bail pending appeal had not been sought, thus rendering the appellant's argument for release on a conditional sentence academic. The Court concluded:

10 ... In this case, that is the community of caregivers, persons who are usually law-abiding and who are entrusted with the care of vulnerable persons. Obviously, the breach of trust committed by Mr. Ashley-Pryce engages the principle of deterrence and denunciation and the sentence he receives is likely to be noted by that community to a greater extent than many sentences are noted by the general public. Society must be able to trust that such persons will not commit serious breaches of this kind.

11 In the final analysis, although I might not have imposed a term of imprisonment were I the sentencing judge, I cannot say the sentencing judge here was wrong to do so. ...

[46] The offender in that case was in a similar position of trust to that of Mr. Comeau and like Mr. Comeau was married with children, no record and showed little risk of re-offending. He lost his job, moved from the community and was embarrassed by the attendant publicity. There were positive character references provided. The case differs in that the offender entered a guilty plea, the touching was, perhaps (depending on how you measure these things), less intrusive but

involved a resident who clearly could not and did not give any indication of capacity to or actual consent by words or conduct. The defence offered by Mr. Comeau had some basis in the evidence – that would not have been available to Mr. Ashley-Price.

[47] In my view this case is instructive in setting out the importance of general deterrence and denunciation in such circumstances. It also highlights the differing views of an appropriate disposition that can co-exist in such challenging fact scenarios, as commented upon by the British Columbia Court of Appeal in suggesting that the court might not have ordered a period of incarceration.

[48] The Crown has also referred me to *Guzman v. Canada*, 2009 FCC 899, for its reference to an 18 month sentence imposed for sexual assault on a dementia patient. The case deals with the removal of Mr. Guzman from Canada. The facts underlying the criminal matter are insufficiently clear to draw a comparison to the matter before the court today.

[49] Other cases referred to by the Crown include: *R v Ngoddy*, 2016 ONCJ 178, and *R v West*, 2007 ABCA 67.

[50] In *Ngoddy*, the offender was a staff member at a group home employed as a care giver. The victim was a 28-year-old female suffering from autism, severe anxiety disorder, bipolar affective disorder, obsessive-compulsive disorder, a developmental disability and behavioural problems - all conditions that were well known to the offender. Her room was locked and required a key to enter from the outside. The offender entered her room at night and kissed her breasts, touched her vagina and placed his penis on her body. Following the incident, the victim's condition regressed significantly, including expressions of suicidal ideation. The offender had no criminal record and denied responsibility for the offence. Justice Brewer J. considered several cases, including *Ashley-Price* and *West*. Justice Brewer also considered the conditional sentence meted out in *R. v. Buna*, 2010 BCCA 53, a case where a chiropractor was sentenced to three concurrent nine month conditional sentences for three sexual assaults that involved touching the breasts and buttocks of patients who attended for treatment. Justice Brewer noted that in *Buna* that "there was no evidence of devastating victim impact... unlike the situation with MGW". The court rejected Mr. Ngoddy's application for a conditional sentence and sentenced him to 13 months imprisonment followed by three years of probation.

[51] In the *West* case, the victim of the assault arrived at the hospital at 3:00 a.m. complaining of a sore throat. In the examination room, after administering pain relief, the respondent, the sole nurse on duty at the hospital, fondled the victim's

breasts, and placed her hand on his penis and he ejaculated. The victim said the medication made her light-headed and sleepy but she was still aware and alert. When the victim told the respondent that she knew what he did, he denied it, then later asked her not to say anything, offering to give her, in return, the bottle of whiskey which was a part of her belongings when she checked into the hospital. Later that morning, he admitted what he did and was remorseful. At trial, the respondent pleaded guilty. The Court of Appeal overturned the original conditional sentence of 18 months plus 24 months of probation and imposed a sentence of 12 months' incarceration. The Court cited the use of drugs to take advantage of an injured and vulnerable patient. It reviewed cases involving doctors and nurses who were sentenced for sexual assaults in the 12 month to 30 month range.

[52] This decision again highlights the societal concern for vulnerable patients. However, an aggravating factor not present in Mr. Comeau's case was the offender's use, in the *West* case, of his medical knowledge and access to drugs to incapacitate and assault a clearly non consenting patient.

[53] The defence has referred me to the following cases:

[54] *R. v. J.W.*, 2010 NSPC 40: Tax JPC imposed a sentence of 15 months' probation and a conditional discharge in the case of an 18-year-old who forcibly removed the clothes of his 16-year-old girlfriend, removed his own clothing and then made her touch his penis while he touched her vagina. The case is distinguishable from that of Mr. Comeau in that the Crown had proceeded by summary conviction in the matter. Also, the Court noted that it was an isolated, impulsive act committed by a youthful first offender with career aspirations for the military. There was no evidence of harm to the victim.

[55] *R. v. J.H.*, 2010 NSSC 120: Scaravelli J. accepted a joint submission of a suspended sentence with two years of probation for a 49-year-old who entered the bedroom of a 15 year old friend of his daughter. He rubbed her back, and briefly placed his hands under her panties and on her vagina and anus. Unlike this case, that case had a joint submission; there is no joint submission in Mr. Comeau's case.

[56] *R. v. Stout*, 2003 BCPC 111: A 68-year-old man with no criminal record was sentenced to a period of 12 months' probation and granted a conditional discharge for a 28 year old historical sexual assault that occurred when the complainant was seven and he was 31. The offender penetrated the victim with his finger. The case is distinguishable in that the charge of indecent assault carried a maximum punishment

of five years, and the offender had no history of similar conduct in the 28 years following the assault.

[57] *R. v. Gilmour*, 2005 ABQB 354: The offender was a 71-year-old who entered a store and pressed his groin into the side of a female employee. He had no criminal record and was awaiting surgery for prostate cancer. The Summary Conviction Appeal Court upheld the guilty verdict and the sentence imposed at trial of six months' probation and a conditional discharge. This case, too, is readily distinguishable. It was proceeded upon summarily, did not involve a position of trust and the conduct was, as described, at the "low end" of sexual assaults.

[58] As counsel have indicated, the caselaw does not have the same combination of circumstances as are present here. I will add for discussion the following cases.

[59] An offender's health concerns can be relevant to the imposition of a custodial sentence. Cases that speak to that include:

- *R. v. Armstrong*, 2016 ONSC 5760
- *R. v. SH*, 2014 ONCA 323
- *R. v. LR*, 2013 ONCA 504

[60] The Crown has correctly pointed out that there is no evidence in the case before me that the provincial correctional facility is unable to fulfill its obligations to safeguard the health of an inmate. In the absence of such evidence I must assume that Mr. Comeau's health is not a factor in whether he should serve a custodial sentence.

[61] The following decisions speak to factors that influence the length of sentence, particularly those involving sentences of one year or less. (I note that some may speak to conditional sentences which are no longer permitted, but include consideration of the appropriate range of custodial sentences):

- *Québec (Directeur des poursuites criminelles et pénales) c Trépanier Beaulieu*, 2015 QCCQ 3528
- *R. v. Aguas*, 2015 ONSC 5732
- *R. v. Beckers*, 2013 ONSC 3065
- *R. v. Bergeron*, 2013 ONSC 3311

- *R. c. Bibeau*, 2016 QCCQ 613
- *R. v. Long*, 2013 ONCJ 617
- *R. c. Lussier*, 2013 QCCQ 6897
- *R. v. RRI*, 2016 NSPC 66
- *R. v. J.A.H.*, 2011 NSSC 434 (conviction upheld at 2012 NSCA 121)
- *R. v. Rushton*, 2017 NSPC 2 (re: sentencing principles and the role of suspended sentences)

[62] In the interests of time, I will not outline the results of each of these decisions. What they demonstrate, cumulatively, is that sexual assaults can result in a wide range of sentences. At the low end of the range, as suggested by the defence cases and in *Lussier*, a non-custodial sentence may be imposed. Intermittent sentences, such as imposed in *Long* and *Beaulieu*, may result. Certainly there is ample authority for periods of incarceration that include the period urged by the Crown in this case. The cases I have listed also include custodial sentences of four months, six months, and nine months - each one unique to the circumstances of those cases.

[63] In *R. v. R.R.I.*, 2016 NSPC 66, now Justice Gabriel, when a judge of the Provincial Court, set out a very useful review of the principles of sentencing in sexual assaults as set out in the statutory and case authorities.

[64] Gabriel J. concluded that the range of sentence is from three to 24 months of imprisonment, plus probation, in the cases he reviewed. While the precedents discussed in each of these cases pertain to sexual assaults on children, they do reflect the sentencing considerations in cases of sexual assault by a trusted person on a vulnerable victim.

[65] While speaking about sexual assaults on children by their parents or guardians, Judge Tufts in *R. v. S.C.C.*, 2004 NSPC 41, outlined:

16 ... Other factors which impact on this aspect are the following aggravating features which may exist in varying degrees in different crimes:

- (1) the degree of invasiveness or the nature of the assaults and the variety of the acts;
- (2) the presence of other forms of physical violence beyond the abuse itself;
- (3) the presence of threats or other psychological forms of manipulation;

- (4) the age of the victim;
- (5) other forms of vulnerability of the victim besides the parent/child relationship;
- (6) the number of incidents and the period of time over which the abuse occurred;
- (7) the impact on the victim;
- (8) the risk to re-offend.

17 Mitigating features include a guilty plea at an early stage, remorse and acknowledgement of harm to the victim, a lack of a criminal record, disabilities or character of the offender or other characteristics which reduce the moral blame worthiness of the offender and prospects of treatment.

[66] Although it is repetitive to do so, when applying these factors to this case it can be said that the criminal act was minimally invasive and occurred briefly and on one occasion only. There was no physical violence beyond the act itself. The victim was elderly and vulnerable, although not in the sense that one speaks of in the parent/child relationship. The victim did not suffer a mental or physical impact. There are mitigating factors present.

## **Sentence**

[67] If a conditional sentence were available to Mr. Comeau I would not hesitate to impose one based on the circumstances as I know them today. However, Parliament has not left that option to the courts and the defence has not chosen to challenge the legislation, so I must look to other available options that provide a proper balancing of the various factors in evidence here in arriving at a fit and proper sentence.

[68] The circumstances of this offence are unique in that according to Dr. Meehan, Ms. W. had the ability to agree to the conduct and in fact did so, but lacked the ability to understand the consequences. Staff on the floor, with a much greater understanding of her medical condition than Mr. Comeau had, acquiesced in Ms. W's sexualized behaviour with another resident. They would certainly have been aware of the special circumstances she presented. Having said that, it is one thing to let her participate in this conduct with a resident – but Mr. Comeau was an employee obligated to provide support for Ms. W's care.

[69] Mr. Comeau had been warned to stay out of her room while the door was closed, a warning he ignored. As an employee, responsible for cleaning her room

and common areas, it is understandable that the employers and the prosecution could not minimize the wrongfulness of his conduct. There must be some period of incarceration to express societal disapproval of this conduct and to send a message to caregivers that this conduct will not be treated lightly.

[70] Having regard to all the circumstances, I sentence Mr. Comeau to a period of 90 days in jail and a period of probation for 30 months.

[71] DISCUSSION with Counsel.

[72] Mr. Hughes has requested that this sentence be served on an intermittent basis. I am prepared to grant that request.

[73] I am not in a position to speak to the quality of medical care that the correctional facility can provide to Mr. Comeau. As Mr. Kennedy quite properly pointed out, they have an obligation to provide appropriate care. Having said that, I think it is fairly evident that given Mr. Comeau's age, his lack of familiarity with institutional life, what was obviously a serious cardiac incident, that required hospitalization for a period of time, and the fact that he continues to be under doctor's care are all factors in favour of trying to reach a sentence that satisfies the principles of sentencing but does not, unnecessarily, jeopardize his health condition.

[74] The defence request is not to change the length of sentence, but rather the manner in which it is served. So if the manner in which it is served can better address Mr. Comeau's health concerns, while still keeping the sentence at the same length, then I think that the request is a reasonable one. It is not a mitigation of the penalty, such as described in the caselaw that Mr. Kennedy cited, which holds that there can be mitigation of penalty if it is demonstrated that the facility is unable to meet the offender's medical concerns.

[75] Given this man's history of good employment, and his apparent ability to obtain employment, and the comments of Ms. Smeltzer, directly and through Mr. Hughes about his employability, there is a chance that Mr. Comeau can obtain employment, notwithstanding the circumstances. That is not only in his interests, it is in the interest of his family, and it is also in the interests of society. There are competing interests here: the sentence is intended to deal with issues of general deterrence and denunciation, but in balance with other principles of sentencing. If he is able to obtain employment it is in society's interest if he and his family can support themselves, and he seems to have a very good chance of accomplishing that.

[76] For these reasons, I am prepared to accede to the request.

[77] Mr. Comeau: you are sentenced to a period of 90 days to be served in the Central Nova Scotia Correctional Facility or such other facility as designated by the Province. You are to serve that sentence intermittently, commencing on Friday, July 14, at 8:00 p.m., and out on Monday, July 17, at 6:00 a.m. and each Friday to Monday thereafter until the completion of your sentence, on the same basis, Fridays at 8:00 p.m. to Mondays at 6:00 a.m.

[78] You are to serve a period of probation when not in confinement pursuant to an intermittent sentence and for a period of 30 months thereafter. So you are on probation during the time that you are serving the intermittent sentence and then for 30 months after the completion of the sentence.

[79] The terms of the probation order will include:

- You are to keep the peace and be of good behaviour.
- You are to appear before the court when required to do so by the court.
- You are to notify the court, probation officer, or supervisor, in advance, of any change of name, address, employment or occupation.
- You are to report to a probation officer at 277 Pleasant Street, Dartmouth, Nova Scotia, before the end of business tomorrow, July 13, 2017, and you are to report to a probation servicer as required and directed by your probation officer or supervisor.
- You are to remain within the Province of Nova Scotia unless you have written permission from your probation officer.
- You are to have not direct or indirect contact or communication with Ms. W.
- You are to make reasonable efforts to locate and maintain employment or an education program as directed by your probation officer.
- You are not to accept employment in any facility that is used as a residence for persons with mental or physical disabilities.
- You are to attend for mental health assessment and counselling as directed by your probation officer.

- You are to attend for assessment, counselling or a program directed by your probation officer.
- You are to participate and cooperate with any assessment, counselling or program directed by the probation officer.

### **Ancillary Orders**

[80] There will be the following ancillary orders:

- an order to provide a DNA sample pursuant to s. 487.04 CC;
- an order to register under the Sex Offender Information Registration Act, (SOIRA) pursuant to s. 490.012 and s. 490.013, for a period of 20 years;
- an order to have no communication directly or indirectly with Ms. W. during the custodial period of the sentence, pursuant to s. 743.21 CC.
- a mandatory firearms order under s. 109 CC, for life.

### **Victim Surcharge**

[81] The law requires the imposition of a victim surcharge in the amount of \$200. That is payable by July 13, 2018.

Duncan, J.