SUPREME COURT OF NOVA SCOTIA
Citation: *R.v. C.F.Y.*, 2019 NSSC 178

Date: 20190527
Docket: Hfx No. 473969
Registry: Halifax

Between:

Her Majesty the Queen

v.

C.F.Y.

SENTENCING DECISION
Restriction on Publication: Ss. 486.4, 486.5 and 539(1) of the *Criminal Code of Canada*

Judge:	The Honourable Justice Christa M. Brothers
Heard:	October 9,11,18 & 22, 2018, in Halifax, Nova Scotia
Sentencing Hearing:	March 22, and April 3, 2019, in Halifax, Nova Scotia
Oral Decision:	April 3, 2019
Written Decision:	June 4, 2019
Counsel:	Emma Woodburn, for the Crown Terrance Sheppard, for the Defendant

By the Court:

[1] This is the sentencing decision in relation to the offender, C.F.Y., who was the stepfather of the complainant, N.S. At a trial, by Judge alone, I found him guilty under s. 151 of the *Criminal Code* of touching his stepdaughter for a sexual purpose, abusing a position of trust, over a period of years. The following is my reasoning concerning a fit and proper sentence.

[2] On January 7, 2019, C.F.Y. was convicted of the following charges:

> 1. Between September 30, 2010 and April 1, 2012, did unlawfully commit a sexual assault against [the complainant], contrary to Section 271 of the *Criminal Code*;
> 2. FURTHER, that at the same time and place did for a sexual purpose touch [the complainant], a person under the age of sixteen years directly with a part of his body, to wit, "his hands", contrary to Section 151 of the *Criminal Code*;
> 3. AND FURTHER, that he did between March 30, 2012 and August 22, 2014, commit a sexual assault on [the complainant], contrary to Section 271 of the *Criminal Code*;
> 4. AND FURTHER, that he between March 30, 2012 and August 22, 2014, did for a sexual purpose touch [the complainant], a person under the age of sixteen years directly with a part of his body, to wit, "his hands", contrary to Section 151 of the *Criminal Code*.

[3] Based on the application of the principles set forth in *R. v. Kienapple*, [1975] 1 SCR 729, the Crown and defence agreed that the first and third counts should be stayed.

[4] C.F.Y. was convicted of two counts contrary to s. 151 of the *Criminal Code* which stated as follows:

> 151 Every person who, for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of a person under the age of 16 years
>
> (a) is guilty of an indictable offence and is liable to imprisonment for a term not exceeding ten years and to a minimum punishment of imprisonment for a term of forty-five days.

and also stated, from 2012 to 2015, as follows:

> 151 Every person who, for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of a person under the age of 16 years
>
> (a) is guilty of an indictable offence and is liable to imprisonment for a term of not more than 10 years and to a minimum punishment of imprisonment for a term of one year;

Agreements

[5] There was agreement among counsel on certain issues.

1. Given this was a continuous offence where the indictment was structured in separate counts in order to take into account a change of location, all agreed the sentences imposed should run concurrently.
2. Both the Crown and Defence agree that there is no mandatory minimum sentence for a conviction under s. 151. I am bound by *R. v. Hood*, 2018 NSCA 18.
3. There is also some agreement on aggravating factors which I will address later in these reasons.

[6] This is where the agreement ends. The Crown and Defence differ significantly on what is a fit and proper sentence, in these circumstances, for this offender.

[7] It is important to remember the findings from the trial. In summary I concluded the following:

> When N.S. was between the ages of 7 and 10 years old, C.F.Y. engaged in the following behavior for a sexual purpose:
>
> - He would touch her upper, inner thigh when they were cuddling on the couch.
> - He would touch her buttocks, or squeeze and grab it under the pretense of horseplay or tickling.
> - He would touch her breasts over her clothing, but once over a sports bra. This would happen while cuddling or watching television.
> - He would watch her in the shower.

[8] I concluded on the first count, that he touched N.S.'s buttocks, breast and inner thigh for a sexual purpose. On the third count, relating to the time the family lived

in Dartmouth, I concluded the touching for a sexual purpose was of N.S.'s inner thigh.

Circumstances of the offender / Pre-sentence Report

[9] The following is information gleaned from the generally positive Pre-Sentence Report authored by Terry A. Lewis, as well as letters of support submitted on behalf of the offender.

[10] The offender is currently 40 years old. He resides with his common-law wife and her 15-year-old son. It is worthy of note, that C.F.Y.'s spouse, J.L, has attended this entire proceeding and continues to be supportive and committed to their now five-year relationship. C.F.Y. is close to his family, which includes his parents and his two brothers. He continues to enjoy the support of his family. He is currently employed with the Department of National Defence as an Electronics Technician and has been for the last 14 years. C.F.Y.'s supervisor, Stanley Humphrey, was contacted for the purposes of the Pre-Sentence Report. He has acted in the role of Supervisor to C.F.Y. for the last five years. He remarked about the offender, "He is employed full-time and he is a brilliant employee."

[11] C.F.Y. holds a Bachelor of Science degree from Dalhousie University and a diploma in Electronic Technology from the Nova Scotia Institute of Technology Campus.

[12] C.F.Y. is involved in the community, volunteering with the Halifax Urban Folk Festival, Nova Scotia Music Week, and the Halifax Jazz Fest. He is described by his friends and family as "caring, thoughtful, patient and always willing to lend a helping hand". By all accounts, his close-knit support system describes him as remorseful and as someone who has gained insight and improvement through his previous sentence and counselling.

[13] The Pre-Sentence Report, ("PSR") further sheds light on the initiative the offender has taken to seek counselling and treatment. C.F.Y. has attended appointments with Dr. Debbie Sutherland on a regular basis from 2015 to 2017, with his last appointment being in June 2017. He apparently, at the time of the PSR, scheduled an appointment with her to "reconnect".

[14] C.F.Y. has also attended the Forensic Sexual Behavior Program ("FSBP") from September 2016 until completion in May 2017. He then transitioned into the maintenance group of the program, where he continues to attend monthly meetings. The co-facilitator of that program, Bernadette McQuade, noted that the offender was

an active and engaged group member and was utilizing the group treatment to make life improvements. She also facilitates the maintenance program with Dr. Angela Connors and C.F.Y. continues to attend. Ms. McQuade has suggested that the offender continue to attend the maintenance program and follow any treatment suggested by Dr. Connors and the FSBP.

[15] In addition, it was suggested that treatment involve a minimum of six months of structured weekly group treatment sessions, followed by bi-weekly involvement in a maintenance group for the remainder of the term of supervision.

[16] C.F.Y. has several people who have provided what I would describe as good character references through the pre-sentence report process. These include his spouse, J.L., his friend, Martin Maunder, and his father.

[17] While I have considered what they have said, I take the Crown's point that such offences, as those committed against N.S. here, are committed in private, away from society and others. However, I do note the positive aspects of the reporting.

Forensic Sexual Behavior Presentence Assessment

[18] This assessment was completed prior to the offender's sentencing on the earlier two counts of sexual interference contrary to s. 151 of the *Criminal Code*. This report is dated November 5, 2015.

[19] This assessment indicated that it was crucial for C.F.Y. to continue his counselling with Dr. Sutherland. The assessment noted that the offender sexualizes underaged females for his own gratification. The Forensic Sexual Behavior Presentence Assessment (FSBPA) also noted that C.F.Y. exploited his parental responsibilities to secure inappropriate contact with his stepdaughter, Z.S. He did the same with N.S.

[20] While the results of the testing in 2015 indicated that the offender preferred adult women and did not have a sexual interest in underaged females, the offending itself demonstrated that C.F.Y. responds to deviant stimuli to meet his own sexual needs. In summary, the report concluded that C.F.Y.'s risk for future violence was low. C.F.Y. presents the greatest risk to an underaged female with whom he is acquainted. His primary risk factors are sexualization of underaged females and his motivation to act upon it. The tests indicate while the offender has a non-deviant profile, he has the ability to respond and act sexually towards underage females in the absence of a sexually gratifying outlet. His "twisted thoughts" were referenced and problems with self-regulation were noted.

[21] In the FPBSA, the author discusses treatment options for C.F.Y., stating:

> To the knowledge of the undersigned, treatment that matches C.F.Y.'s (low) level of risk is not available in the federal or provincial jail systems. It is, however, available in the community, offered by this program, and is suitable for those under the jurisdiction of either a Probation or Conditional Sentence Order.

[22] This report gives a great deal of insight into C.F.Y. and the necessity for him to take proactive steps to not reoffend, despite him being assessed as low risk.

Updated Risk Assessment

[23] Dr. Sutherland performed an updated risk assessment and submitted a report dated March 5, 2019. She continues to be of the view that based on test scores, C.F.Y. is at a low risk to reoffend or for sexual recidivism. This was also supported by Dr. Sutherland's review of his changes in behaviour and attitudes, and strategies he has developed to ensure he does not return to sexual behavior towards children. Dr. Sutherland opined that C.F.Y. has made progress in treatment and is managing his risk for sexual recidivism.

[24] Further, she states, at p. 4:

> Dr. Connors commented that C.F.Y. has been an 'excellent' maintenance group attendee: he is open and honest in group sessions, he can identify his risk factors, recognizes when he is reverting to old, unhealthy coping patterns and can identify and implement healthier copies strategies, and he has offered appropriate support and feedback to other group member.

Aggravating and Mitigating Factors

[25] First, the aggravating factors.

1. Prior Offence

[26] The offender has a prior criminal record. On November 25, 2015, C.F.Y. was sentenced on two counts of sexual interference pursuant to s. 151 of the *Criminal Code*. He was sentenced to two 90-day consecutive terms of custody followed by 24 months of probation.

[27] There has been great debate concerning the aggravating factors that this Court is being asked to consider. The Crown asks me to conclude that C.F.Y. is not a first-

time offender, having been convicted of offences against two other young girls. The Defence argues that these offences occurred during the same time as the other two.

[28] I agree with the Crown to a certain extent. I do not think it would be appropriate to ignore the prior convictions. I am prepared to consider the previous convictions to the extent that they demonstrate that the offence before me is not an isolated incident in that C.F.Y. has committed similar offences with regards to two other young girls.

[29] The Crown agrees no step-up approach is called for or being proposed.

2. Impact on the Complainant

[30] The Crown also focuses on the inherently violent nature of sexual offences as an aggravating factor. I accept this submission. Such actions by those in charge of children, as C.F.Y. was are inherently violent. *R. v. McCraw*, [1991] 3 S.C.R. 72, at pp. 83-85; *R. v. Simpson*, 2017 NSPC 2,5 at para. 46; *R. v. G.(T.V.)*, (1994) 133 N.S.R. (2d) 299 (S.C.).

[31] Evidence that the offence had a significant impact on the victim, considering her age and other personal circumstances, including her health and financial situation, is a statutorily aggravating factor under s 718.2(a)(iii.1). I refer to *R. v. Hajar*, 2016 ABCA 222, which discusses (*albeit* in a case of more severe acts by an offender) the inherently harmful and exploitative nature of sexual offences against children.

[32] The complainant's Victim Impact Statement makes it clear that these offences had a devastating impact on her. She states that the offender's conduct has affected her in the following ways:

- She has trouble sleeping and suffers from nightmares;
- She has suffered from depression, anxiety, a panic disorder and an eating disorder;
- She has many difficulties in maintaining relationships, especially with males;
- She has missed school due to her mental health issues;
- She has attended the IWK multiple times due to panic attacks and suicidal thoughts;

- Loss of relationships with family members; and,
- Fear around taking a shower and having someone stare at her.

3. Position of Trust or Authority

[33] It is a statutorily aggravating factor under Section 718.2(a)(iii) that if an offender, in committing an offence, abused a position of trust or authority in relation to the victim.

[34] I found as fact that the offender was acting as a "father" to the victim at the time of the offences, his role being "*in loco parentis*". N.S. called him "Dad" during his time with S. family. There is no doubt he was in a position of trust in relation to N.S.

4. Age of the Victim

[35] A statutorily aggravating factor is identified at Section 718.2(a)(ii.1), where the victim is under the age of 18 years.

5. **Two victims in the same family**

[36] In *R. v. G.*, 2019 ABCA 46, the Alberta Court of Appeal upheld the trial judge's decision that two child victims from the same family constituted an aggravating factor for the purposes of sentencing. In that case the accused was a stepfather to the two young daughters of his domestic partner. He was convicted of repeated major sexual assaults against both stepdaughters. In finding this to be an aggravating factor, the Court of Appeal noted the following:

> [10] In the case at bar, the fact that the victims were from the same family aggravated the trauma suffered by the family as a whole. The evidence supports the conclusion that the family was shattered. One child left her mother's home to get away from the appellant without offering an explanation. The impact on the mother and her remaining siblings was devastating. That the criminal behavior was visited on the two girls in the same family could properly be characterized as aggravating in these circumstances.

[37] This is a difficult issue to consider. While I accept this is to be an aggravating factor, if I do so here, I will be considering the prior conviction an aggravating factor and then finding another aggravating factor on the same basis. This may

unintentionally duplicate in some ways the consideration of the aggravating factors. If the offences relating to both Z.S. and N.S. were subject to sentencing at the same time, the Crown's position would be accepted. I have already considered this as an aggravating factor but am cautious of the weight to be placed upon it.

6. **Lack of accountability**

[38] The Crown says the following in their brief:

> The Crown considers the accused's view of his past criminal behavior of sexual abuse to be self-indulgent and self-congratulatory. It is concerning that C.F.Y. puts a positive spin on his past conduct as liberating. His Pre-Sentence Report implies C.F.Y. views his past as a road to aggrandized self-improvement rather than an example of extremely predatory, criminal behavior.

[39] The Crown asks me to conclude that the offender lacks insight and that his lack of accountability in addition are aggravating factors. I do not agree. I think it is dangerous to make assumptions about what a person means by some limited comments in a Pre-Sentence Report. I am asked to characterize these comments in a negative light despite the evidence and reports of his therapist who have said just the opposite: that C.F.Y. has been successful in group treatment and maintenance and has demonstrated positive attributes.

Mitigating factors

1. Presentence Report

[40] The Crown asks me to give little weight as a mitigating factor to the evidence that the offender has led a mostly pro-social life and is a person of good character in the eyes of his family, work colleagues and friends. I accept the Crown's argument that these types of offences, by their very insidious nature, happen in private, far from the rest of society, so as to avoid detection. Consequently, the average person would not see anything sinister but could compartmentalize the person they know versus the person who commits the crime. However, I accept the Defence position that this is a mitigating factor.

[41] I will give some weight as a mitigating factor to the information from C.F.Y.'s circle of support. There is, however, another side to C.F.Y., one the complainant sadly experienced and is suffering as a result. However, I accept that C.F.Y. has the ability to be a good partner, son, friend and, employee. He has been a contributing member of society in his public life.

2. **Remorse and Accountability**

[42] The Defence contends that C.F.Y. has expressed remorse and has taken responsibility for his actions. C.F.Y. expressed remorse and accountability for the prior two offences in the FSBPA.

[43] C.F.Y. was given the opportunity to address the Court. He stated that he was deeply regretful about his inappropriate behaviour. He apologized for his actions and the resulting pain it caused. He promised to do his best not to treat anyone like that again.

[44] C.F.Y. has now expressed remorse and taken accountability for this offence. I have heard him and taken this into account.

3. **Rehabilitation and Risk of Re-Offending**

[45] The Defence submits that the offender's efforts towards rehabilitation to date, and his low risk of re-offending, should be considered mitigating factors. I accept that C.F.Y.'s proactive approach to treatment prior to this offence coming to light is a factor to weigh. So is his low risk of re-offending.

Victim Impact Statements

[46] I heard Victim Impact Statements read by J.S. and N.S. In addition, I took time to review and consider them after the hearing.

[47] First, the Victim Impact Statement of J.S. - what pain this has caused a loving and devoted grandfather. He articulated the impact of this offence and his words have resonated with me. I understand he has been caused grief, anxiety, and remorse due to these offences. He has been a first-hand observer of the impact C.F.Y.'s conduct has had on his granddaughter. I cannot imagine how difficult this has been. Watching your loved one suffer, experiencing such severe consequences.

[48] J.S. has supported N.S. through panic attacks, suicidal ideation, and her eating disorder. He has clearly been an unwavering support for his granddaughter. How fortunate they are to have each other. I understand he has a lot of anger but I am hopeful, with this process concluded, that with time the healing will begin. I am aware, of course, that no sentence, no matter the gravity or duration, can reverse the damage done by C.F.Y.'s actions.

[49] Next, and importantly, the Victim Impact Statement of N.S. How brave and courageous it has been for her to testify, participate in this process, and describe the continual impact C.F.Y.'s actions have had on her. I commend her for her courage. She has shown more resolve at the young age of 14 than most adults can muster.

[50] I have thought a great deal about her words and the harm this has caused. I have considered this harm, which N.S. articulated, as including depression, anxiety, panic disorders, and an eating disorder. I understand C.F.Y.'s actions have had an effect on her ability to trust people.

[51] N.S. said in her statement, "No child should have to be treated like I was by an adult who they trusted and thought they were loved by." She is absolutely correct. She also stated, "I will never forget what he did to me and through family support and counselling it may be a little easier to deal with for the rest of my life."

[52] I hope the end of this legal process marks the beginning of the alleviation of the suffering endured by N.S., and that her healing continues with the support of her family.

[53] The sentence I impose on C.F.Y. cannot take away the victim's pain, memories, or suffering. In fact, she may not agree with the sentence I ultimately impose, but know this: I have heard her, and I have considered her comments very seriously. N.S. has not been forgotten in this process.

Crown's Position

[54] The Crown argues that a period of incarceration of 18 months followed by 36 months of probation is appropriate, given the need to address general and specific deterrence and denunciation. The Crown argues that a stricter approach to sentencing offenders in cases of sexual interference and sexual assault of young people is being applied across Canada. In cases such as this, the Crown asserts the foremost sentencing principles are denunciation and deterrence, not rehabilitation.

[55] The Crown suggests that any prior good character of the offender should be given less weight here because of the very nature of the offences: these types of offences happen often and mostly in private, and the general community and people who are close to such offenders would not usually be present during or aware of these incidents.

Defence Position

[56] In relation to the relevant sentencing factors, the Defence submits that there is a high likelihood of C.F.Y.'s rehabilitation given his past treatment and the risk of him re-offending is low. The Defence points to both the pre-sentence report and the FSBPA as indications that C.F.Y. is at a low risk to reoffend.

[57] The Defence also points to C.F.Y.'s proactive behavior towards treatment and his extensive support system. The Defence argues that this all supports a high probability of rehabilitation and a low risk of re-offending.

[58] The Defence argues that C.F.Y. is remorseful and is taking accountability for his actions. While it is acknowledged that the FSBPA was completed prior to these offences coming to light, it was still completed after the offences actually occurred. The Defence submits that C.F.Y.'s comments and work towards rehabilitation should be recognized by this Court. The Defence argues that C.F.Y. continues to demonstrate efforts to work towards rehabilitation and to remove any chance of re-offending.

[59] The Defence acknowledges that the offences took place while N.S. was under 18, and refers to the *Criminal Code* which states that offences against children under the age of 18 require sentencing to primarily consider the objectives of denunciation and deterrence of the conduct. The Defence seemingly acknowledges that C.F.Y. was N.S.'s stepfather at the time of the offence. This placed him in a position of trust and authority and is therefore considered an aggravating factor.

[60] The Defence argues that C.F.Y. has been a contributing member of society for some time, and that he continues to earn the love and respect of friends and family members. Both his parents and his good friend have provided letters describing C.F.Y.'s good nature as well as the improvements he has made since beginning treatment. The Defence argues that C.F.Y.'s ability to continue to provide love and support as well as to contribute to society through his work is crucial to his rehabilitation in the future.

[61] The Defence says that if C.F.Y. is away from his job too long, he will lose his current level of security clearance, and there is a possibility he would lose his job altogether. The argument raised is that such a loss would cause C.F.Y. and his family both undue emotional and financial hardship.

[62] The Defence reminds the court that when the offence relating to Z.S. occurred in 2015, C.F.Y. took immediate steps to ensure that he would never re-offend. On

his own initiative, he started seeing Dr. Sutherland for counselling. He also volunteered to take the FSBPA, which is described as a very invasive process.

[63] The Defence submits that C.F.Y. has already been sentenced and served a custodial sentence after the timeline of these current offences. He has been able to experience the consequences of his actions and learn from them. He has also greatly benefitted from his ongoing treatment with Dr. Sutherland.

[64] The Defence submits that while C.F.Y. acknowledges that the offences he has been found guilty of are very serious and troubling; in terms of the "spectrum" of sexual offences described in the case law, these actions fall on the very low end of the scale.

[65] The Defence submits, that the appropriate sentence for C.F.Y. in this instance is a conditional sentence of between six and 12 months in duration.

Appropriate Sentence

[66] The general purpose and principles of sentencing are found in s. 718 of the *Criminal Code*, which states:

> 718. The fundamental purpose of sentencing is 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;
>
> (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 the community; and,
>
> (f) to promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims and to the community.

[67] Sentencing involves a balancing of the objectives set out in this section.

[68] Section 718.1 requires that a sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender. Section 718.2 identifies further sentencing principles which must be considered, including the following:

> Other sentencing principles

> 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,
> >
> > …
> >
> > > (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,
> >
> > …
> >
> > (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.

[69] I note that s 718.2(a)(iii.1) was added to the section effective January 13, 2013, which was after the time frame of count 2, and during the time frame of count 4. That said, the caselaw suggests that the consequences for the victim were always a relevant consideration. See, for instance, *R. v. Woodward*, 2011 ONCA 610, cited below).

[70] Any sentencing hearing requires a careful consideration of the unique circumstances of the offender and the offence. It requires the balancing of sentencing objectives.

General Overview of Deterrence, Denunciation, Rehabilitation and Proportionality

[71] These important principles are at the heart of the sentencing process. Denunciation and deterrence emphasize society's interest in protecting the public by imposing appropriate punishment for criminal conduct. There is the goal of ensuring that the particular offender before the Court is discouraged from repeating their criminal behaviour.

[72] Rehabilitation requires the Court to consider the individual offender and what options may be available to maximize the likelihood that they can be rehabilitated. It has been generally accepted that imprisonment is not necessarily an effective tool for rehabilitation.

[73] In some sentencing hearings deterrence, denunciation, and rehabilitation are at odds with each other. The Court must balance the need to sanction criminal behaviour with the goal of helping the offender become a productive member of the community.

[74] Proportionality requires the Court to consider the seriousness of the offence and the degree of responsibility of the offender. In other words, the sentence must first and foremost fit the specific crime and the specific offender.

[75] Section 718.2(b) of the *Criminal Code* states that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.

[76] The caselaw is clear that in cases of sexual interference of minors, the focus of the sentencing exercise must consider denunciation and deterrence for this type of crime. Deterrence and denunciation are the primary considerations when imposing sentences upon those who have abused children.

[77] In sentencing C.F.Y., I bear in mind the apt comments by Judge Campbell (as he then was) in *R. v. E.M.W.*, 2009 NSPC 65:

> 7 Society reserves its strongest sense of revulsion for those who cross the legal and moral boundary into treating children as objects of sexual gratification. The treatment of a child in this way is an attempt to deny her basic human dignity. In the eyes of the adult the child is reduced to being a nameless "thing". She is robbed of her childhood and her innocence. She has no choice in the matter. She is simply used. She has become a means to an end.

[78] Gilles Renaud, in his text, *The Sentencing Code of Canada: Principles and Objectives* (Markham, Ont: LexisNexis, 2009), at 228, said the following about the

objectives of sentencings in child sexual abuse cases as compared to standard sentencing in non-abuse case:

> … the ranking to be assigned to the six sentencing objectives listed in s. 718 of the *Criminal Code* are case specific and their relative importance will be determined by the nature of the offence and of the offender at the conclusion of an exercise of discretion by the sentencing judge. By way of contrast, there is no exercise of discretion in the case of abuse of one under the age of 18: the court begins by assigning pride of place to both denunciation and deterrence. This is not to say, of course, that the resulting sentence must be one in which imprisonment is selected or emphasized but the likelihood of such a result is enhanced given the dictates of Parliament.

Defence Case Law

[79] The Court of Appeal in *R. v. E.M.W.*, 2011 NSCA 87, (E.M.W. No. 2), reviewed the range of sentences for crimes involving the sexual abuse of children but not involving sexual intercourse. Those cases ranged from a suspended sentence to six years of incarceration. The Appeal Court approved of the analysis followed by the trial judge. After referring to the trial judge's statement of principles, the Court said:

> 28 The judge then considered similarity of sentences given to similar offenders in similar circumstances, the parity principle in s. 718.2(b) of the *Code*:
>
> > a. Case law can provide a general sense of a range of sentences and some sense of the principles that have been applied. It does not dictate a precise sentence. Judge Tufts in *R. v. S.C.C.* [2004 NSPC 41, paras 19-54] provided a comprehensive review of the case law with respect to sentencing for matters involving the sexual abuse of children up to 2004. Since that time, there has been no significant change in the approach.
> >
> > b. Sentences range from conditional sentences to federal prison terms of six years. Those at the higher end of the sentencing range have tended to involve intercourse or oral sex. They have included case [sic] where abuse has been ongoing over a period of years. Sexual touching in various forms generally attract sentences ranging from conditional sentences to two to three years of incarceration. Where the touching is over clothing or is a single incident or happens in an unplanned way in the context or [sic "of"] wrestling or horseplay, the sentence is more likely to be toward the lower end of the range. Where the touching involves masturbation and touching of the penis, the sentence is likely to be toward the higher end of the range. Where the perpetrator has a record of similar offences, the sentences have certainly tended toward the more severe end of the range.

> Where the abuser is a person in a position of trust, the sentence has reflected that.

[80] The offences in this case involved touching over clothing. They were not isolated to one incident. It was not incidental contact. It was not digital penetration or acts of intercourse or oral sex. I do not mention this to minimize the conduct, but only to acknowledge that the appropriate sentence must consider the conduct.

[81] Courts have noted that, where the touching is over clothing and is unplanned, as when it is connected to horseplay or wrestling, this will suggest a sentence toward the lower end. A record of past offences, where the abuser is a person in a position of trust and where the conduct involves more severe conduct, such as penetration and masturbation, will result in a longer sentence. In *R. v. E.M.W.*, two years of incarceration was imposed. That case involved far more serious offences.

[82] I agree with the Defence submission that there was no oral sex or intercourse and no touching of the penis or vagina in the case before me. While the incidents occurred during a time of horseplay, they also occurred while watching television; further they occurred many times and did not involve one single incident. However, I agree with the Defence that the facts in the present case are on the lower end of the scale of sexual interference. But these acts were committed by the complainant's stepfather in a clear violation or breach of trust.

[83] In *R. v. III*, (1996), 151 N.S.R. 2(d) 216, [1996] N.S.J. No. 219 (S.C.), the offender was charged with sexual assault in relation to incidents of touching his granddaughter both above and under her clothing on her breasts, vagina, and buttocks. The Court sentenced the offender to three months of incarceration followed by one year of probation. Despite his age, lack of a criminal record, and pro-social background, incarceration was found to be warranted.

[84] *R. v. R.H.S.* (1993), 126 N.S.R. 2(d) 392, [1993] N.S.J. No. 489 (C.A.), involved an offender who admitted that he had touched his stepdaughter. The offender admitted to masturbating in the same room as his stepdaughter, but there was no suggestion that the victim was aware of this. The Court reviewed the positive results of the Pre-Sentence Report and took into consideration the fact that the probabilities of rehabilitation appeared to be high. The Court stated that this likelihood of rehabilitation mandated that the sentence be reduced to one that would not keep the offender from his family and his employment for an extended time. The Court of Appeal set aside the trial judge's 10-month sentence and instead gave the appellant a 90-day intermittent incarceration.

[85] *R. v. R.H.S.* was decided in 1993. It is 26 years old. There are some comments about the family reuniting and the Court not wanting prison to interfere with that. I am not certain courts in this country today would reward a perpetrator of sexual abuse who, despite circumstances, somehow stayed in the home with the victim and the family. However, I need not reject this case as helpful in the circumstances for that reason. The facts of the case are not similar to this case. This case does not involve an isolated incident.

[86] In *R. v. S.J.P.*, 2016 NSPC 50, the Court reviewed a number of sentences issued for s. 151 offences. One of these cases was the unreported decision in *R. v. Sawlor*, where the accused pleaded guilty to sexual interference of his three-year-old granddaughter. On multiple occasions over a three-month period, while babysitting, he touched and rubbed the child's vaginal area with his hand. The accused had an excellent Pre-Sentence Report and an extensive history of employment and community involvement. He also had a serious problem with alcohol abuse. The family was highly impacted by the conduct. The accused was sentenced to four months of incarceration.

[87] In *R. v. J.B.O.*, 2013 NSCA 97, a 70-year-old man was charged with touching his five-year-old granddaughter for a sexual purpose and with exposing himself to his nine-year-old granddaughter. In the case of the five-year-old, the conduct occurred when she stayed over at his house. On multiple occasions he slept in bed with her and touched her vagina with his hands and penis. In the bath, he touched her vagina and used her hand to touch his penis. He was sentenced to 90 days for the touching of the five-year-old and a consecutive conditional sentence on the exposure, plus probation for three years. The conditional sentence was ultimately adjusted to six months but, otherwise, the sentence was upheld on appeal.

[88] The Defence argues that the incidents of touching in *J.B.O.* involved the victim's vagina and the accused's penis. The Defence says these incidents would warrant a higher sentence than what would be appropriate in this case. However, this fails to consider that there was a plea in that case, the age of the offender was 70, there was remorse expressed, and the Court considered that his wife of 40 years was in ill health and relied on him for financial support. He was a first time offender as well. Despite this, a period of custody was imposed in *J.B.O.*

Crown's Authorities

[89] The Crown relies on a number of cases for the submission that C.F.Y.'s offences require a period of custody of 18 months followed by a 36-month

probationary period. I have reviewed all of the case law submitted by the Crown and, while I will not review all of them in this decision, I have considered all of the precedents provided.

[90] The Crown relies on *R. v. D.(D.)*, (2002), 163 C.C.C. (3d) 471 (Ont. C.A.), for the overarching consideration I should have when sentencing C.F.Y. More recently, in *R. v. Woodward*, 2011 ONCA 610, the Ontario Court of Appeal summarized the relevant considerations and principles emanating from the earlier decisions, at para 72:

> (1) Our children are our most valued and our most vulnerable assets.
>
> (2) We as a society owe it to our children to protect them from the harm caused by sexual predators.
>
> (3) Throughout their formative years, children are very susceptible to being taken advantage of by adult sexual offenders and they make easy prey for such predators.
>
> (4) Adult sexual predators recognize that children are particularly vulnerable and they exploit this weakness to achieve their selfish ends, heedless of the dire consequences that can and often do follow.
>
> (5) Three such consequences are now well-recognized: (i) children often suffer immediate physical and psychological harm; (ii) children who have been sexually abused may never be able, as an adult, to form a loving, caring relationship with another adult; (iii) and children who have been sexually abused are prone to become abusers themselves when they reach adulthood.
>
> (6) Absent exceptional circumstances, in the case of adult predators, the objectives of sentencing commonly referred to as denunciation, general and specific deterrence and the need to separate offenders from society must take precedence over the other recognized objectives of sentencing.

[91] I have considered the decision of our Court of Appeal in *R. v. E.M.W.,* 2011 NSCA 87, and the review of sentencing ranges in cases of crimes involving the abuse of children. I have also considered the review of the ranges of sentencing in *R. v. J.J.W.*, 2012 NSCA 96. In addition, *R. v. Hood,* 2018 NSCA 18, discusses sentences for such crimes as sexual interference and the relevant principles.

[92] I have reviewed *R. v. J.A.H.*, 2011 NSSC 434, where the Court imposed a six-month sentence in an offence involving the touching of a nine-year-old daughter, on her stomach, thighs, and vagina on one occasion.

[93] I have considered *R. v. D. L.*, 2018 ONSC 3409, where on two occasions, on one evening the offender had the complainant, a six-year-old child, the niece of his

common law spouse, sit on his lap where he fondled her vagina without digital penetration. He was not remorseful. He was sentenced to six months less a day in custody and two years' probation.

[94] In *R. v. I.P.W.*, 2016 ONSC 5919, the Court imposed an 18-month period of incarceration in circumstances that were somewhat similar to these offences, but also included more severe touching, such as touching of the young girl's vaginal area and an occurrence involving what was described as a "humping motion" by the accused. These incidents occurred over a four-year period and included more than 50 occasions of touching of breasts and vaginal area over clothing. This is obviously at the higher end of conduct than the facts in the case before me.

[95] In *R. v. W.P.*, 2018 NLSC 113, the offender was convicted of two counts of sexual assault under s. 271(1)(a) and one count of sexual interference under s. 151(1)(a) of the *Criminal Code*. That case involved a grandfather committing two distinct acts several years apart: first, touching his granddaughter over clothing on her vaginal area while they were snowmobiling and, second, touching her under her clothing on her vaginal area while he was teaching her how to drive. A Conditional Sentence Order was rejected, and he was sentenced to two months for the first offence and four months on the second, to be served consecutively. While the touching was more serious, the frequency was much less than in the case before me.

[96] A case particularly relevant given the factual circumstances is *R. v. G.H.E.*, 2017 NSSC 281. In that case, Lynch, J. imposed a six-month period of incarceration upon an offender for acts committed against his young daughter. The offender touched his daughter while she was between the ages of three and five years. He touched her genital area "a few times" (para.10). While the frequency was less than in this case before me, the touching of the genital area is not present on the facts as found here. This case provides some guidance about a fit and proper sentence.

[97] Another case supporting the proposition that a Conditional Sentence Order is not fit in such circumstances is *R. v. J.P.*, 2013 NSSC 65.

Conclusion

[98] C.F.Y. abused his underaged stepdaughter. He created opportunities to touch her inappropriately. He manipulated her and violated clear boundaries. He utilized his relationship with the family to abuse his position of trust he held with her. He did so for his own sexual gratification.

[99] The question is whether a Conditional Sentence Order ("CSO") can adequately address the principles of sentencing in the circumstances. In some cases, depending on the circumstances, such orders can adequately address the sentencing principles. A CSO is punishment. It is not to be mistaken for something less than punishment. Nevertheless, in these circumstances, I conclude a CSO would not be appropriate. I cannot accept the Defence submission, having considered all of the applicable principles, case law and the circumstances of these offences. I find it necessary to impose a period of custody. I will explain my reasons for reaching this conclusion.

[100] I refer to *R. v. Proulx*, 2000 SCC 5, at para 114:

> Where punitive objectives such as denunciation and deterrence are particularly pressing, such as cases in which there are aggravating circumstances, incarceration will generally be the preferable sanction. This may be so notwithstanding the fact that restorative goals might be achieved by a conditional sentence. Conversely, a conditional sentence may provide sufficient denunciation and deterrence, even in cases in which restorative objectives are of diminished importance, depending on the nature of the conditions imposed, the duration of the conditional sentence, and the circumstances of the offender and the community in which the conditional sentence is to be served.

[101] I must also consider s. 742.1 of the *Criminal Code* which states, in part:

> 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;
>
> (b) the offence is not an offence punishable by a minimum term of imprisonment…

[102] I must determine whether the safety of the community would be endangered by the offender serving his sentence in the community. I must consider the risk of the offender re-offending and the gravity of the damage that could result if the offender re-offended.

[103] While the risk is low, the harm of such an offence would clearly be great.

[104] On the next step, that is whether a CSO order would be consistent with the fundamental purpose and principles of sentencing, I find a CSO would not.

[105] In reaching this conclusion I rely on the apt comments by Campbell, Prov. Ct. J. (as he then was) in *R. v. E.M.W.*, as follows:

> 44. When abuse of children is involved punishment matters. When the abuser is a parent punishment matters a lot. While the restrictions of a conditional sentence can indeed be punishment, there are times when they are no replacement for the sound of a shutting jail cell.

[106] Nothing less than incarceration would be consistent with the principles and the purposes of sentencing.

[107] The Defence argues that C.F.Y.'s psychologist, Dr. Sutherland, has indicated that C.F.Y. has been working towards improvement and has shown progress since his first convictions. They submit that an overly onerous sentence, including one where C.F.Y. is to be incarcerated, would impede progress. I do not see how a term of incarceration would impede progress. C.F.Y. may not be able to engage in treatment if incarcerated, but he can re-engage in treatment upon release. I do consider, in fashioning his sentence, that C.F.Y. has been an active participant in treatment, which has proved helpful.

[108] However, I find the period suggested by the Crown disproportionate and would be too harsh considering all of the circumstances of this case.

[109] Given the following:

- The need to recognize as paramount importance the principles of deterrence and denunciation;
- This is not C.F.Y.'s first offence;
- The age of N.S.;
- The position of trust C.F.Y. held; and,
- The impact on N.S.

I conclude that the only appropriate sentence is a period of custody followed by probation.

[110] In considering the duration of incarceration, I take note of the following:

- The positive Pre-Sentence Report;
- C.F.Y.'s work in treatment and his ongoing commitment to the maintenance program;
- Dr. Sutherland's positive comments;
- The support system and the positive aspects of this offender;
- C.F.Y.'s prospects of rehabilitation; and
- C.F.Y.'s low risk of reoffending.

[111] As such, on Count #2 of the Indictment – touching for a sexual purpose between September 30, 2010, and April 1, 2012, I sentence C.F.Y. to eight months in custody.

[112] On Count #4 of the Indictment – touching for a sexual purpose between March 30, 2012, and August 22, 2014, I sentence C.F.Y. to 90 days in custody, to be served concurrently.

[113] In addition, I order 30 months of probation which will include the following:

- Report to a probation officer at Probation Services at the Bedford, Nova Scotia location upon the expiration of your sentence of imprisonment, and when required, as directed by C.F.Y.'s probation officer or supervisor;
- Remain within the Province of Nova Scotia unless he receives written permission from his probation officer;
- Refrain from taking or consuming alcohol or other intoxicating substances;
- Refrain from taking or consuming a controlled substance as defined in the *Controlled Drugs and Substances Act*;
- Attend for assessment, counselling or a program directed by his probation officer; and,
- Participate in and cooperate with any assessment, counselling or program directed by the probation officer – I trust it will be the one in which he is currently enrolled.

[114] In ordering probation, I take into account the comments in the Pre-Sentence Report and from Dr. Sutherland of the importance of treatment. Probation will assist

in achieving the goal of rehabilitation. I have ordered a 30-month period to enable and encourage rehabilitation and treatment after the period of custody.

Ancillary Orders

[115] The parties have agreed on the Ancillary Orders sought by the Crown.

- Order of Prohibition pursuant to ss. 110 and 114 of the *Criminal Code*;
- Order pursuant to s 487.051(1) and (2) of the *Criminal Code,* for DNA;
- Order of Prohibition pursuant to s. 161(1)(b), for life prohibiting contact or communication with N.S., Z.S., J.S. and J.S. (mother);
- Order of Prohibition pursuant to s. 743.21(1); and,
- SOIRA Order pursuant to s. 490.013(2.1), for life.

[116] The complainant, a young girl, was used by C.F.Y. for sexual gratification. Society must and does condemn this behaviour. C.F.Y. has a support system. He has access to treatment which has been successful. He must continue his commitment to this treatment. He cannot afford to slip into this twisted thinking where he breaches boundaries and becomes destructive again. There is no place for excuses. Dr. Sutherland has reported positively about his progress. He will need to be committed to that for the rest of his life.

Brothers, J.