PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v.R.R. I.*, 2016 NSPC 66

Date: 20160908
Docket: 2962384
Registry: Shubenacadie

Between:

Her Majesty the Queen

v.

R. R. I.

Restriction on Publication: 486.4

Sentencing Decision

Editorial Notice:	Identifying information has been removed from this electronic version of the judgment.
Judge:	The Honourable Judge Timothy Gabriel
Heard:	July 28, 2016 and September 8, 2016, in Shubenacadie, Nova Scotia
Decision	September 8, 2016
Charge:	271(a) of the Criminal Code
Counsel:	R. Hartlen for the Crown B. Stephens for the Defendant

NOTICE OF BAN ON PUBLICATION

NAME OF CASE: **R. v. R.R.I.**

CASE NO.: 2962384

BY ORDER OF JUDGE: THE HONOURABLE JUDGE GABRIEL, J.P.C.

DATE: MARCH 7, 2016

COURT REPORTER: Cynthia Roy

A Ban on Publication of the contents of this file has been placed subject to the following conditions:

> **Section 486.4 & 486.5**: Bans ordered under these Sections direct that any information that will identify the complainant, victim or witness shall not be published in any document or broadcast or transmitted in any way. No end date for the Ban stipulated in these Sections.
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> Details of Ban: _____
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Reporting of this proceeding in any manner that would identify the name of any individual whose name is covered by the Ban is strictly prohibited without leave of the Court. The intent of the foregoing is to protect the welfare of any children or victims referred to in the proceeding and/or avoid prejudice to any persons facing criminal charges

By the Court (orally):

Introduction

[1] On April 18, 2016, R. R. I. entered a plea of guilty with respect to the charge that he had committed a sexual assault upon his biological daughter, C.L., over the period from June 1st, 2003 to January 10, 2010, contrary to Section 271(a) of the **Criminal Code**.

[2] The Crown has proceeded by way of indictment. The accused, through Counsel, requested that a comprehensive Forensic Sexual Behaviour Presentence Assessment (which includes a risk assessment) be ordered.

[3] An assessment was conducted on May 24th and 25th, 2016, and a written report was prepared on June 8, 2016, by Dr. Angela Connors, who is a registered psychologist and also the program leader of the Provincial Forensic Sexual Behaviour Program. I will henceforth refer to it as either "the assessment" or "the report".

[4] On July 28, 2016, the Court heard submissions with respect to the sentence that Mr. I. should receive as a result of his guilty plea to the Section 271(a) charge. Cutting to the bottom line of each party's position (for the moment), the Crown is of the view that Mr. I. should receive a custodial sentence of one year in a provincial institution, together with a period of probation of three years' duration. The Crown also seeks a SOIRA order for 10 years and a DNA order on a primary designated basis, as well as a forfeiture of the computer and any other electronic devices used during some of the accused's impugned conduct.

[5] The Defence recommends a lengthy Conditional Sentence Order (two years less a day) and also proposes house arrest during that time, with exceptions for treatment and a number of other provisions, including a no contact provision with respect to C.L.

[6] The Defence takes no position with respect to the Crown's request for forfeiture of the electronic devices, or the probationary period sought.

Facts

[7] Mr. I. is a 52 year old single man without dependents. He is unemployed at present and resides with his elderly parents in their home and is a source of support for them. He suffered a stroke in 2001, and was unable to subsequently continue with his job at a local […], as a consequence.

[8] Since 2001 he has been in receipt of a disability pension, which has effectively reduced his income by more than 60% compared to what it was before his health difficulties. He walks with the assistance of a cane, and rents a room in his parents' basement. It should be noted, however, that he has lived with his parents for almost all of his adult life in any event. As noted on page seven of the assessment, "Mr. I. is reasonably isolated at this time and reliant on the computer for his primary social contacts."

[9] Mr. I. says that he drinks approximately a quart of rum per week, sometimes while chatting online with a female friend who does the same. This "platonic female friend", as he describes her, is a person who had been a friend of his daughter, and is the person through whom he and C.L. became reconnected.

[10] He described his relationship with C.L.'s mother as his "first serious relationship." It is convenient to quote from the assessment, page eight, at this juncture:

> Mr. I. advised that he had two serious relationships, but in the end he described four cohabitating relationships including two others that he now does not classify as serious. The first serious relationship was with D., six years his junior whom he started to date when she was reportedly 18 years of age. Mr. I. explained that they were together for 2-3 years "off and on" with D. living with him at his parents' home at least one year. Mr. I. advised that D. reportedly "bugged me for three months to get pregnant" until he gave in, although he recalled that she told other people that she was pregnant by accident. Mr. I. opined that "our biggest problem was her mother always interfered", leading in the end to him breaking up with her. Despite the conflictual nature of this relationship, Mr. I. recalled it as the one in which had the deepest feelings.
>
> The two had a daughter, C.L., who is the victim of the index matters. Mr. I. explained that his ex's mother allegedly made it difficult for him to see his daughter and his ex refused the child support that he tried to provide (corroborated). Mr. I. recalled "I was told she figured I had no rights if I didn't pay child support so I figured good enough and I walked away". Mr. I. indicated that he did not know his daughter in her youngest years, but at age 12-13 he came to know one of her friends as she was the daughter of his friend's girlfriend. Mr.

> I. stated that this was how he came about being back in touch with his daughter, which formed the context for the index matters. Mr. I. opined "they tried to keep her way from me all these years but they are going to use this to their advantage now".

[11] Returning briefly to his medical history following his stroke, Mr. I. has been diagnosed with a blood clotting disorder, which essentially requires his heart to work harder because his blood is thicker than normal. He takes medication for this condition, and also for high blood pressure. His doctors feel that he has made an excellent recovery from his stroke, the only residual effect being mild left-sided weakness.

The Sexual Acts

[12] As previously noted, C.L. had been estranged from her father, or (perhaps more accurately) simply had no contact with him until the age of 12 or 13 years (2003). Once contact was established, during the course of successive visits (which occurred approximately every second weekend) the relationship between C.L. and her father became increasingly sexualized. It culminated with him fondling her genitals and breasts while purporting to give her massages and (subsequent to that) inciting her to text nude photographs of herself.

[13] During the course of one of these "massages", Mr. I. convinced her to remove her bra and he massaged her breasts and manipulated her nipples. This is referenced at page 21 of the assessment. On another occasion he massaged her in the vaginal area, afterwards claiming to her that this had been accidental. This is referred to on page 21 of the assessment which says:

> Of note, despite his daughter choosing to take a break from spending time with him after he blatantly sexually touched her breast (i.e., he had experienced a concrete consequence of his actions in the form of his daughter's withdrawal) he was not able to respond to these consequences by containing his sexualization of his daughter. Thereafter, his ongoing sexualization and sexual exploitation of his daughter resulted in her finally choosing to have no contact with him."

[14] What led to these incidents appears to have been planned and deliberate. Almost immediately upon her entering into Mr. I.'s life at 12 or 13 years of age, he introduced C.L. to pornography, touching and exposing himself while this material was being presented to her. This continued amidst an increasing sexualization of their conversations. Of note is that upon C.L.'s 16th birthday, he presented her with a vibrating dildo. After the two so called "massages" which form the subject

matter of the charges, he also created an online persona (which he represented to C.L. as another person) and encouraged her to send explicit photos of herself to this so called "friend". When she resisted doing this, he bribed her with cigarettes to send these photographs, and further increased the pressure upon her to do so. In addition, he encouraged her to send photographs to someone represented to be a "bisexual friend" of his on the internet. When queried about his rationale for doing this, he attempted to portray his conduct as a "virtue test" of his daughter, whom he claimed to have suspected of promiscuity. He said, "I wanted to see how far she would go for a pack of smokes."

[15] On earlier occasions, before the two sexual assaults, Mr. I. would discuss his own sexual experiences with her, and would encourage her to remove her bra to "let the puppies breathe". He would also tell her things like "you've got a nice pussy compared to your mother."

[16] Mr. I.'s pattern of interaction with his daughter is summarized at pages 26 and 27 of the report:

> Post-stroke Mr. I. was without much structure to his days and without an intimate relationship when he first established contact with his biological daughter, CL, who was now 12-13 years of age. The two developed a relationship and CL began to visit for the weekend with some regularity. While aware that there should be a parental barrier in place, Mr. I. responded sexually to his daughter and contributed to a sexualized atmosphere by discussing sexual topics, showing pornography, and commenting on his daughters sexual practices (e.g., masturbation) and body parts (e.g., "pussy"). This sexualized atmosphere groomed CL toward larger boundary violations, such as requesting that she send nude photographs to a person named "Kyle". Mr. I. created the persona and online account of "Kyle", serving to hide his personal sexual interest in her nude photographs from his daughter and thereby increase her potential for compliance. This is the area of sexual abuse of his daughter in which Mr. I. showed the most planning.
>
> While engaged in non-sexual massage, Mr. I. crossed boundaries and touched his daughter sexually on more than one occasion. It is likely that physical contact was too triggering for Mr. I. to maintain what boundaries he did have – leading to sexual contact up to the point that CL was forced to set a boundary by saying no/stopping her father. Following one such instance of sexual touching, CL distanced herself from Mr. I. until he apologized and promised he would not act in such a manner again. While Mr. I. maintained this particular promise, upon their reunion he was more aggressive and persistent about his daughter sending more nude photographs to a third party, escalating to promising cigarettes in exchange.

> This behaviour served to sever his daughter's connection with Mr. I., although he was not charged until some years later.

[17] The author had also earlier noted at page 22 of the report:

> … It is most likely that, not having an internal sense of a parental bond, Mr. I. immediately sexualized his young teen daughter, and did not stop himself from acting on this sexualization – moving from grooming processes such as showing her pornography and encouraging masturbation, to seeking nude photographs under false pretenses and sexually touching her body while providing nonsexual massages. Further, even when it was clear his daughter might withdraw from him should he continue, he was not able to contain himself and continued the sexual exploitation.

[18] C.L.'s relationship with her father ended when she was 18 or19 years of age. She reported his actions to the police sometime later, with the result that he was not charged until March 1st, 2016.

[19] Precise dates, hence the precise age of C.L. when the two individual acts of sexual assault occurred, cannot be established. The parties agree, however, that the two instances of sexual assault and the "desensitizing acts" which preceded them, occurred over the period of time alleged in the Information, which is to say, while C.L. was between 12 and 19 years of age.

Discussion and Analysis

[20] The relevant portion of Section 271 of the **Criminal Code** reads as follows:

> **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; or
>
> **(b)** an offence punishable on summary conviction and is liable to imprisonment for a term of not more than 18 months or, if the complainant is under the age of 16 years, to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of six months.

[21] As previously noted, the age of C.L. (at the time of the acts comprising of the two sexual assaults (the massages), cannot, or has not, been established with precision. The Defence acknowledges that the two acts would have occurred when

the complainant was “17 or 18”. The minimum punishment noted in Section 271(a) is not therefore operative.

[22] The parties’ positions respecting sentence are quite different. The Crown seeks a custodial term of one year followed by three years of probation. The Defence contends that a lengthy Conditional Sentence Order (two years less a day) with strict house arrest conditions, followed by an unspecified period of probation, would be appropriate.

[23] In accordance with the procedure set forth by the Supreme Court of Canada in *R. v. Proulx*, [2000] 1 S.C.R. 61, I turn first to consider whether this offence is one for which a sentence of less than two years is fit and appropriate. If it is not, by necessary implication, a Conditional Sentence would not be possible.

[24] Section 718 of the **Criminal Code** sets forth the fundamental purpose of sentencing:

> **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.

[25] Section 718.01 tells us that when the Court imposes a sentence for an offence that involved the abuse of a person under the age of 18 years, it should give “primary consideration to the objects of denunciation and deterrence.”

[26] Section 718.1 tells us that a sentence “must” be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[27] Section 718.2 states:

> **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 any other similar factor,
> >
> > **(ii)** evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner,
> >
> > **(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,
> >
> > **(iv)** evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization,
> >
> > **(v)** evidence that the offence was a terrorism offence, or
> >
> > **(vi)** evidence that the offence was committed while the offender was subject to a conditional sentence order made under section 742.1 or released on parole, statutory release or unescorted temporary absence under the *Corrections and Conditional Release Act*
>
> 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.

[28] Some points are immediately apparent. While the accused has conceded that the two sexual assaults themselves occurred when the complainant was "17 or 18",

this does not equate (necessarily) to C.L. being "under the age of 18" at the time. While neither of the directives contained in Sections 718.01, and 718.2(a)(ii.1) are thus operational, I have nonetheless concluded that primary consideration must be given to the principles of denunciation and deterrence, both general and specific, in fashioning a fit and appropriate sentence for Mr. I.. I will explain my rationale further on.

Case Authorities

[29] Another point to be emphasized is that case authorities are not to be used to construct an "artificial minimum sentence". That said, the parity principle contained in Section 718.2 mandates that:

> **(b)** a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

[30] This blends well with the principle of proportionality set out in Section 718.1, and also in Section 12 of the **Charter of Rights and Freedoms**, in the sense that a sentence disproportionate to the particular crime under consideration, or to what similar offenders in similar circumstances have received, may be excessive, and may, in some cases, violate the prohibition against cruel and unusual punishment.

[31] In *R. v. M. (CA)*, [1996] 1 S.C.R. 500, at pages 557-558, the Supreme Court of Canada formulates this concept quite well, at the same time distinguishing "retribution" (which a sentence always seek to achieve) from mere "vengeance", which has no place in the process:

> [80] … Retribution in a criminal context … represents an objective, reasoned and measured determination of an appropriate punishment which properly reflects the **moral culpability** of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct. Furthermore, unlike vengeance, retribution incorporates a principle of restraint; retribution requires the imposition of a just and appropriate punishment, and **nothing more**.
>
> [Emphasis added]

[32] One of the exacerbating features of this case is the relentless sexualization of the interactions between the accused and his daughter over the course of their contact beginning when she was at the age of 12 or13, and lasting until she was 18 or 19.

[33] From this vantage, the two actual incidents of sexual assault, which the Defence says occurred when C.L. was between the ages of 17 and 18 years of age (while they could be viewed as "lower end" in and of themselves) were merely the culmination of years of episodes such as repeated exposure to pornography (sometimes accompanied by masturbation by the accused in his daughter's presence), conversations in which she was told things like she had a "nice pussy, nicer then her mother's", and discussions by the accused as to the things that he'd "like to do with her" if she wasn't his daughter. Even after the two sexual assaults, he was able to successfully pressure her to post explicit nude photographs of herself online to a fictitious persona, "K-Man", who he told C.L. was his friend "Kyle", and was, in reality, the accused himself.

[34] I do not think that this type of atmosphere, as promoted by the accused, and in which he enveloped his daughter from the time that she was 12 or 13 years of age (until she finally broke with him for the final time at age 18 or 19) can be isolated from the sexual assaults themselves. The accused groomed C.L. in an attempt to desensitize her to the sexual transactions. Had she not objected to being touched sexually by her father in the course of the two so-called "massages", he may well have thereafter attempted to push this boundary still further. As it was, after the massages, he pushed it in an equally troubling (albeit different) direction, by having her send explicit pictures of herself online to both himself and to someone whom he represented to be a bisexual friend.

[35] The foundations of the sexual assault which the accused perpetrated upon C.L. were laid from the time she was 12 or 13, when she was a young child, and continued to the age of 18 or 19, when she a very young adult.

[36] The impact of these crimes upon the victim was tragically predictable. She has been left with flashbacks, depression, trust and intimacy issues, despite having been in counselling with the Avalon Sexual Assault Centre for the last two to three years. These problems persist and continue to impede and interfere with her ability to form adult relationships. This will affect her for a long time, if not for the rest of her life. Her fragile self-esteem and sense of self-worth has been shattered after realizing that she was used as an object of gratification by her own father over such an extended period of time.

[37] Judge Alan Tufts conducted a helpful analysis of a number of authorities in *R. v. S.C.C.*, 2004 NSPC 41, and, as he notes at paragraph 16 thereof:

> [16] There are few crimes that are more serious and have a more devastating effect on its victims than sexual assault against young children by their parents or guardians. Both in terms of gravity and moral blameworthiness such crimes represent serious criminal conduct which requires proportionate criminal sanctions. 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 form 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.

[38] When one considers the range of sentences reviewed by Judge Tufts in *R. v. S.C.C.*, (*supra)*, which cover a myriad of circumstances, they indeed illustrate the fallacy of ever attempting to find cases which square "one to one" with the individual case (at bar) under consideration.

[39] In addition to those cases reviewed in *R. v. S.C.C., (supra),* and those to which I have been referred by Defence counsel (which consist of *R. v. P.A.L.*, [2008] A.J. 1141, *R. v. D.E.M*, [2009] B.C.J. No. 532, and *R. v. R.M.*, [2008] O.J. No. 2191). I have also considered the following cases: *R. v. C.B.K.*, 2015 NSSC 62, *R. v. D.J.M.*, 2014 NSSC 370, *R. v. F.L.*, 2011 NSCA 91, *R. v. W.F.B.*, 2015 NSSC 353, *R. v. J.A.H.*, 2011 NSSC 434, *R. v. G.K.N.*, 2014 NSSC 150, and *R. v. E.M.W.*, 2011 NSCA 87.

[40] *R. v. J.A.H., (supra)* dealt with the post-trial conviction of the accused for sexual assault and sexual interference. The victim was his daughter who was nine years old when the assault took place. He put his hands down the front of her pajamas and in so doing he touched her stomach, the upper part of her thighs and vagina. This was considered to be an opportunistic offence with no prior criminal convictions for sexual interference or assault. It was a single incident that was considered to be minimally intrusive. He violated his position of trust, and an

attempt was made to intimidate the maternal grandfather and child victim. He was sentenced to six months incarceration followed by 18 months of probation.

[41] In *R. v. S.C.C., (supra)* the accused pled guilty to one offence of sexual assault against his 11 year old stepson. The assault occurred over several months, beginning in late 2002 and ending in 2003. It consisted of rubbing the victim's body and legs, over time leading to touching in a sexual manner which included touching the victim's buttocks and masturbating the victim, and there was some more serious sexual contact following that.

[42] The mitigating features were that his current spouse was supportive of him, guilty plea was entered at an early stage, he expressed remorse and acknowledgment of the harm done to the victim, had no criminal record, there were no other acts of physical violence or threats present, he was considered to be a low risk for violent recidivism, a low to moderate risk to reoffend if proper controls were put in place, he was motivated to pursue treatment, and had the capacity to remain in treatment.

[43] The aggravating features were that the accused had violated a position of trust, the abuse occurred frequently, the offender exploited the victim's challenges, and rationalized his behaviour to satisfy his own need for gratification. He was sentenced to two years' incarceration, followed by two years' probation.

[44] *R. v. D.J.B,* (*supra)* was a post-trial conviction for sexual acts committed against four young girls, aged 17, 10, 14 and 11 years. These acts consisted of touching of their private areas under their clothing, kissing on the neck, attempting to put his hand down pajama bottoms, rubbing breasts under clothes, and lying naked next to the victims.

[45] By way of mitigation, it was considered that these were opportunistic crimes, not those of a sexual predator, and that the actions were on the lower end of the sexual interference scale. Aggravating was the violation of a position of trust, that the victims experienced considerable emotional duress, and the children were under the age of 18. The sentence was two years' incarceration followed by two years' probation.

[46] In *R. v. E.M.W., (supra)* the accused was found guilty of sexually assaulting his 9 to 11 year old daughter and the accused had challenged the credibility of his daughter and forced her to testify. The acts consisted of repeated incidents of fondling and digital penetration of the vagina. Mitigating features consisted of the

fact that there was no intercourse or oral sex, no touching or exposure of the penis, no exposure of the child to pornography, no recording made, and there was no additional violence involved. Aggravating features – he had abused a position of trust, and demonstrated no acceptance of responsibility, (which reflected upon his candidacy for rehabilitation) he had challenged the credibility of his daughter, forced her to testify, and the abuse had been ongoing over a period of years. Two years' incarceration was considered appropriate for such mid-range sexual offences without intercourse.

[47] *R. v. G.K.N.*, (*supra)* again dealt with a post-trial conviction. The accused was sentenced on six counts of sexual interference committed in relation to his stepdaughter. There were multiple occurrences which started when the victim was seven or eight and continued until she was 13 years of age. These incidents included masturbation in front of her and the touching of his penis on her back and buttocks and entering the bathroom while she was showering, and masturbating while she was in there. Mitigating features included that there was no penetration, gratuitous violence or threats, and a positive Pre-Sentence Report, in which he was described as being a caring, helpful, quiet and intelligent man. Although he had a dated record, there was a 20 year gap between his last conviction and the present offence, during which the accused had led a productive and law-abiding life. As to aggravating features, he violated a position of trust, and engaged in multiple acts over a period of five years. The child was well under the age of 18 years, and the victim was severely impacted. He received a sentence of 18 months of incarceration followed by three years of probation. The sentence was to allow for forensic treatment.

[48] In the case at bar, I consider the relevant range of sentence for the two sexual assaults (viewed in and of themselves) to be from three to 24 months of imprisonment, with two to three years of probation in addition. I conclude, therefore, that the possibility of a Conditional Sentence is not foreclosed by the range that I have determined to be appropriate.

[49] There is Appellate authority for the proposition that meaningful deterrence and denunciation may be encompassed in a Conditional Sentence. That said, Provincial Court Judge Jamie Campbell (as he was then) put it this way in *R. v. E.M.W.* (*supra),* and his comments were repeated by Justice Fichaud in the Appellate decision at paragraph 13:

> [13] Next the judge framed his reaction to E.M.W.'s conduct, and its impact on R.:
>
> > 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 of her innocence. She has no choice in the matter. She is simply used. She has become a means to an end.
> >
> > When the person who has tried to turn a child into an object is a parent, the sense of moral outrage is almost unrestrained. There is no way to speak of these kinds of crimes without using language that reflects the sense that the most basic of moral standards has been violated. They are described by judges as being horrific, shocking, selfish, sordid, despicable, reprehensible, repugnant and depraved.

[50] Despite the aptness of the epithets with which he describes such acts, Judge Campbell went on to emphasize, as is appropriate, the distinction, to which I referred earlier, between retribution and revenge. The former is the proper focus of the sentencing process, while the latter has no place in it.

[51] Although at least one (and possibly both) of the sexual assaults may have occurred after C.L. had attained her 18th birthday, these are crimes (in an all-encompassing sense) which were inflicted upon a child, particularly when one considers the considerable period of "grooming" which preceded them. This grooming was protracted and started virtually from the time C.L. began contact with the accused at the age of 12 to 13 years. Once that contact was established, as I've said earlier, C.L. visited with him every other weekend. This "grooming", in addition to being exploitative, in my view constitutes "abuse of a child under the age of 18" within the meaning of Section 718.2 of the **Criminal Code.**

[52] Some sense of how Mr. I. viewed his actions may be gleaned from page 18 of the report:

> Given Mr. I.'s concrete thinking, the author considers it likely that Mr. I. did find the fact that his daughter was sexual in any way to be confusing, in that she would no longer fit neatly into the common conceptualization of a "child". However, his response to this information was to now see her as a sexual being more than as his daughter, and he utilized this information to both justify his actions to himself, and to manipulate his daughter. The belief that underage people are capable of sexual exchanges in the same way as adults, and that sexual exchanges with adults

> are not harmful to children, are cognitive distortions (called implicit theories) that have been empirically related to sexual reoffense.

[53] So, too, at page 19:

> When asked about pretending to be to be another man "Kyle", Mr. I. claimed that he made a fake account in the name of Kyle MacKay specifically because he wanted to know if she was sending nude pictures of herself over the internet. He advised that she did send nude pictures to "Kyle", and while he knows he should have told her immediately that it was him, he liked that she seemed more "open" to Kyle, and he did not want to lose that. Mr. I. advised that his daughter took nude photographs in front of him, and that he later found out that she sent nude photographs to other people that he never knew about at the time.
>
> When asked about the reported last instance in which he asked CL to take pictures to send to a bisexual friend in exchange for cigarettes, Mr. I. again claimed to be "testing" his daughter "I wanted to see how far she would go for a pack of smokes". Mr. I. claimed that he had told his daughter not to take pictures of her face to protect herself, showing the degree to which he was instrumental in counselling her in this form of abuse. He claimed that she took the pictures right in front of him using his camera and then left, and he then realized that it was wrong and deleted the images.
>
> Mr. I. claimed that it was this same bisexual friend that he was chatting with while masturbating when he received a chat request from CL and he "clicked on" without thinking about his actions. He noted that she immediately shut the connection (as she reported in her account of events), and that this was the circumstance whereby she was exposed to his penis over the webcam.

[54] The assaults, as well as the years of grooming which preceded them, as well as the inducements to send nude photographs of herself over the internet which followed the assaults, were egregious breaches of trust by a parent toward his daughter.

[55] Moreover, the impact of this upon C.L. has been profound. Here was a parent that had had nothing to do with her for the first 12 or 13 years of her life. He was given an opportunity to play a role in her life because she wanted that. That he would turn out to be the type of person who would use her as an object of gratification could not have been expected by even the most cynical child of that age. Nor could she have foreseen that as a result of the contact with her father, she would be left haunted by nightmares, with intimacy issues, self-loathing, depression, and in need of lengthy counseling.

[56] These are all aggravating features.

[57] The most significant mitigating feature in this case is Mr. I.'s guilty plea. In so doing, he has spared the victim the necessity of testifying and re-experiencing the trauma anew. I agree with Defence counsel's submission that this is a weighty consideration.

[58] So, too, is Dr. Connors' conclusion at page 25 of the report:

> Overall, Mr. I.'s baseline risk for future violence (including sexual assaults) appears low, particularly over the short term. At the present time, Mr. I.'s risk is externally managed due to lack of opportunity and access to anyone underage as well as Mr. I.'s current concern regarding sentencing and wish to avoid any further trouble. Dynamic variables remain essentially unchanged from the time of offending, indicating that risk (while low overall) would be most likely/active if a situation of access and opportunity specific to an underage female were again to occur (either in person or online).

[59] Overall, I consider the "low risk" designation to be somewhat of a mitigating factor, even though its significance is diminished because it appears to be driven by Dr. Connors' conclusion that at the present time he would have only a very limited opportunity to reoffend, in any event. I therefore do not consider this to be as significant a mitigating factor as his guilty plea.

[60] I have also considered the health circumstances of the accused, who is post-stroke, with mild left-sided weakness. He is smallish and walks with the aid of a cane. He has said to Dr. Connors that if he were to receive a jail term "I can't defend myself, I'm a dead man."

[61] Finally, I did not find Mr. I.'s view with respect to the impact of his behaviour upon his daughter to be particularly insightful, or remorseful, for that matter. As a consequence, I cannot assign any "mitigating value" towards it. Indeed, his strongest emotions, as reported by Dr. Connors in the report, occurred when he was describing his own health difficulties post-stroke. By way of contrast, he persistently rationalized the sexualization of his daughter (as Dr. Connors put it) as we see at page 18 of the report:

> When asked about CL's report that he showed her pornography, Mr. I. advised that this started because she had claimed to him that she had "made out" with a girl, and he was skeptical that she even knew what people did together sexually; "I kept asking her if she really knew what people do, but I shouldn't've gone any further". While Mr. I. acknowledged that he did show his daughter pornography, and did so more than once, he also suggested that she "exaggerated" how often they watched pornography when they had actually watched other movies as well.

> Mr. I. also downplayed the significance of having watched pornography with his daughter by noting that kids these days are watching pornography on their own. Mr. I. was open to the undersigned's suggestion that this is unlikely to occur with one's opposite sex parent; and he acknowledged that he would still feel uncomfortable if he were to watch pornography in the same room as his mother, even today at his age.
>
> Mr. I. agreed that he had said words to the effect that CL had a "nicer pussy" than her mother, but minimized this by claiming that he had meant to be joking. Mr. I. advised that he is aware that he never should have made jokes of this nature, "sometimes I do things without thinking". Similarly, when asked about CL's report that he had told her that she could masturbate if she had the urge (stated while watching pornography and reportedly touching himself), Mr. I. claimed that he had made this comment in a joking manner, but he is aware "I shouldn't've done it". Mr. I. acknowledged that he had always said to CL that masturbation was safer because she could not get pregnant – and he claimed that she told him that she had already masturbated and so he believed that she knew about it (thereby making his comments, in his view, less harmful). …

[62] Even when asked by Dr. Connors as to what he would do differently, if he could go back and redo the conversations that he had with his daughter, Mr. I. was at a loss. He commented that he "didn't really get a chance to learn to be a father", and that he "never got any sexual advice from his parents", that he wanted "to be different" and he had not meant to "cross the line".

The Sentence

[63] This is Mr. I.'s first criminal offence, first of any kind. That said, by committing these sexual assaults, in the context in which they occurred, he has (so to speak) jumped in at the "deep end of the pool". He asked for a Conditional Sentence, and such is not precluded by the range of sentence that I have determined to be appropriate.

[64] Conditional Sentences are governed by Section 742.1 of the **Criminal Code**, the relevant portion of which reads as follow:

> 7**42.1** 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;

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

(c) the offence is not an offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 14 years or life;

(d) the offence is not a terrorism offence, or a criminal organization offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 10 years or more;

(e) the offence is not an offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 10 years, that

(i) resulted in bodily harm,

(ii) involved the import, export, trafficking or production of drugs, or

(iii) involved the use of a weapon; and

(f) the offence is not an offence, prosecuted by way of indictment, under any of the following provisions:

(i) section 144 (prison breach),

(ii) section 264 (criminal harassment),

(iii) section 271 (sexual assault),

(iv) section 279 (kidnapping),

(v) section 279.02 (trafficking in persons — material benefit),

(vi) section 281 (abduction of person under fourteen),

(vii) section 333.1 (motor vehicle theft),

(viii) paragraph 334(a) (theft over $5000),

(ix) paragraph 348(1)(e) (breaking and entering a place other than a dwelling-house),

(x) section 349 (being unlawfully in a dwelling-house), and

(xi) section 435 (arson for fraudulent purpose).

[65] In its present form, Section 742.1(f)(iii), and (arguably) subsection (e), would preclude the availability of a Conditional Sentence Order for this type of offence. However, at the time that these offences occurred (and the period leading up to the offences), no such prohibition was in effect, so the door is not closed to what counsel for the accused has recommended, at this time.

[66] That said, and while I am satisfied that service of the sentence in the community would not endanger the safety of the community, at least in a manner such that it could not be managed, I cannot conclude that this would be consistent with the fundamental purpose and principles of sentencing set out in Sections 718 to 718.2, which I have earlier reviewed in detail.

[67] I (again) have recourse to the *R. v. E.M.W.* (*supra*) case, where at paragraph 42, Justice Fichaud once again quotes (with apparent approval) from (then) Judge Jamie Campbell to the following effect:

> [42] But the [trial] judge was not satisfied that a conditional sentence would satisfy s. 742.1's other prerequisite. He said:
>
> > A man who sexually violates his own ten-year-old daughter in these circumstances cannot be allowed to serve his sentence by going to work, going out to the grocery store for a few hours on Saturday, watching television from his favourite chair and enjoying the fellowship of friends and family in his home.
> >
> > A conditional sentence does not, in these circumstances, provide for punishment that is measured and thoughtful. It would, to put it simply, be the kind of sentence that does not speak of justice and compassion but of weakness and naiveté.
> >
> > 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.

[68] Although we are not dealing with abuse of a ten year old in this case, the accused subjected his daughter to a systematic program of abuse which continued all throughout her teenage years, and culminated in both of the sexual assaults noted. This had its predictable effect to the point where afterwards she could still be persuaded and/or bribed and/or exhorted by the accused to send explicit nude photographs of herself over the internet to the accused (who was posing as someone else) and to another person represented by the accused to be his bisexual friend.

[69] The accused was even present when she took some of these photographs of herself. He also subjected her to pornography, touching himself in the process on some occasions and exhorting her to masturbate herself. He purchased her a sexual object, a vibrating dildo for her 16th birthday.

[70] C.L.'s recovery, if it ever comes, will be preceded by years of torment, counselling, and anguish as she struggles in the aftermath of what has been done to her. Her life will likely never become what it would have been if Mr. I. had simply stayed out of it.

[71] I am not (of course) bound to accept either of the parties' submissions as to sentence. That said, and under all of the circumstances, I conclude that the Crown's recommendation is a fit and appropriate sentence. As such, Mr. I., if you would stand up, please, sir: I sentence you to 12 months imprisonment in a provincial institution, to be followed by a period of probation of three years duration, on the following terms and conditions:

1. You will keep the peace and be of good behaviour.
2. You will appear before the Court when required to do so by the Court.
3. Notify the Court or probation officer in advance of any change in name or address, and promptly notify the Court or probation officer of any changes of employment or occupation.
4. You will report to a probation officer in this building within 10 days from the date of expiration of your sentence of imprisonment and thereafter when required in the manner directed by the probation officer.
5. You will remain within the Province of Nova Scotia unless written permission to leave the Province has been obtained from your probation officer in advance.
6. You will reside at (your residence).
7. You will undergo and successfully complete any psychiatric, psychological, or mental health counseling as directed by your probation officer.
8. You will undergo and successfully complete any counseling directed by your probation officer regarding sexual deviance.
9. You are not to contact or communicate, or attempt to contact or communicate, directly or indirectly, with C.L., or anyone under the age of 16 years of age.
10. You are to attend Court, on a date to be assigned by Madame Clerk, after the expiration of one year, and thereafter on a yearly basis for the duration of the probationary period to assess progress.

11. You are to immediately turn over any computer or electronic device in your possession or control used to communicate with C.L. and/or photograph her, and/or transmit photographs of her, and/or share photographs of her over the internet at any time, and/or used to communicate with her at any time pertinent with these offences, to the RCMP for the purposes of destruction.

12. You are not to possess a device capable of accessing the internet.

13. There will also be a "keep away" paragraph with respect to any address, place of employment or education known to you of the complainant, C.L.

[72] There will also be a SOIRA order for ten years as well as a DNA order on a primary designated basis.

[73] I will also recommend that during your period of incarceration that you receive a psychiatric evaluation to assess the benefit of medication to help you cope, and also that you be evaluated for potential restrictive placement having regard to your own health, safety, and also having regard to your health deficits.

[74] A copy of the comprehensive Forensic Sexual Behaviour Pre-Sentence Assessment shall be made available to your probation officer and any health care professionals providing service to you during your incarceration and to your probation officer post-incarceration.

[75] As for the Victim Fine Surcharge, I will give you six years within which to pay it.

Timothy Gabriel, J.P.C.