PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. S. P. W.*, 2021 NSPC 24

Date: 20210427
Docket: 8258805, 8258806, 8258807
Registry: Dartmouth

Between:

Her Majesty the Queen

v.

S. P. W.

Restriction on Publication: Section 486.4 & 486.5

Judge:	The Honourable Judge Theodore Tax ,
Heard:	March 24, 2021, in Dartmouth, Nova Scotia
Decision	April 27, 2021
Charge:	Section 271, 151 & 152 of the Criminal Code of Canada
Counsel:	Terri Lipton, for the Nova Scotia Public Prosecution Service Eugene Tan, for the Defence Counsel

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By the Court:

Introduction:

[1] Mr. SPW has entered guilty pleas to three offences of a sexual nature. Those three offences were: (1) unlawfully committing a sexual assault on MW, contrary to section 271 of the **Criminal Code**; (2) sexual interference by touching MW, who was a person under the age of 16 years directly with a part of his body, to wit, his penis, contrary to section 151 of the **Criminal Code**; and (3) invitation to sexual touching by inviting, counselling or inciting MW, a person who was under the age of 16 years to touch directly a part of SPW's body, to wit, his penis, for a sexual purpose, contrary to section 152 of the **Criminal Code**.

[2] The three offences of a sexual nature occurred between December 31, 2016 and July 2, 2018 at or near Dartmouth, Nova Scotia. The Crown proceeded by indictment on all three of those charges.

[3] Mr. SPW has also pled guilty to the offence of having failed to attend court, without a lawful excuse, in Dartmouth, Nova Scotia, on December 10, 2018, which was an offence contrary to the section 145(2)(b) of the **Criminal Code**. The Crown proceeded by way of summary conviction for that offence.

[4] Following the entry of the guilty pleas to the sexual offences on September 8, 2020 which was the date scheduled for the trial of those matters, the Court requested the preparation of a Pre-Sentence Report by a Probation Officer as well as a Comprehensive Forensic Sexual Behaviour Pre-Sentence Assessment Report.

[5] The submissions on sentencing were originally scheduled for January 29, 2021 but were subsequently adjourned by the Court to March 24, 2021. The adjournment had been requested in order to provide the Crown Attorney and Defence Counsel with some additional time to resolve any outstanding factual issues with respect to the sexual offences for which SPW had entered guilty pleas.

[6] On March 24, 2021, at the outset of the sentencing hearing, the Court was advised that there remained a factual issue in dispute between the parties. After a brief adjournment, the parties advised the Court that the factual issue had been resolved. The Crown Attorney and Defence Counsel advised that they had agreed

upon the summary of the facts and circumstances of those sexual offences to be read into the record by the Crown Attorney with inclusion of an additional agreed fact.

[7] The Court confirmed with the Crown Attorney and Defence Counsel that they would be presenting an agreed statement of facts and circumstances and also confirmed with SPW that he did not dispute the facts and circumstances which would be read into the record by the Crown Attorney.

Positions of the Parties:

[8] It is the position of the Crown that, given the serious nature or gravity of the sexual offences and SPW's high degree of responsibility or moral blameworthiness for those offences involving his young biological daughter [MW], the just and appropriate sentence for these offences should be a period of five (5) years of imprisonment. In recommending that sentence, the Crown Attorney submits that it takes into consideration all of the relevant purpose and principles of sentencing as well as the recent statements of the Supreme Court of Canada in **R. v. Friesen**, 2020 SCC 9 in relation to sexual offences against children.

[9] The Crown Attorney also recommends that a judicial stay should be imposed pursuant to the **Kienapple** principle with respect to the sexual assault offence contrary to section 271 of the **Criminal Code** and that the five (5) year sentence be imposed concurrently for the sexual interference and the sexual touching offences contrary to sections 151 and 152 of the **Criminal Code** respectively.

[10] With respect to the offence of failing to attend court on December 10, 2018, contrary to section 145(2)(b) of the **Criminal Code**, the Crown Attorney recommends a 30-day concurrent sentence to the sentence imposed by the Court for the sexual offences.

[11] The Crown Attorney also recommends that the Court should impose ancillary orders, including: (1) a DNA order pursuant to section 487.051 of the **Code** as those offences are each a "primary designated offence" for that purpose; (2) a section 109 **Code** firearms prohibition order for 10 years; (3) a SOIRA order pursuant to section 490.013(1)(b) of the **Criminal Code**; (4) a section 161 **Code** order of prohibition to prohibit SPW from being in contact with persons under the age of 16 years as well as certain locations or employment where a person under the age of 16 years could reasonably be expected to be present and (5) a section

743.21 **Code** order prohibiting SPW from contacting MW while serving his sentence of imprisonment.

[12] For his part, Defence Counsel advised the Court that they do not oppose or dispute any of the ancillary orders which have been sought by the Crown Attorney.

[13] It is the position of the Defence that, while there are certainly several aggravating factors which they do not dispute, there are also several important mitigating factors which the Court must also take into account in determining a just and appropriate sentence. Defence Counsel submits that the Sexual Behaviour Presentence Risk Assessment Report and the Pre-Sentence Report could, in his opinion, be characterized as being "largely neutral." As a result, notwithstanding the focus on deterrence and denunciation, he submits that there are reasonable prospects for SPW's rehabilitation and that when the Court balances all of the applicable purposes and principles of sentencing, a just and appropriate sentence would be in the range of 36 to 42 months imprisonment, less SPW's enhanced credit for time spent on remand prior to the sentencing date.

[14] The Crown Attorney and Defence Counsel have also agreed that, as of March 24, 2021, SPW has spent a total of 511 days on remand.

[15] Both Counsel have noted that the statutory minimum sentences in relation to the offences before the Court have been struck, as acknowledged by the Nova Scotia Court of Appeal in **R. v. Hood,** 2018 NSCA 18. In those circumstances, the Court is not bound by any mandatory minimum penalty and, in fact, both parties have recommended sentences in ranges significantly higher than the minimum penalty legislated by Parliament.

Circumstances of the Offences:

[16] The victim of the sexual offences, MW, is the biological daughter of SPW. She was between the ages of four and six years old between December 31, 2016 and July 2, 2018, when these offences occurred. During that period of time, SPW had been exercising his access rights to MW and her two siblings (who were also his biological children) every other weekend. At the time, SPW was living on a boat and MW would be with him at that location, every other weekend when he exercised his access rights to his daughter.

[17] On July 27, 2018, MW, who was then six years old, disclosed to her stepfather that she was being sexually assaulted by her biological father, SPW. She

indicated that this had been occurring since approximately December, 2016. MW disclosed that when she was with her father on his boat, he would sit her on his lap with his "wiener" out and make her touch it with her fingers. MW used her arm to show her stepfather how this was done.

[18] On August 14, 2018, MW met with the police and disclosed that when she was on her father's boat for his biweekly access visits, he would try to "put" his "wiener" and then to show the specific location, she pointed to the buttocks and vagina of the police doll. In referring to those two locations on the doll, she referred to them as her "pagina and butt." She further indicated to the police officer that it happened when her underwear and pants were down.

[19] In addition, during the meeting with the police, MW drew a picture of her father's (SPW's) "wiener" going into her "pagina and butt." She also described seeing her father's "wiener" on her "pagina." MW said that her father put her there for 10 minutes. MW further indicated that he would "pull his wiener out of the hole of his pyjama pants, the triangle that holds the wiener."

[20] Furthermore, MW demonstrated on the police doll how she sits on her father's lap and he "pulls his wiener out and then she sits back down on his lap." MW indicated that she could see him put his "wiener" in her "butt and pagina."

[21] MW also advised the police that SPW makes her "taste his pee" and "scrub his pee up-and-down on his wiener" and that "white stuff comes out." Then, she added that he makes her put her fingers on the side and taste it. She said that her father had told her it is juice, but she said it is not, it tastes like pee. She also indicated that while she is "scrubbing" it, her father tells her to keep doing it.

[22] Finally, MW described this as happening every time that she was with SPW for the access visits.

[23] As indicated previously, there had been a factual issue raised between the parties with respect to certain comments made by SPW in the Pre-Sentence Report and the Comprehensive Forensic Sexual Behaviour Assessment Report. However, the Crown Attorney and Defence Counsel, with SPW's instructions, resolved the factual issue in dispute. As a result, the Crown Attorney added that the offences involved attempts, on every occasion mentioned by MW, to vaginally and/or anally penetrate her, but did not involve actual penetration.

[24] The Court confirmed with Defence Counsel and SPW himself, that the facts as read into the record by the Crown Attorney with this additional agreed fact were accepted by the Defence and not disputed.

Victim Impact Statement:

[25] The Crown Attorney advised the Court that the biological mother of MW, AM had submitted information to her regarding the emotional and physical impacts of the offences committed by SPW, on their daughter. She indicated that the whole incident has been painful and that she feels that she failed to protect her daughter when she needed her most.

[26] With respect to MW, her mother said that she needs regular therapy and from time to time, her daughter thinks of triggers which cause trauma, requiring extra support on school work, as well as her relationships with other children. AM has concerns that these triggers may be long-standing and have led to a lack of trust in men and may affect MW's relationship with her stepfather. AM had asked MW if she wished to draw a picture to express the impact of the offence on her, but her mother said that she was too sad to do so.

[27] In addition to those comments made by MW's mother, a Victim Impact Statement was filed with the court by MW's grandparents. They indicated that the offences have caused emotional difficulties for everyone in the extended family. They are still in shock as to what took place and observed that the offences have created confusion in how they react with their grandchildren and not knowing how to approach MW without causing her undue stress.

Circumstances of the Offender:

[28] SPW is now 42 years old. He was raised by his mother as he has never met his biological father and is not aware of his name. The Pre-Sentence Report also indicated that, while his mother was attending school and between ages 2 and 9, he lived with his grandparents. During that time, life was good. When he was nine years old, he returned to live with his mother, who was then residing with her boyfriend, but shortly thereafter, her mother ended that relationship due to the boyfriend being an alcoholic and physically abusing her. When he was about 13 years old, his mother married his stepfather.

[29] SPW stated that he has a close relationship with his mother and that she has always been a solid support in his life. The Probation Officer contacted SPW's

mother who described him as an active child and now believes that he had ADHD. SPW's mother indicated that he had the benefit of a good upbringing while living with her parents.

[30] SPW reported that he had been in a relationship with AM for about seven years, but their relationship had many "ups and downs" because he could not provide a stable household for his partner and their children. SPW and AM share three children who are now ages 10, nine and seven. Their middle child [MW] is the victim of the offences before the court. Since being charged with these offences, SPW has not had any contact with his children, however, prior to that, he spent every other weekend with them.

[31] SPW graduated from high school and attended the Nova Scotia Community College where he completed a diploma program in truck and trailer repair. Since he was 22 years old, SPW has been self-employed as a painter. At the time of his incarceration, SPW was in receipt of Employment Insurance and advised the Probation Officer that he was paying $450 per month for child support, with the remainder of his monies being spent on food and fuel for his boat.

[32] In terms of his physical health, SPW said that he had always been physically active but since being remanded into custody his physical health has deteriorated. He has experienced occasional numbing in his hands and three discs in his neck are deteriorating. He has not been prescribed any medication for any of those ailments. SPW indicated that he began abusing marijuana when he was 13 years old and that since his early 20's, he has been smoking between 3 g to 5 g of marijuana per day until he was remanded into custody.

[33] The Probation Officer contacted a long-time friend of SPW who has known him for the last 28 years. The friend was "shocked" to hear about the offences before the court.

[34] SPW has a very limited prior criminal record, which were both dealt with on March 15, 2019: (1) a fine of $150 for failing to attend court as directed on November 27, 2018 and (2) a suspended sentence with probation of 12 months for failing to comply with a recognizance or undertaking on December 30, 2018. The only other prior offence which was listed in the Pre-Sentence Report was that on November 28, 2005, SPW received a conditional discharge with the probation order of the 18 months in relation to a charge of uttering threats on July 7, 2004.

[35] In addition to the Pre-Sentence Report prepared by the Probation Officer, SPW agreed to participate in a Comprehensive Forensic Sexual Behaviour Pre-Sentence Assessment, which was ordered by the Court. Dr. Michelle St. Amand-Johnson, a Clinical and Forensic Psychologist completed the report on December 22, 2020.

[36] In concluding her report, Dr. St. Amand-Johnson noted that SPW's baseline risk for sexual recidivism is "half to similar that of the 'average' adult male adjudicated for crossing legal sexual boundaries." If sexually reoffending, the doctor's opinion was that it would most likely be against a child acquaintance when supervision is lacking or inadequate. She recommends that SPW avoid unsupervised contact with children and she noted that he expressed a willingness to comply with supervised contact if required to do so to regain access to his children.

[37] In terms of recommendations for his treatment, Dr. St. Amand-Johnson recommends that SPW attend, participate in and successfully complete a specialized treatment program for sexual offending delivered at the low-to-moderate level of intensity, unless recommended otherwise by his treatment providers. She added that moderate intensity treatment is available in the community and may also be available within the federal correctional system but may not be available in the provincial correctional system.

[38] In terms of contact with minors, Dr. St. Amand-Johnson recommended that SPW not have unsupervised contact with children under the age of 16 years, excluding incidental contact with children in public. Supervision should be conducted by responsible adults who are aware of SPW's offence history and the potential to re-offend and that he should not engage in the physical care of children. Finally, Dr. St. Amand-Johnson recommended counselling for improving his coping and emotional management skills as part of a general mental health services referral.

[39] SPW was initially arrested for these sexual offences, on or about August 29, 2019 and was subsequently released under the terms of a Recognizance. However, a warrant was issued for failing to attend in court on October 15, 2019, which was the first scheduled trial date. Although SPW had not been arrested for some time on the warrant issued by the Court, after he was arrested, he applied for judicial interim release in early December 2019. SPW's bail application was denied on December 4, 2019 and since then, he has consented to his remand in custody.

[40] As previously mentioned by counsel, the Court was advised that SPW had spent 511 days on remand as of March 24, 2021. The Crown Attorney and Defence Counsel agree that SPW should receive an enhanced pre-sentence custody credit of 1½ days for each day served on remand.

Analysis:

Applicable Purposes and Principles of Sentencing:

[41] In all sentencing decisions, determining a fit and proper sentence is highly contextual and is necessarily an individualized process which depends upon the circumstances of the offence and the circumstances of the specific offender. On this point, the Supreme Court of Canada stated, in **R. v. M. (C.A.),** [1996] 1 SCR 500 at paras. 91 and 92, that the determination of a just and appropriate sentence requires the trial judge to do a careful balancing of the societal goals of sentencing against the moral blameworthiness of the offender and the gravity of the offence while at the same time taking into account the victim or victims and the needs of and current conditions in the community.

[42] Given the circumstances of the offences, I find that denunciation of the unlawful conduct and specific and general deterrence are the important purposes of sentencing in section 718 of the **Code** which must be emphasized in the context of these sexual offences which were perpetrated upon his young and vulnerable daughter over a period of time. However, given SPW's very limited and unrelated prior record of convictions, this sentencing decision should also consider his rehabilitation, promoting a sense of responsibility in him and acknowledging the harm done to the victim, in determining the just and appropriate sentence.

[43] In addition to those general purposes and principles of sentencing set out in section 718 of the **Code**, Parliament has also enacted section 718.01 of the **Code** for those offences committed against children. Parliament has stipulated in this provision that, when a court imposes a sentence for an offence that involves the abuse of a person under the age of 18 years, the Court **shall give primary consideration to the objectives of denunciation and deterrence** of such conduct.

[44] In the sentencing decision, the Court must also consider the fundamental sentencing principle found in section 718.1 of the **Code** that the sentence must be proportionate to the gravity of the offence(s) and the degree of responsibility of the offender. Parliament has assessed the objective gravity of the indictable offences for which SPW entered pleas of guilty, by stating that the sexual interference

offence contrary to section 151 **Code**, the invitation to sexual touching offence contrary to section 152 **Code** and the sexual assault offence contrary to section 271 **Code** are all liable to a maximum imprisonment of not more than 14 years **and** to a minimum punishment of imprisonment for a term of one year. The Victim Impact Statements outline the devastating and ongoing impact of the offences on the victim and her extended family. As a result, I find that these offences of a sexual nature were very grave and serious offences.

[45] In terms of the issue of SPW's moral blameworthiness, I find that he bears a very high degree of responsibility for these offences. SPW had to be aware, at all times, that he was committing these atrocious acts on his young daughter of very tender years and ought to have known that these offences would have a devastating impact on her. These offences represented an extreme breach of trust as he was the victim's biological father, the offences occurred in a very confined space where he was residing on a boat, when SPW was exercising his access rights to be with his daughter who was only 4 to 6 years old at the time. In those circumstances, I find that SPW's degree of responsibility or moral blameworthiness for these offences is also very high.

[46] In terms of other sentencing principles which are to be considered by the court in imposing a sentence, section 718.2(a) of the **Criminal Code** mandates that a sentencing court must take into consideration any relevant aggravating or mitigating circumstances relating to the offence(s) or to the offender in considering whether or not the sentence should be increased or reduced.

[47] Parliament has also enacted sections 718.2 (a)(ii) to (iii.1) of the **Code** to direct a court imposing sentence to consider the principles outlined in those sections which relate to evidence that the offender, in committing the offence abused a member of the offender's family, the offender abused a person under the age of 18 years, the offender abused a position of trust or authority in relation to the victim and that the offence had a significant impact on the victim considering their age and other personal circumstances. All of those principles are relevant in the circumstances of this case and are considered to be aggravating circumstances in the imposition of a just and appropriate sentence.

[48] Section 718.2(b) of the **Criminal Code** stipulates that the judge imposing a sentence consider the so-called "parity" principle which reminds judges that the sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. On this point, I note that it is often

difficult to find those similar cases, as the sentencing process is highly individualized and it is based upon the circumstances of the offence and on the circumstances of the particular offender.

[49] In addition, in sections 718.2(d) and (e) of the **Criminal Code**, Parliament has reminded sentencing judges that an offender should not be deprived of liberty if a less restrictive sanction may be appropriate in the circumstances. Furthermore, the sentencing judge is required to consider all available sanctions other than imprisonment that are reasonable in the circumstance, with particular attention to the circumstances of aboriginal offenders.

The Impact of the Supreme Court of Canada's Friesen Decision:

[50] The Supreme Court of Canada's decision in **R. v. Friesen**, 2020 SCC 9 at para.1, stated that children are the future of our country and our communities and they are also some of the most vulnerable members of our society. They deserve to enjoy a childhood free of sexual violence. The Court's decision was about how to impose sentences that fully reflect and give effect to the profound wrongfulness and harmfulness of sexual offences against children.

[51] In **Friesen,** *supra***,** at para. 5, the unanimous Supreme Court of Canada decided to send "a strong message" at the outset of their decision, made on April 2, 2020, that:

> "[5] … Sexual offences against children are violent crimes that wrongfully exploit children's vulnerability and cause profound harm to children, families and communities. Sentences for these crimes must increase. Courts must impose sentences that are proportional to the gravity of sexual offences against children and the degree of responsibility of the offender, as informed by Parliament's sentencing initiatives and by society's deepened understanding of the wrongfulness and harmfulness of sexual violence against children. Sentences must accurately reflect the wrongfulness of sexual violence against children and the far-reaching and ongoing harm that it causes to children, families and society at large."

[52] The Supreme Court of Canada confirmed, *supra*, at para. 30 that all sentencing starts with the principle that sentences must be proportionate to the gravity of the offence and the degree of responsibility of the offender. The Court points out that the principle of proportionality is now codified as the "fundamental principle" of sentencing in section 718.1 of the **Code**.

[53] In **Friesen**, *supra* at paras. 31-33 the Court stated that sentencing judges must also consider the principle of parity, that similar offenders who commit similar offences in similar circumstances should receive similar sentences, which principle is now codified in section 718.2 (b) of the **Code**. Parity and proportionality do not exist in tension, rather, parity is an expression of proportionality. Judges calibrate the demands of proportionality by references to sentences imposed in other cases which reflect the range of factual situations and judicial perspectives.

[54] Then, the Court in **Friesen,** *supra***,** at para. 42 provided additional guidance with respect to sentencing principles for sexual offences against children by stating that:

> "[42] Protecting children from wrongful exploitation and harm is the overarching objective of the legislative scheme of sexual offences against children in the **Criminal Code**.…Protecting children from becoming victims of sexual offences is thus vital in a free and democratic society."

[55] In **Friesen**, the accused had pled guilty to the offence of sexual interference with the victim who was his four-year-old daughter as well as the offence of attempted extortion of the victim's mother. In the final analysis, the Supreme Court of Canada restored the sentencing judge's imposition of a six-year sentence for the sexual interference and a concurrent six-year sentence for the attempted extortion offence.

[56] Most importantly for the purposes of this sentencing decision, the Supreme Court of Canada stated, *supra*, at para. 44, as follows:

> "[44] Given the facts of this case, the guidance we provide is focused on sentencing principles for the offence of sexual interference and closely related offences such as invitation to sexual touching (**Criminal Code**, s.152), sexual exploitation (**Criminal Code**, s.153(1), incest (**Criminal Code**, s.155) and sexual assault (**Criminal Code**, s. 271). However, the principles that we outline also have relevance to sentencing for other sexual offences against children, such as child luring (**Criminal Code**, s. 172.1)."

[57] The Supreme Court of Canada added in their concluding comments at para. 44 in **Friesen**, *supra*, that: "Courts should thus draw upon the principles that we set out in this case when imposing sentences for such other sexual offences against children." In adding this comment, the Supreme Court of Canada added a footnote

to refer to several other sexual offences against children described in the **Criminal Code** for which their comments would be equally relevant.

[58] In **Friesen**, *supra* at para. 50, the Court also pointed out that to effectively respond to sexual violence against children, sentencing judges need to properly understand the wrongfulness of sexual offences against children and the profound harm that they cause. Properly understanding the harmfulness will help bring the sentencing law into line with society's contemporary understanding of the nature and gravity of sexual violence against children and will ensure that past biases and myths do not filter into the sentencing process. This requires courts to focus their attention on emotional and psychological harm, not simply physical harm from the sexual violence against children (at para. 56).

[59] At paragraphs 60-64, in **Friesen**, *supra,* the Supreme Court of Canada discussed the additional harm caused to children by damaging their relationship with their parents, caregivers and family members. Because much sexual violence against children is committed by a family member, as it was in this case, the violence is often accompanied by a breach of a trust relationship. Victims may also lose trust in the ability of family members to protect them and may withdraw from their family as results. The ripple effects can cause children to experience damage to their social relationships and lose trust in the communities and people they know.

[60] With respect to those comments by the Supreme Court of Canada, I note that the comments in the Victim Impact Statement provided by MW's mother and her grandparents speak to those emotional, psychological and relationship impacts being present in this case.

[61] Following the Supreme Court of Canada's general discussion of the issues around sexual offences involving children, the Court concluded that sentences must reflect the contemporary understanding of sexual violence against children by:

- recognizing and reflecting both the harm that sexual offences against children cause and the wrongfulness of the sexual violence – para. 74.
- taking into account and accurately understanding the wrongfulness and the harmfulness of sexual offences against children when applying the proportionality principle – para. 75.

- imposing sentences that are commensurate with the gravity of the sexual offences against children, by reflecting the normative character of the offender's actions and the consequential harm to children and their families, caregivers and communities. This involves giving effect to (1) the inherent wrongfulness of these offences; (2) the potential harm to children that flows from these offences; and (3) the actual harm the children suffer as a result of these offences – para. 76.

- taking into account the modern recognition of the wrongfulness and harmfulness of sexual violence against children when determining the offender's degree of responsibility and that intentionally applying force of a sexual nature to a child is "highly morally blameworthy" because the offender is or ought to be aware that this action can profoundly harm the child – paras. 87-88.

- taking into account that Parliament has recognized the gravity of these offences and that sexual offences against children cause profound harm by increasing their maximum sentences and by prioritizing denunciation and deterrence in sentencing for sexual offences against children – paras. 95-103.

[62] Under the heading of potential harm to the victim, the Supreme Court of Canada points out in **Friesen**, *supra*, at paras. 79 to 84 that sexual violence against children inherently has the potential to cause several recognized forms of harm which may manifest during childhood and long-term harm that only becomes evident during adulthood. Many of those harms result in relationship and trust challenges, fear, mental and psychological health issues, sleep disturbances and antisocial or self-destructive behaviour. As a result, courts must consider the reasonably foreseeable harm that flows from sexual violence against children when determining the gravity of the offence.

[63] When possible, courts must consider the actual harm that a specific victim has experienced as a result of the offence. This consequential harm is a key determinant of the gravity of the offence. Direct evidence of actual harm is often available, in particular, through Victim Impact Statements, including those presented by parents and caregivers of the child, which usually provide the "best evidence" of the harm that the victim has suffered: **Friesen**, *supra*, at paras.85-86.

[64] Although the Supreme Court of Canada declined, in **Friesen**, *supra*, at para. 106, the Crown's invitation to create a national "starting point" for sexual offences

against children, the Court stated, at para. 107, that "we wish to provide guidance to courts on three specific points":

> 1. Upward departure from prior precedents and sentencing ranges may well be required to impose a proportionate sentence;
> 2. Sexual offences against children should generally be punished more severely than sexual offences against adults; and
> 3. sexual interference with the child should not be treated as less serious than sexual assault of a child.

[65] Finally, the Supreme Court of Canada in **Friesen** *supra*, at paras.121 to 147 offered some additional guidance to sentencing courts with respect to "significant factors" to determine a fit sentence. They specifically noted that this was neither a checklist nor an exhaustive list of factors that were meant to displace the specific list of factors set out by provincial appellate courts. Those "significant factors" to consider are as follows:

> (a) *Likelihood to reoffend*:
>
> Where the sentencing judge finds that the offender presents an increased likelihood of reoffending, the imperative of preventing further harm to children calls for emphasis on the sentencing objective of separating the offender from society in section 718(c) of the **Criminal Code.**
>
> The offender's likelihood to reoffend is also relevant to the objective of rehabilitation in section 718(d) of the **Criminal Code** as courts should encourage efforts towards rehabilitation because it offers long-term protection. Rehabilitation may also weigh in favour of a reduced term of incarceration through programming available in prison and a lower likelihood that the offender will reoffend. [See paras. 123 and 124]
>
> *(b) Abuse of a Position of Trust or Authority:*
>
> Any breach of trust is likely to increase the harm to the victim and thus the gravity of the offence. A child will likely suffer more harm from sexual violence where there is a closer relationship and a higher degree of trust between the child and the offender. The "grooming" of a child to exploit an existing trust relationship or to build one, is an aggravating factor in its own right.

The abuse of a position of trust is also aggravating because it breaches a duty of protection and care and thus enhances the offender's degree of responsibility. As a result, the Supreme Court of Canada emphasized that, all other things being equal, and offender who abuses a position of trust to commit a sexual offence against a child should receive a lengthier sentence than an offender who is a stranger to the child. [See paras. 125-130]

(c) *Duration and Frequency*:

The duration and frequency of sexual violence is a further important factor which can significantly increase the immediate harm to the victim and the long term emotional and psychological harm can also become more pronounced. This increased harm magnifies the severity of the offence and increases the offender's moral blameworthiness because the additional harm to the victim is "a reasonably foreseeable consequence of multiple assaults." Sexual violence against children that is committed on multiple occasions and for longer periods of time "should attract significantly higher sentences that reflect the full cumulative gravity of the crime." [See paras. 131-133]

(d) *Age of the Victim*:

The age of the victim is a significant aggravating factor because dependency and vulnerability are more pronounced in younger children, which impacts both the gravity of the offence and the moral blameworthiness of the offender. At the same time, courts must also be particularly careful to impose proportionate sentences in cases where the victim is an adolescent. The Supreme Court of Canada noted that sexual violence by adult men against adolescent girls is associated with higher rates of physical injury, suicide, substance abuse, and unwanted pregnancy. [See paras. 134- 136]

(e) *Degree of Physical Interference*:

The Supreme Court of Canada acknowledges that the degree of physical interference is a recognized aggravating factor as it reflects the degree of violation of the victim's bodily integrity. It also reflects the sexual nature of the touching and its violation of the victim's sexual integrity. The degree of physical interference also takes account of how specific types of physical acts may increase the risk of

harm to the victim, such as the risk of disease or pregnancy, causing physical pain or physical injuries.

The Court pointed out that "any sexual offence is serious" and that they strongly cautioned courts against downgrading the wrongfulness of the offence or the harm to the victim where the sexually violent conduct does not involve penetration, fellatio, or cunnilingus. Courts must recognize the wrongfulness of sexual violence even in cases where the degree of physical interference is less pronounced. There is no hierarchy of physical acts for the purposes of determining the degree of physical interference. [See paras. 137-147]

(f) *Victim Participation*:

The Supreme Court of Canada points out that Parliament has determined that the age of consent to sexual activity in Canada is 16. Subject to the close in age exceptions for certain offences, children under the age of 16 are thus "incapable of giving true consent to sexual acts with adults." Courts should avoid language such as "de facto consent" and not treat a victim's participation as a mitigating factor as it would circumvent the will of Parliament through the sentencing process and undermine the wrongfulness of sexual violence against a child, who is under the legal age of consent. [Paras. 148-154]

Aggravating and Mitigating Circumstances:

[66] As I previously mentioned, section 718.2(a) of the **Criminal Code** requires the Court to consider any relevant aggravating and mitigating circumstances which relate to the offences or to the offender in considering whether the sentence imposed by the Court should be increased or reduced.

[67] I find that the Aggravating Circumstances are as follows:

- SPW, as the biological father of MW who is his young daughter, abused his position of trust as a parent, guardian and caregiver for her well-being and protection when his daughter came to visit him on scheduled access visits, where he lived on a boat, where no one else was available to turn to and in confined quarters, there was nowhere else for MW to go - section 718.2(a)(iii) **Criminal Code**;

- The serial nature of the duration and frequency of the sexual violence perpetrated on MW occurred on multiple occasions when SPW exercised his access rights as the biological father to be with his young daughter every second week for a period of approximately 18 months - section 718.2(a) (ii) **Criminal Code**;

- The very young age of the victim, MW, is a very significant aggravating factor as she was very vulnerable being between four and six years old when the sexual violence was perpetrated by her father. At that very young age, when she spent weekends with him, MW's dependency on her father was total for her protection and care - section 718.2(a)(ii.1) **Criminal Code**;

- The nature and degree of the physical interference and sexual violence perpetrated by SPW on MW were extremely serious and degrading which included attempts at both vaginal and anal penetration, forcing MW to masturbate him to ejaculation and then taste his semen. In those circumstances, SPW's actions reflect a very significant degree of the violation of the victim's bodily and sexual integrity;

- The Victim Impact Statements clearly highlight the profound emotional and psychological harm from this sexual violence that has already impacted MW, her mother and her extended family. It is also reasonably foreseeable that MW will likely have to cope with those emotional and psychological effects for years to come - section 718.2 (a)(iii.1) **Criminal Code**.

[68] I find that the Mitigating Circumstances are as follows:

- SPW has a very limited and unrelated previous criminal record;

- SPW entered a guilty plea which spared MW, her mother and other witnesses from having to come to court and relive all of the details of the sexual violence by testifying in court. Both counsel informed the Court that, this should be considered as a significant mitigating factor;

- In entering the pleas of guilty to the offences before the court, with some clarifications of facts prior to the sentencing hearing, SPW has accepted full responsibility for the offences before the court;

- It is evident from SPW's comments to the Probation Officer which are mentioned in the Pre-Sentence Report that SPW is genuinely remorseful for his actions;

- Prior to these offences coming to light, SPW was considered to be of good character and had been self-employed as a painter for 19 years;

- The comprehensive Forensic Sexual Behaviour Assessment prepared by Dr. St. Amand-Johnson noted that SPW generally falls in a "below-average" risk of recidivism which can be further mitigated through counselling, treatment and programming in prison and appropriate supervision should he be in contact with children in the future.

The Just and Appropriate Sentence:

[69] As I previously indicated, in all sentencing decisions, determining a just and appropriate sentence is highly contextual and is necessarily an individualized process which depends upon the circumstances of the offence(s) and the circumstances of the specific offender. The Court is required to consider a careful balancing of the various purposes of sentencing set out in section 718 **Code** and take into account the statutory aggravating and mitigating circumstances which may increase or decrease the sentence set out in section 718.2 **Code** in the assessment of the fundamental principle of proportionality set out in section 718.1 **Code.** The principle of proportionality requires that the sentence imposed by the Court must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[70] In determining the just and appropriate sentence to impose on an offender who has committed offences such as sexual assault, sexual interference or invitations to sexual touching of a child, as in this case, section 718.01 **Code** stipulates that the Court **shall** give primary consideration to the objectives of deterrence and denunciation of such conduct when the offence involved the abuse of a person under the age of 18 years.

[71] The emphasis on deterrence and denunciation of the offender's unlawful conduct in sexual violence perpetrated on children has also been highlighted by our Court of Appeal in **R. v. EMW**, 2011 NSCA 87. In **EMW** *supra*, at paras. 26-27, Fichaud JA endorsed the comments of the sentencing judge, which provide valuable guidance in applying section 718.01 of the **Criminal Code**: "crimes involving the abuse of children by people who should be protecting them are ones

where a clear and unequivocal statement must be made. Children are valued. If you treat them as objects for sexual gratification, you will suffer serious consequences."

[72] More recently, the Supreme Court of Canada has underlined the significant emphasis that trial judges should place on the specific and general deterrence as well as the denunciation of an offender's unlawful conduct in sexual violence perpetrated on children in its recent **Friesen** decision. While the prior precedents and sentencing ranges may have been previously determined a proportionate sentence by taking into account the principle of parity, the Supreme Court of Canada's "guidance" to trial judges is that there should be an "upward departure" based on a more accurate understanding of the nature of the offence and the harm caused to the victim.

[73] In her sentencing brief, the Crown Attorney provided the Court with a detailed table of similar offences committed by similar offenders in similar circumstances to assist the court in determining the appropriate range of sentence in accordance with the principle of parity. As I indicated previously, it is often difficult to locate those similar cases , due to the fact that the sentencing process is a highly individualized one and that those sentencing precedents provide guidelines for a range of sentence, not hard and fast rules or "starting point" sentences.

[74] Looking at the cases provided by the Crown Attorney to establish a range of sentence in support of her recommendation that SPW be sentenced to 5 years in prison, I find that the precedents provided by her which were most similar to this offender and the offences having been committed in similar circumstances were:

1. **R. v. R.,** 2021 ONSC 7411 – the accused was **found guilty** after a trial in relation to an offence contrary to section 271 **Code**. The offence involved touching the nine-year-old victim inappropriately on three separate occasions. On the first occasion, he had rubbed her vagina with his fingers under her pants and underwear. On a second occasion, he touched her nipples with his hand. During the third incident, the accused placed his hand under her shorts and underwear and touched her vaginal area with his finger. He also placed the back of her vagina on his penis and rubbed his penis in that area while his penis was in and out of his pants.

The accused had no prior record and was 50 years old at the time of the offences. He was gainfully employed on full-time basis and supported three children who were between ages 5 and 19. The accused had been living with the victim's mother and was a caregiver for the victim. The case was **post-Friesen**, had few mitigating factors and no acceptance of responsibility. The Court ordered a sentence of 5 ½ years in prison.

2. **R. v. C.B**., 2021 ONSC 187 - The accused was **found guilty** after a trial in relation to offences contrary to section 151 and 152 of the **Code.** The Court entered a judicial stay for the offence of sexual assault contrary to section 271 **Code**. The Crown had sought a sentence of six years and the Defence recommended three years in prison. The accused had sexually assaulted his biological daughter when she was between 13 and 16 years old. The sexual offences included touching her breasts, digital penetration, oral sex on the victim, manual stimulation of the accused's penis and repeated attempts to engage in sexual intercourse.

   The accused was 43 years old and had no prior criminal record. He had a University education and had been gainfully employed since graduation. He had been married for 22 years and was the father of three children, with the victim being the eldest. The accused had mental health issues while in university, which re-occurred around the time that the offending behaviour began. Due to mental health issues, which arose prior to being charged, the accused left his employment and since then was under the care of a psychiatrist. The psychiatrist stated that the accused had a major depressive disorder and prescribed medication.

   The case was **post-Friesen** and although the Court considered that the accused was a low risk to reoffend, this case involved a significant breach of trust, the offending behaviour had occurred on multiple occasions over a lengthy period of time which indicated that the accused's moral blameworthiness was very high. The Court found that this was the highest level of moral culpability, given the young age of the victim and that she was very vulnerable to the abuse by her biological father, who had total control over her every movement. The Court ordered five years in prison for the offence contrary to section

151 **Code** and five years concurrent for the offence contrary to section 152 **Code**.

3. **R. v. BJR**, 2021 NSSC 26 – The accused **pled guilty** to a charge of sexual assault contrary to section 271 **Code**. The accused was 38 years old and he had acted as a father figure for several years in relation to the victim, who was 16 years old at the time and the biological daughter of his wife. The offence had occurred while the accused and the victim were on a camping trip, after the accused had consumed a significant amount of alcohol. He laid down next to his stepdaughter in the bed, began rubbing her legs, thighs and breasts and then took off her shorts and performed cunnilingus on her. The one incident lasted about one minute.

   There were several mitigating factors, including the plea of guilty, the accused was gainfully employed on a full-time basis, had no prior criminal record, had accepted full responsibility for the offence, expressed his remorse and had written a letter of apology to the victim. While he also had the full support of his family, the Court noted that he had not addressed his alcohol issues and had started counselling sessions but did not continue with them. In addition, the accused did not attend for a sexual offender assessment, in order to continue working during Covid 19, so there was no opinion that he was a low risk to reoffend.

   There were, however, several significant aggravating circumstances, which included the fact that the offender had abused a person under 18, a statutorily mandated aggravating factor under s. 718.2 (ii.1) **Code**, he abused the highest position of trust, as he sexually assaulted his own daughter and as the victim was a family member, it was a statutorily mandated aggravating factor under s. 718.2 (ii) **Code**, the offence had a significant impact on the victim and the victim was vulnerable because her and her family were dependent on the accused for family income.

   The case was **post-Friesen,** and the Crown recommended a sentence in the range of 2 to 4 years in prison, while Defence Counsel recommended a 3-year suspended sentence on terms of probation. The Court ordered a sentence of three years of imprisonment.

4. **R. v. WGL**, 2020 NSSC 323 – The accused was **found guilty** after trial for historical sexual offences against his stepdaughter. The

> accused was acting as the stepparent of the victim between 1997 and 2005, during which time the victim was between 10 and 14 years old. The accused was charged with section 271 and section 151 offences between 1995 and December 31, 2000. The offences involved allegations of one incident of digital penetration of the victim's vagina in early 1997 and between 25 to 30 instances of simulated sexual intercourse while clothed.
>
> The sentencing hearing was **post-Friesen.** At the time, the accused was 64 years old, disabled from work, but supporting a son who was confined to a wheelchair following an accident. He had no prior criminal record. The accused had family support but expressed no remorse in the Pre-Sentence Report. Although there was no assessment as to the risk of reoffending, the Court noted that there had been no further incidents in the past 20 years. The Crown recommended a sentence of five years of imprisonment while Defence Counsel recommended 18 to 24 months in prison. The offences involved significant aggravating factors of multiple incidents over an extended period, the breach of trust as a stepparent and significant impact on the victim. The Court imposed a sentence of 3 ½ years of imprisonment for the section 151 **Code** offence and a conditional judicial stay for the section 271 **Code** offence.

[75] The other cases cited by the Crown Attorney in support of her recommendation for a sentence of five years imprisonment, were mostly from other provinces and involved even more serious violations of young and very vulnerable victims, which included vaginal and anal intercourse. The range of sentences imposed for those offenders was between six and nine years in prison.

[76] Sentencing decisions rendered **post-Friesen** were: **R. v. S(D),** 2020 MBQB 163 – 43-year-old indigenous offender, *after tria*l, sentence 9 years; **R. v DC**, 2020 NLSC 78 – 35-year-old offender with prior record for Internet luring – *after trial*, several sexual offences while victim was between five and 11 years old, sentence 7 years; **R. v. MLC,** 2020 ABQB 295 – 60-year-old indigenous accused, victim was granddaughter between ages of five and 13 at the time of the offences, *after trial*, sentence 6 ½ years; **R. v. Burch**, 2020 ONSC 484 – 36-year-old offender, no prior record, stepfather relationship, 10 incidents of sexual abuse while the victim was between ages 10 and 13, *pled guilty*, sentence 6 years.

[77] For his part, Defence Counsel noted that the statutory minimums in relation to the offences before the Court have been struck down, as acknowledged by the Nova Scotia Court of the Appeal and therefore, there is no issue with respect to a minimum sentence. He noted that the case law provides a common-law range of sentences and that **R. v. EMW**, 2011 NSCA 87 is the leading case in this province with respect to the sentencing of offences of this nature.

[78] Defence Counsel submitted that the sentence of five years as recommended by the Crown Attorney was likely at the higher end of the range of sentences for these offences. Initially, based upon the fact that his client's guilty plea should be considered as an indication of genuine remorse, the stigma attached with a conviction of this nature, good prospects for rehabilitation and a below-average risk of recidivism, Defence Counsel, relying on decisions written prior to the **Friesen** decision, had recommended a sentence of between 18 to 24 months. After reviewing the cases submitted by the Crown Attorney and considering the factors identified by the Supreme Court of Canada in **Friesen**, in particular, that an "upward departure from prior precedents" may well be required to impose a proportionate sentence, he recommends a sentence of 36 to 42 months.

[79] Based upon my review of the relevant jurisprudence to establish a range of sentence for the parity principle, I find that the range of sentence for sexual assault, sexual interference of a child or invitation to sexual touching involving a child could reasonably result in the imposition of sentences between four and six years, assuming a balance between the aggravating and mitigating circumstances in the case. Sentences at the lower end of that range would appear to have had several significant mitigating circumstances, such as an early guilty plea which spares the victim from testifying, expressions of remorse and acceptance of responsibility.

[80] However, as the Supreme Court of Canada stated in **Friesen,** there are several **significant factors** that the Court should also consider in determining a fit sentence. In relation to those **significant factors**, which are relevant in this case:

(a) The greater the risk of re-offence, the greater emphasis on the objective of separating the offender from society. In this case, the forensic assessment indicated that there was a "below-average" risk of recidivism which could be further mitigated through appropriate supervision should SPW be in contact with children in the future.

(b) This offence involved an abuse of a position of trust as a parent and should receive a lengthier sentence than an offender who is a stranger

to the child, due to the fact that the breach of trust is likely to increase the harm to the victim. the gravity of the offence and the offender's degree of responsibility.

(c) The sexual violence perpetrated by SPW on his very young daughter occurred on multiple occasions over a relatively long period of time, which the Court stated should militate in favour of "significantly higher sentences."

(d) The age of the victim is an aggravating factor because dependency and vulnerability are more pronounced in younger children. In this case, MW was a very young victim of the sexual violence, being between four and six years old at the time of the offences, which impacts both the gravity of the offences and the offender's degree of responsibility.

(e) Although there is no hierarchy of physical acts or specific sexual activity, since significant harm can flow from all types of sexual acts, Court should not downgrade the "wrongfulness of the offence or harm to the victim" as certain acts such as penetration, fellatio, etc. certainly create an elevated degree of physical interference and as such are aggravating factors

[81] In this case, as I have outlined above, I agree with the Crown Attorney that the primary purposes and principles of sentencing are specific and general deterrence and very clear denunciation of the unlawful conduct.

[82] I have also highlighted the fact that there are several very significant aggravating circumstances which would tend to increase the sentence, but on the other hand, there are also several mitigating circumstances, which would tend to reduce the sentence to be imposed by the Court.

[83] In particular, both counsel pointed out that the entry of the guilty plea spared MW, her mother and other witnesses from having to come to the court and relive the details of the sexual violence and given the very youthful age of the victim, the Crown was relieved of the requirement to prove the offences beyond a reasonable doubt. In my opinion, the representations of counsel on these points are consistent with SPW's full acceptance of responsibility and a genuine expression of remorse for his actions, which are significant mitigating circumstances.

[84] I have also already determined that, in terms of the proportionality principle found in section 718.1 of the **Criminal Code** that SPW's moral blameworthiness or degree of responsibility for the offences is very high having repeatedly committed sexual offences over a significant period of time, when the young victim of a very vulnerable age was totally dependent on SPW for her care and he abused that position of trust as a parent and caregiver. Similarly, given the circumstances of these offences, their inherent wrongfulness, the devastating actual and potential long-term impact on the young victim from the offences, there can be absolutely no doubt that were very grave and serious offences.

[85] Having considered the relevant purposes and principles of sentencing, taking into account all of the relevant aggravating and mitigating circumstances and having considered the directions provided by the Supreme Court of Canada **Friesen**, in dealing with the determination of a just and appropriate sentence in a case which involved sexual offences where a young child was the victim, I find that the just and appropriate length of sentence is to order SPW to serve a sentence of imprisonment of 56 months in a federal penitentiary.

[86] The 56-month sentence of imprisonment is being imposed for the offence contrary to section 151 of the **Criminal Code** with a 56-month sentence for the section 152 **Criminal Code** offence to be served concurrently with the other offence. Furthermore, pursuant to the **Kienapple** principle, the Court hereby orders a conditional judicial stay for the offence of sexual assault contrary to section 271 **Code**. Finally, with respect to the failure to attend court offence contrary to section 145(2)(b) of the **Code**, the Court orders a sentence of 30 days in prison to be served concurrently with the other sentences which have been imposed.

[87] Before concluding the determination of SPW's sentence on a go-forward basis, it is also important to consider the amount of remand credit that he has accumulated to this date, provide an enhanced credit of 1½ days for each day served on remand and then deduct that total amount from the 56-month sentence that has been imposed.

[88] The Court was advised that, as of March 24, 2021, SPW had spent a total of 511 days on remand. Taking into account, the further period of time on remand between March 24, 2021 and April 27, 2021, which adds a further 34 days of remand credit for a total of 545 days to today's date. Therefore, calculating the enhanced credit at 1½ days for each actual day SPW has served on remand, I find

that the total enhanced credit would result in an additional 278 days of remand credit for a grand total of 823 days of remand credit.

[89] Having determined that the just and appropriate sentence of imprisonment for SPW to serve in a penitentiary was 56 months, and finding that the enhanced remand credit of 823 days is essentially the equivalent of 27½ months of remand credit, I hereby sentence SPW to a "go forward" sentence of imprisonment of 28½ months to be served in a federal penitentiary.

Ancillary Orders:

[90] The Crown Attorney also recommends that the Court should impose the following ancillary orders, which were not opposed by Defence Counsel.

[91] Therefore, the Court hereby imposes these ancillary orders: (1) a DNA order pursuant to section 487.051 of the **Code** as the offences are each a "primary designated offence" for that purpose; (2) a section 109 **Code** firearms prohibition order for 10 years; (3) a **Sex Offender Information Registration Act (SOIRA)** order pursuant to section 490.013(1)(b) of the **Criminal Code** for 20 years; (4) a section 161 **Code** order of prohibition to prohibit SPW from being in contact with persons under the age of 16 years as well as certain locations or employment where a person under the age of 16 years could reasonably be expected to be present for a period of 20 years after the date upon which SPW is released from imprisonment for the offences and (5) a section 743.21 **Code** order prohibiting SPW from communicating, directly or indirectly with the victim, MW, during the custodial period of his sentence of imprisonment.

[92] Finally, with respect to the imposition of the surcharge for victims, pursuant to section 737 of the **Criminal Code**, given the fact that SPW has not worked in a long time, has been held in custody for the last 545 days, I find it would be an undue hardship to order him to pay a surcharge for victims. The Victim Fine Surcharge is hereby waived.

Theodore Tax, JPC