*R v Scott*, 2024 NWTSC 24 S-1-CR-2021-000026

 IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

 IN THE MATTER OF:

 HIS MAJESTY THE KING

 - v -

 ANDREW SCOTT

 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 Transcript of the Decision delivered by The

 Honourable Deputy Justice D. Gates, sitting in

 Yellowknife, in the Northwest Territories, on the

 24th day of May, 2024.

 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 APPEARANCES:

 A. Piché Counsel for the Crown

 J.K. Bran Counsel for the Defence

 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 Charge under s. 271 Criminal Code

 1

 1 THE COURT: On December 14, 2023, the

 2 accused Andrew Scott was convicted of a sexual

 3 assault on J.M. that took place on March the 27,

 4 2019 at Yellowknife. J.M. is the mother of their

 5 ten-year-old son and a former intimate partner of

 6 the accused. He is here to be sentenced today.

 7 The offence of sexual assault carries a

 8 maximum sentence of ten years' imprisonment. No

 9 minimum sentence is prescribed. The defence

 10 urges me to impose a sentence of two years less a

 11 day to be served in the community by way of a

 12 conditional sentence followed by two years'

 13 probation. The Crown, on the other hand,

 14 maintains that an appropriate sentence would be

 15 three-and-a-half years' imprisonment.

 16 Facts. The facts relating to this matter

 17 are set out in my oral reasons for decision

 18 delivered on December 14, 2023. Briefly stated,

 19 the accused forced unprotected sexual intercourse

 20 on the victim while attending her home in

 21 response to her invitation to come and smoke

 22 marijuana together. The accused and the victim

 23 separated in October 2018, so an informal

 24 shared-parenting arrangement between them had

 25 only been in place for a few months at the time

 26 of the offence. They were in regular contact

 27 with one another because the victim did not drive

 2

 1 and, as such, regularly relied on the accused to

 2 drive her to work and their son to school.

 3 On the date of the offence the accused was

 4 looking after their son while he was on his

 5 school break notwithstanding that it was the

 6 victim's week to have the child in her care.

 7 After having returned their five-year-old

 8 son to his mother's care, the accused returned to

 9 her residence later that evening. After smoking

 10 a joint outside, they went inside the residence.

 11 In the living room they discussed some behavioral

 12 issues exhibited by their child. At one point

 13 the accused grabbed the victim and tried to pull

 14 down her pants. He told her that she was lonely

 15 and that she needed his comfort. The victim

 16 repeatedly said "no" and attempted to pull up her

 17 pants. The accused then flipped her around,

 18 pushed her head and shoulders down towards the

 19 couch and proceeded to have unprotected sexual

 20 intercourse with her without her consent. She

 21 was upset and crying. She told the accused that

 22 he was disgusting and to stop but he would not

 23 listen. She felt helpless and could not fight

 24 him any longer. She did not scream as she did

 25 not want to wake up their sleeping child. After

 26 repeatedly telling him "no" and to "stop" the

 27 victim told him to just be done and to leave.

 3

 1 After the sexual activity had ended, the accused

 2 made comments about how wet the victim got and

 3 how much she needed and enjoyed the sex. The

 4 accused left the residence after the victim again

 5 told him that he was disgusting and that he was

 6 to leave.

 7 The Principles of Sentencing. The

 8 principles of sentencing are set out in

 9 Section 718 of the Criminal Code. The section

 10 reads as follows:

 11 "The fundamental purpose of

 12 sentencing is to contribute, along

 13 with crime prevention initiatives,

 14 to respect for the law and the

 15 maintenance of a just, peaceful

 16 and safe society by imposing such

 17 sanctions that have one or more of

 18 the following objectives:

 19 (a) to denounce unlawful conduct;

 20 (b) to deter the offender and

 21 other persons from committing

 22 offences;

 23 (c) to separate offenders from

 24 society where necessary;

 25 (d) to rehabilitate offenders;

 26 (e) to provide reparations for

 27 harm done to victims and to the

 4

 1 community; and

 2 (f) to promote a sense of

 3 responsibility in offenders, and

 4 acknowledgement of the harm done

 5 to victims and the community".

 6 I note that Section 718.2 is applicable in this

 7 instance:

 8 " A sentence should be increased

 9 or reduced to account for any

 10 relevant aggravating or mitigating

 11 circumstances relating to the

 12 events or the offender;

 13 (b) evidence that an offender, in

 14 committing the offence, abused the

 15 offender's intimate partner or a

 16 member of the victim or offender's

 17 family, shall be deemed to be an

 18 aggravating circumstance;

 19 (c) a sentence should be similar

 20 to sentences imposed on similar

 21 offenders for similar offences

 22 committed in similar

 23 circumstances; and

 24 (d) an offender should not be

 25 deprived of liberty, if less

 26 restrictive sanctions may be

 27 appropriate in the circumstances".

 5

 1 It is a fundamental principle of sentencing

 2 that a sentence must be proportionate to the

 3 gravity of the offence and the degree of

 4 responsibility of the offender. In R. v. Lacasse

 5 the Supreme Court explained, at paragraph 12, that,

 6 "proportionality is the cardinal

 7 principle that must guide

 8 appellate courts in considering

 9 the fitness of the sentence

 10 imposed on an offender. The

 11 more serious the crime and its

 12 consequences or the greater the

 13 offender's degree of

 14 responsibility the heavier the

 15 sentence will be. In other words,

 16 the severity of a sentence depends

 17 not only on the seriousness of the

 18 crime's consequences but also on

 19 the moral blameworthiness of the

 20 offender. Determining a

 21 proportionate sentence is a

 22 delicate task".

 23 Further guidance is found in the decision of

 24 Renke, J. in *R v Pettitt*, 2021 ABQB 773, at

 25 paragraph 28:

 26 "The 'gravity' aspect of

 27 proportionality focuses on the act

 6

 1 and its consequences or on what

 2 was done. The 'responsibility'

 3 aspect focuses on the actor, the

 4 offender's level of fault in

 5 committing the offence, how the

 6 act was done, why the act was

 7 done, and by whom the act was

 8 done".

 9 These principles guide and direct courts in what

 10 is one of the most difficult judicial tasks,

 11 crafting a fit and proper sentence for an offence

 12 and an offender.

 13 In assessing the gravity of the offence I am

 14 satisfied that the offence of sexual assault is a

 15 very serious offence. It strikes at the essence

 16 of an individual's dignity, sexual integrity and

 17 personal safety. This case involves a

 18 non-consensual act of sexual intercourse. As

 19 such, the defence concedes that the circumstances

 20 surrounding the commission of this offence

 21 constitute a major sexual assault as that term

 22 has been defined and interpreted by various

 23 decisions of the Court of Appeal including *R v*

 24 *Arcand* and *R v A.J.P.J*., a decision of the

 25 Northwest Territories Court of Appeal. The

 26 starting point for a major sexual assault is

 27 three years. From this three-year starting point

 7

 1 the sentence can be adjusted up or down to

 2 account for aggravating and mitigating

 3 circumstances.

 4 These decisions must, in my view, be

 5 considered in light of the Supreme Court's

 6 decisions in *R v Friesen* and *R v Parranto*. The

 7 impact of Friesen and Parranto is very thoroughly

 8 canvassed by Justice S.E. Pepper of the Alberta

 9 Court of Justice in *R v Hay*. I agree with her

 10 conclusion that Friesen tells us that starting

 11 points are guidelines only and not "hard and fast

 12 rules". I also agree that Parranto tells us that

 13 the starting points do not dispense with the

 14 requirement for an individualized approach to

 15 sentencing that "takes into account all relevant

 16 factors and sentencing principles". In Hay

 17 Justice Pepper suggested that the offence of

 18 sexual assault exists on the spectrum of

 19 seriousness. At paragraph 36 of her decision she

 20 stated:

 21 "While all sexual assault is

 22 serious, like all crimes it exists

 23 on a spectrum of seriousness.

 24 Some factors will push a crime

 25 towards a longer sentence often

 26 involve planning and deliberation,

 27 violence, injury, restraint,

 8

 1 multiple offenders, a young or

 2 otherwise vulnerable complainant

 3 or an unconscious complainant. A

 4 crime of sexual assault that does

 5 not contain these aggravating

 6 elements can attract sentences of

 7 shorter duration".

 8 A review of the many cases cited by counsel

 9 reveals that the violation of the integrity and

 10 dignity of a victim of a major sexual assault is

 11 so serious that it will almost always attract a

 12 significant jail sentence.

 13 Victim Impact Statement. In accordance with

 14 Section 722.1 of the Code, the victim, J.M., read

 15 her Victim Impact Statement during the sentencing

 16 hearing. Victim Impact Statements allow the

 17 victims of crime to take an active and meaningful

 18 role in the sentencing process. Through their

 19 participation in the sentencing process we gain a

 20 broader understanding of how crime affects real

 21 people. I want to thank S.M. for sharing with

 22 the Court the physical and emotional harm as well

 23 as the economic loss that she has experienced

 24 because of this offence. It takes courage and

 25 strength to come forward in a public setting to

 26 share this very personal information.

 27 It is clear from the Victim Impact Statement

 9

 1 that this offence has caused significant

 2 emotional damage and profoundly affected J.M.'s

 3 sense of personal security in her own home and in

 4 her community. It is also very clear to me

 5 that, notwithstanding the passage of almost

 6 five years since the date of this offence, Ms. M.

 7 continues to experience shame, disgust,

 8 loneliness, and feelings of insecurity. I am

 9 pleased to learn that she is receiving support

 10 and assistance to help her address the

 11 accompanying anxiety and depression.

 12 Personal Circumstances of the Offender.

 13 In addition to the submissions of counsel the

 14 Court had the benefit of a Pre-Sentence Report

 15 prepared in relation to Mr. Scott. The accused

 16 is currently 39 years of age. He was born in

 17 Woodstock, New Brunswick, and moved to St. John

 18 at the age of five months where he remained until

 19 he finished school. The accused's parents

 20 separated prior to his birth, and he has had

 21 virtually no contact with his father throughout

 22 his life. At the age of 24, Mr. Scott met his

 23 father for the first time. He has had some

 24 contact with his father in the past 15 years but

 25 his father's alcoholism was a barrier during the

 26 first ten of these years. Mr. Scott reports that

 27 there has been better contact in the past

 10

 1 five years. Mr. Scott has two stepbrothers, a

 2 product of his father's union with another

 3 partner, but he has never met them. The

 4 accused's parents recently reconciled and have

 5 resumed a relationship.

 6 Mr. Scott had a stable and loving upbringing

 7 and was surrounded by very supportive extended

 8 family members during his youth and adolescence.

 9 He cites them as a very positive force in his

 10 life. Based on what I have seen and heard, it is

 11 clear to me that the accused has a very strong

 12 sense of family. After graduating with honours

 13 from high school, and being named the top athlete

 14 in New Brunswick, Mr. Scott attended university

 15 for two years. He left his university program

 16 and enrolled in a one-year machinist course at

 17 New Brunswick Community College. He worked as a

 18 personal trainer from the age of 17 to 24 years.

 19 In 2009 he enlisted with the Canadian Armed

 20 Forces as a linesman and was responsible for

 21 building military communications towers. He was

 22 posted to Dartmouth, Nova Scotia, in 2010 and

 23 then to Yellowknife in 2015. He left the

 24 military in 2016.

 25 The accused began a relationship with the

 26 victim J.M. in 2006 in New Brunswick. Their

 27 son was born in 2014. The family moved to

 11

 1 Yellowknife the following year but the accused

 2 and the victim separated, as I mentioned a few

 3 moments ago, in October of 2018. After leaving

 4 the military the accused took two years off to

 5 recover from PTSD and be a stay-at-home parent.

 6 When he returned to work he did self-contracting

 7 work for various communications companies. In

 8 2023 he commenced employment with Northview as a

 9 renovator. Unfortunately, Mr. Scott was

 10 terminated a few months ago once his employer

 11 learned of the matter now before the courts.

 12 Mr. Scott commenced a new relationship in

 13 2020. Together with his new partner they have a

 14 three-month-old son. His spouse also works for

 15 Northview as a cleaner. She is currently on

 16 maternity leave and collecting Employment

 17 Insurance maternity benefits and expects to

 18 return to work. They share in the household

 19 expenses. In addition to his full-time

 20 employment at Northview, the accused and his wife

 21 recently started a construction company.

 22 Mr. Scott's goal is to become fully self-employed

 23 at some point in the future.

 24 Mr. Scott has one previous criminal

 25 conviction in Halifax, Nova Scotia, in 2014 for

 26 conspiracy to traffic in a Schedule 2 substance.

 27 He received a 12-month conditional sentence in

 12

 1 relation to this matter. According to the

 2 defence, Mr. Scott got involved with a friend in

 3 the unlawful distribution of steroids.

 4 Mr. Scott's counsel asks the court to place

 5 minimal, if any, weight on this conviction given

 6 the age of the entry, the fact that it did not

 7 involve an offence of violence, and that it

 8 resulted in a conditional sentence. The Crown

 9 concedes that little, if any, weight should be

 10 placed on this prior conviction. I agree. In my

 11 view, the age of the conviction and the nature of

 12 the offence provide little assistance in the

 13 assessment of Mr. Scott's moral blameworthiness

 14 for the current offence.

 15 It is clear to me from the Pre-Sentence

 16 Report that Mr. Scott is a very good father to

 17 both of his sons and committed to supporting both

 18 of his children. While he continues to maintain

 19 his innocence notwithstanding the conviction

 20 entered this past December, he told the author of

 21 the Pre-Sentence Report that he fully accepts the

 22 decision of the Court.

 23 The Pre-Sentence Report paints a very

 24 positive picture of the accused's current

 25 relationship. However, the family is

 26 experiencing some serious financial difficulties

 27 and are several months in arrears on the rent for

 13

 1 their apartment. The accused is also carrying a

 2 significant debt load. In addition, there are

 3 hints in the Pre-Sentence Report that the accused

 4 may be turning to alcohol to deal with the very

 5 many stresses in his life. There is also some

 6 suggestion that the accused disappears for

 7 periods of time during which his current partner

 8 has no idea where he is.

 9 It is clear to me that Mr. Scott is subject

 10 to significant sources of stress in his life.

 11 He has been diagnosed and is being treated for

 12 PTSD. In addition, he carries the stress of

 13 family debt as well as the ongoing conflict

 14 relative to a shared parenting arrangement with

 15 the victim. He is, doubtless, also suffering

 16 stress flowing from the fact that this matter has

 17 been hanging over him for nearly five years.

 18 Further, he is a new father and in a relatively

 19 new relationship. Finally, up until quite

 20 recently he was working two jobs to try and

 21 provide for his various family responsibilities.

 22 By the terms of release on this charge

 23 Mr. Scott was prohibited from having contact with

 24 the victim except through a third party and then

 25 restricted to matters pertaining to their shared

 26 parenting of their son. I will have more to say

 27 about that in a moment.

 14

 1 The Crown relies on a series of authorities

 2 including *R v A.J.K*., *R v A.J.P.J*., R v D.J.A., *R*

 3 *v H.P.M*., and *R v T.S.I*. The defence asked me

 4 to consider the decision in *R v Hudson*, a

 5 decision of Justice Shaner, dated November the

 6 15, 2023. In addition, I invited counsel to

 7 consider the decision of both the Court of Appeal

 8 and the Alberta Court of Justice in *R v Hay*,

 9 previously mentioned.

 10 Conditional Sentences. As previously

 11 indicated, the defence seeks a sentence of two

 12 years less a day to be served in the community.

 13 Section 742.1 sets out the circumstances in which

 14 a court may impose a conditional sentence of

 15 imprisonment. Certain conditions apply. First,

 16 the section requires that the court impose a

 17 sentence of less than two years in relation to

 18 the offence. Second, the offence must be one for

 19 which no minimum term of imprisonment is

 20 prescribed. Third, the offence must not be one

 21 for which a maximum term of imprisonment of

 22 14 years or life may be imposed. In addition,

 23 the court must be satisfied that serving the

 24 sentence in the community would not endanger the

 25 safety of the community and would be consistent

 26 with the fundamental principles set out in

 27 Section 718 to 718.2. While the section in the

 15

 1 Code which provides for conditional sentences

 2 also sets out other limits, counsel agree that

 3 none of these other limits apply in this

 4 instance.

 5 In *R v Hay*, Justice Pepper provides a very

 6 comprehensive history of the availability of

 7 conditional sentences in cases of sexual assault.

 8 I am grateful to her for this very helpful review

 9 set out at paragraphs 48 to 57 of her decision.

 10 I do not propose to repeat this entire section of

 11 her judgment but would summarize her review as

 12 follows:

 13 1) Conditional sentences were introduced

 14 in September 1996;

 15 2) In 2000, the Supreme Court found that

 16 parliament's intention in introducing conditional

 17 sentences was to enhance restorative justice

 18 principles in the sentencing process and to

 19 reduce reliance on the use of prison. The

 20 authority for that is *R v Proulx*;

 21 3) From 1996 to 2007, Section 742.1

 22 conditional sentence orders were available for

 23 any offence, including sexual assault, if the

 24 proposed sentence was less than two years and the

 25 other preconditions referred to above had been

 26 met;

 27 4) In 2007 the Criminal Code was amended

 16

 1 to restrict conditional sentences and, as such,

 2 they were no longer available for serious

 3 personal injury offences including sexual

 4 assault;

 5 5) The Criminal Code was further amended

 6 in 2012 to remove the phrase "serious personal

 7 injury offences" but the amendment specifically

 8 precluded conditional sentences for the offence

 9 of sexual assault when prosecuted by indictment;

 10 6) In November 2022 a further amendment

 11 to the Criminal Code reinstated the option of

 12 conditional sentences for sexual assault

 13 offences, again subject to the various conditions

 14 described above;

 15 7) A conditional sentence order is a

 16 form of incarceration served in the community

 17 under strict conditions for up to two years less

 18 a day.

 19 In Proulx the Supreme Court found that a

 20 conditional sentence can provide significant

 21 denunciation and deterrence,

 22 "particularly so when onerous

 23 conditions are imposed and the

 24 duration of a conditional sentence

 25 is extended beyond the duration of

 26 the jail sentence that would

 27 ordinarily have been imposed in

 17

 1 the circumstances",

 2 and that's found at paragraphs 102 and 127 of

 3 Proulx. However, the court also recognized that

 4 there may be some instances where the requirement

 5 for denunciation and deterrence is so pressing

 6 that only a custodial sentence will be a suitable

 7 sentence. In my view this is one of those cases.

 8 Hay was a case involving a consensual sexual

 9 encounter where consent was withdrawn when the

 10 offender initiated a new form of sexual activity

 11 without having first obtained the victim's

 12 consent. At that point the victim abruptly moved

 13 away, got angry and asked the offender to leave

 14 her house. Hay immediately apologized to the

 15 victim and made no attempt to continue the sexual

 16 activity. He was acquitted at trial but the

 17 acquittal was overturned by the Court of Appeal.

 18 The Court of Appeal entered a conviction and the

 19 matter was remitted back to the trial judge for

 20 sentence. He received a sentence of two years

 21 less a day to be served in the community on a

 22 conditional sentence order. Of note, the court

 23 found that the very brief duration of the assault

 24 was a neutral factor, not a mitigating factor as

 25 advocated by the defence, but that it was a

 26 factor in assessing the moral blameworthiness of

 27 the offender.

 18

 1 The case relied on by the defence Hudson

 2 involved facts that are similar to those in Hay

 3 though Hudson involved a guilty plea. In that

 4 case the offender and the victim were intimate

 5 partners. As in Hay, Mr. Hudson penetrated the

 6 victim's anus without first having obtained her

 7 consent to that sexual activity. Both the

 8 offender and the victim were Indigenous, and the

 9 offender had significant Gladue factors that the

 10 court found diminished his moral blameworthiness

 11 relative to the offence. A sentence of 18 months

 12 to be served in the community was imposed in that

 13 instance.

 14 Returning to Hay, Justice Pepper identifies

 15 three types of cases involving major sexual

 16 assault. While not determinative I find her

 17 analysis to be helpful. At paragraph 58 she

 18 states:

 19 "There are three main types of

 20 cases cited by the Crown, all of

 21 which involve major sexual

 22 assault. There are cases

 23 involving an unconscious victim,

 24 cases with significant acts of

 25 overcoming resistance through

 26 force, and cases where consent

 27 is removed but the assault is

 19

 1 discontinued with no act of

 2 overcoming resistance".

 3 In my view, both Hay and Hudson fall into the

 4 third category discussed by Justice Pepper. As

 5 such, both cases involve situations where consent

 6 had previously been given but subsequently

 7 withdrawn. In both instances the offender

 8 immediately discontinued the sexual activity.

 9 In my view, this case does not fall within

 10 this same category. Rather, this case involved

 11 significant acts on the part of Mr. Scott in

 12 overcoming the resistance of J.M. The decisions

 13 in Hay and Hudson are, in my view, readily

 14 distinguishable from the matter before me.

 15 Aggravating Circumstances. I agree with the

 16 Crown that there are several aggravating

 17 circumstances in this case. First, this was a

 18 case where Mr. Scott persisted in a sexual

 19 assault after the victim made it clear that she

 20 was not consenting to his actions. As such, I

 21 agree that this case is, as I mentioned a moment

 22 ago, readily distinguishable from the line of

 23 cases involving an offender who immediately

 24 desists from sexual activity once he becomes

 25 aware of his partner's lack of consent. This is

 26 clearly not such a case, and the assault took

 27 place over a significant period of time. I also

 20

 1 find aggravating the fact that the victim was

 2 Mr. Scott's former intimate partner and that he

 3 engaged in unprotected sexual intercourse with

 4 her. Also aggravating is the fact that the

 5 offence took place in the victim's home, a

 6 location where she was entitled to feel safe.

 7 The fact that the child was present and sleeping

 8 at the time is also a somewhat aggravating

 9 circumstance. I agree that the impact on the

 10 child of witnessing his mother being sexually

 11 assaulted by his father would, doubtless, have

 12 been very negative. Fortunately this did not

 13 occur. Finally, the significant continuing

 14 impact of this offence on the victim is an

 15 aggravating circumstance in this instance.

 16 One of the terms of Mr. Scott's release on

 17 these charges was that he is not to communicate

 18 directly or indirectly with the victim except

 19 through a sober third party to arrange child care

 20 access. He entered into this undertaking on

 21 January 21, 2021. During the sentencing hearing

 22 the Crown introduced copies of text messages

 23 exchanged between Mr. Scott and the victim in

 24 October 2023. These are found in Exhibit S-2 and

 25 Exhibit S-3. The defence consented to the

 26 introduction of this evidence.

 27 On October 12, 2023, J.M. sent a text to

 21

 1 Mr. Scott seeking his agreement to a form of

 2 medical treatment recommended for their son.

 3 J.M. initiated this direct communication in the

 4 mistaken belief that the parties were permitted

 5 by the terms of Mr. Scott's release conditions to

 6 communicate in relation to their son. Several

 7 messages were exchanged between the parties.

 8 Mr. Scott's hostility towards J.M. is quickly

 9 revealed. His messages are aggressive and filled

 10 with profanity and veiled threats while J.M.

 11 remains relatively calm. A second exchange of

 12 text messages was initiated by Mr. Scott relating

 13 to his request for the return of clothing items

 14 he had purchased for their son. Again, the tone

 15 of Mr. Scott's messages is aggressive, even

 16 hostile. As with the first text messages he

 17 makes threats against J.M. and members of her

 18 family. I am advised that Mr. Scott was charged

 19 with breach of undertaking but the Crown has

 20 elected not to proceed with those charges. The

 21 Crown does, however, points to this conduct and

 22 urges the Court to find that he is not a suitable

 23 candidate for a community-based sentence.

 24 While I find Mr. Scott's failure to comply

 25 with the terms of his release to be an

 26 aggravating circumstance, I place limited weight

 27 on this evidence. First, these two text messages

 22

 1 took place while Mr. Scott was in Edmonton with

 2 his new partner and involved in medical

 3 complications relating to the birth of their

 4 child. Second, no other breaches over the very

 5 extended period of time that he was subject to

 6 these release conditions were noted.

 7 Nevertheless, the content of Mr. Scott's messages

 8 is concerning, particularly the threats directed

 9 towards J.M. and members of her family.

 10 Mitigating Circumstances. I find that

 11 various aspects of Mr. Scott's background to be

 12 mitigating in this instance. First, he is

 13 reported to be a loving and caring father to his

 14 two sons. While the victim, the mother of his

 15 elder son, gave evidence during the trial of the

 16 toxic nature of her relationship with Mr. Scott

 17 post separation, she acknowledged that he was a

 18 good father. The various individuals who

 19 provided input into the Pre-Sentence Report all

 20 spoke highly of Mr. Scott as a parent. Second,

 21 Mr. Scott has a solid Record of Employment

 22 including ten years as a member of the Canadian

 23 Armed Forces. He served overseas in Kuwait,

 24 Syria, Afghanistan and the United States. While

 25 not directly involved in combat, his time with

 26 the Armed Forces certainly involved service in

 27 combat zones. He has been diagnosed with PTSD

 23

 1 arising from his military service. In addition

 2 to his service in combat zones, Mr. Scott has

 3 lost former colleagues to suicide because of

 4 PTSD. To his credit, Mr. Scott is reported to

 5 regularly access on-line counselling through

 6 Veterans Affairs to address his trauma and PTSD.

 7 Collateral Consequences. At the request of

 8 the court counsel had provided supplementary

 9 written submissions on the impact of collateral

 10 consequences on Mr. Scott's two children as well

 11 as his current family if he were to receive a

 12 penitentiary term of imprisonment as requested by

 13 the Crown. In Pham the Supreme Court recognized

 14 that collateral consequences flowing from an

 15 offender's personal circumstances, including the

 16 impact on the offender's family, may be relevant

 17 in the determination of an individualized

 18 sentence in appropriate circumstances. If

 19 applicable, collateral consequences are not,

 20 however, mitigating factors as they do not relate

 21 either to the seriousness of the offence or the

 22 offender's degree of responsibility.

 23 In *R v Suter*, the Supreme Court explained

 24 that collateral consequences may be found to

 25 relate to the sentencing principles of

 26 individualization of sentences and sentencing

 27 parity. In both instances the court explained

 24

 1 that the presence of collateral consequences

 2 cannot take a sentence outside of the appropriate

 3 range of sentences the offender would otherwise

 4 receive. At paragraph 53 of Suter the court

 5 stated:

 6 "I agree with the Court of Appeal

 7 that the fundamental principle of

 8 proportionality must prevail in

 9 every case - collateral

 10 consequences cannot be used to

 11 reduce a sentence to a point where

 12 the sentence becomes

 13 disproportionate to the gravity

 14 of the offence or the moral

 15 blameworthiness of the offender.

 16 There is, however, no requirement

 17 that the collateral consequences

 18 emanate from state misconduct in

 19 order to be considered as a factor

 20 in sentencing".

 21 In *R v* *Kogvik*, the decision of the Nunavut

 22 Court of Appeal, the offender entered a plea of

 23 guilty to aggravated assault and was sentenced to

 24 a three-year suspended sentence. He viciously

 25 attacked a stranger while she was out hiking,

 26 inflicting serious injury including a broken arm,

 27 multiple other fractures and head wounds. The

 25

 1 offender was the primary care-giver and income

 2 earner for his partner and children. His

 3 incarceration would also deprive his parents of

 4 his assistance. The Nunavut Court of Appeal

 5 found the sentence to be demonstrably unfit and

 6 substitute a sentence of seven months

 7 imprisonment followed by probation for a period

 8 of one year. At paragraph 34 they outline the

 9 proper approach to the inclusion of collateral

 10 consequences in the sentencing process:

 11 "It is an unfortunate reality that

 12 collateral consequences flow from

 13 most criminal convictions, their

 14 seriousness increasing in step

 15 with the seriousness of the

 16 offence and consequent sentence.

 17 Those sentenced for serious crimes

 18 may lose their employment and

 19 housing. Professional licenses

 20 and designations may be revoked.

 21 Their standing in the community

 22 may be diminished and their

 23 reputation destroyed. Their

 24 future opportunities may be

 25 limited by a criminal record.

 26 As here, those for whom an

 27 offender is responsible may be

 26

 1 forced to adapt to the loss of a

 2 care-giver or provider. These are

 3 not irrelevant considerations,

 4 however, collateral consequences,

 5 no matter how sympathetic, must

 6 not eclipse the overarching duty

 7 of a sentencing judge to impose a

 8 proportionate sentence in

 9 consideration of all of the

 10 circumstances".

 11 In this instance Mr. Scott points to the

 12 very damaging effect of sending him to the

 13 penitentiary on his family responsibilities, both

 14 as 50/50 parenting arrangement for his

 15 ten-year-old son with the victim of this offence

 16 and his new son and new partner who is currently

 17 on maternity leave. During the sentencing

 18 hearing he reported that he had recently lost his

 19 current employment because of his outstanding

 20 legal matter. While he is still developing his

 21 construction company, his ability to support his

 22 children and partner would be compromised if he

 23 were to be sentenced to a penitentiary term of

 24 imprisonment.

 25 As previously indicated, Mr. Scott never

 26 knew his own father until he was 24 years of age.

 27 While he now has some relationship with his

 27

 1 father that obviously was completely missing in

 2 Mr. Scott's life during his formative years. I

 3 am mindful that sending Mr. Scott to the

 4 penitentiary as requested by the Crown will lead

 5 to two other young boys being deprived of their

 6 father for a significant period. It will also

 7 result in two other mothers being left to care

 8 for children on their own. Ironically, it would

 9 also result in the victim being left to carry a

 10 significantly greater burden in terms of child

 11 care.

 12 I cannot ignore these collateral

 13 consequences, particularly the risk it creates

 14 for two young children. Mr. Scott's current

 15 partner was previously employed as a cleaner

 16 at Northview, the same company that employed

 17 Mr. Scott. While I do not have detailed

 18 information before me, there is some financial

 19 information in the Pre-Sentence Report relating

 20 to Mr. Scott's current financial circumstances

 21 that include reference to his partner's

 22 contribution to the support of the family. As

 23 such, it is reasonable to conclude that her

 24 current employment would not provide an adequate

 25 basis for her to support herself and her son.

 26 I am very sympathetic to the potential

 27 impact that a sentence of two years or more will

 28

 1 have on Mr. Scott's family and his relationship

 2 with his two sons. However compelling this

 3 argument may be, I cannot allow these collateral

 4 consequences to displace what is otherwise a

 5 proportionate sentence in this instance. Sexual

 6 assault is a very serious offence in which the

 7 primary sentencing objectives are denunciation

 8 and specific and general deterrence given the

 9 generally very high moral blameworthiness

 10 associated with the offence.

 11 All of the circumstances relating to this

 12 offender as well as the circumstances relating to

 13 the offence have been carefully considered in

 14 this sentencing process in assessing Mr. Scott's

 15 degree of responsibility for moral

 16 blameworthiness. I have very carefully

 17 considered the various cases cited by counsel.

 18 While the sentencing authorities are helpful, I

 19 would observe that no two cases are alike and

 20 that the role of the court is not to dissect

 21 sentencing authorities to find a perfect fit.

 22 The sentencing process is not a mechanical one

 23 but rather the delicate balancing of sentencing

 24 principles, the unique circumstances of both the

 25 case and the offender and the application of

 26 relevant and mitigating and aggravating

 27 circumstances.

 29

 1 Again, having carefully considered both the

 2 aggravating and mitigating circumstances that

 3 exist in this case, I am not persuaded that a

 4 sentence of less than two years would be

 5 appropriate. As such, I cannot accede to the

 6 defence request for a conditional sentence to be

 7 served in the community in this instance.

 8 Would you please stand up, Mr. Scott. On

 9 the charge of the sexual assault of J.M. I

 10 sentence you to three years of imprisonment. In

 11 addition, I direct the following ancillary

 12 orders: There will be a DNA Order pursuant to

 13 Section 47.051 subsection (1) of the Criminal

 14 Code. You are to provide a sample of your DNA

 15 within 72 hours of having been taken into custody

 16 which is now. In addition, there will be a

 17 Firearms Prohibition Order for ten years. I

 18 further make an order under Section 743.21 of the

 19 Code that you are to have no communication,

 20 directly or indirectly, with J.M. during the

 21 course of your sentence of imprisonment except

 22 via a third party and in relation to issues

 23 pertaining to your child. Have a seat,

 24 Mr. Scott.

 25 Counsel, we had a brief discussion during

 26 the sentencing hearing about the potential

 27 application of the provision of the Code dealing

 30

 1 with a SOIRA Order. Forgive me but my

 2 recollection, Ms. Piché, is that you sought a

 3 SOIRA Order and, Mr. Bran, you took the position

 4 that it was not mandatory, that it should not be

 5 made in this instance.

 6 J. BRAN: That's correct, Sir.

 7 A. PICHÉ: I only pointed to the fact

 8 that it is presumptive in this case under the new

 9 legislation, and the burden is on the defence to

 10 convince the court it shouldn't be made.

 11 THE COURT: Mr. Bran, what do you want to

 12 say about that, if anything?

 13 J. BRAN: I agree with my friend the

 14 burden is on the defence, and in my respectful

 15 submission this is an individual with no record

 16 of any relevance. His background and the

 17 circumstances of this case I would suggest inform

 18 us that this is not something that would be in

 19 the best interest to have him on a SOIRA Order.

 20 The order is -- is not required under the

 21 circumstances would be my position, Sir.

 22 THE COURT: Ms. Piché?

 23 A. PICHÉ: I don't really have comments.

 24 I -- I don't disagree with Mr. Bran.

 25 THE COURT: Thank you. Under the

 26 circumstances I decline to make a SOIRA Order in

 27 relation to this matter.

 31

 1 Mr. Bran, one of the points that you made in

 2 your brief was your client's concern that on

 3 sending him to the penitentiary, likely down

 4 south, I'm going to ask you about that in a

 5 moment, would have a negative impact on the

 6 relationship between the two step-siblings -

 7 the ten-year old that Mr. Scott has with J.M. and

 8 the much younger child that he has with his new

 9 partner. I'm concerned about that. In my view

 10 the relationship that you have with your siblings

 11 is the only relationship you have for your entire

 12 life, and so in my view it's a very important

 13 relationship. What, if anything, do you have to

 14 say to me about how we can address that issue?

 15 J. BRAN: Sir, I'm not sure that, that

 16 this court given the decision that it just made

 17 is in a position to do that. I've recently been

 18 advised by my client that the mother of his

 19 eldest child is actively making plans to remove

 20 that child from this jurisdiction to be sent back

 21 east to live with her family. I've not been able

 22 to confirm that, but this is the information that

 23 I've been provided. This is something that I

 24 mentioned in -- in my brief in regard to not only

 25 Mr. Scott losing that day-to-day contact with his

 26 children but also his two children losing that

 27 contact between them. It is a concern.

 32

 1 Mr. Scott has advised me that he's going to, of

 2 course, take steps to protect his interest

 3 through the family courts, but again, what this

 4 court may be able to do I'm not sure. There's

 5 nothing before the court so I'm not sure

 6 there's anything --

 7 THE COURT: Of course not. I can't make a

 8 Family Law order. I'm not suggesting that that's

 9 even in my contemplation, but I am concerned

 10 about it.

 11 J. BRAN: As we are.

 12 THE COURT: As I understand your client is

 13 as well. The other thing that I want to ask you

 14 about is do you want me to make a recommendation

 15 that he serve his sentence in the Territories?

 16 J. BRAN: I would ask that the Court

 17 make that recommendation. I know it's not

 18 binding but I can advise my understanding is that

 19 when those recommendations are reviewed by the

 20 correctional authorities they do take them

 21 seriously and they do look into those requests

 22 diligently. So I would ask the Court to make a

 23 judicial recommendation that if at all possible

 24 Mr. Scott have the opportunity to serve that

 25 sentence here in the community.

 26 THE COURT: Okay. Thank you. Ms. Piché,

 27 do you have anything you want to say about that?

 33

 1 A. PICHÉ: No.

 2 THE COURT: Okay. I am going to direct

 3 that a copy of these reasons and a copy of the

 4 Pre-Sentence Report be - obviously these reasons

 5 will have to be transcribed, they can't be done

 6 immediately - but they should accompany the

 7 Warrant of Committal or they should be sent to

 8 the Correctional Service of Canada so that they

 9 are aware of what this case is about. They also

 10 need a copy of the Pre-Sentence Report in my

 11 view, so a copy of the Pre-Sentence Report should

 12 be appended to the Warrant of Committal.

 13 Mr. Scott, this is a very, very sad case.

 14 I found you guilty of sexually assaulting your

 15 former partner. It is a very serious matter.

 16 But today the focus is on you, and my concern for

 17 you, Mr. Scott, is, reading between the lines,

 18 looking at the content of your text messages,

 19 hearing what is in the Pre-Sentence Report, the

 20 limited information that I have about the

 21 counselling that you are getting for PTSD, I am

 22 seriously concerned about your well-being. You

 23 are a very angry man. I am not saying you do not

 24 have good reason to be angry. Your experience in

 25 the military, your other life experiences, may

 26 well explain this anger that I see in you. But

 27 you are a young guy. You have your whole life

 34

 1 ahead of you, and being angry for the rest of

 2 your life is not what I think you want to be

 3 because you can not be the kind of father that I

 4 know you want to be if you spend the rest of your

 5 life in anger. Angry parents create angry

 6 children and it goes on and on and on, and we

 7 never break the vicious circle.

 8 I am sure you think that this is the worst

 9 day of your life. I understand that. I hope in

 10 the next short while that you will come to see

 11 this as the first day of the second part of your

 12 life, and that the second part of your life is

 13 going to be a much happier one. You are going to

 14 deal with your demons. You are going to take

 15 whatever counselling is available to you in the

 16 correctional system. You are going to come to

 17 terms with your own issues and that you will take

 18 every single course or program that is offered to

 19 you while in the prison system. Do not waste a

 20 single day, Mr. Scott, by sitting in your cell

 21 and not doing anything. Use the time to better

 22 yourself, to heal, and to figure out how you are

 23 going to navigate the second part of your life.

 24 I believe that you can do that but you need to

 25 deal with your demons first.

 26 Thank you very much, Counsel, for your

 27 assistance. Ms. Piché, is there anything else?

 35

 1 A. PICHÉ: Just the victim of crimes

 2 surcharge --

 3 THE COURT: Oh, I'm sorry. What's your

 4 position on that?

 5 A. PICHE: Should be waived considering

 6 your order.

 7 THE COURT: Thank you. Mr. Bran, I'm sure

 8 you are not going to object to that. Crown says

 9 that I should waive the victim crime surcharge.

 10 J. BRAN: Yes, thank you. I missed

 11 that. I appreciate that.

 12 THE COURT: No, that's okay. So ordered.

 13 I want to thank you both very much, particularly

 14 you, Ms. Piché, for stepping in at the last

 15 minute on a case where you did not do the trial.

 16 Thank you.

 17 (PROCEEDINGS CONCLUDED)

 18 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 19

 20

 21

 22

 23

 24

 25

 26

 27

 36

 1 CERTIFICATE OF TRANSCRIPT

 2

 3 I, the undersigned, hereby certify that the

 4 foregoing pages are a complete and accurate

 5 transcript of the proceedings taken down by me in

 6 shorthand and transcribed from my shorthand notes

 7 to the best of my skill and ability. Judicial

 8 amendments have been applied to this transcript.

 9

 10 Dated at the City of Edmonton, Province of

 11 Alberta, this 11th day of June 2024.

 12

 13

 14

 16 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 17 Darlene Sirman, CSR(A)

 18 Official Court Reporter

 19

 20

 21

 22

 23

 24

 25

 26

 27

 37