**IN THE PROVINCIAL COURT OF NEWFOUNDLAND AND LABRADOR**
**JUDICIAL CENTRE OF CORNER BROOK**

**Citation:** ***R. v. Smith,*** **2017 NLPC 1416A00549**
**Date: December 5, 2017**

**HER MAJESTY THE QUEEN**

**V.**

**GEORGE ANSTEL SMITH**

**Place of Hearing:** Corner Brook, NL.
**Hearing Date:** November 27, 2017.

**Summary:** The accused was sentenced to a period of fifteen months of incarceration, to be served on a consecutive basis to any sentence being presently served, for the offence of indecent assault upon a male, contrary to the former section 156 of the *Criminal Code of Canada*, R.S.C. 1953-54.

**Appearances:**
Ms. B. Duffy counsel for Her Majesty the Queen.
Ms. J. Noseworthy counsel for Mr. Smith.

**CASES CONSIDERED:** ***R. v. Smith***, [2013] N.J. No. 109 (S.C.), ***R. v. Shah***, 2017 ONCA 872, ***R. v. Ferris-Bromley*** [2017] NZCA 115, ***R. v. Scott***, [2016] N.J. No. 133 (C.A.), ***R. v. Oake***, [2010] N.J. No. 94 (C.A.), ***R. v. Cardinal***, 2017 ABCA 396, ***R. v. Johnson***, 2010 ABCA 287, ***R. v. Lacasse***, 2015 SCC 64, ***R. v. Johnston***, [2011] N.J. No. 303 (C.A.), ***Ali & Ors, R v*** [2017] EWCA Crim 1211, ***R. v. Hynes***, 2016 NLCA 34, ***R. v. Slizak***, 2017 BCCA 279, ***R. v. Tucker***, [1996] N.J. No. 157 (C.A.), ***R. v. E.P.***, [1994] N.J. No. 93 (C.A.), ***R. v. C.M.***, [1998] N.J. No. 209 (C.A.), ***R. v. G.K.B.***, [2001] N.J. No. 26 (C.A.), ***R. v. S.P.***, [2003] N.J. No. 93 (S.C.), ***R. v. Murphy***, [2004] N.J. No. 220 (S.C.), ***R. v. G.J.O.***, [2006] N.J. No. 307 (S.C.), ***R. v. Smith***, [2008] N.J. No. 334 (S.C.), ***R. v. O'Keefe***, 2016 NLTD(G) 196, ***R. v. Burry***, 2016 NLTD(G) 124, ***R. v. Barry***, [2016] N.J. No. 385 (P.C.), ***R. v. Kendell***, 2017 NLTD(G) 145, ***R. v. Atkins*** (1988), 69 Nfld. & P.E.I.R. 99 (N.L.C.A.), ***R. v. Stuckless*** (1998), 127 C.C.C. (3d) 225 (Ont. C.A.), ***R. v. Al-Shimmary***, 2017 ONCA 122, ***R. v. J.N.O.***, [1993] N.J. No. 9 (C.A.), ***R. v. Andrews***, [2004] M.J. No. 158 (C.A.), ***R. v. C.W.***, 2012 NLTD(G) 124, ***R. v.***

***M.P.S.***, 2017 BCCA 397, ***R. v. R.J.***, 2017 MBCA 13, ***R. v. James***, 2012 MBPC 31; [2013] M.J. No. 48 (C.A.), ***R. v. Hutchings***, 2012 NLCA 2, ***R. v. Barrett***, 2012 NLCA 46, ***R. v. McLeod***, [2014] O.J. No. 6063 (C.J.), ***R. v. Stuckless***, [2016] O.J. No. 3030 (C.J.), ***R. v. Miller***, 2017 NLCA 22, ***R. v. Butler***, 2017 NLCA 69, ***Tran v. Canada (Public Safety and Emergency Preparedness)***, 2017 SCC 50, ***R. v. Knoblauch***, [2000] 2 S.C.R. 780, ***R. v. McCarthy***, [2016] N.J. No. 330 (C.A.), ***R. v. K.R.J.***, 2016 SCC 31, ***R. v. G.C.F.***, [2004] O.J. No. 3177, (C.A.), ***R. v. Parsons***, 2017 NLCA 64, ***R. v. Williams***, 2017 NLTD(G) 45, ***R. v. L.F.W.***, [2000] 1 S.C.R. 132, ***R. v. Bent***, [2017] O.J. No. 2786 (S.C.), ***Elias v The Queen***; ***Issa v The Queen*** [2013] HCA 31, ***R. v. Leroux***, 2015 SKCA 48, ***R. v. Knott***, 2012 SCC 42, ***R. v. Bosco***, 2016 BCCA 55, ***R. v. Cluney***, 2013 NLCA 46, ***R. v. Loor***, 2017 ONCA 696, ***R. v. Huggins*** [2016] EWCA Crim 1715, ***R. v. Briand***, [2010] N.J. No. 339 (C.A.), ***R. v. M.F.S.*** (2008), 432 A.R. 387, ***R. v. Branton***, 2013 NLCA 61, ***R. v. D.A.I.***, 2012 SCC 5, ***R. v. Vautour***, 2016 BCCA 497, ***R. v. Dajaeger***, 2015 NUCJ 2 (CanLII), ***R. v. Aylward*** (1992), 71 C.C.C. (3d) 71 (N.L.C.A.), ***R. v. J.P.***, 2013 ONCA 505, ***R. v. Rich***, 2014 BCCA 24,***R. v. Mackie***, 2014 ABCA 221, ***R. v. Clifford*** [2014] EWCA Crim 2245, ***R. v. Lundrigan***, 2012 NLCA 43, ***R. v. Cloutier***, [2011] O.J. No. 3005 (C.A.), ***R. v. Boudreau***, 2012 ONCJ 322, ***R. v. Kelly***, [1988] N.J. No. 1 (C.A.), ***R. v. R.J.H.***, 2012 NLCA 52, and ***R. v. Freckleton***, 2016 ONCA 130.

**STATUTES CONSIDERED:** The *Criminal Code of Canada*, R.S.C. 1985 and the *Criminal Code of Canada*, R.S.C. 1953-54.

**AUTHORITIES CONSIDERED:** K. Heilbrun, J. Fairfax-Columbo, S. Wagage and L. Brogan, *Risk Assessments for Future Offending, The Value and Limits of Expert Evidence at Sentencing*, (2017), Volume 53, Issue 3, Court Review 116.

**JUDGMENT OF GORMAN, P.C. J.**
**(SENTENCE)**

**INTRODUCTION:**

[1] In 2013, Mr. Smith pleaded guilty to thirty-eight offences involving the sexual abuse of thirteen children. The offences (twenty-three counts of indecent assault, seven counts of sexual assault, and eight counts of assault) took place over a twenty year time period commencing in 1969. At the time, Mr. Smith was a

parish priest. Justice Goodridge imposed a period of eleven years of imprisonment (see [2013] N.J. No. 109 (S.C.)). Mr. Smith has been released on parole.

[2] On November 18, 2016, an additional charge of indecent assault upon a male, contrary to the former section 156 of the *Criminal Code of Canada*, R.S.C. 1953-54, was laid against Mr. Smith. This charge was laid as a result of the victim (Mr. X) having provided a statement to the police in July of 2016. Mr. Smith entered a plea of guilty to this charge.

[3] The evidence presented at the sentence hearing indicates that on a "few" occasions, Mr. Smith fondled and masturbated Mr. X while he and Mr. Smith were in Mr. Smith's bed. The offence took place over the time frame of 1978 to 1980, at a time when Mr. X was between eleven and fourteen years of age. Mr. Smith was a parish priest. Mr. X was an altar boy.

[4] The sole issue for determination is the imposition of an appropriate sentence for this offence. In ***R. v. D.A.I.***, 2012 SCC 5, the Supreme Court of Canada resorted to extremely strong judicial language, characterizing the sexual abuse of children as "evil." In ***R. v. Vautour***, 2016 BCCA 497, the British Columbia Court of Appeal suggested that "for too long crimes such as this, involving children and inflicted by persons in a position of trust, have attracted unwarranted leniency" (at paragraph 54). In ***R. v. Dajaeger***, 2015 NUCJ 2 (CanLII), Justice Kilpatrick in sentencing a priest who had abused many young children, suggested that the

growing "recognition of the tragic human consequences associated with this type of crime has caused a shift in sentencing jurisprudence over the last two decades. This jurisprudence now requires the Court to put special emphasis upon the sentencing principles of denunciation and deterrence when addressing sexual offences against children" (at paragraph 130). Twenty-five years ago the Court of Appeal of this Province in ***R. v. Aylward*** (1992), 71 C.C.C. (3d) 71 (N.L.C.A.), suggested that the "prevalence of sexual abuse of children is becoming...notorious" (at paragraph 56).

[5] I have concluded that an appropriate sentence in this case is the imposition of a period of fifteen months of incarceration, to be served on a consecutive basis to any sentence presently being served by Mr. Smith. I have concluded that this is an appropriate sentence because of the seriousness of the offence committed; Mr. Smith's high level of moral responsibility for the offence; the nature of the breach of trust which occurred; and the long term negative consequences suffered by Mr. X as a result of Mr. Smith's actions.

[6] Let me explain my reasons for this conclusion in further detail by commencing with a review of the circumstances of the offence committed by Mr. Smith.

## THE CIRCUMSTANCES OF THE OFFENCE

[7] The circumstances of the offence were summarized by Crown counsel at the sentence hearing in the following manner:

> In July of 2016, Mr. X reported to the...Police in Ontario that he had been sexually abused as a child while he was an altar boy at a church in A, Newfoundland. He provided a statement indicating that the abuse was at the hands of Father George Smith and that it occurred over a three year span from 1978 to 1980. Constable Kavanagh of the...Police took a statement from Mr. X that is summarized as follows:
>
> Mr. X was born March 26, 1966. Father George Smith was a priest for the diocese in A and B, Newfoundland. Between 1978 and 1980, Mr. X was an altar boy in A, Newfoundland and attending school in B. At that time, Father Smith was a priest in A, Newfoundland. Mr. X would have been between 11 and 14 years of age.
>
> After church on Saturdays, Mr. X would get into George Smith's car and go to C which is 15 to 20 minutes away where he would hang around with friends and where he was welcome to stay at Smith's house for the night.
>
> On some nights, Smith would have Mr. X sleep with Smith because Smith said it would make less cleaning for the maid. Mr. X said he would be in bed in a fetal position and Smith would reach over and fondle him. Smith would have his hand on Mr. X's penis. Smith would masturbate Mr. X. Mr. X says he recalls waking up feeling sticky in his underwear.
>
> Mr. X does not recall exactly how many times this happened, but knows that it happened a few times. Mr. X said that Smith drank alcohol all of the time. Mr. X also said that Smith would give Mr. X money to go out. He would also give Mr. X special treatment in that he would allow Mr. X to drive despite Mr. X being 11, 12 and 13 years of age. Mr. X said he was enticed with money and Smith's car, but doesn't think he was ever enticed by alcohol.
>
> Mr. X didn't have much at home because he was the youngest of 13 kids. Everything he got was hand-me-downs. Mr. X feels that Smith took advantage of this. Smith would often give Mr. X money to go to the pool

hall down the street or to impress girls that Mr. X hung out with. Mr. X said that Smith would visit many homes in the community and would visit Mr. X's house on a regular basis to see Mr. X's parents. Mr. X never told anyone about the abuse until June 10, 2016 when he told his sister.

## THE VICTIM IMPACT EVIDENCE

[8] Section 718.2(a)(iii.1) of the *Criminal Code* explicitly provides that a court that imposes a sentence shall take into consideration the following principle:

> A sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
>
> > (iii.1) evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation,
>
> shall be deemed to be aggravating circumstances.

[9] Mr. X filed a victim impact statement. In his statement he indicates that having been a victim of sexual abuse has made it "very difficult" to "trust others and build close intimate relationships...I can't help but sometimes feel that my chance to have a normal childhood, and somewhat of a normal life was taken from me."

[10] In his victim impact statement, Mr. X describes returning home for his father's funeral and finding Mr. Smith at his parents' home:

> I made a comment earlier in regards to my memory, that being that I don't remember much. However I do have one memory that stands out amongst the rest. My dad passed away in 19… I remember going back to NL for the funeral. I remember walking into the house, opening the kitchen door and seeing him [Mr. Smith] sitting at the kitchen table talking to my mom, he

was actually sitting in the same place at the table where my dad would always sit. I remember quickly walking past him and going into the family room, as I felt very uncomfortable and did not want to speak to him, however I did not understand why at the time. I don't remember anything after that. Very shortly after returning to Ontario, I found myself lying in a hospital bed for two weeks, I had tried to commit suicide. I loved my dad with all my heart and I know I was grieving his death, but I could not comprehend why I would try to actually take my own life. Now I understand that seeing him that day in my family's home sitting with my mom, was a huge trigger for me and the emotions felt so overwhelming, that all I could think of was to die. The thought of him sitting there with my mom that day will be embedded in my memory for ever. If my memory ever decides to fail me, I'm sure the mental picture will always remain.

What he did to me was wrong, and has affected me tremendously, in many ways and in all areas of my life, including my work life and in my personal life. Unfortunately over the years my actions have affected other people and that I cannot change. I have pushed away people who only wanted to be part of my life.

I have been alone for the last 13 years and during that time I have had no physical contact whatsoever with a woman. I don't want to live like this, but I feel I have no other options. Because of the lifestyle I have lived, I have kept myself from enjoying some of the better aspects of life. I have never had children, something I will always regret. However lately I have been doubting my abilities to be a normal Father, and almost Thankful I never had children. What kind of life could I possibly offer them?

[11] Mr. X describes the more recent impacts the offence has had upon him in the following manner:

The past 4 or 5 years have been a bit more challenging than the previous years. I found myself losing control of my life, and once again wondering where I went wrong.

Since June 9, 2016, my life has taken a bit of a downward spiral. My health started to decline to the point where it affected my ability to work. Recalling the memories of what was done to me as a child has made it very difficult for me to function in my day-to-day life. I have a very hard time sleeping

> which makes it very hard for me to concentrate and be effective at work. I started missing work to the point where I was fired from my job in November 2016. Nine years of my life gone, six months after remembering what happened to me as a child. Needless to say that losing my job has created a few more obstacles for me to overcome. My Financial situation has gotten to the point where I had my vehicle repossessed 7 months ago. My Health has declined to the point where I have lost almost 30 lbs in the past 6 months.
>
> I feel as though my journey to recovery is just beginning, and that reporting what was done to me as a child to authorities was my first step. This isn't something that I wanted to do, but I felt it was necessary in order to move on, and hopefully start to get my life back.
>
> I realize that the Journey I am now currently on is going to be a long and difficult one, as it is just beginning, and I am starting off with nothing. However the Journey that I had been on for the majority of my life was difficult as well, and apparently a journey down the wrong path. I'm hoping that this Journey that I have chosen to take, finally leads me down the right path.

[12] Finally Mr. X very eloquently describes the nature of the abuse of the position of trust which occurred in this case:

> I was raised as a child to respect and love one another, never to cause harm to another. In School and in Church I was told how to act, as our actions affect other people. Seems a little ironic when I think about that now. It's unfortunate how we chose not to practice what he preached.
>
> I was also told as a child that Priests were special people with special powers, sent down from God to lend a guiding hand, to guide us down the proper path in life. However what he decided to do with his hands, definitely didn't put me on the right path.
>
> I made a comment earlier in regards to me trying to kill myself. There continue to be countless times when I think that I would be better off dead, a little more frequent in the past 15 months. However the thought of dying also scares me, I honestly don't want to die anytime soon, as I feel as though I haven't had the chance to live yet, I've only existed.

> It feels as though I have been locked away as a Prisoner for almost forty years, in a Prison of my own, a Prison built with his hands. I also feel that after finally remembering what was done to me as a child, I am finally being given a chance to escape from this Prison.

[13] In ***R. v. J.P.***, 2013 ONCA 505, at paragraph 15, the Ontario Court of Appeal suggested that sentences "related to the sexual abuse of children are rising as courts become more familiar with the horrific consequences for the victims." Similarly, in ***R. v. Rich***, 2014 BCCA 24, at paragraph 18, the British Columbia Court of Appeal indicated that it agreed "with the Crown's observation that 'as society becomes more aware of the impact of sexual abuse on children, there has been an escalation in the severity of sentences imposed where children are the victims of sexual offences.'"

[14] In ***R. v. Mackie***, 2014 ABCA 221, the Alberta Court of Appeal, at paragraph 17, indicated that we "have come to understand the full magnitude of the impact such crimes have on children":

> We know better now than we did then. We have come to understand the full magnitude of the impact such crimes have on children and that some have even resorted to suicide to find relief from online tormentors. In fact, one of the victims here reported having thoughts of suicide to escape the appellant. This and the other victim impact statements provided in this case are poignant reminders of the trauma and suffering caused by these crimes.

[15] Finally, in ***R. v. Clifford*** [2014] EWCA Crim 2245, at paragraph 22, the Court of Appeal for England and Wales noted that sexual offending "will by its very nature cause harm at the time the offence is committed, but it is well

recognised that for many victims significant harm persists for a considerable period afterwards."

## THE CIRCUMSTANCES OF THE OFFENDER

[16] In ***R. v. Lundrigan***, 2012 NLCA 43, the Court of Appeal indicated that a "fit sentence" is one "that takes account of the circumstances of the offences and the offender." In ***R. v. Freckleton***, 2016 ONCA 130, the Ontario Court of Appeal indicated that in imposing sentence "an offender's individual circumstances must be taken into account."

[17] Mr. Smith is seventy-nine years of age. As noted, he is a former Catholic Priest and a recidivist sexual offender. He is presently on parole.

[18] Mr. Smith was born in Nova Scotia. He advised the author of the pre-sentence report that he "had a normal childhood and recalled no form of abuse in the home."

[19] Mr. Smith indicated to the author of the pre-sentence report that he "accepts responsibility for his actions." However, the author of the pre-sentence report notes Mr. Smith "displayed limited victim empathy." In addition, Mr. Smith said the following to the author of the pre-sentence report: "To me, it's in the past." Mr. Smith also told the author of the pre-sentence report that he wished the victim had "come forward at the time with the others when the whole thing was put together.

It would have been easier for me if he did then. I feel very guilty about him, about all of them."

[20] Of course, Mr. Smith could have indicated that there was another victim when he entered pleas of guilty in 2013. Blaming Mr. X for not having come forward until 2016, when he remained silent in 2013, constitutes a perverse form of reasoning. I am not suggesting that Mr. Smith had an obligation to advise the police in relation to the 2013 sentencing that he had sexually abused another child. I am not suggesting that his silence is a consideration in sentencing in this case. However, an offender who commits an offence which because of its nature often remains unreported for years can hardly complain that it took a number of years for one of his victims to find the strength to report what had been done to him in secret as a child. Mr. Smith's comments are concerning because they illustrate little understanding on his part or remorse for his own actions and their consequences for Mr. X. In ***R. v. Shah***, 2017 ONCA 872, the Ontario Court of Appeal described when a lack of remorse can be "a relevant factor in sentencing" in the following manner (at paragraph 8):

> Lack of remorse is not ordinarily a relevant aggravating factor on sentencing: *R. v. Valentini* [1999] O.J. No. 251 (C.A.), at para. 82. It cannot be used to punish the accused for failing to plead guilty or for having mounted a defence: *Valentini*, at para. 83; *R. v. J.F.*, 2011 ONCA 220, at para. 84, 105 O.R. (3d) 161; aff'd on other grounds in 2013 SCC 12, [2013] 1 S.C.R. 565. Absence of remorse is a relevant factor in sentencing, however, with respect to the issues of rehabilitation and specific deterrence, in that an accused's absence of remorse may indicate a lack of insight into

> and a failure to accept responsibility for the crimes committed, and demonstrate a substantial likelihood of future dangerousness: *Valentini*, at para. 82; *R. v. B.P.* (2004), 190 O.A.C. 354 (C.A.), at para. 2.

[21] The author of the pre-sentence report indicates that access to an assessment for entrance into a community based sexual offender program would "take two to three years to complete from the date of the referral." The author of the pre-sentence report recommends that if a "community based disposition" is imposed that it contain "strict supervision as well as immediate consequences for non-compliance."

[22] A letter from Mr. Smith's parole officer was entered at the sentence hearing. It provides the following "information regarding Mr. Smith":

> Following his sentencing hearing which saw him be imposed a nine year, eleven month and 10 day sentence, Mr. Smith entered federal custody on 2013-03-14. While no Correctional Programming was recommended for him, Mr. Smith participated in a psychological evaluation specific to sex offenders in 2014 which assessed his risk of sexual recidivism to be in the Low range. Following his offending period, Mr. Smith reportedly participated in a rehabilitation program in 1992 for alcohol abuse and inappropriate sexual behavior.
>
> Mr. Smith completed his incarceration period without problems and was released on a Day Parole on 2016-01-26 with conditions to: "not to be in the presence of any male children under the age of 18 unless you are accompanied by a responsible adult who knows your criminal history and has previously been approved in writing, by your parole supervisor; no direct or indirect contact with the victim(s) or any member of the victim's family; not to consume, purchase or possess alcohol; not be to in, near, or around places where children under the age of 18 are likely to congregate such as elementary and secondary schools, parks, swimming pools and recreational centres unless accompanied by an adult previously approved in writing by your parole supervisor; and not to own, use or possess a

> computer, as defined in s. 342.1 of the *Criminal Code*, or any technological device, that would allow you unsupervised access to the Internet." He resided in a Halfway House in Dartmouth until granted a Full Parole on 2017-07-08 where he moved to his own apartment with the same conditions of release.
>
> Ms. Smith has been living alone without problems for over one year now. He has been abiding by the terms of his release, following his conditions and reporting to his Parole Office as directed. We have no information leading us to believe that his risk to re-offend has increased or that he can no longer be managed in the community. In light of the new charges, Mr. Smith was upfront with us and transparent with all the new information. Amongst other things but importantly, we considered the historical nature of the new charges and the length of time since his last offence and we have assessed that his risk did not increase, hence our decision to maintain his parole.
> The severity of his offences, harm caused to his victims and the exponential ramifications of his actions are recognized. At this time, his progress to date and the risk assessment indicate that a conditional release remains manageable.

[23] When provided with an opportunity to speak on his own behalf at the sentence hearing, Mr. Smith indicated that he lives with "grief and regret." He did not say anything to Mr. X.

[24] Let us now consider the principles of sentencing which must be applied.

## THE PRINCIPLES OF SENTENCING

[25] In ***R. v. Knott***, 2012 SCC 42, it was held that "the purpose and principles of sentencing set out in the *Criminal Code* are meant to take into account the correctional imperative of sentence individualization."

[26] In ***R. v. Bosco***, 2016 BCCA 55, the British Columbia Court of Appeal held, at paragraph 29, that the "fundamental purpose of sentencing is to contribute to

respect for the law and to maintain a just, peaceful and safe society. To meet this purpose, judges determine and impose 'just sanctions' upon those convicted of committing crime. Sanctions are just when they are tailored to the nature of the offence and the circumstances of the offender, bearing in mind a wide array of sentencing goals and principles. Their overarching purpose is to protect society and affirm its shared values."

[27] Section 718 of the *Criminal Code* states that the fundamental purpose of sentencing "is to contribute...to respect for the law and the maintenance of a just, peaceful, and safe society." This is to be achieved by imposing sentences which have, among other objectives, the objectives of:

-separating offenders from society, where necessary;

-denouncing unlawful conduct;

-general deterrence;

-rehabilitation; and

-the promoting of a "sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community."

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

[29] Section 718.1 of the *Criminal Code* states that any sentence imposed must be "proportionate to the gravity of the offence and the degree of responsibility of the offender." In ***R. v. Cluney***, 2013 NLCA 46, the Court of Appeal, at paragraph 16, indicated that the "principle of proportionality applies to sentencing for all criminal offences…The appropriate range of sentence is related to the gravity of the offence and the moral blameworthiness of the offender." In ***R. v. Loor***, 2017 ONCA 696, the Ontario Court of Appeal suggested that the "consequences" of an offence can be considered in determining what constitutes a proportionate sentence.

[30] In ***R. v. Huggins*** [2016] EWCA Crim 1715, it was indicated, at paragraph 39, that seriousness is "determined by two main matters: the culpability of the offender and the harm caused, or risked being caused, by the offence. The extent or level of an offender's culpability for an offence therefore depends not only on the harm he intended, but the extent to which the harm actually caused could have been foreseen."

[31] Section 718.2(a) of the *Criminal Code* indicates that a "sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender." In ***R. v. Briand***, [2010] N.J. No. 339 (C.A.), the Court of Appeal stressed the importance of considering an offender's personal circumstances in applying section 718.2(a) of the *Criminal*

*Code*. In ***R. v. R.J.H.***, 2012 NLCA 52, it was held that evidence "of 'grooming' is an aggravating factor to be taken into account in determining an appropriate sentence" (at paragraph 24).

**Section 718.2(a)(iii):**

[32] Section 718.2(a)(iii) of the *Criminal Code* indicates any sentence imposed "should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender" and that the following "shall be deemed to be aggravating circumstances":

> ...evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim.

[33] In this case, Mr. Smith held a significant position of trust in relation to Mr. X, Mr. X's family, and Mr. X's community.

**Section 718.01:**

[34] Of particular importance in this case is section 718.01 of the *Criminal Code*. It states as follows:

> When a court imposes a sentence for an offence that involved the abuse of a person under the age of eighteen years, it shall give primary consideration to the objectives of denunciation and deterrence of such conduct.

[35] In ***R. v. M.F.S.*** (2008), 432 A.R. 387, the Alberta Court of Appeal stated that in cases in which denunciation and deterrence are the primary sentencing principles to be applied "they should not be improperly discounted in a search for an individualized solution."

[36] In ***R. v. Branton***, 2013 NLCA 61, the Court of Appeal indicated that the "effect" of section 718.01 "is to direct a court to give primary consideration to denunciation and deterrence when weighing and balancing the objectives of sentencing." The Court of Appeal held that "offenders who criminally abuse young people are particularly deserving of society's denunciation" (at paragraph 19).

[37] In ***Branton***, the accused was sentenced to a period of nine months of imprisonment for the offence of sexual assault. Hoegg J.A. summarized the circumstances involved in the following manner (at paragraph 43):

> Mr. Branton's assault of A. involved masturbation, oral sex and a determined attempt at anal intercourse. The fact that anal intercourse was not fully effected was not due to any attack of conscience on Mr. Branton's part. The entire assault ceased only when Mr. Branton was ready to end it. Mr. Branton preyed upon a young boy whom he had met only days before when Mr. Branton moved to or visited the neighbourhood in which A. lived. Mr. Branton ingratiated himself to A. by purchasing cigarettes for him, and subsequently invited A. into the house where he (Mr. Branton) was staying and where the assault took place. While a single incident, the assault cannot be characterized as minor or fleeting. By any measure, it was serious.

[38] The Court of Appeal increased the sentence imposed to twenty-three months, less a day, imprisonment. What occurred in this case is as serious, if not more so, than what occurred in ***Branton***.

[39] Section 718.2(d) states that "an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances" and section 718.2(e) states that "all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to

the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders."

[40] In ***R. v. Cardinal***, 2017 ABCA 396, the Alberta Court of Appeal suggested that sections 718.2(e) "interconnects the sentence with the principle of proportionality" (at paragraphs 35 and 36):

> Section 718.2(e) starts out by echoing in many respects what is already said in s 718.2(d) about the principle of restraint. As with s 718.2(d), s 718.2(e) is a provision of universal application, because it specifically refers to "all offenders", although it calls for "particular attention" to the circumstances of aboriginal offenders. The provision does not state that it overrides all other sentencing objectives, such as protection of the public, nor does it recast the paramountcy of proportionality under s 718.1 of the *Code*. Rather, by referring to sanctions that are "available" and "reasonable in the circumstances", it interconnects the sentence with the principle of proportionality.
>
> Moreover, s 718.2(e) also specifically recognizes that the balancing must be done "consistent with the harm done to victims or to the community". While it does not expressly say so, it is clearly appropriate for a sentencing judge to consider the prevention of future harm to the complainant and to the community, either by separating the offender from society, or by imposing a sentence that will have individual deterrent effect. Those considerations are to be balanced against "the circumstances" generally, and the "circumstances of the offender" specifically.

## THE STATUTORY REGIME

[41] The "starting point in any consideration of the imposition of criminal punishment must be that it is imposed for the offence for which the offender has been convicted" (see ***Elias v The Queen***; ***Issa v The Queen*** [2013] HCA 31, at paragraph 26).

[42] At the time that Mr. Smith indecently assaulted X, section 156 of the *Criminal Code* read as follows (see ***R. v. Leroux***, 2015 SKCA 48, at paragraph 87):

> Every male person who assaults another person with intent to commit buggery or who indecently assaults another male person is guilty of an indictable offence and is liable to imprisonment for ten years.

## THE POSITIONS OF THE PARTIES

[43] Both counsel made detailed and excellent submissions. At this stage, I intend to summarize the essence of their positions. I will return to some of the specific elements of their submissions later in this judgment.

**The Crown:**

[44] The Crown sought the imposition of a period of incarceration of six to twelve months in length. Ms. Duffy, in support of her submission, referred to the seriousness of the offence and the significant negative impact it has had upon Mr. X. She suggested that Mr. Smith "groomed" Mr. X and that he took advantage of the respect and trust that Mr. X's family and the community afforded him in order to sexually abuse Mr. X.

[45] As we have seen, from a consideration of ***Branton***, the range of sentence suggested by the Crown is not consistent with the jurisprudence. A further example can be found in ***R. v. Johnson***, 2010 ABCA 287. In that case the Alberta Court of Appeal indicated that "Mr. Johnson was travelling on a Greyhound bus

from Golden, B.C., to Calgary. He noticed that the complainant, a 14-year-old female, was sitting alongside another male. Mr. Johnson requested that the male move so he could sit beside the young woman. While the complainant was asleep facing the window, the respondent started touching her ankle, rubbed her legs and then moved to her crotch. He then placed his hands down the front of her pants under her panties. At that point the complainant pulled away and tried to press herself against the window of the bus. She was scared to move during the assault and waited until she had the courage to tell the bus driver what had happened."

[46] At trial, a period of ninety days of imprisonment was imposed. On appeal, the Court of Appeal increased the sentence imposed to a period of twelve months of imprisonment (at paragraph 9):

> The reasons of the sentencing judge make clear that he failed to appreciate the gravity of the offence and the blameworthiness of this offender. He overlooked the highly aggravating circumstances. The assault was predatory, took place on a public bus, and the respondent deliberately gained access to the complainant by asking another passenger to move. He waited until she fell asleep and then began to assault her. The complainant was 14 and developmentally delayed, and the sentencing judge found that there was a real probability that she would suffer long-term consequences. While the nature of the touching itself was not at the serious end of the spectrum of sexual assaults, the predatory, deliberate nature of it clearly enhanced the blameworthiness of the respondent.

[47] What occurred in this case is significantly more serious than what occurred in ***Johnston***.

[48] The Crown also sought the imposition of the following orders:

(1) a DNA order (section 156 is a "primary designated offence");

(2) a *SOIRA* order for life;

(3) a section 109 weapon/ammunition prohibition; and

(4) a section 161 playground/schoolyard prohibition.

**Mr. Smith:**

[49] Mr. Noseworthy submitted that it would be inappropriate to re-incarcerate Mr. Smith. Mr. Noseworthy argued that this matter should have been dealt with when Mr. Smith was sentenced in 2013 and that it would be contrary to the principles of sentencing to return Mr. Smith to prison in light of his release on parole and his low risk to reoffend.

[50] Mr. Noseworthy submitted that an alternative to the imposition of a period of incarceration is the imposition of a conditional period of imprisonment. Mr. Noseworthy recognized the jurisprudence which suggests that a conditional sentence will rarely be imposed for an offence involving the sexual abuse of a child, but argued that such sentences have been imposed (he referred to ***R. v. L.F.W.***, [2000] 1 S.C.R. 132, and ***R. v. Bent***, [2017] O.J. No. 2786 (S.C.)). He argued that with properly crafted conditions, such a sentence would protect the public and satisfy the need to stress the sentencing principles of general deterrence and denunciation.

[51] In support of his position, Mr. Noseworthy referred to Mr. Smith having entered a plea of guilty and not having had any prior convictions when he committed the present offence. A plea of guilty is a well-accepted mitigating factor, though it must be noted that it was not entered by Mr. Smith on a timely basis in this matter. A lack of prior convictions is also generally considered to be a mitigating factor in sentencing. However, when offending occurs in secret over many years, saying that the offender lacks any prior convictions can, as pointed out in ***R. v. Ferris-Bromley*** [2017] NZCA 115, ring "hollow" (at paragraph 9):

> The concept of good character is a hollow one when offending occurs regularly and is secretive in nature, as the domestic abuse was in this case. This was not out of character offending. As this Court observed in *R v Zhang*:
>
> > This was not the more common case of a first offender being sentenced for a single offence. Any concession to be gained by reason of a previously unblemished record should have been and was dispelled by the prolonged and premeditated nature of the offending in this case.

[52] Mr. Smith took no objection to any of the ancillary orders sought by the Crown being imposed.

[53] At the end of counsels' submissions, I alerted them to my concern with the range suggested by the Crown. They were provided with an opportunity to make additional submissions (see ***R. v. Scott***, [2016] N.J. No. 133 (C.A.)).

## THE RANGE OF SENTENCE

[54] In ***R. v. Oake***, [2010] N.J. No. 94, the Court of Appeal indicated that a judge has a duty "to impose sentences in line with precedent, noting always that for each offence and each offender some elements are unique." In ***Cluney***, the Court of Appeal indicated that while sentencing ranges "are merely guidelines rather than hard and fast rules, a judge ordering a sentence outside the regular range should explain how it is in accordance with the principles and objectives of sentencing."

[55] In ***R. v. Lacasse***, 2015 SCC 64, the Supreme Court of Canada indicated that sentencing ranges "are nothing more than summaries of the minimum and maximum sentences imposed in the past, which serve in any given case as guides for the application of all the relevant principles and objectives. However, they should not be considered 'averages', let alone straitjackets, but should instead be seen as historical portraits for the use of sentencing judges, who must still exercise their discretion in each case..." (at paragraph 57).

[56] In addition, in every case in which sentence is imposed in this Province the sentencing judge must initially determine if a "prescriptive" or "descriptive" range of sentence applies (see ***R. v. Johnston***, [2011] N.J. No. 303 (C.A.)). A prescriptive range has not been set for the offence of indecent assault upon a male.

## SENTENCING PRECEDENTS

[57] I have searched for sentencing precedents which have some similarity to what occurred here. Finding such a precedent in a given case can be very difficult. In ***Ali & Ors, R v*** [2017] EWCA Crim 1211, it was suggested that "the comparison of the facts of one case with another is a hopeless exercise" (at paragraph 40).

[58] Sentencing precedents can provide guidance, but unless a prescriptive range of sentence has been established (which it has not for the type of offence committed here) then careful application of the principles of sentencing, particularly the mandatory ones, become crucial (see ***R. v. Hynes***, 2016 NLCA 34, at paragraph 31).

[59] In this case, section 718.01 of the *Criminal Code* mandates that in sentencing Mr. Smith I give "primary consideration to the objectives of denunciation and deterrence." Section 718.1 states that any sentence I impose must be "proportionate." It has been noted that the "concern must be to ensure a proportionate sentence that reflects the gravity of the offence as well as the moral blameworthiness of the offender. Proportionality in both these senses ensures justice for victims and helps maintain public confidence in the justice system" (see ***R. v. Slizak***, 2017 BCCA 279, at paragraph 18)).

[60] Having said this, let us review the sentencing precedents I was able to find, keeping in mind that the manner in which the imposition of sentence upon offenders who have sexually abused children had judicially and statutorily evolved.

[61] In ***R. v. Tucker***, [1996] N.J. No. 157 (C.A.), the accused was convicted of the offences of sexual assault and defamatory libel. The sexual assault was described as follows:

> There were basically three incidents giving rise to the charge of indecent assault which, according to the evidence of the complainant, occurred during the latter part of 1991, at which time the complainant was eighteen years old and the appellant was forty-four. The complainant was a friend of the appellant's daughter.
>
> In the first incident, the complainant had gone to the appellant's house and asked him for a drive to a shopping centre where she was to meet his daughter. Instead of driving to the centre, the appellant drove to a secluded place where he forcibly removed some of the complainant's clothing and attempted to have sexual intercourse with her. The second incident occurred after the appellant had telephoned the complainant and asked her to go for a drive. She agreed. According to the complainant, the appellant was very angry. He drove to the same area as in the previous incident and again, there was a forced removal of some of the complainant's clothing and he attempted to have sexual intercourse with her. Following the second incident, the appellant telephoned the complainant on several occasions and approximately three or four weeks after the second incident, the complainant, at the appellant's invitation, again went for a drive in the appellant's motor vehicle. He drove to a parking lot. Again, there was the forced removal of some of the complainant's clothing and sexual intercourse occurred, which, according to the complainant, lasted approximately thirty seconds.

[62] At trial, the accused was sentenced to a period of five years of imprisonment for the sexual assault offence. On appeal, the sentence was reduced to a period of

three years. The Court of Appeal indicated that the "circumstances were not such as to warrant a sentence of five years. That sentence is excessive."

[63] In ***R. v. E.P.***, [1994] N.J. No. 93 (C.A.), the accused was convicted of the offence of indecent assault in relation to his nine year old niece and sentenced to a period of fifteen months of imprisonment. The circumstances were described as follows:

> J.P. explained how her uncle used to touch her vagina. When she went to bed she had her nightdress and underwear on but "when I'd wake up my underwear was off, or you know, he'd take them off".
>
> During her testimony the complainant stated that she always went to bed before her uncle: "this one night he got in bed and he was naked, and he took my underwear off. I just pretended I was asleep, and he straddled me over his stomach and he was pushing me down on his penis, and he was trying to put his penis in my vagina, and he kept doing that until I always like come to my senses, like try and wake up and like push away and things like that, and he kept trying that for like four or five times until I use to bleed, and I use to tell him I was sore and that it hurt and he use, when there was blood on my underwear he use to rinse them in the sink for me and give them back to me".
>
> Crown counsel asked the complainant if she meant by that statement that the respondent attempted intercourse four or five times in one night. She replied "No, over the two weeks".

[64] On appeal, the sentence was increased to a period of twenty-four months of imprisonment. The Court of Appeal, per Steele J.A., indicated that "bearing in mind the particularly perilous nature of an indecent assault of the description that occurred here on a nine year old girl, I am of opinion that the sentencing judge failed to give proper consideration to the aggravating factors of the offence,

imposing a sentence that was inordinately low. This was a serious indecent assault" (at paragraph 24).

[65] In ***R. v. C.M.***, [1998] N.J. No. 209 (C.A.), the accused pleaded guilty to fourteen counts of indecent assault and sexual assault offences involving his daughters; granddaughters; and the children of his neighbours. The offences occurred between 1962 and 1992. The offences consisted of "touching the vaginal areas of his victims either inside or outside their clothes, some digital penetration and one incident of attempted intercourse." The victims were between the ages of 5 and 12 and the accused was 75 years of age. The accused had been convicted in 1991 of two sexual assault offences and sentenced to 21 days imprisonment.

[66] The trial judge imposed a 21 month conditional sentence. The Crown appealed. The appeal was allowed, but only to the extent that the "residential restrictions" imposed by the trial judge were extended to cover the entire 21 month period. The Court of Appeal placed great reliance on appellate deference toward the sentencing discretion of trial judges.

[67] In ***R. v. G.K.B.***, [2001] N.J. No. 26 (C.A.), the accused was convicted of three counts of indecent assault and one count of gross indecency, all involving the same complainant (N.P.). He was sentenced to a period of three years of imprisonment. The Court of Appeal described the circumstances involved as being the following:

> The incidents, that gave rise to the allegations against the appellant, and the subsequent convictions, took place between January 1, 1954 and December 31, 1959. The incidents, according to N.P., took place in three different locations: in the orphanage canteen, in the dormitory and at the Mount Cashel raffle site in downtown St. John's.
>
> The incidents in the canteen, according to N.P., would occur around laundry time, just before bed. He said the appellant was in charge of the laundry and would ask him to go to the canteen and wait for him there. He would use a key given to him by the appellant to gain access. N.P. described the appellant's kissing him and putting his tongue in his mouth and then pulling down his pants and putting his penis between his legs from behind. N.P. said that the appellant would ejaculate and try to ejaculate him. The appellant would send him back to bed when he was finished with him. N.P. testified that the events such as described took place more than five times.
>
> N.P.'s evidence was that the dormitory incident occurred when he was about thirteen. He was in his bunk sick and, sometime during the afternoon, the appellant came and put his hand under the clothes, kissed him and felt his genitals. He said this went on for about five minutes.
>
> The incident at the raffle site, N.P. testified, took place one night when he went there with the appellant by car, possibly to bring some tickets. He said that while at the site the appellant held him against the wall, kissed him and fondled his genitals.

[68] In upholding the sentence imposed, the Court of Appeal concluded that “having regard to the proven facts, the position of trust of the appellant at the time

of the offences and the impact on N.P., this Court should not interfere with the sentence imposed. In other words, I find that the sentence is neither clearly unreasonable nor demonstrably unfit."

[69] In ***R. v. J.P.***, [2003] N.J. No. 120 (S.C.), the accused pleaded guilty to five counts of indecent assault. The circumstances of the offences were set out as follows:

> A brief outline of the offences against J.F. indicate that the offences took place between January 1, 1972 and December 31, 1975. The complainant came forward in July of 2001 and alleged indecent assault against her by the Accused. The abuse took place when the complainant was between five and six years old. At the time, the Accused was dating her aunt. The Accused had been staying at the residence of the complainant's parents while he was a student at the Fisheries College. He was approximately 21 years of age at the time. The indecent assaults consisted of touching of the complainant in the vaginal area with his finger. At the time, the family bunked the Accused in a bed with the complainant in a basement apartment. The room was small and there were no other bedrooms. The Accused would get into bed with the complainant and touch her inside her clothing. He would then leave the room and go to the bathroom. The Accused would rub his penis between her legs on occasion in a simulated act of intercourse. There was no intention of actual intercourse and this has been acknowledged by the Crown. The Accused would always stop and go to the bathroom to relieve himself.
>
> The Accused on another occasion fondled the complainant and had the complainant masturbate his penis. This happened when he babysat the complainant. He would rub his penis on the complainant's legs to simulate intercourse, but would stop when the complainant said it was hurting her.
>
> There were also a couple of incidents at the complainant's family home on the Mount Scio Road. The Accused was married to the complainant's mother's sister. The Accused was babysitting and he got the complainant to masturbate him until he ejaculated. The complainant says there were a total of about eight incidents involving the Accused and the complainant between the year 1972 and 1975. The offences, after they have moved to her parent's

own home, were less frequent than when they were in the basement apartment in the rental unit.

The offences involving R.S. took place when she was eight years old. These incidents occurred between 1971 and 1972 when she was living in Valleyfield. The Accused was living in the family home for about one and a half years prior to marrying D.S. on July 1, 1972. At the time R.S. was sharing a room with E.S., her sister. R.S. would be on the top bunk and E.S. would be in the lower bunk. On occasion the Accused would lie next to R.S. and touch her in the vagina area with his finger. Sometimes he would place his penis between her legs and simulate sexual intercourse. He would stop if she made any noises.

The complaint involving E.S. was a single incident. She was visiting the home of D.S., her sister, and she was 11 at the time. She had gone to bed. She was awakened by the Accused, who was touching her with his finger and digitally penetrating her vagina under her clothing. He had gotten into bed with her. She jumped out of bed and her vagina area was wet. There was one incident involving this particular complainant. The Accused left the bedroom and went to another room. This offence took place between June 1, 1973 and August 17, 1973.

[70] A 15 month conditional period of imprisonment was imposed.

[71] In ***R. v. S.P.***, [2003] N.J. No. 93 (S.C.), the accused pleaded guilty to sexually assaulting and indecently assaulting his granddaughter and five of his daughters. The offences occurred over an extended period of time and involved fondling, digital penetration and simulated intercourse. The accused was 78 years of age and in poor health. A period of 23 months incarceration was imposed. Justice Handrigan declined to order that it be served in the community. Though he concluded that the offender did not constitute a danger to the public, he also concluded that a "conditional sentence would not be consistent with the

fundamental purposes and principles of sentencing set out in sections 718 to 718.2 of the *Criminal Code*." Justice Handrigan indicated that he "was unable to reconcile the notion of a conditional sentence with the directives contained in ss. 718 and 718.2 of the *Criminal Code*, nor, for that matter, with the requirements of s. 718.1 of the *Criminal Code*, which stipulates that a 'sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender'" (at paragraphs 77 to 79).

[72] In ***R. v. Murphy***, [2004] N.J. No. 220 (S.C.), the offender was convicted of four counts of the offence of indecent assault on a male, contrary to section 156 of the *Criminal Code*. The accused was found guilty in 2004, but the charges related to offences that occurred in the early 1950's. The circumstances were described as follows:

> Count No. 1 - J.E.
>
> J.E. described one incident of sexual assault that occurred when he was probably 12 or 13 years of age and a resident at the Mount Cashel Orphanage. At the time J.E. was a member of the school band and the accused was the bandmaster. J.E. said that on one occasion Murphy came to his bed and spoke to him about the band and, while there, he put his hand on his leg, and then on his penis, stroking him until he had an erection. J.E. didn't say or do anything but said he was terrified because the incident occurred at Mount Cashel, which was such a religious place. J.E. said he never told anybody until the investigation into the events at Mount Cashel were made public in the late 1980's. This was the only incident of assault.

Count No. 2 - E.C.F.

E.C.F. is a retired school teacher and has very clear memories of the accused as a school teacher and bandmaster. He said that in hindsight Murphy was a very good teacher who was very good to all the boys in that he read them stories, took them on walks, and was generally kind. His bad memories relate to numerous events involving sexual conduct when Murphy would come to his room, lie across his bed, and kiss him in the neck area, as well as fondle him by rubbing his hand around his pubic area. E.C.F. also recalled one incident where he awoke to find the accused attempting to put a jock strap on him with the explanation that he would have to learn to use one as he was active in sports. E.C.F. said there was never any touching of his genitals, but the events caused him anguish. The only person he told at the time was his brother who was also at Mount Cashel, but other than that, he told no one until the inquiry into Mount Cashel began.

Count No. 3 - J.F.

The accused taught J.F. in school and in band. J.F. was also an alter boy when the accused was in charge of the alter. The event of sexual contact that he recalled was just before he went to a cadet summer camp when the accused came to his bed to say goodbye. He said that Murphy lay on his bed, kissed him on the neck and rubbed his penis and genitals. J.F. pretended to be asleep, and when he moved he actually fell out of bed. He said that Murphy explained to him that he was having a bad dream and he was comforting him. The only person J.F. told was his brother, E.C.F., until he told the police in the 1990's. Like his brother, E.C.F., J.F. said the accused was very kind and, other than this incident, he never had any problems with him, nor did he see him do anything of a sexual nature to anybody else.

Count No. 6 - J.N.F.

J.N.F. is the brother of J.F. and E.C.F.. J.N.F. presently works in the corrections program and, with his brothers J.F. and E.C.F., was in Mount Cashel from 1948 until 1959. The accused, Murphy, taught him Grades 9 and 10, but unlike his other brothers, J.N.F. was not a member of the band. J.N.F. described one incident of sexual abuse which occurred when he was in bed in the Mount Cashel dormitory. He awoke to find Murphy fondling him by playing with his penis. He said he never said nor did anything and the fondling went on for about a half hour. During the trial J.N.F. said this

was an isolated incident but, on cross-examination, he agreed that it probably happened three times, but he repressed the other two incidents and only talked about one. All incidents involved fondling.

[73] A period of twenty months of imprisonment was imposed. The sentencing Judge stated:

> Having reviewed the authorities for similar offences which were submitted to me by both counsel, a sentence of 6 months on each offence would seem to be in the appropriate range. At the sentencing hearing counsel agreed with that range. Taking into consideration that the sentences here should be consecutive and considering, as well, totality and pre-trial custody, I find that the appropriate sentence is 5 months for each offence. In total then, the sentence will be 20 months.

[74] In ***R. v. G.J.O.***, [2006] N.J. No. 307 (S.C.), the accused was convicted of two counts of indecent assault. The circumstances involved were described by the trial judge in the following fashion:

> As to the charge involving the victim, R.B., the offender was convicted on the basis of three incidents. All occurred in 1980 when the victim was 9 years of age and the offender 41 years of age. The offender was married to the victim's aunt. All three incidents involved oral sex, with the offender putting his penis in the victim's mouth, and on two of those occasions ejaculating into the victim's mouth.
>
> As to the charge involving the victim, A.O., the offender was convicted on the basis of one incident which occurred between 1977 and 1979 when the victim was 14 or 15 years of age and the offender between 38 and 40 years of age. The victim was a nephew of the offender and residing in the offender's home at the time of the incident. The incident proven involved the victim performing oral sex on the offender. No ejaculation occurred.

[75] The trial judge imposed a period of fifteen months of imprisonment for the offence in relation to RB and a period of nine months of imprisonment for the

offence in relation to AO. These two periods of imprisonment were ordered to be served consecutive to each other.

[76] In ***R. v. Smith***, [2008] N.J. No. 334 (S.C.), the accused pleaded guilty to two charges of indecent assault and two charges of sexual assault in relation to two girls who were related to his spouse. The offences took place between 1977 and 1983 and were described as follows:

> Victim 1 reported to the Royal Newfoundland Constabulary on March 6, 2006, that she had been the victim of historical acts of sexual misconduct by Mr. Smith. Victim 1 was born on April 10, 1966.
>
> Although she does not specifically recall the earliest time of being assaulted by Mr. Smith, the incidents began occurring when she was approximately nine years of age when her family lived on Forest Pond Road in Goulds, NL. These incidents began in approximately 1977 and Victim 1 recalls incidents which involved her lying on the couch in this residence and Mr. Smith would touch Victim 1 and would have Victim 2 touch his penis. Victim 1 indicated that this happened on many occasions as the accused was a regular and frequent visitor at her house. These incidents would occur in the living room at the residence on the couch and following Mr. Smith's direction to the complainant not to wear underwear, he would touch her "every chance he got". They would sit on the couch in this residence under a blanket and many times he would touch her outside her clothes or (if there was no one present in the immediate area) he would touch her inside her clothing. She recalled acts of digital penetration by the accused on many occasions and on others the accused would have her touch him (mostly outside his clothes) in the genital area. She recalled incidents where the accused would call her over to the couch when nobody was immediately present and she would sit on the couch where he was lying and the accused would take her hand and put it on his penis. She recalled incidents where this occurred when she was playing spotlight and in many cases she recalled that Mr. Smith ejaculated after she was forced to masturbate him. She also recalled that Mr. Smith had on occasions kissed her breasts, had given her toys and on one occasion had masturbated while standing outside her window. The residence in which these incidents occurred was destroyed by fire on October 30th, 1977.

Between October 30, 1977 and May 30, 1978, Victim 1 lived with Mr. Smith and [her relative] at 295 Bay Bulls Road. This touching continued at this residence, involved inside and outside the clothing of both persons and ejaculation by the accused. The family moved back to Forest Pond Road in May, 1978. Victim 1 reported that these incidents continued through the early 1980s until she was almost 17 years old and began to involve Mr. Smith removing his pants and her pants and rubbing her legs with his penis and he would "either masturbate himself or get me to do it for him". She indicated at the preliminary that this continued until she was approximately 17 years old. However, Mr. Smith never attempted intercourse.

The facts involving the allegations of Victim 2 were also reported to the RNC in March of 2006. Victim 2 is Victim 1's sister and was born on January 8th, 1971. The assaults in relation to her commenced when she was about seven years of age and began at the home of the accused where she lived from October 30, 1977 to May 1978 (the time of the fire), although she can remember no incidents of sexual abuse after she moved out of the accused's home when she was 7 until she was 10 years old. During this time period the accused would touch her in her genital area and he would have her touch his penis. On the many times this happened, the accused would ejaculate over the victim's hand. These events were often preceded by tickling or book reading by the accused, who was the victim's [relative] at the time. This type of touching occurred inside and outside her clothing and inside and outside the pants and underwear of Mr. Smith. These events continued as the accused moved to a home on Doyle Street and terminated around January 8, 1983, the time the complainant turned twelve years of age. The complainant remembers a large number of incidents, preceded by story reading and accompanying the accused, Mr. Smith, while he was lying on the couch. These incidents most often began with Mr. Smith on the couch with Victim 2 in her nightdress whereupon he would start by tickling her back and stomach and then touch her private area and ask the complainant to rub his penis. The accused never penetrated Victim 2's vagina.

Victim 2 testified at the preliminary that she has no idea how many times this happened but it started when she was around 7 years old at the home of the accused, from October 30, 1977 to May, 1978 in her home at 130 Forest Pond Road, at Mr. Smith's home on Doyle Street and ended when she turned twelve years of age.

[77] The accused was sentenced to a period of two years and six months of incarceration.

[78] In ***R. v. O'Keefe***, 2016 NLTD(G) 196, the accused was convicted of six counts of indecent assault on a female person. The offences occurred over a 14 year period from 1967 to 1981. The trial judge indicated that "Mr. O'Keefe assaulted four complainants by fondling them, touching them with his penis and causing them to touch his penis. Mr. O'Keefe assaulted three of the complainants once but he assaulted a fourth complainant three times." A period of forty months of incarceration was imposed.

[79] In ***R. v. Burry***, 2016 NLTD(G) 124, the accused was convicted of three counts of sexual assault. The circumstances involved were described by the trial judge in the following manner:

> The complainant, DP was born on 26 May 1991 and is now 24 years of age. Mr. Burry is her uncle.
>
> On Christmas Eve in 1999 DP was visiting at Mr. Burry's residence. She was 8 years old at the time. All of the family had gone to church, leaving DP and Mr. Burry alone in the home. While on her way to the washroom Mr. Burry placed his hand on DP's shoulder and pinned her up against the wall. He then ran his hand up inside her shirt feeling her breasts and placed his fingers inside her vagina. DP could not recall if anything was said.
>
> DP testified to three specific assaults, in addition to the incident on Christmas Eve 1999, which occurred during the year 2000, when she was between 8 and 9 years of age. On each occasion Mr. Burry felt her breasts and put his fingers in her vagina; once when she was taken by Mr. Burry in his boat to a beach near his community; once while berry picking with Mr.

> Burry and her father, and once when staying at Mr. Burry's following an argument with her father over her use of her father's ATV.
>
> The complainant, CP, was born on 20 December 1995 and is presently 20 years of age. She is the younger sister of DP.
>
> During the fall of 2013, CP was attending school in Marystown in an effort to complete her high school education. She did not have a driver's license and her parents were working, so her mother asked Mr. Burry if he could drive her to school. It is a 20 minute drive from CP's house to Marystown. Mr. Burry agreed and once or twice a week during September and October 2013 drove CP to and from school. There were other occasions when she took the bus.
>
> On the occasions when Mr. Burry drove, CP sat in the front passenger seat. Mr. Burry would reach over with his hand stroking her leg outside her clothing, towards, but not touching her genital area. This made CP uncomfortable and she would move closer to the passenger door.
>
> On one occasion after driving her home from school Mr. Burry followed her into her home. This made CP feel uncomfortable, as she felt that Mr. Burry had no particular reason to be there. While in the kitchen Mr. Burry asked for a "squeeze" before he left and proceeded to hug her, grabbing her bum outside her clothes. She pulled away and Mr. Burry left. CP felt that Mr. Burry's hugs "never felt right".

[80] The offender was sentenced to a period of twenty months imprisonment, concurrent, for the two sexual assaults upon DP and two months consecutive for the sexual assault on CP, followed by a period of one year of probation.

[81] In ***R. v. Barry***, [2016] N.J. No. 385 (P.C.), the accused was convicted of the offences of invitation to sexual touching, sexual touching, and sexual assault. Judge Porter described the circumstances involved in the following manner:

> The 14 year old complainant engaged in a trade with the accused. The accused supplied her with beer and cigarettes. In return, she did things for

> him. These things involved allowing him to touch her breasts and vagina, and included him digitally penetrating her vagina, him committing oral sex on her, and also her fellating him. All of these offences were committed over the space of a few weeks in February, 2016.

[82] A period of fourteen months imprisonment, a ten year section 161 prohibition, a *SOIRA* order, a DNA order, and two years of probation were imposed.

[83] In ***R. v. Kendell***, 2017 NLTD(G) 145, the accused was convicted of the offences of sexual interference and sexual exploitation of a person with a disability contrary to sections 151 and 153.1(1) of the *Criminal Code*. The victim was the accused's partner's twelve year old daughter. Justice Furey indicated:

> The incidents of sexual interference and sexual exploitation occurred over a period of months between March and August, 2016. The Agreed Statement of Facts described these in detail. There were multiple incidents of sexual contact ranging from touching, including digital penetration of the victim's vagina, to sexual intercourse by the Offender.

[84] A period of six years of imprisonment was imposed.

**A Summary:**

[85] The following table summarizes these precedents:

| CASE NAME | CIRCUMSTANCES | SENTENCE |
|---|---|---|
| ***R. v. Tucker*** | Three incidents involving the forceful removal of clothing and one act of forced sexual intercourse. | Three years of incarceration. |
| ***R. v. E.P.*** | Accused sexually assaulted his nine year old niece by attempting to have sexual intercourse | Twenty-four months of incarceration. |

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| | with her on a number of occasions. | |
| ***R. v. C.M.*** | The accused sexually abused his daughters; granddaughters; and the children of his neighbours. The offences occurred between 1962 and 1992. The offences consisted of "touching the vaginal areas of his victims either inside or outside their clothes, some digital penetration and one incident of attempted intercourse". The victims were between the ages of 5 and 12 and the accused was 75 years of age. | Twenty-one months of conditional imprisonment. |
| ***R. v. G.K.B.*** | Three incidents of sexual abuse of a child at the Mount Cashel orphanage involving the accused kissing the victim, pulling down his pants and putting his penis between his legs from behind, and putting his hand under the clothes, kissing the victim and touching the victim's genitals. | Three years of incarceration. |
| ***R. v. Murphy*** | The sexual abuse of four children at the Mount Cashel Orphanage, involving the kissing and fondling of the children while they were in bed. | Twenty months of incarceration. |
| ***R. v. J.P.*** | The sexual abuse of a three children who were | Fifteen months of conditional imprisonment. |

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| | the accused's step-children. The offences involved the accused touching the victims' vaginal area with his finger, rubbing his penis between the victims' legs in a simulated act of intercourse and having the victims masturbate him. | |
| ***R. v. S.P.*** | The accused sexually abused his granddaughter and five of his daughters. The offences occurred over an extended period of time and involved fondling, digital penetration and simulated intercourse. The accused was 78 years of age and in poor health. | Twenty-three months of incarceration. |
| ***R. v. G.J.O.*** | The accused sexually abused two children. The offences involved the children performing fellatio upon the accused. | A period of twenty-four months of incarceration. |
| ***R. v. Smith*** | The accused sexually assaulted two girls who were related to his spouse. The offences involved the accused sexually touching the children and having them touch his penis. | A period of thirty months of incarceration. |
| ***R. v. Branton*** | The accused sexually assaulted a boy in his neighbourhood. The offence "involved masturbation, oral sex and a determined attempt at anal intercourse." | Twenty-three months less a day of incarceration. |

| | | |
|---|---|---|
| ***R. v. O'Keefe*** | The accused "assaulted four complainants by fondling them, touching them with his penis and causing them to touch his penis." | A period of forty months of incarceration. |
| ***R. v. Burry*** | The accused sexually assaulted two young girls by touching their breasts and their vagina. | A period of twenty-two months of incarceration. |
| ***R. v. Barry*** | "The 14 year old complainant engaged in a trade with the accused. The accused supplied her with beer and cigarettes. In return, she did things for him. These things involved allowing him to touch her breasts and vagina, and included him digitally penetrating her vagina, him committing oral sex on her, and also her fellating him. All of these offences were committed over the space of a few weeks in February, 2016." | A period of fourteen months of incarceration. |
| ***R. v. Kendell*** | "The incidents of sexual interference and sexual exploitation occurred over a period of months between March and August, 2016. The Agreed Statement of Facts described these in detail. There were multiple incidents of sexual contact ranging from touching, including | A period of six years of incarceration. |

| | | |
|---|---|---|
| | digital penetration of the victim's vagina, to sexual intercourse by the Offender." | |

[86] As we can see, these precedents extend over the time period of 1996 to 2017 and offer a broad range of sentence. They also illustrate the persistence of sexual abuse of children in our communities. In the earlier years, the sentences imposed for offenders who sexually abused children were very lenient.

[87] As noted earlier, in 2013, Justice Goodridge sentenced Mr. Smith to eleven years of imprisonment for offences involving thirteen children. Mr. X is the fourteenth. Were any of the offences for which Justice Goodridge imposed sentence similar to what occurred in relation to Mr. X? Mr. Justice Goodridge described Mr. Smith's overall scheme for sexually abusing young boys in the following manner (at paragraph 3):

> The offender's *modus operendi* was to win friendship from his chosen victim through gifts and praise. The gifts included money, alcohol, cigarettes, cigars, ice cream, soft drinks, pornographic videos (viewed at the offender's home), road trips, fishing trips and use of a snowmobile. Once trust and friendship were established, the offender would invite the victim to his home for a sleep over. Ten of the thirteen victims were given alcohol immediately preceding the first incident of sexual abuse. Nine of the victims were asleep or passed out and awoke to discover their first victimization by sexual assault in progress. The criminal acts committed by the offender included kissing, body rubbing, genital fondling, masturbation, fellatio, anal intercourse, attempted anal intercourse, simulated intercourse between the legs and more.

[88] As can be seen, this is very similar to the manner in which Mr. Smith groomed Mr. X. In addition, for some of the thirteen boys for which sentence was imposed in 2013, the sexual acts committed upon them were also very similar to the sexual acts committed by Mr. Smith upon Mr. X. Consider the following counts pointed out by Ms. Duffy:

| COUNT NUMBER | CIRCUMSTANCES | SENTENCE IMPOSED |
|---|---|---|
| Forty-nine. | "S.B. recalls Smith telling him to sleep in Smith's bed, which he did…S.B. recalls waking with wet underwear and feeling pain in his penis.<br>S.B. recalls this to be around or near the Fall of 1979."<br>"In bed, he felt Smith's hand come around his waist and go down into his underwear. S.B. pulled away and turned over, but Smith continued to stroke S.B.'s penis and genitals until S.B. became erect. S.B. said he experienced pain in his penis. After Smith stopped touching S.B., he rolled away from S.B. in the bed and masturbated himself with S.B. still in the bed." | One year of imprisonment. |
| Forty-five. | "D.B. recalls two evenings during which he spent this night at Smith's residence before anything | Two years of imprisonment. |

| | | |
|---|---|---|
| | sexual occurred."<br><br>"Throughout the night he awoke to Smith having his hand down inside of D.B.'s underwear."<br><br>"When D.B. awoke Smith was performing oral sex on him." | |
| Forty-Three. | "Smith told K.B. that they would both sleep in his bed so that Smith would only have one bed to make up in the morning." "K.B. went to sleep but awoke later in the night with his underwear twisted around his hips and thighs so he straightened them out and pulled them up. Some time later, he awoke again feeling that his underwear was uncomfortable, and again he awoke to find that his underwear was twisted around his hips and thighs. At the same time K.B. felt Smith stroking K.B.'s penis with Smith's thumb and forefinger, and felt Smith's body close to his back. " | Six months of imprisonment. |
| Forty-one. | "He states he went to bed in Smith's bed and woke in the dark with Smith's hand on his genitals, fondling and stroking | Six months of imprisonment. |

| | | |
|---|---|---|
| | him. " | |

[89] As can be seen from this table, Justice Goodridge imposed sentences of six months, one year and two years of imprisonment for offences similar to the offence committed by Mr. Smith against Mr. X

**ANALYSIS**

[90] In ***Bosco,*** the British Columbia Court of Appeal indicated that the "process of determining a sentence requires full consideration of the offence's gravity, including the harm caused, and the offender's degree of responsibility, including his or her moral blameworthiness. Moral blameworthiness is determined, in part, by considering the intentional risks undertaken by the offender. The degree of harm caused by the offence is also considered, as is the degree to which the conduct deviates from acceptable standards of behaviour...The offender's age, mental capacity or motive for offending may also bear upon his or her moral blameworthiness. The gravity of the offence concerns its circumstances, including the harm or likely harm caused to the victim, society and societal values..." (at paragraph 32).

**The Atkins Factors:**

[91] In ***R. v. Atkins*** (1988), 69 Nfld. & P.E.I.R. 99 (N.L.C.A.), the Court of Appeal set out a number of factors which a sentencing court might consider when dealing with sexual assault offences. The Court of Appeal clearly indicates,

however, that this list is not meant to be exhaustive and that sentencing must always remain a process that concentrates on the particular offender and offence. A consideration of the factors suggested in ***Atkins*** follows.

**(i) The extent of the assault**:

[92] The sexual assault took place on at least three occasions over a three year period.

**(ii) The degree of violence or force used:**

[93] Force is inherent in all assault offences, but Mr. X was not physically harmed. However, physical harm is not what makes the sexual abuse of children such an insidious offence.

**(iii) The impact upon the victim:**

[94] As we have seen, Mr. X's victim impact statement illustrates the long term and ongoing devastating impact the offence has had upon him.

**(iv) The impact upon the offender:**

[95] There is no evidence of any specific impact upon Mr. Smith beyond the impact that committing a criminal offence has upon all offenders. He is not working as a parish priest, but he receives his priest's pension.

**(v) The degree of trust involved:**

[96] The offence involved the breach of a position of trust at or near the highest level. It has to be recalled that in many of this Province's communities a Catholic

Priest once had an enormous position of authority, respect and power (see ***R. v. Cloutier***, [2011] O.J. No. 3005 (C.A.), at paragraph 115). Mr. X eloquently captured this reality when in his victim impact statement he wrote:

> I was also told as a child that Priests were special people with special powers, sent down from God to lend a guiding hand, to guide us down the proper path in life.

[97] In ***R. v. Kelly***, [1988] N.J. No. 1 (C.A.), the Court of Appeal noted the importance of members of the clergy "to the very foundation of our society":

> There are two classes of people outside the family with whom young children will almost inevitably have contact as they grow up. These are clergymen and teachers. Society generally and parents particularly must have confidence that these people are worthy of the trust that is placed in them. They are essential to the very foundation of our society. They are almost as important as the parents in the formation of young lives.
>
> Where one from either of these groups commits a sexual assault upon a child entrusted to him, he offends against the child, the child's parents and all society. The child is disillusioned and may become apprehensive of all teachers, clergy and others in authority. Parents are concerned as to whether the children can be safely entrusted to such persons, all of whom are so important to the development of a child.
>
> Clergymen and teachers must act with the utmost good faith. When they do not, they must pay the price - not only to be deterred themselves, but so that others in positions of trust will also be deterred.
>
> Although it is not possible to state a universal rule for sentencing, it may be said that such a breach of trust generally calls for a custodial sentence.

**(vi) Public abhorrence to the type of crime involved:**

[98] Sexual assaults upon children are condemned by our society.

**(vii) The offender's plea, attitude toward the offence and any biological or psychiatric factors that led to the commission of the offence:**

[99] Mr. Smith pleaded guilty. This is a mitigating factor in sentencing.

[100] No evidence was presented at the sentence hearing that the offence was committed as a result of any psychiatric factors. Mr. Smith appeared to have issues with alcohol consumption and he was sexually attracted to young boys. He has shown a lack of victim empathy.

[101] In his sentencing judgment, Justice Goodridge referred to a "January 8, 2013 psychiatric report" which "reveals that Mr. Smith suffers guilt for his actions and feels the need to suffer consequences for his terrible deeds." This report was not filed in this case.

**(viii) The need for specific and general deterrence:**

[102] These sentencing principles along with denunciation must receive the Court's primary emphasis, though in this case specific deterrence is not a significant issue. Rehabilitation must not be ignored.

**(ix) The antecedents of the offender and the prospects for rehabilitation:**

[103] Mr. Smith had no convictions at the time that he was sexually abusing Mr. X, but he was involved in the long term and systematic sexual abuse of a number of children. I will consider the issue of rehabilitation later.

**An Application of these Principles to this Case:**

[104] In this case, Mr. Smith sexually abused a young child to whom he held a significant position of trust, power and authority. The offence is of the utmost seriousness. As noted by Abella J.A. (as she then was) in ***R. v. Stuckless*** (1998), 127 C.C.C. (3d) 225 (Ont. C.A.), at paragraph 44:

> Sexual abuse is an act of violence. When committed against children, the violence is both physical and profoundly psychological. It is coercive and exploitive conduct, and represents the use of compulsion against someone who is defenceless.

[105] The offence committed by Mr. Smith has had a long term negative impact upon Mr. X. In imposing sentence, for "sexual crimes involving children, the principles of denunciation and deterrence must take precedence over other sentencing objectives, such as rehabilitation" (see ***R. v. Al-Shimmary***, 2017 ONCA 122, at paragraph 6). I must also consider that Mr. Smith entered a plea of guilty to the offence and his age.

[106] Mr. Smith is seventy-nine years of age. The age and health of an offender are considerations in the imposition of sentence (see ***R. v. J.N.O.***, [1993] N.J. No. 9 (C.A.)). However, there is no evidence that Mr. Smith suffers from a serious or life threatening illness (see ***R. v. Andrews***, [2004] M.J. No. 158 (C.A.)). An inflexible rule that holds that the elderly are immune from the imposition of significant periods of incarceration does not exist. For instance, in ***R. v. C.W.***, 2012 NLTD(G) 124, the offender, who was 90 years of age, was convicted of five

sexual offences, four of which occurred in the late 1960's and the early 1970's. The offences involved two victims, one who was between seven and eleven years of age and the other who was between nine and twelve years of age. A total sentence of three years of imprisonment was imposed. Thus, "age and health are but one of many factors to consider in determining the length of the appropriate sentence" (see ***R. v. M.P.S.***, 2017 BCCA 397, at paragraph 12).

[107] Mr. Noseworthy submitted that a crucial factor which differentiates this case from others is that the police were aware of Mr. X when investigating Mr. Smith for the offences for which he was sentenced in 2013. Though Mr. Noseworthy does not suggest the police were negligent or that an abuse of process occurred, he did submit that more could have been done and that the principle of "finality" should play a role in the sentencing of offenders who commit multiple offences.

[108] No evidence was presented at the sentence hearing as to exactly what the police were aware of in investigating Mr. Smith prior to 2013. There is no evidence that they purposely held charges back. The only evidence presented was that Mr. X provided a statement to the police, in another province, for the first time in July 2016. Thus it is difficult to see how this differentiates this case from others. Late disclosure of sexual abuse as a child is common. It often takes many years for victims to come forward. An offender, particularly one in a position of trust who sexually abuses a multitude of children over a significant number of

years, has created a situation in which incremental disclosure is highly likely. It would be the height of cynicism for such an offender to criticize his victims for not all disclosing at the same time or to expect lenient treatment as a result.

[109] Having said this, I must consider the sentence imposed in 2013. The offence committed against Mr. X by Mr. Smith is related to those offences and thus the totality principle of sentencing is engaged. I must also consider that I am being asked to return Mr. Smith to prison after he has been released on parole. These are fair and proper considerations, but Mr. X constitutes a separate victim who deserves the attention of the court for the offence committed against him and Mr. Smith must be sentenced for that offence in accordance with the applicable principles of sentencing. He cannot be given a free ride as if the offence against Mr. X never occurred. As noted by the Manitoba Court of Appeal In ***R. v. R.J.***, 2017 MBCA 13, when "a sentence is reduced to maintain the fundamental principle of proportionality, the judge must, as far as possible, ensure that the offender does not get a free ride on any criminal conduct" (at paragraph 13). Finally, because Mr. X is a separate victim, any period of imprisonment imposed should be ordered to be served on a consecutive basis.

[110] The issue of the imposition of sentence for an offence which formed part of a series of offences, but which was disclosed at a later period of time, was

considered in ***R. v. James***, 2012 MBPC 31, which was referred to by Ms. Duffy in her submission.

[111] In ***James***, the offender was convicted of sexually assaulting two teenaged hockey players (Fleury and Holt). He had been sentenced to a period of imprisonment in 1997 for sexual offences which had been committed during the same time period against other players. At the time of the sentence hearing involving the offences committed against Fleury and Holt the offender had, as here, been released on parole for the other offences. The sentencing judge indicated that in "the unique circumstances of this case, the Court, as a starting point, must consider what total sentence Mr. James may have received in 1997 if he had then been sentenced for the offences against Mr. [Fleury] and Mr. [Holt] as well as the two for which he was then sentenced involving repeated sexual assaults." The sentencing judge concluded that a period of two years of imprisonment in relation to each count, to be served on a concurrent basis, should be imposed. The Crown appealed.

[112] On appeal, the Manitoba Court of Appeal increased the sentence imposed to a period of five years of imprisonment (see ***R. v. James***, [2013] M.J. No. 48 (C.A.)). The Court of Appeal suggested that the sentencing judge "was overly fixated on what she described on several occasions as the unique nature of this case." The Court of Appeal held that the sentencing judge erred in failing to

initially determine an appropriate sentence for each offence before considering the totality principle (at paragraphs 56 and 57):

> The starting point for her analysis should have been to focus upon the offences before her, not what happened in the past or may have happened if the accused had been sentenced for all four offences in 1997. She should have first determined whether the offences against Mr. Fleury and Mr. Holt were to be served consecutively or not, and following the principles of sentencing, determined an appropriate sentence for each of those offences. If consecutive, she should then have considered the principle of totality.
>
> What happened in 1997 was clearly relevant information for consideration by the judge in determining what an appropriate sentence would be in respect of the offences against Mr. Fleury and Mr. Holt, but it was an error to give that factor the pre-eminent focus which she did.

[113] This approach is consistent with the approach mandated in this Province by the Court of Appeal in ***R. v. Hutchings***, 2012 NLCA 2.

[114] The Manitoba Court of Appeal also concluded in ***James*** that the trial judge erred in her application of the totality principle of sentence. The Court of Appeal indicated that it was an error to "speculate as to what the sentence in 1997 for all four offences would have been" (at paragraph 58). Similarly, I cannot speculate on what the total sentence would have been in 2013 if the offence committed against Mr. X was before Justice Goodridge, though generally speaking an increase in the number of victims would serve to increase a sentence. In addition, as pointed out by the Court of Appeal in ***R. v. Barrett***, 2012 NLCA 46, a "totality analysis pursuant to section 718.2(c) does not expressly address consideration of offences which are not before the sentencing court. In ordinary circumstances, a judge who

is imposing sentence for multiple offences conducts his or her totality analysis on considerations relating to sentencing for the multiple offences which are before him or her and does not usually consider a sentence previously imposed by another judge" (at paragraph 24). Thus, I cannot impose sentence upon Mr. Smith and then apply the totality principle to the sentence imposed in 2013.

[115] The Manitoba Court of Appeal concluded in ***James*** that a period of eight years imprisonment would have been an appropriate sentence. It reduced it to five years to reflect the actions taken by the offender since his release from prison (at paragraph 76):

> ...during the 14 years between the completion of his 1997 sentence and the date of his sentence under appeal, the accused, through therapy and his own efforts, has been able to control and redirect his sexual preference away from minors. He has not offended throughout that period of time, has been gainfully employed and has rebuilt his life notwithstanding the incredible public vilification and notoriety which he and his sexual misconduct have attracted. So, as opposed to a prospect of rehabilitation, there is evidence of actual rehabilitation having occurred. The accused has become a rehabilitated and contributing member of society.

[116] In ***R. v. McLeod***, [2014] O.J. No. 6063 (C.J.), it was held that the offender in that case could not "make any direct claim to any reduction of sentence because of the existence of the previous sentence imposed for offences committed in the same time frame against different victims. The logic of the Manitoba Court of Appeal in the notorious 'hockey coach' case of ***R. v. James***...seems to me to be unassailable on this issue" (at paragraph 77). In ***R. v. Stuckless***, [2016] O.J. No. 3030 (C.J.), it

was suggested that "the appropriate approach is to apply the principle of totality to the offences that are presently before the court once I have decided the appropriate sentence for each offence and then only if it is necessary to ensure that the overall sentence is not crushing. This does not mean that the prior sentence is irrelevant. In my view the fact that Mr. Stuckless has already spent 6 years in custody for similar offences that took place during the same period and that upon his release he has not re-offended is a relevant factor in assessing the overall appropriate sentence" (at paragraph 81).

[117] In ***Barrett***, the Court of Appeal held that the "fact that an offender is already serving an incarcerating sentence does not independently support a second totality adjustment. Moreover, neither is an automatic downward adjustment necessarily warranted. The trial judge must assess whether an offender's incarceration for previous offences is a factor which, with all of the other factors bearing on a totality analysis, warrants a downward adjustment in sentence, and if so, explain why" (at paragraph 37).

**A Summary of the Appropriate Procedure:**

[118] In cases where offences are interrelated, but sentencing occurs at different times, the following procedure should be adopted by sentencing judges:

1. the sentencing judge should determine an appropriate total sentence for the offence or offences committed (including applying the totality principle if there is more than one offence); and

2. consider the earlier sentence imposed (without speculating on what sentence might have been imposed if all of the offences were considered at one time) and the offender's actions since being released or imprisoned (i.e., his or her present circumstances). However, the sentencing judge must refrain from making a "second totality adjustment" at this stage (see ***Barrett***, at paragraphs 37 and 39).

[119] Adopting this approach, I conclude that an appropriate sentence in this case is a period of eighteen months of imprisonment. I conclude that this reflects the seriousness of the offence, Mr. Smith's moral blameworthiness, his plea of guilty, the mitigating factors referred to, the sentencing principles and precedents referred to, the impact of the offence upon Mr. X, and the requirement that I stress the sentencing principles of deterrence and denunciation. Should this sentence be reduced to reflect the principles of sentencing as explained in ***James***?

[120] As noted earlier, Justice Goodridge imposed a period of eleven years of imprisonment. The existence of another offence and another victim might have caused him to have imposed a longer period. I am unable to say and I refuse to speculate.

**Rehabilitation?**

[121] In ***James***, the key to the Manitoba Court of Appeal's decision to reduce the sentence to five years of incarceration were the steps taken in relation to rehabilitation by Mr. James. What evidence is there of steps taken by Mr. Smith to promote his rehabilitation?

[122] The pre-sentence report refers to Mr. Smith's nephew's suggestion that Mr. Smith is "doing perfectly" and his opinion that "I don't believe he's a danger to society." Otherwise, the report states that Mr. Smith "denies any mental health issues" and claims that he "has not consumed alcohol in 30 years." However, there is no evidence that alcohol played any significant role in Mr. Smith's offence against Mr. X, as it did in some of the 2013 offences.

[123] The author of the pre-sentence report indicates that Mr. Smith "is not currently in any counselling or programming. He mentioned he participated in a sexual behavior program while incarcerated." The report does not indicate what impact if any this program has had upon Mr. Smith's sexual attraction to young

boys. The author of the pre-sentence report does note that Mr. Smith "displayed limited victim empathy." This is a concerning comment.

[124] The letter from Mr. Smith's parole officer indicates that Mr. Smith "participated in a psychological evaluation specific to sex offenders in 2014 which assessed his risk of sexual recidivism to be in the Low range. Following his offending period, Mr. Smith reportedly participated in a rehabilitation program in 1992 for alcohol abuse and inappropriate sexual behavior." The letter indicates that Mr. Smith's "release conditions attempt to limit his contact with "any male children under the age of 18." The letter concludes that a risk assessment indicates that "conditional release remains manageable." The letter does not explain how this conclusion was reached.

[125] In ***R. v. Miller***, 2017 NLCA 22, the Court of Appeal noted that "risk assessments are not given to exact measurement. Predicting whether an offender will reoffend, not to mention assessing the risk of future harm to children by a particular offender who has been convicted of a sexual offence involving children, is a challenging exercise. While past conduct can be an indicator of future conduct, care must be taken in placing reliance on this common-sense notion in the application of criminal law principles" (at paragraph 20).[1]

[1] Also see, K. Heilbrun, J. Fairfax-Columbo, S. Wagage and L. Brogan, *Risk Assessments for Future Offending, The Value and Limits of Expert Evidence at Sentencing*, (2017), Volume 53, Issue 3, Court Review 116.

[126] Thus, there are positive signs, but the overall evidence is slim.

[127] Considering the progress which is evident and Mr. Smith's present circumstances, which should be reflected in the sentence I impose, I have concluded that the period of eighteen months should be reduced to a period of fifteen months of imprisonment. I conclude that this is not a harsh or crushing sentence. It does not ignore treatment or rehabilitation. I note that in ***Barrett***, Justice Hoegg indicated that "the impact of a lengthy or harsh sentence is generally understood to mean that an offender must not be crushed by it such that he will be rendered unable to learn from his mistakes and will lose all motivation to successfully reintegrate into the community when released. That said, it cannot be forgotten that opportunities for rehabilitation exist within the prison system. Addictions programs, behavioural therapy and skill training provide opportunities for an offender like Mr. Barrett to reflect, learn and move forward -- in effect, to rehabilitate himself." In addition, in ***R. v. Butler***, 2017 NLCA 69, Justice Welsh held that a sentencing judge can "take judicial notice of the fact that prison authorities are required to provide psychiatric care for inmates where necessary" (at paragraph 15).

[128] Thus, Mr. Smith is sentenced to a period of fifteen months of imprisonment. Should this period of imprisonment be ordered to be served on a conditional basis?

**Conditional Periods of Imprisonment:**

[129] In ***Tran v. Canada (Public Safety and Emergency Preparedness)***, 2017 SCC 50, the Supreme Court of Canada considered the nature of conditional sentences in the following context:

> This appeal concerns the obligation of permanent residents to avoid "serious criminality", as set out in s. 36(1)(a) of the IRPA (*Immigration and Refugee Protection Act*, S.C. 2001, c. 27.). This obligation is breached when a permanent resident is convicted of a federal offence punishable by a maximum term of imprisonment of at least 10 years, or of a federal offence for which a term of imprisonment of more than 6 months has been imposed.

[130] The Supreme Court made the following comments concerning the nature of conditional sentences (at paragraphs 28, 32 and 33):

> …conditional sentences generally indicate less "serious criminality" than jail terms. As Lamer C.J. said, a "conditional sentence is a meaningful alternative to incarceration for less serious and non-dangerous offenders" (*Proulx*, at para. 21; see also *R. v. Knoblauch*, 2000 SCC 58, [2000] 2 S.C.R. 780, at para. 102)…Thus, more serious crimes may be punished by jail sentences that are shorter than conditional sentences imposed for less serious crimes — shorter because they are served in jail rather than in the community…Conditional sentences are designed as an alternative to incarceration in order to encourage rehabilitation, reduce the rate of incarceration, and improve the effectiveness of sentencing (*Proulx*, at para. 20).

[131] Section 742.1 of the *Criminal Code* sets out the prerequisites for the imposition of a conditional sentence. It states as follows:

> 742.1 If a person is convicted of an offence and the court imposes a sentence of imprisonment of less than two years, the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the conditions imposed under section 742.3, if
>
> > (a) the court is satisfied that the service of the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2;
> >
> > (b) the offence is not an offence punishable by a minimum term of imprisonment;
> >
> > (c) the offence is not an offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 14 years or life;
> >
> > (d) the offence is not a terrorism offence, or a criminal organization offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 10 years or more;
> >
> > (e) the offence is not an offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 10 years, that
> >
> > > (i) resulted in bodily harm,
> > >
> > > (ii) involved the import, export, trafficking or production of drugs, or
> > >
> > > (iii) involved the use of a weapon; and
> >
> > (f) the offence is not an offence, prosecuted by way of indictment, under any of the following provisions:
> >
> > > (i) section 144 (prison breach),

(ii) section 264 (criminal harassment),

(iii) section 271 (sexual assault),

(iv) section 279 (kidnapping),

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

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

(vii) section 333.1 (motor vehicle theft),

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

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

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

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

[132] As can be seen, section 742.1 of the *Criminal Code* allows the Court, in imposing a period of imprisonment of less than two years, to order that the period of imprisonment be served in the community if satisfied of the following:

(1) the offence is not punishable by a minimum period of imprisonment;

(2) the offence is not an offence prosecuted by way of indictment, for which the maximum term of imprisonment which can be imposed is fourteen years or life;

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

(4) the offence is not an offence prosecuted by way of indictment for which the maximum term of imprisonment is ten years and the offence did not result in bodily harm, involve the import, export, trafficking or production of drugs, or involve the use of a weapon;

(5) the offence is not an offence prosecuted by way of indictment pursuant to sections 144, 264, 271, 279, 279.02, 281, 333.1, 334(a), 348(1)(e), 349 or 435 of the *Criminal Code*;

(6) serving the period of imprisonment in the community would not endanger the safety of the community; and

(7) the imposition of such a sentence is consistent with the fundamental principles of sentencing set out in the *Criminal Code.*

[133] If the sentencing judge concludes that one of these elements is not satisfied, a conditional period of imprisonment cannot be imposed.

[134] In this case, the offence committed by Mr. Smith does not contain a minimum prescribed period of imprisonment as a penalty. It was proceeded with by way of indictment, but it is not subject to a maximum term of imprisonment of 14 years or life. It is not specifically listed in section 742.1 of the *Criminal Code* as being immune from the conditional sentencing alternative.

[135] In determining if a conditional period of imprisonment is appropriate, assuming it is available for an offence committed prior to its enactment, two

primary questions must be answered: (1) would the imposition of a conditional period of imprisonment endanger the safety of the community or (2) be inconsistent with the fundamental principles of sentencing set out in the *Criminal Code*? Danger to the public is evaluated by reference to (1) the risk of re-offence, and (2) the gravity of the danger in the event of a re-offence (see ***R. v. Knoblauch***, [2000] 2 S.C.R. 780). In ***R. v. McCarthy***, [2016] N.J. No. 330 (C.A.), the Court of Appeal indicated that a "conditional sentence has a punitive as well as a rehabilitative aspect" (at paragraph 14).

**Danger to the Public:**

[136] As pointed out earlier, risk assessment is a very difficult and uncertain exercise. Mr. Smith sexually abused fourteen young boys. Perhaps this answers the question as to whether he constitutes a danger to the public, but care must be taken in drawing this inference.

[137] The evidence presented at the sentence hearing is inconclusive on this issue. However, based upon his age and circumstances, I am satisfied that a properly drafted conditional sentence order can protect the public from Mr. Smith.

**The Principles of Sentencing:**

[138] In ***R. v. K.R.J.***, 2016 SCC 31, the Supreme Court of Canada indicated that it "is clear from the plain language of s. 718 that public protection is part of the very essence of the purpose and principles governing the sentencing process" (at

paragraph 33). In addition, as we have seen, Parliament has mandated that I place my primary emphasis in this case on deterrence and denunciation.

[139] In his submission, Mr. Noseworthy asked: "What is the purpose of returning Mr. Smith to custody?" This misses the point for two reasons. Firstly, though I must consider Mr. Smith's present circumstances, I must impose a proportionate sentence. I cannot impose a sentence which fails to reflect the appropriate principles of sentencing in an attempt to ensure that Mr. Smith is not returned to custody. That is an issue for the parole authorities. Secondly, sentencing is not purely utilitarian in nature. The sentencing principle of denunciation, for instance, is designed to express society's condemnation of an offender's conduct, regardless of whether the sentence has a positive impact such as deterrence.

[140] It has been held that "a conditional sentence should rarely be imposed in cases involving the sexual touching of children by adults, particularly where, as here, the sexual violation is of a vulnerable victim by a person in a position of trust" (see ***R. v. G.C.F.***, [2004] O.J. No. 3177, (C.A.), at paragraph 13). As I noted earlier, the sentencing principles of general deterrence and denunciation are the primary sentencing principles to be applied in this case. As we have seen, the Supreme Court of Canada has indicated that conditional sentences are designed for offences of "less serious criminality." The offence committed by Mr. Smith cannot be properly characterized in this manner. In ***R. v. Parsons***, 2017 NLCA 64,

however, the Court of Appeal, in the context of sentencing for the offence of conspiracy to traffic in cocaine, noted that though it "has emphasized that general deterrence is a paramount consideration" with "rehabilitation being a secondary consideration" in such cases, that "proposition does not foreclose a focus on rehabilitation where the circumstances warrant" (at paragraph 53).

[141] I conclude that the imposition of a conditional period of imprisonment would be inconsistent with the principles of sentencing (see ***R. v. Boudreau***, 2012 ONCJ 322, at paragraph 62). It would not be a proportionate sentence. It would not denounce Mr. Smith's conduct or serve to deter others. It would fail to reflect the seriousness of the offence and the devastating impact it has had upon Mr. X. Accordingly, the period of fifteen months of imprisonment imposed upon Mr. Smith shall be served by him in a penitentiary and in a consecutive manner to any sentence he is presently serving.

## ANCILLARY ORDERS

[142] As agreed, the following ancillary orders are issued:

-a DNA order;

-a lifetime *SOIRA* order;

-a section 109 prohibition for a period of ten years and life; and

-a section 161(a),(b) and (c) order for a period of ten years.

**A Victim Fine Surcharge?**

[143] The parties agreed that the victim fine surcharge provision could not be applied as it was not in force at the time this offence was committed (see ***R. v. Williams***, 2017 NLTD(G) 45, at paragraph 20).

## CONCLUSION

[144] For the reasons provided, Mr. Smith is sentenced to a period of fifteen months of incarceration to be served on a consecutive basis to any sentence being served.

[145] Judgment accordingly.