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COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:		**COUNSEL:**
HER MAJESTY THE QUEEN	)	For the Crown:
	)	Breta M. Passler and
- and -	)	Mandy L. Klein
	)	
	)	For the Accused:
SERAPHIM KENNETH WILLIAM STORHEIM	)	Jeffrey J. Gindin
	)	
	)	
Accused.	)	Judgment delivered:
	)	July 9, 2014

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MAINELLA J.

Introduction and Issues

On January 24, 2014, after a trial, I found the accused guilty of a historical sexual assault in 1985 of an eleven-year-old altar boy (L.J.R.), when the accused was the parish priest at the Holy Trinity Cathedral, an Orthodox Church in Winnipeg's North End.

Section 11(i) of the Canadian Charter of Rights and Freedoms recognizes the lex mitior principle; a person is to benefit from the lighter penalty where there has been a change in the law. For just shy of 11 years and 3 months, between September 3, 1996 and November 30, 2007, a conditional sentence was available for historical sexual assaults, even those involving children. The parties agree I can consider imposing one in this case if the accused meets the four preconditions of s. 742.1 of the *Criminal Code*, which were summarized as follows in *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61 (at para. 46):

> ....
>
> (1) the offender must be convicted of an offence that is not punishable by a minimum term of imprisonment;
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> (2) the court must impose a term of imprisonment of less than two years;
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> (3) the safety of the community would not be endangered by the offender serving the sentence in the community; and
>
> (4) a conditional sentence would be consistent with the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2.

A conditional sentence is possible because it is agreed that the accused meets the first three preconditions (*Proulx* at para. 47). The parties, however, disagree on whether a conditional sentence would be appropriate (*Proulx* at para. 47). The accused says a conditional sentence would be consistent with the fundamental purpose and principles of sentencing; the Crown says it would not be. The Crown argues the accused should serve a 12 month prison term. The accused submits he should receive a conditional sentence which would require him to live under a strict curfew, ultimately in a monastery in Ontario (based on a sentence transfer pursuant to s. 742.5(1) of the *Criminal Code*).

Because the first three preconditions of a conditional sentence are met, serious consideration must be given to imposing one (*Proulx* at para. 90). That

said, it is only in the rarest of cases where a conditional sentence will be appropriate for an offence involving the sexual touching of a child by an adult, particularly where the offender has abused a position of trust or authority in relation to the victim (*R. v. J.A.G.*, 2008 MBCA 55 at paras. 22-24, 228 Man.R. (2d) 99; and *R. v. Cromien (T.)* (2002), 155 O.A.C. 128 at para. 7 (C.A.)).

Whether a conditional sentence would be consistent with the fundamental purpose and principles of sentencing as set out in ss. 718 to 718.2 of the *Criminal Code* is the central question for me to resolve. This requires a comprehensive consideration of sentencing principles and objectives to determine the venue and duration of the sentence, and if a conditional sentence is imposed, its conditions (*Proulx* at paras. 60, 78; and *R. v. Wells*, 2000 SCC 10 at para. 29, [2000] 1 S.C.R. 207).

Background

Circumstances of the Offence

The circumstances of the offence are detailed in my reasons for decision, a summary of them is as follows.

The accused met L.J.R. and his family when he was their parish priest in London, Ontario. L.J.R.'s mother was a single mother and devoutly religious. At her insistence, L.J.R. and his twin brother (L.A.R.) became altar boys.

When the accused moved to Winnipeg, he and L.J.R's mother agreed that L.J.R. and L.A.R. would come to Winnipeg in the summer of 1985 for the purpose of being altar boys at the Holy Trinity Cathedral.

L.J.R. and L.A.R. came to Winnipeg at different times. L.J.R. came first and spent two weeks alone with the accused, staying in his suite in the rectory of the Holy Trinity Cathedral.

When L.J.R. arrived in Winnipeg, the accused told him he would be taking off his clothes inside the suite of the rectory. The accused had a habit of intentionally walking around naked in the presence of the child. Some mornings the accused would lie naked on the living room floor of the suite while L.J.R. ate breakfast. The accused would have his hand on his penis during these occurrences. L.J.R. was shocked by the accused's behavior, but he trusted him. The mindset of L.J.R., based on the upbringing of his mother, was to trust priests and obey them without question.

On one occasion the accused touched L.J.R. in circumstances of a sexual nature. The touching was very brief in duration. The two were alone and naked in L.J.R.'s room. The accused's stated purpose for this mutual nudity was sexual education. The accused discussed the penis and premature ejaculation. He held up L.J.R.'s pyjamas to the light to look for semen stains. The accused put his hands on the area of L.J.R.'s penis telling the child he was looking for pubic hair. The accused also invited L.J.R. to touch the accused's testicle which the child did. L.J.R. found the incident to be alarming.

I concluded in my decision that the accused's motive for this sexual touching was his personal gratification, not his stated purpose at the time of sexual education. L.J.R.'s mother never consented to the accused giving L.J.R. sexual education during the visit. Moreover, sexual education does not require mutual nudity or the touching of genitalia.

L.J.R. made disclosure of what happened to his mother several weeks after his return home. L.J.R.'s mother cut off all contact with the accused, but did not report the matter to the police. She raised the incident with church officials, but nothing happened.

Sometime in 1985 or 1986, the accused wrote an apology note to L.J.R.'s mother. Later she showed that apology note to her then parish priest, Fr. Steven Kostoff. While the accused did apologize, he was not forthright as to what was his inappropriate conduct. In his apology note, he omitted mentioning being nude with L.J.R. and described his inappropriate conduct as only being limited to teaching the boys about adult things. Because the apology was selective, in my view, it was half-hearted and not genuine.

In 2008, Fr. Kostoff's guilt for remaining silent led him to seek forgiveness from L.J.R. and his family. Fr. Kostoff then confronted the accused about his inappropriate behavior. The accused replied: "The mistake I made was getting too close to that family." I do not accept counsel's submission that this was an expression of remorse; it was nothing more than a rationalization.

Victim Impact

Sexual abuse of a child has long-term consequences to the victim and society generally, which courts must take into account when sentencing offenders (*R. v. D. (D.)* (2002), 58 O.R. (3d) 788 at paras. 35-38 (C.A.)). Child victims of sexual abuse often suffer permanent emotional trauma. Some victims, such as L.J.R., suffer in their ability to trust others. Still worse, other victims, when they become adults, become abusers of children themselves.

L.J.R. is 40 years old, married with children and operates a successful business in Vancouver, B.C. The victim impact statement, however, confirms that despite his apparent success, L.J.R. is an individual suffering from the long-term effects of sexual abuse as a child.

As a result of the accused's sexual abuse, L.J.R. suffers from anxiety, insomnia and stress related conditions. He has episodes of anger, stress, fear and feelings of helplessness when something trigger's his memories of the

accused. He has flashbacks to the events in 1985 and nightmares related to the accused. He takes medication to address his anxiety, insomnia and stress-induced ulcer. He has had extensive counselling and treatment over the years related to being sexually abused by the accused.

L.J.R. is also suffering tremendous guilt in relation to his own children. His personal fears are preventing his children from being exposed to religion. L.J.R. says he fears his children will be abused if he exposes them to religion; his solution is simply to not allow them to attend church or have any religious upbringing. When his children speak to him about religious questions he avoids the conversation and is uncomfortable discussing it with them.

During her testimony at the trial, L.J.R.'s mother explained how she has been also deeply affected by the accused's betrayal of her trust and friendship. While I had doubts on the reliability on some of her evidence, this aspect of her evidence is both credible and reliable. As I explained earlier, L.J.R.'s mother is a devoutly religious woman. The idea of a priest sexually touching one of her children was deeply upsetting to her in 1985 and is so even to this day.

I acquitted the accused of another count of sexual assault in relation to L.A.R. and his separate visit to Winnipeg in 1985. I did not find the evidence of L.A.R. sufficiently reliable. I also concluded that even if I accepted his evidence, in law it would not support an allegation of sexual assault by the accused against L.A.R. because the accused never touched him in circumstances of a sexual nature. I do, however, accept that L.A.R. has also been negatively affected by the accused's sexual assault of L.J.R. L.A.R. was surprised when L.J.R. told him what happened and, although L.A.R. is an alcoholic with mental health issues, it was clear to me he is supportive of his brother and feels empathy to him for the fact that the accused sexually assaulted L.J.R.

Circumstances of the Offender

The accused is single with no dependents and has no criminal record.

At the time of the offence, the accused was 39-years-old. He is now 68-years-old and is in good health, save for hypertension and high cholesterol. A psychiatric report prepared by Dr. Jeffrey C. Waldman, confirms that the accused has no mental health history and does not currently have any difficulties consistent with a paraphilic disorder, a psychiatric illness or a personality disorder.

The accused had a good upbringing in a loving family environment and did not suffer any sexual or physical abuse growing up.

The accused is highly educated. He has a Bachelor of Arts in Music with a minor in Latin Philosophy as well as a Bachelor of Sacred Theology. He also has a Masters degree in Theology.

The accused was a cleric for 42 years. He was ordained as an Anglican Priest in 1972. In the late 1970s, he decided to attend an Orthodox Church seminary in New York State. The accused was ordained as a priest in the Orthodox Church in America in 1979. In 1987, he became a monk and later was consecrated as an auxiliary bishop in Edmonton, Alberta. He then moved to Ottawa, Ontario. In 1990, he became the ruling bishop of the Orthodox Church in America's Archdiocese of Canada. He was later elevated to the position of Archbishop. He also held senior positions within the Orthodox Church in America including secretary to the Holy Synod and Chair of the Church's Department of External Affairs.

He was suspended from his duties as Archbishop on his arrest in 2010. Since being found guilty, the accused has retired from his position as Archbishop

of Ottawa and Canada in the Orthodox Church in America. He currently lives on his pension in a monastery in Ontario.

During the trial, I heard testimony from individuals who have known the accused for many years: Connie Kucharczyk, Jason Rodgers and Esther Juce. Eleven character references were filed at the sentencing from various people who knew the accused over the last several decades throughout Canada. One of the accused's siblings also provided background information that was supportive of the accused to Dr. Waldman for the purposes of his assessment.

The general theme of the references and the testimony regarding the accused's character is that this sexual offence is completely out of character for the accused. The accused was deeply trusted and respected by many people and highly thought of both as a priest and as a good moral person. The references and testimony of the character witnesses were very positive of the accused. Throughout the trial, and at the sentencing, many friends of the accused were in attendance to show their support and solidarity for a man who has otherwise led an exemplary life in service of the community.

Dr. Waldman's opinion is that, given the accused is over 65 and has not offended in the last 15 years; he is an extremely low risk of future sexual offending behavior.

Analysis

Historic Nature of the Case

When dealing with a historic allegation, an offender is to be sentenced under the criminal law provision in place at the time the offence was committed (*R. v. Johnson*, 2003 SCC 46 at para. 41, [2003] 2 S.C.R. 357). The maximum punishment for the offence of sexual assault in s. 246.1(1)(*a*) of the *Criminal Code* in 1985 was ten years' imprisonment. The relevant sentencing principles,

however, to be applied are those at the time of sentencing (*R. v. Fones (D.R.)*, 2012 MBCA 110 at paras. 60-62, 288 Man.R. (2d) 86).

Synthesis of Principles in Light of the Circumstances

Sections 718-718.2 of the *Criminal Code* set out the fundamental purpose of sentencing, the relevant objectives and the principles for a sentencing court to take into consideration. In *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, Lebel J. explained these statutory provisions in the following manner (at para. 43):

> The language in ss. 718 to 718.2 of the *Code* is sufficiently general to ensure that sentencing judges enjoy a broad discretion to craft a sentence that is tailored to the nature of the offence and the circumstances of the offender. The determination of a "fit" sentence is, subject to some specific statutory rules, an individualized process that requires the judge to weigh the objectives of sentencing in a manner that best reflects the circumstances of the case … ….

The *Criminal Code* creates a hierarchy of sentencing objectives for certain types of offences which judges must give effect to when imposing sentence. In terms of the six sentencing objectives set out in s. 718 of the *Criminal Code*, because this case involves an offence that involved the abuse of an eleven-year-old, s. 718.01 of the *Criminal Code* mandates that I give primary consideration to the objectives of denunciation and deterrence of such conduct. While other sentencing objectives set out in s. 718 are relevant, to the extent there is any conflict in sentencing objectives, other sentencing objectives must be considered secondary to denunciation and deterrence (*R. v. J.R.A.*, 2012 MBCA 48 at para. 9, 280 Man.R. (2d) 123).

The parties agree that other sentencing objectives in s. 718 either have no relevance (separation, reparation) or marginal relevance (rehabilitation,

promoting a sense of responsibility and acknowledging harm) in the circumstances of this case.

A conditional sentence is capable of achieving the objectives of denunciation and deterrence (*Proulx* at para. 22). A conditional sentence achieves these objectives by punitive conditions, the duration of the conditional sentence and the circumstances of the offender and the place where the community sentence is to be served (*Proulx* at para. 114).

While rare, conditional sentences for sexual offences committed against children have been considered to satisfy the objectives of denunciation and deterrence given the individual circumstances of the particular case (e.g., *R. v. L.F.W.*, 2000 SCC 6, [2000] 1 S.C.R. 132; *R. v. R.N.S.*, 2000 SCC 7, [2000] 1 S.C.R. 149). The sentencing principles of proportionality (s. 718.1) and restraint (ss. 718.2(d) and 718.2(e)) mandate consideration of whether a conditional sentence would attain the same sentencing objects as a prison term (*Johnson* at para. 28). It is only if this is not the case that a prison term can be imposed.

Conditional sentences are rare for sexual offences against children because the need for denunciation or deterrence is so pressing that incarceration is typically the only suitable way to express society's condemnation of the conduct or to deter similar conduct (*Proulx* at paras. 106-107, 114-15). Cases that rise to the level of the rare case where a conditional sentence was appropriate for such crimes typically involve some extraordinary mitigating factor(s), in addition to the usual mitigating factors.

Beginning with an assessment of the principle of proportionality, in my view, the gravity of the offence and the moral blameworthiness of the accused strongly favours a prison term in this case.

Counsel for the accused argued that the gravity of the offence, for the purposes of s. 718.1 of the *Criminal Code*, was a form of sexual violation that was towards the lower end of the spectrum as it involved only the fleeting touching of genitalia, without manipulation of L.J.R.'s penis or attempted masturbation. The situation did not escalate into more serious sexual conduct such as fellatio or anal intercourse.

While counsel's summary of the physical characteristics of the crime is accurate, according to the victim impact statement, the emotional trauma L.J.R. has suffered is anything but minor. The accused has emotionally scarred L.J.R. permanently.

Causing psychological harm to the victim is an aggravating factor on sentence for a sexual offence (*R. v. McDonnell*, [1997] 1 S.C.R. 948 at paras. 37-38). There is no doubt, based on L.J.R.'s victim impact statement, that he has been acutely traumatized as a result of this offence. That harm has persisted over the last 29 years and will likely continue to affect L.J.R.

The accused's conduct was nothing short of deplorable. It would be an error in weighing the gravity of the offence to separate the physical aspect of the abuse from its psychological consequences, given the record before me. The nature of the physical act that constitutes sexual assault may be aggravating (e.g., penetration). However, the absence here of fellatio or penetration is not a mitigating factor or a factor that neutralizes other aggravating factors such as the abuse of trust (*R. v. Stuckless* (1998), 41 O.R. (3d) 103 at 116-17 (C.A.)).

There is no dispute that the moral blameworthiness of the accused in this case is very high. The victim was under the age of 18-years-old, and the accused abused a position of trust or authority in relation to the victim in committing the offence (ss. 718.2(*a*)(ii.1) and 718.2(*a*)(iii) of the *Criminal Code*).

L.J.R. was an 11-year-old boy in a strange city where the only person he knew was the accused, a mature priest he trusted without hesitation. L.J.R. was a particularly vulnerable victim. The manner in which the sexual assault was committed is aggravated by evidence of grooming and trickery.

The sexual assault was not a momentary lapse of judgment by the accused, there is evidence before me of "grooming."

Grooming is the process where an offender deliberately desensitizes a child to sexual issues to prepare them for sexual activity with the offender (*R. v. A.G.* (2004), 191 O.A.C. 386 at para. 11 (C.A.); and *U.S.A. v. Chambers*, 642 F.3d 588, 593 (7th Cir.)). In deciding whether grooming has occurred, a court is required to look at the relevant context and the purpose behind an offender's behavior. When proven by the Crown, grooming is an aggravating factor for the purposes of sentencing.

Context is often everything in fact-finding; this is such a situation. The context of the accused's conduct and its deliberate nature leads inexplicably to a finding of grooming. L.J.R.'s visit to Winnipeg for a religious purpose began with the accused immediately telling him he would be nude in the suite of the rectory. That comment served no legitimate purpose for a priest dealing with an altar boy. The accused's later deliberate behavior of intentionally exposing himself to L.J.R. also served no legitimate purpose. I am left with, as the Crown put it, the accused deliberately introducing a strange aura of sexuality to what was supposed to be a religiously inspired visit, prior to sexual touching occurring.

The use of trickery to commit a sexual offence against a child is also an aggravating factor for sentencing purposes (*R. v. Revet (C.J.)*, 2010 SKCA 71 at para. 12, 350 Sask.R. 292). Evidence of trickery is before me as the sexual touching here took place under the false pretext of the accused giving sexual education to L.J.R. The accused had no reason to discuss sex with L.J.R. He

had no permission to do so from L.J.R.'s mother. Sexual education does not require mutual nudity of an adult and a child or the necessity of the touching of genitalia. Finally, a celibate priest is particularly ill-qualified for such a venture.

The accused's abuse of a position or trust or authority is two-fold and, in my view, very significant. The accused abused his position of trust as L.J.R.'s priest. The family was devout and the accused took advantage of that. The accused was also in a position of authority by being *in loco parentis of L.J.R. during his visit to Winnipeg.*

Counsel for the accused submitted, however, that, despite there being a number of aggravating factors in this case, I should consider a sentence that places due consideration on the sentencing principle of restraint (ss. 718.2(*d*) and 718.2(*e*) of the *Criminal Code*). Counsel argued that there are several mitigating factors to consider that favour a conditional sentence, such as:

- the accused has no prior criminal record;
- the accused is 68 years old;
- the passage of almost 30 years given the accused has not sexually abused another child since this incident in 1985;
- the accused has good character and has led an exemplary life contributing to his faith and the wider community;
- the accused has been disgraced by the criminal prosecution and conviction losing his position and status in the Orthodox Church in America; and
- the accused has been stigmatized by intense adverse publicity over the last four years since his arrest.

Counsel for the accused submitted that a conditional sentence requiring the accused to live under a strict curfew for a lengthy period of time would achieve the objectives of denunciation and general deterrence. Counsel's bottom line is imprisoning the accused would serve no purpose.

It is not uncommon for individuals who sexually abuse children in a position of trust to be first offenders and persons of apparent good character (*R. v. H.S.*, 2014 ONCA 323 at para. 49 (QL)).

While the accused's age would undoubtedly make a prison sentence difficult for him, he is not suffering an infirmity such that imprisonment would be unjust, nor is a prison sentence likely to be so long as to extend beyond his natural life (*R. v. M. (C.A.)*, [1996] 1 S.C.R. 500 at para. 74; and *R. v. Cromwell (E.J.)*, 2006 ABCA 365 at para. 16, 401 A.R. 77).

The antiquity of the offence is not a mitigating factor in this case. While the appellant is not responsible for L.J.R.'s delay in reporting the offence and the appellant has led an exemplary life since 1985, there is no evidence of his genuine remorse before me (*R. v. A.R.* (1994), 92 Man.R. (2d) 183 at paras. 33-34 (C.A.)). While the absence of genuine remorse is not an aggravating factor, the accused is disentitled to the benefit of the mitigating factor of demonstrating genuine remorse because he has not done so. In this very limited and discrete way, the absence of genuine remorse in this case is relevant.

The suffering of disgrace and humiliation is a factor that can favour the imposition of a conditional sentence in an appropriate case (*R. v. Bunn*, 2000 SCC 9 at para. 23, [2000] 1 S.C.R. 183). However, this case is factually quite different than *Bunn*. This is not a situation where the accused has dependents who share in his fall from grace and who would suffer if he went to prison. For example, the accused does not have care-giving responsibilities. I also note at the time the accused was arrested for this offence, he was already in his mid-

60s. Unlike the situation in *Bunn* where a professional career was halted mid-way, the accused here was closer to the end of his working life before his arrest, and prosecution ended his career.

Related to the accused's fall from grace, counsel for the accused argued that I consider as a mitigating factor the stigmatization the accused has received from the publicity of this case over the last four years (*R. v. Kneale*, [1999] O.J. No. 4062 at para. 35 (S.C.) (QL)).

In some cases, adverse publicity will have denunciatory or deterrent effect, and, therefore, a judge can take that into consideration in imposing sentence; this is particularly the case when a person is of previous good character and has a position of responsibility in the community (*R. v. Schiegel* (1985), 7 O.A.C. 37 at para. 6 (C.A.)).

According to counsel for the accused, whose submission I accept, the media scrutiny of this case has been intense since the accused was arrested in 2010. Coverage has been local, national and international because of the accused's high office in the Orthodox Church in America.

No evidence, however, was put before me as to how this media coverage has negatively affected the accused psychologically (*R. v. Ewanchuk (S.B.)*, 2002 ABCA 95 at paras. 66-68, 299 A.R. 267, leave to appeal to S.C.C. ref'd, [2002] S.C.C.A. No. 469 (QL)). I accept counsel for the accused's argument that some negative impact can be inferred based on common sense. What little direct evidence that is before me comes from Dr. Waldman's psychiatric report. The accused advised Dr. Waldman, after he was convicted, that he has no "problems with his mood, thinking or anxiety." This is not a case where, in addition to the expected shame and humiliation of being charged and convicted of sexual abuse of child, there is the additional consideration that the accused has emotionally or

psychologically disintegrated by the experience. That was not proven or indeed argued.

While I accept that negative publicity is a mitigating factor for me to consider, I also recognize that media coverage of serious crime is a common feature of the criminal justice system, particularly given the accused's high rank inside his church. Adverse publicity does not always justify a reduction in sentence (*R. v. Deck (B.S.)*, 2006 ABCA 92 at para. 17, 384 A.R. 106). It does so only when the adverse publicity has an "inordinate" impact on the offender (*R. v. Heatherington (D.M.)*, 2005 ABCA 393 at para. 5, 380 A.R. 395).

Here, the language of s. 718.01 of the *Criminal Code* is important to remember. The statute requires primary consideration be given to the sentencing objectives of denunciation and deterrence as to certain "conduct" (the abuse of a child or young person). General deterrence thus must be emphasized in any sentence in such cases. Where general deterrence is an important sentencing objective in a given case, the effect of adverse publicity will have less relevance to the mitigation of sentence (*R. v. Zentner (R.)*, 2012 ABCA 332 at paras. 36-51, 539 A.R. 1).

Great care must be taken to not quickly dilute the message a sentence sends to the public to deter others from the conduct of sexually abusing children or young persons when in a position of trust or authority, by giving too much emphasis on the stigma one offender incurs by intensive media attention of their fall from grace.

I have carefully weighed the impact of the accused's fall from grace in the context that it has been widely reported about for four years. Because the accused's moral blameworthiness in this case is high (as a result of the nature of his abuse of his position of trust or authority in relation to L.J.R), I am not satisfied that the ruin and humiliation that he has experienced, that has been

intensely publicized, is reason when weighed with other mitigating factors to conclude this is a rare case where a conditional sentence is appropriate for a sexual offence committed against a child.

Both counsel referred me to several cases at the sentencing hearing as to the appropriateness of a conditional sentence for a member of the clergy committing a sexual offence against a victim who was under the age of 18-years-old and the accused abused a position of trust or authority in relation to the victim in committing the offence (*R. v. Doucette (G.)*, 2000 SKQB 312, 194 Sask.R. 267; *Cromien*; *Kneale*; *R. v. Borne* (April 10, 2012) (Ont. S.C.) (unreported); *R. v. Boudreau*, 2012 ONCJ 322 (QL); and *R. v. Jacobs*, 2013 BCSC 768).

Reference was also made to other breach of trust cases involving sexual offences against children involving family members, neighbours, massage therapists, school officials, foster parents and coaches (*R. v. P.D.U.*, 2000 MBCA 142, 150 Man.R. (2d) 309; *R. v. A.C.*, 2012 ONCA 608 (QL); H.S.; *R. v. K.R.D.*, 2005 NSCA 13, 229 N.S.R. (2d) 381; *R. v. Palacios*, 2012 ONCA 195 (QL); *Fones*; *J.A.G.*; *R. v. H.K.*, 2014 MBQB 18, 301 Man.R. (2d) 241; and *R. v. Smart* (October 19, 2012) (Man. P.C.) (unreported)).

I have considered these decisions and several others. In some cases a conditional sentence was considered appropriate, in others not. Rationalizing the disparities in sentences is folly. There is no such thing as a uniform sentence for a particular crime. Sentencing is an individualized process where sentences are tailored to the exigencies of the particular case. As noted in *R. v. E.M.W.*, 2011 NSCA 87, 308 N.S.R. (2d) 15, the range of sentence for the sexual touching of a child, short of oral sex or intercourse, is wide (at para. 28):

> ....

> .... Sexual touching in various forms generally attract sentences ranging from conditional sentences to two to three years of incarceration. Where the touching is over clothing or is a single incident or happens in an unplanned way in the context or [*sic* "of"] wrestling or horseplay, the sentence is more likely to be toward the lower end of the range. Where the touching involves masturbation and touching of the penis, the sentence is likely to be toward the higher end of the range. Where the perpetrator has a record of similar offences, the sentences have certainly tended toward the more severe end of the range. Where the abuser is a person in a position of trust, the sentence has reflected that.
>
> [emphasis added]

Care must also be taken in viewing conditional sentence precedents involving sexual offences against children with reference to the date of the precedent. Since 2005, Parliament has sent a clear message that offenders who commit sexual offences against children will face a prison sentence (e.g., *An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act*, S.C. 2005, c. 32; *An Act to amend the Criminal Code (conditional sentence of imprisonment)*, S.C. 2007, c. 12; *Tackling Violent Crime Act*, S.C. 2008, c. 6; and *Safe Streets and Communities Act*, S.C. 2012, c. 1).

In the last decade, the direction of Parliament has led to a deliberate upward trend in the severity of punishment for child sexual abuse where the offender is in a position of trust or authority (*R. v. P.M.*, 2012 ONCA 162 at paras. 45-46, 289 O.A.C. 352, leave to appeal to S.C.C. ref'd, [2012] S.C.C.A. No. 242; *R. v. D.M.*, 2012 ONCA 894 at para. 66, 299 O.A.C. 202; and *R. v. D.M.*, 2012 ONCA 520 at para. 43, 294 O.A.C. 71).

Sexual abuse of children is recognized to be a prevalent crime in our society (*R. v. L. (D.O.)*, [1993] 4 S.C.R. 419 at 439). Sexual abuse of a child committed by an adult in a position of trust or authority must be denounced by a sentence that communicates society's condemnation of such conduct in the

clearest terms as such offences involve significant moral blameworthiness. The general deterrent effect of sentencing also contributes to the fundamental purpose of sentencing by helping protect children who are particularly vulnerable to sexual abuse by adults who betray a position of trust or authority.

In my view, the objectives of denunciation and general deterrence require the incarceration of the accused despite the mitigating factors, particularly his lack of criminal record, exemplary service to his church and wider community for many years and the consequences to his reputation and very public shame this offence has brought him. The accused was a mature offender at the time of the offence, the offence was a gross abuse of trust and the lasting effects of the crime on the victim are serious. A conditional sentence, even a long one with punitive conditions beyond just house arrest, would not only fail to reflect the objectives of denunciation and general deterrence in the circumstances, but would not be proportionate given the gravity of the offence and the accused's degree of responsibility (s. 718.1). I reach this conclusion taking into account sentencing objectives and principles that favour a conditional sentence such as the principle of restraint.

The related question to the venue of the accused's sentence is its duration. Because the sexual abuse in this case was only one incident and did not involve the aggravating features of fellatio or penetration, I am satisfied a relatively short prison term is appropriate (*R. v. Levert (G.)* (2001), 150 O.A.C. 208 at paras. 41-42 (C.A.)).

Some care must be taken with consideration of the appropriate range of sentence for sexual assault in this case. In 1985, there was no minimum punishment for the offence of sexual assault relating to a child. As of August 9, 2012, the minimum punishment for the offence of sexual assault relating to a complainant under the age of 16 prosecuted by indictment was set at one year imprisonment (s. 25 of the *Safe Streets and Communities Act*; SI/2012-0048).

As mentioned previously, the accused is to be sentenced under the statute as it read in 1985, but with reference to the sentencing principles and case law as it is today. I have taken into account that where reference is made to any sentencing precedent for an offence committed on or after August 9, 2012, there is by operation of the statute a different lower end of the range than what existed in 1985. Several authorities are of assistance as to the applicable range of sentence.

In *R. v. B.W.B.*, 2007 ABCA 199, 412 A.R. 182, a sentence, after a trial, of one year was upheld for a sexual assault against a nine-year-old girl. The sexual assault was a one-time incident. The victim, who was a friend of the accused's daughter, was staying at the accused's residence. While the victim was asleep, the accused placed his hand inside her panties and briefly stroked her vagina. The accused was 50 years old with no criminal record.

In *J.A.G.*, on appeal a sentence of one-year plus probation was substituted for a sentence of two years less a day plus probation for a guilty plea to sexual interference against the accused's eight-year-old step-granddaughter. On ten occasions the accused either fondled the victim's vagina or placed his penis against her buttock (without any penetration). The accused was 77-years-old with no criminal record.

In *R. v. G.W.R.*, 2011 MBCA 62 at paras. 33-34, 268 Man.R. (2d) 204, a case involving one incident of the touching of the buttock and vagina of a nine-year-old girl by a friend's father, the Court of Appeal cited, with approval, sentences in the range of 12-27 months for first offenders who fondled or touched the genitalia of a child on one or two occasions. It is important to note that the range of sentence cited with approval by the Court of Appeal included cases where there was a breach of trust for which s. 718.2(*a*)(iii) of the *Criminal Code* would apply and cases where there was no breach of trust. The ultimate

sentence in *G.W.R.* of four years is not relevant to this case as the accused there had a prior-related record.

In *Klassen*, a sentence of one-year plus probation for a guilty plea to sexual interference against the accused's 14-year-old niece was upheld on summary conviction appeal. On two occasions the accused made sexually suggestive comments to the victim while she was living in his house. On one of the occasions when the victim came out of the shower, the accused squeezed her breasts and brushed his hand across her pubic area. The accused was 38-years-old with no criminal record.

The Accused's Sentence

When I weigh the mitigating factors in this case such as the accused's age and lack of record, his exemplary career and demonstrated good character otherwise than for this crime and the fact that he has suffered negative publicity and humiliation over the last four years, I am satisfied that an appropriate mitigation of his prison term is required. This can be done while still giving primary consideration to the principles of denunciation and deterrence.

Taking into consideration the fundamental purpose of sentencing, the relevant objectives and the principles of a sentencing in light of the circumstances of this case, I am of the view that a prison term of eight months for the accused is appropriate. The following mandatory ancillary orders will go:

- Ten year weapons prohibition order pursuant to s. 101(1)(*a*) of the *Criminal Code*;

- A DNA order pursuant s. 487.051 of the *Criminal Code* as this is a primary designated offence; and

- An order to comply with the *Sexual Offender Information Registration Act* pursuant to s. 490.012 of the *Criminal Code* for a

period of 20 years as this is a designated offence punishable by a maximum punishment of 10 years' imprisonment.

Despite the Crown's request for me to exercise my discretion for a non-communication order pursuant to s. 743.21 of the *Criminal Code*, I have determined in the circumstances that this is not necessary. The accused has shown no interest in communicating with L.J.R. for almost three decades. I see no reason why that would change while he is in custody. The accused also has little ability to communicate with L.J.R. as he does not know where he lives. I see no purpose such an order would serve in the circumstances.

A victim surcharge is not mandatory in this case given the date of the offence. Given the circumstances, costs and the surcharge are waived.

_____J.