Court of Queen's Bench of Alberta

Citation: R v Pettitt, 2021 ABQB 773

Date: 20210923
Docket: 180979379Q1
Registry: Edmonton

Between:

Her Majesty the Queen

Crown

- and -

Scott Bradley Pettitt

Accused

Restriction on Publication

Identification Ban – See the *Criminal Code*, section 486.4.

By Court Order, information that could identify the victim must not be published, broadcast, or transmitted in any way.

NOTE: Identifying information has been removed from this judgment to comply with the ban so that it may be published.

Reasons for Sentence
of the
Honourable Mr. Justice W.N. Renke

This decision was delivered orally, in abbreviated form. I reserved the right to add headings and a table of contents, complete citations and quotations, make grammatical and stylistic changes, and to anonymize the complainants. A text of the decision was provided to counsel.

[1] On February 12, 2021, Mr. Pettitt was convicted by a jury of three offences, that he:

- between the 1st day of October 2014 and the 31st day of December 2014, both dates inclusive, at or near Edmonton, Alberta, did unlawfully commit a sexual assault upon [C.O.], contrary to s. 271 of the *Criminal Code* of Canada (count 1)
- between the 1st day of September, 2017 and the 1st day of January 2018, both dates inclusive, at or near Edmonton, Alberta, did unlawfully commit a sexual assault upon [I.H.], contrary to s. 271 of the *Criminal Code* of Canada (count 2)
- on or about the 1st day of June, 2018, at or near Edmonton, Alberta, did unlawfully commit a sexual assault upon [E.S.], contrary to s. 271 of the *Criminal Code* of Canada (count 4).

[2] Sentencing was adjourned to a later date and was adjourned again because of a change in the responsible Crown Prosecutor.

[3] A Pre-Sentence Report prepared by Probation Officer Amanda Andrusiak (the PSR) was admitted in the sentencing proceedings. Victim impact statements from C.O. and E.S. were filed and read into the record. The victim impact statements were not challenged. A set of letters from third parties respecting Mr. Pettitt's character was filed. Mr. Pettitt made a statement under s. 726, expressing his remorse. No witnesses testified in the sentencing proceedings.

[4] I have two main tasks: to determine the facts necessary for sentencing from the issues before the jury, and to determine the appropriate sentence for Mr. Pettitt in light of those facts and any further facts established in the sentencing proceedings.

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I. Facts Necessary for Sentencing

A. Principles

[5] Section 724(2) of the *Criminal Code* provides as follows:

> (2) Where the court is composed of a judge and jury, the court
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> > (a) shall accept as proven all facts, express or implied, that are essential to the jury's verdict of guilty; and

> (b) may find any other relevant fact that was disclosed by evidence at the trial to be proven, or hear evidence presented by either party with respect to that fact.

[6] In ***R v Ferguson***, 2008 SCC 6, Chief Justice McLachlin wrote as follows at paras 16-18:

> [16] ... [U]nlike a judge sitting alone, who has a duty to give reasons, the jury gives only its ultimate verdict. The sentencing judge therefore must do his or her best to determine the facts necessary for sentencing from the issues before the jury and from the jury's verdict. This may not require the sentencing judge to arrive at a complete theory of the facts; the sentencing judge is required to make only those factual determinations necessary for deciding the appropriate sentence in the case at hand.
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> [17] Two principles govern the sentencing judge in this endeavour. First, the sentencing judge "is bound by the express and implied factual implications of the jury's verdict": *R. v. Brown*, [1991] 2 S.C.R. 518, p. 523. The sentencing judge "shall accept as proven all facts, express or implied, that are essential to the jury's verdict of guilty" (*Criminal Code*, s. 724(2)(a)), and must not accept as fact any evidence consistent only with a verdict rejected by the jury: Brown; *R. v. Braun* (1995), 95 C.C.C. (3d) 443 (Man. C.A.).
>
> [18] Second, when the factual implications of the jury's verdict are ambiguous, the sentencing judge should not attempt to follow the logical process of the jury, but should come to his or her own independent determination of the relevant facts: *Brown*; *R. v. Fiqia* (1994), 162 A.R. 117 (C.A.). In so doing, the sentencing judge "may find any other relevant fact that was disclosed by evidence at the trial to be proven" (s. 724(2)(b)). To rely upon an aggravating fact or previous conviction, the sentencing judge must be convinced of the existence of that fact or conviction beyond a reasonable doubt; to rely upon any other relevant fact, the sentencing judge must be persuaded on a balance of probabilities: ss. 724(3)(d) and 724(3)(e); see also *R. v. Gardiner*, [1982] 2 S.C.R. 368; *R. v. Lawrence* (1987), 58 C.R. (3d) 71 (Ont. H.C.). It follows from the purpose of the exercise that the sentencing judge should find only those facts necessary to permit the proper sentence to be imposed in the case at hand. The judge should first ask what the issues on sentencing are, and then find such facts as are necessary to deal with those issues.

See also ***R v Roncaioli***, 2011 ONCA 378 at para 59 ("Where the basis of the jury's verdict is unclear, the correct principle is that the sentencing judge should make his or her own independent determination of the facts, consistent with the jury's verdict"); ***R v RTK***, 2014 ABCA 349 at paras 11, 19.

B. Determination of the Facts

1. The Jury Verdict

[7] Mr. Pettitt had faced a three-count indictment and was convicted on each count. No verdict was rejected.

[8] Mr. Pettitt had testified, claiming either that certain events alleged by a complainant did not occur, or that, contrary to a claimant's testimony, sexual contact was consensual. The verdicts demonstrate that Mr. Pettitt's testimony was wholly rejected by the jury.

2. The Facts

[9] Each of the offences occurred in Mr. Pettitt's tattoo studio in North East Edmonton. Each of the offences occurred while Mr. Pettitt was applying a tattoo to the complainant.

[10] C.O. and E.S. consumed wine while their tattoos were applied.

(a) C.O.

[11] During the winter of 2014, Mr. Pettitt applied a tattoo to C.O.'s buttocks and thighs. The sexual assault began with Mr. Pettitt touching her buttocks. He pulled her underwear aside, put his hand between her legs, and touched her vagina with his hand. At that point, C.O. left his premises. There was no consent to the touching. There was no penetration.

[12] I find that these facts were essential to the jury's verdict concerning the count respecting C.O.

[13] C.O. had alleged that Mr. Pettitt had provided a Percocet pill to her. The pill had been his wife's. I find that the likelihood of C.O.'s confusion about dates of tattooing sessions and the dates of Mr. Pettitt's wife's illness preclude acceptance of this allegation by C.O. in relation to the tattooing session in question. The alleged fact was not essential to the jury's verdict.

(b) I.H.

[14] In January 2018, Mr. Pettitt applied a tattoo to I.H.'s upper left leg. In the course of applying the tattoo, Mr. Pettitt moved I.H.'s underwear out of the way and put his finger on her clitoris several times. I.H. asked him to stop. Mr. Pettitt did not. I.H. feared injury if she pulled away. There was no consent to the touching.

[15] I.H. testified to an earlier incident, in October 2016, when Mr. Pettitt applied a tattoo to her upper chest. Some touching of her breast area, to stretch the skin, was necessary to apply the tattoo. I.H., however, testified that he cupped her naked breast. That was not necessary for the application of the tattoo. As a matter of law, there would have been no consent to the touching.

[16] The 2018 facts were essential to the jury's verdict on the single count respecting I.H.

[17] I have a doubt about whether Mr. Pettitt improperly cupped the breast of I.H. during the 2016 incident. The tattooing involved some contact with her breast area. Mr. Pettitt was not on trial for substandard tattooing practice.

[18] In connection with the 2018 incident, I.H. testified that Mr. Pettitt required her to remove the pants she had been wearing to permit the application of the tattoo and she denied that removing her pants was necessary. In her testimony in chief, however, the Crown's expert body art witness stated that pants of the sort I.H. was wearing could not be "compressed" to permit the application of the tattoo. I do not accept the "lack of necessity" allegation by I.H. in connection with the tattooing session in question.

(c) E.S.

[19] On June 1, 2018, Mr. Pettitt applied a tattoo to E.S.'s upper thigh. The sexual assault began with Mr. Pettitt brushing then resting a finger on her pubic bone area. Mr. Pettitt then put a

finger underneath her underwear and brushed his finger against her labia. E.S.'s leg subsequently cramped and she stretched it out. Mr. Pettitt inserted a finger of his left hand into her vagina. He moved his finger in and out and asked her if she was enjoying what he was doing. She moved her leg back and the touching of her vagina stopped. Mr. Pettitt completed the tattoo. There was no consent to the touching.

[20] E.S. had attended with her partner at the time, C.B. C.B. observed Mr. Pettitt's finger underneath E.S.'s underwear, "far inside."

[21] Mr. Pettitt completed the tattooing of E.S. He then applied a tattoo to C.B.

[22] I find that these facts were essential to the jury's verdict respecting E.S.

II. Sentencing Positions

[23] The Crown urged a sentence of 8 and ½ years and seeks ancillary orders. The total sentence is composed of sentences of 18 months for the sexual assault of C.O., 3 years for the sexual assault of I.H., and 4 years for the sexual assault of E.S. The sentences would be served consecutively.

[24] The Defence submits that the appropriate sentence is a maximum of 18 months in total, involving a 14-18 month sentence for the sexual assault of E.S. and sentences of 9 months each for the sexual assaults of C.O. and I.H. The sentences would run concurrent with one another. Against this sentence, the Defence contends that Mr. Pettitt should receive a custodial credit of 18 months for the 36 months he spent under release conditions prior to trial. The result would be that the credit would offset Mr. Pettitt's sentence and he would serve no period of imprisonment. In effect, he would be in a "time served" position.

[25] The Defence did not oppose probation for one or two years, and did not challenge the ancillary orders sought by the Crown.

[26] I will proceed with my assessment of the appropriate sentences for Mr. Pettitt by providing a very brief overview of sentencing principles, the sentencing starting point for major sexual assaults established by our Court of Appeal, and the impact of the Supreme Court's decision in ***R v Friesen***, 2020 SCC 9 for sexual offences against adults. I will then work through the elements of the sentencing analysis – the gravity of Mr. Pettitt's offence and his degree of blameworthiness, in light of aggravating and mitigating circumstances, pre-offence and post-offence factors, and comparator sentences – before setting Mr. Pettitt's sentences.

III. Sentencing Principles

A. Overview

[27] The foundational sentencing provision in the *Criminal Code* is s. 718:

> 718 The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
>
> > (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;

> (b) to deter the offender and other persons from committing offences;
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> (c) to separate offenders from society, where necessary;
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> (d) to assist in rehabilitating offenders;
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> (e) to provide reparations for harm done to victims or to the community; and
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> (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

[28] The fundamental principle of sentencing is proportionality, captured in s. 718.1: "A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender." See ***R v Hajar***, 2016 ABCA 222 at para 136; ***R v Hamlyn***, 2016 ABCA 127 at para 7; ***R v Safarzadeh-Markhali***, 2016 SCC 14 at paras 70-71; ***Friesen*** at paras 5, 75, 30; ***R v Lacasse***, 2015 SCC 64 at para 12; ***R v Ipeelee***, 2012 SCC 13 at paras 36, 37; ***R v Arcand***, 2010 ABCA 363 at para 48. The "gravity" aspect of proportionality focuses on the act and its consequences or on what was done. The "responsibility" aspect of proportionality focuses on the actor, the offender's level of fault in committing the offence, how the act was done, why the act was done, and by whom the act was done. A proportionate sentence is a "just sanction" because the punishment "fits" the crime. The punishment must be neither excessive nor inadequate. Proportionality ensures that the punishment is what the offender "deserves:" ***Arcand*** at para 46.

[29] Aspects of the proportionality analysis include the following:

- Under s. 718.2(a), the assessment of the gravity of the offence and the degree of responsibility of the offender must be informed by "any relevant aggravating or mitigating circumstances relating to the offence or the offender."
- Pre-offence and post-offence factors may be relevant to the offender's degree of responsibility.
- Section 718.2(b) requires that parity in sentencing be respected: "a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances." See ***Friesen*** at paras 31-33; ***Lacasse*** at para 2; ***Arcand*** at para 61.
- Section 718.2(c) confirmed that "where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh." As for consecutive sentences, s. 718.3(4)(b) provides that

> (4) The court that sentences an accused shall consider directing ...
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> (b) that the terms of imprisonment that it imposes at the same time for more than one offence be served consecutively, including when
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> (i) the offences do not arise out of the same event or series of events ....

- Section 718.2(d) requires that the principle of restraint be respected: "an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances."
- Under s. 718.2(e), "all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders …."
- Since offences are committed in particular circumstances by particular individuals, the determination of a proportionate sentence is "highly individualized:" ***R v Nur***, 2015 SCC 15, McLachlin CJC at para 43; ***Arcand*** at para 66.

[30] In some instances, statute or appellate authority specifies the primary penal objectives of sentencing for particular offences (e.g. deterrence, denunciation, rehabilitation). In other instances, factors relevant to the proportionality analysis assist in determining the appropriate objective or objectives to be promoted by a sentence. For example, the more serious the offence and the higher the degree of responsibility associated with committing that offence, the stronger the link to the objectives of denunciation and deterrence, which, in turn may attract more severe punishment in the form of longer periods of imprisonment.

B. Starting Points

[31] For some types of cases, the Court of Appeal has established sentence starting points. Starting point sentencing has three elements. First, the Court of Appeal identifies the type or category of offence. Second, it sets a starting point sentence for that category of offence. The Court of Appeal takes into account the gravity of the offence and the degree of responsibility typically associated with the category of offence and the objectives properly served by sentencing for this type of offence: ***Arcand*** at para 104. "Starting point sentences are thus an assimilation and amalgam of all of the relevant sentencing considerations:" ***R v Godfrey***, 2018 ABCA 369 at para 6. Third, the sentencing judge refines the starting point sentence in light of the specific facts of the individual case and the offender: ***Arcand*** at para 105.

[32] The Court of Appeal has established a sentencing starting point of three years imprisonment for a "major sexual assault:" ***Arcand*** at para 169; ***R v Sandercock***, 1985 ABCA 218 at para 17.

[33] ***Arcand*** defines a "major sexual assault" at para 171 as

> [171] [a] sexual assault ... of a nature or character such that a reasonable person could foresee that it is likely to cause serious psychological or emotional harm, whether or not physical injury occurs. The harm might come from the force threatened or used or from the sexual aspect of the situation or from any combination of the two. A major sexual assault includes but is not limited to non-consensual vaginal intercourse, anal intercourse, fellatio and cunnilingus.

[34] Major sexual assaults are grave and serious acts of violence: ***Arcand*** at para 175. That is, the gravity of such offences is high. The harm inherent in the offence, regardless of actual effects on particular victims, is high: at para 174. Consequently, the primary objectives of sentencing for major sexual offences are denunciation and deterrence: ***Arcand*** at para 274; ***R v Glessman***, 2013

ABCA 184 at para 8; ***Sandercock*** at para 14; ***R v Shrivastava***, 2019 ABQB 663, Antonio J, as she then was, at para 30.

[35] Sexual assault inherently involves violence, the sexual touching of another without consent. Violence beyond the minimum required for conviction may be an aggravating circumstance: ***Arcand*** at para 172. The absence of physical injury, however, does not mean that an offence was not a major sexual assault. At para 274, the Court of Appeal wrote that

> [274] Although major sexual assaults are serious crimes, they still sometimes continue to be viewed as comparatively small crimes, especially where there is no evident physical injury. "No real harm done" seems to be the assumption. This could not be more wrong ....

[36] What separates major sexual assault from sexual assault not meeting that classification is whether "a reasonable person could foresee that it is likely to cause serious psychological or emotional harm, whether or not physical injury occurs." The reasonably foreseeable effects of the offence are the crucial measure. The foreseeable harm "might come from the force threatened or used or from the sexual aspect of the situation or from any combination of the two." The Court of Appeal added at paras 176-177 of ***Arcand*** that

> [176] .... When an offender commits a major sexual assault, including rape, against a person, this act of violence causes harm. It is harm to both the victim and society. A major sexual assault constitutes a serious violation of a person's body and an equally serious violation of their sexual autonomy and freedom of choice. These breaches of one's physical integrity and privacy are indisputable and undeniable. That harm, and it is substantial, is inferred from the very nature of the assault. Add to this the serious breach of a person's human dignity and the gravity of a major sexual assault perpetrated on a victim becomes readily apparent.
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> [177] In addition to this very grave harm, there is also intrinsic to major sexual assaults the likelihood of other very real psychological or emotional harm. That includes fear, humiliation, degradation, sleeplessness, a sense of defilement, shame and embarrassment, inability to trust, inability to form personal or intimate relationships in adulthood with other socialization problems and the risk of self-harm or even suicide. While these effects fall into the psychological or emotional harm category, they may be equally or even more serious than the physical ones but much less obvious, indeed even unascertainable at sentencing. [footnotes omitted]

[37] At para 171, the Court of Appeal provided some examples of major sexual assaults: "non-consensual vaginal intercourse, anal intercourse, fellatio and cunnilingus." The examples include acts of penetration and manipulation. The examples are not exhaustive ("includes but is not limited to").

[38] The three-year starting point sentence "assumes a person with no record and of good character:" at para 132. It does not assume a guilty plea: at para 169.

[39] The starting point is just that – a starting point. A sentence should be adjusted upwards to account for aggravating factors relating to the gravity of the offence or the degree of

responsibility of the offender. The sentence should be adjusted downwards to account for mitigating factors, including a guilty plea.

C. *Friesen* and Sentencing for Sexual Offences Against Adults

[40] The sentencing landscape for sexual offences against children was recently modified by ***Friesen***. Mr. Pettitt's victims were all adults. ***Friesen***, though, was relied on by the Crown in sentencing. Three main questions respecting the role of ***Friesen*** in Mr. Pettitt's sentencing must be addressed:

> 1. Is ***Friesen*** irrelevant to Mr. Pettitt's sentencing for sexual assaults of adults?
>
> 2. If not, are there limitations on the applicability of ***Friesen*** to Mr. Pettitt's sentencing?
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> 3. And if ***Friesen*** is not irrelevant and beyond any limitations in its applicability, what features of ***Friesen*** are important respecting Mr. Pettitt's sentencing?

1. Is *Friesen* irrelevant to Mr. Pettitt's sentencing for sexual assaults of adults?

[41] ***Friesen's*** focus was on the sentencing for sexual offences against children. The import of the decision, however, is not confined to sentencing for these offences.

[42] ***Friesen*** confirmed sentencing principles, such as the centrality of the proportionality analysis and the importance of parity ("parity gives meaning to proportionality": at para 33), the approach to consecutive as opposed to concurrent sentences and the role of the totality principle.

[43] ***Friesen*** discussed factors important to sentencing, particularly for sexual offences. I will return to these below.

[44] ***Friesen*** clarified the understanding of and proper approach to the gravity of sexual offences. In doing so, the decision makes reference to the jurisprudence and literature respecting adult offenders. The gravity and blameworthiness of sexual offending is magnified by offending against a child victim but the fundamental wrongfulness, harm, and blameworthiness of sexual offences persists regardless of the victim's age. See ***Friesen*** at para 116: "[w]hile sexual violence against either a child or an adult is serious, Parliament has determined that sexual violence against children should be punished more severely."

2. Are there limitations on the applicability of *Friesen* to Mr. Pettitt's sentencing?

[45] There are, however, limitations on the applicability of ***Friesen*** to Mr. Pettitt's sentencing.

[46] ***Friesen*** did not call for the increase of sentences for sexual offences against adult victims. At para 5, ***Friesen*** directed that sentences for sexual offences against children must increase. At para 118, ***Friesen*** clarified that "nothing in these reasons should be taken either as a direction to decrease sentences for sexual offences against adult victims or as a bar against increasing sentences for sexual offences against adult victims."

[47] While ***Friesen*** did not reject the starting point approach to sentencing, ***Friesen*** did identify concerns with this approach to sentencing, writing at para 41 that

> [41] .... However, this Court has not yet addressed these concerns. We make no comment on the merits of these concerns. Nor should anything in these reasons be

> taken to suggest that starting points are no longer a permissible form of appellate guidance. While we have determined that this case does not provide an appropriate opportunity to assess the merits of these concerns, they raise an issue of importance that should be resolved in an appropriate case.

Arcand and its starting point sentence for major sexual assaults remains binding law in Alberta after ***Friesen***.

[48] While ***Friesen*** does not provide an endorsement or interpretation of the ***Arcand*** starting point for major sexual offences, ***Friesen*** does provide a lens through which ***Arcand*** may be read.

3. What features of *Friesen* are important respecting Mr. Pettitt's sentencing?

(a) Spectrum or Continuum of Blameworthiness

[49] ***Friesen*** confirmed that sexual offences fall along a wide spectrum of immoral conduct. Some conduct is less morally blameworthy and some more morally blameworthy than other conduct: at para 91. Distinctions may be drawn between instances of morally indefensible conduct. It is not that all conduct is equally morally blameworthy just because it is found to be sexual assault. A task of the sentencing judge is to draw distinctions and to situate the conduct on the scale of moral blameworthiness.

(b) Wrongfulness and Harm

[50] As does ***Arcand***, ***Friesen*** identified the fundamental wrongfulness of sexual offences, the gravity of these offences, in their violation of the personal autonomy and physical and sexual integrity of the victim, and in their rejection of the equality of the victim – the victim is not treated with inherent dignity and value, but as an object to serve the offender's desires: at para 89. As in ***Arcand***, ***Friesen*** confirmed that violence is inherent in applying force of a sexual nature: at para 77. That the harm has a sexual dimension is aggravating. Not only physical or bodily integrity is violated but sexual integrity as well: at para 77. And as discussed in ***Arcand***, sexual offending risks potential harm to every victim. The evidence may support findings of particular injury caused to particular victims. Harm to the victim reverberates as harm beyond the victim, ultimately to the national community: ***Friesen*** at para 76.

[51] The interests protected by the law and threatened by sexual offending are similar as between adults and children, although the violations of the interests have a different meaning for children than adults: ***Friesen*** at paras 51, 52. Citing ***R v Goldfinch***, 2019 SCC 38 at para 37, ***Friesen*** confirmed at para 118 that "our understanding of the profound physical and psychological harm that all victims of sexual assault experience has deepened ...."

(c) Factors Bearing on Fit Sentences

[52] ***Friesen*** discussed some factors bearing on the setting of fit sentences for sexual offences against children. These factors are also relevant respecting sexual offences against adults.

(i) Likelihood of Reoffending

[53] An "increased," enhanced, or above-baseline risk of reoffending engages the fundamental purpose of sentencing, to protect society. An elevated risk of reoffending may attract the sentencing objective of separation from society, to protect potential victims: ***Friesen*** at para 122-123.

[54] An elevated risk of reoffending may weight separation above rehabilitation. “In some cases, the only way to achieve both short-term and long-term protection of children may thus be to impose a lengthy sentence:” ***Friesen*** at para 124.

(ii) Abuse of a Position of Trust or Authority

[55] The discussion in ***Friesen*** on abuses of positions of trust or authority focuses on typical or common instances of positions of trust or authority. But at para 125, ***Friesen*** provided some important reminders about positions of trust or authority:

> [125] We also wish to offer some comments on the factor of the abuse of a position of trust (*Criminal Code*, s. 718.2(a)(iii)). Trust relationships arise in varied circumstances and should not all be treated alike (see *R. v. Aird*, 2013 ONCA 447, 307 O.A.C. 183, at para. 27). Instead, it makes sense to refer to a “spectrum” of positions of trust (see *R. v. R.B.*, 2017 ONCA 74, at para. 21 (CanLII)). An offender may simultaneously occupy multiple positions on the spectrum and a trust relationship can progress along the spectrum over time (see *R. v. Vigon*, 2016 ABCA 75, 612 A.R. 292, at para. 17). In some cases, an offender’s grooming can build a new relationship of trust, a regular occurrence in child luring cases where children are groomed by complete strangers over the Internet, or move an existing trust relationship along the spectrum. Even where grooming does not exploit an existing relationship of trust or build a new one, it is still aggravating in its own right.

Friesen confirmed at para 126 that “[a]ny breach of trust is likely to increase the harm to the victim and thus the gravity of the offence. As Saunders J.A. reasoned in *D.R.W.*, the focus in such cases should be on ‘the extent to which [the] relationship [of trust] was violated’ (para. 41).”

(iii) Duration and Frequency of Offending

[56] ***Friesen*** confirmed that the duration and frequency of sexual violence must receive weight in sentencing: at para 132.

(iv) Degree of Physical Interference

[57] ***Friesen*** acknowledged at para 138 that “the degree of physical interference is a recognized aggravating factor. This factor reflects the degree of violation of the victim’s bodily integrity. It also reflects the sexual nature of the touching and its violation of the victim’s sexual integrity.” At para 139 the Court wrote that

> [139] .... [S]pecific types of physical acts may increase the risk of harm. For instance, penile penetration, particularly when unprotected, can be an aggravating factor because it can create a risk of disease and pregnancy .... Penetration, whether penile, digital, or with an object, may also cause physical pain and physical injuries to the victim ....

[58] The harm caused by sexual offending is primarily damage to the victim’s interests. The harm lies primarily in what the offender has (intentionally) done to the victim not in the offender’s act itself.

[59] Hence, the precise means or instrumentalities by which the victim’s interests are damaged are not crucial to the gravity analysis. While the degree of physical interference is

relevant to gauging the gravity of the offence, at para 140 ***Friesen*** cautioned against establishing sentencing ranges based on penetration or specific types of sexual activity, and urged courts to avoid four errors (at paras 141-146):

> [141] First, defining a sentencing range based on a specific type of sexual activity risks resurrecting at sentencing a distinction that Parliament has abolished in substantive criminal law. Specifically, attributing intrinsic significance to the occurrence or non-occurrence of penetrative or other sexual acts based on traditional notions of sexual propriety is inconsistent with Parliament's emphasis on sexual integrity in the reform of the sexual offences scheme. As we have explained, Parliament abolished the distinctions the *Criminal Code* formerly drew between offences based on whether penile penetration was involved. For sexual assault and sexual interference, the same maximum sentence thus applies regardless of whether penetration was involved. Making the presence or absence of penetration the cornerstone of a sentencing range would thus bring the old substantive law back indirectly by recreating at the sentencing stage the propriety-based distinctions that Parliament abolished in the substantive law (Boyle, at p. 177; see also Nadin-Davis, at p. 46).
>
> [142] Second, courts should not assume that there is any clear correlation between the type of physical act and the harm to the victim. In assessing the significance of the degree of physical interference as a factor, as Christine Boyle writes, "judges should think in terms of what is most threatening and damaging to victims" (p. 180). Judges can legitimately consider the greater risk of harm that may flow from specific physical acts such as penetration. However, as McLachlin J. explained in *McDonnell*, an excessive focus on the physical act can lead courts to underemphasize the emotional and psychological harm to the victim that all forms of sexual violence can cause (paras. 111-15). Sexual violence that does not involve penetration is still "extremely serious" and can have a devastating effect on the victim (*Stuckless (1998)*, at p. 117). This Court has recognized that "any sexual offence is serious" (*McDonnell*, at para. 29), and has held that "even mild non-consensual touching of a sexual nature can have profound implications for the complainant" (*R. v. J.A.*, 2011 SCC 28, [2011] 2 S.C.R. 440, at para. 63, per McLachlin C.J., and para. 121, per Fish J.). The modern understanding of sexual offences requires greater emphasis on these forms of psychological and emotional harm, rather than only on bodily integrity (*R. v. Jarvis*, 2019 SCC 10, [2019] 1 S.C.R. 488, at para. 127, per Rowe J.) ....
>
> [144] Specifically, we would strongly caution courts against downgrading the wrongfulness of the offence or the harm to the victim where the sexually violent conduct does not involve penetration, fellatio, or cunnilingus, but instead touching or masturbation. There is no basis to assume, as some courts appear to have done, that sexual touching without penetration can be [translation] "relatively benign" ....
>
> [145] Third, we would emphasize that courts must recognize the wrongfulness of sexual violence even in cases where the degree of physical interference is less pronounced. Of course, increases in the degree of physical interference increase the wrongfulness of the sexual violence ....

> [146] Fourth, it is an error to understand the degree of physical interference factor in terms of a type of hierarchy of physical acts. The type of physical act can be a relevant factor to determine the degree of physical interference. However, courts have at times spoken of the degree of physical interference as a type of ladder of physical acts with touching and masturbation at the least wrongful end of the scale, fellatio and cunnilingus in the mid-range, and penile penetration at the most wrongful end of the scale (see *R. v. R.W.V.*, 2012 BCCA 290, 323 B.C.A.C. 285, at paras. 19 and 33). This is an error - there is no type of hierarchy of physical acts for the purposes of determining the degree of physical interference. As the Ontario Court of Appeal recognized in *Stuckless (2019)*, physical acts such as digital penetration and fellatio can be just as serious a violation of the victim's bodily integrity as penile penetration (paras. 68-69 and 124-25). Similarly, it is an error to assume that an assault that involves touching is inherently less physically intrusive than an assault that involves fellatio, cunnilingus, or penetration ....

(d) Victim Impact Statements and Actual Harm

[60] Para 85 of ***Friesen*** addressed victim impact statements as evidence of actual harm to victims:

> [85] When possible, courts must consider the actual harm that a specific victim has experienced as a result of the offence. This consequential harm is a key determinant of the gravity of the offence (see *M. (C.A.)*, at para. 80). Direct evidence of actual harm is often available. In particular, victim impact statements, including those presented by parents and caregivers of the child, will usually provide the "best evidence" of the harm that the victim has suffered (*R. v. Gabriel* (1999), 137 C.C.C. (3d) 1 (S.C.J. Ont.), at p. 11). [emphasis added]

[61] ***Friesen*** is in line with s. 722(1), which provides that

> 722 (1) When determining the sentence to be imposed on an offender ... in respect of any offence, the court shall consider any statement of a victim prepared in accordance with this section and filed with the court describing the physical or emotional harm ... suffered by the victim as the result of the commission of the offence and the impact of the offence on the victim. [emphasis added]

In the absence of evidence to the contrary and in the absence of challenge or dispute, a judge may regard filed victim impact statements as evidence of the actual impact on a victim of a sexual offence: ***R v BRS***, 2020 ABCA 29 at paras 24-25, 28 ("the trial judge was entitled to accept the contents of the victim impact statement as proof of the harm suffered"). Were it otherwise, as the Ontario Court of Appeal noted in ***R v AG***, 2015 ONCA 159 at para 73, "victim impact statements would have limited utility and the mandate to consider them as part of the sentencing process ... would be rendered meaningless."

[62] I have tempered my use of the victim impact statements in light of the caution provided by Justice Di Luca in ***R v Theriault***, 2020 ONSC 6768, affd 2021 ONCA 517 at para 17(SC):

> [17] .... I am mindful that when properly considered, victim impact statements provide important and potentially aggravating context to the sentencing process. They inform the seriousness of the offence committed and the harm caused.

> However, they cannot be used to *improperly* aggravate or increase the length of sentence ....

Justice Blair commented in ***R v Taylor***, 2004 CanLII 7199, 189 OAC 38 at para 42 (CanLII) that "victim impact statements, like criminal records, do not justify double punishment – once for the crime against society, and again to counterbalance the harm done to the victims (a sort of criminal revenge in lieu of civil damages)." ***AG*** confirmed at paras 72 and 73 that a victim impact statement cannot be used to increase a sentence to an inappropriate level. Proportionality remains the governing sentencing principle.

IV. Sentencing Assessment

A. The Gravity of Mr. Pettitt's Offences and His Degree of Responsibility

[63] Mr. Pettitt committed three separate sexual assaults. I will describe specific or unique features of each sexual assault then features common to each, before addressing Mr. Pettitt's culpability or blameworthiness.

1. The Sexual Assaults

(a) C.O.

[64] The sexual assault of C.O. was a non-consensual sexual touching, particularly to her vaginal area. There was no penetration. The touching was brief. When she realized what Mr. Pettitt was doing, C.O. got up and left.

[65] In her victim impact statement, C.O. stated that the events were "the most humiliating, demeaning and scarring moments of my life." She said that she has been "traumatized" since the events occurred. She stated that the events "affected" her "ability to be able to trust people." She said that "since the incident I have been struggling with anxiety and recurring nightmares."

(b) I.H.

[66] I.H.'s vagina area was digitally penetrated and Mr. Pettitt put his finger on her clitoris "quite a few times." She asked him to stop three or four times and he did not.

[67] She did not file a victim impact statement.

(c) E.S.

[68] E.S.'s vaginal area was touched and she was digitally penetrated. Mr. Pettitt asked her if she liked it. The penetration lasted at least a minute.

[69] In her victim impact statement, E.S. wrote that "This affected me emotionally by not being able to get tattoos anymore. This has made me not being able to date anyone as I am scared to get hurt or abused. I'm scared to tell family that I was sexually assaulted." She stated that "This has made me go into depression everytime I look at my tattoo. I get horrible nightmares."

[70] C.B. was present when the initial touching occurred. He was also present after the assault concluded. He was tattooed by Mr. Pettitt.

2. Common Features of the Sexual Assaults

[71] The offences had some common aggravating elements.

(a) Breach of Trust/Vulnerability of Complainants

[72] First, each involved a form of breach of "trust." The presence of this aggravating factor was not disputed by the Defence. See ***R v Lemay***, 2020 ABCA 365 at paras 28-34. As indicated above, ***Friesen*** recognizes that "trust" relations fall across a broad spectrum. The offences involved exploitation of the physical vulnerability of the complainants as subjects of tattoos, and violation of the expectation that the complainants would receive the professional services contracted for and not be used as sexual objects in that process. See, by way of analogy, ***R v Gill***, 2018 BCCA 60 at para 7 (sexual assault of passenger by taxi driver).

[73] Each of the offences took place in Mr. Pettitt's tattoo studio. Each of the offences occurred while a tattoo was being applied to the complainant. In each case, the tattoos were being applied in the upper thigh-hip area. The location of the tattoos meant that some exposure of skin in the area to be tattooed would be necessary.

[74] Mr. Pettitt was not tried for failure to follow the best practices of the tattooing profession. Had he followed practices described by the expert witness, Mr. Pettitt would have had less access to the bodies of the complainants than he did. The evidence did not show that Mr. Pettitt was aware of the industry-standard measures were for maximizing the privacy of clients and that he ignored those measures for the purpose of facilitating access to the bodies of his clients.

[75] Nonetheless, the complainants were in states of undress. They were vulnerable.

[76] The offences occurred during tattooing. Mr. Pettitt, then, was operating a tattooing gun or device that was marking the skin of the complainants at the time of the offences. I do not consider Mr. Pettitt to have been using a "weapon" while tattooing the complainants and I do not consider his use of the tattooing gun to have been an additional aggravating circumstance, but the use of the tattooing gun did contribute to the state of vulnerability of the complainants. They were exposed and the mechanism by which tattoos were applied imposed, or could reasonably be considered to have imposed, limitations on their movement.

[77] It is true that C.O. got up and left, but the manifest reluctance of I.H. and E.S. to move away while being tattooed was entirely explicable.

[78] Given their physical vulnerability, both with regard to their physical exposure and the use of the tattooing gun, the complainants could reasonably expect and a reasonable person would expect that Mr. Pettitt, as a tattooing professional, would not abuse their vulnerability and touch them improperly in the course of applying tattoos.

[79] In my opinion, Mr. Pettitt's taking advantage of the complainants' vulnerability aggravated the gravity of the offences.

(b) Visual Reminder

[80] Each of the sexual assaults occurred when the complainants were being tattooed. They were left, then, with the tattoos that had been applied. Their bodies bore the mark of what had occurred. Their tattoos were visual reminders of what had occurred. E.S. made explicit mention of the adverse effects of viewing her tattoo. The marking of the complainants prolongs and prompts the experience of harm caused by the sexual assaults. I view the marking borne by the complainants as increasing the gravity of the offence.

[81] I realize that tattoos may be removed or may be covered by other tattoos. There was no evidence of the feasibility of removal or obscuring the tattoos and no evidence of the cost, which, on the record, would have to have been borne by the complainants.

(c) Humiliation

[82] C.O. left with the tattoo unfinished.

[83] I.H. and E.S. felt compelled to remain until their tattoos were completed. The completion (or at least as much work as could have been done that day) followed the assaults. After having been assaulted, then, I.H. and E.S. faced the embarrassment and humiliation of having to remain in Mr. Pettitt's presence while he continued his work on their bodies. I view this prolongation of their experience with Mr. Pettitt as an aggravating circumstance.

(d) Predatory Conduct

[84] Mr. Pettitt's conduct was not only a breach of trust or an abuse of the position of vulnerability of the complainants. I must not double-count the abuse of vulnerability, but this abuse had the added aggravating element of demonstrating a pattern of taking advantage of vulnerable clients, that is, a pattern of predatory conduct. The assault on C.O. was the first instance of this pattern. The sexual assault of I.H. unfolded in a manner similar to the assault on C.O. The sexual assault of E.S. unfolded in a manner similar to the assaults on C.O. and I.H.

[85] In each case, Mr. Pettitt moved from proper tattooing conduct, to touching just beyond the boundary of the acceptable, to touching the vaginal area and, in I.H. and E.S.'s cases, to digital penetration.

[86] Mr. Pettitt's conduct was fully intentional and purposeful.

[87] His conduct was not spontaneous, opportunistic, or "impulsive."

[88] The predatory nature of Mr. Pettitt's conduct aggravates Mr. Pettitt's degree of responsibility or blameworthiness in committing the offences.

(e) Objectification

[89] Mr. Pettitt treated each woman as an object to satisfy his desires. He disregarded the dignity of each complainant. That is an aggravating factor, going to Mr. Pettitt's moral blameworthiness: ***Friesen*** at para 89.

(f) Wine

[90] Both C.O. and E.S. were given wine during the application of their tattoos. I do not regard this as an aggravating circumstance. I do not consider Mr. Pettitt to have offered the wine as a means of lowering their inhibitions to facilitate the commission of his offences. Rather, the wine was offered as a sort of service to clients. Receiving a tattoo may be an uncomfortable experience. The wine could help take the edge off the experience. I recognize that the expert counselled against the ingestion of alcohol during the application of tattoos, since this could promote bleeding. But again, Mr. Pettitt was not on trial for failing to meet recommended tattooing practices.

3. Mr. Pettitt's Blameworthiness

(a) Seriousness of the Offences

[91] Each of the offences committed by Mr. Pettitt was serious. Each offence violated the complainant's personal autonomy, her physical integrity, and her sexual integrity. Each offence involved a measure of violence. Mr. Pettitt put his hands on the complainants in a sexual manner, without consent.

[92] The victim impact statements of C.O. and E.S. demonstrated the psychological and emotional harm caused by his offences. As regards I.H. and the other complainants, both ***Friesen*** and ***Arcand*** recognized that psychological and emotional injury are intrinsic to sexual assault, even without proof of specific injury: ***Friesen*** at 56, 79, 85; ***Arcand*** at paras 174-176, 274.

[93] The offences exploited the complainants' physical vulnerability and violated their expectations that they would receive the professional services that brought them to Mr. Pettitt's studio.

[94] The markings left on the complainants' bodies aggravated his offences.

[95] I have found that his conduct was predatory and violative of the complainants' dignity.

[96] Nonetheless, Mr. Pettitt's culpability or blameworthiness is not the same for each offence.

(b) C.O.

[97] The Crown recommended a sentence of 18 months for Mr. Pettitt's offence against C.O., a substantially lower sentence than those urged for the offences against I.H. and E.S.

[98] In my opinion, the Crown was right that the offence against C.O. did not involve the culpability attaching to the other two offences.

[99] ***Friesen*** warned against establishing a hierarchy of acts, on fixating on the modality of the sexual assault. But in this case, the assault was brief. It involved no penetration. Even if this offence displayed an incipient pattern, this assault did not repeat prior assaults (this form of assault was repeated in subsequent assaults).

[100] I have considered C.O.'s victim impact statement.

[101] Nonetheless, I agree with the Crown's implicit assessment that the offence against C.O. was not a major sexual assault. I cannot use the victim impact statement to impose a sentence that would not be proportional to Mr. Pettitt's actual conduct.

(c) I.H. and E.S.

(i) Major Sexual Assaults

[102] Were the offences against I.H. and E.S. major sexual assaults as specified by ***Arcand***?

[103] In my opinion, in light of the elements of Mr. Pettitt's offences that I have reviewed, his offences against I.H. and E.S. were major sexual assaults. The offences involved penetration, physical and sexual violations of an intensity and duration that could likely cause serious psychological or emotional harm, even without physical injury. The physical violence was not extreme but the sexual violation was profound. I agree with Chief Judge Lilies in ***R v GWS***, 2004 YKTC 5 at para 20:

> [20] Earlier cases often considered lack of the penile penetration or even incomplete intercourse as a mitigating factor. In my opinion, these factors have been given too much weight. The typical feelings of humiliation, degradation, guilt, shame, embarrassment, fear, and self-blame can result from the unwanted invasion of intimate privacy and the loss of control associated with sexual victimization. That invasion occurs even in the absence of sexual intercourse. It would be wrong to suggest that digital penetration is significantly different from penile penetration, from the perspective of the victim. Touching a vulnerable or sleeping victim in the genitals can generate strong feelings of victimization.

Further, see the observations of Justice Pepall in ***R v Stuckless***, 2019 ONCA 504, cited with approval in ***Friesen***, at paras 124 and 125(ONCA):

> [124] While physically different, digital penetration and fellatio constitute a serious invasion of the sexual integrity of the victim. Put differently, if sentencing courts are to focus on the "harm caused to the child by the offender's conduct" as Moldaver J.A. (as he then was) instructs in *Woodward*, at para. 76, distinctions among these forms of sexual abuse may be unhelpful and are not determinative of the seriousness of the offence. Is fellatio any less intrusive than digital penetration? Surely not.
>
> [125] Indeed, the factual circumstances of this case underscore the point that the impact on the physical and psychological integrity of the victims is often no different simply because the penetration is found to be digital rather than penile ....

[104] The offences did not take place over a long duration. That does not matter. The culpability of an act is not measured or not measured only by the act's duration. A murder may take only a moment: ***R v Lepine***, 2013 NWTSC 19, 2013 CarswellNWT 21, Shaner J at para 18 (CarswellNWT).

[105] The offences involved digital penetration. That modality of violation is not set out in the "list" in para 171 of ***Arcand***. Neither has our Court of Appeal confirmed, in the digital penetration cases that have come before it, that digital penetration falls within the ambit of major sexual assault. See ***R v Moriarty***, 2016 ABPC 25, Allen PCJ at para 177 (Judge Allen's position is nuanced: "I concede in some circumstances that a sexual offence where the offender digitally penetrated an adult victim might be a 'major sexual assault.' In some circumstances, the digital penetration might meet the other aspects of the ***Arcand*** test so that an offence of digital penetration is the type of serious offence akin to the named offences. This is likely to arise where the victim is particularly vulnerable or has suffered a significant impact, or the circumstances surrounding the commission of the offence are egregious.")

[106] The argument from omission, a sort of *expressio unius est exclusio alterius* argument, fails for three reasons.

[107] First, since ***Sandercock*** and since even ***Arcand***, the appreciation of the harms associated with sexual violation has deepened. That was one of ***Friesen's*** messages: at para 118; see also ***Lemay*** at para 51. Recent cases have confirmed that digital penetration of a sleeping victim are major sexual assaults. The relevance of these cases lies in the mode of penetration and the vulnerability of the victim. See ***R v Jensen***, 2019 ABQB 873, Dunlop J at para 25; ***Lepine*** at

paras 17-18 (CarswellNWT); ***R v Flowers (Sentence)***, 2020 CanLII 4578 (NL PC), Porter PCJ at para 30; ***R v Thompson***, 2017 SKCA 33 at para 49; see also ***Stuckless***, Huscroft JA at para 69, Pepall JA at paras 124-125.

[108] Second, another message of ***Friesen*** was that the courts should not establish hierarchies of violative acts, as if the modality of violation governed the harm caused. Whether the violation was digital, penile, or by an object, the question is whether, in all the circumstances, the violation was likely to cause serious psychological or moral harm.

[109] Third, ***Arcand's*** "list" is prefaced by the words "includes but is not limited to." The listed acts are paradigm cases but not exhaustive of seriously damaging sexual assaults.

[110] I also refer to the discussions of precedential value in ***Arcand*** at paras 209-229 and in ***Lemay*** at para 54 ("This Court's decision not to interfere with a sentence is often influenced by the standard of review, passage of time, positions of the parties below, or other case-specific factors").

[111] In my opinion, the offences against I.H. and E.S. were both major sexual assaults.

(ii) Blameworthiness for the Offences Against I.H. and E.S.

[112] Even as between the two offences, though, Mr. Pettitt's culpability was not the same.

[113] The offence against E.S. had some elements that made it more blameworthy than the offence against I.H.

[114] The offence against E.S. involved not only penetration as in the offence against I.H., but non-invasive touching of significant duration.

[115] The assault of E.S. was the third offence in time. It involved a further repetition of illegal conduct.

[116] An additional feature of the offence against E.S. involved the presence of C.B. On the evidence, Mr. Pettitt put his finger beneath E.S.'s underwear while C.B. was present and when C.B. could observe what was occurring.

[117] On the one hand, this demonstrates a degree of deliberateness or intentionality of great intensity. Mr. Pettitt was "obviously determined to carry out this act regardless of who was present:" ***Lepine*** at para 44 (CarswellNWT).

[118] On the other hand, the disregard for C.B.'s presence, in my opinion, demonstrates disregard for E.S.'s equality. She was not worthy of respect as between two men.

[119] Moreover, E.S. was left to remain in Mr. Pettitt's presence until not only her tattoo work was done, but until C.B.'s tattoo was done. This could only have magnified the humiliation she must have felt. I am not attaching blame to C.B. On the evidence, I cannot find that he knew precisely what was done to E.S. Mr. Pettitt did know.

[120] I have addressed Mr. Pettitt's blameworthiness and the application of the major sexual assault classification to his offences against I.H. and E.S. Are there any factors that mitigate Mr. Pettitt's blameworthiness?

B. Pre-Offence and Post-Offence Factors

[121] I detect no mitigating factors bearing directly on the commission of the offences. Some aggravating factors are absent, such as extreme or gratuitous violence, substantially prolonged

assaults, or repeated assaults against the same complainant, but the absence of aggravating factors is not mitigating.

[122] Some pre-offence and post-offence factors considered in sentencing do not relate directly to the offender's degree of responsibility in committing the offence but may nonetheless be relevant to the offender's blameworthiness or to the objectives appropriate to the offender's sentence or both.

1. Pre-Offence Factors

(a) Age

[123] The age of an offender may be a mitigating factor, particularly the youth of an offender: ***Friesen*** at para 174; ***Shrivastava*** at paras 52-55.

[124] Mr. Pettitt is 60. He is neither so old nor so young for age to be a mitigating factor.

(b) Family and Social History

[125] The PSR disclosed nothing remarkable or that might mitigate Mr. Pettitt's blameworthiness arising from his upbringing, social context, or personal history. See PSR 4-5.

[126] Mr. Pettitt has no history of substance abuse or mental health concerns.

[127] Mr. Pettitt had four children with his wife of nearly 30 years. She passed away in 2014. He lives now with his common law partner. She has lived with him since 2016.

[128] Mr. Pettitt graduated from High School in 1977. Except for a period of imprisonment at Drumheller Institution, he has been steadily employed. In the late 1970s, he worked with the Art Department of the Edmonton Sun. He was a bartender at the Sherwood Park Inn. From 1984-1988 he worked with the Calgary Sun. He worked with the advertising department of The Brick from 1988 to 2010. In 2005, he had begun tattooing customers out of his home. In 2010, he worked at a tattoo studio in Leduc. He opened his tattooing business, Second Skin Tattoos, in Edmonton in January 2011. He has continued to operate that tattooing business.

(c) Criminal Record

[129] A lack of prior offences may go to rehabilitative potential or to restraint in punishment as the offender may be deterred by a lighter penalty: ***Shrivastava*** at para 71. A recent related criminal record may be aggravating, not by way of re-punishing for offences, but because re-offending may attract a lengthier sentence to achieve the objectives of specific or general deterrence or separation as a matter of public protection.

[130] Mr. Pettitt has a non-trivial criminal record. The PSR referred to 13 prior convictions going back to 1978. However, the convictions are dated and unrelated. The Crown did not rely on Mr. Pettitt's record as an aggravating factor.

[131] The lengthy gap in Mr. Pettitt's record (his last conviction, it appears, was in 1982) supports characterizing Mr. Pettitt as having "good character" for at least starting point purposes.

(d) Good Character

[132] In addition to his lengthy conviction-free period, Mr. Pettitt offered some 30 letters of support.

[133] His father, supported by his brother, spoke of Mr. Pettitt's devotion to his mother, who has passed on, and his wife, who has also sadly passed on. Mr. Pettitt provides significant assistance to his father.

[134] Many of the letters (about 23) are from customers who spoke to Mr. Pettitt's good work as a tattoo artist and their satisfaction with his work, and to the positive personal relationships they have developed with Mr. Pettitt. The letters confirm that his work and conduct have been professional and appropriate. He has provided emotional support for his customers. He has been a friend and, as one writer put it, a tattoo therapist.

[135] Several letters spoke to Mr. Pettitt's fundraising contributions. He has donated tattooing proceeds to animal welfare, animal rescue, and mental health awareness causes.

[136] What is the significance of this evidence to Mr. Pettitt's sentencing?

[137] Evidence of pro-social activity and community support can support rehabilitative potential. Good character can show that an offender has the capacity and inclination to take responsibility for repairing his or her life and to return to a law-abiding life. Community support, support by others, can aid an individual's rehabilitative efforts. It can be hard to repair one's life on one's own. This sort of evidence, for similar reasons, can also show that punishment is not required to secure specific deterrence.

[138] Sentencing for serious sexual offences, though, emphasizes the penal objectives of denunciation and general deterrence.

[139] Moreover, good character on the part of the offender, that is to say average or ordinary good character, is assumed in the starting point sentence for major sexual assaults: ***Arcand*** at para 133; ***Shrivastava*** at para 71.

[140] ***Arcand*** leaves open the possibility of an offender demonstrating extraordinary good character, but that possibility implicates two difficulties. First, the criteria or tests for extraordinary good character as opposed to ordinary good character are not clear: ***Arcand*** at para 135.

[141] Second, and more fundamentally, it is not clear why even extraordinary good character should mitigate blameworthiness for committing an offence. The good character did not prevent the commission of the offence. It does not appear to have any bearing on the gravity of the offence committed or on the responsibility for committing the offence. Further, in ***R v Hepburn***, 2013 ABQB 520 at paras 36-37, Justice Jeffrey confirmed that evidence of good character has low probative value in sexual offence cases:

> [36] In respect of the extensive letters attesting to Hepburn's otherwise stellar character and conduct, I am mindful of these further comments of the Alberta Court of Appeal in *BSM*, at para 16:
>
> > Turning to mitigating circumstances, the Reasons mention good character. Likely it existed here …. But previous good character is common in child sexual assault cases. So previous good character would not take one much below the starting point, nor significantly reduce what would otherwise be a higher sentence.

> [37] These crimes are committed by people from all walks of life, out of the public eye, clandestinely and secretly, often to the surprise of people who thought they knew the perpetrator best ….

The difficulty is that self-presentation in public and conduct in private may not match: see ***Shrivastava*** at paras 77-78; ***R v Jonat***, 2019 ONSC 1633, Dunphy J at para 63.

[142] Finally, to quote Justice Jeffrey's ***Hepburn*** decision again (at para 37),

> [37] .... It cannot be that because of a person's abundant good deeds and potential for societal contribution that they are given a free pass on a crime against another, that they can in a secret double life victimize the vulnerable of our society with impunity.

Justice Antonio has pointed out that obeying the law, an obligation we all bear, cannot be taken to earn credit against punishment for commission of a serious offence: ***Shrivastava*** at para 78; see ***Arcand*** at para 136. And even if one goes beyond being merely law-abiding and performs "abundant good deeds," there is no obvious compelling argument that those goods deeds should constitute banked credit that may be drawn down to excuse wrongdoing, even by way of mitigation of penalty. No submissions undercut Justice Jeffrey's point that our good deeds don't earn a free pass to offend.

[143] The good character evidence presented by Mr. Pettitt does not have and cannot have a significant mitigating effect on his punishment.

2. Post-Offence Factors

[144] Post-offence factors include

- guilty plea
- cooperation with the authorities
- pre-sentencing rehabilitative steps
- remorse.

(a) Guilty Plea

[145] A guilty plea is a recognized mitigating factor: ***Friesen*** at para 164. See also ***R v TF***, 2019 SKCA 82 at paras 44-46; ***R v Cowell***, 2019 ONCA 972, Trotter JA at para 102; ***R v SLW***, 2018 ABCA 235 at paras 32-35.

[146] Mr. Pettitt did not plead guilty. He exercised his constitutional right to a trial. There is no mitigation from a guilty plea.

(b) Cooperation with the Authorities

[147] Mr. Pettitt was interviewed by the police following arrest on two occasions. He was cooperative with the police throughout the processes. He did not confess or take responsibility for his actions.

[148] Nothing in Mr. Pettitt's conduct had an aggravating effect, but I do not view his cooperativeness with the authorities as having any mitigating effect.

[149] Mr. Pettitt challenged the admissibility of the statements made in his interviews. I found that the statements were admissible. Mr. Pettitt was entitled to challenge the admissibility of his statements and his challenges were not frivolous. The challenges have no aggravating effect.

(c) Remorse and Rehabilitative Steps

[150] ***Friesen*** also confirmed that remorse is a mitigating factor, but its weight increases when "paired with insight" and with signs that the offender has changed his attitude and has taken steps to reduce the likelihood of further offending: at para 165. An offender, for example, may have, on his or her own, taken steps to address the "root causes" of his or her offending, as by attending addictions treatment or counselling.

[151] Mr. Pettitt did not take responsibility or express remorse for his conduct in his interactions with the police following arrest, during the trial process (including his testimony), or in his interactions with the PSR writer after conviction: see PSR 4, 8. The PSR writer stated that Mr. Pettitt lacked insight and did not understand the gravity of his actions.

[152] Mr. Pettitt has not completed any programs or counselling that might have addressed his risk of reoffending.

[153] However, in his s. 726 statement, Mr. Pettitt stated that he is sorry, very sorry, for what happened to the complainants. He recognizes that he made mistakes, now that he has had a lot of time to think. He said that what he did will never happen again. He said that he did tell his probation officer that he was willing to do any therapy necessary. He has changed the way he does business to ensure client safety, including putting a video camera in his studio to record interactions. He said that he accepts his responsibility for going outside the lines of being professional.

[154] So, remorse has come to Mr. Pettitt, if only late. Nonetheless, his remorse – late as it may be – has some mitigating weight, as do his acceptance of responsibility and the steps he has taken to prevent the recurrence of any offences involving clients.

3. Risk of Re-Offending

[155] The higher the risk of re-offending, the greater the concern for sentencing purposes. Specific deterrence and separation, reducing the risk of this offender re-offending, become important objectives of sentencing.

[156] No expert evidence formally assessing Mr. Pettitt's risk of reoffending was provided.

[157] Mr. Pettitt was convicted of three similar offences, one that occurred in 2014 and two that occurred in 2018. He has taken no programming or counselling that might have reduced any risk he posed. Mr. Pettitt has had his own tattooing business since 2011. He has abided with the conditions of release for 36 months without incident. He has expressed some remorse and insight in his s. 726 statement. There was no evidence of any sexual offending other than as set out in the evidence at trial.

[158] The repetition of offences and the lack of remedial steps shows that Mr. Pettitt's risk of reoffending is greater than the risk of offending of a person with no sexual offence charges or convictions, or of a person with (e.g.) one charge or conviction. I could not find, though, that Mr. Pettitt's risk of reoffending is high. But neither, though, could I find that Mr. Pettitt's risk of reoffending is low and so has some mitigating weight.

[159] I do not consider Mr. Pettitt's risk of reoffending to be a significant factor for sentencing, either in aggravation (high risk) or in mitigation (low risk) and the Crown did not assert that this was a significant factor.

4. Actual Impact/Collateral Consequences

[160] "Collateral consequences," the actual impact of the sentence on the individual, is also a relevant factor in sentencing. Actual effects may be taken into account in determining sentence, so long as the sentence remains proportional: ***R v Morrisey***, 2000 SCC 39 at para 41; ***SLW*** at para 39; ***Shrivastava*** at paras 61, 64, 66, 67. Peculiar effects can be taken into account in pulling a sentence toward the lower edge of penal severity of a proportionate punishment.

[161] Three types of collateral consequences are relevant to Mr. Pettitt's sentences.

(a) Publicity

[162] Mr. Pettitt has asserted that his charges were reported in traditional media and on social media. The police made a request through the media for others who may have been victims of Mr. Pettitt to come forward. His personal and business reputation suffered. The reporting was not in evidence, but reporting doubtless occurred.

[163] I do not regard the pre-trial publicity as a mitigating factor.

[164] Justice Antonio addressed publicity in ***Shrivastava*** at para 63. Publicity is an ordinary incident of our justice system. It is an expected consequence of charges, not an unexpected, unusual, or peculiar consequence of charges. I recognize that publicity may mitigate when "fulfills a denunciatory function that has an inordinate impact on the offender:" ***R v Deck***, 2006 ABCA 92 at para 17; ***R v Heatherington***, 2005 ABCA 393 at para 5. This is not an instance of publicity damaging a prominent person. Neither is this an instance of publicity having a devastating effect on a person who has little, taking that little from him. The evidence did not support a finding of "inordinate impact" of publicity on Mr. Pettitt and his business.

(b) Family Consequences

[165] Mr. Pettitt's partner, who lives with him, has some psychological challenges. Mr. Pettitt supports and assists her. She relies on him heavily. The evidence did not show that her challenges had reduced her competence to or near "represented adult" status. I accept, as is set out in a physician's letter, that a loss of support by Mr. Pettitt "will result in some detriment to her mental health."

[166] Mr. Pettitt has been the primary caregiver for his father, who is 83 years old. However, it was acknowledged in the course of submissions that there are other family members who could take over as caregivers for Mr. Pettitt's father.

[167] At para 16 of ***Godfrey***, the Court of Appeal stated that disruption of employment and family life is a normal consequence of imprisonment, and cannot ordinarily be considered exceptional. If Mr. Pettitt were imprisoned for a significant period, that would likely be especially hard for Mr. Pettitt's partner. However, given ***Godfrey***, I cannot and do not find that the impact on Mr. Pettitt's partner or his father are mitigating circumstances.

(c) Physical Effects of Imprisonment

[168] Mr. Pettitt has some physical health challenges, confirmed in the PSR at 7-9. He was diagnosed with diabetes in 2017 and has hypertension, high cholesterol, a 50% blockage in a

heart artery, and arthritis. Defence counsel mentioned in submissions that he suffers from sleep apnea. He had knee replacements in 2018 and 2019. He is currently taking a half dozen medications.

[169] In ***Morrisey*** at para 41, the Supreme Court urged consideration of actual impact of imprisonment on an offender:

> (3) The Actual Effect of the Punishment on the Offender
>
> 41 This factor requires the court to consider how the offender will be personally affected by the actual punishment imposed. It will be relevant to consider the nature and conditions of the sentence, as well as the duration of the sentence ....

[170] If an offender suffers from a serious physical illness, the imprisonment that might otherwise be a proportional sentence may have a disproportionate adverse impact. The unusual hardship associated with imprisonment would be a mitigating factor in determining the proportional sentence. See CC Ruby, GJ Chan, and NR Hasan, *Sentencing*, 8th ed, §5.170-176; §5.239-243; ***R v Nuttall***, 2001 ABCA 277; ***R v Scott***, 2014 SKQB 225, Gunn J at para 46, ***R v ME***, 2012 ONSC 1078, Hill J at para 58.

[171] However, the fact of illness or significant physical challenge does not, by itself, necessitate punishment deviating from the punishment otherwise proportional to the gravity of the offence and the degree of blameworthiness of the offender. See ***R v Myette***, 2013 ABCA 371 at paras 35-37.

[172] The burden lies on the offender to establish mitigating circumstances. In particular, the evidence must support the conclusion that the physical challenges of the offender cannot be properly or adequately addressed by the correctional authorities. See the foundational Ontario case of ***R v Drabinsky***, 2011 ONCA 582 (leave to appeal ref'd March 29, 2012) at para 170. See also ***R v HS***, 2014 ONCA 323 at para 38; ***R v Deren***, 2021 ABPC 84, Anderson PCJ at para 70; ***R v Huynh***, 2017 ABPC 130; ***R v GRB***, 2013 ABCA 93 at para 18; ***ME*** at para 59; ***R v Swope***, 2015 BCCA 167; ***R v Potts***, 2011 BCCA 9 at paras 85 and 86; ***Scott*** at para 46.

[173] There was no evidence that the correctional authorities could not accommodate Mr. Pettitt's physical ailments. Mr. Pettitt's medical conditions will make imprisonment more physically challenging for him than if he were free of those conditions. In my opinion, though, on the evidence, his conditions do not, considered together, reach a level of disability or severity that would warrant any mitigation of his sentence.

C. Parity of Sentences

[174] Section 718.2(b) provides that "a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances." This paragraph evokes the principle of parity. See ***Friesen*** at paras 31-33; ***Lacasse*** at para 2.

[175] The starting point for major sexual assault is 36 months or 3 years. There are cases, though, in which offenders convicted of digital penetration of vulnerable (often sleeping) victims have been sentenced to much shorter sentences of imprisonment. See, for example:

- ***R v Rosenthal***, 2015 YKCA 1 at para 8 ("There is no logical basis on which to exclude assault by digital penetration from the range, it being a serious and invasive form of sexual assault, as recognized by the trial judge"); sentence of 14 months (para 15)

- ***Flowers*** at para 30 ("I conclude that digital penetration of the vagina of a sleeping victim will usually be considered to be a major sexual assault"); sentence of 18 months (but *Gladue* factors)
- ***R v Kiyawasew***, 1991 ABCA 345 at para 5 ("We regard this offence as one which may not be classifiable as a major sexual offence in the same sense as the examples of those offences which are given in the ***Sandercock*** case. But nevertheless, in our view, the facts of this case represent a sexual assault which is properly to be regarded as not far below that characterization"); sentence of 18 months ("settling if at all on the side of leniency:" at para 8)
- ***Myette*** at para 37 ("the sexual assault was serious and the respondent's degree of responsibility was high"); sentence of 18 months (para 39)
- ***Moriarty*** - 2 years consecutive for one of the digital penetration counts (Information 2, count 4; paras 24, 169, 251, 261).

[176] In ***Jensen***, the sentence was 18 months, but that case was prosecuted summarily and that was the maximum penalty.

[177] In contrast to the lower penalty cases are such cases as

- ***Lepine*** (digital penetration – sleeping victim), 3-year sentence
- ***Gill*** (digital penetration by cab driver of passenger), 3-year sentence
- ***Thompson***, 3-year sentence but more serious culpability (many assaults over nearly a decade, violation of trust, victim was mentally challenged)

[178] I am guided by the observation of Justice Huscroft in ***Stuckless*** at para 61:

> [61] .... Nevertheless, it was incumbent on the sentencing judge to impose a sentence with regard to the jurisprudence and understanding of sexual offending as it exists today. Previous sentencing decisions are historical portraits, not straitjackets: ***Lacasse***, at para. 57. The sentencing judge appears to have overlooked the significant evolution in sentencing jurisprudence that has taken place since *Stuckless 1998*.

See also Pepall JA at para 93.

[179] I have found that Mr. Pettitt's offences against I.H. and E.S. amount to major sexual assaults. In my opinion, that characterization is consistent with the evolution of the understanding of the gravity of sexual offending. While I cannot ignore ***Kiyawasew*** or ***Myette***, neither can I ignore ***Friesen***. Parity, then, entails that the starting point for sentencing for these offences be 36 months, as is the case for other major sexual assaults.

V. The Fit Sentences for Mr. Pettitt

A. Sentences, Before Totality

[180] I have described the seriousness of Mr. Pettitt's offences.

[181] All three offences involved breaches of trust or exploitation of vulnerability, and visible reminders of the offences left on the complainants' bodies. Mr. Pettitt's responsibility was

aggravated by his deliberate pursuit of a pattern of offending and by his objectification of the complainants.

[182] His offence was not mitigated by youth or extreme age, an adverse family or social background, a guilty plea, any significant cooperation with the authorities, or rehabilitative efforts. He has expressed remorse, but that has come late. The good character evidence could have little mitigating weight.

[183] I found that the offence against C.O. was not a major sexual assault. The Crown contended that the offence against C.O. warranted a sentence of 18 months, the Defence urged a sentence of 9 months. Before consideration of totality, I would impose a sentence for count 1, respecting C.O., of 15 months imprisonment.

[184] I found that the offences against I.H. and E.S. were major sexual assaults. The offence against E.S. was the most serious, as it included greater non-invasive sexual touching and, in my opinion, it demonstrated a more culpable attitude or intentionality towards E.S.

[185] The Crown contended that the offence against I.H. warranted a sentence of 3 years, the Defence urged a sentence of 9 months. Before consideration of totality, I would impose a sentence for count 2, respecting I.H., of 3 years imprisonment.

[186] The Crown contended that the offence against E.S. warranted a sentence of 4 years, the Defence urged a sentence of 14-18 months. Before consideration of totality, I would impose a sentence for count 4, respecting E.S., of 3 years and 6 months.

B. Consecutive or Concurrent

[187] Paragraph 718.3(4)(b) provides that

> (4) The court that sentences an accused shall consider directing ...
>
> > (b) that the terms of imprisonment that it imposes at the same time for more than one offence be served consecutively, including when
> >
> > > (i) the offences do not arise out of the same event or series of events ....

[188] ***Friesen*** confirmed at para 155 “the general rule is that offences that are so closely linked to each other as to constitute a single criminal adventure may, but are not required to, receive concurrent sentences, while all other offences are to receive consecutive sentences.”

[189] In this case, the offences did not arise from the same event or the same series of events. The offences involved different complainants at different times. There were no connections between the complainants save that they were customers of Mr. Pettitt. See ***R v McKnight***, 2020 ABQB 443, Sulyma J at para 53 (“the sentences must be consecutive as each is obviously in regard to a specific and separate person, act and place”).

[190] In my view, the sentences for Mr. Pettitt’s offences must be served consecutively. I discern no basis for any of the sentences to run concurrently with another sentence.

[191] As Mr. Pettitt’s sentences will run consecutively, after having determined the appropriate sentence for each offence in isolation from the others, I must take a “last look” to decide whether the totality principle warrants a reduction in the global period of imprisonment.

C. Totality

[192] Under s. 718.2(c), "where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh." ***Friesen*** confirmed at para 157 that "[t]he principle of totality requires any court that sentences an offender to consecutive sentences to ensure that the total sentence does not exceed the offender's overall culpability ...." In ***R v Brodt***, 2016 ABCA 373, Chief Justice Fraser wrote at para 6 that

> [6] Statutory totality requires reducing a cumulative sentence that will crush the offender's rehabilitative prospects: see *R v McDonald*, 2015 ABCA 108 at para 54, 599 AR 300. This involves an individualized consideration of restraint which exists over and above whether a cumulative sentence for the offences is broadly proportionate. The focus is instead on the offender's circumstances and whether the sentence is in keeping with the offender's record and future prospects: *R v Wozny*, 2010 MBCA 115 at paras 59-60, 262 Man R (2d) 75 ....

[193] Since the sentences for Mr. Pettitt's offences must be served consecutively, he faces an aggregate period of imprisonment of 7 years and 9 months.

[194] I have had regard for Mr. Pettitt's age and health. I accept that he was sincere in his s. 726 statement and is truly remorseful. With that there is the prospect of rehabilitation. He has made efforts to contribute to charitable causes. It appears that he has not only been a good tradesman but has enhanced the lives of at least numerous customers. These pro-social factors show that he has a reasonable prospect of continuing to make valuable contributions to his community. Mr. Pettitt had a rough start in young adulthood, but for decades, until these offences, managed to maintain a law-abiding life. That too speaks to his good prospects.

[195] Taking into account considerations of restraint embedded in the totality principle, I reduce Mr. Pettitt's aggregate sentence to 6 years and 6 months, or 78 months total.

[196] In view of this reduction, Mr. Pettitt's sentences are as follows:

- count 1, respecting C.O., 12 months imprisonment
- count 3, respecting I.H., 30 months imprisonment
- count 4, respecting E.S., 36 months imprisonment.

The sentences are to be served consecutively.

D. Pre-Trial Custody

[197] I was advised in submissions that Mr. Pettitt served, in effect, one day of pre-trial custody. The Crown urged that there be no time-served credit for a single day. The Defence did not argue otherwise. No credit is recognized for the single day in custody.

E. Credit for Time Served under Release Conditions

[198] Mr. Pettitt's bail conditions included requirements to report to a bail supervisor, no contact provisions relating to the complainants, to keep the peace and be of good behaviour, and to have a third party present when doing tattooing. Mr. Pettitt has complied with his bail conditions since May 31, 2018 without incident: PSR 3.

[199] Mr. Pettitt's partner served as his third party supervisor. Mr. Pettitt was not required to pay a third party to supervise. There was no evidence of any lost revenues.

[200] Mr. Pettitt claims a credit to be offset against the period of imprisonment of one-half of his 36 months spent on release.

[201] In my opinion, compliance with bail conditions, by itself, simply shows a lack of aggravating circumstances or the lack of a factor tending to show that rehabilitation would be inappropriate, as opposed to showing a mitigating factor.

[202] However, credit against a period of imprisonment may be recognized for onerous interim release conditions. Mr. Pettitt further points out that he was on bail for a long time – 36 months. His trial was delayed because of COVID.

[203] Compliance with bail conditions for a lengthy period, by itself, does not attract a sentencing credit. See ***RTK*** at para 20.

[204] The key issue is whether Mr. Pettitt's release conditions were onerous. I do not find Mr. Pettitt's release conditions to have been onerous. He was able to continue in his trade, with some inconvenience, but without losing revenues. Given his charges, the supervision condition was, in my view, entirely reasonable and was an effective compromise. He could earn money at his trade while the public would be protected. Mr. Pettitt was not under conditions that amounted to house arrest. He was not bound by a strict curfew. There was no evidence that he was prevented from having normal social or family relationships. See ***R v Eliasson***, 2021 ABCA 188 at para 11; ***R v Faulkner***, 2019 ABCA 352 at para 10; ***R v Nguyen***, 2018 ABQB 861, Hughes J, as she then was, at paras 32-43; ***R v Hoelscher***, 2017 ABCA 406 at paras 10-12; ***R v Varsallona***, 2010 ABCA 314 at para 10.

[205] I do not give any sentencing credit for time spent by Mr. Pettitt under his release conditions.

F. Confirmation of Sentences

[206] In my opinion, the appropriate sentences for Mr. Pettitt in all the circumstances are as follows:

- count 1, respecting C.O., 12 months imprisonment
- count 3, respecting I.H., 30 months imprisonment
- count 4, respecting E.S., 36 months imprisonment.

The sentences are to be served consecutively.

G. Ancillary Orders

[207] I hereby also grant the following ancillary Orders:

- an Order requiring Mr. Pettitt to provide a sample of his DNA for inclusion in the DNA data bank pursuant to s. 487.051 of the *Criminal Code*, attached to each count, as each of the three convictions is for a primary designated offence.
- pursuant to section 109(3) of the *Criminal Code*, as Mr. Pettitt has been convicted of three offences under s. 109(1)(a), Mr. Pettitt is prohibited from possessing any prohibited firearm, restricted firearm, prohibited weapon, prohibited device, and prohibited ammunition for life. He is also prohibited from possessing any firearm, other than a prohibited firearm or restricted firearm, and any crossbow, restricted weapon, ammunition, and explosive substance for life. This prohibition is in

relation to counts 2 and 4. Mr. Pettitt's armed robbery conviction is also relevant to the term of these prohibitions.

- pursuant to sections 490.012(1) and 490.013(2.1) of the *Criminal Code*, Mr. Pettitt is subject to a mandatory SOIRA order in Form 52 for life, as he has been convicted of three designated offences.
- an Order of Forfeiture of offence-related property to Her Majesty.

The Crown sought no victim surcharge in the circumstances. I accept that concession and order no victim surcharge on the grounds that it would cause undue hardship to Mr. Pettitt.

Heard on the 30th day of August, 2021.
Delivered on the 8th day of September, 2021.
Dated at the City of Edmonton this 23rd day of September, 2021.

W.N. Renke
J.C.Q.B.A.

Appearances:

Chantelle Washenfelder
Crown Prosecutor
Alberta Crown Prosecution Service
for the Crown

Gloria Hammermeister
Barrister & Solicitor
for the Accused