SUPREME COURT OF YUKON

Citation: *R v J.R.*,
2021 YKSC 50

Date: 20210712
S.C. No. 19-01503
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

AND

J.R. and F.N.

Before Justice E.M. Campbell

Agent for the Public Prosecution Service of Canada — Amy Porteous

Counsel for the Defence — André Roothman (by videoconference)

This decision was delivered in the form of Oral Reasons on July 12, 2021. The Reasons have since been edited for publication without changing the substance.

REASONS FOR SENTENCE[1]

[1] CAMPBELL J. (Oral): F.N. and J.R. are before me today for sentencing, having been found guilty after trial of assault charges against I.N. that date back approximately 10 to 17 years.

[2] I do not intend to go over all of the circumstances surrounding the commission of the offences because they are addressed in detail in my decision of April 23, 2021.

[1] These Reasons for Sentence have been redacted and initialized in light of an Order made by the Territorial Court of Yukon, pursuant to s. 111(1) of the *Youth Criminal Justice Act*, S.C. 2002, c. 1, prohibiting the publication of information that could identify a child or young person as having been a complainant or a witness in a related criminal matter.

Nonetheless, a brief overview is necessary for the purpose of this sentencing proceeding.

[3] First, I found F.N. guilty of assault with a weapon (a wooden spoon) on I.N., pursuant to s. 267(a) of the *Criminal Code*. The assault consisted of hitting/spanking her son I.N. with a wooden spoon on his buttocks and on his hands on a regular basis while he was between the ages of eight years old and 12 or 13 years old. F.N. did so as a means to discipline him. The finding of guilt also includes one incident where F.N. hit her son two or three times on the head with a wooden spoon during that period of time.

[4] I found J.R. guilty of one count of assault, pursuant to s. 266 of the *Criminal Code*; and one count of assault with a weapon, pursuant to s. 267(a) of the *Criminal Code*. The assault with a weapon consisted of J.R. grabbing and folding an extension cord to hit/spank I.N. once on his buttocks on top of his clothes when I.N. was seven years old. The simple assault consisted of J.R. grabbing I.N., pushing him on his bed, pinning him down onto his bed, and restraining him by using the weight of his body to hold I.N. down for a period of time. This assault took place when I.N. was 11 years old.

[5] Neither counsel suggest that a custodial sentence is appropriate in this matter. Crown counsel submits that a suspended sentence followed by a probationary term of one year, including a counselling condition, is appropriate. Defence counsel submits that a conditional discharge with a short probationary period, including the statutory conditions only, is the appropriate outcome for both F.N. and J.R.

[6] I agree with Crown counsel and defence counsel that a custodial sentence is not required either for F.N. or J.R., and that a non-custodial disposition is in the range of appropriate sentences for both accused. Therefore, the main issue I have to decide is

whether a suspended sentence or a conditional discharge is the appropriate sentence for each offender.

[7] First, I will review the general principles of sentencing.

[8] Second, I will outline the legal test applicable to the granting of discharges.

[9] Third, I will review the impact of the offences on the victim.

[10] Fourth, I will review the personal circumstances of F.N. in light of the legal test for discharges and what I find to be an appropriate sentence for her.

[11] Fifth, I will review the personal circumstances of J.R. in light of the legal test for discharges and what I find to be an appropriate sentence for him.

[12] Finally, I will address the ancillary orders the Crown requested in this matter and my findings in that regard.

[13] The fundamental purpose of sentencing is set out at s. 718 of the *Criminal Code*, as follows:

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

> (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

[14] A sentencing judge must therefore consider the relevant sentencing objectives in determining a fit sentence for an offender.

[15] In addition, the principle of proportionality, found at s. 718.1 of the *Criminal Code*, which requires that "[a] sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender" plays a central role in sentencing an offender.

[16] A judge must consider all the circumstances of the offence, of the offender, and the needs of the community in which the offence occurred in determining a fit sentence (*R v Nasogaluak*, 2010 SCC 6, ("*Nasogaluak*") at para. 44).

[17] Also, pursuant to s. 718.2(d), "an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances".

[18] In addition, the principle of parity, that offenders in similar circumstances who commit similar offences should receive similar sentences, has to be taken into account, pursuant to s. 718.2(b).

[19] However, sentencing remains an individualized process. As per s. 718.2(a) of the *Criminal Code*, "a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender".

[20] In light of those principles, the circumstances of the offences, the impact on the victim, and the circumstances of both offenders — which I will address more specifically later in my decision — as I stated at the beginning of my decision, I agree with counsel that a custodial sentence is not required for either offender.

[21] I now turn to the central issue in this case, which is whether the imposition of a conditional discharge is an appropriate sentence for F.N. and J.R.

[22] The important difference between a suspended sentence and a conditional discharge was addressed by Justice Gower in *HMTQ v. Barry*, 2011 YKSC 39, at para. 19. He stated as follows:

> [19] The difference between the two dispositions is, of course, significant. With a suspended sentence, there is a conviction entered against the offender, whereas with a conditional discharge, assuming that the period of probation is completed without any difficulty, then the discharge becomes absolute and the accused is deemed not to have been convicted under the relevant provision in the *Criminal Code*. ...

[23] The test to determine whether a discharge should be granted is set out at s. 730(1) of the *Criminal Code* as follows:

> Where an accused, other than an organization, pleads guilty to or is found guilty of an offence, other than an offence for which a minimum punishment is prescribed by law or an offence punishable by imprisonment for fourteen years or for life, the court before which the accused appears may, if it considers it to be in the best interests of the accused and not contrary to the public interest, instead of convicting the accused, by order direct that the accused be discharged absolutely or on the conditions prescribed in a probation order made under subsection 731(2).

[24] There is no dispute that the offences for which F.N. and J.R. have been found guilty do not preclude the granting of a conditional discharge.

[25] As stated in s. 730(1), there are two essential preconditions that must be met for a conditional discharge: (i) it has to be in the best interests of the accused; and (ii) it cannot be contrary to the public interest.

[26] I now turn to the scope of the first precondition, the best interests of the accused.

[27] In *R v Fallofield*, [1973] 6 WWR 472, at para. 21, the Court of Appeal for British Columbia provided guidance on the scope of the expression "best interests of the accused" in the context of discharges. The Court stated:

> [21] …
>
> (5) Generally, the first condition would presuppose that the accused is a person of good character, without previous conviction, that it is not necessary to enter a conviction against him in order to deter him from future offences or to rehabilitate him, and that the entry of a conviction against him may have significant adverse repercussions.
>
> …

[28] In *HMTQ v Shortt*, 2002 NWTSC 47, Justice Vertes made the following comments regarding the threshold to apply in determining whether the entry of a conviction against an offender may have significant adverse repercussions on them. He stated:

> [32] A review of the case law reveals that in many cases a discharge was granted where a conviction would result in an accused losing his or her employment, or becoming disqualified in the pursuit of his or her livelihood, or being faced with deportation or some other significant result. These are examples of highly specific repercussions unique to the specific accused. But, such specific adverse consequences are not a prerequisite. In my opinion, it is sufficient to show that the recording of a conviction will have a prejudicial impact on the accused that is disproportionate to the offence he or she has committed. This does not mean that the accused's employment must be endangered; but it does require evidence of negative consequences which go beyond those that are incurred by every person convicted of a crime (unless the particular offence is itself harmless, trivial or otherwise inconsequential); see *R. v. Doane* (1980), 41 N.S.R. (2d) 340 (N.S. C.A.), at pages 343-344; and *R. v. Moreau* (1992), 76 C.C.C. (3d) 181 (Que. C.A.)

[29] I note that, in the recent decision of *R v M.D.*, 2021 YKTC 24, Judge Ruddy of the Territorial Court of Yukon relied on Justice Vertes' comments in considering the test set out at s. 730(1) of the *Criminal Code* for discharges.

[30] The second precondition for a discharge is that it not be contrary to the public interest.

[31] In *R v Fallofield*, the Court of Appeal for British Columbia found that this precondition must be assessed in the context of deterrence to others or general deterrence.

[32] In *R v MacKenzie*, 2013 YKSC 64, Justice Veale adopted a list of factors set out by the Court of Appeal of Newfoundland and Labrador in *R v Elsharawy*, 156 Nfld & PEIR 297, at para. 3, to assess the general deterrence component of this second precondition. The factors are:

> [44] …
>
> 1. the gravity of the offence;
> 2. the prevalence of the offence in the community;
> 3. public attitudes towards the offence; and
> 4. public confidence in the effective enforcement of the criminal law.

[33] In addition, in *R v Shortt*, Justice Vertes stated that the need to maintain public confidence in the justice system also constitutes a consideration under this precondition. Justice Vertes described the need to maintain confidence in the justice system at para. 34 of the decision as follows:

> [34] The second criterion requires that a discharge not be contrary to the public interest. Most of the case law identifies the "public interest" with the need for general deterrence. Yet, in my opinion, there is a further aspect to the public interest, one familiar to those who work with the *Criminal Code* bail and bail pending appeal provisions, that being the

> need to maintain the public's confidence in the justice system. From this perspective the knowledge that certain type of criminal behaviour will be sanctioned by way of a criminal record not only acts as a deterrent to others but also vindicates public respect for the administration of justice. The question to ask here is would the ordinary, reasonable, fair-minded member of society, informed about the circumstances of the case and the relevant principles of sentencing, believe that the recording of a conviction is required to maintain public confidence in the administration of justice. …

[34] I will now turn to the case law provided by the Crown and the defence in this case.

[35] Counsel submitted three Yukon decisions in which discharges were considered in cases of offences involving domestic violence. The cases are: *R v MacKenzie*, 2013 YKSC 64; *HMTQ v Barry*, 2011 YKSC 39; and *R v Gill*, 2009 YKTC 57.

[36] Counsel acknowledged at the hearing that while these cases are helpful, as they relate to incidents of family violence, none of them are exactly on point, because they involve an assault against a partner or spouse, not an assault on a child by a family member.

[37] I note that in *R v MacKenzie*, Justice Veale cited with approval Justice Vertes' comments in *R v Shortt*, "that offences involving violence are generally not amenable to the granting of a discharge, particularly cases involving domestic violence" (para. 34).

[38] However, Justice Veale also recognized that a discharge remains an available sentencing tool and may be granted when appropriate, even in cases involving domestic violence (*R v MacKenzie*, at para. 42).

[39] In *R v MacKenzie*, Justice Veale, sitting as a summary conviction appeal judge, set aside a conditional discharge that had been granted in a matter involving domestic violence committed in the presence of the victim's children, as well as a number of no

contact breaches. The assault was committed during a dispute that occurred at the end of the domestic relationship. It consisted of one incident where the offender grabbed the victim and put his arm around her neck restraining her and holding her. The assault did not involve choking. The victim struggled, the offender let her go and left the premises. The offender had also breached his no contact condition with the victim on three occasions.

[40] Justice Veale came to the conclusion that the trial judge had erred by failing to give sufficient consideration to the importance of deterrence of the accused and had overemphasized the potential for rehabilitation when the offender denied that the offences had occurred. He also determined that the trial judge had erred in his assessment of the gravity of the offences and that granting a conditional discharge in that case was contrary to the public interest.

[41] The cases of *R v Barry* and *R v Gill* were provided by the defence as examples of cases of domestic violence where conditional discharges were granted. Both cases involve a single incident of simple assault against the offender's partner. In both cases, a conditional discharge was granted.

[42] In *R v Gill*, the accused was found guilty after trial of a common assault that consisted of the offender striking the victim’s mouth once with his hand, which caused some small swelling and some temporary bleeding. The sentencing judge described it as a minor assault that occurred in a matter of seconds. However, it was committed against the offender’s spouse and in front of the couple’s children, which the judge found aggravating. The accused had a favourable pre-sentence report. He had no criminal record and was steadily employed. The judge granted a discharge and placed

the accused on probation for a period of 18 months with a number of conditions, including that he report to the Family Violence Prevention Unit to be assessed and complete the Spousal Abuse Program.

[43] In *R v Barry*, the assault occurred during a heated argument between the parties involving pushing and shoving from both sides. The assault consisted of the accused striking the victim a number of times on various parts of her body and laying his arm across her throat. The assault caused, most noticeably, a bruise on one of her arms. The Crown agreed that a non-custodial sentence was appropriate and sought a suspended sentence with probation. The defence submitted that a conditional discharge should be granted.

[44] In that case, the accused had entered a guilty plea to a charge of common assault against his spouse. He was 33 years old. He had no criminal record and a solid employment history. He had not breached his release conditions. There were a number of mitigating factors.

[45] The sentencing judge stated that the incident appeared to be genuinely out of character for the accused. He also noted that the accused had a very low risk of reoffending. The accused was also willing to take any counselling recommended by his probation officer. The sentencing judge granted a conditional discharge with a one-year probation, including a condition that he attend and participate in counselling as directed by his probation officer.

[46] I will now turn to the impact of the offences on the victim

[47] There is no victim impact statement in this matter. Crown counsel advised at the hearing that I.N. is not seeking a no contact order with his mother, F.N., or his

grandfather, J.R. This is not to say that there is no evidence regarding the impact of the offences on I. N. in this matter. The evidence at trial, including the testimony of the victim and of two of his siblings, reveal that the offences had a lasting negative emotional impact on I.N., who is now a young adult.

[48] I will now turn to the specific circumstances of F.N. and my determination of an appropriate sentence for her.

F.N.

[49] F.N. is in her 40s. She was a stay-at-home parent and homeschooled her seven children for many years. In 2018, after her separation from her husband, she came back to live full-time in the Yukon after a few years partly spent in British Columbia. She has interim custody of her three youngest children. She has recently started a [redacted] business with the help of her two youngest daughters, who are, I am told, approximately [redacted] and [redacted] years old. Also, she has been accepted in a [redacted] program by a college in Vancouver.

[50] Several letters were filed at sentencing in support of F.N. I have some reservations about the content of some letters provided in support of F.N. and J.R. that include comments regarding the charges before the Court, even though the authors of those letters did not attend court to listen to the evidence adduced at trial. However, there are several other letters provided by adult family members and members of F.N.'s community that reveal that F.N. is highly regarded and thought of by people around her.

[51] Would a conditional discharge be in the best interests of F.N., which is the first precondition of the test for discharges?

[52] F.N. does not have a criminal record. She comes before the Court as a first-time offender. In light of the information filed before the Court, she otherwise appears to be an individual of good character who is well regarded by members of her community. She has recently started a new business and has taken steps to further her education.

[53] As part of her family proceeding, regarding custody and access of the three youngest children of the marriage, two of whom are now in their teenage years, as I understand it, F.N. has completed the “For the Sake of the Children” session. Defence counsel reported that, since 2018-2019, F.N. has been in counselling to deal with the issues surrounding her marriage and her separation, as well as trauma counselling regarding the sexual abuse suffered by two of her younger daughters. According to defence counsel's submissions, I understand that F.N. would not be opposed to further counselling relevant to the area of parent-children relationship.

[54] I note that some of the reference letters that were filed for the sentencing hearing also described regular positive interactions between the authors of the letters, F.N., and her three youngest children since 2018.

[55] Defence counsel noted that, for the first time of her adult life, F.N. is in a position to take care of herself. I note that this is something that the authors of a number of reference letters have noted as well.

[56] I understand that F.N. has a brother who lives in the United States. While the issue of travelling to the United States was raised more specifically by defence counsel with respect to J.R.’s ability to cross the border to visit some of his grandchildren, I note that F.N. would find herself in the same situation as her father if she wanted to visit members of her family who reside in the United States.

[57] Overall, considering the fact that F.N. was a stay-at-home mother for much of her adult life, the efforts she is making to better her education and to set up a business to become self-employed and generate income for her and the children who are still in her care, as well as the possible impact that a criminal record may have on her ability to travel to the United States to visit family, I am prepared to accept that there is some evidence of negative consequences which go beyond those that are incurred by every person convicted of a crime, in that a criminal record would negatively impact the efforts F.N. has made since 2018 for her and her three children in her care. I find that the first precondition is met as a conditional discharge would be in the best interests of F.N.

[58] I was not invited to and I decline to comment on the fact that F.N. is presently a party to a family matter that involves custody and access (or parenting time) of her three youngest children, as it will be for the judge presiding over that matter to make a determination based on the evidence presented in that case and the best interests of the children.

[59] I will now turn to the second precondition of a conditional discharge, which is that the granting of a discharge must not be contrary to the public interest.

[60] As I stated, this precondition raises the issue of general deterrence. I also have to consider the need to maintain public confidence in the justice system in assessing this aspect of the test.

[61] I now turn to the four factors adopted in *R v MacKenzie* to assess the issue of general deterrence.

[62] First, the gravity of the offence.

[63] F.N. was convicted of assaulting her son by hitting him with a wooden spoon on his hands and his buttocks when he was between the ages of eight years old and 12 or 13 years old on a regular basis as a means to discipline him. The assault on the hands and buttocks does not involve a single incident. F.N. used a wooden spoon to spank her son on several occasions over a number of years. While there is no evidence of physical injury as a result of the use of the spoon to discipline the victim, as previously stated, there is evidence of emotional harm.

[64] I have also found F.N. guilty of one incident of hitting her son on the head two or three times with a wooden spoon in the course of a single incident.

[65] Also, there are aggravating factors in this case in relation to the gravity of the offence. F.N. was in a position of trust over her child when she committed the assault, which is an aggravating factor, pursuant to s. 718.2(a)(iii) of the *Criminal Code*. It is also aggravating that the assault was committed on a person under the age of 18, pursuant to s. 718.2(a)(ii.1) of the *Criminal Code*. The assault took place over a period of time that started approximately a year after the Supreme Court of Canada issued its decision in *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4. The Supreme Court found that s. 43 of the *Criminal Code* only exempts from criminal sanction the use of minor corrective force of a transitory or trifling nature by a parent or someone standing in the place of a parent on a child.

[66] The Supreme Court stated at para. 40, “[d]iscipline by the use of objects or blows or slaps to the head is unreasonable.”

[67] The Supreme Court of Canada's decision recognized the consensus among experts regarding corporal punishment that already existed in 2004.

[68] As I noted at para. 337 of my decision of April 23, 2021, in this matter:

> In addition, this passage [— and I refer to the decision of the Supreme Court of Canada —] also indicates that [Ms.] N.'s subjective belief that it was appropriate for her to discipline her children, including I.N., with a wooden spoon, as long as it was done in a controlled manner and for a corrective purpose, based on her own upbringing, beliefs and personal research, is not determinative, as the reasonableness of the use of force must be assessed objectively. The majority of the Supreme Court of Canada stated clearly at paras. 36 and 37 of the decision, when they concluded that based on social consensus already in existence on January 30, 2004, corporal punishment using objects or that involve slaps or blows to the head is harmful and not reasonable …
>
> (as read)

[69] In addition, in my April 23, 2021 decision, I quoted paras. 36 and 37 of the decision of the Supreme Court of Canada as follows:

> [36] ... It is wrong for caregivers or judges to apply their own subjective notions of what is reasonable; s. 43 demands an objective appraisal based on current learning and consensus. Substantial consensus, particularly when supported by expert evidence, can provide guidance and reduce the danger of arbitrary, subjective decision making.
>
> [37] Based on the evidence currently before the Court, there are significant areas of agreement among the experts on both sides of the issue (trial decision, at para. 17). Corporal punishment of children under two years is harmful to them, and has no corrective value given the cognitive limitations of children under two years of age. Corporal punishment of teenagers is harmful, because it can induce aggressive or antisocial behaviour. <u>Corporal punishment using objects, such as rulers or belts, is physically and emotionally harmful</u>. Corporal punishment which involves slaps or blows to the head is harmful. <u>These types of punishment, we may conclude, will not be reasonable</u>. [my emphasis]

[70] As a result, I am of the view that, while the facts surrounding the commission of the offence are not as egregious as in cases where serious physical harm is inflicted, I

find that this is a serious offence that does not fall at the lower end of the scale because the striking with the spoon occurred on a regular basis over a number of years.

[71] I will now turn to the second factor, the prevalence of the offence in the community.

[72] There is no evidence before me regarding the prevalence of this type of assaulting behaviour against children in recent years in Yukon or in Canada. In addition, counsel have not directed my attention to any recent cases where findings regarding the prevalence of this type of offence in the community have been made. Therefore, I am not in a position to make a finding regarding this factor.

[73] The third factor relates to public attitudes towards the offence. Children are vulnerable members of our society in need of protection from abuse or harmful conduct committed by people in a position of trust. Offences of violence against children are considered serious by the public. The fact that the *Criminal Code* specifically considers as aggravating evidence that the offender in committing the offence abused a person under the age of 18 is a reflection of the public attitudes towards abusive conduct against children and youth. In addition, the Supreme Court of Canada indicated that its decision reflected a consensus that existed at the time regarding the harmful impact and unreasonableness of corporal punishment involving the use of an object.

[74] I will now turn to the fourth factor, which is the public confidence in the effective enforcement of the criminal law.

[75] Public confidence in the administration of the criminal law does require a sentencing judge to carefully consider an appropriate sanction based on all applicable

sentencing principles and objectives, including the need for denunciation and deterrence of offences involving an assault by a parent on their child.

[76] In addition, as stated by Justice Vertes, in *R v Shortt*, this precondition also involves consideration of the need to maintain the public confidence in the justice system. Again, the question to ask in that regard is as follows: Would an ordinary, reasonable, fair-minded member of society, informed about the circumstances of the case and the relevant principles of sentencing, believe that the recording of a conviction is required to maintain public confidence in the administration of justice?

[77] I note that there are a number of mitigating factors in this case.

[78] F.N. does not have a criminal record. She is otherwise an individual of good character who is well-regarded by members of her community who know her well. I note that the offence before the Court dates back 10 to 15 years ago and that, since then, F.N. has engaged in some counselling mostly involving her situation since her separation, but has also taken the course "For the Sake of the Children" that every parent involved in a family matter is directed to take in this jurisdiction. The fact that F.N. was convicted after trial is a neutral factor. While F.N. does not get the benefit of the mitigating effect of a guilty plea, she should not be penalized for exercising her right to take this matter to trial. In any event, the absence of a guilty plea does not prevent the granting of a conditional discharge, as illustrated by the decision of *R v Gill*, submitted by the defence.

[79] I also note that F.N. married when she was quite young. She had seven children in a relatively short period of time. Except for the help provided mostly by her mother, who lived nearby, F.N. was essentially alone at home with her children during the day

while her husband was working. F.N. also homeschooled her children for a good part of their childhood.

[80] I also acknowledge that F.N. had to cope with a health condition that was diagnosed at a later point. Her health condition caused her to be very fatigued. There is no question that raising seven children, mostly on her own while her husband was at work, homeschooling them for a good part of their childhood, and being the one responsible for almost every aspect of their lives was a full-time job, a job that could be exhausting at times. There is no doubt that I.N. was a difficult and challenging child, and that F.N. had a hard time managing him when he was young. However, while I understand and I am prepared to consider F.N.'s difficult and challenging situation at the time of committing the offence before the court (and even if I were prepared to consider the difficult relationship she stated she had with her husband), I want to restate that her situation did not justify the use of corporal punishment with an object on her son on a repetitive basis.

[81] I now turn to the aggravating factors, which I have already identified.

[82] The assault constituted an abuse of a person under the age of 18, which is deemed an aggravating factor by the *Criminal Code*. As the victim's mother, F.N.'s actions constitute an abuse of trust, which is also a statutorily aggravating factor, pursuant to s. 718.2(a)(iii) of the *Criminal Code*. Pursuant to s. 718.01 of the *Criminal Code*, the principles of denunciation and general deterrence must be given primary consideration in cases of offences of violence against children.

[83] Considering the gravity of the offence before the Court, having balanced the mitigating and aggravating factors that apply in this case, and the need to give primary

consideration to the principles of deterrence and denunciation in cases involving abuse of children by a person in a position of authority and trust, in order to maintain public confidence in the administration of justice, I find that a discharge would be contrary to the public interest. As a result, I am of the view that the test for granting a discharge has not been met with respect to F.N. Instead, I am of the view that an appropriate sentence for her is a suspended sentence with a period of probation. Accordingly, I would suspend the passing of the sentence and place F.N. on probation for a period of 12 months.

[84] The terms and conditions of the probation will be as follows:

1. Keep the peace and be of good behaviour.
2. Appear before the Court when required to do so by the Court.
3. Notify the probation officer in advance of any change of name or address and promptly of any change in employment or occupation.
4. Report to a probation officer within two working days and thereafter when and in the manner directed by the probation officer.
5. Attend and actively participate in all assessments and counselling programs as directed by your probation officer, and complete them to the satisfaction of your probation officer in the following areas: discipline of children and teenagers, remedial parenting courses, family relationships, anger managements, and other related counselling as found appropriate and as directed by her probation officer.

[85] I will address the issue of ancillary orders requested by the Crown at the end of my decision.

J.R.

[86] I will now turn to the appropriate sentence for J.R.

[87] The first question is whether a conditional discharge is in the best interests of the accused.

[88] J.R. is 72 years old. He comes before the Court without a criminal record. He has been gainfully employed and has been a successful entrepreneur. He and his wife have provided [redacted] services to a number of communities in Canada and the United States over the years. Numerous character letters and letters of reference have been filed as part of the sentencing process. As previously stated, I have some reservations about the content of some letters provided in support of F.N. and J.R. that include comments regarding the charges before the Court even though the authors of the letters did not attend court to listen to the evidence.

[89] However, there are also several other letters provided by adult family members and members of J.R.'s community that reveal that J.R. is highly regarded and thought of by members of his community. The letters describe J.R. as a hard-working, responsible, respectful, and caring individual, as well as a loving grandfather who is involved in his grandchildren's lives.

[90] Defence counsel submits that a conviction would have a significant impact on J.R., as it may prevent him from crossing the border to visit one of his children and a number of his grandchildren who reside in the United States.

[91] Considering J.R.'s age, the absence of previous convictions, and the negative impact that a criminal record may have on his ability to cross the border to visit family – J.R. I was not considering your age alone but the fact that you have been on Earth for

72 years without a previous conviction and the negative impact that a criminal record may have on your ability to cross the border to visit your family – I am prepared to find that a conditional discharge would be in the best interests of J.R.

[92] I now turn to the second precondition to the granting of a discharge, which is that a discharge must not be contrary to the public interest.

[93] As previously stated, this precondition raises the issue of general deterrence. I also have to consider the need to maintain public confidence in the justice system in assessing this aspect of the test. Again, four factors guide the assessment of the question of general deterrence.

[94] The first factor is the gravity of the offences. J.R. was found guilty of two discrete incidents of assault against I.N. that took place approximately four years apart. The assault with a weapon consisted of striking the victim once with an extension cord on his buttocks over his clothes. The victim was only seven years old at the time.

[95] The assault occurred after the Supreme Court of Canada rendered its decision in *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, in January of 2004.

[96] The evidence reveals that I.N. was a difficult and challenging child. Also, I note that the assault did not cause any physical injury to I.N. However, the Supreme Court of Canada recognized that assaulting a child, even for corrective purposes, with an object, is unreasonable and harmful.

[97] With respect to the common assault charge, the accused entered the residence of the victim in reaction to an incident that had occurred between his wife and his grandson, I.N. J.R. went directly to the 11-year-old victim, even though one of his

parents, his mother, F.N., was present in the house at the time, and took it upon himself to apply physical force on I.N.

[98] I found that J.R. was the aggressor in this case and that the common assault involved pushing I.N. on his bed, pinning him down onto his bed, and restraining him by using the weight of his body to hold I.N. down for a period of time.

[99] This is not a case that involves one single minor incident. Considering all the circumstances surrounding the two offences, including the fact that an object was used in relation to the offence that was committed when I.N. was seven years old, I am unable to conclude that this is a case that falls at the very low end of the scale. Offences involving the physical assault of a child by a person in a position of trust are offences of a serious nature.

[100] The second factor is the prevalence of the offence in the community. As previously stated, there is no evidence before me regarding this factor. I am therefore not in a position to make a finding in that respect.

[101] The third factor relates to public attitude towards the offence. As previously stated, children are vulnerable members of our society in need of protection from abuse or harmful conduct committed by people in a position of trust. Offences of violence against children are considered serious by the public. The fact that the *Criminal Code* specifically considers as aggravating evidence that the offender in committing the offence abused a person under the age of 18 is a reflection of public attitudes towards abusive conduct against children and youth. Also, the Supreme Court of Canada indicated that its decision (*Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*) reflected a consensus that existed at the time regarding the

harmful impact and unreasonableness of corporal punishment involving the use of an object.

[102] I will now turn to the fourth factor, which is public confidence in the effective enforcement of the criminal law.

[103] Public confidence in the administration of the criminal law does require a sentencing judge to carefully consider an appropriate sanction based on all applicable sentencing principles and objectives, including the need for denunciation and deterrence of offences involving an assault by a parent or a grandparent on their child or grandchild.

[104] In addition, as stated by Justice Vertes, in *R v Shortt*, this precondition involves consideration of the need to maintain public confidence in the justice system. The question to ask is as follows. Would an ordinary, reasonable, fair-minded member of society, informed about the circumstances of the case and the relevant principles of sentencing, believe that the recording of a conviction is required to maintain public confidence in the administration of justice?

[105] There are a number of mitigating factors in this case.

[106] J.R. is 72 years old and does not have a criminal record. In addition, he is highly regarded by several members of his community.

[107] I note that the offences before the Court concern two separate incidents that date back 10 to 15 years ago.

[108] The fact that J.R. was convicted after trial is a neutral factor. While J.R. does not get the benefit of the mitigating effect of a guilty plea, he should not be penalized for exercising his right to take this matter to trial. In any event, as I have stated before, the

absence of a guilty plea does not prevent the granting of a conditional discharge, as illustrated by the decision of *R v Gill* submitted by the defence.

[109] J.R. has not taken any programming since he was convicted of the offences or during the court process. However, he has indicated a willingness to participate in programming as directed by a probation officer.

[110] The aggravating factors are as follows. The assault constitutes an abuse of a person under the age of 18, a deemed aggravating factor requiring primary consideration to the objectives of denunciation and deterrence, as per s. 718.2(a)(ii.1) and s. 718.01 of the *Criminal Code*.

[111] As the victim's grandfather, J.R.'s actions constitute an abuse of trust, which is an aggravating factor pursuant to the *Criminal Code* (s. 718.2(a)(iii)).

[112] I have to admit that the decision regarding an appropriate sentence for J.R. has been difficult to make. I recognize the positive aspects of J.R.'s circumstances. I also recognize that granting a conditional discharge would be to his benefit. However, considering that the first offence for which J.R. was found guilty is an assault with an object (an extension cord), upon a seven-year-old child by a person in a position of trust, followed a few years later by a second episode of unlawfully assaultive conduct towards the same victim, his then 11-year-old grandson, I am unable to conclude that a conditional discharge is a disposition that would be in the public interest.

[113] I am of the view that, in these circumstances, the objectives of deterrence and denunciation would not be adequately served by the imposition of a discharge. Instead, I find that a suspended sentence with a probation of 12 months is the appropriate sentence to impose. Accordingly, I would suspend the passing of sentence and place

J.R. on probation for a period of 12 months. The terms and conditions of the probation will be the same as for F.N. They are:

1. Keep the peace and be of good behaviour.
2. Appear before the Court when required to do so by the Court.
3. Notify the probation officer in advance of any change of name or address and promptly of any change in employment or occupation.
4. Report to a probation officer within two working days and thereafter when and in the manner directed by the probation officer.
5. Attend and actively participate in all assessments and counselling programs as directed by the probation officer, and complete them to the satisfaction of the probation officer in the following areas: discipline of children and teenagers, family relationships, anger management, and other related counselling as directed by the probation officer.

[114] I will now turn to the ancillary orders the Crown is seeking in this matter.

[115] As previously stated, Crown counsel seeks that I make a number of ancillary orders in this matter, namely a DNA order and a firearms prohibition order.

[116] The offence of assault with a weapon, when the Crown proceeds by Indictment, is a "primary designated offence", pursuant to s. 487.04 of the *Criminal Code*. This was the case even back in 2004 when the first of the offences before the Court was committed, and it has not changed since then. Therefore, I agree with counsel that a DNA order is mandatory in this case.

[117] Defence counsel rightly concedes that a DNA order is mandatory for both F.N. and J.R., as they were both found guilty of a charge of assault with a weapon.

[118] As I am satisfied that a DNA order is mandatory for both F.N. and J.R., I am prepared to make an order pursuant to s. 487.051 of the *Criminal Code* authorizing the taking of the number of samples of bodily substances reasonably required for the purpose of DNA analysis from F.N. and J.R.

[119] I have to say that, even if I had decided to grant discharges, the DNA order would still have been mandatory.

[120] Also, Crown counsel seeks the mandatory minimum firearms prohibition of 10 years pursuant to s. 109 of the *Criminal Code*. Defence counsel concedes that the *Criminal Code* provides for a mandatory minimum prohibition order of 10 years for the offence of assault with a weapon for which both accused have been convicted. The mandatory minimum firearms prohibition already existed in 2004 and, as I understand it, was in force when all the offences before the Court occurred.

[121] In addition, considering that the offences before the Court involve acts of violence, and considering that it is the first conviction for such an offence for both F.N. and J.R. — and first conviction, period — I order that both F.N. and J.R. be prohibited from possessing any firearm, other than a prohibited firearm or restricted firearm, and any cross-bow, restricted weapon, ammunition, and explosive substance for 10 years, pursuant to s. 109(2)(a) of the *Criminal Code*.

[122] In addition, considering the nature of the offences before the Court, a lifelong prohibition order with respect to any prohibited firearm, restricted firearm, prohibited weapon, prohibited device, and prohibited ammunition is mandatory, pursuant to s. 109(2)(b) of the *Criminal Code*. This has also been the case since 2004. I therefore order, pursuant to that section, that F.N. and J.R. be prohibited from possessing any

prohibited firearm, restricted firearm, prohibited weapon, prohibited device, and prohibited ammunition for life.

[123] However, considering that both J.R. and F.N. hunt for sustenance purposes, I am prepared to make an order pursuant to s. 113 of the *Criminal Code* authorizing a chief firearms officer or the registrar to issue an authorization, a licence, or a registration certificate, as the case may be, to F.N. and J.R. in order for them to be able to hunt for sustenance purposes.

[124] Finally, I am of the view that there is no valid reason not to impose a victim fine surcharge in this case for both F.N. and J.R. for each offence for which they have been found guilty pursuant to s. 737 of the *Criminal Code*. However, Ms. Porteous, Mr. Roothman, I noticed that the amount has changed over the years. Between 2004 and 2010, when the offences were committed, the victim surcharge was $100 per indictable offence, whereas now it is $200 per indictable offence, which does make a difference in this case.

[DISCUSSIONS]

[125] I agree with counsel's submissions and, therefore, I impose a victim surcharge of $100 to F.N.; and because J.R. was convicted of two indictable offences, I impose a victim surcharge of $200 for J.R.

[DISCUSSIONS]

[126] They will each have 30 days to pay the surcharge.

[127] Anything arising, Ms. Porteous, maybe with respect to the statutory conditions of the probation order?

[128] MS. PORTEOUS: No, Your Honour. The one thing that I should perhaps stress is when I say I'm willing to proceed with the lower older victim fine surcharge, I am not —

[129] THE COURT: Binding in any way —

[130] MS. PORTEOUS: Yes, my former office.

[131] THE COURT: — the Director of Public Prosecutions in any subsequent cases.

[132] MS. PORTEOUS: Yes, thank you.

[133] THE COURT: Even though I find that this is the logical outcome, they should get the benefit of the lesser sanction.

[134] MS. PORTEOUS: It may well be. I'm just — I would want to look into it —

[135] THE COURT: You are careful and you are no longer with the PPSC, so I understand, Ms. Porteous.

[DISCUSSIONS]

[136] This is the end of this matter, then.

[137] Good luck, F.N., J.R. As I said before, this was not an easy sentencing decision for me.

[DISCUSSIONS]

[138] Thank you for your attendance today.

[139] Thank you, Mr. Roothman.

[140] Thank you, Ms. Porteous.

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CAMPBELL J.