In the Provincial Court of Alberta

Citation: R v CH, 2021 ABPC 119

Date: 20210408
Docket: 200158129P1
Registry: Medicine Hat

Between:

Her Majesty the Queen

- and -

CH

Restriction on Publication

Identification Ban – See the *Criminal Code*, section 486.4.
By Court Order, information that could identify the victims or the witnesses must not be published, broadcast, or transmitted in any way.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.

Corrected judgment: A corrigendum was issued on May 5, 2021; the corrections have been made to the text and the corrigendum is appended to this judgment.

Sentencing Judgment of the Honourable Judge J.N. LeGrandeur

Nature of the Proceedings

[1] On July 9th, 2020, CH (the Offender) entered guilty pleas to six criminal offences: possessing child pornography contrary to s163.1(4) of the *Criminal Code of Canada* (*Criminal Code*); distributing child pornography contrary to s163.1(3) of the *Criminal Code*; commit bestiality contrary to s160(1) of the *Criminal Code*; sexually assaulting one, JN, contrary to s271 of the *Criminal Code*;, for a sexual purpose did unlawfully touch, directly or indirectly, the part of his body or with an object a part of body of HL, a person under the age 16 years, contrary to s151 of the *Criminal Code*; and did make child pornography, contrary to s163.1(2) of the *Criminal Code* (the Offences).

[2] On the 23rd day of June, 2020, the Offender executed an Agreed Statement of Facts with respect to the aforementioned charges acknowledging the facts set out therein which were ultimately tendered before this Court. The Agreed Statement of Facts is Exhibit S-1 in the sentencing proceedings and was read into the record before the Court on the 4th day of March,

2021, the date on which sentencing submissions were presented by the Crown and Defence to this Court.

[3] A Pre-Sentence Report and a psychiatric Pre-Sentence Report and Risk Assessment were ordered by the Court and entered respectively as Exhibits S-3 and S-4.

[4] This Court heard sentencing submissions on the 4th day of March, 2021. A sentencing brief and cases were submitted by Crown counsel. As well, cases were submitted by Defence counsel.

Circumstances of Offences

[5] The circumstances leading up to and commission of the Offences to which the Offender has pled guilty are detailed in the 69 paragraphs of the Agreed Statement of Facts accepted by the Offender.

[6] It is not my intention to recite those facts specifically as part of this sentencing judgment. Suffice it to say that the facts as set out in Exhibit S-1 are incorporated by reference into this judgment for consideration with respect to the determination of sentence along with the representations of counsel as well as the pre-sentence report, and the psychiatric assessment. I also had the benefit of a Victim Impact Statement filed by the mother of the child, HL, and read into the Court record by the mother, as well as the benefit of a Victim Impact Statement filed by the father of HL, and read into the Court record by the father, and finally, the benefit of a Victim Impact Statement prepared by the mother on behalf of the child, HL, and filed with the Court. These reports are Exhibits S-5, S-6, and S-7 respectively in these proceedings.

[7] The Court viewed a representative sample of the child pornography that CH possessed and made, which has been sealed and filed as Exhibit S-2.

[8] I will refer to facts relating to each individual offence to which the Offender has pled guilty during the course of my sentencing determination with respect to each offence and my ultimate determination as to the cumulative sentence length having regard to the sentencing principle of globality.

Circumstances of Offender (CH)

[9] The Offender is a young man who turned 28 years of age on March 16th of this year. He has no criminal record, nor any previous involvement with the law. He was released on a recognizance order dated September 26th, 2019, under the bail supervision of a probation officer. As far as known to that bail supervisor, he has complied with all of the conditions of his release throughout the period of his bail.

[10] He is the only child of his parents' union. He has a half brother on his father's side and another half brother from a previous relationship that his mother entered into. He has had virtually no relationship with his father since he was a little boy and believes his father deserted the family shortly after he was born. He recalls only three involvements with his father, the most memorable of which was when he was 16 years of age. He attended his father's residence to tell him of the death of his mother; his father described her to him as a "slut" and told him that he was not his father and denied loving him. He has not spoken to his father since. CH's previous child care worker confirmed that there was no relationship between he and his father.

[11] CH's half brother, JN, is the victim in the sexual assault charge before this Court. CH states that he always had a good relationship with this particular brother, and despite the sexual assault upon JN, JN has indicated he wished to continue to have contact with CH.

[12] CH's childhood was also negatively impacted by his mother's alcoholism. He reports his mother as having experienced sexual abuse and having medical problems. He recalled being left alone in the home regularly and felt that he was responsible for "taking care of himself" starting at a very young age.

[13] The Child and Family Services caseworker involved with the family indicates that Child and Family Services came into his life at an early age and he spent many years in foster care, which he believed started when he was about 14 years of age. His childcare worker recalled that his mother was unable to care for him and keep him safe, and that ultimately, he had to be removed from the home and confirmed that he was placed in foster care at approximately aged 14. She recalls him telling her that he was often afraid to fall asleep at night because his mother would fall asleep while smoking and he was afraid she would burn the house down. His childcare worker also described him as a young boy who was "desperate for human connection".

[14] Although CH denies any physical abuse during his time in foster care, he did indicate he was verbally and emotional abused by one of his foster parents, a single mother, whom he stated was emotionally abusive and unloving.

[15] CH identifies as a "gay male", stating that he came out to his friends and family at age 14. He describes himself as having become very interested in sex at the young age of 13 years. When he was 14 he became involved with a 49-year old male who sexually assaulted him. Whether this male groomed him for the sexual life and sexual activity that followed is unknown, but certainly from that point on, his life involved significant and increasing sexual activity. CH described that after his first sexual encounter he became "addicted to finding men for sexual purposes" and admitted to having engaged with up to seven different men sexually in one day. He believes he had over 500 male sexual partners over the course of his young life.

[16] CH states that he developed an interest in the "furry sexual lifestyle" at a very early age and was exposed to and engaged with "furry pornography". His first sexual encounter with a canine followed having met a male on an internet website. He denied having ever penetrated an animal, but admitted allowing the dog on him, so to speak. He acknowledged having made videos of performing on a dog perhaps 30 times. He described bringing his fantasies to life.

[17] He described having involvement with other males with whom he would role play, and he then began looking at child pornography. He stated he would only view this material when he was engaged in fantasy playing with a specific male person. He felt that he engaged in sexual activities to please other people first, not himself, and that he got introduced into online sites involving incest, pedophilia and bestiality. He felt he became de-sensitized over time as a result of the individuals he became involved with who promoted such activities as normal and justified. He stated he knew these types of behaviours were wrong, but that he felt he did not have control over them so as to stop the behaviour. He says he does not understand why. He still acknowledges recognizing the wrongness of his behaviour and knows that he needs help, and wants help. He has attended some Sexual Addicts Anonymous meetings and plans to continue to do so. He suggests he is looking forward to the counselling and therapy he hopes to receive while incarcerated.

[18] CH states that he has, in the past, had little to do with doctors or counsellors, and has never previously been diagnosed with mental health issues. He also asserts that perhaps if he had recognized his actions for what they were and sought professional help rather than rationalizing them, it could have made a difference in his decision-making.

[19] Despite the dramatic events of his childhood and the negative influence as described by CH, he managed to go back and finish high school and qualify for acceptance into a nursing program at Medicine Hat College, which he put on hold because of these proceedings and will likely be lost to him in the future because of these convictions.

[20] The Psychiatric Assessment, notes that the Offender reflected on his actions and expressed remorse, and indicated his concerns for the child. He wishes that he had never done what he did, and indicates that he regrets it each and every day, and hopes that the child will be okay. As the assessment indicates, he was diagnosed with the following primary issues:

- Pedophilic Disorder
- Other specified Paraphilic Disorder – Zoophilia
- Other specified Paraphilic Disorder – Sexual Role Playing Disorder

[21] He was described by the assessing psychiatrist as a moderate to high risk for re-offending at this point in time. However, the assessing psychiatrist also describes him as "insightful and forthright in regards to his offending pattern" and that he presents with features that suggest he is sincere in wanting to change. He presents the optimistically guarded opinion that if he engages in therapy and makes the changes he reports he is open to, he believes that the Offender's risk could be significantly reduced. Overall, the Offender is a young man who appears to have a had a difficult, unloving childhood, who was sexually abused when he was around aged 14, thereafter became involved in a sexual lifestyle that led him to animal pornography and other forms of pornography, then ultimately to child pornography, role playing, desensitization, and over the course of three to four years, the commission of the offences before this Court.

Position of the Crown

[22] By way of a general overview, the Crown seeks a sentence in the range of 2.5 years for possession of child pornography (s163.1(4)), to run concurrently with a sentence of 4 years with respect to the offence of distribution of child pornography, contrary to s163.1(3). The Crown also seeks a 1-year consecutive sentence for the bestiality offence, s160(1), and a further 3- year consecutive sentence for the sexual assault upon JN. Finally, the Crown proposes consecutive sentences of 2.5 years for the sexual interference charge, s151, and 1 year for the offence of making of child pornography, contrary to s163.1(2).

[23] The Crown asserts that the majority of the sentences to be meted out to the Offender should be consecutive, save for the concurrency between the sentence for possession of child pornography and the distribution thereof, which should be concurrent to each other, and that concurrent sentence should be consecutive to all other sentences imposed.

[24] The Crown emphasizes that general and specific deterrence and denunciation are the primary sentencing factors to be applied in this case. In terms of aggravating factors, the Crown asserts, with respect to all the child pornography offences and the sexual interference offence, the inherent wrongfulness of these offences, the potential harm to children that flows from these

offences, and the actual harm that the children suffer as a result of these offences. The Crown also points out the abuse of trust with respect to the offences involving children, and asserts that as well with respect to the sexual assault on JN. The Crown also asserts that there is a trust relationship between the Offender and the owners of the dogs that he breached, and thereby that represents an aggravating factor with respect to that particular offence. The Crown also asserts that the actions of the Offender were planned and deliberate, not spontaneous or impulsive. The Crown also asserts that the Court must consider that based on some evidence before the Court, he represents a moderate to high risk to re-offend at this point in time.

[25] Overall, the Crown asserts that the offences relating to child pornography and sexual interference are at the high end of the spectrum of moral culpability in terms of the far-reaching harm done to children and society at large.

Mitigation

[26] The Crown accepts that the guilty plea mitigates in his favour, and acknowledges that it represents an early plea, and illustrates his acceptance of responsibility and his accountability for his actions.

[27] The Crown does not appear to have considered as part of its sentencing assessment the Offender's young age, or the fact that this will be the first sentence of incarceration to be imposed upon the Offender.

Globality

[28] The Crown asserts that the Court must reflect, or take one last look at the final sentence to be imposed. Section 718.2(c) provides that where consecutive sentences are imposed, the combined sentence should not be "unduly long or harsh".

[29] In this case, the Crown concludes that a global sentence of 10 years would adequately address the relevant principles of sentencing and balance the aggravating and mitigating factors.

[30] The Crown sees the fact that he has no previous criminal involvement with the criminal law as a neutral factor in sentencing. Crown counsel asserts that the 10-year global sentence addresses deterrence, and the need for protection of society due to ongoing risk and the harm done to the victims, and appropriately denounces these offences on behalf of society.

[31] With respect to collateral orders the Crown seeks the following:

- An Order of Forfeiture of all seized property containing prohibited material pursuant to ss490.1 and s164.2 of the *Criminal Code*
- An Order requiring the Offender to provide a sample of his DNA pursuant to s487.51 of the *Criminal Code*
- With respect to Counts 1, 3, 5, 6 and 8, an Order requiring the Offender to comply with a SOIRA Order for life pursuant to s490.012 and s490.013 (2.1) of the *Criminal Code*
- An Order pursuant to ss 161(1)(a)(b)(c) and (d) of the *Criminal Code* for a period of 20 years, prohibiting the Offender:

a. from attending in a public park, swimming area where persons under the age of 16 years are present or could reasonably be expected to be present, or a daycare centre, school ground, playground or community centre;
b. seeking or obtaining any employment whether or not the employment is remunerated, or becoming or being a volunteer in a capacity, that involves being in a position of trust or authority towards persons under the age of 16 years;
c. having any contact – including communication by any means – with a person who is under the age of 16 years unless he does so under the supervision of a person the Court considers appropriate; and
d. using the internet or any other digital network to access any content that violates the law, or directly or indirectly accessing any social media sites, social internet, internet discussion forum or chat room or maintaining a personal profile of any device.

- A Mandatory Weapons Prohibition Order pursuant to s109.2(a) and (b) of the *Criminal Code*
- An Order prohibiting communication with respect to all named complainants while the Offender is in custody pursuant to s743.21 of the Criminal Code.

Position of the Defence

[32] Defence counsel submits that a global sentence of 6.5 years be imposed, broken down as follows:

Count 1: Possession of Child Pornography – 1-year imprisonment

Count 3: Distribution of Child Pornography – 2 years imprisonment

Count 4: Bestiality – 6 months imprisonment

Count 5: Sexual Assault on JN – 1-year imprisonment

Count 6: Sexual Interference – 1-year imprisonment

Count 8: Making Child Pornography – 1-year imprisonment

[33] Counsel has, it appears, approached sentencing on the basis of concluding what is an appropriate global sentence, and then determining the individual sentence for each offence, such as to cumulatively concur with the global sentence suggested. I believe that to be counsel's approach because there is not suggested by counsel any "last look" at the 6.5 years to determine whether it would be "unduly long or harsh".

[34] That approach does not allow the Court to determine whether the individual sentence proposed by Defence counsel represents what counsel believes is a fit and proportionate sentence for that individual offence, or is some lesser sentence designed to fit into a proposed global sentence with other matters. I will make some comment on this approach later in this judgment.

[35] In any event, Defence counsel focuses on the principle of restraint and the individual circumstances of the Offender. Counsel points out that there is no doubt as to his remorse, nor his desire to get counselling and treatment.

[36] Counsel also points out the Offender's tragic background, and the sexual abuse that he has suffered, and which he submits played a large role in why this young man is before this Court for these Offences at this time. He asserts we should not be surprised that we (society) find ourselves in this courtroom at this time. Counsel asserts he was victimized as a young person and that traumatic childhood and sexual victimization has impacted the life he has led and the decisions he has made. In other words, he was abused and groomed as a young boy, and that has shaped his mindset and actions as an adolescent and as he has grown into early male adulthood. Counsel asserts that his "moral culpability" should be seen as reduced, as it would be, and is, for others whose lives are shaped by trauma and victimization as children and young people.

[37] Counsel acknowledges the requirement for DNA samples and a SOIRA Order and agrees with a s161 Order but asserts it should be 10 years, not 20, as it does not become operative until he has served his incarcerative sentence. He takes no issue as to the weapons prohibition, but asserts with respect to the s160(4) Order, that the Order be limited to dogs, and that it lasts only for 10 years as it too does not begin until after he has completed his sentence.

Sentencing Principles

[38] The fundamental purpose of sentencing set out in the *Criminal Code* is "to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society": s718. That contribution is to be achieved by "imposing just sanctions" which have one or more of the following objectives:

1. to denounce unlawful conduct;
2. to deter the Offender and other persons from committing offences;
3. to separate Offenders from society, where necessary;
4. to assist in rehabilitating Offenders;
5. to provide reparations for harm done to victims or to the community; and
6. to promote a sense of responsibility in Offenders and acknowledgment of the harm done to victims and to the community.

[39] The fundamental principle of sentencing set out in the *Criminal Code* is proportionality; the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. Indeed, this is the only mandatory principle of sentencing. The other principles set out in s718(2) are not mandatory and are assigned no respective weights. It is mandatory, however, that each sentence must meet the fundamental and overarching sentencing principle of proportionality (*R v Brady*, 1998 ABCA 7). It is important to note that not only is the proportionality principle codified in the *Criminal Code*, it has also attained the status of a fundamental principle of justice (See: *Reference re s 94(2) of Motor Vehicle Act (British Columbia*), [1985] 2 SCR 486). The purpose of sentencing as set out in the *Criminal Code* is to impose "just sanctions". A "just sanction" is one that is deserved. A fit sentence in that context is one that is commensurate with the gravity of the offence and the moral blameworthiness of the Offender (*R v CAM*, 1996 SCC 230 (*CAM*)). In *R v Proulx*, 2000 SCC 5 at para 82 (*Proulx*), Chief Justice Lamer repeated that principle stating:

> Proportionality requires an examination of the specific circumstances of both the Offender and the offence so that the "punishment fits the crime".

[40] Disparity in sentencing for similar offences is a natural consequence of the fact that the sentence must fit not only the offence, but also the offender.

[41] In *R v Anderson*, 2014 SCC 41 (*Anderson*), Moldaver J, on behalf of the Supreme Court, reiterates the aforementioned principle stating at para 21 thereof:

> 21 As LeBel J., for the majority of this Court, stated in *Ipeelee*, "[p]roportionality is the *sine qua non* of a just sanction" and a principle of fundamental justice: paras 36-37. Proportionality means that the sentence must be "proportionate to the both the gravity of the offence and the degree of responsibility of the Offender" (*Ipeelee*, at para 39 (Emphasis deleted); See also s718.1 of the *Code*).

[42] In *R c Lacasse*, 2015 SCC 64 (*Lacasse*), Wagner J, on behalf of the majority of the Court, stated at paragraph 53:

> Proportionality is determined both on an individual basis, that is, in relation to the accused him or herself and to the offence committed by the accused, and by comparison with sentences imposed for similar offences committed in similar circumstances. Individualization and parity of sentences must be reconciled for a sentence to be proportionate: s718.2(a) and (b) of the *Criminal Code*.

[43] Gascon J in *Lacasse*, at para 128 reiterated these principles in his dissent:

> The principle of proportionality has a long history as a guiding principle in sentencing, and it has a constitutional dimension: *R v Nasogaluak*, 2010 SCC 6, [2010] 1 SCR 206, at para 41: *R v M(CA)*, [1996] 1 SCR 500, at p 530. A person cannot be made to suffer a disproportionate punishment simply to send a message to discourage others from offending: *Nur*, at para 45. As Rosenberg JA wrote in *R v Priest* (1996), 30 OR (3d) 538 (CA), at pp 546-47:
>
> > The principle of proportionality is rooted in notions of fairness and justice. For the sentencing court to do justice to the particular Offender, the sentence imposed must reflect the seriousness of the offence, the degree of culpability of the Offender, and the harm occasioned by the offence. The court must have regard to the aggravating and mitigating factors in the particular case. Careful adherence to the proportionality principle ensures that this Offender is not unjustly dealt with for the sake of the common good. [Footnote omitted.]
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> Although a court can, in pursuit of the objective of general deterrence, impose a harsher sentence in order to send a message with a view to deterring others, the Offender must still deserve that sentence: *R c Pare*, 2011 QCCA 2047; G Renaud, *The Sentencing Code of Canada: Principles and Objectives* (2009), at para. 3.13. If a judge fails to individualize a sentence and to consider the relevant mitigating factors while placing undue emphasis on the circumstances of the

> offence and the objectives of denunciation and deterrence, all that is done is to punish the crime: *R c Roy*, 2010 QCCA 16, 73 CR (6th) 136 (CA Que). Proportionality requires that a sentence not exceed what is just and appropriate in light of the moral blameworthiness of the Offender and the gravity of the offence. From this perspective, it serves as a limiting principle: *Nasogaluak*, at para 42.

[44] Each sentencing is an individual process whereby the Court seeks to impose a sentence that addresses the two elements of proportionality, that is the circumstances of the offence and the circumstances of the offender, and thereby reach a sentence that fits not only the offence but also the offender. The sentencing judge must fashion a disposition from among the limited options available which take both sides of the proportionality inquiry into account (See: *R v Hamilton*, [2004] OJ No 3252 at para 93 (CA)). This proportionality is achieved by a "complex calculus" that is informed by the normative principles set out in the *Criminal Code* in s718 and s718.2 (see *R c LM*, 2008 SCC 31 at paras 17, 21, 22).

[45] In considering the degree of responsibility of the offender, or in other words the moral culpability of the offender, the Court considers the fault component of the offender and any background factors that may bear on the culpability of the offender and which may shed light on his or her level of moral blameworthiness: *Anderson*, at para 21.

[46] An offender's degree of responsibility does not flow inevitably and solely from the gravity of the offence. The gravity of the offence and the moral blameworthiness of the offender are two separate factors, and the principle of proportionality requires that full consideration be given to each of them: *Proulx*, at para 83. As s718.1 provides, "[a] sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender".

[47] The gravity of the offence relates to the harm caused by the offender to the victim as well as to society and its values, and the other aspect of the proportionality principle relates to the offender's moral culpability. This does not just relate to the *mens rea* degree of responsibility of the offender at the time of the commission of the offence, but was intended to include other factors affecting culpability, such as the offender's personal circumstances, mental capacity, or motive for committing the crime (see: *R v Arcand*, 2010 ABCA 363 at paras 58-59; also, *R v Nasogaluak*, 2010 SCC 6 at para 42 (*Nasogaluak*), and *CAM*). The gravity of the crime, although a relevant factor, is not to be considered on its own, but must be considered in conjunction with the offender's degree of responsibility; a factor that is unrelated to the gravity of the offence (*Lacasse*, at para 131).

[48] Although proportionality is the fundamental principle of sentencing, it is not the only principle for consideration. The Court must also consider parity, totality and restraint, which are all principles which must be engaged when determining the appropriate sentence. The principle of restraint is of particular importance where incarceration is a potential disposition. That principle's importance is brought to light by ss718.2(d) and (e):

> (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
>
> (e) all available sanctions other than imprisonment that are reasonable in the circumstance should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

[49] The principle of restraint as it is captured by the 1996 *Criminal Code* amendments codifying sentencing principles is explained by Professor Allan Manson in his text *The Law of Sentencing*, (Toronto: Irwin law, 2001) at 95:

> Restraint means that prison is a sanction of last resort. ... Restraint also means that when considering other sanctions, the sentencing court should seek the least intrusive sentence and the least quantum which will achieve the overall purpose of being an appropriate and just sanction. [footnotes omitted]

[50] In *Nasogaluak*, at para 43, LeBel J commented as follows with respect to the interplay between sentencing objectives in proportionality discussion:

> No one sentencing objective trumps the others and it falls to the sentencing judge to determine which objective or objectives merit the greatest weight, given the particulars of the case. The relative importance of any mitigating or aggravating factors will then push the sentence up or down the scale of appropriate sentences for similar offences.

[51] Again, in *Lacasse*, Gascon J, in discussing the issue of general deterrence and prison, states at para 132:

> I would also qualify my colleague's statement that the courts have "very few options other than imprisonment" (para 6) for meeting the objectives of general or specific deterrence and denunciation in cases in which they must be emphasized. In my view, the court should not automatically assume that imprisonment is always the preferred sanction for the purposes of meeting these objectives. To do so would be contrary to other sentencing principles. Rather, a court must consider "all available sanctions, other than imprisonment," that are reasonable in the circumstances: s718.2(e); *Gladue*, at para 36.

[52] At paragraph 133 he goes on to state:

> … A court that emphasizes general deterrence must therefore always be mindful of both the principle of restraint and that of proportionality…

[53] At paragraph 134 he goes on to state:

> …the objective of general and even specific deterrence does not relate exclusively to the severity of a sentence considered in the abstract,,,Deterrence can work through conditions tailored to fit the Offender or the circumstances of the Offender, as the … Court noted in *Proulx*: …

[54] In *R v Chowdhury*, 2019 ABCA 205 (*Chowdhury*), the Alberta Court of Appeal, in paragraphs 13 and 14, discuss the objectives of deterrence and denunciation in the proportionality analysis in a similar vein to the statements of Gascon J above, stating:

> [13] Objectives do not govern the sentence. Objectives provide guidance, particularly as to ordinal proportionality (*Arcand* at para 50), assist in identifying a starting point or range and help define a framework for the sentence, but they do not compel a result. It is an error to assume that a certain sentence necessarily follows from the identification of the primary objectives in any particular case. It is over-simplification to assume that the objectives of denunciation and deterrence

> are only served by severity; conversely, that the objective of rehabilitation is only served by lenience.
>
> [14] The key principle in sentencing is proportionality. A sentence must still be proportionate to the gravity of the offence and the degree of responsibility of the Offender. A proportional sentence may be severe or it may be lenient. If a disposition is plainly lacking in proportionality in either direction, that discrepancy cannot be cured or justified by reliance on the punitive demands of an objective.

Discussion and Analysis

[55] The Crown asserts, and I agree that the proper approach to sentencing in cases involving multiple offences is for the court to identify a proper sentence for each offence applying proper sentencing principles, and then consider whether any of the individual sentences should be made consecutive or concurrent on the grounds that they constitute a single criminal adventure or where two or more crimes are sufficiently related or connected so as to fit within the description of a single enterprise; *R v Crocker*, [1991] NJ No 303 (CA), per Goodridge CJN.

[56] Separate offences of a similar type though committed at separate times may also be considered to constitute a single event for purposes of this determination. For example, separate offences amounting to a repetition of the same behaviour towards the same victim or offences committed during a "crime spree"; *R v Hutchings*, 2012 NLCA 2 at para 22 (*Hutchings*).

[57] The Court has a wide discretion as to whether to impose a consecutive sentence or concurrent sentence or combination of both; *R v Arbuthnot*, 2009 MBCA 106 at para 22.

[58] If two or more sentences are to be consecutive, then the application of the totality principle may be engaged. This requires that the Court take one last look at the combined sentences to determine whether it is unduly long or harsh in the sense that it is disproportionate to the gravity of the offences and the moral responsibility of the offender; *Hutchings*, at para 84.

[59] The last look serves to ensure that the application of the principles of proportionality and the principle of restraint in sentencing to ensure the application of the principle of proportionality and the principle of restraint in sentencing; *R v Aubichon*, 2015ABCA 242 at para 3.

[60] In *R v Craig*, 2009SCC 23, the Supreme Court of Canada stated that:

> Totality is a principle of sentencing, the purpose of which is to ensure that the total sentence imposed does not extinguish the rehabilitation potential of the offender.

[61] The cumulative sentence should not exceed the overall culpability of the offender: *CAM*, at para 42. This involves a consideration of whether the total sentence is in keeping with the offender's record and prospects: *R v KVE*, 2013 BCCA 521.

[62] In keeping with these principles, it is my intention to determine a fit and just sentence for each of the offences individually, having regard to the proportionality principle, that is, the circumstances of the offence and the offender and considering any mitigating or aggravating factors. It must then be determined, with respect to each offence, what offences should be seen as consecutive, and what, if any, offences may be seen as concurrent. Finally, this court must have a

last look at the cumulative total of consecutive offences and concurrent offences to determine whether or not the total is just and appropriate.

[63] In approaching my task in this case, I am acutely aware of the directions and guidance given by the Supreme Court of Canada in *R v Friesen*, 2020 SCC 9 (*Friesen*), with respect to sentencing principles for sexual offences involving children. Although the *Friesen* case dealt only with the offence of sexual interference contrary to s151, there can be no doubt that the Supreme Court, in discussing sentencing principles relating to sexual offences involving children, encompasses all sexual offences relating to children involving sexual violence, whether it be direct or indirect, such as through child pornography, possession, distribution, or creation. The Supreme Court of Canada pointed out the following in this regard:

1. The prime interests that the legislative scheme of sexual offences against children protect are the personal autonomy, bodily integrity, sexual integrity, dignity, and equality of children. This requires sentencing judges to focus their attention on emotional and psychological harm, not simply physical harm. Courts must also recognize the relational harm caused by sexual violence, as well as the harm to families, communities and society. (Paras 50-64)
2. Sentencing judges must understand the inherent wrongfulness of exploiting children's weaker position in society and the disproportionate impact on Indigenous people and other vulnerable groups. (Paras 65-73)
3. Courts need to take into account the wrongfulness and harmfulness of sexual offences against children when applying the proportionality principle. It is not sufficient for courts to simply state that sexual offences against children are serious. Courts must recognize and give effect to: (1) the inherent wrongfulness of these offences; (2) the potential harm to children that flows from these offences; and, (3) the actual harm that children suffer as a result of these offences. (Paras 75-86)
4. Courts must also take wrongfulness and harmfulness into account when determining the offender's degree of responsibility. Intentionally applying force of a sexual nature to a child is highly morally blameworthy because children are so vulnerable, and because the offender is or ought to be aware that this action can profoundly harm the child. The personal circumstances of offenders can have a mitigating effect, as an example, offenders who suffer from mental disabilities that impose serious cognitive limitations will likely have reduced moral culpability (Paras 87-92)
5. Parliament has repeatedly increased maximum sentences for sexual offences against children and prioritized denunciation and deterrence for these offences [s.718.01 *CC*]. Therefore, courts should generally impose higher sentences than the sentences imposed in cases that preceded the legislative changes. (Paras 96-105)
6. The appropriate length and the setting of sentencing ranges or starting points for sexual offences against children are best left to provincial appellate courts. (Para 106)
7. Upward departure from prior precedents and sentencing ranges may well be required to impose a proportionate sentence for sexual offences against children. Sentences should increase as Parliament and the courts more fully appreciate the gravity and harmfulness of these offences. (Paras 108-110)
8. Substantial sentences will frequently be required to respond to the gravity of sexual offences against children and the degree of responsibility of offenders. Mid-single digit penitentiary terms for sexual offences against children are normal, and upper-single digit and double-digit penitentiary terms should be neither unusual nor

reserved for rare or exceptional circumstances. Substantial sentences can be imposed where there was only a single instance of sexual violence and/or a single victim. Maximum sentences should not be reserved for the worst crime committed in the worst circumstances, but rather should be imposed whenever the circumstances warrant it. (Para 114)

9. Sexual offences against children should be punished more severely than sexual offences against adults. (Paras 115-118)
10. The offence of sexual interference with a child should be treated similarly to the offence of sexual assault against a child. (Paras 119-120)
11. Some significant factors to determine a fit sentence for sexual offences against children include the following:

    (a) The higher the offender's risk to reoffence, the more the court needs to emphasize the sentencing objective of separating the offender from society to protect vulnerable children from wrongful exploitation and harm. (Paras 122-124)
    (b) An offender who abuses a position of trust should receive a lengthier sentence than an offender who is a stranger to the child. (Paras 125-130)
    (c) Sexual violence against children that is committed on multiple occasions and for longer periods of time should attract significantly higher sentences. (Paras 131-133)
    (d) The age of the victim is a significant aggravating factor because children who are particularly young are even more vulnerable to sexual violence. (Paras 134-136)

[64] The seminal case of *R v Sharpe*, 2001 SCC 2, from the Supreme Court, discusses child pornography and its' harms on a broad basis, and provides guidance as to the purpose of the legislation dealing with child pornography and the protection the legislation seeks to offer. At paragraph 158 of *Sharpe* the Court states:

> The very existence of child pornography, as it is defined by s.163.1(1) of the *Criminal Code*, is inherently harmful to children and to society. This harm exists independently of dissemination or any risk of dissemination and flows directly from the *existence* of the pornographic representations, which on their own violate the dignity and equality rights of children. The harm of child pornography is inherent because degrading, dehumanizing, and objectifying depictions of children, by their very existence, undermine the *Charter* rights of children and other members of society. Child pornography eroticises the inferior social, economic, and sexual status of children. It preys on pre-exiting inequalities.

[65] Paragraph 169, following the same vein of thought, states:

> Section 163.1 was enacted to protect children. Because of their physical, mental, and emotional immaturity, children are one of the most vulnerable groups in society, particularly with regard to sexual violence. Child pornography plays a role in the abuse of children, exploiting the extreme vulnerability of children. Pornography that depicts real children is particularly noxious because it creates a permanent record of abuse and exploitation. An analysis of the vulnerability of

> the group and their subjective fears supports Parliament's decision to prohibit child pornography.

[66] It is clear as submitted by the Crown that protection by way of prevention is the primary function of our legislation with respect to pornography and children. Although the offences of possession and distribution and the making of child pornography may all have their individual aspects, underlying all these offences is a recognition of the vulnerability of children, the harm caused by possession and distribution and the making of child pornography to society as a whole, as well as to individual children and the dangers associated with child pornography.

[67] Clearly the principal factors in the proportionality assessment in cases such as this are denunciation and deterrence; deterrence both of the offender and the public. Rehabilitation is of lesser consideration, but the Court may consider the same in the sentencing process just as it must also consider parity and restraint, as well as the principle of imposing the least restrictive sentence that is appropriate in the circumstance. The offence of possession carries no minimum sentence and distribution of child pornography carries a minimum sentence of 1 year. Distribution is generally seen as a more serious offence than possession, but that depends on the individual circumstances under consideration.

[68] The decision of Molloy J in *R v Kwok*, 2007 CanLII 2942 (ONSC) offers some guidance with respect to the aggravating and the mitigating factors for child pornography offences. At para 7 of the decision the learned justice states:

> Not surprisingly, each case turns on its own particular facts. However, an analysis of the case law does reveal an emerging consensus on the relevant factors to be taken into account: see, in particular, *R. v. Parise*, [2002] O.J. No. 2513 (Ont.C.J.); *R. v. Mallett*, [2005] O.J. No. 3868 (S.C.J.) Generally speaking, any of the following are considered to be aggravating factors: (i) a criminal record for similar or related offences; (ii) whether there was also production or distribution of the pornography; (iii) the size of the pornography collection; (iv) the nature of the collection (including the age of the children involved and the relative depravity and violence depicted); (v) the extent to which the offender is seen as a danger to children (including whether he is a diagnosed pedophile who has acted on his impulses in the past by assaulting children); and (vi) whether the offender has purchased child pornography thereby contributing to the sexual victimization of children for profit as opposed to merely collecting it by free downloads from the Internet. Generally recognized mitigating factors include: (i) the youthful age of the offender; (ii) the otherwise good character of the offender; (iii) the extent to which the offender has shown insight into his problem; (iv) whether he has demonstrated genuine remorse; (v) whether the offender is willing to submit to treatment and counseling or has already undertaken such treatment; (vi) the existence of a guilty plea; and (vii) the extent to which the offender has already suffered for his crime (for example, in his family, career or community).

This is not considered as a complete list of aggravating and mitigating factors.

Possession and Distribution of Child Pornography

[69] As noted aforesaid, the Crown accepts that it is appropriate that the sentences imposed for the possession and distribution of child pornography offences be concurrent one to the other.

[70] With respect to the images and videos possessed by the Offender, although the collection is significantly smaller than many of the quantities observed by this Court in other cases, that does not mean the quantity in its own right is insignificant. The Agreed Statement of Facts demonstrates that eight electronic devices seized contained evidence that the Offender had committed the Offences before this Court, and when examined, the eight exhibits and the linked drop box account displayed 644 images which were Category 1 child pornography, that is they showed a person who is or is depicted as being under the age of 18 years and is engaged in or is depicted as engaged in explicit sexual activity, and 382 images which were classified as Category 2 child pornography, that is, pornography that meets the definition set out in 163.1(1) of the *Criminal Code*, but involves or depicts a child under the age of 18 who is clothed or in very little clothing and the image could be used for a sexual purpose. 555 videos over the eight devices and drop box were classified as Category 1 child pornography, and 29 pornographic videos were Category 2 child pornography. Extensive forensic evidence related one user to all eight devices, and that the user was the Offender. Copies of the same images and videos appeared over multiple devices, indicating that the images and videos had been transferred between devices.

[71] Children who are depicted in the child pornography images on the eight exhibits and drop box account range in age from babies and toddlers to young adolescents; the vast majority of images depicted young male children. As noted in the Agreed Statement of Facts, paragraph 33, the Offender's collection included, but is not limited, to a male child:

1. posing naked;
2. urinating;
3. spreading his buttocks to expose his genitals and/or anus;
4. with his mouth on an erect adult male's penis;
5. with his mouth on another child's penis;
6. with his penis in an adult male's mouth;
7. engaged in genital touching with an adult male or multiple other children;
8. touching his own genitals;
9. inserting an object into his anus; and
10. being anally penetrated by an adult male or another male child.

[72] The majority of the child pornography videos depict the sexual assault of young male children and there are a significant number of videos across the exhibits which depict the violent anal rape of very young male children, including toddlers. Some of these videos have sound and the child audibly whimpers, screams or cries out in pain as the adult male forcible rapes the child. In examination of the images and videos it is indicated that the user knew at least three of the children depicted in videos, although there is no suggestion that any of these three children were violently abused by this offender or anyone else. The identities of the three children were determined; the first is a nine-year-old, KH, who was depicted in a video with an adult male pulling down his pants while he was sleeping and ejaculated onto his buttocks. This is the child of a friend of the Offender in British Columbia. The second child is HL, who was three years old at the time of the video. In the video, the Offender is wrestling with HL in the child's bedroom, and the focus of the camera is primarily on the child's buttock. At one point the adult male spreads the child's buttocks with his hands so the camera can record the child's exposed anus. The parents of the child are cousins of the Offender, who had frequent access to their home, and to HL. The third child is a teenaged male, KS, who was depicted in several images.

KS lived in a foster home with this offender when KS was a child. KS was naked in the images in the computer, and the Offender claimed that he obtained the images by posing as a female over the internet to trick KS, who was between the ages of 14 and 16 at the time into sending the naked images.

[73] The child pornography discovered in the electronic devices was acquired over the course of time from January 1st, 2016 through September 26th, 2019.

[74] The Crown asserts that although the size of the Offender's collection would be at the lower end of the spectrum, the horrific nature of the collection is an aggravating factor which justifies the sentence of 2.5 years for this offence. The depiction of assault on babies and toddlers, the violent rape of male children and audio of their suffering and the possession of pornography of three children known to the offender, all substantiate, the Crown says, the recommended sentence.

Distribution

[75] The Offender did not acquire images and video and then allow them to be accessed from his collection by other users. He did transfer pornography, however, by images and video, to other individuals that he had a connection with in respect to child pornography.

[76] During the period of April 2016 through September 2019, he distributed child pornography to those individuals, including the video of KH and images of KS. He had personal relationships with these two boys, and the Crown asserts that this is a significant betrayal on his part in putting these images and video on the internet, and that should be seen as an aggravating factor.

[77] Crown submits a sentence in the range of four years before any reduction for totality as a proportionate sentence for the distribution offence. The Crown referenced, in support of the submission, the case of *R v Tettersell*, 2012 ABCA 57 (*Tettersell*), where the court imposed an 8-year cumulative sentence for the offences of making, distributing, possessing child pornography and sexual interference. He possessed some 32,000 child pornography images, 2,400 child pornography movies, and made available approximately 16,000 of the images and video. The Crown also referenced *R v Inksetter*, 2018 ONCA 474, where the Ontario Court of Appeal imposed a sentence of three years for the offence of possession and three-and one-half years for the making available offence he shared with others over 28,000 images and over 1,000 videos, to be served concurrently. In *R v Secrete* (unreported) ABQB February 18, 2010, where the learned justice imposed a three-year sentence for distribution and one year concurrent for possession. The collection depicted what the justice described as disturbing, degrading and abusive images and videos of a very young female being sexually assaulted by adult males.

[78] Crown also referenced *R v Clayton*, 2012 ABCA 384, where the majority of the Alberta Court of Appeal dismissed an appeal from a 3 year sentence imposed on an offender for possession, accessing and distributing child pornography. The offender was a 39-year old male with no criminal record, who, over a 10-month period, had possessed, accessed and distributed child pornography. He had approximately 46,000 child pornographic images.

Sexual Interference With a Child Victim

[79] This offence involves the Offender, through the pretence of wrestling with the child, HL, spreading HL's buttock in order to expose his anus to a camera that was secretly recording this sexual interference. This interference occurred only once, and did not involve touching or penetration of the child's anus.

[80] The child, HL, is the son of the Offender's cousin, and he took advantage of that relationship to gain access to this young boy.

[81] It is clear from the Victim Impact Statements filed and read out in Court by this child's parents that this offence has significantly impacted this family. They feel betrayed and fearful of the potential long-term impact upon this child.

[82] The Crown asserts that given the breach of trust, the tender age of the victim, and the potential long-term harm to HL, that a sentence of 2.5 years is proportionate to the gravity of the offence and the moral culpability of the Offender.

Making Child Pornography

[83] Inherently connected with the Offender's sexual interference of HL is the fact that he video recorded the mock wrestling (sexual interference) activity. He did not distribute the video, but did describe to other internet users how he wanted to engage in different acts of sexual abuse, including anal rape of pre-pubescent boys, and specifically in a chat with other users, described a naked, male, three-year old boy crawling over him and that he spread his buttock to look at his anus. He did not send a copy of the video or say specifically who the boy was.

[84] The making of the video and the chats over the internet about fantasizing about sexual activity with young male children constitutes the making of child pornography in a video and written form, contrary to the provisions of the *Criminal Code*.

[85] The Crown submits that a 1-year sentence, consecutive to the sentence imposed for the sexual interference and other offences, is a proportional sentence. The Crown asserts that although inherently connected one to the other, the sexual interference charge and the making of chid pornography arising in part from that offence should be consecutive one to the other (*R v DCH*, 2020 ABQB 510).

Bestiality

[86] At a young age (13 years), this offender began fantasizing about sexual contact with animals. By age 16 he had purchased a canine dildo for personal use and had his first sexual encounter with a dog after he had spoken with another male on a chat line, who I infer, encouraged him to fulfill his fantasies. This offender never involved children with animals and never penetrated the dog himself, rather he allowed the dogs to penetrate him.

[87] He did make videos of interaction with dogs. He asserted that this was a way of making his sexual fantasy in that regard come to life.

[88] The Crown submits that a denunciatory sentence of 1-year is called for, and is proportional to the gravity of the offence and his moral culpability therefore.

Sexual Assault of JN

[89] JN is the older half brother of the Offender. He admits exposing JN's penis and placing his mouth and tongue on his penis while JN was asleep. He recorded this assault and saved it into his drop box account.

[90] The Crown asserts that this offence is aggravated by the fact that JN was asleep and vulnerable, and that these actions also represented a breach of trust as between the Offender and JN, as JN was staying with the Offender at that point in time. The Crown asserts that this is a major sexual assault, and given the aggravating factors, requires a denunciatory sentence in the range of 3 years, which is to be consecutive to the other sentences suggested by the Crown, resulting in a cumulative total of 11.5 years incarceration.

[91] Overall, the Crown, in reaching its conclusions as to individual sentences, emphasized the impact and potential future harm to children and society as a whole with respect to child pornography offences. The Crown notes the aggravating factor of this offender's breach of trust with respect to HL and KS, and the deliberate nature of his acts with respect to the children and with respect to the sexual assault of his half brother, JN. The Crown also points out as a factor for consideration, the risk as measured at this point that he may re-offend as being moderate to high.

[92] The Crown, of course, also emphasizes the impact of *Friesen* with respect to the imposition of sentences for sexual abuse of children. The Crown also points out the harm to the family of HL, and the ongoing impact this offence is likely to have on not only HL, but the family as a whole.

[93] With respect to mitigating factors, the Crown accepts this offender's guilty plea as timely and as significant in nature. The Crown, however, did not identify how that guilty plea mitigates each individual sentence, rather the Crown has chosen to consider the guilty plea in the context of the globality proportionality assessment, not with respect to the guilty pleas impact with respect to the sentences proposed individually by the Crown for each offence. It would appear that the 1.5-year reduction as a consequence of the globality proportionality assessment considers the guilty pleas as a principle factor in that regard.

[94] The Crown asserts that the global sentence of 6.5 years proposed by counsel for the Defence would improperly dilute the Court's denunciation of each of these individual offences each of which are a discreet harm to society.

[95] With respect to the Crown's approach to sentencing, it is my view that the law requires each offence to be assessed individually, having regard to sentencing principles including aggravating and mitigating factors and that with respect to each individual charge a proportional sentence must be imposed; that thereafter the matter of whether the offences shall be looked at concurrently or consecutively is to be considered, which ultimately results in a cumulative sentence with respect to consecutive offences or combination of consecutive and concurrent offences which is then subject to a last look globality proportionality assessment to determine whether or not the cumulative sentence is unduly long or too harsh, thereby justifying a further reduction.

[96] Instead of following that approach, the Crown appears to have left consideration of the guilty plea and any other circumstances for consideration in the context of the totality assessment as opposed to the determination of a proportional sentence for each individual offence.

[97] As noted aforesaid, any offender's degree of responsibility does not flow inevitably or solely from the gravity of the offence or offences. The gravity of the offence and the moral blameworthiness of the offender are two separate factors and the principle of proportionality requires that full consideration be given to each of the them: *Proulx*, at para 83. This fault component may include consideration of background factors that may bear on the culpability of the offender and may shed light on moral blameworthiness; such as personal circumstances, mental capacity or motive, to name a few. The gravity of the crime, although a relevant factor, is not to be considered on its own, but must be considered in conjunction with the offender's degree of responsibility; a factor that is unrelated to the gravity of the offence (*Lacasse,* at para 131).

[98] In this case, the Offender entered timely guilty pleas, cooperated with authorities, was otherwise of previous good character, has shown remorse, and according to the psychiatric assessment, has demonstrated insight into his offending pattern, and appears sincere in wanting to make change; he is open to counselling and therapy, indeed is looking forward to is while incarcerated.

[99] The Offender was 24 through 27 years of age at the time of commission of these offences; he was at that point a young man with no criminal record and the sentence that is ultimately imposed in this case will be his first experience with a prolonged restriction of freedom.

[100] Defence counsel points out and asserts that the Court must consider in this proportionality assessment that the Offender was sexually abused as a 14-year old, and that likely contributed to his lifestyle of sexual promiscuity and deviance that has ultimately brought him before this Court.

Conclusion as to Individual Sentences

[101] All of the Offences before this Court are sexual in nature and although, for the most part, discreet offences one from the other, there is a connectedness amongst the Offences and the circumstances of the Offender. It is reasonable to consider that there is a connectivity between the abuse he suffered as a child and these Offences. His circumstances, background, and the abuse he suffered is not an excuse for the Offences before this Court, but it provides context, and provides the foundation for reaching a conclusion that such a background of assault and likely grooming, contributed in some part to how he got to this point before this Court. It would be contradictory, to say the least, to accept as part of a sentencing assessment that sexual abuse of a child, in one or more of its many forms, even without actual evidence thereof is likely to have profound psychological, emotional and mental affects on the life of the child even into adulthood, and not recognize how such abuse could lead to a child becoming, as a consequence thereof, part of the culture that led to that offender's abuse in the first place. This offender's abuse as a young boy, and what appears to have followed from that, justifies a measure of reduction with respect to his moral culpability for the Offences before this Court through a reduction in sentence commensurate therewith.

[102] It is also my view that his youthfulness, and the fact that the sentences to be imposed will represent his first period of prolonged incarceration, requires the Court to exercise some restraint such that any sentence imposed for individual offences should be at the lower range of sentences for the individual offence in the given circumstances.

Section 163.1(4) and Section 163.1(3)

[103] With respect to the Count 1 possession of child pornography and the Count 3 distribution of child pornography, using the sentencing ranges suggested by the Crown and considering the aggravating factors the Crown asserts in justifying sentences of 2.5 and 4 years respectively; and on the other hand considering the Offender's guilty plea, the personal circumstances of the Offender, in particular the sexual abuse suffered as a young boy; his youthfulness and the fact these sentences will represent his first period of prolonged incarceration; his commitment to rehabilitate; the insight he has shown into his behaviour; and his demonstrative remorse, it is my conclusion that a proportionate sentence for possession of child pornography recognizing the seriousness of the images and videos which he possessed should be 2 years, and the sentence for distribution in all the circumstances, should be 3 years. In keeping with the Crown submissions and the principles relating to imposition of concurrent and/or consecutive sentences, these two sentences should be served concurrently, leaving the total for those two offences being 3 years.

Section 151 and Section 163.1(2)

[104] With respect to the charges of sexual interference with respect to HL, and making child pornography, which is represented by the video made of the sexual interference with HL and the verbal description of the same forwarded to internet friends of the Offender and a further video made with respect to KS, it seems to me that they are so intricately related that it is almost impossible to consider the circumstances of one without considering the overlapping nature of the other. It would seem that integral to the sexual interference was the making of the video, which was based entirely upon the act of sexual interference. One could not achieve the video in question without sexual interference.

[105] When I consider the sexual interference as part of the circumstances relating to the making of the child pornography video of HL, recognizing the age of the child, the potential psychological and emotional trauma imposed on the child and the family, the admonitions of the Supreme Court in *Friesen* as to sentencing for child abuse, noting that the video made was not distributed in video form, but was distributed through written pornography, and as well considering the circumstances of the Offender as described aforesaid, his guilty plea, his remorse, and his insight, it is my view that a sentence of 3 years for the making of child pornography, recognizing there was also another video involving KS, is a proportional sentence after considering all the aggravating and mitigating factors.

[106] With respect to the sexual interference charge without considering the making of the video, given the nature of the interference, the level of physical interference, the tender years of the child, the potential psychological and emotional impact upon the child and his family, the guilty plea of the offender and the other personal circumstances referred to herein before, I conclude that a sentence of 2 years is a proportionate and appropriate sentence for that individual offence.

[107] The sexual interference is such an integral part of the making of the child pornography that I conclude the sentences should be served concurrently to each other (see *Friesen*, at para 155); thereby resulting in a concurrent total sentence of 3 years incarceration. A concurrent sentence better represents the seriousness of the making of the video as part of the sexual assault than would be the case if a sentence of only 1-year consecutive to the sexual interference were to be imposed.

Section s271

[108] With respect to the sexual assault involving JN, I disagree with the Crown's assessment of 3 years for that offence. Although this individual was sleeping, and in that sense, there was some measure of vulnerability, there is no suggestion he was passed out or blacked out, or intoxicated, the contact was very short-lived, there was no form of penetration, no violence or threats, or other physical abuse, and no evidence of psychological or emotional trauma nor any reason to draw any inference in that regard in this circumstance.

[109] The primary aggravating factor in this circumstance is that he videoed the assault. Considering the circumstances of the offence, the circumstances of the Offender, the guilty plea, the minimal physical intrusion, minimal if any psychological or mental impact, a sentence of 1.5 years is a proportional and fit sentence in this circumstance. That sentence shall be served consecutive to the other sentences imposed in this case.

Section s160(1)

[110] The Crown's suggestion of an appropriate sentence for the bestiality charge is 1 year. However, given the personal circumstances of this offender as described aforesaid and his guilty plea, I agree with counsel for the Offender that a sentence of 6 months incarceration is a proportionate sentence that adequately denounces the Offender's actions in this regard on behalf of society and also provides a measure of deterrence. This sentence would ordinarily be served consecutively to the aforesaid sentences as imposed.

Cumulative Sentence Total

[111] The total cumulative sentence as described aforesaid is 8 years.

Globality Assessment

[112] Section 718.2(c) provides that:

> When consecutive sentences are imposed, the combined sentence should not be unduly long or harsh.

[113] When the Court imposes consecutive sentences it must take a "last look" as stated in *Wozney* at para 59;

> … to ensure that the total or cumulative sentence is a fit sentence in that it does not exceed the overall culpability of the offender. Again, due regard is to be given to the "intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct (see *M.(C.A.),* at para. 80).

[114] The Court continues at para 60 as follows;

> In addition, the intended total or cumulative sentence may offend the totality principle if it is substantially above the maximum sentence available for that type of crime or if its effect is a "crushing sentence," that, a sentence not in keeping with the offender's record and future prospects.

[115] In the more recent case, of *Hutchings*, the Newfoundland and Labrador Court of Appeal discusses in great detail the totality principle in the context of ss718.1 and 718.2(c) in terms of how the principle is to be applied. I will not repeat that analysis, but only the approach finally adopted by the court; which is set out in paras 84(4) and (5) of the judgment as follows:

> 84(4) The approach is to take one last look at the combined sentence to determine whether it is unduly long or harsh, in the sense that it is disproportionate to the gravity of the offence and the degree of responsibility of the offender.
>
> 84(5) In determining whether the combined sentence is unduly long or harsh and not proportionate to the gravity of the offence and the degree of responsibility of the offender, the sentencing court should, to the extent of their relevance in the particular circumstances of the case, take into account, and balance, the following factors:
>
> (a) the length of the combined sentence in relation to the normal level of sentence for the most serious of the individual offences involved;
> (b) the number and gravity of the offences involved;
> (c) the offender's criminal record;
> (d) the impact of the combined sentence on the offender's prospects for rehabilitation, in the sense that it may be harsh or crushing;
> (e) such other factors as may be appropriate to consider to ensure that the combined sentence is proportionate to the gravity of the offences and the offender's degree of responsibility.

[116] The Newfoundland Court agreed with Chartier JA's description of the "last look" as detailed in *Arbuthnot*, at para 70 as:

> … a more focused application of the general principle of proportionality (see *M.(C.A.),* at para. 42). It does not require a reconsideration of the sentencing principles [applied when determining individual sentences]. Rather, this last look ensures that the total sentence is not unduly long or harsh. To make this determination, the sentencing judge is to consider the gravity of the offences, the offender's moral culpability, the harm done to the victims, that the effect of the sentence is not "crushing", and that it be in keeping with the offender's record and future prospects …

[117] In this case, the Offender's cumulative total sentence is 8 years made up, save for 6 months thereof, of sentences for sexual offences involving children, and a sexual assault of an adult male. It is clear this individual suffers from more than one sexual disorder and at present represents a risk to society, however, there is, as noted herein before, optimism that he is rehabilitatable and he is desirous of achieving the same. He is relatively young, and given the sentence whether it be for 7 years or 8 years, he will spend the latter part of his 20's and early 30's incarcerated. He has no previous record and has a chance to have a decent life, although these convictions, will haunt him forever. When I consider the offences involving directly or indirectly children and the single sexual assault involving the adult male I see no disproportionality in the total cumulative sentence with respect to those matters which is 7.5 years.

[118] With respect to the sentence of 6 months for the bestiality charge it seems to me that adding the 6 months to the total sentence serves no rehabilitative purpose or meaningful punitive purpose other than to make it 6 months longer.

[119] Although the offence is one of sexual deviance which represents part of this offender's overall sexual profile, any aspects of rehabilitation or punitive response for his sexual actions seem to me to be more than adequately addressed by the 7.5 years cumulative sentence for the other matters before this Court. Making the 6 months sentence for bestiality part of the 7.5 years otherwise imposed recognizes more fully the principle of restraint and the fact that he has never served any previous incarcerative sentence and that it is not likely that a total sentence of 8 years will serve any more meaningful a purpose than a total sentence of 7.5 years.

[120] Accordingly, pursuant to the totality principle, I conclude that a global sentence of 7.5 years is more appropriate overall. 7.5 years recognizes the inherent gravity of all the offences, his youthfulness, his lack of a record and sufficiently addresses his criminality which is rooted in his sexual disorders and impacts his future prospects no more than is necessary in the circumstances and in that sense serves the principle of restraint.

[121] There is nothing in the overall circumstances recognizing the gravity of the offences that cannot be addressed justly by a total sentence of 7.5 years; *R v Martin*, 2018 ONCA 1029 at para 19.

[122] Accordingly, the sentence of six months for the bestiality charge will be served concurrently to all other sentences, leaving the Offender with a cumulative total sentence of 7.5 years.

The Court Also Makes the Following Collateral Orders:

Collateral Orders

1. All seized property containing prohibited material shall be forfeited forthwith to the Crown pursuant to s490.1 and s164.2 of the *Criminal Code*.
2. The Offender, CH shall provide a sample of his DNA for inclusion in the DNA Data Bank pursuant to s487.051 of the *Criminal Code*, with respect to Counts 1, 3, 5, 6 and 8.
3. The Offender, CH, shall comply with a SOIRA Order for life pursuant to s490.012 and s490.013(2.1) of the *Criminal Code.*
4. Pursuant to ss161(1)(a), (b), (c) and (d) of the Criminal Code, the Offender, CH is prohibited for a period of 15 years commencing upon his release from prison, from;

    (a) attending at a public park, swimming area where persons under the age of 16 years are present or could reasonably expected to be present, or a daycare center, schoolground, playground or community center;
    (b) seeking or obtaining any employment whether or not the employment is remunerated or becoming or being a volunteer in a capacity, that involves being in a position of trust or authority towards persons under the age of 16 years;

(c) having any contact – including communication by any means – with a person who is under the age of 16 years, unless he does so under the supervision of a person the court considers appropriate as may be determined upon application at a later date; and

(d) from using the internet or any other digital network to access any content that violates the law, or directly or indirectly assessing any social media sites, social network, internet discussion forum or chat room, or maintaining a personal profile on any such device;

5. The Offender is prohibited from possessing any firearm, crossbow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition and explosive substance the duration of such order with respect to specific weapons or firearms shall be as follows:

- Any firearm other than a prohibited firearm or restricted firearm and any crossbow, restricted weapon, ammunition and explosive substance for a period of 10 years commencing after the offender is released from imprisonment; and

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

6. The offender is prohibited from communicating with all named complainants while in custody pursuant to s743.2 of the *Criminal Code*, with the exception of the complainant JN.

7. This offender is prohibited from owning, having custody or control of, or residing in the same premises as any animal for a period of 10 years commencing from the date this Offender is released from prison, provided that this Offender may apply to vary that order so as to allow him to own, have custody or control of, or reside in the same premises as any animal other than a canine after this prohibition order has been in effect for five years.

[123] It is recommended by this Court, in keeping with the psychiatric assessment, in these proceedings, that this offender attend an intensive sex offender treatment program while incarcerated, which said program is available, I understand, at the Bowden Institution of Alberta.

Heard on the 4th day of March, 2021.
Dated at the City of Medicine Hat, Alberta this 8th day of April, 2021.

J.N. LeGrandeur
A Judge of the Provincial Court of Alberta

Appearances:

Ms. S. Goard-Baker
for the Crown

Mr. G. White
for the Accused

Corrigendum of the Sentencing Judgment
of
The Sentencing Judgment of the Honourable Judge J.N. LeGrandeur

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In Paragraph 103, line 9 – sentence should read: ....should be 2 years, ...