REDACTED VERSION
KING'S BENCH FOR SASKATCHEWAN

Citation: **2024 SKKB 90**

Date: **2024 05 17**
File No.: CRM-SA-00237-2022
Judicial Centre: Saskatoon

BETWEEN:

HIS MAJESTY THE KING

- and -

A.E.R.

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Counsel:

Lana E. Morelli	for the Crown
Aleida M. Oberholzer	for A.R.

SENTENCING DECISION — CROOKS J.
May 17, 2024

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[1] This case centres around sexual abuse by a mother against her four-year-old daughter. At the time of the allegations, A.R was a young mother of two girls and pregnant with her third child. She was living with her partner, who worked long hours

to support his family. He had no idea what criminal activities were occurring in his home.

[2] Following a trial, A.R. was found guilty of the following five counts:

Count 1: commit a sexual assault on K.R., contrary to section 271 of the *Criminal Code*, RSC 1985, c C-46;

Count 3: for a sexual purpose, touch directly or indirectly a part of the body of K.R., a person under the age of sixteen years, contrary to section 151 of the *Criminal Code*;

Count 5: distribute child pornography, contrary to section 163.1(3) of the *Criminal Code*;

Count 6: make child pornography, contrary to section 163.1(2) of the *Criminal Code*; and

Count 7: by means of telecommunication, make an arrangement with a person to commit an offence under section 151 or 152, with respect to a person that is under the age of sixteen years, contrary to section 172.2(1)(b) of the *Criminal Code*.

[3] At the outset of trial, A.R. entered a guilty plea to the following:

Count 8: commit bestiality contrary to section 160(1) of the *Criminal Code*.

[4] In October 2019, K.B. and A.R. started chatting online. Both were interested in a fetish lifestyle and connected through a related website. Their online conversations moved to Kik Messenger [Kik] and they shared personal details about their lives. Their last contact was in December 2020, just before Christmas.

[5] During their lengthy online connection, A.R. shared images of herself engaged in sexual acts with the family dog. She sent him images of child pornography. She made videos of child pornography and sent those to K.B.

[6] During this same time, A.R. was communicating with multiple men, gauging their curiosity with comments about her sexual activities with the victim,

evaluating their interest through her comments about “what would you do if she walked in on us” and using this for her own sexual arousal and to arouse those with whom she was communicating. She was offering her daughter to multiple men as a sexual pawn, talking about hotel rooms and formulating plans with these men. But A.R.’s comfort with K.B. had progressed further than with these other men. K.B. described A.R. as “aggressive” in trying to get him to send her child pornography and described feeling like she was trying to get him to implicate himself.

[7] A.R. eventually began sending videos to K.B. with a full view of her and the victim. He described these videos as being three to four series with six to eight videos in quick succession, each video being approximately 15 to 20 seconds long. These videos were sent through Kik. K.B. described observing videos of the victim and A.R. both naked with the victim performing oral sex on A.R. and the victim suckling A.R.’s breast while A.R. masturbated. He observed A.R.’s face and her recognizable tattoos. He observed the victim’s face.

[8] The allegations came to light on January 11, 2021. On that date, K.B. walked into the Saskatoon Police Station and disclosed allegations of abuse by A.R. against her daughter, who was four years old at the time. He turned over his cell phone along with his password to his Kik account without any promise of immunity, allowing police to check this account for recent messages. Based on their messaging history, he expected there would be messages from A.R. about child sexual abuse or child pornography waiting to be opened in Kik.

[9] This disclosure led to an investigation by the Saskatoon Police Service, who obtained a search warrant for A.R.’s home and electronic devices. Her two young daughters were apprehended by the Ministry of Social Services. Her cell phone and other electronic devices were seized. No images of child pornography were found on her phone. In fact, Kik Messenger was not on her phone at all. During trial, A.R.

testified she would delete the Kik app every night and reinstall it the next day.

[10] K.B. was the only witness who reported observing the sexual abuse of the victim and details of the images were provided through his testimony. However, there was other evidence that corroborated K.B.'s testimony, including testimony from the victim, who was seven years old at the time of trial.

[11] There was also evidence of A.R.'s specific communications with two other males during this same time period. In September 2021, one male's residence was identified as a location where child pornography was being uploaded. He was convicted in October 2022 of possessing child pornography and making child pornography available. At the time of his testimony, he was serving the probationary period of his sentence. He testified that at the time of his offences, he used Kik for sharing child pornography. His evidence was that it was easy to find individuals to share child pornography with – "they are everywhere." Very occasionally, he would talk to women on Kik and recalled one such female from Saskatoon. He did not share or receive child pornography from this female.

[12] However, the female did describe sexual things she did with the family dog and shared related images. This led to the female starting to discuss her daughter. The female said that she "did things" with her daughter and talked about sexual acts with her. He understood these communications to be an inquiry into whether he wanted sexual relations with her and her daughter.

[13] The female sent pictures of her and her daughter to this male. The female was topless with her arm around her daughter, who was fully clothed and standing beside her. He believed the child to be four or five years old. At trial, he identified A.R. and the victim through photos shown to him.

[14] Also introduced into evidence were a series of text messages between

A.R. and a second male. These messages were retrieved by police from A.R.'s cell phone through extraction software. A.R. shared intimate images with this male, including bestiality. She presented scenarios about her daughter "walking in" on her while she was sexually engaged with another male. She posed this scenario to the second male, asking what he would do if that happened while they were together. This male had previously been convicted of luring a child and A.R. was aware of that conviction.

[15] A.R. was also carrying on multiple online conversations with other unknown males which escalated to discussions about meeting at a hotel room or coming to her house, all supposedly for sexual contact with the victim.

[16] The victim provided a video-taped statement to police when she was four years old, the majority of which was admitted as evidence. At the trial, the victim was seven years old and much more focussed. When there were things that she could not recall or that she did not believe to be truthful, she said so. When the victim was cross-examined about her video-taped statement, the following exchange unfolded:

> Defence counsel: So, do you remember in that video with you talking to that lady, you talk about your mom licking you, do you remember that?
>
> Victim: No, not licking me, me licking my mom.
>
> Defence counsel: Oh, okay.
>
> Victim: I didn't want that.

[17] Through the framework set out under *R v W.(D.)*, [1991] 1 SCR 742, I rejected A.R.'s evidence as I did not find her to be credible. Rather, I determined that the Crown had established beyond a reasonable doubt the elements of the offences for which convictions were entered.

[18] Following her conviction at trial, A.R. also entered guilty pleas on two charges under s. 145(5) of the *Criminal Code* for breaching her release Order. These

breaches involved using a portable wireless communication device and for being in contact with a person under the age of 16 years.

Crown Position on Sentencing

[19] The Crown suggests that I impose a custodial sentence of 11 years 6 months; however, when adjusted for the principle of totality, they propose that a sentence of 8 years 11 months is appropriate.

[20] The Crown proposes the sentence be apportioned as follows:

Criminal Code	**Sentence**	**Sentence Adjusted for Totality**
271	Judicial Stay	Judicial Stay
151	60 months	50 months
163.1(3)	36 months concurrent	36 months concurrent
163.1(2)	36 months consecutive	30 months consecutive
172.2(1)(b)	24 months consecutive	20 months consecutive
160(1)	12 months consecutive	6 months consecutive
145(5)	3 months consecutive	1 month consecutive
145(5)	3 months consecutive	1 month concurrent
TOTAL SENTENCE:	138 months (11 years 6 months)	107 months (8 years 11 months)

[21] The Crown also seeks:

a. A DNA order pursuant to s. 487.051 of the *Criminal Code*;

b. An order under the *Sex Offender Information Registration Act,* SC 2004, c 10 [*SOIRA*], for 20 years pursuant to s. 490.012(1) and s. 490.013(2)(b) of the *Criminal Code*;

c. A 10 year weapons prohibition pursuant to s. 109 of the *Criminal Code*;

d. A no-contact order with her two daughters, including the victim, while she is in custody pursuant to s. 743.21 of the *Criminal Code*; and

e. A prohibition order pursuant to s. 161(1) of the *Criminal Code*.

[22] While the Crown's position did not initially seek a no-contact order with respect to the youngest daughter, who was born while A.R. was awaiting trial, this request was made by the child's biological father, who is currently raising this child with the support of his parents, and was addressed with counsel during the sentencing hearing.

[23] A Pre-Sentence Report [PSR] was prepared on April 1, 2024, by Community Corrections. A.R. was assessed as being in the medium risk category for reoffending.

Defence Position on Sentencing

[24] Defence counsel proposes a sentence of 7 years, apportioned as follows:

Criminal Code	**Sentence**
271	Judicial Stay
151	48 months
163.1(3)	12 months consecutive to the s. 151 sentence, concurrent to 163.1(2)
163.1(2)	24 months consecutive to the s. 151 sentence, concurrent to 163.1(3)
172.2(1)(b)	12 months concurrent
160(1)	6 months concurrent
145(5)(a)	70 days consecutive
145(5)(a)	71 days consecutive
TOTAL SENTENCE:	7 years for the offences on the Indictment, 141 days consecutive on the breach offences

[25] The defence agrees the ancillary orders sought by the Crown are appropriate, although they raise a concern regarding two of the proposed conditions under the s. 161 prohibition order.

Sentencing Principles

[26] The fundamental purpose of sentencing is to ensure respect for the law and to maintain a just, peaceful, and safe society. Imposing a just sentence requires consideration of the sentencing objectives set out in s. 718 of the *Criminal Code*: to denounce unlawful conduct; to deter this offender and others from committing similar offences; to separate offenders from society where necessary; to assist in rehabilitating offenders; to provide reparations for harm done to victims or to the community; and to

promote a sense of responsibility in offenders and acknowledgment of the harm done to victims and to the community. In addition, in imposing sentence I must take into account the principle of proportionality and the aggravating and mitigating circumstances relating to the offences as set out in s. 718.2.

[27] In *R v Sand*, 2019 SKQB 123, Danyliuk J. summarized the artful balancing required when determining an appropriate sentence:

> 15 The Canadian sentencing process is now highly individualized. It is as much art as it is science. Cases are assessed using applicable general principles but as same are applicable to the existing circumstances. It is incumbent upon a sentencing judge to consider all relevant factors under the *Criminal Code* and as enunciated in the case law, and ascribe to each the weight that the circumstances require. Of necessity, this will vary from case to case. No one sentencing objective trumps the others. Sentencing is a flexible procedure, with relatively few predetermined results (such as minimum sentences). As Lamer C.J.C. said in *R v M.(C.A.)*, [1996] 1 SCR 500:
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> > The determination of a just and appropriate sentence is a delicate art which attempts to balance carefully the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence, while at all times taking into account the needs and current conditions of and in the community.

[28] Section 718.01 of the *Criminal Code* confirms that denunciation and deterrence are the primary objectives of sentencing for crimes that involve the abuse of a person under the age of 18 years.

[29] The Supreme Court of Canada has provided significant guidance on the approach to sentencing offenders for sexual offences against children in *R v Friesen*, 2020 SCC 9, [2020] 1 SCR 424 [*Friesen*]. This decision reframed the approach to crafting a sentence for sexual offences against children. The Supreme Court addressed the priorities of denunciation and deterrence:

> 105 Parliament's choice to prioritize denunciation and deterrence for sexual offences against children is a reasoned response to the wrongfulness of these offences and the serious harm they cause. The sentencing objective of denunciation embodies the communicative

> and educative role of law (*R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, at para. 102). It reflects the fact that Canadian criminal law is a "system of values". A sentence that expresses denunciation thus condemns the offender "for encroaching on our society's basic code of values"; it "instills the basic set of communal values shared by all Canadians" (*M. (C.A.)* [[1996] 1 SCR 500], at para. 81). The protection of children is one of the most basic values of Canadian society (*L. (J.-J.)* [(1998), 126 CCC (3d) 235], at p. 250; *Rayo* [2018 QCCA 824], at para. 104). As L'Heureux-Dubé J. reasoned in *L.F.W.* [2000 SCC 6], "sexual assault of a child is a crime that is abhorrent to Canadian society and society's condemnation of those who commit such offences must be communicated in the clearest of terms" (para. 31, quoting *L.F.W. (C.A.)* [(1997), 155 Nfld & PEIR 115], at para. 117, per Cameron J.A.).

[30] New technologies have enabled new forms of sexual violence against children. There are constantly evolving ways to violate a child's autonomy, their sexual dignity, and their physical and mental well-being. Social media provides sexual offenders with unprecedented access to potential victims. Many of these violations remain not only in the public domain forever, but are burned into the fabric of a child's psyche for the remainder of their lives.

[31] Also significant in crafting an appropriate sentence is the fundamental principle set out in s. 718.1 of the *Criminal Code*, namely that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[32] This must also be balanced with other principles outlined in s. 718.2 of the *Criminal Code*:

> **718.2** A court that imposes a sentence shall also take into consideration the following principles:
>
> > **(a)** a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
> >
> > …

> **(ii)** evidence that the offender, in committing the offence, abused the offender's intimate partner or a member of the victim or the offender's family,
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> **(ii.1)** evidence that the offender, in committing the offence, abused a person under the age of eighteen years,
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> **(iii)** evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,
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> **(iii.1)** evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation,
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> …
>
> shall be deemed to be aggravating circumstances;
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> **(b)** a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
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> **(c)** where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
>
> **(d)** an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
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> **(e)** all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

[33] Our criminal justice system is a reflection of societal values. The legislation enacted by Parliament is in response to these values. As our understanding of the impacts of sexual offences against children has grown, so too have the maximum penalties expanded to reflect this understanding. At present, the maximum sentence for a number of these convictions is 14 years' incarceration.

[34] In *Friesen*, the Supreme Court addressed the "wrongfulness of exploiting children's weaker position in society," specifically stating:

> 65 The protection of children is one of the most fundamental values of Canadian society. Sexual violence against children is especially wrongful because it turns this value on its head. In reforming the legislative scheme governing sexual offences against children, Parliament recognized that children, like adults, deserve to be treated

> with equal respect and dignity (Badgley Committee, vol. 1, at p. 292 [(*Canada, Committee on Sexual Offences Against Children and Youths, Sexual Offences Against Children: Report of the Committee on Sexual Offences Against Children and Youths* (1984), vol. 1, at p. 29]; Fraser Committee, vol. 1, at p. 24, and vol. 2, at p. 563 [Canada, Special Committee on Pornography and Prostitution, *Pornography and Prostitution in Canada: Report of the Special Committee on Pornography and Prostitution* (1985), vol. 1, at p. 24]). Yet instead of relating to children as equal persons whose rights and interests must be respected, offenders treat children as sexual objects whose vulnerability can be exploited by more powerful adults. There is an innate power imbalance between children and adults that enables adults to violently victimize them (*Sharpe* [2001 SCC 2], at para. 170, per L'Heureux-Dubé, Gonthier and Bastarache JJ.; *L. (D.O.)* [[1993] 4 SCR 419], at p. 440, per L'Heureux-Dubé J.). Because children are a vulnerable population, they are disproportionately the victims of sexual crimes (*George* [2017 SCC 38], at para. 2). In 2012, 55 percent of victims of police-reported sexual offences were children or youth under the age of 18 (Statistics Canada, *Police-reported sexual offences against children and youth in Canada, 2012* (2014), at p. 6).

[35] The Court in *Friesen* set out a non-exhaustive list of factors to consider in determining an appropriate sentence. A number of these factors were specifically noted to increase the moral blameworthiness of the offender:

a. Likelihood to reoffend;

b. Abuse of a position of trust or authority;

c. Duration and frequency;

d. Age of the victim;

e. Degree of physical interference; and

f. Victim participation.

Aggravating Factors

[36] There are extensive aggravating factors which require consideration in this case.

[37] The abuse of persons under the age of 18 years is a statutory aggravating

factor, as is the abuse of a position of trust or authority. In *Friesen*, the Supreme Court commented on the abuse of a position of trust:

> 126 Any breach of trust is likely to increase the harm to the victim and thus the gravity of the offence. As Saunders J.A. reasoned in *D.R.W.* [2012 BCCA 454], the focus in such cases should be on "the extent to which [the] relationship [of trust] was violated" (para. 41). The spectrum of relationships of trust is relevant to determining the degree of harm. A child will likely suffer more harm from sexual violence where there is a closer relationship and a higher degree of trust between the child and the offender (see *R. v. J.R.* (1997), 157 Nfld. & P.E.I.R. 246 (N.L.C.A.), at paras. 14 and 18). This is likely to be the case in what might be described as classic breach of trust situations, such as those involving family members, caregivers, teachers, and doctors, to mention a few.
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> …
>
> 129 The abuse of a position of trust is also aggravating because it increases the offender's degree of responsibility. An offender who stands in a position of trust in relation to a child owes a duty to protect and care for the child that is not owed by a stranger. The breach of the duty of protection and care thus enhances moral blameworthiness (*R. v. S. (W.B.)* (1992), 73 C.C.C. (3d) 530 (Alta. C.A.), at p. 537). The abuse of a position of trust also exploits children's particular vulnerability to trusted adults, which is especially morally blameworthy (*D. (D.)* [(2002), 58 OR (3d) 788], at paras. 24 and 35; *Rayo*, at paras. 121-22).

[38] The harm caused by A.R. to this young victim is at the high end of the spectrum. The sexual abuse occurred in the victim's home and violated her right to safety and peace. Not only did these offences take place in the victim's home, but they were perpetrated by her mother. She was the victim's primary caregiver and committed these offences while in a position of trust and authority.

[39] The sexual abuse included the touching and licking of A.R.'s breasts and vagina while A.R. filmed and masturbated. This is highly intrusive of the victim's sexual integrity and personal autonomy.

[40] It is difficult to imagine a more egregious breach of trust than a mother manipulating a child to perform sexual acts on her, filming these acts, and distributing

this child pornography – all of which appeared to be centered on A.R.'s own sexual gratification.

[41] The evidence confirms that these offences occurred while the victim's younger sister, two years old at the time, was also present in the home.

[42] The duration and frequency of the abuse is an aggravating factor. Repeated assaults increase A.R.'s degree of responsibility and her moral blameworthiness. The sexual offending against the victim occurred over a period of 15 months. From K.B.'s evidence, the victim was identifiable in these videos. The recording and distribution of this abuse perpetuates the child's victimization. I determined at trial that there were three to four incidents where videos were made with the victim, each with six to eight videos of approximately 15 to 20 seconds made in quick succession. This is the equivalent of 18 to 32 videos made on a minimum of three occasions.

[43] In *Friesen*, the Court outlined the escalating harm and trauma that flows from the commission of multiple occasions of offending:

> 133 In sum, sexual violence against children that is committed on multiple occasions and for longer periods of time should attract significantly higher sentences that reflect the full cumulative gravity of the crime. Judges cannot permit the number of violent assaults to become a statistic. Each further instance of sexual violence traumatizes the child victim anew and increases the likelihood that the risks of long-term harm will materialize. Each further instance shows a continued and renewed choice by the offender to continue to violently victimize children. As Abella J.A. (as she then was) wrote in *Stuckless* (1998) [(1998), 41 OR (3d) 103], where the offender has committed numerous assaults, the court cannot shy away from assessing the full dimensions of the wrong but must give effect to the "staggering" and "systematic" nature of the sexual violence in the sentence imposed (p. 116).

[44] In addition, in relation to Count 5, the evidence satisfied me that A.R. also distributed seven or eight images of child pornography that were not created by

her and two videos of child pornography which were allegedly created by her, but for which there was insufficient evidentiary basis for me to conclude they were her creations.

[45] The age of the victim is a significant aggravating factor. There is an extreme power imbalance between children and adults, and even more so between parents and children. As her mother and her primary caregiver, the four-year-old victim was totally dependent on A.R. As noted in *Friesen* at paras 134-135:

> 134 The age of the victim is also a significant aggravating factor. The power imbalance between children and adults is even more pronounced for younger children, whose "dependency is usually total" and who are "often helpless without the protection and care of their parents" (*R. v. Magoon*, 2018 SCC 14, [2018] 1 S.C.R. 309, at para. 66). Their personality and ability to recover from harm is still developing (*Renaud*, at s. 12.64 [G. Renaud, *The Sentencing Code of Canada: Principles and Objectives* (2009), at s. 12.64]; *L. (J.-J.)*, at p. 250). Moreover, children who are victimized at a younger age must endure the consequential harm of sexual violence for a longer period of time than persons victimized later in life.
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> 135 These realities flowing from the age of the victim are relevant to both the gravity of the offence and the degree of responsibility of the offender. Sexual offences against children are wrongful precisely because the perpetrators recognize and exploit children's special vulnerability (*Woodward* [2011 ONCA 610], at para. 72). It follows that the moral blameworthiness of the offender is enhanced when the victim is particularly young and is thus even more vulnerable to sexual violence.

[46] The harm flowing from an offence is not limited to the victim against whom the offence was committed – it extends within the family, the community, and to society as a whole.

[47] In *Friesen*, the Supreme Court addressed the extensive harm that can manifest from sexual offences against children – physically, psychologically and emotionally. For example, in her statement, the victim called her tongue a “tickler”, which gives insight into the level of manipulation of and harm to this victim, including how she views her own body.

[48] Further, A.R.’s actions have shattered this family. Her mother is now raising the victim. Her other two daughters reside with their biological fathers. There is the loss of this sibling connection between these sisters as none of them now reside together. A.R.’s ongoing reliance on her grandmother for support – both emotional and financial – has resulted in the loss of this support for her own mother as she raises the victim given the rift in the family that these offences have caused.

[49] The Supreme Court in *Friesen* noted that an offender’s underlying attitudes are highly relevant in sentencing, as these assist in assessing the offender’s moral blameworthiness and in considering the sentencing objective of denunciation:

> 89 All forms of sexual violence, including sexual violence against adults, are morally blameworthy precisely because they involve the wrongful exploitation of the victim by the offender - the offender is treating the victim as an object and disregarding the victim's human dignity (see *R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584, at paras. 45 and 48). As L'Heureux-Dubé J. reasoned in *L. (D.O.)*, "the occurrence of child sexual abuse is one intertwined with the sexual abuse of all women" precisely because both forms of sexual offences involve the sexual objectification of the victim (p. 441). Courts must give proper weight in sentencing to the offender's underlying attitudes because they are highly relevant to assessing the offender's moral blameworthiness and to the sentencing objective of denunciation (*Benedet* [J. Benedet, "*Sentencing for Sexual Offences Against Children and Youth: Mandatory Minimums, Proportionality and Unintended Consequences*" (2019), 44 Queen's L.J. 284], at p. 310; *Hajar* [2016 ABCA 222], at para. 67).

[50] The degree of physical interference is also an aggravating factor. This factor reflects the degree of violation of the victim's bodily integrity as well as the sexual nature of the touching and its violation of the victim's sexual integrity. Here, the four-year-old victim was required to perform oral sex on her mother and suckle her breasts while A.R. masturbated. In my view, this reflects a high degree of physical interference given the violation of the victim’s sexual integrity, her dignity, and her personal autonomy. This degree of interference is only identified when one considers that such was demanded of the victim by her own mother, who held a position of trust.

[51] A.R.'s personal accountability for the offences is low. She views her error as talking to men online about her children and pretending to be a bad mother. She appears to justify her actions, reporting that she chatted with men about her children in a sexual way in order to placate them so they would not look for other children. She stated the same about her involvement with bestiality – she did not want to do this, but believed she was providing this so that these individuals would not abuse children.

[52] A number of victim impact statements were provided by the Crown. The victim provided a statement through her school counsellor, drawing pictures of emotions – faces with tears and angry faces and a happy face because she was happy A.R. was going to jail. The victim's maternal grandmother, who has also cared for her since A.R.'s arrest, described some of the trauma that has started to be exhibited by the victim. She described the victim being afraid of dreaming, her struggles adjusting at school, her completely altered relationship with her sister. And the details shared in the maternal grandmother's victim impact statement reflect only the issues that have arisen in the past three years. The harm will continue to unfold as the victim continues to face the crimes committed against her.

[53] A.R.'s former partners have been impacted by this offence. In particular, the partner with whom she was living at the time of her arrest, who is also the father to her youngest daughter, described the impacts of A.R.'s offending in his life. Family members of A.R.'s middle daughter also write about how their lives have been impacted and their concerns about the impact on this little girl, including on her relationship with the victim.

[54] Again, A.R. takes little responsibility for her actions. Even as it relates to the offence of bestiality, a charge to which she pled guilty, she denies knowing this was illegal. A.R. has an explanation for everything. At trial, she testified as to her ability to manipulate others. She appears to view herself as a victim in the circumstances despite

the clear victimization of her young child. She blames any wrongdoing on her own childhood trauma and the actions of others. In my view, this attitude reflects her effort to manipulate the narrative surrounding these offences, presenting herself as the victim and minimizing her responsibility. A.R.'s underlying attitude increases the seriousness of her conduct.

Mitigating Factors

[55] While these offences inherently carry a high degree of moral blameworthiness and the impacts will undoubtedly be profound, there must be a balancing with the individual circumstances of the offender. Counsel for A.R. suggests her Métis heritage, history of victimization, mental health issues, and history of substance abuse are factors which may impact her moral culpability.

[56] As to mitigating factors, A.R. does not have a criminal record. A.R. also has the support of her elderly grandmother, although this ongoing support has caused fracture in the family between A.R.'s maternal grandmother and A.R.'s mother, who is now raising the victim.

[57] A.R. has Mètis heritage through her father. She was estranged from her father until age 13, which impacted her ability to access her Métis heritage. Disconnection from Indigenous heritage, culture and community are relevant considerations and flow from Canada's colonial history and assimilation policies that *R v Gladue*, [1999] 1 SCR 688, and *R v Ipeelee*, 2012 SCC 13, [2012] 1 SCR 433, seek to address. As A.R.'s father did not participate in the PSR process, additional context for the level of, or reasons for, this disconnection, or any other factors related to her Métis heritage, are unclear.

[58] However, being Métis does not necessarily entitle A.R. to a discount on her sentence. As the Saskatchewan Court of Appeal stated in *R v L.T.N.*, 2021 SKCA

73 [*L.T.N.*]:

> [50] Proper application of s. 718.2(e) compels sentencing judges to consider the historical and personal circumstances unique to an Indigenous offender that may have played a part in bringing that offender before the court and which, as a result, may have diminished his or her moral culpability. It also requires sentencing judges to examine the types of sentencing procedures and sanctions that may be appropriate in light of the offender's Indigenous heritage and related circumstances (*Ipeelee* at paras 72–74; *R v Chanalquay*, 2015 SKCA 141 at paras 39–43, 472 Sask R 110 [*Chanalquay*]; *R v Peekeekoot*, 2014 SKCA 97 at para 58, 446 Sask R 22). While s. 718.2(e) "does not create a race-based discount on sentencing", it requires sentencing judges to "pay particular attention to the circumstances of Aboriginal offenders in order to endeavour to achieve a truly fit and proper sentence in any particular case" (*Ipeelee* at para 75).
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> [51] In *J.P.* [2020 SKCA 52], this Court held that it is an error in principle for sentencing judges to effectively set *Gladue/Ipeelee* considerations to the side once they conclude that a penitentiary sentence is required. Regardless of the nature of the offence, "the requirement for proportionality demands that the impact systemic and background factors have on an individual's moral blameworthiness be put into the balance" when determining the appropriate sentence (at para 63). This holds true whether or not the offender is Indigenous, as Leurer J.A. observed:
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> > [64] …[*A*]*ny* factor affecting moral blameworthiness (whether by increasing or decreasing it) *must* be given weight in order to impose a fit sentence based the principle of proportionality. This is so, regardless of whether the factor is connected to the principle set out in s. 718.2(e). As explained in *Friesen (J.)*, "[a]ll sentencing starts with the principle that sentences must be proportionate to the gravity of the offence and the degree of responsibility of the offender" (at para 30, emphasis added). This principle, which "has long been central to Canadian sentencing" is "now codified as the 'fundamental principle' of sentencing in s. 718.1 of the *Criminal Code*" (at para 30). Justice Wagner (as he then was) put it this way in *Lacasse*, in a context untethered to s. 718.2(e): "[T]he severity of a sentence depends not only on the seriousness of the crime's consequences, but also on the moral blameworthiness of the offender" (at para 12).
> >
> > (Emphasis in original)
>
> [52] However, where the offender *is* Indigenous, even if the sentencing judge concludes that a penitentiary sentence is required, the analysis required by s. 718.2(e) must still be conducted. That is to say, the sentencing judge must carefully consider the length of the sentence and determine whether systemic and background factors bear

> on the offender's moral blameworthiness in a way that impacts the length of the appropriate period of incarceration (*J.P.* at para 63; *Gladue* at para 93; *Whitehead* [2016 SKCA 165] at paras 84–85; *Chanalquay* at para 52; *R v McKay*, 2019 SKCA 129 at para 34). In general terms, a sentence imposed on an Indigenous offender will be open to appellate variance if the sentencing court has not shown that it has considered (i) the extent to which the offender's unique circumstances may have had a bearing on his or her moral culpability; and (ii) whether and how the relevant sentencing objectives can be actualized through sanctions other than imprisonment or through the term of imprisonment imposed (*Whitehead* at para 56).

[59] The Crown suggests there is no connection between A.R.'s historical and personal circumstances as a Métis woman and the offences before the Court. However, the issue is not necessarily the degree of connection, but rather assessing the impact on an offender's moral blameworthiness.

[60] A.R. was raised by her non-Indigenous mother, stepfather, and grandparents. There is nothing to suggest she was the target of racism or that she was exposed to violence or substance abuse within the home. A.R. connected with her father when she was 13 years old.

[61] By the time she connected with her father, she was already putting herself on pornographic websites. At the age of 13, she had sexual involvement with a 19-year-old as well as with two friends from school, including videotaping their sexual activity and putting it online. Some of this sexual activity included a dog.

[62] A.R. alleges that her paternal grandfather sexually abused her at 15 years old. She found little support from her family and these allegations were never pursued. In A.R.'s view, this abuse, along with the accusation that she fabricated the allegations, contributed to her offending behaviour. At age 17 years, she first engaged in sex for money with an older male.

[63] Beyond her disconnection from her biological father and therefore her Métis heritage, A.R.'s early sexualization and her allegations of sexual assault as a

teenager are considerations under s. 718.2(e). As noted, A.R. alleges that at age 15, she was a victim of sexual abuse by a close family member, which trauma was compounded as her account was not believed.

[64] A.R. has also extensively used marijuana which has impacted her parenting, employment and behaviour. When combined with her mental health issues and diagnoses, her decision-making and ability to regulate her emotions have created instability.

[65] Defence counsel suggests that A.R.'s own victimization was significant in her lifestyle and criminal behaviour. Counsel notes the instability A.R. experienced as a child and points to her exposure to pornography and her early involvement in a highly sexualized lifestyle at a young age, including bestiality and sex for money. Counsel suggests this must undoubtedly point to a troubled upbringing. However, the source of these behaviours is unclear as the evidence suggests much of A.R.'s sexualized behaviour began before her allegations of sexual abuse arose.

[66] Defence counsel also suggests that A.R. has faced socioeconomic challenges as well as disconnection from her family and support network, largely as a result of the charges for which she has been found guilty.

[67] A.R. has a history of dysfunctional relationships and shares three daughters with three different fathers. She met her most recent partner, whom she was dating when she was arrested for breaching her release order. A friend in A.R.'s apartment building set up an online profile for A.R. on a dating site, despite A.R. not being permitted to be on a computer.

[68] A.R. struggles with mental health diagnoses which may well impact her self-perception and decision-making. She has a history of substance abuse which started as a teenager and her use of marijuana has continued into adulthood, impacting her

parenting, employment and mental health.

[69] Although A.R. is not taking full responsibility for her offences, she admits that she needs help to work on her problematic behaviour.

Case Law

[70] While sentencing ranges provide guidance in crafting an appropriate sentence, it also must be an individualized process. The *Criminal Code* requires that a sentence should be similar to those imposed on similar offenders for similar offences committed in similar circumstances. As such, a review of similar cases is required.

a. Bestiality

[71] The offence of bestiality was included in the *Criminal Code* for the first time in 1955, reflecting the recognition of the importance of protecting animal welfare. In 2016, the Supreme Court of Canada undertook a detailed review of the history of certain provisions relating to offences against animals in *R v D.L.W.*, 2016 SCC 22, [2016] 1 SCR 402. Ultimately, a majority of the Court concluded that penetration was a required element of the offence of bestiality under the wording of s. 160 at that time.

[72] However, Parliament responded by amending s. 160 of the *Criminal Code* to include a definition of the offence of bestiality at s. 160(7), which was expanded to be "any contact, for a sexual purpose, with an animal."

[73] Section 160(3) imposes a minimum sentence of one year incarceration where a person commits bestiality in the presence of a person under the age of 16 years. This reflects not only the seriousness of the offence, but also the increased seriousness when the offence of bestiality is committed in the presence of a child.

[74] In this case, the circumstances strongly suggest the victim was exposed to A.R.'s involvement in bestiality. In her statement, the victim talks about family pets

"licking" members of her family. While it would be easy to speculate that the child was present for some of these sexual acts, it is not the only inference to be drawn. As such, and from my findings as it relates to the evidence, the minimum sentence required under s. 160(3) of the *Criminal Code* does not apply because the evidence did not establish that A.R. committed bestiality in the presence of the victim.

[75] The offence of bestiality is relatively rare in case law. However, there are frequently custodial sentences imposed for this offence.

[76] In the absence of evidence that the offence of bestiality was committed in the presence of the victim, counsel agree that case law indicates a sentencing range of three months to one year incarceration for this offence.

[77] There are a number of cases referenced by counsel which support a custodial sentence between three months to one year. I would summarize these cases briefly as follows:

- In *R v A.B.*, 2007 SKPC 46, 296 Sask R 289, the Saskatchewan Provincial Court sentenced a female offender to one year incarceration for having a dog lick her vagina, attempted stimulation of the dog's penis and recording these events. This appears to be limited to one occasion.

- In *R v R.L.D.*, 2023 NBCA 70, the New Brunswick Court of Appeal upheld a one-year sentence where the male offender engaged in bestiality with the family dog. The bestiality appears to be limited to one occasion but was imposed consecutive to the sentences imposed for sexual offences against a child.

- In *R v L.D.*, 2022 ONCJ 480, the Ontario Court of Justice sentenced a female offender to 3 months' incarceration for one incident (captured

in a 59 second video) of the family dog licking her vagina. There were significant mitigating factors noted by the Court.

- In *R v C.H.*, 2021 ABPC 119, the Alberta Provincial Court sentenced a male offender to 6 months incarceration for engaging in various sexual acts with a dog on multiple occasions, which were captured on video.

- In *R v DeJaeger*, 2018 NUCA 7, the Nunavut Court of Appeal upheld a one-year period of incarceration for anal intercourse with a dog in the presence of children.

- In *R v L.M.R.*, 2010 ABCA 286, 490 AR 196, the Alberta Court of Appeal upheld a sentence of one year incarceration for a female offender who entered guilty pleas and had significant mitigating factors. No facts were discussed.

[78] In my view, the circumstances of this offence require a sentence near the upper end of this range. There were multiple incidences of bestiality with the family dog, which were then recorded and shared with multiple people online. While it remains unclear whether the victim was present for these offences, it is not disputed that she was in the family home when this occurred.

[79] A consecutive period of incarceration is appropriate on the facts of this case. The offence of bestiality was committed as a standalone offence, one with little or no connection to the other offences. A.R. engaged in this offence independent of her sexual offences and it will stand alone as a period of incarceration which she will serve.

b. Sexual Offences

[80] The Supreme Court of Canada's decision in *Friesen* emphasized the

seriousness of sexual offences against children. It made clear that sexual offences against children are violent crimes which exploit children's vulnerabilities and causes profound harms. The message was clear – sentences imposed for sexual offences against a child must reflect the seriousness of the offence and the related lingering harm that these offences cause.

[81] As Jackson J.A. stated in *R v L.A.*, 2023 SKCA 136 at para 36 [*L.A.*]:

> 36 As an ongoing process, it is understood that the above considerations reflect Parliament's direction that sentences for sexual offences against children need to increase. To that end, courts are expected to consider the following actions: increase sentences from what might have been previously considered a notional maximum and prioritize denunciation and deterrence.

[82] This echoes the Supreme Court's message in *Friesen* on sentencing for sexual offences against children:

> 114 … That message is that mid-single digit penitentiary terms for sexual offences against children are normal and that upper-single digit and double-digit penitentiary terms should be neither unusual nor reserved for rare or exceptional circumstances. We would add that substantial sentences can be imposed where there was only a single instance of sexual violence and/or a single victim, as in this case, *Woodward*, and *L.M.* In addition, as this Court recognized in *L.M.*, maximum sentences should not be reserved for the "abstract case of the worst crime committed in the worst circumstances" (para. 22). Instead, a maximum sentence should be imposed whenever the circumstances warrant it (para. 20).

[83] In Saskatchewan, sentencing for "major" sexual assaults on adults begins at three years and increases or decreases depending on aggravating and mitigating circumstances. Given the severity of the harm arising from sexual offences against children, this three-year benchmark cannot, should not, and does not apply.

[84] The significance of this shift was recognized in the recent decision of the Saskatchewan Court of Appeal in *L.A.*, where a 10-year sentence was upheld for a father who sexually abused three young female family members.

[85] Counsel presented a number of cases which set out sentences which they invite the Court to consider, all of which involve sentencing post-*Friesen*. I have summarized those which are most relevant to the circumstances of this case:

- In *R v Menard*, 2023 QCCA 1270, the offender was convicted of 10 counts, including make arrangements; make, possess and distribute child pornography; and counsel to commit a sexual offence. The offender was communicating with an undercover police officer pretending to be a mother to an eight-year-old girl. The Quebec Court of Appeal upheld a sentence of 4 ½ years and a 20-year s. 161 prohibition.

- In *R v C.H.*, 2021 ABPC 119, the offender pled guilty to bestiality; distribute, make, possess child pornography; sexual assault; and sexual interference. He was 28 years old with no criminal record, compliant with release conditions and was the victim of childhood sexual assault himself. He received a global sentence of 7 ½ years incarceration, which was calculated as follows: 3 years for distributing child pornography, 3 years for making child pornography, 2 years concurrent for possessing child pornography, 1 ½ years for sexual assault and 2 years concurrent for sexual interference.

- In *R v B.H.*, 2023 ONCJ 539, an Indigenous offender entered guilty pleas to sexual assault against his teenaged daughter and making child pornography. The offender suffered from mental health and addictions issues, but no prior criminal record. On this occasion, he supplied his daughter with alcohol, sexually assaulted her and took videos and photos of the assault. He also had six additional images of child pornography in his possession, but these did not relate to his

daughter. The Ontario Court of Justice imposed a global sentence of 7 years, calculated as: 5 years for sexual assault, 2 years consecutive for making child pornography, and a 6-month concurrent sentence for an unrelated weapons charge.

- In *R v K.R.*, 2022 ONCJ 344, the 29-year-old female offender pled guilty to making and distributing child pornography. The offences were against her six-year-old daughter and five-year-old son. She recorded video of her children naked, took photos of her daughter posing in adult clothing and took photos of her son's penis and bum as well as her daughter looking at her son's penis. She sent these images to her boyfriend. There was no physical contact between the offender and the victims. She was sentenced to 5 years' incarceration on each charge, to be served concurrently. A lifetime prohibition was ordered under s. 161.

- In *R v J.K.D.*, 2020 BCPC 211, the female offender pled guilty to sexual interference, make and distribute child pornography and make arrangements. The victim was a young female child whom the offender and her husband were babysitting. The abuse occurred on three occasions while the victim was asleep. The offender touched the victim's vagina on one occasion, took images of her husband masturbating near the victim's head, took images of the victim's vagina, and took a video of her husband masturbating to a photo of the victim. The offender distributed this material to her husband, made arrangements with him to further sexually abuse the victim, and had a further 11 images of child pornography in her possession. The offender was sentenced to a global sentence of 117 months (9.75 years) with a 10-year s. 161 prohibition order.

- In *R v C.C.D.*, 2022 SKKB 253, the offender was convicted of sexually assaulting his 12-year-old stepdaughter on one occasion. He was sentenced to 5 years' incarceration. Mitigating factors were limited, but there were aggravating factors such as an abuse of a position of trust and the significant impact on the victim.

- In *R v A.W.C.*, 2022 SKPC 34, the offender pled guilty to sexually touching his six-year-old step-granddaughter and for breaches of his release conditions. The sexual offending involved touching and licking the victim's vagina while she tried to escape the bathroom. He was sentenced to 4 years' incarceration, which reflected consideration of his Indigenous heritage, a previous conviction for sexual assault, the age of the victim, the breach of trust, his guilty plea, and his expressions of remorse.

- In *R v Mendoza*, 2023 SKPC 52, the offender pled guilty to sexual offences against his daughter's 14-year-old friend as well as making and possessing child pornography. He invoked a sophisticated ruse to maintain contact with her online and paid to meet with her for a sexual encounter. On arrest, over 40 images of child pornography were found on his phone, the majority of which were the 14-year-old victim. The appropriate sentences, before considering totality, were determined to be 5 years for sexual assault, 2 years consecutive for making child pornography, 1 year concurrent for possession of child pornography, and additional sentences for other sexual offences related to these events.

[86] The sexual offending against the victim occurred over a period of 15 months and began when she was only three years old. I determined at trial that there

were three to four series of videos made with the victim, each with six to eight videos of approximately 15 to 20 seconds long made in quick succession. This is the equivalent of 18 to 32 videos made on a minimum of three occasions. From K.B.'s evidence, the victim was identifiable in these videos. The recording and distribution of this abuse perpetuates the child's victimization.

[87] In addition, the evidence satisfied me that A.R. also distributed seven or eight images of child pornography that were not created by her and two videos of child pornography which were allegedly created by her, but for which there was insufficient evidentiary basis for me to reach that conclusion.

[88] Not only did A.R. violate the victim in these ways, but she engaged with multiple males in making arrangements to facilitate the sexual abuse of the victim. In her own evidence, A.R. acknowledged that she had contact with dozens of men to discuss arrangements for the sexual abuse of her daughter, although she denies any intention to follow through with these arrangements.

[89] As I noted in convicting A.R. of a number of offences, it was apparent that she had an evolving and escalating pattern of behaviour – engage with men online, move them to Kik Messenger, share personal sexual images, share images of bestiality, raise sexual innuendo about her daughter, gauge the men's reaction, and engage in the sexual victimization of her daughter with an imminent escalation toward her daughter's sexual victimization by others. There was overall consistency in the evidence – the sole discordant note was A.R.'s testimony.

[90] As noted in *Friesen*, it is an error of law to treat sexual interference as less serious than sexual assault. Both offences carry the same maximum sentence for victims under the age of 16 years. The elements of the offence are similar and a conviction for one can frequently support the factual foundation for the other.

[91] While the sexual offences against the victim arose during the same 15-month period of time and therefore bear some overlap or connection, the majority of these offences stand independent of one another. As the Crown points out, A.R. could have distributed child pornography without involving her four-year-old daughter. She could have distributed child pornography without sexually interfering with the victim. She could have sexually assaulted the victim without making or distributing child pornography. She could have committed all of these offences without making arrangements with others to commit further sexual offences against the victim. Each of these offences compounds the seriousness of the harm. Given the independence of these respective offences and in considering the guidance in *Friesen*, I am of the view that the circumstances of these offences invite consecutive sentences.

c. Child Pornography

[92] A number of the cases cited above also address sentences imposed for making or distributing child pornography in conjunction with sentencing for other sexual offences. However, the Supreme Court in *Friesen* also provided comment in the context of child pornography:

> 51 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 Court recognized the importance of these interests in Sharpe in the context of the production of child pornography. As this Court reasoned, the production of child pornography traumatizes children and violates their autonomy and dignity by treating them as sexual objects, causing harm that may stay with them for their entire lifetime (para. 92, per McLachlin C.J., and para. 185, per L'Heureux-Dubé, Gonthier and Bastarache JJ.). Sexual violence against children is thus wrongful because it invades their personal autonomy, violates their bodily and sexual integrity, and gravely wounds their dignity (see Sharpe, at paras. 172, 174 and 185, per L'Heureux-Dubé, Gonthier and Bastarache JJ.).

d. Breaches

[93] A breach of a release order under s. 145(5) of the *Criminal Code* has a maximum penalty of two years' incarceration. Sentences for a breach are often highly discretionary and highly fact specific.

[94] The breaches here are concerning. A.R. was released on a release order in February 2021. She remained in the community for nearly two years without incident. However, in February 2023, she began a romantic relationship online.

[95] The PSR indicates that A.R. met her most recent partner through an online dating website – a profile set up with a friend in her apartment building – at a time when A.R. was under release conditions including a restriction on accessing or using a computer capable of accessing the internet.

[96] A.R. then travelled out of town for a few days, used her new partner's hotspot, went to a park, and was in contact with a toddler in her partner's family. Her partner was unaware of A.R.'s charges or the restrictions in place under the release order.

[97] A.R. entered a guilty plea for two breaches: using a portable wireless communication device and being in contact with a person under the age of 16 years.

[98] The breach offences were committed separately from the other offences, although the sentence for the two convictions will be concurrent to each other as they arose from the same series of events.

Totality Principle

[99] The totality principle requires a sentencing judge who orders an offender to serve consecutive sentences for multiple offences to ensure that the cumulative sentence rendered does not exceed the overall culpability of the offender. Although

the totality principle must always be considered when sentencing for multiple offences, the sentence imposed cannot thereby become inadequate to properly recognize the overall gravity of this conduct that victimizes children in the most horrendous way.

[100] In *R v Gryba*, 2016 SKQB 123, Popescul C.J. outlined the practical application of the totality principle:

> 86 Taking a "last look" in the context of the application of the totality principle requires an examination of a number of factors including the gravity of the offences, the offender's degree of guilt, the harm done to the victims, and the offender's personal circumstances. Here, the gravity and degree of guilt is high and the harm to the victims is significant. On the other hand, the offender, who has had the weight of his wrongful conduct on his shoulders for almost 4-1/2 years, has worked hard towards rehabilitation. He has no previous criminal record other than for the earlier related convictions and has a bright future. To impose a further five-year sentence would amount to an overly harsh and crushing sentence not in keeping with his prospects and the principle of proportionality.

[101] The approach to sentencing for multiple offences was recently confirmed by our Court of Appeal in *L.T.N.*:

> [69] The proper approach to sentencing for multiple offences was explained in *R v Chicoine*, 2019 SKCA 104, 381 CCC (3d) 43 [*Chicoine*], where Ryan-Froslie J.A., writing for a panel of five judges, said:
>
> > [66] …A judge, when sentencing an offender for multiple offences, must first determine the appropriate sentence for each offence and then decide whether those sentences should be served concurrently or consecutively to each other. If one or more consecutive sentences are imposed, the judge must go on to apply the principle of totality and consider whether the cumulative effect of the sentence is "unduly long or harsh". Application of the principle of totality has been described as taking "one last look" at the sentence to determine if it is just and appropriate… .
> >
> > [67] In determining whether a sentence is unduly long or harsh, a sentencing judge must consider all relevant factors, including, but not limited to, the number, gravity and circumstances of the offences involved, the offender's moral culpability, the principle of parity, the harm done to the victim(s), and the offender's age, criminal record and personal circumstances, including his prospects for rehabilitation… .

> [68] If a judge concludes a sentence is "unduly long or harsh", then the sentence must be adjusted.
>
> [69] A number of different approaches have been taken to adjust a sentence so that it complies with the principle of totality: sentences that would normally be consecutive have been made concurrent; individual sentences have been made shorter; or a single concurrent term has been imposed for some or all offences… .
>
> [70] This Court has indicated that the preferable way to adjust a sentence to comply with the principle of totality is by converting consecutive sentences into concurrent ones. That approach has the advantage of maintaining the original individual sentence imposed while, at the same time, reducing the cumulative sentence…
>
> (Citations omitted)

[70] As noted in this passage, after determining the appropriate sentence for each individual offence, a sentencing judge must next decide whether the individual sentences should be served concurrently or consecutively. In *Chicoine*, Ryan-Froslie J.A. explained that, generally, consecutive sentences should be imposed for different offences unless there is a valid reason not to do so (at para 93). Valid reasons for the imposition of concurrent sentences for individual offences include where multiple offences are committed as part of a single enterprise or transaction and where the imposition of concurrent sentences is necessary to avoid an overall sentence that is unduly long or harsh (at para 94).

[71] However, even where a nexus exists that might justify the imposition of concurrent sentences, a court may properly refuse to impose concurrent sentences where offences "constitute the invasion of different legally-protected interests or where there are multiple victims" (*Chicoine* at para 95). Generally speaking, and subject to considerations of totality, this means that in cases involving multiple offences committed against multiple victims, it may be more appropriate to impose consecutive sentences, even where the offences are committed over a short time span (*McLean* [2016 SKCA 93] at para 54).

…

[73] In applying the totality principle, courts must also be mindful of the effect of mandatory minimum sentences. Even though a sentencing judge is bound to apply a mandatory minimum sentence, absent a finding that it is unconstitutional (*R v Nasogaluak*, 2010 SCC 6 at para 45, [2010] 1 SCR 206), totality and proportionality must operate in tandem where multiple offences carrying mandatory minimum penalties are involved. While courts are not free to simply disregard

> applicable mandatory minimum sentences, the cumulative sentence imposed for multiple offences must always respect the fundamental principle of proportionality (see, for example: *R v Khawaja*, 2012 SCC 69 at para 126, [2012] 3 SCR 555; *R v S.C.*, 2019 ONCA 199 at para 17, 145 OR (3d) 711; *R v Stauffer*, 2007 BCCA 7 at paras 43–45, 234 BCAC 210; *R v Parry*, 2012 ONCA 171 at para 23, 289 OAC 201; *R v Clarke*, 2021 NLCA 8 at paras 68–72; *R v Arafa*, 2009 ABCA 412 at paras 11–13, 469 AR 144).
>
> …
>
> [78] Having determined that the combined sentence was "unduly long and harsh and not proportionate" (at para 139), the sentencing judge instructed herself to determine the extent to which the combined sentence should be reduced to comply with the totality principle. She asked herself whether that would best be accomplished, in this case, by making one or more of the sentences concurrent with others, or by reducing the length of any individual sentence(s). […]

[102] Generally, offences that are so closely linked to each other as to constitute a single criminal adventure may, but are not required to, receive concurrent sentences while other offences are often imposed consecutively.

[103] Once an appropriate sentence is determined, the totality principle can be achieved both by imposing concurrent sentences and adjusting consecutive sentences while remaining mindful of the primary sentencing objectives of denunciation and deterrence.

Custodial Sentence

[104] Given the seriousness of these offences, the young age of the victim, A.R.'s position of authority, and the harm caused to the victim and the community, along with A.R.'s high moral blameworthiness, a significant sentence is required to meet the principles of denunciation and deterrence, even when these principles are balanced with the other demands of finding an appropriate sentence.

[105] I am of the view that the global sentence proposed by the Crown is appropriate in these circumstances, including the proposed sentence for each of the charges. This would result in a sentence of 11 years 6 months. However, I also accept

that there must be some adjustment under the totality principle to ensure the sentence is not unduly long or harsh.

[106] While I accept the Crown's position on the total sentence, I intend to adopt the approach suggested by the Saskatchewan Court of Appeal in *L.T.N.* To reflect the seriousness of sexual offences against children, I prefer to maintain the individual sentence imposed for each of the offences and adjust the totality of the sentence by converting consecutive sentences into concurrent ones.

[107] Not only does this adjustment account for the totality principle, but it also reflects consideration of the mitigating factors raised such as A.R.'s dysfunctional youth, early sexualization, distorted perceptions of healthy relationships, disconnection from her biological father and her own victimization.

[108] Counsel also agree that a judicial stay of proceedings should be entered on the conviction for sexual assault on the basis of *R v Kienapple*, [1975] 1 SCR 729. The convictions for sexual assault and sexual interference are founded on the same facts and legal basis. On this basis, I direct a judicial stay on Count 1 of the Indictment, being sexual assault contrary to s. 271 of the *Criminal Code*.

[109] Based on all of the above considerations, I conclude that a just and appropriate sentence on the offences for which I convicted A.R. is as follows:

a. Count 1: I enter a judicial stay on this Count;

b. Count 3: 60 months;

c. Count 5: 36 months concurrent to Count 6;

d. Count 6: 36 months consecutive to Count 3 and concurrent to Count 5;

e. Count 7: 24 months concurrent to Count 3; and

f. Count 8: 10 months consecutive to Count 3

[110] In addition, A.R. entered guilty pleas to two counts on Information 991257644. To coordinate sentencing on all matters, I accepted those pleas in my *ex officio* capacity as a judge of the Provincial Court, pursuant to s. 2-7 of *The King's Bench Act,* SS 2023, c 28:

> **2-7** Each judge is, by virtue of that office, a coroner, a justice of the peace and a judge of the Provincial Court, and is deemed to have been appointed to each of those offices.

[111] On Information 991257664, I impose the following sentence:

a. Count 1: 1 month consecutive to Count 3 of the Indictment;

b. Count 4: 1 month concurrent; and

c. Counts 2 and 3 are stayed.

[112] Leading up to sentencing, A.R. has been in custody for 126 actual days. In accordance with the reasoning in *R v Summers*, 2014 SCC 26, [2014] 1 SCR 575, this remand credit should be applied at the rate of 1:1.5, or 189 days.

[113] The aggregate sentence is 8 years 11 months or 3,255 days, less remand credit of 189 days leaves a net sentence of 3,066 days.

Prohibition Order

[114] Writing for the majority of the Supreme Court in *R v K.R.J.*, 2016 SCC 31, [2016] 1 SCR 906, Karakatsanis J. observed that "[t]he legislative history, judicial interpretation, and design of s. 161 all confirm that the section has an overarching protective function: to shield children from sexual violence" (at para. 44). She went on to say that orders under s. 161 require an evidentiary basis, and that they should be "carefully tailored to the circumstances of the particular offender" and crafted so as to "address the nature and degree of risk that a sexual offender poses to children once released into the community" (at para. 47).

[115] Imposing a prohibition order under s. 161 of the *Criminal Code* is discretionary. There must be an evidentiary basis to conclude A.R. poses a risk to children and that the terms of a prohibition order are a reasonable attempt to minimize that risk. Although this type of prohibition is a form of protection, it is also a form of punishment that can be incorporated with other sanctions upon certain convictions. Even though a prohibition order is imposed at sentencing, an offender has the right to vary to apply the terms of that order pursuant to s. 161(3) of the *Criminal Code*.

[116] In this case, there are a number of circumstances that are relevant in considering whether it is appropriate to impose a prohibition order under s. 161. The victim was a very young child at the time of the offences and was the oldest of A.R.'s daughters. The victim was extremely vulnerable as the offender is her mother and was therefore in a position of trust over her. The offending occurred over a 15-month period. While there is no prior criminal record, the offender's attitude, limited remorse and lack of insight raise concerns about the risk she would pose in the community.

[117] Counsel for A.R. raises concerns with two specific conditions proposed by the Crown. First, defence counsel suggests the condition that A.R. not subscribe to, possess, access or maintain any peer-to-peer (P2P) or similar file sharing program is problematic. P2P file sharing programs are applications that allow users to share and download files directly between their computers without the need for a central server. These programs connect individual computers to a network where files can be shared directly among users. While P2P programs are often used for sharing child pornography, there are other uses in daily life, with defence counsel pointing to employment or housing applications as examples.

[118] Additionally, defence counsel suggests the restriction on the possession, access, utilization or maintenance of encryption capable software is problematic, noting that many programs use encryption software without the user even being aware, such

as through the use of emails or messaging.

[119] Defence counsel proposes that A.R.'s agreement to provide her device and passcode up to three times per month renders these conditions unnecessary.

[120] The recent decision of *R v Howitt*, 2024 SKCA 51, provides the following guidance on imposing an order under s. 161:

> [33] In determining the appropriate length of the order and the scope of the conditions, I bear in mind the purpose of s. 161, which is protective in nature. I also consider the guidance from *K.R.J.* concerning the need to tailor the order to address the nature and degree of the specific risk Mr. Howitt poses to children once he is released in the community (at para 47). In that vein, the scope and duration of the order should be informed by such factors as the nature and extent of the risk, considered in light of the circumstances particular to Mr. Howitt, the pool of potential victims, the duration of the sentence, Mr. Howitt's age upon release into the community, and his prospects for rehabilitation (*R.J.H.* [2021 BCCA 54] at para 19). In other words, the duration of the order and the nature of its conditions must be connected to the circumstances of the offence and Mr. Howitt's personal level of risk (see: *M.C.* [2020 ONCA 510] at para 47).
>
> [34] Having regard to the circumstances of the offence and the manner in which it was committed, Mr. Howitt's age, the length of his sentence, his prospects for rehabilitation and the other evidence concerning his risk factors, I am satisfied that the appropriate length of the order is a period of two rather than three years. In this context I note, among other things, that the offence was committed in 2017, and that Mr. Howitt has demonstrated a willingness to participate in measures designed to address his risk factors. Further, bearing those same things in mind, I am not persuaded that conditions that prohibit him from attending places like parks, swimming areas and community centres, or conditions that prohibit him entirely from having contact with persons under 16 are appropriate, as they are not reasonably connected to the circumstances of his offence or his risk factors. On the other hand, conditions prohibiting him from attending within a certain distance of the complainant's residence or place of employment, prohibiting him from holding employment or volunteering in situations that would put him in a position of trust or authority over a person under the age of 16, and prohibiting him from using the internet for certain specific purposes, are all reasonable measures, as there is a nexus between such conduct, the circumstances of his offence, and the identified risk factors.

[121] I share some of the concerns raised by defence counsel. It is a challenge

to keep up with the way in which technology is used, particularly when it is so integral in everyday life. However, A.R.'s pattern of using technology in her offences is significant – as is her testimony that she would delete apps after use to avoid detection of her online activities by her partner. However, in my view, the significant restrictions imposed on A.R.'s use of the internet and technology, including the requirement of supervision or for limited purposes through the prohibition order, will provide adequate protection.

[122] The nature and circumstances of A.R.'s offences and the information set out in the PSR provide an evidentiary basis to conclude that she poses a risk to children. Although A.R. continues to deny these offences, the evidence demonstrates that she does pose a risk to children and that this risk extends to her access to children as well as her use of online social media platforms and the internet.

[123] I am satisfied that imposing conditions that are aimed at restricting her opportunities to have contact with adults with a sexual interest in children or with children themselves would be a reasonable measure to attempt to minimize the risk her conduct has created. Further, given her history of non-compliance and her habitual deleting of the apps she used to commit her offences, an increased degree of monitoring is entirely appropriate.

[124] The nature, seriousness and extent of A.R.'s offending behaviour indicates that a prohibition order is appropriate, as she poses a risk of future harm to children. The PSR includes a Risk Assessment which places her as a moderate risk to re-offend. She has not yet had the benefit of any treatment. Balancing all of these factors, I find that a prohibition order for a period of 15 years following release from custody is appropriate. However, I have tailored the conditions to address the concerns identified by defence counsel and I have not included the proposed condition restricting all P2P access given the other highly restrictive conditions imposed.

[125] In addition to the custodial sentence, I impose a prohibition under s. 161(1) of the *Criminal Code*, prohibiting A.R. from:

a. Attending a public park or public swimming area where persons under the age of 16 years are present or can reasonably be expected to be present, or a daycare centre, schoolyard, playground, or community centre except in the physical presence of a sober adult who is aware of her convictions;

b. Being at the residence, place of employment, or place of education of the victim;

c. Seeking, obtaining, or continuing 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 a person under the age of 16 years;

d. Having any contact, including communication by any means, with a person who is under the age of 16, unless the offender does so under the supervision of a person whom the Court considers appropriate except with the consent of the parent/guardian of the child who is aware of these convictions;

e. Using the internet or other digital network to:

   i. Access any content that violates the law;

   ii. Access any pornography;

   iii. Communicate or attempt to communicate with any persons regarding any person who is, or represented as being, under the age of 16 years, through a social network website, including but

not limited to Facebook, Twitter, Instagram, Tinder, Snapchat, Kik, WhatsApp, Craigslist or any other instant messaging service or chat room except for immediate family members; and

iv. Not to possess, access or utilize any software that is specifically for the purpose of encryption.

f. You may use the internet or other digital network only in the following circumstances:

i. In the immediate presence of a person approved of by the Court;

ii. During lawful employment, not including self-employment, with the circumstances of employment approved in advance in writing by the Court;

iii. For the sole purpose of paying bills, banking, searching for or applying for employment or housing, or communicating with a government agency; or

iv. As approved in advance in writing by the Court.

g. You must provide the device and any passcode used to lock any device you use or possess to any peace officer, upon request, in order for the peace officer to monitor your compliance with this order, up to three times per calendar month.

Ancillary Orders

[126] A number of additional ancillary orders also are required:

a. As a primary designated offence pursuant to s. 487.04 of the *Criminal Code*, there will be an order in Form 5.03 under s. 487.051(1)

authorizing the taking of the number of samples of bodily substances that are reasonably required for the purposes of DNA analysis.

b. Further pursuant to s. 490.013(2)(b) of the *Criminal Code* in Form 52, A.R. shall comply with the *Sex Offender Information Registration Act*, SC 2004, c 10, for a period of 20 years.

c. Pursuant to s. 109 of the *Criminal Code*, A.R. is prohibited from possessing any firearm, other than a prohibited firearm or restricted firearm, and any crossbow, restricted weapon, ammunition and explosive substance for 10 years. She is also prohibited from possessing any prohibited firearm, restricted firearm, prohibited weapon, prohibited device and prohibited ammunition for life.

d. Pursuant to s. 743.21, I also order that A.R. is prohibited from communicating directly or indirectly during the custodial period of her sentence with the victim or the two younger siblings of the victim, which names shall be specified in the Order.

[127] Requiring A.R.'s compliance with the *SOIRA* includes consideration of the recently amended provisions of the *Criminal Code*. Those sections now state:

> **490.012 (1)** Subject to subsection (5), when a court imposes a sentence on a person for a designated offence, it shall make an order in Form 52 requiring the person to comply with the *Sex Offender Information Registration Act* if
>
> **(a)** the designated offence was prosecuted by indictment;
>
> **(b)** the sentence for the designated offence is a term of imprisonment of two years or more; and
>
> **(c)** the victim of the designated offence is under the age of 18 years.
>
> **(2)** Subject to subsection (5), when a court imposes a sentence on a person for a designated offence, it shall make an order in Form 52 requiring the person to comply with the *Sex Offender Information*

Registration Act if the prosecutor establishes that, before or after the coming into force of paragraphs (a) and (b), the person

(a) was previously convicted of a primary offence or previously convicted under section 130 of the *National Defence Act* in respect of a primary offence; or

(b) is or was, as a result of a conviction, subject to an order or obligation under this or another Act of Parliament to comply with the *Sex Offender Information Registration Act*.

…

(4) In determining whether to make an order under subsection (3) in respect of a person, the court shall consider

(a) the nature and seriousness of the designated offence;

(b) the victim's age and other personal characteristics;

(c) the nature and circumstances of the relationship between the person and the victim;

(d) the personal characteristics and circumstances of the person;

(e) the person's criminal history, including the age at which they previously committed any offence and the length of time for which they have been at liberty without committing an offence;

(f) the opinions of experts who have examined the person; and

(g) any other factors that the court considers relevant.

…

490.013 (1) An order made under section 490.012 begins on the day on which it is made.

(2) An order made under subsection 490.012(1) or (3)

(a) subject to subsections (3) and (5), ends 10 years after it was made if the offence in connection with which it was made was prosecuted summarily or if the maximum term of imprisonment for the offence is two or five years;

(b) subject to subsections (3) and (5), ends 20 years after it was made if the maximum term of imprisonment for the offence is 10 or 14 years; and

(c) applies for life if the maximum term of imprisonment for the offence is life.

[128] Offences committed under s. 151 (sexual interference) and s. 163.1 (child pornography) are primary designated offences. The offences were prosecuted by

indictment. A sentence of over 2 years is being imposed. The victim was under the age of 18 years. The maximum term of imprisonment is 14 years. In this decision, I have addressed the required considerations set out in s. 490.012(4). Given the conclusions at trial and the circumstances of this case, the appropriate term for a *SOIRA* order under s. 490.012 of the *Criminal Code* is 20 years.

J.
N.D. CROOKS