IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *R. v. D.K.M.,*
2024 BCSC 1126

Date: 20240619
Docket: 36409-2
Registry: Fort St. John

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Rex

v.

D.K.M.

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Before: The Honourable Mr. Justice Walker

Oral Reasons for Sentence

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Counsel for the Accused:	E.K. Jones (March 19-20, 2024)
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Places and Dates of Hearing:	Fort St. John, B.C. March 19-20, 2024
	Prince George, B.C. June 18, 2024
Place and Date of Sentence:	Prince George, B.C. June 19, 2024

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THE COURT:

Introduction

[1] On August 21, 2023, I convicted Mr. M. on four counts of invitation to sexual touching relating to three of his granddaughters, C.M., C. (L.) M., and K.M., contrary to s. 152 of the *Criminal Code*, R.S.C. 1985, c. C-46, and one count of bestiality relating to K.M., contrary to s. 160(3). My oral reasons for judgment concerning Mr. M.'s conviction are indexed at 2023 BCSC 1467 ("Conviction Reasons").

[2] These reasons address my determination of the appropriate and fit sentence to impose, following sentencing submissions made yesterday, June 18, 2024. Sentencing submissions were delayed to allow for the preparation of a pre-sentence report and a psychological assessment (and report) concerning Mr. M. Although the psychological assessment report was completed on December 6, 2023, the pre-sentence report was not completed until January 23, 2024; both reports were only provided to me in the spring of this year. Since then, sentencing was adjourned following Mr. M.'s failure to show at his prior scheduled sentencing hearing and to accommodate the schedules of his new defence counsel and Crown counsel.

Circumstances of the Offences

[3] The circumstances of the offences for which Mr. M. was convicted are described in detail in the Conviction Reasons. By way of summary, Mr. M., who is 79 years old, engaged in separate incidents of invitation to sexual touching with his granddaughters and one incident involving bestiality with K.M. when they were young children.

C.M.

[4] In respect of C.M., Mr. M.'s conviction is on count 1 (a s. 152 offence). I found that while she stopped for a visit at her grandparents' (mobile) home for a visit, when she was around nine years old, Mr. M., who was alone at the time, took C.M. into his bedroom, turned on the television, and then left C.M. there to watch a sexually explicit video. C.M., who was scared to leave for fear of what her grandfather would

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do if she left right away, hid under the bed covers for approximately five to 10 minutes, and then walked out of the bedroom, and into a hallway leading into the kitchen. At that point, she saw her grandfather sitting on a chair in the kitchen, masturbating. The kitchen adjoined the living room and was in plain view as there were no walls separating the two rooms. The only way for C.M. to get to the living room was to walk directly past Mr. M., which she did. As she walked past Mr. M., he said to her, words to the effect of “now you know what to do, you can do it for me.” C.M. continued walking past her grandfather, into the living room, where she sat down and tried to concentrate on watching the television. She avoided eye contact with Mr. M. as best she could, all while Mr. M. was talking to her, asking her questions such as, if she had ever seen a man’s penis before, including her father’s, to which she said “no”. Once Mr. M. finished masturbating, he pulled his pants up, and began to walk around the kitchen counters. Too scared to say anything while Mr. M. was masturbating, let alone leave at that point for fear of what her grandfather might do as she would have to walk past him to get to the door leading outside, once he had stopped, C.M. thought up an excuse to leave, telling Mr. M. she needed to get home.

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C. (L.) M.

[5] In respect of C. (L.) M., Mr. M.’s conviction is on count 3 (also a s. 152 offence) and concerns an incident when C. (L.) M. was approximately four years old. While staying with her grandparents, C.(L.) M. walked into her grandparents’ home from the outside, she observed Mr. M. whom she thought had just come out of the shower. He was wearing a bathrobe and was sitting on the living room couch, with his feet on the floor, slightly spread apart. She saw Mr. M. reach under his robe, pull it back, and begin rubbing his penis in an up-and-down motion. Mr. M. asked C. (L.) M., who was standing a few feet away on the opposite side of the room, to come closer, to come and feel it, i.e., his penis, and asked her if she knew what it was. C. (L.) M. told him “no” and walked away, outside to the yard.

K.M.

[6] In respect of K.M., Mr. M.'s conviction is on counts 4, 5, and 6, which arise from two separate incidents.

[7] The first incident relates to counts 4 and 6 (ss. 152 and 160(3) offences) and occurred when K.M. was in grade 5 and either 10 or 11 years old. She was with Mr. M. checking on the well-being of her family's pregnant horse who was in the midst of foaling. At one point, K.M. walked with Mr. M. into his motor home/trailer which was parked outside a work shop located at her parents' home. Once inside, she walked over to and sat on a love-seat couch facing the entrance door. Mr. M. sat down on a reclining chair close by, three to four feet away. While sitting, he asked K.M. repeatedly to take her pants off without telling her why. She ultimately complied.

[8] After she removed her pants and her underwear, Mr. M. asked her to touch her vagina. He instructed her to use her two fingers and to rub her vagina in a circular motion, and she complied, all while Mr. M. watched as he directed her on what to do and how to do it. He told her to touch her clitoris area as well. While K.M. was doing what Mr. M. instructed her to do, he walked over to the refrigerator and took out a tub of margarine, and gave it to her (he tossed it on to her stomach). He told her to take some out of the container and apply it to her vagina (using the words, "lube it up"), which she did. Mr. M. then put his small dog onto the couch where K.M. was laying down, and used his arms to guide his dog closer to K.M. to smell the margarine. He used his arms to prevent his dog from leaving the couch. Mr. M.'s dog then licked some of the margarine off of K.M.'s vagina, while Mr. M. sat on the edge of the couch and watched. The incident lasted approximately five minutes, after which Mr. M. and K.M. exited his motor home/trailer.

[9] The second incident, related to count 5 (a s. 152 offence), occurred a few days later in the boot room of K.M.'s parents' home. While K.M. was sitting on a bench, Mr. M. walked in, closed the door (the other door to the room was already closed), and asked K.M. to remove her pants. He repeated his request seven to

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eight times, telling K.M., “You’ve done it once, why does it hurt to do it again”, and “Come on, take your pants off, you’ve done it once, why not do it again?” K.M. understood that Mr. M. wanted to watch her rub her vagina again. She eventually acquiesced, lowered her pants and underwear, and rubbed her vagina and clitoris in front of her grandfather for approximately five minutes.

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Circumstances of the Offender

[10] As stated at the outset, Mr. M. is 79 years old. He was born in Saskatchewan and raised on a farm by his grandparents. He is not Indigenous. According to the pre-sentence report writer, Mr. M. reported a “normal upbringing with no notable abuses or hardships” and has lived a “normal childhood” and “normal adult life”. He spent his childhood and early teenage years living on his grandparents’ farm in Saskatchewan. He left school after completing grade eight to work, and his work history is in the logging, trucking, heavy equipment, and oil industries. He later obtained a grade 10 equivalency in order to enrol in a sheet metal program, and in due course successfully completed it and obtained the requisite certification. He has also enjoyed working with horses. He has resided in a variety of locations in Western Canada and ultimately moved with his wife to British Columbia in the 1960s. Mr. M. is now retired (at the time of his conviction, he had been retired for approximately one year) and is currently living off of his savings and his pension. Mr. M. expressed concern about his depleted finances on account of his legal bills incurred to defend the charges in this case. He would like to relocate to the Kamloops region with his wife to be closer to his family. He has no criminal record and no reported history of traumatic experiences.

[11] According to Mr. M.’s bail supervisor, Mr. M. was compliant with the terms of his release order and reported as directed until he failed to attend his sentencing hearing. Mr. M.’s bail was revoked as a result of that and he has been in custody since March 19, 2024.

[12] Mr. M. is married (for 61 years), with five children, three of whom are boys (two are deceased), with multiple grandchildren. One of his deceased children was the father of C.M., C. (L.) M., and K.M.

[13] According to Mr. M., he is ordinarily a very happy person and has been most of his life. He does not suffer from any mental, psychological, or psychiatric illness or distress.

[14] Mr. M. acknowledged having a temper and, he said, “lets his hand fly from time to time”, explaining that he has been in dozens of fights throughout his life, with the last one being approximately five years ago. He said he spent a couple of hours in police lockup when younger on account of fighting. He also acknowledged that some of his triggers to fighting include “people that lip him off”. He says he copes with stressful situations by talking with his wife or “having whisky” (and admitted to occasional problematic past alcohol abuse that has led to alcohol-fueled altercations and fights with friends). He denied recreational drug use.

[15] Mr. M. advised the consultant psychologist (“Consultant Psychologist”) from BC Mental Health & Substance Use Services, who prepared a report dated December 6, 2023 (“Psychological Assessment Report”), that he has a habit of drinking two beers a night during the summer months and consuming mostly beer and some liquor on the weekends. He claimed to be able to “shut down” his consumption of alcohol at will and denied to the Consultant Psychologist any problems with overindulgence. He also admitted to trying marihuana once and said he did not enjoy it.

[16] Mr. M. was not inclined to share much about his sexual history with the pre-sentence report writer, except to say that he has no deviant sexual interests, has had a “normal” number of sexual partners throughout his life with satisfactory sexual interactions, advising that he never bought sexual services nor used sex as a coping mechanism, and first accessed pornographic material in his fifties.

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[17] However, Mr. M. did advise the Consultant Psychologist that he has had a total of approximately 10 sexual partners. He also denied to the Consultant Psychologist that he paid for sexual services or that he engaged extensively in other sexualized forms of behaviour such as attending strip clubs or seeking diverse sexual experiences. He admitted to viewing pornography on the internet “a few times” but denied personally accessing it. He acknowledged possessing pornographic videos which he said he sometimes viewed with his wife as a component of their sexual interaction. He denied accessing pornography extensively or habitually.

[18] Mr. M. also reports suffering from declining health with medical and physical health issues such as high blood pressure, type II diabetes, high cholesterol, anemia, Shingles, nail fungus, and chronic back and hip pain due to nerve damage in his spine. He has suffered heart attacks. He currently takes medication for hypertension, cholesterol control, type II diabetes, and occasionally an analgesic prescribed by his physician (on account of spinal injuries he sustained when he was 12 years old, followed by another injury when he was 15 to 16 years old, and later, from work injuries). He also suffered fractured bones in his hands from fighting or from harness racing. He deliberately avoids seeing doctors; his medical issues were revealed from tests conducted as part of his efforts to obtain his class one driver’s license. Mr. M. reports having difficulty receiving adequate medical attention and his normal medications while incarcerated and has submitted institutional complaints describing those difficulties.

[19] Up until the time that his bail was revoked in the spring of this year, Mr. M. lived in Fort St. John in a mobile home he has owned for six years. He advises that his marriage is good, but at the same time, would not provide any details with the pre-sentence report writer apart from telling her that she would need to call his wife to ask permission to speak with her. However, when the pre-sentence report writer did reach out to speak with Mrs. M., Mr. M. told the report writer that they no longer wished to speak with her to provide collateral information. Mr. M. told her that he did not care if the result meant there was no supporting collaterals to confirm the

information he provided, that he did not want her speaking with his wife and that his wife was not interested in speaking with her.

[20] Mr. M. told the pre-sentence report writer that with the exception of his daughter-in-law, who is the mother of the C.M., C. (L.) M., and K.M., his relationship with his family is good, and in particular his relationship with his children is “close”. He said that aside from the victims and their mother, the rest of his family is supportive, to the extent that they share his belief that the offences for which he was convicted are based on “lies”.

[21] In this respect, Mr. M. will not take any responsibility or accountability for the offences of which he has been convicted. He denied all circumstances surrounding those offences to the pre-sentence report writer and the Consultant Psychologist. Mr. M. blames the mother of the victims and his oldest granddaughter (just as he did at trial without any evidence to support his assertion) for conspiring against him as a form of payback to ruin his life. Mr. M. told the author of the pre-sentence report that he believes the payback relates to his calling his daughter-in-law a “rotten bitch” approximately six years ago. He believes the younger victims have been “brainwashed” by their mother and oldest sibling. To the Consultant Psychologist, he speculated that the victims’ mother, N.M., made up the incidents out of fear that Mr. M. would “lay claim to part or all of the funds flowing from [her late husband’s] estate settlement”, adding, as set out in the Psychological Assessment Report, “He declared that he is ‘not ashamed of anything I’ve done’ and noted that his sexual interest is restricted to adult heterosexual stimuli.”

[22] Mr. M. is prepared to complete programming and treatment for sexually motivated offenders, but told the author of the pre-sentence report that he will only do so if he is forced to do so by court order. He is adamant that he does not need counselling and, in this respect, he is treatment-resistant. He does not believe in counselling and treatment.

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[23] In addition to his interview with the Consultant Psychologist, Mr. M. underwent objective personality and psychopathology testing (carried out on November 17, 2023).

[24] The key aspects of Mr. M.'s test results described in the Psychological Assessment Report are summarized below:

(a) Mr. M. tends to portray himself as relatively free of common shortcomings that most people will admit to, which may denote limited personal insight, repression, and/or denial, and while his test results were determined to be valid, they potentially do not provide an entirely accurate representation of any underlying personality and behavioural difficulties;

(b) Mr. M.'s defensive responses to personality assessment inventory questions suggested significant suspiciousness and hostility in his relations to others;

(c) he is likely to be quick to believe that he is being treated inequitably and to hold grudges;

(d) he is pragmatic and independent in his interpersonal relationships, irritable and impatient, and unlikely to come across as a warm and friendly person;

(e) Mr. M. is generally satisfied with himself in spite of some possible low mood due to his physical condition, and as a result, his interest and motivation for treatment is below average in comparison to others who are currently not being seen in a therapeutic setting;

(f) Mr. M. is viewed to be a low risk to be charged or convicted for future sexual offences and at low risk of sexual recidivism;

(g) out of 100 individuals with the same risk profile as Mr. M. who have been convicted of sexually motivated offences, 2.8 would be expected to reoffend sexually after three to five years in the community; and

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(h) he was assessed as low in terms of criminogenic needs and thus, viewed to be at a low level, Level I, for supervision and intervention.

[25] From these results and his interview, the Consultant Psychologist provided the following assessment:

> Based on the information on file and Mr. [M.'s] presentation, the impression is that of an opportunistic, exploitative, and hedonistic pattern of sexual offending, possibly catalyzed by alcohol use, by virtue of which he sought variegated and gratuitous sexual stimulation with girls to whom he had ready access and over whom he could exert coercion and control. Although the presence of non-exclusive pedophilic interest in underage females cannot be definitively excluded at this juncture, there is no indication that at this stage of his life Mr. [M.] is likely to present a substantive risk for escalation to more actively predatory form of sexual misconduct. As noted above, based on the present assessment, he is at very low risk for sexual recidivism. It would nevertheless be prudent for him to eschew unsupervised interaction with children, especially if he has partaken of alcohol.

[26] The Consultant Psychologist also provided these further opinions with recommendations:

(a) although Mr. M.'s sexual recidivistic risk level is judged to be low, his denial and unwillingness to accept responsibility may slightly increase his risk;

(b) Mr. M.'s risk would be further reduced if he were not to be alone with females under the age of 16;

(c) incarceration is not considered to be a protective necessity;

(d) if a custodial sentence is imposed, given Mr. M.'s age, lack of previous criminality, and his health concerns, an expedited classification to a lower security setting may be considered appropriate;

(e) Mr. M. is sufficiently experienced and resilient to manage himself in a majority of circumstances he might find himself while in custody;

(f) whether a custodial or community-based sentence, Mr. M. may be an appropriate candidate, albeit on a low-priority basis, for and would benefit

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from the Forensic Sex Offender Program, where his denial and other salient factors could be addressed;

(g) Mr. M. would also benefit from a suitably sustained period of reporting and supervision, with an associated requirement to attend all programs and services proposed by his probation officer; and

(h) given his age and personality, Mr. M. should be supervised by a mature probation officer who has experience managing similar offenders.

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[27] Support letters from Mr. M.'s family were tendered by the defence to support the defence's submissions regarding community support for Mr. M. in the face of his convictions, the current effect of his incarceration on him and his wife of approximately 61 years, and his past contributions to various family members.

Victim Impact

[28] The offences of which Mr. M. was convicted are historical as the victims are now adults. When the offences occurred, the victims, whose ages were four, nine, and between 10-11, and their parents enjoyed a close family relationship with Mr. M. and his spouse. Given their close geographical proximity, they spent much time together for frequent family events, meals, camping trips and other outdoor recreational activities and outings. As the defence acknowledges, prior to Mr. M. being charged, they were a tight-knit family. The nature and extent of relationship of trust between Mr. M. and his granddaughters were significant. So is the degree of harm they continue to suffer (including ongoing psychological harm including anxiety and distress, loss of self-esteem, as well as trust, relationship and intimacy issues). Not only has the victims' relationship with their grandparents been wholly fractured, it is also clear from the letters of support filed for Mr. M., so has their relationship with many members of his family. My summary of the effects of the offences on Mr. M.'s granddaughters, discussed below, comes from their victim impact statements which they read out during the sentencing hearing, information from their mother, and from the pre-sentence report writer.

C.M.

[29] The offence has adversely impacted C.M.'s life and has fractured her once close family. C.M., now approximately 26 years old, continues to feel traumatized and broken. She still struggles daily with feeling broken, constant anxiety, depression, and shattered self-esteem. She developed unhealthy coping mechanisms (such as disordered eating) leading to undue weight gain to cope with Mr. M.'s behaviour. She recalls isolating herself and suffering from anxiety as a child, moving from being a sweet, happy, carefree girl to a person suffering from hate, worried around men and unable to express and control her emotions, quick to anger, as well as being mean and at times, violent, often belittling and bullying her family (including her sisters whom she did not realize at the time were also victims), and her friends, rupturing many relationships. She continues to feel shame for the way she treated her family and friends, and still suffers from nightmares and sleepless nights. She also suffers from feelings of disgust when witnessing love or affection shown by any grandparent towards a grandchild.

C. (L.) M.

[30] C. (L.) M. is now approximately 24 years old and continues to suffer from problems with general anxiety. Growing up, she could not understand why she suffered panic attacks and had uncontrollable fear of "the simplest of things" such as leaving home and being away from her parents, to the point of her throwing fits at the thought of leaving home, all of which greatly impeded her ability to enjoy social interactions with friends, sleepovers at friends' homes, and caused her to miss school. Although her fear of being away from her mother (her father died in 2016) has diminished over time, in her victim impact statement she read in court, C. (L.) M. described her ongoing fears and anxiety, her constant worrying about things that may happen to her, her fear of being around men while growing up, and her reluctance to trust people. Her entire life, she said, has been altered by what her grandfather has done to her as well as to her sisters.

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K.M.

[31] K.M., now approximately 20 years old, reported suffering from ongoing adverse effects similar to C.M. and C. (L.) M. She suffers from anger, significant trust issues, and a chronic fear of being one-on-one with people. This fear has adversely affected her intimate relationships with her partner, for which she has sought considerable medical assistance which has not resolved the issue. She is disturbed by her grandfather's abuse of his power over her as a child and grieves the loss of her extended family, many of whom have aligned themselves with Mr. M. She described herself as the "little girl with a spit-fire personality" who changed "so drastically" and "became desensitized to the ugly part of the world." K.M. continues to try to push the events involving Mr. M. to the back of her mind over the years, but is angry at how her grandfather took away "the light that was once in her little girl's eyes". She found the process of reporting about the offences to the police as well as the recounting the incidents leading to Mr. M.'s convictions while testifying during trial retraumatizing as she continues to struggle to move on.

N.M.

[32] The victims' mother, N.M., provided corroborative information to the pre-sentence report writer. N.M. advised that her family was once close with Mr. M. and his wife and family. Mr. M., she advised, often spent time with her daughters. She noticed C.M. struggling with anger management issues, emotional regulation, and substance misuse in her adolescence. C. (L.). M., she said, was also affected and began self-isolating as a child, displaying a short-fuse and quick to anger, and became anti-social amongst her peers. N.M. noticed similar patterns emerging for K.M., such as substance misuse and trust issues with other people.

<u>Positions of the Crown and Defence</u>

[33] The Crown's position is that in these circumstances – where Mr. M. blatantly violated his position of trust by committing sexual offences against his granddaughters at their young and highly vulnerable ages, resulting in their suffering from ongoing serious emotional and psychological harm – an appropriate sentence

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is a total of nine years, comprised as follows: a three-year jail sentence for each of the five counts, with counts 4, 5, and 6 involving K.M. to run concurrently, but consecutive to counts 1 and 3. The Crown also seeks ancillary orders such as a DNA order per s. 487.05(1), a ten-year firearms prohibition order, per s. 109(1)(a); a lifetime *Sex Offender Information Registration Act*, S.C. 2004, c. 10 [*SOIRA*] order per ss. 490.012(1) and 490.013(3) of the *Criminal Code*; and a lifetime s. 161 order with conditions concerning contact with minors. The Crown does not seek a victim surcharge fine in view of the total sentence it seeks and Mr. M.'s financial circumstances now that he is in custody.

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[34] The defence submits that a global sentence of five to six years, apportioned as follows, is a fit sentence: 18-24 months for each of counts 1 and 3, to run consecutively; and 24 months for each of counts 4, 5, and 6, to run concurrently. In response to the Crown's position, and what I took to be an alternative submission, the defence said in oral submissions that if a nine-year total sentence is imposed, it should be reduced to six to seven years on account of the totality principle.

[35] The defence does not dispute the imposition of the DNA and firearms prohibition orders sought by the Crown. It also says that the reasons for sentence and recommendations relating to the sentence should be forwarded to the Correctional Service of Canada per s. 743.2. The defence disagrees that a lifetime *SOIRA* order is required because, it says, s. 490.013(3)(b) does not apply, thus, a 20-year *SOIRA* order is appropriate.

Applicable Sentencing Authorities

[36] The purpose and principles of sentencing are set out in s. 718 of the *Criminal Code* as follows:

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

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

[37] The sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender: s. 718.1 of the *Criminal Code*. When a sentence is imposed for an offence that involves the abuse of children under 18 years old, primary consideration is to the objectives of denunciation and deterrence: s. 718.01 of the *Criminal Code*.

[38] The Supreme Court of Canada points out in *R. v. Friesen*, 2020 SCC 9 that, "Parliament has recognized the profound harm that sexual offences against children cause and has determined that sentences for such offences should increase to match Parliament's view of their gravity. Parliament", the Court said, "has expressed its will by increasing maximum sentences and by prioritizing denunciation and deterrence in sentencing for sexual offences against children": *Friesen* at para. 95. Moreover, the Court said in that case, in light of the wording of s. 718.01 of the *Criminal Code*, courts should give "primary consideration to the objectives of denunciation and deterrence" for offences that involve the abuse of children:

> [101] Parliament's decision to prioritize denunciation and deterrence for offences that involve the abuse of children by enacting s. 718.01 of the *Criminal Code* confirms the need for courts to impose more severe sanctions for sexual offences against children. In 2005, Parliament added s. 718.01 to the *Criminal Code* by enacting Bill C-2. In cases that involve the abuse of a person under the age of 18, s. 718.01 requires the court to give "primary consideration to the objectives of denunciation and deterrence of such conduct" when imposing sentence.

[39] Thus, the protection of children is one of the most basic values of Canadian society. Prioritizing denunciation and deterrence for sexual offences against children is, the Court said, "a reasoned response to the wrongfulness of these offences and the serious harm they cause": *Friesen* at para. 105.

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[40] In terms of the guidance on the length of custodial sentences for sexual offences against children, the Court in *Friesen* said it would be inappropriate "to establish a range or to outline in which circumstances such substantial sentences should be imposed": *Friesen* at para. 114. Judges, the Court said in its reasons, "'must retain the flexibility needed to do justice in individual cases' and to individualize the sentence to the offender who is before them": *Friesen* at para. 114, citing *R. v. D. (D.)* (2002), 58 O.R. (3d) 788, 2002 CanLII 44915 (C.A.) at para. 33.

[41] In *Friesen*, the Court outlined the following factors as relevant to determine an appropriate and fit sentence:

(a) likelihood to reoffend (paras. 122–124);

(b) abuse of position of trust and authority (paras. 125–130);

(c) duration and frequency (paras. 131–133);

(d) age of the victim (paras. 134–136);

(e) degree of physical interference (paras. 137–147); and

(f) the participation of the victim (paras. 148–154).

[42] The Supreme Court of Canada has repeatedly emphasized the value of individualization in sentencing and the offender's personal circumstances when determining a fit sentence: see, e.g., *R. v. Ipeelee*, 2012 SCC 13 at paras. 37–39; *R. v. Pham*, 2013 SCC 15 at paras. 7–8; *R. v. A.H.K.,* 2022 BCSC 1563 at para. 93.

[43] For example, in *Pham*, Justice Wagner (as he then was), said:

> [8] In addition to proportionality, the principle of parity and the correctional imperative of sentence individualization also inform the sentencing process. This Court has repeatedly emphasized the value of individualization in sentencing: *Ipeelee*, at para. 39; *R. v. Wust*, 2000 SCC 18, [2000] 1 S.C.R. 455, at para. 21; *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 92. Consequently, in determining what a fit sentence is, the sentencing judge should take into account any relevant aggravating or mitigating circumstances (s. 718.2(*a*) of the *Criminal Code*), as well as objective and subjective factors related to the offender's personal circumstances.

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[44] Thus, Mr. M.'s personal circumstances, which I have discussed above, are to be considered when determining a fit sentence, with the caveat that they play a reduced role in sentencing for child sexual offences due to the need to prioritize the principles of denunciation and deterrence.

[45] As for the relationship between personal circumstances and mitigating factors, in *R. v. G.J.M.*, 2024 BCCA 82, a case where the offender was convicted of sexual offences involving counts of sexual interference and abuse of his younger half-sister, including conduct involving physical assaults and forcing her to watch him masturbate in front of her, as well as possession of child pornography, the Court of Appeal discussed the impermissible application of personal circumstances to mitigating factors.

[46] In doing so, the Court of Appeal first reviewed the sentencing judge's approach to personal circumstances and their effect on the sentence.

[47] Having relied on the psychologist's report describing the circumstances of the offender, the sentencing judge found that the moral culpability of the offender is "somewhat" reduced by his own childhood experiences with sexual abuse and neglect and by his longstanding and untreated depression: *G.J.M.* at para. 29. The sentencing judge further noted that collateral consequences of the offender, who lost relationships with his immediate and extended family, as well as a long-term girlfriend because of his offending, and is likely to be deported to the Philippines, should be treated as mitigating factors: *G.J.M.* at para. 32. The sentencing judge imposed a sentence of two-years-less-a-day of imprisonment plus three years of probation.

[48] Even though the sentencing judge listed such aggravating factors as the young age of the victim, the degree of physical interference, and the six-year duration of the offence in the section "Application of the Analytical Framework in *Friesen*" (*G.J.M.* at paras. 33–34), the Court of Appeal determined that the sentencing judge allowed the offender's personal circumstances to overwhelm her analysis.

[49] The Court of Appeal distinguished the circumstances of the offender from the cases where mental disabilities of the accused imposed such cognitive limitations that "likely have reduced their moral culpability": *G.J.M.* at paras. 53–57. The court added that "detailed and specific medical evidence is necessary" to establish a link between a mental illness and "offending conduct that attenuates an offender's moral culpability": *G.J.M.* at para. 58, citing *R. v. Nystrom*, 2023 BCCA 232 at para. 22.

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[50] In *G.J.M.,* the Court of Appeal said an offender's personal circumstances play a reduced role in sentencing for child sexual violence offences and attendant moral blameworthiness:

> [52] The extreme wrongfulness and harmfulness of child sexual offences were clearly explained in *Friesen*. As the Court stated, such conduct "is highly morally blameworthy because the offender is or ought to be aware that this action can profoundly harm the child" and offenders "usually have at least some awareness of the profound physical, psychological, and emotional harm that their actions may cause the child": at para. 88. Like all forms of sexual violence, child sexual offences "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": at para. 89. Moreover:
>
>> [90] The fact that the victim is a child increases the offender's degree of responsibility. Put simply, the intentional sexual exploitation and objectification of children is highly morally blameworthy because children are so vulnerable (*R. v. Morrison*, 2019 SCC 15, [2019] 2 S.C.R. 3, at para. 153). As L'Heureux-Dubé J. recognized in *R. v. L.F.W.*, 2000 SCC 6, [2000] 1 S.C.R. 132, "[a]s to moral blameworthiness, the use of a vulnerable child for the sexual gratification of an adult cannot be viewed as anything but a crime demonstrating the worst of intentions" (para. 31, quoting from *R. v. L.F.W.* (1977), 155 Nfld. & P.E.I.R. 115 (N.L.C.A.) at para. 117, per Cameron J.A. ("*L.F.W. (C.A.)*")). Offenders recognize children's particular vulnerability and intentionally exploit it to achieve their selfish desires (*Woodward*, at para. 72) ...
>
> …
>
> [61] Pursuant to s. 718.2(a)(iii) of the *Criminal Code*, the abuse of a position of trust is an aggravating factor for purposes of determining a fit sentence. Breaches of trust are likely to increase the harm done to the victim, and thus the gravity of the offence and the degree of responsibility of the offender. However, as stated in *Friesen*, trust relationships arise in a wide range of circumstances, and are located along a so-called "trust spectrum". As also stated, "[a] child will likely suffer more harms from sexual violence where there is a closer relationship and a higher degree of trust between the

> child and the offender … such as those [situations] involving family members, caregivers, teachers, and doctors, to mention a few": *Friesen* at paras. 125–126.
>
> …
>
> [67] The foregoing errors all tainted the judge's proportionality analysis. As a result, it was unduly skewed in favour of the respondent. Although the judge stated the *Friesen* principles, she failed to apply them, and focussed instead on the respondent's personal circumstances, which overwhelmed her analysis. <u>However, an offender's personal circumstances necessarily play a reduced role in sentencing for child sexual violence due to the need to prioritize the principles of denunciation and deterrence</u>: *Nystrom* at para. 50.
>
> [68] The judge did not prioritize the principles of denunciation and deterrence, as mandated by *Friesen*. Consequently, the sentence she crafted failed to give full effect to the respondent's moral blameworthiness and the profound harmfulness of his multiple egregious crimes.
>
> [Emphasis added]

[51] The Court of Appeal in *G.J.M.* imposed a four-and-one-half-year custodial sentence on the sexual interference counts and a six-month custodial sentence for possession of child pornography.

[52] In addition, the foregoing comments from the Court of Appeal also direct that Mr. M.'s current age and health issues do not affect his moral blameworthiness.

[53] Other examples of the harsher sentences imposed for sexual offences involving children are found in the Court of Appeal's recent decisions in *R. v. C.K.*, 2023 BCCA 468 and *R. v. P.R.J.*, 2023 BCCA 169. In *C.K.*, the Court substituted a conditional sentence of two-years-less-one-day with the sentence of three-and-a-half-years' imprisonment to an offender who pleaded guilty to sexual interference with his younger step-brother contrary to s. 151 of the *Criminal Code*. In *P.R.J.,* the Court similarly allowed appeal and imposed three years' imprisonment instead of a 23-month conditional sentence on a mother found guilty of sexual interference with her eight-year-old child contrary to s. 151.

[54] All of that said, in *R. v. Maligaspe*, 2023 BCCA 466, a case involving sexual assault by the offender against his adult niece, the Court of Appeal, noted that "the weight to be given age and health is related to the length of sentence under consideration". A sentencing judge, the Court said, should generally refrain from

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fixing a sentence "which so greatly exceeds an offender's expected remaining life span that the traditional goals of sentencing, even general deterrence and denunciation, have all but depleted their functional value…": *Maligaspe* at para. 21, citing *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, 1996 CanLII 230 at para. 74. At the same time, the Court said that the senior age of the offender is not a determinative factor in sentencing, "even where there is a risk that an accused may not outlive the time he is required to serve, the compassion that would evoke is not a controlling or decisive factor in deciding on the appropriate sentence. It is one of many factors to be taken into account in sentencing": *Maligaspe* at para. 22, citing *R. v. Shah* (1994), 94 C.C.C. (3d) 45, 1994 CanLII 1290 (B.C.C.A.) at para. 28. The Court allowed the Crown's appeal and increased the sentence on one of the counts to five-and-a-half years despite the fact that the offender was 72 years old at the time of sentencing.

[55] The defence cites *R. v. Swope*, 2015 BCCA 167 (also referred to in *Maligaspe* at para. 21) in support of its submission that Mr. M.'s age and health issues are important factors to take into account even in cases involving sexual offences. However, following *Maligaspe*, though they are factors, they are not "controlling or decisive" factors.

[56] For historical sexual offences against children as in Mr. M.'s case, the Court of Appeal instructs sentencing judges to conduct analysis "with regard to contemporary caselaw" with the caveat not to exceed the maximum sentence in force at the time of the offence: *R. v. R.O.*, 2023 BCCA 65 at para. 49. The Court noted that such cases "often involve an adult coming forward about abuse they suffered as a child that was not disclosed at the time of the offences" likely due to "moral, social and legal landscape at the time": *R.O.* at para. 54. Thus, as the Court of Appeal points out in that case, at para. 55, "It would be contrary to justice and to 'society's deepened understanding of the wrongfulness and harmfulness of sexual violence against children and the far-reaching and on-going harm that it causes' to use the moral, social, and legal standards at the time of the offence uninformed by these considerations at the time of sentencing."

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[57] In this respect, I have determined the fit sentence, as the defence says I should, based on the maximum sentence of 10 years in place for s. 152 offences at the time of the offences occurred of which Mr. M. has been convicted as opposed to the current maximum range of 14 years (the 10-year maximum for the bestiality offence remains the same). I have also considered the *dicta* in *Friesen* and authorities such as the Court of Appeal's decision in *R.O.* at paras. 53–55 and as the defence asked me to, in *R. v. N.S.N.C.*, 2020 BCSC 1843, in relation to the application of the instructions and directions in *Friesen* to historical sexual offences involving children. Ultimately, in respect of this particular issue, I must be guided by these remarks from the Court of Appeal in *R.O.* referred to above.

Aggravating and Mitigating Factors

[58] Aggravating and mitigating factors must also be taken into consideration in determining a fit sentence. Relevant to this case are these factors set out 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,
> >
> > **(ii.1)** evidence that the offender, in committing the offence, abused a person under the age of eighteen years,
> >
> > **(iii)** evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,
> >
> > **(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,
> >
> > …
>
> shall be deemed to be aggravating circumstances;
>
> **(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
>
> **(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…
>
> [Bold in original]

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[59] Aggravating factors in this case are Mr. M.'s violation of the significant trust relationship between himself and his granddaughters; the young age and vulnerability of the victims; the ongoing negative impact of the offences on them; his grooming of the victims in an effort to persuade them to touch him and in the case of K.M., to masturbate in front of him; and the specific instruction Mr. M. gave to K.M. to use margarine while masturbating so as to attract his dog to lick her vaginal area.

[60] Mr. M.'s lack of remorse and continued insistence that the charges against him are the result of concoction by N.M. and C.M. are neutral factors, not aggravating factors, since remorse can only be treated as a mitigating factor: *R. v. Muhammad*, 2004 BCCA 396 at para. 9; *R. v. Taylor*, 2021 BCCA 283 at para. 23.

[61] In terms of mitigating factors, one is the Consultant Psychologist's determination that Mr. M. is at low risk of reoffending, but it is tempered by the recommendation that Mr. M. not be allowed near females under the age of 16 without supervision. I also note the Consultant Psychologist's opinion that Mr. M. presents an opportunistic, exploitative, and hedonistic pattern of sexual offending, possibly catalyzed by alcohol use.

[62] The next mitigating factor is the absence of a criminal record. However, as Justice Ker noted in *R. v. T.A.P*, 2023 BCSC 316, the absence of a criminal record in the circumstances of sexual offending against children should "only be accorded minimal weight": para. 145. Furthermore, the Court of Appeal ruled in *R. v. R.M.*, 2019 BCCA 409, that "the absence of a criminal record may have little significance" when the offenders are found guilty of multiple counts spread out in time over several years: para. 23.

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[63] A possible mitigating factor is Mr. M.'s history of being a productive member of society on account of his ongoing employment throughout his life, although as I discuss below, it is his stable lifestyle that allowed him to gain a position of substantial trust that he abused.

[64] To the extent that Mr. M.'s past compliance with the conditions of his release could be a mitigating factor, Mr. M. failed to attend his sentencing hearing scheduled for March 19, 2024, and as a result, an unendorsed bench warrant was issued and he was taken into custody later that day. The next day, Mr. M.'s then counsel's application to withdraw from the record was granted. The Crown's application to revoke his bail was also heard and granted after Mr. M. had the opportunity to speak with duty counsel. As I noted above, since then Mr. M. has retained new defence counsel.

Range of Sentence

[65] I will first discuss the range set in the caselaw for offences committed contrary to s. 152 of the *Criminal Code*. In addition to case authorities referred to by the Crown and the defence (some of them pre-*Friesen*), I was made aware of other case authorities that I drew to their attention. I summarize all of these cases below.

Section 152 Offences

[66] In *R. v. R.A.J.*, 2010 BCCA 304, the Court of Appeal upheld the global sentence of eight years against the offender convicted of multiple sexual offences against his daughter committed during an eight-year period, beginning when she was seven years old. The impugned acts began as touching and digital penetration of the victim's vagina, and progressed to the offender performing oral sex on her and requiring her to masturbate him to ejaculation. He also attempted anal sex several times and succeeded once: *R.A.J.* at para.16. Finding that the only mitigating factor was the offender's lack of a prior criminal record, the Court of Appeal concluded that the overall sentence of eight years imposed by the trial judge was fit, only adjusting the sentence to reflect those offences to which the rule against multiple convictions applied: *R.A.J.*, at paras. 29–32.

[67] In a more recent case, *R. v. D.N.*, 2018 BCCA 190, the Court of Appeal upheld a sentence of eight years against a stepfather who had committed sexual acts against the victim when she was six and seven years old, and again when she was in grades 6 through 9: *D.N.* at para. 1. The offender made the girl undress and "fondled her genitals"; on one instance, he told the girl to touch his genitals, and on another she laid on top of him while they were both naked: *D.N.* at para. 2. When discussing the sentence, the Court noted that the seriousness of a sexual offence is not dictated by the existence (or non-existence) of penetration: "In cases involving a breach of trust in the context of a child-parent relationship, the primary measure of the offence is the extent to which the offender violated the relationship, the duration of the violation, and the offender's appreciation of that violation as the abusive behaviour continued": *D.N.* at para. 25.

[68] In *R. v. M.P.S.*, 2017 BCCA 397, the Court of Appeal upheld a sentence of eight years against a step-grandfather found guilty of sexual assaults and sexual touching of his step-granddaughters. Over a seven-year period, he engaged in a serious sexual misconduct with one child, who was between 10 and 17 years old during the time. He went from touching to oral sex and partial penile penetration. The other grandchild was the victim of two incidents, involving digital penetration and oral sex, one when she was 13 and one when she was 15: *M.P.S.* at para. 3. Despite health problems and age of the offender, who was 74 at the time of the sentencing, the Court found that a global eight-year sentence was fit as age and health are "but one of many factors to consider in determining the length of the appropriate sentence": *M.P.S.* at paras. 12, 23.

[69] In *R. v. S.S.S.*, 2018 BCSC 2470, the accused, Mr. S., found guilty of multiple sexual offences against his underage granddaughter (sexual assault contrary to s. 271, incest contrary to s. 155(2), sexual interference contrary to s. 151, and invitation to sexual touching contrary to s. 152), was sentenced to seven years in prison. While being in a caregiver role, Mr. S. started abusing his granddaughter when she was six years old. The offences lasted for 10 years and involved touching of the girl's breasts and vaginal area, progressing to digital penetration, performing

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oral sex on her and having her touch his penis and perform oral sex on him, rubbing or pressing his penis on the outside of her vagina and, at least once, completing an act of sexual intercourse with the child: *S.S.S*, at para 10. Mr. S. was 80 years old suffering from "heart issues" and ulcer at the time of the sentencing: *S.S.S*. at para. 26.

[70] The sentencing judge acknowledged that due to his age and health problems Mr. S. would "experience significant difficulties" in serving a prison sentence: para. 77. However, such aggravating factors as the young age of the victim, the position of trust of the offender, and his moral blameworthiness required a proportional sentence in that case to be "substantial": *S.S.S*. at paras. 67–68, 72–73.

[71] In *R. v. Rayo*, 2018 QCCA 824, the Quebec Court of Appeal allowed the Crown's appeal of the sentencing judgment and substituted the sentence of one year of imprisonment with a global two-year prison sentence to the offender found guilty of child luring, making sexually explicit materials available to a child, production and possession of child pornography, and invitation to sexual touching: *Rayo* at paras. 1–6. The offender had no prior criminal record and did not plead guilty. The 12-year-old victim knew the offender as a family friend when he started "grooming" her via Facebook: *Rayo* at paras. 15–19. The offender described to the victim how to masturbate, when she did not know at the time what masturbation was; encouraged her to masturbate and asked her to send him her intimate photos, which she did: *Rayo* at para. 18. The Court of Appeal found that the offender's breach of trust of the underage victim heightened the gravity of the offences: *Rayo* at paras. 121–122,129. In terms of the appropriate sentence, the Court found that one year of imprisonment for luring should be served consecutively to one year for invitation to sexual touching, meanwhile the sentences imposed for the remaining three offences should be served concurrently: *Rayo* at para. 179.

[72] In *R. v. R.N.*, 2022 ONCJ 145, the court imposed two-years-less-a-day prison sentence on the 57-year-old offender found guilty of one count of sexual interference with his underage step-granddaughter: *R.N.* at paras. 1, 64. When the 13-year-old

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victim was living in the basement of the offender's home, he asked her on five occasions if he could touch her, and then he touched her on her breasts and digitally penetrated her: *R.N.* at para. 2. In coming to the conclusion on the appropriate sentence, the court noted that the guilty plea, full cooperation and remorsefulness of the offender were "significant" mitigating factors: *R.N.* at 52–53, 63.

[73] In *R. v. R.A.,* 2022 ONSC 1161, the offender was sentenced to two years in prison for two counts of sexual interference with his 11-year-old stepdaughter. When the offender was alone at home with the child, he kissed her using his tongue, put his hands in her pyjama shorts, and touched her vagina: *R.A.* at para. 3. On two other occasions, the offender kissed the girl. The offender did not have a prior criminal record, and was a productive member of society: *R.A*. at para. 30. The Crown sought two years of imprisonment, while the defence asked for a conditional sentence to be served in the community: *R.A*. at para. 13. Having rejected the cases submitted by the defence where conditional sentences were imposed for sexual offences against children (*R.A*. at paras. 23–29), the court noted, relying on *Friesen*, that "even non-penetrative sexual abuse can be highly traumatizing": *R.A.* at para. 31. The court added, following *Friesen*, "the normal sentence for child sexual offences involves mid-single digit penitentiary sentences": *R.A*. at para. 39.

[74] Lastly, the defence referred to an unreported decision, *R. v. Caldwell* (10 June 2020), Vernon 53726 (B.C.P.C.), which is cited in *R. v. R.D.Z.,* 2020 BCPC 175 in Appendix "B". The court in *Caldwell* imposed a sentence of two-years-less-a-day (less credit for the time spent in custody) on the 28-year-old offender who pleaded guilty to the offence of inviting sexual touching. The offender often stayed overnight with the mother of the six-year-old victim, and on more than one occasion he awoke the victim at night and prevailed upon the child to touch his penis. The court noted significant impact upon the victim and his family. Meanwhile, the offender had a serious criminal record and was immersed in the local drug culture.

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Bestiality Offences

[75] Turning now to the conviction for bestiality, very few cases were brought to my attention.

[76] In *R. v. J.J.B.B.*, 2007 BCPC 426, the accused pleaded guilty to touching his niece for sexual purpose (she was two to five years old at the time of the offences); he also pleaded guilty to possessing child pornography and inciting his niece to commit bestiality of which at least three incidents were recorded: *J.J.B.B.* at paras. 9, 30. In particular, the accused lured two different dogs to lick the child's genitals; he tried to attract the dogs with butter, and as one dog continually walked away, "he grabbed its snout to force it into contact with [the girl's] genitals": *J.J.B.B.* at para. 19. The offender himself was a victim of sexual assault by his grandfather from a young age to his teens: *J.J.B.B.* at para. 22. The sentencing judge, however, rejected the defence's request for a two-year term of imprisonment plus three years of probation as it did not serve the goal of deterrence and denunciation: *J.J.B.B.* at para. 50. The offender was sentenced to 69 months in prison, including 15 months for bestiality: *J.J.B.B*. at para. 53.

[77] In *R. v. A.B. 1,* 2007 SKPC 46, cited at para. 37 of *J.J.B.B*., the accused pleaded guilty to offences pursuant to ss. 151 and 152 of the *Criminal Code*, child pornography, and bestiality. In particular, bestiality did not involve children, as the accused engaged in sexual activity with a dog which licked her vagina: *A.B. 1* at para. 7. The offender was sentenced to four years' imprisonment, including one-year concurrent term for bestiality: *A.B. 1* at para. 21.

[78] *R. v. L.M.R*., 2010 ABCA 286, involved sexual offences against an infant (the mother of the child was "sexually exploiting" her while the father was filming the process: *L.M.R.* at para. 2). The mother pleaded guilty and was sentenced to four-and-one-half years of imprisonment for sexual interference with the infant, child pornography, and bestiality. According to the sentencing judgment, the mother "was attempting to sexually engage a dog, which had also been filmed by the father":

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L.M.R. at para. 3. The sentencing judge gave one-year concurrent sentence for the count of bestiality: *L.M.R*. at para. 9, which was upheld on appeal.

[79] In *R. v. C.H.*, 2021 ABPC 119, the accused pleaded guilty to multiple offenses including possessing and distributing child pornography, sexual interference with an underage person, and bestiality. The offender sexually engaged dogs himself but never involved children in sexual interactions with animals: *C.H.* at para. 86. The accused received a total sentence of seven-and-one-half years, including six months' imprisonment for bestiality: *C.H.* at paras. 110, 119–120. At first, the sentencing judge agreed with the submissions of the Crown that the sentence for bestiality should be consecutive, but later concluded that it should be served concurrently pursuant to the totality principle.

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Determination

[80] In submissions, the defence said that Mr. M. accepts that the degree of physical interference with K.M. was significant and involved two incidents of between five to 10 minutes, including one with the use of an animal. Nevertheless, the defence characterized the degree of physical interference to be at the low end of the scale when compared to other sexual offences against children and all of the incidents for which Mr. M. was convicted were relatively brief, lasting between one to 10 minutes.

[81] I disagree with the defence's submission that these circumstances warrant a lesser sentence because Mr. M.'s convictions should be viewed as crimes of communication, not crimes of violence that did not involve any physical interreference. For example, unlike *Rayo*, where the offender communicated with the victim solely online, Mr. M.'s offences were committed directly in front of his granddaughters with whom they had a significant personal relationship of trust. Furthermore, the bestiality offence in the case at bar involved indirect physical interference from Mr. M, who made his dog lick K.M.'s vaginal area and prevented the animal from escaping.

[82] I agree with the Crown's submission that crimes of communication and violence are not incompatible concepts as the former can, as it has done in this case, cause significant harm to the victims.

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[83] As the Court in *Friesen* said at para. 142, courts should not assume that there is any clear correlation between the type of physical act and the harm to the victim. Any sexual offence is serious:

> … This Court has recognized that "any sexual offence is serious" (*McDonnell*, at para. 29), and has held that "even mild non-consensual touching of a sexual nature can have profound implications for the complainant" (*R. v. J.A.*, 2011 SCC 28, [2011] 2 S.C.R. 440, at para. 63, per McLachlin C.J., and para. 121, per Fish J.). The modern understanding of sexual offences requires greater emphasis on these forms of psychological and emotional harm, rather than only on bodily integrity (*R. v. Jarvis*, 2019 SCC 10, [2019] 1 S.C.R. 488, at para. 127, per Rowe J.).

[84] I disagree with the defence that viewed in their context, the s. 152 offences fall within the lower end of the scale when compared to other sexual offences against children. It is the nature of Mr. M.'s ongoing conduct involving multiple victims coupled with Mr. M.'s breach of the significant relationship of trust with his granddaughters and the significant harm they continue to suffer as a result that distinguishes this case from those cases I have been referred to that imposed sentences at the lower end of the range.

[85] I find Mr. M.'s moral blameworthiness in committing the offences and the degree of his responsibility, arising from his ongoing, intentional conduct towards his three young, vulnerable granddaughters over eight years, in breach of his relationship of trust – all factors I must take into consideration – to be significant, pervasive, and grave.

[86] Mr. M.'s lack of remorse is not an aggravating factor; however, it does not provide the Court with a mitigating factor which plays a role in sentencing: see *R.N.* at para. 63.

[87] I have not lost sight of rehabilitation in sentencing but in this case, it has a diminished role, not only due to the instruction from *Friesen*, but also on account of

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Mr. M.'s intransigence in refusing to accept any form of counselling unless ordered to do so as he does not believe in it. As for the defence submission that a five to six-year sentence offers hope to Mr. M. for rehabilitation and return to the community, it must not be forgotten that his pro-social lifestyle when the offences were committed allowed him to enjoy a position of great trust with his granddaughters. He also had the opportunity over the years in which the offences occurred, to reflect on and refrain from his past conduct. Instead, his conduct progressed from invitation to sexual touching to indirect physical contact involving the bestiality offence. In addition to impacting my consideration of rehabilitation, this informs the degree of Mr. M.'s moral culpability.

[88] Taking all of those facts and factors into account (including the aggravating and mitigating factors, Mr. M.'s circumstances, and the significant harm his granddaughters continue to suffer), a significant custodial sentence is necessary to satisfy the principles of denunciation and deterrence required by the *Criminal Code* and the leading, instructing case authorities from the Supreme Court of Canada and the Court of Appeal.

[89] Mr. M., when we started the hearing this morning, your counsel told me you do not wish to say anything before I pass sentence, is that the case?

[90] MR. M.: No, nothing.

Custodial Sentence

[91] THE COURT: I have therefore determined that an appropriate and fit sentence is three years for each count.

[92] I have considered whether concurrent or consecutive sentences should be imposed. In *Friesen*, the Supreme Court of Canada said concurrent sentences may be imposed where there is a temporal relationship between the offences:

> [155] The decision whether to impose a sentence concurrent with another sentence or consecutive to it is guided by principles. While the issue warrants further discussion in another case, the general rule is that offences that are so closely linked to each other as to constitute a single criminal adventure

> may, but are not required to, receive concurrent sentences, while all other offences are to receive consecutive sentences [citations omitted].

[93] The point was reiterated by the Court of Appeal in *Maligaspe*, where Justice Saunders said that concurrent sentences may (not should) be imposed where there is a temporal relationship: *Maligaspe* at paras. 18–19, citing *R. v. Bertrand Marchand*, 2023 SCC 26 at para. 95.

[94] In this case, I am satisfied that a temporal relationship exists between the s.152 and bestiality offences involving K.M. in Mr. M.'s mobile trailer. They are so closely connected that I have determined that the sentence for Mr. M.'s offences on counts 4 and 6, contrary to ss. 152 and s. 160(3), shall be concurrent. I also view count 5 to be so closely related in time to the offences under counts 4 and 6 and to essentially be a repeat invitation by Mr. M. to have K.M. engage in masturbation while he watched that I have determined it should run concurrently as well.

[95] Otherwise, I would impose consecutive sentences for counts 1 and 3 as required by s. 718.3(7)(b) of the *Criminal Code*, which states that where sexual offences are committed against different children, they shall be consecutive.

[96] Therefore, the total length of sentences is nine years.

[97] However, I have determined that the aggregate total of nine years should be reduced on account of the totality principle.

[98] As the Supreme Court of Canada points out in *Friesen*, the combined weight of the sentences should not be unduly long or harsh:

> (b) *The Principle of Totality*
>
> [157] The principle of totality requires any court that sentences an offender to consecutive sentences to ensure that the total sentence does not exceed the offender's overall culpability (see *Criminal Code*, s. 718.2(c); *M. (C.A.)*, at para. 42). While this principle is applied throughout Canada, there have been divergences in the methodology used by various appellate courts. Some jurisdictions require the sentencing judge to decide what would be a fit sentence *for each offence* before considering totality (see, e.g., *Hutchings*, at para. 84; *R. v. Adams*, 2010 NSCA 42, 255 C.C.C. (3d) 150, at paras. 23-28; *R. v. Punko*, 2010 BCCA 365, 258 C.C.C. (3d) 144, at para. 93; *R. v. Draper*, 2010 MBCA 35, 253 C.C.C. (3d) 351, at paras. 29-30; *R. v. J.V.*, 2014 QCCA

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> 1828, at para. 28 (CanLII); *R. v. Chicoine*, 2019 SKCA 104, 381 C.C.C. (3d) 43, at paras. 66-68). In other jurisdictions, sentencing judges start by determining an overall fit sentence and then impose individual sentences adding up to the total (*R. v. Ahmed*, 2017 ONCA 76, 136 O.R. (3d) 403).
>
> [158] If the sentences here had been imposed consecutively, as arguably they should have been, then it would have been necessary to apply totality. As noted above, the sentences were imposed concurrently, and thus, totality did not arise. As these issues, while important, were not argued, we leave their consideration for another day.

[99] Moreover, a nine-year sentence would also not be proportionate.

[100] Keeping in mind the purposes of sentencing set out in the *Criminal Code*, the importance of deterrence and denunciation involving sexual offences towards children, as well as proportionality and the totality principle, and having considered the caution concerning the potential impact of a combined sentence that could exceed the offender's natural life span, as well as the expected adverse effect of incarceration on the declining health of Mr. M., I have determined that the total sentence of nine years should be reduced by 18 months.

[101] Since Mr. M. has been in custody since March 19, 2024, the Crown and defence agree that he shall be given credit for his time served of 140 days for actual time served of 93 days.

<u>Sentence Imposed</u>

[102] Mr. M., please stand.

[103] I sentence you to a custodial sentence of seven and one-half years, less credit for time served of 140 days, and to the following ancillary orders.

[104] You must attend all programs and services proposed by your probation officer, noting my recommendation to the correctional authorities, based on the advice of the Consultant Psychologist, to appoint a mature probation officer experienced in managing similar offenders as recommended by the Consultant Psychologist and my recommendation that you attend counselling and the Forensic

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Sex Offender Program as directed by the Correctional Service of Canada and your probation officer.

[105] You shall provide an appropriate sample or samples reasonably required for DNA analysis as directed by your probation officer or other representative of Corrections Canada.

[106] You shall be registered under the *SOIRA* and remain registered for 20 years. I reject the Crown's position that a lifetime *SOIRA* order is required since the conditions of s. 490.013(3)(b) of the *Criminal Code* are not met, and even though you were convicted of multiple designated offences in the same proceeding, the Crown has not proven that you present an increased risk of reoffending.

[107] You are prohibited from seeking, obtaining, or continuing in any employment and likewise in respect of volunteering, for any position or program that involves being in a position of trust or authority with persons under the age of 16.

[FURTHER SUBMISSIONS CONCERNING CONTACT WITH PERSONS UNDER THE AGE OF 16]

[108] A lifetime order that you shall not have any in-person contact with any person who is under the age of 16 years under any circumstances unless a sober adult who is not a member of your immediate family is present except when that person's guardian is present and sober.

[109] You shall not possess any firearm or other weapon under any circumstances for a period of 10 years.

[110] A copy of these reasons for sentence and the reports of the Consulting Psychologist and the pre-sentence report writer shall be forwarded to the Correctional Service of Canada. As well, and similar to what Justice Schultes did in *S.S.S.* at para. 84, in view of the offender's age and personal circumstances (see *S.S.S.* at para. 77), I recommend that Mr. M. be classified to the institution that is best able to accommodate his medical conditions.

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[111] A copy of the order shall be provided to members of Mr. M.'s immediate and extended family.

[112] Lastly, I want to say to the victims, I hope you can move on from this. I know from what you told me that it is difficult, but I hope that in due course you'll be able to put this proceeding behind you and carry on with your lives. And I want to thank you for your courage coming forward and addressing me in court yesterday.

"Walker J."

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