PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. C.B.*, 2023 NSPC 29

Date: 20230428
Docket: 8450694
8450695
8450698
Registry: Halifax

Between:

His Majesty the King

v.

C.B.

Restriction on Publication: Section 486.4
Bans ordered under this section directs that any information that will identify the complainant shall not be published in any document or broadcast or transmitted in any way. No end date for the Ban stipulated in this section.

DECISION ON SENTENCE

Judge:	The Honourable Judge Elizabeth Buckle
Heard:	January 26, 2023, Halifax, Nova Scotia
Decision:	April 28, 2023
Charges:	*Criminal Code* ss. 151, 152, 271, 172.1(1)(b)
Counsel:	Steven Anstey, for the Crown Josh Nodelman, for the Defence

By the Court:

Introduction

[1] C.B. was found guilty after trial of sexual offences relating to a 14-year-old child. C.B. was essentially her step-grandfather. The offences began with video communication and progressed to include in-person sexual activity.

[2] Overall, the activity continued for about nine months. It began with C.B. exposing his genitals to the victim through video and asking to see her in her bathing suit or underwear. Eventually, the video communication included repeated acts of mutual masturbation over approximately seven months. During that same seven-month period, C.B. also engaged in repeated in-person sexual activity with the victim.

[3] C.B. was found guilty of sexual assault, sexual interference, invitation to touch for a sexual purpose and luring, contrary to ss. 151, 152, 271 and 172.1(1)(b) of the *Criminal Code.* The count involving sexual assault, contrary to s. 271, will be stayed pursuant to *R. v. Kienapple* ([1975] 1 S.C.R. 729).

[4] The Crown seeks a global sentence of seven years in custody and various ancillary orders, some of which are mandatory: a *SOIRA* Order for 20 years; a primary DNA Order; a s. 109 Firearms Prohibition for 10 years; a s. 743.21(1) Order while he is in custody; and a s. 161(1) Order for 20 years.

[5] The Defence seeks a global sentence of four years in custody and opposes the imposition of a s. 161(1) Order.

Circumstances of Offence

[6] The circumstances of the offences are contained in my trial decision (*R. v. C.B.,* 2022 NSPC 4).

[7] C.B. met the victim because her father was in a relationship with C.B.'s daughter. In that context, she attended family functions at the home C.B. shared with his wife. They began to have frequent communication by text and video. At the time, she was dealing with typical adolescent issues but also navigating the breakdown of her parents' marriage and her own mental health challenges. She and C.B. became very close. She also visited C.B.'s home on her own, including

staying overnight. When she was there, she spent time with him in his bedroom playing cards and in the basement recreation room.

[8] Records obtained from the victim's phone included the content of their text communication as well as call logs for their video communication.

[9] The victim described their relationship as "really good friends". The text communication reveals an unusually close relationship, both in the frequency and content of their communication. There was approximately 700 pages of text communication between them from late November of 2019 to mid-March of 2020. Many of their text conversations were just reports of their days. However, there were also personal conversations in which the victim described anxieties about school and conflict with her parents, C.B. talked about his health, they each provided encouragement and support to the other and spoke about their mutual affection and missing each other. There was no sexually explicit content, however, in my trial decision I described three exchanges which I concluded contained implicit references to sexual conduct.

[10] They also engaged in regular video communication. The call log for her device showed about 140 video conversations between them over approximately six weeks from the end of January of 2020 to mid-March of 2020. These calls varied in duration but were as long as 40 minutes.

[11] Beginning in the summer of 2019, during video communication, he asked to see her in her swimsuit, in underwear and without clothing, he exposed his penis to her and eventually they each regularly engaged in masturbation while the other watched.

[12] In late summer or early fall, C.B. began in-person sexual activity with the victim. That continued until March of 2020. It started with touching her buttocks over her clothing and progressed to include him touching her vaginal area under her clothing with his hands and mouth, rubbing his penis on her vaginal area, fellatio, and ejaculating on her body.

[13] The sexual activity over video continued after the in-person activity started.

[14] The victim could not recall precisely how many incidents of virtual or in-person activity occurred over that period. I accepted her evidence that there was some form of sexual touching every time she visited C.B.'s home so there were repeated incidents during this period. I also accept that the conduct became

progressively more intrusive. She specifically recalled incidents of fellatio. She also recalled two incidents involving C.B. rubbing his penis on her vaginal area and ejaculating on her. These happened in the last couple of months before the matter was reported to police. She also specifically recalled one incident that occurred about a week before the matter was reported to police where he masturbated and then ejaculated on her.

[15] He told her he wanted to have intercourse with her but said that was a line he would not cross.

[16] The facts supporting the luring offence include C.B.'s general grooming of the victim through text and video communication (see: *R. v. Legare*, 2009 SCC 56, para. 28) as well as his specific requests that she touch herself sexually during video conversations.

[17] C.B. did not threaten the victim or use any extrinsic violence. He told her that if she ever wanted to stop, she just had to say so. However, early on when she was reluctant to touch his penis, she thought he seemed kind of mad about it, so she agreed. He also told her that he couldn't help himself so she would have to "be the adult" in the situation and that if they got caught "they" would be in a lot of trouble.

[18] The matters came to the attention of the police in 2020 after she disclosed to her coach.

Victim Impact Statements

[19] Victim impact statements were provided by the direct victim of the offences as well as her mother, her father, and the coach to whom she disclosed. The Defence did not object to either the content of the statements or the status of any of these individuals as 'victim'.

[20] These statements breathe life into the comments of the Supreme Court of Canada and other courts about the far-reaching harms of sexual abuse of children on the direct victim, the family, and the broader community (see: *R. v. Friesen*, 2020 SCC 9).

[21] A complicating factor in assessing harm is the agreed-upon fact that another individual was also convicted of a sexual offence involving the same victim, so the harms referred to in the victim impact statements have not been exclusively caused

by C.B. However, I understand that C.B.'s conduct was more serious than that perpetrated by the other offender.

[22] The direct victim spoke about how the abuse has impacted her emotionally, physically, and practically. She has experienced an increase in her anxious thoughts, she worries about her future emotional health and ability to form healthy relationships, and she has difficulties trusting people. While the abuse was ongoing, she engaged in self-harm. The abuse has caused her to feel nauseous, have nightmares and difficulties sleeping. It has broken up her family and impacted her relationship with her parents. It has impacted her schoolwork through missing time, difficulties concentrating and what she describes as "brain fog". The resulting impact on her grades has hurt her confidence and self esteem. She has also missed time at her part time job.

[23] The victim's mother described how her life has been completely altered by what happened to her daughter. She feels anxiety, anger, guilt, depression, and hatred toward the perpetrator. Not surprisingly, she has lost trust in people. There have also been direct and indirect impacts on her work. She has missed work to provide her daughter with emotional support, take her to medical appointments or assist her through the court process. Her emotional state has caused inability to focus or concentrate which, in turn, has impacted her work performance. She worries about her daughter's future – whether she will be able to deal with the emotional trauma, form healthy relationships and be safe. The extended family dynamic has been destroyed.

[24] The victim's father spoke about the depression and anger he felt at his inability to protect his daughter and the guilt at having brought C.B. into her life. He initially turned to alcohol to deal with these feelings before eventually seeking professional help and being prescribed anti-depressants. He has also experienced practical impacts – he was unable to work which led to financial strain and the eventual sale of his home.

[25] The victim and her parents worry that she will run into C.B. in the community. She describes feeling worried when she is in public and feelings of panic if she sees a vehicle that looks like his.

[26] The victim first disclosed to her coach who spoke, in her victim impact statement, about the emotional impact of that disclosure. She has felt guilt,

sadness, anxiety, helplessness and, eventually, emotional exhaustion. It has impacted her sleep, her work and her family and caused her to seek counselling.

Circumstances of the Offender

[27] Information about C.B. was provided through a pre-sentence report and comments of counsel.

[28] He is now 68 years old. His father was a heavy drinker who became angry and violent when drunk. In his pre-sentence report, he denied being the victim of sexual abuse, however, he told the victim that he had been.

[29] He is married and has been for 47 years. He and his wife describe their relationship positively and she remains supportive of him. He has two children who are in their 40s and two grandchildren. He remains close with his children and extended family.

[30] His wife and members of his extended family were interviewed for the pre-sentence report. They all expressed disbelief or shock at the offences and say that this type of conduct is entirely out of character for him. His wife described him as kind, loving and generous. His nephew described him as honest and said he had never known him to be unkind or take advantage of anyone. His son's common-law partner described him as a loving and family-oriented person. His daughter's partner described him as kind-hearted and trustworthy.

[31] He does not consume alcohol or any illicit drugs.

[32] He has not been employed for the past 25 years due to a back injury.

[33] He is in poor physical health. He had a serious back injury about 40 years ago that required several surgeries. Since then, he has suffered back pain. He also has a degenerative rheumatoid condition that causes pain, stiffness, and inflammation in his muscles. He takes prescribed medication for the pain from both conditions. About 18 years ago, he had a heart attack that required bypass surgery.

[34] He does not have any mental health concerns or diagnoses.

[35] He has no prior criminal record.

[36] He denies committing these offences but is willing to comply with any sentencing recommendations. He declined to participate in any pre-sentence sexual offender assessment.

Principles of Sentencing

[37] The general purpose, objectives and principles of sentencing are set out in ss. 718 to 718.2 of the *Criminal Code*.

[38] The goal, "in every case is a fair, fit and principled sanction" (*R. v. Parranto*, 2021 SCC 46, para. 10). However, the best means of addressing the principles and attaining the ultimate objective of sentencing will always depend on the unique circumstances of the case. Because of that, it has been consistently recognized that sentencing is "one of the most delicate stages of the criminal justice process in Canada" and is an inherently individualized process (*R. v. LaCasse*, 2015 SCC 64, para. 1; *Parranto*, para. 9; and, *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, paras. 91-92).

[39] The fundamental purpose of sentencing is to protect the public and contribute to respect for the law and the maintenance of a safe society. This purpose is to be accomplished by imposing just sanctions that target one or more of the statutory objectives (s. 718).

Denunciation and Deterrence

[40] The paramount objectives when sentencing offenders for sexual abuse of children are denunciation and general deterrence (s. 718.01; *Friesen; R. v. E.M.W.*, 2011 NSCA 87; *R. v. Sharpe*, 2001 SCC 2; and, *R. v. Hewlett*, 2002 ABCA 179). Emphasizing these objectives reflects society's condemnation for the behaviour and acknowledges the tremendous harm it causes.

[41] Denunciation is the means by which a sentence communicates society's condemnation of conduct. As Justice Lamer said in *M. (C.A.)*, "a sentence with a denunciatory element represents a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law." (para. 81).

[42] The goal of general deterrence is to discourage others from committing similar offences.

[43] The goal of specific deterrence is to discourage C.B. from committing similar offences in the future. C.B. has no criminal record and has had no issues while on release pending trial and sentencing. This suggests that specific deterrence may not be a significant factor. However, he declined to participate in a risk assessment prior to sentence so his motivations and risk factors are unknown.

Rehabilitation

[44] Rehabilitation contributes to the long-term protection of society. It continues to be a relevant objective, even in cases requiring that denunciation and deterrence be emphasized (*Lacasse*, para. 4).

[45] In cases involving sexual offending, rehabilitative efforts usually involve counselling or specific sexual offender programming. In many cases, ensuring offenders have access to that kind of education is crucial to the long-term protection of society.

[46] C.B. does not admit he committed these offences which may be a barrier to treatment and rehabilitation. However, he advised the author of the pre-sentence report that he was prepared to comply with any recommendation of the Court which I accept as a willingness to participate in specific treatment for sex offenders.

[47] Sexual offender programming may help him come to grips with any abuse he suffered as a child, explore the role it played in his own offending, understand his thinking related to sexual violence and appreciate the impact of sexual violence on victims. The kind of programming that might benefit him will be available in the Federal penitentiary system.

[48] Given that he does not accept responsibility for the offences, it is hard to say whether he a good candidate for rehabilitation.

Proportionality

[49] The fundamental principle of sentencing is proportionality (s. 718.1). It requires that a sentence "reflect the gravity of the offence, the offender's degree of responsibility and the unique circumstances of each case" (s. 718.1; and, *Parranto*, para. 12). It requires that a sentence not be more severe than what is fair and appropriate but severe enough to condemn the offender's actions and hold them

responsible for what they have done (*Lacasse,* para. 12; and, *R. v. Nasogaluak*, 2010 SCC 6, para. 42).

[50] Applying proportionality requires me to consider the gravity of these offences in general, the relative gravity of the specific offences committed by C.B. and his degree of responsibility.

[51] The general gravity of these offences is high. Sexual offences against children are recognized as inherently harmful, to children and to society in general. They have devastating and often permanent consequences which may not become apparent until the children are adults (*Friesen; R. v. D.(D.)* (2002), 163 C.C.C. (3d) 471 (ONCA), paras. 36-38; *R. v. T.M.B.*, 2013 ONSC 4019; *R. v. P. (M.)* (1992), 73 C.C.C. (3d) 530 (ABCA); *R. v. G.R.B.*, 2013 ABCA 93; *R. v. Woodward*, 2011 ONCA 610, para. 72; and, *R. v. M.D.*, 2012 ONCA 520, para. 38).

[52] In *Friesen*, the Supreme Court of Canada provided general and specific guidance to sentencing judges when dealing with all manner of sexual offences involving children (para. 44). The Court made a number of comments about the gravity of sexual offending against children that are directly applicable to this case:

- Sexual offences against children are violent crimes that wrongfully exploit children's vulnerability and cause profound harm to children, families, and communities (para. 5);

- Sentencing judges should “reject the belief that there is no serious harm to children in the absence of additional physical violence” (para. 82);

- “[A]ny manner of physical sexual contact between an adult and a child is inherently violent”. Even interactions that occur online can constitute a form of “psychological sexual violence”. All sexual interactions between adults and children have the potential to cause harm” and even “a single instance of sexual violence can "permanently alter the course of a child's life"” (paras. 58 and 82);

- Technology has enabled new forms of violence and provided offenders with new and unprecedented access to children (paras. 46-47);

- Courts must focus their attention on emotional and psychological harm, not simply physical harm. Sexual violence against children can cause serious emotional and psychological harm that "may often be more pervasive and permanent in its effect than any physical harm" (paras. 51-56);

- Sexual violence against children results in various forms of harm: emotional trauma resulting from violation of integrity, self worth and control over their bodies; shame, embarrassment, unresolved anger, reduced ability to trust; interference with children's

self-fulfillment and healthy and autonomous development to adulthood; and damage to familial relationships and a ripple effect that can cause profound harm to their immediate and extended family and community (paras. 57-64);

- "[S]entences must recognize and reflect both the harm that sexual offences against children cause and the wrongfulness of sexual violence". These factors are "key to imposing a proportionate sentence" (para. 74-78);

- The acts are inherently wrong, whether or not they are accompanied by additional violence and whether or not they cause physical or psychological injury (para. 77);

- In considering potential harm, the court can examine the factual circumstances of the specific offending behaviour and the surrounding circumstances such as breach of trust, grooming, number of instances and age of the child (para. 86);

- All forms of sexual violence against children are highly morally blameworthy because the victim is a child and children are vulnerable (paras. 89-90);

- Adolescence can be a confusing and challenging time for young people as they grow and mature, navigate friendships and peer groups, and discover their sexuality. To exploit young teenagers during this period by leading them to believe that they are in a love relationship with an adult "reveals a level of amorality that is of great concern" (para. 153); and,

- Increases to maximum sentences reflect the objective gravity of the offences and signal Parliament's desire to have these offences punished more harshly (paras. 96-100).

[53] Accepting the gravity and high moral blameworthiness of all sexual offending against children, I must still review C.B.'s conduct, place it on "the spectrum that is captured by the offence" and determine whether there are any personal circumstances of C.B. that may reduce his culpability (*Friesen*, paras. 91-95).

[54] C.B.'s offences did not involve extrinsic violence or threats. However, the victim's evidence that he had a negative reaction when she was reluctant to touch his penis suggests emotional manipulation with an implied threat of removal of affection or approval.

[55] The betrayal of trust was significant. C.B. was more than a step-grandfather to the victim; he was a close friend. Her testimony and my review of the hundreds of pages of text communication between them reveals that she was a troubled child. They communicated virtually daily, she relied on him for guidance and emotional support, and she cared for him. He gained her trust and exploited her

vulnerability and sexual curiosity. He then engaged in repeated sexually activity with her over months.

[56] His offences did not involve vaginal or anal penetration. However, his conduct included fellatio and ejaculation on the victim's body. In the absence of consent, both acts are degrading, offensive and can cause tremendous harm. In my view, these acts in no way less of a trespass on the victim's physical, emotional, and sexual integrity. Fellatio is at least as intrusive as other forms of penetration and may, to some victims, feel like more of a psychological or emotional invasion.

[57] C.B. is solely responsible for these offences. His moral culpability is lessened only by the possibility that he is himself a victim of child-hood sexual abuse.

Secondary Sentencing Principles

[58] There are also important secondary sentencing principles that I am required to consider. These are set out in the *Criminal Code* and have been interpreted by the Supreme Court of Canada (s. 718.2; *Parranto*, para. 10; and, *Friesen*, paras. 121-158).

Aggravating and Mitigating Factors

[59] Section 718.2 requires that I consider the aggravating and mitigating factors relating to the offence and the offender in deciding whether to increase or reduce the sentence within the available range.

[60] Some require comment. I have concluded that C.B. 'groomed' the victim to participate in the sexual activity by engaging in online communication with her that built trust, reduced her inhibitions, and exploited her natural sexual curiosity (see: *Legare*, para. 28). That grooming is an aggravating factor when sentencing for the in-person offences. However, it also constitutes the separate offence of 'luring' under s. 172.1(1)(b). Similarly, the fact that the 'luring' led to in-person sexual activity is sometimes treated as an aggravating factor when sentencing for 'luring'. Here, C.B. has been convicted of and will be sentenced for both the 'luring' and the in-person offences and the Crown seeks consecutive sentences. So, I must ensure that I don't punish C.B. twice for the same conduct by sentencing him for it under one offence and then also using it as an aggravating factor to increase the sentence for the other.

[61] Further factors, such as the absence of threats or extrinsic violence, are not mitigating but assist in distinguishing this case from others for purposes of situating C.B.'s conduct on the continuum of conduct that can constitute the offences.

[62] Finally, the victim was legally incapable of consenting, so any acquiescence, agreement, or apparent willingness on her part to participate in the activity is not a mitigating factor (*Friesen,* paras. 148-155).

[63] Following are the aggravating and mitigating factors:

Aggravating Factors

- The victim was a member of C.B.'s family, albeit not his biological family (s. 718.2(1)(ii));
- The victim was under the age of 18 (s. 718.2(a)(ii.1);
- C.B.'s conduct was a significant betrayal and abuse of trust. Not only did he essentially occupy the position of step-grandfather, he also held himself out as her friend. The victim was an adolescent, trying to deal with significant challenges and relied on him for counselling and support (s. 718.2(a)(iii), *Friesen,* paras. 125-130);
- The offences continued for months and involved multiple incidents (*Friesen,* paras. 131-133);
- The degree of physical interference was significant and increase the risk of psychological harm to the victim (*Friesen*, paras. 137-147); and,
- The online communication that resulted in the conviction for 'luring' included frequent communication over months, sexually explicit conversation, requests that the victim send him pictures in her underwear or bathing suit, requests that she masturbate on video, showing her his penis on video and multiple incidents of mutual masturbation on video (subject to 'consecutive vs concurrent' determination).

Mitigating Factors:

- C.B. has no prior criminal record;
- His age and health issues will make custody more difficult for him;

- He continues to have the support of his wife and family; and,
- He is willing to participate in rehabilitative programming.

Parity / Range of Sentences

[64] Section 718.2 also requires consideration of the principle of parity. That principle says that similar offenders committing similar offences in similar circumstances should receive similar sentences. Ultimately, each sentence must reflect the unique circumstances of the offence and the offender. However, the sentencing decisions of other judges inform my application of the sentencing principles and the range of sentences imposed provide a reference for me when situating C.B. and his conduct on the spectrum of gravity.

[65] In *Friesen*, the Supreme Court of Canada made it clear that, prior sentences for sexual offences against children did not reflect a proper understanding of the gravity of the offences and did not respect Parliament's wishes as evidenced by the increases in maximum sentences for these offences. As such, when looking at cases that might contribute to the range, cases decided before *Friesen* should be treated with caution and cases decided before the maximum sentences were increased should not generally be relied on.

<u>Sentences for In-Person Sexual Abuse</u>

[66] I have reviewed all of the cases submitted by the Crown and Defence along with others: *R. v. A.M.B.*, 2022 NSSC 262; *R. v. G.P.W.*, 2021 NSSC 192; *R. v. S.F.W.*, 2021 NSSC 312; *R. v. A.P.L.*, 2021 NSSC 238; *R. v. Hughes*, 2020 NSSC 376; *R. v. S.F.W.*, 2021 NSSC 312; *R. v. A.P.L.*, 2021 NSSC 238; *R. v. D.R.*, 2020 NSPC 46; *R. v. S.P.W.*, 2021 NSPC 24; *R. v. C.A.L.*, 2021 NSSC 365; *R. v. Wood*, 2021 NSSC 253; *R. v. B.J.R.*, 2021 NSSC 26; *R. v. C.D.C.*, 2021 NSSC 287; *R. v. C.H.*, 2017 ONSC 71; *R. v. C.H.*, 2017 ONSC 71; *R. v. W.G.L.*, 2020 NSSC 323; *R. v. Fisher*, 2020 NSSC 325; and, *R. v. K.M.*, 2020 NSSC 278. I will specifically address only those which I view as most relevant in establishing a range.

- *Hughes*, 2020 NSSC 376 – six years in custody. The offender sexually abused a child in his care over approximately five years. The victim was between the ages of seven and eleven years, vulnerable, and indigenous. The conduct included oral and anal sex. The offender had a prior related record and did not plead guilty. The only mitigating factors were the offender's age, 71 at the time of sentencing, and ill health.

- *A.P.L.*, 2021 NSSC 238 – six years in custody. The offender sexually abused his biological daughter over approximately four years. The victim was between the ages of 12 and 16 years and had physical and intellectual challenges. The conduct included touching and intercourse. The offender encouraged the victim to send him sexually explicit photographs and used threats and money to ensure her silence. The offender had no related record and did not plead guilty.

- *S.F.W*, 2021 NSSC 312 – six years in custody. The offender sexually abused his stepdaughter over approximately four years. The victim was between the ages of seven and ten years old. The conduct was frequent and included oral sex with ejaculation and simulated intercourse with ejaculation. The offender had no criminal record, was 51 years old and had some health issues. He did not plead guilty.

- *S.P.W.*, 2021 NSPC 24 – four years and eight months in custody. The offender sexually abused his biological daughter for approximately 18 months. The victim was between the ages of four and six years old. The conduct was frequent and included making her touch his penis, attempted or simulated intercourse and having her taste his ejaculate. The offender had an unrelated record, pleaded guilty and a sexual behaviour assessment revealed there was a below average risk of recidivism.

- *Wood*, 2021 NSSC 253 - three and a half years in custody. The offender sexually abused a child whom he'd met online. The victim was 15 years old. The conduct included numerous instances of vaginal intercourse some of which were recorded. He pleaded guilty.

- *C.A.L.*, 2021 NSSC 365 – three and a half years in custody. The offender sexually abused the child of close family friends over many years. The victim was between the ages of nine and sixteen years old. There was a non-familial trust relationship. The conduct included frequent sexual touching and kissing. He had no criminal record and had a health issue. He did not plead guilty.

- *W.G.L.*, 2020 NSSC 323 – three and a half years in custody. The offender sexually abused his stepdaughter over approximately four years. The victim was between the ages of 11 and 14 years old. The conduct included grooming the victim one incident of digital penetration of her vagina, multiple incidents of kissing and simulated intercourse while clothed. The offender was 64 years old at the time of sentencing, had physical health issues that prevented him from working and had no criminal record. He did not plead guilty.

- *B.J.R.*, 2021 NSSC 26 – three years in custody. The offender sexually abused his daughter on one occasion. The victim was 16 years old. The incident involved removing her shorts and performing oral sex on her. He had no prior record, pleaded guilty and expressed remorse.

- *Fisher,* 2020 NSSC 325 – 27 months in custody. The offender was a youth pastor who sexually abused a youth parishioner. The victim was 14 years old when the grooming began. It continued for several years, leading to in person sexual activity that continued for approximately five months when the victim was 17 years old. There was a non-familial trust relationship. The conduct included touching, oral sex and vaginal intercourse. The offender was African Nova Scotian and an Impact of Race and Culture Assessment revealed mitigating factors that caused the Court to reduce the sentence. He did not plead guilty.

Sentences for 'Luring'

[67] The general guidance from *Friesen* concerning the use of older sentencing precedents also applies to this offence. In 2015, the maximum sentence for 'luring', when prosecuted by indictment, was increased from ten years to fourteen years. As such, decisions from before 2015 are of limited use.

[68] In *Friesen*, the Court noted that "online child luring can be both a prelude to sexual assault and a way to induce or threaten children to perform sexual acts on camera" (para. 46). This case involved both.

[69] There are reported decisions in Nova Scotia that deal with sentencing for this offence, post-amendment and post-*Friesen*. They do not involve a familial or other trust relationship between the victim and offender, but they do help inform the range: *R. v. Ward*, 2019 NSPC 72; and, *R. v. Pentacost*, 2020 NSSC 277:

- *Ward,* 2019 NSPC 72 – 3-month custodial sentence to be served intermittently, followed by 2 years' probation. The offender contacted the victim through social media. She was in grade nine. He offered to buy her alcohol, repeatedly suggested they get together, complimented her physical appearance, and eventually asked her to meet him to have sex. She declined. He pleaded guilty, took counseling, and expressed remorse.

- *Pentacost,* 2020 NSSC 277 – 120 days custody, followed by two years' probation. The victim was 14 years old. The offender used a social media app to groom the victim over a period of approximately six months. He sent her pictures of his penis, and, at his request, she sent him pictures of herself wearing underwear or shorts and one of her bare breasts.

[70] There are cases from other provinces involving luring where there is a breach of trust. The Crown provided: *R v. J.R.*, 2021 ONCJ 14; and, *R v Lemay*, 2020 ABCA 365 and I have also reviewed *R. v. Rayo*, 2018 QCCA 824:

- *Rayo*, 2018 QCCA 824 – before totality, 15 months in custody, followed by probation, reduced to one year due to totality (he was also sentenced for in-person sexual activity with the victim). The offender knew the victim, initiated online communication with her and she responded because she trusted him. She was 12 years old. For approximately six months, he communicated with her every day and eventually told her how to masturbate and encouraged her to do it, they exchanged intimate images and he asked to meet for sex. The offender had no prior record. He did not plead guilty.

- *Lemay*, 2020 ABCA 365 – 18 months in custody for luring (he was also sentenced to four years in custody, after totality, for in-person sexual activity with the victim). The victim was 15 years old when the luring began. They had a quasi-familial relationship which included the victim calling him 'uncle'. He offered to teach her about sex, sent her pictures of his genitals and, after being pressured by him, she reciprocated by sending him pictures of her breasts, buttocks, and genitals. The sexual interference offence included five incidents of sexual contact including digital penetration, fellatio, and attempted intercourse. The offender pleaded guilty.

- *J.R.*, 2021 ONCJ 14 – five years in custody for luring and extortion. The victim was 11 to 12 years old. The offender was her biological father but was also her grandfather. Her mother was the offender's stepdaughter whom he had sexually abused and impregnated. He provided the victim with a phone and over a prolonged period, induced and threatened her to send him pornographic images of herself. He had a prior related record involving the sexual abuse of her mother.

[71] The case of *J.R.* is very useful for its discussion of principles. However, the uniquely aggravating circumstances make it difficult to use it to inform the range.

[72] I have to apply *Lemay* cautiously because the appeal court relied on the one-year minimum penalty to increase the sentence. That mandatory minimum has been declared unconstitutional in Nova Scotia (*R. v. Hood*, 2018 NSCA 18, paras. 147-156).

The Prohibition Order - s. 161(1)

[73] The Crown seeks an order under s. 161(1) (a.1), (b), (c), and (d) of the *Criminal Code* prohibiting C.B., for a period of 20 years, from: being within a specified distance of the victim's residence, place of work or education; seeking or obtaining employment or volunteer work that would place him in a position of authority over anyone under the age of 16 years; having contact or communication with anyone under the age of 16 years; and, from using the internet.

[74] The Crown submits that C.B., through his conduct, has demonstrated that he is a serious risk to children and that protection of the victim and other children requires such an order.

[75] The Defence submits that there is no evidence that he is a risk to children beyond the specific circumstances of this case which did not involve finding a victim online, through employment or volunteer work and did not involve a child who was biologically related to him.

[76] The provision requires courts who sentence offenders for specified offences to "consider" imposing the order. In *R. v. Miller*, 2017 NLCA 22, the Court of Appeal upheld the sentencing judge's exercise of discretion to impose a s. 161 prohibition order following a guilty plea for possession of child pornography. In doing so, the Court said the decision to impose the s. 161(1) order does not mean the offender "is likely to reoffend and thereby harm children or that he is likely to otherwise harm children.". It means that the "facts and circumstances" of the case "show that he poses a risk of future harm to children, so as to justify imposition of a section 161 order, which is directed to minimizing such risk." (para. 34). The Court also concluded the sentencing judge had tailored the terms of the order to the offender's circumstances and they were not overly broad (para. 36).

[77] In this case, I do not have the benefit of a sexual offender risk assessment. The information that helps inform my own risk assessment is the circumstances of the current offences and C.B.'s circumstances, including the absence of any other criminal record.

Restraint, Consecutive vs Concurrent and Totality

[78] Finally, I have to consider the principle of restraint. Restraint, in general, requires that the punishment should be the least that would be appropriate in the circumstances.

[79] If I conclude that the sentences for the two offences should be served consecutively, I also have to consider the related principle of totality which says that combined consecutive sentence should not be "unduly long or harsh" (s. 718.2(c)). Totality is a form of restraint and is a function of proportionality when consecutive sentences are imposed (*M. C.(A.)*, para. 42; and, *Parranto*, para. 251).

Analysis and Conclusions

[80] After consideration of totality, the Crown seeks a global custodial sentence of seven years and the Defence, a global custodial sentence of four years.

[81] The Nova Scotia Court of Appeal has directed that when sentencing for multiple offences, a sentencing judge should first determine the appropriate sentence for each individual conviction and then go on to decide whether the sentence should be consecutive or concurrent before ultimately taking a final look at the total sentence and reducing it if required to reflect totality (*R. v. Adams*, 2010 NSCA 42; and, *R. v. Laing*, 2022 NSCA 23).

Step 1 – What is the appropriate sentence for each individual conviction?

[82] Proper application of the principles of proportionality, denunciation and general deterrence require that I sentence C.B. to a period of custody. Determining its length requires me to consider his prospects of rehabilitation, assess the gravity of his conduct and his personal circumstances in comparison to other cases and apply restraint.

[83] Sentences of six years have been imposed for in-person sexual abuse of a child where there has been no guilty plea (*Hughes, A.P.L.* and *S.F.W.*). These cases have similarities to the case before me. Like C.B., none of these offenders had the mitigation of a guilty plea, they all involved a breach of trust, multiple incidents, and I cannot see a meaningful difference in the degree of sexual interference or harm. Further, the offenders in *A.P.L.* and *S.F.W.* had no prior criminal record.

[84] However, those cases had some aggravating factors that are either not present in the case before me or are less pronounced here. In all three, the abuse continued for a much longer period. In *Hughes,* the offender had a prior related, albeit dated, criminal record and the victim was younger and indigenous (a statutory aggravating factor). In *A.P.L.*, there was a closer familial relationship and the offender used threats. In *S.F.W.*, the child was significantly younger.

[85] Lower sentences have also been imposed for in-person sexual abuse, including where there has been no guilty plea (*C.A.L., W.G.L., C.D.C., K.M.* and *Fisher*). In *C.A.L.* (3 ½ years), the abuse continued for longer and started when the victim was younger. However, the degree of sexual interference and breach of trust were less significant. In *W.G.L.* (3 ½ years), there was a closer familial relationship and the conduct continued for longer, but the degree of sexual interference was less. In *C.D.C.* (22 months), there was a lengthy period of

grooming, a breach of a nonfamilial trust relationship and the conduct involved a significant degree of interference. However, there was only one instance of sexual activity. In *K.M.* (5 years), there was no breach of trust, the offender was relatively youthful and there was only one instance of sexual activity. However, the sexual assault was aggressive, violent and degrading and the offender had a significant but unrelated criminal record. In *Fisher* (27 months), the abuse and grooming continued for a comparable period and the degree of sexual interference was similar. However, there was no familial relationship, the victim was older and the IRCA factors warranted mitigation of sentence.

[86] A guilty plea in this type of case spares victims and their families the trauma of a trial and is significantly mitigating. So, where there has been a guilty plea, that has resulted in lower sentences (*S.P.W., Wood,* and *B.J.R.*). In *S.P.W* (4 years and 8 months), the breach of trust was significant, the child was very young, and the activity continued for over a year. In *Wood* (3 ½ years), there was no breach of trust. In *B.J.R.* (3 years), the victim was the offender's own daughter, so the breach of trust was significant, but there was only one incident.

[87] The circumstances here are less aggravating than in *Hughes, A.P.L.* and *S.F.W.,* but more aggravating than the other cases that did not have the benefit of a guilty plea and lacks the significant mitigation of a guilty plea that resulted in lower sentences in *S.P.W., Wood,* and *B.J.R.*.

[88] The sentencing range for 'luring' is very broad. Because, as I will explain in a moment, I am satisfied that the sentences for 'luring' and the in-person offences should be consecutive to each other, I have not treated the underlying conduct of either as an aggravating factor on the other.

[89] The circumstances here warrant a higher sentence than was imposed in *Ward* and *Pentacost*. Factually, this case is more like *Lemay* and *Rayo*. In *Lemay*, the offender pleaded guilty, but the communication included significant coercion. Further, as I have noted above, the sentence imposed in that case was influenced by reliance on the one-year mandatory minimum penalty which does not apply in Nova Scotia.

[90] The Defence relies on *R. v. A.E.S.*, 2018 BCCA 478 to argue that there should be a reduction in sentence due to the hardship that custody will cause to C.B. because of his age and ill health. I accept that this his age and ill health are mitigating factors, however, as the Defence acknowledges, the facts in *A.E.S.* were

unique and resulted in extraordinary hardship. On appeal, the Court described the circumstances "unusual and rare" and accepted that the offender had a terminal illness which would result in his death before he could complete a lengthy sentence (paras. 67 and 70). As a result, the sentence imposed by the sentencing judge was effectively a life sentence and the Court of Appeal substituted a conditional sentence. C.B. is 68 years old and has serious health issues that cause pain and reduced mobility and require medication. His condition will probably deteriorate, however, there is no evidence that those conditions cannot be treated in custody or that custody will endanger his health or shorten his life.

[91] In *Hughes*, the offender was a couple of years older than C.B. and suffered from physical health conditions including debilitating chronic pain (paras. 36-38). In sentencing Mr. Hughes, Justice Arnold accepted his age and health as mitigating factors which would cause additional hardship during incarceration but concluded that there was no evidence that his conditions could not be treated in custody and no evidence that serving a custodial sentence would endanger his health or life (paras. 42 and 48-49). In the result, he did not significantly reduce his sentence from what would have otherwise been appropriate and imposed a custodial sentence of six years.

[92] Prior to consideration of totality, I conclude the following sentences are appropriate:

Count 1 – sexual interference contrary to s. 151 – 5 1/2 years

Count 2 – invitation to touch contrary to s. 152 – 5 1/2 years

Count 3 – sexual assault contrary to s. 271 – stayed

Count 5 – luring contrary to s. 172.1(1(b) – 15 months

Step 2 – Should the sentences be consecutive or concurrent?

[93] Sentences for separate offences "should be consecutive unless there is valid reason for making them concurrent" (*R. v. Campbell*, para. 35). A valid reason is where there is a reasonably "close nexus between the offences in time and place as part of one continuing criminal operation or transaction" (*R. v. Hatch*, 31 N.S.R. (2d) 110 (S.C.A.D.), para. 6). In *Friesen*, speaking specifically about sexual

offences, the Court said that sentences should be consecutive unless they are so closely linked that they constitute a single criminal venture (para. 155).

[94] The Crown agrees that the sentences for counts 1 and 2, the sexual interference and invitation to touch offences, should be concurrent to each other.

[95] However, the Crown submits that the sentence for 'luring', should be consecutive to the sentence for the in-person offences, because those offences protect different interests. The Defence did not dispute this and chose instead to focus on the global sentence.

[96] I agree with the Crown, that these offences protect discrete interests. That was the conclusion of the Quebec Court of Appeal in *Rayo* (para. 134) and is generally supported by the Supreme Court of Canada's general comments about 'luring' in *Legare* and more specific comments about the dangers of technology in *Friesen*. Consecutive sentences are often imposed for luring and in-person offending; however, these cases typically involve a distinct period of 'luring' which is used to facilitate, and is then followed by, distinct in-person offending (for example, see: *R. v. Hajar*, 2016 ABCA 222; *R. v. Woodward*, 2011 ONCA 610; *Lemay*; and *J.R.*). Here, there is some overlap in the conduct that underlies the offences. For example, I have concluded that C.B.'s request, during video communication, that the victim touch herself sexually while he watched constitutes both 'luring' and 'invitation to touch'. There is also some temporal overlap because the online communication that constitutes the luring offence continued after he started the in-person offending.

[97] In *Rayo*, the Quebec Court of Appeal grappled with the same problem of determining whether a sentence of 'luring' should be consecutive to other offences when there is temporal and factual overlap. After a comprehensive review of the applicable principles, the Appeal Court concluded that the sentences should be consecutive (paras. 130-156). In doing so, the Court noted the distinct societal interests protected by 'luring' and that it was important not to conflate 'luring', which precedes other conduct and is a gradual process by which the offender gains the victim's trust, with the discrete acts that may or may not be committed along the way (paras. 149-152).

[98] *Rayo* is not binding on me, but it is highly persuasive, and I agree with its reasoning. As such, I conclude that the 'luring' offence deserves a consecutive sentence.

Step 3 – Should the sentence be reduced to reflect totality and, if so, how?

[99] Prior to consideration of totality, C.B. would be sentenced to a custodial sentence of six years and nine months.

[100] The "final look" under *Adams* is an opportunity to ensure that the global sentence is "just and appropriate" given all the circumstances, does "not exceed the offender's overall culpability" and is not so crushing that it removes hope and undermines rehabilitation (*Friesen*, para. 157; and (*M. (C.A.)*, para. 42).

[101] In *Laing*, the Court suggested two questions: (1) are the cumulative consecutive sentences "unduly long or harsh" and, if so, (2) what reduced cumulative term of incarceration will mollify the harshness while maintaining the proportionality to overall culpability demanded by s. 718.1? (para. 57).

[102] The principle of totality does not require that consecutive sentences be reduced in every case (*R. v. W.(J.J.)*, 2012 NSCA 96, para. 42; and *Adams*, para. 23). However, I conclude that the principles of proportionality, parity and restraint require some reduction of C.B.'s sentence. In reaching that conclusion, I have considered the global gravity of the conduct and C.B.'s culpability as well as his age and degenerative health condition. Previously, I have referenced his age and health as mitigating because they will make his time in custody more difficult. In my view, they are also relevant to totality (See generally: *R. v. M.P.S.*, 2017 BCCA 397; *R. v. Swope*, 2015 BCCA 167; *R. v. R.J.G.*, 2007 BCCA 63, para. 24; and, *M.(C.A.)*, para. 74).

[103] In my view an appropriate global sentence would be six years in custody. To achieve that sentence, I will reduce the sentences for all counts. In the result, the custodial sentences will be:

Count 1 – s. 151 – 5 years

Count 2 – s. 152 – 5 years, concurrent

Count 3 – s. 271 – stayed

Count 5 – s. 172.1(1(b) – 1 year consecutive

[104] I will impose the mandatory ancillary orders: SOIRA order for 20 years; primary DNA Order; and s. 109 Firearms Prohibition for 10 years.

[105] I will also impose the discretionary Order prohibiting C.B. from communicating with the victim while in custody under s. 743.21(1).

[106] I have considered the arguments concerning the s. 161(1) order. In my view, C.B.'s conduct gives rise to a reasonable concern that, at least in some circumstances, he is a risk to children, so a s. 161(1) order is appropriate. However, the Order must be tailored to his risk.

[107] Given C.B.'s age, a 20-year order is not necessary to accomplish the goal of protecting children and this victim. The order will not begin until C.B. is released from custody, including on parole (s. 161(2)(b)). He is now 68 years old. I have concluded that a 10-year prohibition is sufficient to manage his risk. Even if he is released on parole, he will be approximately 80 years old when it expires. It is reasonable to conclude that his risk of sexual offences will have decreased by then.

[108] The victim has expressed fear of seeing C.B. in the community. Prohibiting him from contacting or communicating with her is reasonable as an attempt to minimize the psychological harm these offences have caused her.

[109] These offences did not involve abuse of a person that C.B. met through employment or in a volunteer capacity, but it did involve the abuse of a position of trust. So, I do not accept the Defence submission that there is no evidence of risk in that area.

[110] C.B. did not meet the victim on-line, but he used on-line communication to commit offences and groom the victim. A restriction on his access to on-line communication is reasonable.

[111] These offences did not involve the abuse of a biological child or grandchild and that may be an entirely different kind of offending. However, the circumstances disclose a risk of harm to children where there exists or where there is the ability to develop a relationship of trust. In the absence of a sexual offender assessment or other expert opinion, I cannot assume that risk does not extend to biological relations. The risk is exacerbated here because no one in his immediate family accepts that he committed these offences so are unlikely to be vigilant. Supervision of his contact with children under the age of 16 is reasonable.

[112] As such, pursuant to s. 161(1), C.B. is prohibited for a period of 10 years from the following:

- being within two kilometres of any place where [the victim] ordinarily resides, works or attends school;

- 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 persons under the age of 16 years;

- having any contact or communication with a person who is under the age of 16 years, except:

    - under the direct supervision of the young person's parent or guardian; and,

- using the Internet or other digital network for the purpose of communicating with anyone under the age of 16 years.

Elizabeth Buckle, JPC.