PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. W.M.*, 2023 NSPC 30

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Docket: 8462254, 8462256, 8462257, 8462260, 8462262, 8462264, 8462265, 8462268
Registry: Halifax

Between:

His Majesty the King

v.

W.M.

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DECISION ON LONG-TERM OFFENDER APPLICATION / SENTENCE

Judge: The Honourable Judge Elizabeth Buckle

Heard: June 13, 14, December 9, 2022, January 22, 26, 2023 at Halifax, Nova Scotia

Decision: April 20, 2023

Charge: Criminal Code, ss. 151 x 3, 152 x 4, 163.1(4)

Counsel: Sean McCarroll and Samantha Allen, for the Crown
Peter Planetta, for the Defence

By the Court:

Introduction

[1] W.M. pleaded guilty to seven offences involving sexual activity with three children, including ‘sexual interference’ and ‘invitation to touch’, and one count of possession of child pornography, contrary to ss. 151, 152 and 163.1(4) of the *Criminal Code.*

[2] The victims of the ‘sexual interference’ and ‘invitation to touch’ offences are sisters. W.M.’s conduct continued from approximately 2008 until approximately 2020. He abused KL and AL for about five years, when each was between the ages of five and ten years old. He abused CL for approximately two years when she was between the ages of four and six years old.

[3] He repeatedly performed sexual acts on them, exposed them to child pornography and had them perform sexual acts on him.

[4] W.M. suffers from pedophilia and has previous convictions for sexual offending against a child.

[5] The Crown applied to have W.M. declared a Long-term Offender (LTO) and sought a global sentence of 15 years in custody, less credit for the time he has served in custody pending sentence, followed by a 10-year Long-Term Supervision Order (LTSO) along with various ancillary orders.

[6] The Defence contested the LTO designation and submitted that the global custodial sentence should be eight years, less credit for time already spent in custody. Alternatively, the Defence submitted that if W.M. is declared to be an LTO, the total duration of the sentence, including custody and supervision, should not exceed ten years. The Defence was not opposed to the ancillary orders.

The Long-Term Offender Regime

[7] This is a stand-alone application for an LTO designation, as opposed to one that arises as an alternative to an application for a dangerous offender (DO) designation.

[8] The pre-requisites for a hearing were met (ss. 754(1) and 753.1(1)):

1. An Assessment of W.M. was ordered and performed (s. 752.1);

2. The Assessment Report was provided to counsel and filed with the Court within the timelines set out in the Criminal Code (s. 752.2 – Ex. 3);

3. The written consent of the Attorney General was obtained (s. 754(1)(a) – Ex. 2); and,

4. Written Notice of Application containing the required information was filed with the Court and served on the Defence (s. 754(1)(b) – Ex. 4).

[9] The hearing is essentially a sentencing hearing. However, there are two stages to my analysis: (1) the designation stage; and, (2) the penalty stage (*R. v. Boutilier*, 2017 SCC 64).

[10] At the designation stage, I must decide whether I am satisfied that the criteria for an LTO designation in s. 753.1(1) are met:

(a) A custodial sentence of two years or more is appropriate for these offences;

(b) There is a substantial risk that W.M. will reoffend; and

(c) There is a reasonable possibility of eventual control of the risk in the community.

[11] The Defence does not dispute that the first criterion is met. Given the circumstances of the offences for which I am sentencing W.M., there is no question that a sentence of two years or more is appropriate.

[12] The third criterion, reasonable possibility of eventual control in the community, is also not disputed. This criterion is generally thought to be aimed at LTO designation as an alternative remedy on a DO application rather than a stand-alone LTO application (See: *R. v. F.E.D.*, 84 O.R. (3d) 721 (CA), paras. 53-55). When it has been considered in the DO context, courts have found that it does not impose a burden on either the Crown or the Defence (See: *F.E.D.*, paras. 38-55; and *R. v. Wormell*, 205 BCCA 328, leave to appeal refused [2005] S.C.C.A. No. 371). Rather, it is simply something that the Court needs to be satisfied of on all the evidence.

[13] The Defence disputes that the second criterion, substantial risk that W.M. will re-offend, has been established. The Crown must prove beyond a reasonable doubt that that there is a substantial risk of recidivism (*F.E.D.*, para. 52; *R. v.*

J.J.P., 2020 YKCA 13, para. 75; *R. v. L.M.*, 2008 SCC 31 para. 40; and, *R. v.C.R.G.*, 2019 BCCA 463).

[14] To do that, the Crown can rely on the presumption (or deeming provision) in s. 753.1(2). If the Crown proves that W.M. and the offences fit within that subsection, the presumption is satisfied, and I am required to find that he presents "a substantial risk to reoffend". If its requirements are not satisfied, the Crown can still seek to prove he is a substantial risk to reoffend as required by s. 753.1(1)(b) through other means (*R. v. McLean*, 2009 NSCA 1, para. 19).

[15] The requirements for the presumption in s. 753.1(2) are that:

> (a) The offence for which I am sentencing W.M. (the predicate offence) is one of the listed offences which include ss. 151, 152, and 163.1(4); and,
>
> (b) W.M. has either:
>
> (i) shown a pattern of repetitive behaviour, of which the predicate offence is a part, that shows a likelihood of causing death, injury or inflicting severe psychological damage, or
>
> (ii) by conduct in any sexual matter, including the predicate offence, shown a likelihood of causing injury, pain or other evil in the future through similar offences.

[16] There is no dispute that the predicate offences are included in s. 753.1(2)(a).

[17] The Crown argues that the pre-requisites for both alternatives under s. 753.1(2)(b) are met and, if not, that substantial risk has been otherwise proven. Specifically, the Crown argues that W.M.'s current and previous convictions demonstrate a pattern which shows a likelihood of inflicting severe psychological harm, thus satisfying s. 753.1(2)(b)(i). Further, W.M.'s sexual conduct with children shows a likelihood of causing injury, pain or other evil in the future through similar offences, thus satisfying s. 753.1(2)(b)(ii). Finally, the Crown argues that the evidence proves beyond a reasonable doubt that there is at least a 50% probability that W.M. will re-offend and that meets the standard to find 'substantial risk' without reliance on the deeming provision.

[18] The Defence argues that the circumstances do not meet the test for 'substantial risk' under any of these routes. The Defence submits that, given the gap between W.M.'s previous convictions and those for the predicate offences and the absence of prior convictions for child pornography, his offending does not constitute a "pattern of repetitive behaviour" as required by s. 753.1(2)(b)(i). Further, given the psychiatric evidence relating to W.M.'s age and resulting decline in recidivism, the Crown has not proven that there is a 'likelihood' (better than 50% probability) of re-offending, which would be required to prove substantial risk under any of the routes (ss. 753.1(1)(b) and 753.1(2)((b)(i) or (ii)).

[19] In assessing whether W.M. is likely to continue to be a risk in the future, I must consider his risk at the time when he would be released from prison after being sentenced for the predicate offences (*R. v. Neve*, 1999 ABCA 206, para. 102).

[20] If I am persuaded beyond a reasonable doubt that 'substantial risk' is established, either through the deeming provision or otherwise, I may (not must) designate W.M. to be a LTO (s. 753.1(1)). In other words, even if I am satisfied that the criteria to designate him an LTO are met, I have discretion to decline to do so (*R. v. C.R.G.*, 2019 BCCA 463, paras. 19-21; and *R. v. R.A.O*, 2021 BCCA 384, para. 17).

[21] The provisions do not provide guidance as to how that discretion is to be exercised. In *R.A.O.*, the appeal court concluded that the sentencing judge's decision to make the LTO designation was reasonable. In doing so, the Court said that it "reflects the objectives of an LTSO to protect the public from offenders who pose an ongoing risk of re-offence, and to facilitate their rehabilitation" (para. 20, relying on, *R. v. Steele*, 2014 SCC 61, para. 30; *C.R.G.*, paras. 14-15; *L.M.*, para. 42; and, *R. v. Janssen*, 2015 ABCA 92, para. 15).

[22] Prior to 2008, there was a similar discretion in the DO designation, so decisions dealing with that provision provide guidance. In that context, the Supreme Court of Canada said that "a judge's discretion whether to declare an offender dangerous must be guided by the relevant principles of sentencing contained in ss. 718 to 718.2 of the *Criminal Code*." (*R. v. Johnson,* 2003 SCC 46, para. 28). The exercise of discretion must also respect the purpose and legislative objectives of the dangerous and long-term offender regime. The purpose of the regime is characterized broadly as 'protection of the public' and it is recognized as having both punitive and preventative objectives (*Steele,* para. 29; *Johnson*, paras. 28-29; and, *Boutilier*, paras. 33-34).

[23] At the penalty stage, if I do not find W.M. to be an LTO, I must sentence him for the offences in accordance with the purposes and principles of sentencing (s. 753.1(6)).

[24] If I do designate him to be an LTO, I must impose a sentence of not less than two years imprisonment and order that he be subject to a long-term supervision order that does not exceed 10 years (s. 753.1(3)).

[25] In deciding how long W.M. should be incarcerated, I cannot take into account the fact or length of the community supervision (*L.M.*, para. 50). That is because their goals, guiding principles and effect on the offender are different (*L.M.*, paras. 38-50). The primary goal of the custodial sentence is to punish W.M. for the predicate offences, its length will be determined by application of the

principles and purposes of sentence, including parity, and its effect is a deprivation of liberty (*L.M.*, para. 46-50; *R. v. Blair*, 2002 BCCA 205, para. 37). The goal of the supervision order is prevention, its length will be determined based on W.M.'s record and risk of re-offending, and its effect is to provide supervision aimed at reintegration and risk management (*L.M.*, paras. 46-50; and *Blair*, para. 37).

Issues

[26] The positions taken by counsel have significantly narrowed the issues:

1. Is there a substantial risk that W.M. will reoffend? Resolving that issue requires consideration of whether:

   (a) W.M.'s predicate offences are part of the requisite 'pattern of behaviour'; and,

   (b) There is a probability that he will re-offend when he is released after serving his custodial sentence; and,

2. If the criteria to designate him an LTO are met, should I exercise my discretion to decline to do so?;

3. What is the appropriate custodial sentence for these offences? and,

4. If I designate W.M. an LTO, how long should he be supervised under an LTSO?

Evidence on the Hearing

[27] Prior to the hearing, Dr. Shabehram Lohrasbe was designated to provide an Assessment under s. 752.1. His report was filed with the Court (Ex. 3).

[28] With the consent of the Defence, other material was also filed at the hearing: an Agreed Statement of Fact (Ex. 1); the Consent of the Attorney General (Ex. 2); the Crown's Notice of Application (Ex. 4); W.M.'s criminal record in the form of a JEIN report (Ex. 5); a transcript of the sentencing hearing for W.M.'s previous convictions (Ex. 6); Health Records relating to W.M.'s previous sexual offender treatment program (Ex. 7); Probation and Custody Records for W.M. (Ex. 8); Dr.Lohrasbe's CV (Ex. 9); and, the Crown's Brief (Ex. 10).

[29] At the hearing, I heard testimony from: Dr. Lohrasbe who is a psychiatrist with a specialty in forensics and was qualified as an expert to give opinion

evidence in the areas of "psychiatric disorders and related dysfunctions, substance abuse, patterns of behaviour, risk to the community, and sexual deviancy"; W.M. who testified about his experiences in custody during the Covid pandemic; and, Brad Ross, a Deputy Superintendent with Nova Scotia Corrections, who also testified about conditions in provincial correctional facilities during the pandemic.

[30] Counsel also filed written submissions which were tremendously helpful and for which I am very grateful.

[31] Resolving the issues requires me to consider W.M.'s background, previous conduct, the circumstances of the predicate offences, the expert opinion, the likelihood of recidivism and the impact of age on recidivism (*Boutilier*, para. 45; *R. v. Dow*, 1999 BCCA 177, para. 29).

W.M.'s Background

[32] Information about W.M.'s background came from a variety of sources including information provided to the judge who previously sentenced him (Ex. 6), Dr. Lohrasbe's assessment Report and testimony (Ex. 3), and W.M.'s health care, probation, and custodial records (Ex. 7 and 8).

[33] He is now 68 years old. He has been in custody since April of 2020.

[34] He was born in Halifax, Nova Scotia. His biological father was an alcoholic who was only sporadically present and not attentive or interactive with W.M. His parents separated when he was about nine or ten years old. His mother began a relationship with his stepfather who was also an alcoholic. He described both his mother and stepfather as verbally and physically abusive to him. He said his stepfather was particularly violent when drunk and would kick him and hit him with a 2 x 4 or pipe. He said his relationship with his mother was "devoid of attention, affection or guidance" and his childhood was largely unhappy (Ex. 3, pp. 6-7).

[35] W.M. also reports being sexually abused as a child (Ex. 6; Ex. 3, p.7-8). To Dr. Lohrasbe, he described an incident when he was around five or six years old involving a friend of his father's, another when he was between seven and nine years old involving an adult neighbour, and repeated sexual abuse when he was between ten and twelve years old by two of his stepfather's nephews (Ex. 3, p. 7). In 2005, he described to the author of the pre-sentence report, that at the age of 13 or 14, he was sexually abused. He said he reported it to his mother, but nothing was done about it (Ex. 6).

[36] He was kept back a few grades in elementary school and eventually left school in grade 11. He attended a vocational school for a time but did not

complete the program and then began work as a painter. He enjoyed work, and did well in it (Ex. 3, p. 8).

[37] In his early 20s he began to drink heavily, spent time in detox facilities and 28-day programs before finally quitting in 1994 (Ex. 3, p. 8). While he was drinking, he was let go from his work as a painter. He worked for a few years in a transition house before returning to work as a painter in 1999. He remained with the same company until his incarceration for the current offences (Ex. 3, p. 9).

[38] He had his first voluntary sexual experiences in his teens. He was married for about nine years and has two children who are now adults (Ex. 6). He was drinking heavily during his marriage. His separation from his wife was acrimonious and had a negative impact on his relationship with his children whom he has not seen in approximately ten years (Ex. 3, p. 10).

[39] He has a younger brother with whom he has had no contact for about 30 years. He also has not had any contact with his mother for many years (Ex. 3, p. 6). At the time of his arrest, he was residing with his common-law partner. He has been in a relationship with her since 1994. They have lived together for most of the intervening years and when they lived apart for about three years, they remained friends. They continue to have regular contact by video since his incarceration and she continues to be supportive (Ex. 3, p. 10).

Previous Convictions

[40] In 2005, W.M. pleaded guilty to two counts of sexual assault contrary to s. 271 of the *Criminal Code.* Those convictions related to two different incidents involving the same victim (Ex. 5 and Ex. 6).

[41] The victim, J.S., was the niece of W.M.'s common-law partner and would visit them. He admitted that:

- Between January of 2002 and December of 2003, when the victim was between five and seven years old, he invited her into a closet with him, exposed his penis and asked her to touch it, which she briefly did; and,

- In October of 2004, when the victim was eight years old, he took her into a bedroom and again exposed his penis and had her briefly touch it.

[42] On July 28, 2005, he was sentenced to a one-year conditional sentence order followed by a two-year probationary term for both offences. The conditions

included a period of house arrest, and he was required to participate in the sexual offender treatment program through the Nova Scotia Forensic Psychiatry Service.

[43] When discussing these offences with Dr. Lohrasbe, W.M. said he could recall only one of the incidents. He denied that he was motivated by sexual urges and claimed that he acceded to the child's request to touch his penis (Ex. 3, p. 10).

Predicate Offences and Surrounding Circumstances

[44] On April 1, 2021, W.M. pleaded guilty to the following offences:

- Count 1 - Between 2008 and 2014, he touched KL, a person under the age of sixteen years, directly with his hands, mouth and penis, contrary to s. 151 of the Criminal Code;

- Count 3 - Between 2008 and 2014, he did, for a sexual purpose, invite KL, a person under the age of sixteen years, to touch her vagina, contrary to s. 152 of the Criminal Code;

- Count 4 - Between 2008 and 2014, he did, for a sexual purpose, invite KL, a person under the age of sixteen years, to touch his penis, contrary to s. 152 of the Criminal Code;

- Count 7 - Between 2014 and 2019, he touched AL, a person under the age of sixteen years, directly with his hands, mouth and penis, contrary to s. 151 of the Criminal Code;

- Count 9 - Between 2014 and 2019, he did, for a sexual purpose, invite AL, a person under the age of sixteen years, to touch his penis, contrary to s. 152 of the Criminal Code;

- Count 11 - Between 2017 and 2020, he touched CL, a person under the age of sixteen years, directly with his hands, mouth and penis, contrary to s. 151 of the Criminal Code;

- Count 12 - Between 2017 and 2020, he did, for a sexual purpose, invite CL, a person under the age of sixteen years, to touch his penis, contrary to s. 152 of the Criminal Code; and,

- Count 15 - Between March 18, 2020, and August 18, 2020, he had in his possession child pornography, to wit, videos or digital images, contrary to s. 163.1(4) of the Criminal Code.

[45] W.M. was approximately 54 years old when he began abusing the children and it continued until he was about 65 years old.

[46] The facts are succinctly captured in the Agreed Statement of Facts that was

filed with the Court (Ex. 1).

[47] The three victims are sisters: KL, who was born in 2004; AL, who was born in 2008; and, CL, who was born in 2014.

[48] In 2005, W.M.'s partner began babysitting for the family in her residence. W.M. was in a relationship with her at that time and, in 2009, he moved in with her.

[49] From 2005 until 2015, W.M.'s partner provided daytime babysitting for KL and then for KL and AL. During this time, W.M. was often alone with the children.

[50] In 2015, the girls' family moved, so the girls were no longer at his home daily. However, they had become close to W.M. and his partner so would come to stay on weekends. Starting in 2015, all three girls would spend weekends with W.M. and his partner approximately one a month and would also spend lengthier periods with them in the summers.

[51] W.M. frequently engaged in sexual activity with KL from the time she was approximately five years old until she was approximately ten years old. That activity included:

- He told her to take her clothes off and touched her vagina, buttocks and nipples with his mouth and hands;

- He made her sit on his lap while he showed her child pornography on the computer and told her to touch herself sexually while they watched; He rubbed his erect penis on her naked body, including her vagina and buttocks;

- He made her touch his penis and masturbate him with her hand; and,

- He put his penis inside and around her mouth.

[52] W.M. frequently engaged in sexual activity with AL from the time she was approximately five years old until she was approximately ten years old. That activity included:

- He took her on errands and, while she was seated in her booster seat, he would put his hands down the front of her clothing and touch her vagina;

- He told her to take her clothes off and touched her vagina, buttocks and nipples;

- He made her touch his penis and masturbate him with her hand;

- He put his penis inside and around her mouth;

- He kissed her vagina and nipples;

- He rubbed his erect penis on her body, including her vagina and buttocks; and,

- He showed her child pornography.

[53] W.M. frequently engaged in sexual activity with CL from the time she was approximately four years old until she was approximately six years old. That activity included:

- He rubbed his erect penis on her body, including her vagina and buttocks;

- He kissed her on the lips while they lay in bed together;

- He kissed her vagina and nipples;

- He touched her vagina, buttocks and nipples with his hands;

- He made her touch and masturbate his penis; and,

- He showed her child pornography.

[54] He asked each of the girls not to tell anyone (ASF, Ex. 1 and comments to Dr. Lohrasbe, Ex. 3, p. 12).

[55] While speaking with Dr. Lohrasbe, W.M. also admitted that with at least one of the children he ejaculated on or near the child's body. He could not recall how many times he assaulted KL or AL but told Dr. Lohrasbe that he thought he had sexual contact with CL, his most recent victim, about 30 times (Ex. 3, p. 12).

[56] W.M.'s conduct came to the attention of the authorities in March of 2020 when CL disclosed the abuse to her parents and provided a statement. W.M. was arrested and admitted that he had abused CL and that he was in possession of a

large quantity of child pornography. At that time, he denied that he had abused AL and KL. AL and KL were both interviewed. KL disclosed abuse but AL had no memory of any sexual activity. W.M. was re-arrested and he confessed to abusing both AL and KL in the manner described above.

[57] In June of 2016, W.M.'s computer was examined, and 663 images and videos were identified as child pornography. The material included photos:

- of young children being sexually assaulted by adult males, including fellatio, vaginal and anal intercourse;

- of the sexual organs of young children;

- suggesting fellatio and ejaculation with young girls;

- involving naked infants and naked adult males, including bondage; and

- of a young girl who is bound with a ball in her mouth.

[58] W.M. told Dr. Lohrasbe that he got his first computer in 2007 or 2008 and first accessed child pornography before his first sexual assault of KL. He said he started viewing adult pornography and then drifted into child pornography. He felt ashamed and stopped many times but said "he'd fallen into a hole". He denied being sexually aroused by infants or by children being physically harmed or in distress and believed the images of infants and bondage were on his computer because they "pop up". (Ex. 3, p. 12).

[59] He told Dr. Lohrasbe that he had no interest in children following his convictions in 2005 but developed an interest following his exposure to child pornography online.

Expert Evidence

[60] Psychiatric evidence plays a significant role in this type of proceeding (see *Neve*, para. 124). Its purpose is "… to provide the judge with an expert opinion on the interpretation of past conduct and the likely future conduct of the offender based on his or her past behaviour" (*Neve*, para. 182). However, the Court in *Neve* also warned of the well documented difficulties and dangers in predicting future risk and emphasized that it is, ultimately, for the Court to decide what future threat the offender presents to society (para. 183).

[61] Dr. Lohrasbe's evidence is particularly relevant to the risk assessment required for the LTO determination. However, his insights are also relevant to

general sentencing principles and objectives such as specific deterrence and rehabilitation and mitigating factors such as remorse and acceptance of responsibility, so also assists with determining the quantum of the custodial portion of the sentence.

[62] Dr. Lohrasbe's qualifications and experience are summarized in his C.V. (Ex. 9). He is highly qualified, both through education and experience, to provide opinions in the relevant areas. I was also impressed with his impartiality, objectivity, and compassion.

[63] He formed his opinion based on:

- review of material including: Crown disclosure for the predicate offences; Crown disclosure for the previous offences; records from Nova Scotia Corrections and Probation; W.M.'s criminal record; material related to W.M.'s participation in sexual offender treatment in 2007-2008, including a "Comprehensive Psychological Assessment" and a "Sexual Offender Discharge Summary";

- three interviews with W.M., totally 4 hours and 40 minutes; and,

- an interview with W.M.'s common-law partner.

[64] He testified that the information available from these sources was more than adequate and noted that the assessments conducted following W.M.'s previous conviction provided more "high quality" background information than would often be the case.

[65] He noted one potential limitation - due to the Covid pandemic all interviews were by video and telephone. He testified that literature from the College of Physicians and Surgeons on the reliability of video/phone interviews, world-wide and in a variety of assessment types, found them to be as reliable as in-person interviews with limited exceptions that he did not feel applied here.

[66] Dr. Lohrasbe testified that the most striking aspects of his interviews with W.M. were W.M.'s level of anxiety and his level of self-condemnation. He said it is not uncommon for people to be anxious in custody, but they generally calm down over time. When Dr. Lohrasbe interviewed W.M., he had been in custody for over a year. He was still unusually frightened of being harmed in custody and of dying in custody. Those fears persisted through all three interviews. He also expressed higher than normal levels of self-condemnation; repeatedly saying he had done terrible things.

[67] In contrast to his self-condemnation, Dr. Lohrasbe also remarked that W.M. was "remarkably clueless" about the harm his conduct caused the children. Dr. Lohrasbe said lack of insight is not unusual amongst young first offenders but was surprising given W.M.'s age and that he had already been through treatment. He said that W.M. feels horrible but is not able to break it down and recognize specific harm. He lacks insight and cannot appreciate the perspective of the victim.

[68] Dr. Lohrasbe also expressed concerns about W.M.'s cognitive capacity. He said decline in cognitive ability with age is not uncommon, but W.M. had some memory issues that were quite striking and which he thought were genuine. He opined that the medication he takes for his physical ailments might cause cognitive problems or there might be some other cause which would likely lead to progressive decline.

[69] He did not believe there was a relationship between W.M.'s cognitive issues and his lack of insight, since the lack of insight appeared to be long-standing, dating back at least to the period immediately following his 2005 convictions.

[70] Dr. Lohrasbe said that W.M. is able to accept responsibility for the physical acts he has committed and legal responsibility for those same acts but struggles with accepting psychological and moral responsibility. It is difficult for him and many others to acknowledge they are the kind of person who does things that cause harm to children and to have an empathetic connection with the damage they have done. In Dr. Lohrasbe's opinion, W.M. is nowhere near accepting psychological and moral responsibility and, since this becomes harder as we get older, W.M. may never get there. W.M. avoids introspection as a defence strategy. Despite his previous treatment and lots of time to think, he really hasn't spent time thinking about what this did to the children.

[71] Dr. Lohrasbe viewed W.M.'s own history of sexual abuse and parental cruelty/neglect as relevant but not unique as many sexual offenders have themselves been the victims of abuse. The result for W.M. is that he has no basis for self-esteem, is very dependent on others to feel good about himself and has few skills that would help him exercise restraint.

[72] When discussing the predicate offences, W.M. told Dr. Lohrasbe that he never wanted to hurt the children but couldn't stop himself. Dr. Lohrasbe said that for people like W.M. who come into adulthood without good skills, restraint is difficult. People with good skills will know that we can't act on some urges because there will be negative consequences for us, or we will hurt others. However, for people like W.M., that is a struggle because they don't have the skills or the habit of restraint. For someone like W.M., the combination of exposure to child pornography and access to children, can be viewed as like an addiction.

[73] I will review his opinions in more detail when I deal with the issues to which it relates.

Analysis of the Issues

Issue 1 – Is there a Substantial Risk that W.M. will Re-offend?

Deemed 'Substantial Risk' - s. 753.1(2)(b)(i)

[74] To deem W.M. a 'substantial risk' under this subsection, I have to be persuaded that he has shown: a "pattern of repetitive behaviour" of which the predicate offences are a part; and the pattern shows "a likelihood" of causing injury or inflicting "severe psychological damage" on others.

[75] The burden is on the Crown to prove the pattern of repetitive behaviour and the likelihood of causing injury or "severe psychological damage" in the future.

(a) Pattern of Repetitive Behaviour

[76] Much of the caselaw addressing pattern is in the DO context where a pattern is a requirement for some routes to that designation (s. 753(1)). They differ only as to what the pattern must show.

[77] The pattern analysis is not based exclusively on the number of offences. The elements of similarity in the behaviour are also important (*R. v. Tynes*, 2022 ONCA 866, para. 67). Two offences, one predicate offence and one previous offence, is sufficient to create a pattern (*R. v. Langevin* (1984), 11 C.C.C. (3d) 336 (Ont. C.A.)). However, the fewer the offences in the pattern, the greater the similarity that is required (*Langevin*, para. 29; and *R. v. Camara*, 2017 ONCA 817, para. 26). Even factually different offences can form a pattern if they share enough common elements and demonstrate that the offender is likely to repeat his behaviour with similar results in the future (*R. v. Jarrar*, 2023 ONCA 67, paras. 23-27; and *Camara*, para. 26).

[78] In *R. v. Tremblay*, 2010 ONSC 486, paras. 96-98, Karakatsanis J., as she then was, discussed what was necessary to find a pattern:

> … there must be a common element in the behaviour, something that connects prior incidents together in a manner that justifies considering them as a whole. A pattern of behaviour is something more than a mere history of criminal activity. Similarity can supply the requisite degree of connection.

[79] She went on to say that "[to] determine whether there is a pattern sufficient to predict future conduct", a trial judge may consider evidence of: (i) what type of conduct was involved, (ii) who, generally, the victims were, and (iii) what motivated the offender to commit the offences (para. 98).

[80] The Defence submits that there is no pattern here because W.M.'s offences are 15 years apart. I disagree. The passage of time between occurrences, while relevant, does not prevent a finding that a pattern of behaviour exists (see: *R. v. Milne* (1982), 66 C.C.C. (2d) 544 (B.C.C.A.) where there was a ten year gap between offences).

[81] More significant to my conclusion is that the Defence submission is based on the dates of the respective convictions, 2005 and 2021. Whereas, in my view, the pattern analysis required by the legislation and the common law is concerned with the pattern of "behaviour", not the pattern of convictions (s. 753.1(2)(b)(i); *Steele*, para. 46). Examination of W.M.'s 'behaviour' reveals the following:

- 2002 – 2003 – sexual assault against JS, age five to seven;
- 2004 – sexual assault against JS, age eight;
- 2008 – 2014 – sexual offending against KL, age five to ten;
- 2014 – 2019 – sexual offending against AL, age five to ten;
- 2017 – 2020 – sexual offending against CL, age four to six; and,
- 2020 – possession of child pornography.

[82] This chronology shows specific incidents of sexual offending against a child in 2002 and 2004, a gap between 2004 and 2008 and then regular/continuous offending until 2020 when CL disclosed. The underlying facts for all these incidents reveal a pattern of opportunistic sexual offending against pre-pubescent girls using persuasion, trust, and a power imbalance rather than threats or violence.

[83] In some cases, there is a lengthy history of offending and a single predicate offence, so the primary task is to consider whether the historical offences form a pattern that the predicate offence is part of. In this case, there are only two prior offences each of which includes one incident, but the predicate offences include multiple offences, with multiple incidents and multiple victims over a lengthy period. So, the task here is to determine whether all the offences, including the predicate offences form the requisite pattern.

[84] The conduct underlying the predicate offences, as a group, is more serious than the conduct underlying the two earlier offences. That does not preclude the finding of a pattern. Comparative seriousness between predicate offences and the pattern behaviour is not a requirement (*R. v. Shea*, 2017 NSCA 43, paras. 125-126). Further, here, the offences committed between 2008 and 2020 with KL, AL

and CL are of similar gravity and are significantly alike.

[85] The Defence also submits that the possession of child pornography either does not fit the pattern or is a distinct act that somehow breaks the pattern. I disagree. The addition of child pornography, which W.M. admitted to Dr. Lohrasbe began in 2008, is different from his offending in 2003 and 2004. However, I view the pornography as simply a tool that became available to him that assisted in his grooming of the children and represents an escalation in his behaviour but does not fundamentally change the type of offending, the type of victim, or the motivation.

[86] I am persuaded beyond a reasonable doubt that there is a pattern of repetitive behaviour of which the predicate offences are a part.

(b) A Likelihood of Causing Injury or Inflicting Severe Psychological Harm

[87] The Crown must also prove that the pattern of repetitive behaviour shows a likelihood of causing injury or "inflicting severe psychological harm". Here, the Crown relies on the latter.

[88] This requires the Crown to prove both a likelihood of re-offending and a likelihood that a future offence will cause "severe psychological damage".

[89] 'Likelihood' has been interpreted as meaning "more than simply a possibility", "at the very least, it means more probable than not", a risk of "more than 50 percent" and "very likely" (*Neve*, para. 114; *R. v. J.T.H.* 2002 NSCA 138, para. 24; and *Lyons*, p. 338). Here, the Crown and Defence agree that the burden on the Crown is to prove beyond a reasonable doubt that W.M. will probably re-offend, meaning a 50% probability of re-offending.

[90] The Defence did not dispute that if W.M. re-offended in a similar way, 'severe psychological damage' would be caused. However, because it was not specifically conceded, I will address it briefly.

[91] The phrase is also used in the definition of a 'serious personal injury offence' in s. 752 but is not defined in the legislation.

[92] The focus of the analysis is on the effect of the conduct, not the intent of the offender or the level of violence associated with the conduct (*Steele*, para. 58). The decisions are consistent in their conclusion that use of the adjective 'severe' mandates a qualitative assessment of the level of harm or potential harm and elevates the degree of psychological damage that is contemplated by this provision.

[93] The inquiry is "fact-specific and context-driven" (*R. v. Armstrong*, 2014

BCCA 174, para. 49; *R. v. Cook*, 2013 ONCA 467, paras. 41-43). 'Severe psychological damage' is not the equivalent of "any emotional distress", it connotes a "much higher" standard, and neither "fear alone" nor "trivial or *de minimis* concerns" would be enough to qualify (*R. v. Burton*, 2013 ONSC 3021, paras. 26-27; and *Armstrong*, para. 54). It requires, "as a minimum, a substantial interference with the victim's physical or psychological integrity, health or well-being" (*Tremblay*, para. 76.).

[94] W.M.'s pattern of offending has been of sexual offending against children that includes significant interference with their sexual integrity, exposure to child pornography, breach of trust and manipulation but not threats or overt violence.

[95] I do not have the benefit of victim impact statements or expert evidence on the issue of impact of crimes of this nature on victims. The inquiry at this stage is concerned with the conduct that forms the pattern of offending and how a similar offence would impact a victim in the future. In deciding whether the type of behaviour revealed by W.M.'s pattern of offending would likely cause severe psychological damage in the future, the impact of W.M.'s conduct on these victims is relevant but not determinative and not necessary.

[96] Further, actual or likelihood of severe psychological damage can be established without expert evidence (*R. v. Cherry*, [1996] O.J. No. 267 (Gen. Div.), paras. 19 - 25; *Armstrong*, para. 53; *Burton*, para. 29; *R. v. Hopley*, 2012 BCSC 1329, para. 92; and, *Tremblay*, paras. 77-79)

[97] In *Tremblay*, the Court said, "studies and common sense are sometimes sufficient to come to a conclusion on psychological damage", often "the nature of the offence will inherently be likely to cause severe psychological damage" and in some cases "the ordinary and reasonable person looking at the impact of the offender's conduct on the victim would conclude that she sustained severe psychological damage or that she was likely to sustain severe psychological damage" (paras. 77-79).

[98] In *R. v. Friesen*, 2020 SCC 9, the Supreme Court noted the psychological harm caused to children by all manner of sexual offending and essentially told judges to take judicial notice of these harms (generally, but specifically at paras. 80-84). While *Friesen* was not decided in the specific context of an application to have an offender designated a LTO, the Court's comments are entirely consistent with the decisions I have referred to above.

[99] I have no doubt that the probable consequence of W.M.'s typical offending is "a substantial interference with the victim's physical or psychological integrity, health or well-being" (*Tremblay*, para. 76). As such, I am satisfied beyond a reasonable doubt that if he re-offends, his offending is likely to cause severe

psychological harm.

[100] So, the remaining issue is whether the Crown has proven that W.M. will probably re-offend after expiry of his custodial sentence.

[101] Dr. Lohrasbe's opinion is that W.M. currently and for the foreseeable future has a high risk for sexual recidivism, if he were released into the community without monitoring and supervision (Exhibit 3, p. 43). He concluded that: W.M.'s risk will decline with age and with the impact of incarceration; reliance cannot be placed on treatment alone to reduce risk; he is likely to be a good candidate for risk-management interventions if they are comprehensive and in place for a lengthy period; and the greatest risk management challenge will be for on-line offending.

[102] W.M. has psychiatric disorders and diagnoses that are relevant to risk. He suffers from: alcohol use disorder, in sustained remission; pedophilic disorder (not exclusive) with an attraction to females; mood/anxiety disorders; a mild cognitive impairment; and personality traits that, under stressful conditions can become dysfunctional. Dr. Lohrasbe did not have sufficient information to diagnose W.M. with sexual sadism but, given the content of some of the child pornography in his possession, he also could not entirely rule it out. Were it to apply, that diagnosis would significantly increase risk and would create risk that might persist beyond when risk would typically decline due to age.

[103] Alcohol use disorder is relevant because of its probable impact on cognitive impairment. Dr. Lohrasbe described cognitive impairment as a lingering concern.

[104] Dr. Lohrasbe's opinion concerning risk was arrived at using a structured professional judgment which combines unstructured clinical judgement and actuarial risk assessments performed when W.M. was assessed following his 2005 convictions. In his opinion, the actuarial data is useful to provide a baseline. He did not apply another actuarial instrument because many of the available instruments were developed prior to the explosion of online child pornography so are of more limited utility when there is both hands-on and virtual offending and because W.M., by virtue of his age at the time of his first offence and predicate offences, is an outlier. Actuarily, the likelihood of a man committing a sexual offence when he is in his sixties approaches zero. As a result, because W.M. was still offending in his 60s, it cannot be assumed that what applies to most sexual offenders, applies to him (Ex. 3, p. 30).

[105] Following his 2005 offences, W.M. was thoroughly assessed by Dr. Angela Connors and Jan Evans, their report, dated April 5, 2007, was filed with the Court and relied on by Dr. Lohrasbe (Ex. 7). At the time, results of the penile plethysmography testing showed no strong sexual response to any category but

suggested capacity to be aroused by sexual acts with underage children and adults. He denied any sexual attraction to children. Actuarial testing at the time revealed a low score on the Psychopathy Checklist – Revised, low to moderate risk for violent recidivism and low to moderate risk for sexual recidivism. The authors noted that his level of denial was a barrier to full participation in treatment as was his inability or unwillingness to be introspective.

[106] W.M. took sex offender treatment beginning on October 10, 2007, and was discharged on July 25, 2008, having completed 27 group sessions and 3 individual sessions. The author noted he put excellent time and effort into homework and was an active participant. His baseline risk was still considered low but his refusal to acknowledge any sexual motivation was a concern.

[107] Dr. Lohrasbe used a Risk for Sexual Violence Protocol (RSVP) as a guideline for his assessment. It contains 22 risk factors in five domains. For W.M., he noted that 12 of the factors were unequivocally present:

- Chronicity of sexual violence – persistence and frequency of sexual violence;

- Diversity of sexual violence – his conduct includes contact and non-contact offences, and the contact offences include diverse behaviours;

- Escalation of sexual violence – the predicate offences are a clear escalation;

- Psychological coercion in sexual violence – the relationship of trust and the children's description of manipulation;

- Attitudes that support or condone sexual violence – he does not grasp the consequences of his actions on the victims and his repetition over time suggests he ultimately condones his offending;

- Problems with self awareness – despite treatment, he has limited insight

- Problems with stress or coping – stress can precipitate deviant fantasies and may lead to acting on them. His history of substance abuse suggests he does not have good stress-coping strategies;

- Problems resulting from child abuse – the evidence supports a link between childhood abuse and adult offending but the underlying reason for this is unknown;

- Sexual deviancy – there is a strong link between deviancy and sexual violence but not all people with deviant sexual preferences commit offences;

- Violent or suicidal ideation – these thoughts disrupt rational thinking, can exclude feelings of empathy and thoughts of self harm can shift to others

- Problems with intimate relationships – he is in a long-standing relationship but it has been unstable and has not prevented his offending; and,

- Problems with treatment – he has completed treatment but began offending not long after and his offending escalated.

[108] Dr. Lohrasbe noted some things that were particularly significant to risk – both to elevate it and reduce it.

[109] His risk is particularly elevated because of the depth and persistence of his sexual offending, he cannot be relied on to self-regulate since he deceived himself and others for more than a decade, and his partner cannot be relied on to monitor him. His avoidance of introspection also has an impact on risk going forward but does not mean that the risk cannot be managed. W.M. could "remain insightless" but still be managed in the community.

[110] His risk may be mitigated by age and the sentencing process.

[111] It is likely that his risk will decrease with time and his poor health may hasten that. However, his potential cognitive decline may increase impulsivity and behavioural disinhibition, especially sexual disinhibition. In cross-examination, Dr. Lohrasbe said that he would expect W.M.'s risk to decline, that it would be significantly lower in a decade, and that it is rare for a man in his late 70s to molest a child in his care.

[112] Treatability is relevant to the assessment of future threat (*Boutilier*, paras. 43-45). Dr. Lohrasbe said that, in general, available treatment programs can improve the offender's self-awareness and self-control. The consensus is that they are somewhat effective at reducing recidivism in a substantial proportion of offenders. Success requires motivation, cognitive capacity, and emotional

stability. All three will be barriers to W.M.'s success. He feels guilt, shame, and remorse but these don't necessarily promote motivation for self-examination and change. His advancing age and potential cognitive decline will also be barriers. Dr. Lohrasbe was not hopeful that, at W.M.'s age, treatment would impact his insight and would not rely on treatment alone to reduce risk.

[113] According to Dr. Lohrasbe, the sentencing process, especially the LTO process and W.M.'s time spent in custody also reduces risk of reoffending. This was W.M.'s first time in custody. Dr. Lohrasbe said that he is unusually afraid of jail and of dying in jail, so the fear of returning would be a powerful motivator for him to resist offending. However, given his age and cognitive impairment, he would need frequent reminding of that risk.

[114] Treatment, supervision, and the impact of aging are interconnected and relevant to recidivism. The Defence argues that the aging process and treatment will continue to reduce W.M.'s risk of re-offending while he is serving the custodial portion of his sentence.

[115] W.M.'s age is a significant factor. The research clearly indicates that the vast majority of sexual offenders do not re-offend after age 60. However, W.M. has already demonstrated that he is one of the few who do. Dr. Lohrasbe's opinion was that it was possible that a man in his late 70s might molest a child in his care, but it would very rare. Given Dr. Lohrasbe's opinion and the fact that W.M. had comprehensive sexual offender treatment in 2007 – 2008 and then not only re-offended but actually escalated his behaviour, I am not hopeful that treatment will have a significant impact on risk. I do accept that W.M.'s fear of incarceration reduces risk but, given that he will require regular reminders of that risk, this is more of a risk management strategy than a risk removal mechanism.

Deemed 'Substantial Risk' - s. 753.1(2)(b)(ii)

[116] To deem W.M. a 'substantial risk' under this subsection, I have to be persuaded that he has shown: by conduct in any sexual matter, including the predicate offence, a likelihood of causing injury, pain or other evil in the future through similar offences.

[117] W.M.'s conduct has clearly been sexual conduct. I have already addressed the 'likelihood' requirement. The words "injury", "pain" and "other evil" are not statutorily defined. 'Evil' is commonly defined as "profoundly immoral". In my view, the only reasonable interpretation of this provision is that 'pain' and "other evil" must include psychological impacts. I say that, in part because this subsection deals with sexual offences. As I have previously discussed, often the most profound impact of a sexual offence is psychological.

[118] Relying on my analysis in the previous section, I am satisfied beyond a reasonable doubt that if W.M. committed similar offences in the future, the offending would likely cause psychological pain and "evil". So, again, the issue is 'likelihood' of recidivism.

'Substantial Risk' without resort to the deeming provisions - s. 753.1(b)

[119] The term 'substantial risk' has been interpreted as not more onerous, and perhaps less onerous, than 'likelihood' (*R. v. McDowell*, 2002 ABPC 199, paras. 30-33, aff'd, 2005 ABCA 65.). As such, to establish 'substantial risk' without relying on the 'deeming' provisions, the Crown is required to prove nothing more than a 50 % probability that W.M. will re-offend.

[120] To determine whether there is a 'likelihood' or 'substantial risk' that W.M. will reoffend, I have to assess his risk at the time of his eventual release from custody. I cannot do that without first considering how long the custodial portion of his sentence should be. So, I will consider the evidence, arguments and principles that impact my determination of the length of the custodial sentence before I complete my analysis on the LTO designation. Proceeding in this order will also help ensure that my determination of the length of the custodial sentence is not impacted by my designation decision and any resulting LTSO (*L.M.*, paras. 46-50).

Issue 3 - What is the appropriate custodial sentence for these offences?

[121] The Crown and Defence generally agree on the sentencing range for the predicate offences but disagree on where W.M. fits within that range and the impact of totality.

[122] The Crown submits that the total custodial sentence, after consideration of totality, should be 15 years in custody, less remand credit. Specifically, five years for the offences involving KL, four years for the offences involving AL, five years for the offences involving CL, and one year for the child pornography offences. The Crown submits that their position reflects totality because in its absence, they would seek a sentence of six or seven years for each of the sexual interference charges. Further, in seeking a four-year sentence for the offences involving AL, it has applied totality and the extra mitigation provided because W.M. confessed to crimes the victim could not recall.

[123] The Defence submits that the total custodial sentence, after consideration of totality should be seven or eight years, less remand credit. Specifically, two and a half years for the offences involving KL, two years for the offences involving AL, two and a half years for the offences involving CL and one year for the child pornography offence. The Defence submits that this should be further reduced by

one year if I conclude that the conditions W.M. experienced while incarcerated are mitigating.

[124] The Crown and Defence also agree that W.M. should be given enhanced credit for the time he has served in pre-sentence custody at the statutory maximum of 1.5 days per day served (s. 719(3.1)). W.M. has been in custody since April 20, 2020. As of the date of sentencing, April 20, 2023, he has served three years (1,095 days) and will be give credit for four and a half years (1,643 days). The Defence argues that W.M.'s sentence should also be mitigated due to the impact of the Covid pandemic on conditions in the provincial correctional facility. The Crown disagrees.

Purposes and Principles of Sentencing

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

[126] 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).

[127] 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

[128] Denunciation and general deterrence are the paramount considerations in sentencing offenders for sexual abuse of children (s. 718.01; *Friesen,* paras. 101-105). Emphasizing these objectives reflects society's condemnation for the behaviour and acknowledges the tremendous harm it causes.

[129] Denunciation is the means by which a sentence communicates society's condemnation of conduct. As Justice Lamer said in *C.A.M.* "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).

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

[131] The goal of specific deterrence is to discourage W.M. from committing similar offences in the future. Given his record, there is a need to deter him. However, given the evidence of Dr. Lohrasbe, the deterrent effect that custody can have on him may have already been accomplished. According to Dr. Lohrasbe, his time in custody before being sentenced has terrified him and the fear of returning will be a powerful disincentive to re-offending.

Rehabilitation

[132] 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).

[133] In cases involving sexual offending, rehabilitative efforts usually involve counselling or specific sexual offender programming. That programming can help offenders come to grips with their own abuse and understand their thinking related to sexual violence and the impact of sexual violence on victims. It can also provide offenders like W.M. who have deviant sexual interests with coping strategies and help them manage their harmful behaviour, emotions, and risk factors. In many cases, ensuring offenders have access to that kind of education is crucial to the long-term protection of society.

[134] W.M. had this kind of programming following his 2005 convictions. However, according to Dr. Lohrasbe, he still does not fully appreciate that his type of offending harms children. He clearly requires more programming. He was the victim of sexual abuse as a child and adolescent and has never received treatment. There is little doubt that his own history of abuse plays some part in his offending. The kind of programming that might benefit him will be available to him in the Federal penitentiary system.

[135] It is hard to say whether W.M. is a good candidate for rehabilitation. He has taken responsibility for his actions but has not taken moral or psychological responsibility. He has expressed remorse, shame and regret without any externalization of blame but without fully internalizing the harm he's done.

Proportionality

[136] 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).

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

[138] 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).

[139] W.M.'s offending did not involve extrinsic violence, threats, or vaginal or anal penetration but has involved significant sexual activity including fellatio, exposure to child pornography, activity that was frequent and occurred over a lengthy period and involved the violation of a trust relationship.

[140] 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);

- 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" (paras. 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);

- Harm can manifest itself during childhood or there can be long-term harm that only becomes evident during adulthood. Children can experience psychological harm that persists throughout their childhood (para. 80);

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

- 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);

- 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);

- Younger children experience harm from sexual violence for a longer period. These harms are "relevant to both the gravity of the offence and the degree of responsibility of the offender". The "moral blameworthiness of the offender is enhanced when the victim is particularly young and is thus even more vulnerable to sexual violence" (paras. 134- 135); and,

- Sexual violence that does not involve penetration is still "extremely serious" and can have a devastating effect on the victim (para. 142).

[141] In *R. v. Sharpe*, the Supreme Court of Canada commented on the many harms of child pornography. It said its very existence is inherently harmful to children and society:

- The images undermine the Charter rights of children, "eroticizes" their "inferior social, economic and sexual status", and preys on their "pre-existing inequalities" (para. 158);

- It causes "a type of attitudinal harm which is manifested in the reinforcement of deleterious tendencies within society" (para. 159); and,

- It plays a role in the abuse of children, exploiting their extreme vulnerability (para. 169).

[142] The offences that W.M. has pleaded guilty to capture a wide range of behaviour. Without diminishing the gravity of any sexual assault on a child or any offence involving child pornography, there are degrees of severity and W.M.'s conduct and moral culpability must be placed on the "the spectrum that is captured by the offence" (*Friesen*, paras. 91-95).

[143] The conduct that constitutes the sexual assaults here does not involve vaginal or anal penetration, physical injury or extrinsic violence or threats. However, given the type of activity, its duration, repetition, the fact that he exposed the children to child pornography, and the breaches of trust, the gravity of the hands-on offending is high.

[144] In assessing the gravity of the child pornography offence, I have considered the quantity of material and the subject matter of the images. The quantity of recordings and images here is not large as compared to some cases involving possession or distribution of child pornography. However, the content of some of the images includes infants, hands-on abuse of young children and elements of bondage. Given all these factors, the gravity of the child pornography related offences is also high.

[145] W.M. is solely responsible for these offences. His moral culpability is lessened only by the fact that he is himself a victim of childhood sexual abuse and that he suffers from pedophilia.

Secondary Sentencing Principles

[146] 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

[147] Section 718.2 requires that I take into account the aggravating and mitigating factors relating to the offence and the offender in considering whether to increase or reduce the sentence within the available range.

[148] The Crown and Defence disagree on whether W.M. suffered any negative consequences as a result of being in custody during the Covid pandemic and, if so, whether that should reduce his sentence. The Defence did not challenge the

constitutionality of s. 719(3.1) which caps enhanced credit at one and a half days. As such, I can not give enhanced credit beyond that maximum. However, in *R. v. Duncan,* 2016 ONCA 754, the Court said that "in the appropriate circumstances, particularly harsh presentence incarceration conditions can provide mitigation apart from and beyond the 1.5 credit referred to in s. 719(3.1).

[149] This has been applied to the restrictive conditions and health risks experienced in some jails resulting from the Covid pandemic and we now have appellate direction on how to apply it (see: *R. v. Morgan,* 2020 ONCA 279; and, *R. v. Marshall,* 2021 ONCA 344, para. 50).

[150] From those authorities, some general principles have emerged:

- This kind of credit (sometimes referred to as 'Duncan credit') "addresses exceptionally punitive conditions which go beyond the normal restrictions associated with pretrial custody" (Marshal, para. 50);

- Where it applies, it is described as either a mitigating factor under s. 718.2 or as a relevant 'collateral consequence' that "speaks to the personal circumstances of the offender" and should be considered under the principles of individualization and parity (Marshal, para. 52; R. v. Pham, 2013 SCC 15, para. 11; and, R. v. Suter, 2018 SCC 34, para. 48);

- Where it applies, it is "not a deduction from the otherwise appropriate sentence, but it is one of the factors to be taken into account in determining the appropriate sentence" (Marshall, para. 52); and,

- It cannot justify an inappropriate sentence having regard to all the relevant mitigating or aggravating factors.

[151] W.M. and Deputy Superintendent Bradley Ross from Nova Scotia Correctional Services both testified about the conditions in the Central Correctional Facility in Burnside where W.M. has been housed.

[152] W.M. entered custody in April of 2020, at the beginning of the pandemic and has remained in custody since. During that time, the facilities have followed protocols as directed by the Chief Medical Officer of the province. These have changed over time depending on the level of Covid in the community or the institution. As of the date of the sentencing, many had been relaxed. I am satisfied on the evidence that over the past three years there have been increased restrictions

on inmates due to Covid protocols – limited or no programming, limited or no visits for periods, and reduced time out of one's cell. However, these have not had the same negative impact on W.M. that they have on some other inmates. During the pandemic, the facility started allowing inmates to have video-communication with people on the outside. W.M. testified that he did not want in-person visits with his common-law partner, so being able to have video communication with her had a positive impact. My impression from W.M.'s evidence about the impact on him of being confined to his cell was that it was not entirely negative. He liked being able to do things off his range, however, he was also quite afraid while in custody and felt some safety when everyone was confined to their cells. W.M. had worked in the laundry, which he enjoyed. That was shut down due to Covid. He also applied for programs, but they were also shut down for a period. I am satisfied that there was some negative impact to him from not being able to work in the laundry or take programs.

[153] In addition to the impact of Covid, W.M. also experienced an assault while in custody, when another inmate threw feces on him.

[154] I will consider these circumstances in my sentence calculation, however, given the seriousness of the offences for which I am sentencing him, the mitigation is limited.

[155] The Defence also submits that the fact that there is a lengthy gap between offences is mitigating. I disagree. There is a gap between convictions, but there is very little gap between offending. W.M. abused J.S. in 2002 and 2004. He was convicted for those offences in 2005 and started abusing K.L. in 2008. The gap in offending was about four years. For much of that time, W.M. was under the supervision of a conditional sentence supervisor or probation officer and involved in sexual offender treatment. From 2008 to 2020, there is essentially no break in his offending.

[156] Following are the aggravating and mitigating factors:

Aggravating Factors

- The victims were very young (s. 718.2(a)(ii.1; Friesen, paras. 134-135);
- W.M. abused a position of trust or authority toward the victims (s. 718.2(a)(iii));
- W.M. groomed the children by showing them child pornography (Friesen, para. 125);

- The offences continued for years and involved multiple incidents (Friesen, paras. 131-133);

- The degree of physical interference was significant, including most forms of sexual contact other than vaginal or anal penetration, and increase the risk of psychological harm to the victims (Friesen, paras. 137-147);

- The offences involved multiple victims;

- W.M. has a prior related record which is relevant to specific deterrence and rehabilitation; and,

- The quantity and type of child pornography is an aggravating factor on the charge of possession of child pornography.

Mitigating factors:

- W.M. pleaded guilty, advised he was pleading guilty at an early opportunity and knowing the Crown would seek to have him designated as a dangerous or long-term offender;

- He gave a full confession to police relating to all three victims, including one who has no memory of the activity so, for her, his confession is the only evidence against him;

- Through his guilty plea, confession, comments to Dr. Lohrasbe and in court, it is clear that he accepts responsibility for his conduct and feels deep remorse, shame and regret;

- His age and health issues, including COPD, angina, ulcerative colitis, anxiety and cognitive decline which will make custody more difficult;

- He continues to have the support of his common law wife; and,

- He is willing to participate in rehabilitative programming.

I also consider the collateral consequence relating to his pre-trial custody, including the impact of the Covid restrictions and his assault. There is also an absence of other aggravating factors such as threats or additional violence.

Parity / Range of Sentences

[157] Section 718.2 also requires consideration of the principle of parity. Within reason, a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. Sentencing ranges are important. They are intended to encourage greater consistency between sentences and respect for the principle of parity.

[158] 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.

Sentences for In-Person Sexual Abuse

[159] I have reviewed all of the cases submitted by the Crown and Defence along with others: *Friesen*; *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. G.P.W.*, 2021 NSSC 192; *R. v. D.R.*, 2020 NSPC 46; *R. v. S.P.W.*, 2021 NSPC 24; *R. v. C.A.L.*, 2021 NSPC 365; and *R. v. Wood*, 2021 NSSC 253. I will specifically address only those which I view as most relevant.

- *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.M.B.*, 2022 NSSC 262 –seven years in custody. The offender sexually abused a child for approximately one year. There was a non-familial trust relationship. The victim was approximately 11 years old. The conduct included oral, vaginal, and anal penetration.The accused did not plead guilty.

- *GPW* – six years in custody. The offender sexually abused his niece when she was between ten and eleven years old. There were three incidents of sexual interference and making/distributing child pornography involving the victim. He did not plead guilty and he had convictions for similar offences that post-dated the crimes he was being sentenced for.

- *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 did not plead guilty and had no related record.

- *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.

Sentences for Possession of Child Pornography

[160] The Crown and Defence agree that the appropriate sentence for the child pornography offence, after consideration of totality, is one year in custody.

[161] The general guidance from *Friesen* also applies to this offence. In 2015, the maximum sentence for this offence, when prosecuted by indictment, was increased from five years to ten and the minimum from six months to one year. There are few reported decisions in Nova Scotia that deal with sentencing for possession of child pornography after the amendments and none that considered *Friesen*. Cases dealing with making or distributing child pornography are of some assistance but are not good comparators since they are generally treated as more serious offences. There are helpful cases from other provinces:

- *R. v. Singh*, 2021 ABPC 103 - the offender pleaded guilty to possession of a relatively small quantity, four videos, but the content included very young

children and one video involved explicit violence against a child. He had no criminal record. In consideration of immigration consequences, the judge imposed a custodial sentence of one day under six months. In a very helpful review of the cases to date, Judge Stirling concluded that the range after the 2015 amendments, where there was a guilty plea and no prior criminal record, is typically between nine and 18 months incarceration (para. 77).

- *R v John*, 2018 ONCA 702 – the Court struck down the mandatory minimum penalty and imposed a custodial sentence of 10 months. The accused had not plead guilty, the collection consisted of 50 images and 89 videos depicting children between two and four years old subjected to explicit sexual activity including anal and vaginal penetration. The accused was 31 one years old, suffered from mental health issues and had made extensive efforts toward rehabilitation.

- *R v Batshaw*, 2004 MBCA 117 – on appeal from the imposition of a conditional discharge, the Court of Appeal substituted a conditional sentence of 15 months. The accused possessed 80 - 100 images of children, some of which displayed children in various acts of sexual intercourse.

- *R. v. Adams*, 2022 BCSC 2289 – the offender was sentenced to 16 months in custody and two years probation. He was in possession of 357 images which include children performing sex acts, he lacked insight but had no criminal record and had pleaded guilty.

Restraint, Consecutive vs Concurrent and Totality

[162] 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.

[163] If I conclude that any of the sentences should be served consecutively, I also have to consider the related principle of totality which says the combined 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).

[164] 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 need be to reflect totality (*R. v. Adams*, 2010 NSCA 42; and, *R. v. Laing,* 2022 NSCA 23).

Conclusion on Duration of Custodial Sentence

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

[165] The cases reveal that in the absence of a guilty plea, the typical sentence for sexual interference with a young child, involving a breach of trust, multiple incidents, and a significant degree of interference over a lengthy period, would be six or seven years (*Hughes, A.M.P., G.W.* and *A.P.L.*). That range has been applied even in cases involving elderly offenders with health issues (*Hughes*). In *S.P.W.,* a sentence of just under five years was imposed for similar conduct, where the offender pleaded guilty. In other cases, lower sentences have been imposed, with or without a guilty plea, but the circumstances are less aggravating. In *Wood,* there was no breach of trust, the victim was older and there was a guilty plea. In *C.A.L.*, the degree of sexual interference was less.

[166] For the hands-on offending, I find that Justice Arnold's decision in *Hughes* is the most useful comparator. Mr. Hughes was sentenced to six years in custody. W.M. is of a similar age to Mr. Hughes and, like him, has physical health issues. There are other similarities, both have a prior related record, both were in a position of trust toward a child, both abused the child over a lengthy period. The degree of interference was also similar. Mr. Hughes engaged in anal sex with his victim; whereas W.M. forced fellatio on his, ejaculated onto them and exposed them to child pornography. I cannot see a meaningful difference in the degree of interference or harm.

[167] The main difference between W.M. and Mr. Hughes is that W.M. confessed and pleaded guilty. That is significantly mitigating, both in general and in this case, specifically. In general, it spares victims and their families the trauma of a trial. In this case, but for W.M.'s confession, the charges involving AL would not have been prosecuted, and, but for his guilty pleas, the other children would probably have had to testify, and the family would have been put through a lengthy trial. I also accept that W.M.'s guilty pleas as a true sign of remorse. While W.M. still does not truly understand the harm his conduct has and will cause the children and their families, he does have some sense of the wrong he's done and regrets it.

[168] Having regard to the purposes and principles of sentencing, prior to totality, application of remand credit or consideration of whether the sentences should be consecutive or concurrent to each other, I conclude the following sentences are appropriate:

Count 1 – s. 151 (KL) – 5 years

Count 3 – s. 152 (KL) – 1 year

Count 4 – s. 152 (KL) – 1 year

Count 7 – s. 151 (AL) – 4.5 years

Count 9 – s. 152 (AL) – 1 year

Count 11 – s. 151 (CL) – 5 years

Count 12 – s. 152 (CL) – 1 year

Count 15 – s. 163.1(4) – 1 year

[169] In imposing a lower sentence for Count 7 involving AL, I have considered the additional mitigation provided by W.M.'s confession and guilty plea in the face of her absence of recall.

[170] For the child pornography offence, the quantity of material is moderate, but the content is at the higher end of gravity. W.M. has a some-what related record. However, he has pleaded guilty, expressed remorse, and taken some responsibility. He claims he did not seek out the more disturbing material, however, he did retain it.

Step 2 – Should the sentences be consecutive or concurrent?

[171] There is no dispute that the sentence imposed for possession of child pornography must be consecutive to the sentences for the other sexual offences and that the sentences imposed for offences relating to each separate victim must be consecutive to those imposed for the other victims (ss. 718.3(7)(a) and (b)). The Crown and Defence also agree that the sentences for 'sexual interference' and 'invitation to touch' for each victim should be concurrent to each other. I agree. In the context of this case, those offences are inextricably linked and constitute a single criminal venture (*Friesen,* para. 155).

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

[172] Prior to consideration of totality, W.M. would be sentenced to a custodial sentence of 15.5 years in custody, less remand credit.

[173] 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).

[174] 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).

[175] 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, W.M. is now 68 years old, is in physically poor health and will probably experience cognitive decline while in custody. I do conclude that 15.5 years in custody would be a crushing sentence for him. 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 because of the practical reality of W.M.'s reasonably anticipated life span and anticipated condition when he is released from custody (See generally: *R. v. M.P.S.*, 2017 BCCA 397; *R. v. Swope*, 2015 BCCA 167; *R. v. R.J.G.*, 2007 BCCA 631, para.24; and, *M. (C.A.)*, para. 74).

[176] Many of the offences are statutorily required to be served consecutively, so the only option to achieve totality is to reduce the sentence for individual offence(s).

[177] Applying the principles and purposes of sentencing to the facts, in my view an appropriate global sentence would be 12.5 years in custody, less remand time. To achieve that sentence, I will reduce the sentences for Counts 7 and 11. In the result, the custodial sentences will be:

Count 1 – s. 151 (KL) – 5 years

Count 3 – s. 152 (KL) – 1 year concurrent

Count 4 – s. 152 (KL) – 1 year concurrent

Count 7 – s. 151 (AL) – 3 years consecutive

Count 9 – s. 152 (AL) – 1 year concurrent

Count 11 – s. 151 (CL) – 3.5 years consecutive

Count 12 – s. 152 (CL) – 1 year concurrent

Count 15 – s. 163.1(4) – 1 year consecutive

As I previously stated, W.M. has already spent the equivalent of 4.5 years in custody. As a result, his sentence going forward will be 8 years in custody. He is now 68 years old. At warrant expiry, he will be 76 years old. If he is released prior to that, he will be under the supervision of a parole officer.

Conclusion on Designation Stage of LTO Application

[178] The Defence argues that several factors contribute to a reasonable expectation that W.M. is not likely to reoffend when he completes the custodial portion of his sentence:

1. W.M.'s age – Dr. Lohrasbe confirms the well-recognized reduction in sexual recidivism with age and W.M. will be at least in his early 70s upon release; and,

2. Treatability – W.M. is willing to take part in treatment which is available in the Federal Penitentiary

[179] Essentially, the submission is that by the time W.M.'s custodial sentence is complete, the aging process and programming will have reduced his risk to a level where he is no longer likely to re-offend.

[180] Given the evidence, in my view the key factor will be W.M.'s age at the time he is released. Dr. Lohrasbe's evidence persuades me that treatment may help reduce risk but cannot be relied on. In assessing the impact of age on risk, I have considered that W.M. was still offending at age 65, his risk when he was assessed at age 67, was still high, and Dr. Lohrasbe testified that it is possible that he would offend in his late 70s. However, at some point between age 65 and age 79, his risk to reoffend will move from high or 'likely' to 'possible' which is lower than likely. His physical health issues may hasten the age-related decline, but his cognitive decline may impede that normal age-related decline. Not surprisingly, the evidence does not precisely identify the point at which his risk will move from 'likely' to reoffend to 'possibly' will reoffend.

[181] If the burden on the Crown was to persuade me that W.M. is likely to commit further offences today, it is met. If the burden was to persuade me that it is possible that W.M. will reoffend when he is released from custody, it is met. However, I have to be persuaded beyond a reasonable doubt that W.M. is likely to reoffend when his custodial sentence expires. I recognize that he was still offending at 65 years old, that treatment is not likely to have a profound effect and that neither he nor his common-law partner can be trusted to monitor or regulate his conduct. Despite that, given Dr. Lohrasbe's evidence, the Crown has not met the burden. In reaching that conclusion I have considered all the evidence but, in particular the following:

- W.M.'s expected age at the expiry of his sentence is 76, the likelihood of re- offending will decline over time and that decline may be hastened by poor physical health;

- Ancillary orders will make it unlikely that he will be in a position of trust, power or control over children or otherwise have access to children; and,

- Dr. Lohrasbe's opinion.

[182] Therefore, I impose the custodial sentences outlined above (12.5 years, less remand time for a go forward sentence of eight years) and decline to designate W.M. a long-term offender. I will grant the following ancillary orders: SOIRA order for life; primary DNA Order; s. 109 Weapons Prohibition for life; s. 743.21(1) Order prohibiting communication with the victims while W.M. is in custody; and s. 161 Order (duration and terms to be addressed by counsel).

Elizabeth Buckle, JPC.