Court of Queen's Bench of Alberta

Citation: R v DCH, 2020 ABQB 510

Date: 20200903
Docket: 181252883Q1
Registry: Calgary

Between:

Her Majesty the Queen

Crown

- and -

DCH

Offender

Restriction on Publication

Identification Ban – See the *Criminal Code*, section 486.4.

By Court Order, information that may identify the victim must not be published, broadcast, or transmitted in any way.

NOTE: This judgment is intended to comply with the identification ban.

Reasons for Sentence
of the
Honourable Mr. Justice D.A. Labrenz

Introduction

[1] On February 7, 2020, DCH entered guilty pleas to the following *Criminal Code*, RSC 1985, c. C-46 charges:

1. invitation to sexual touching contrary to s. 152 of the *Criminal Code*;
2. making child pornography contrary to s.163.1(2) of the *Criminal Code*;
3. accessing child pornography contrary to s.163.1(4.1) of the *Criminal Code*.

[2] After DCH entered the guilty pleas, I canvassed s.606(1.1) of the *Criminal Code* and I was satisfied that the guilty pleas were voluntary and properly tendered. An Agreed Statement of Facts signed by both legal counsel and DCH was filed as an exhibit. DCH confirmed the facts as written in the Agreed Statement of Facts and read into the record. I was satisfied that the agreed facts supported the essential elements of the offences to which DCH pleaded guilty. On this basis I directed that convictions be entered.

[3] Upon DCH's request, sentencing was adjourned to August 31, 2020 for the preparation of a presentence risk and mental health assessment psychiatric report (FAOS), and a presentence report.

[4] The Crown seeks a global sentence of 5 years incarceration and DCH submits that a fit and proper sentence is a period of incarceration of 2–3 years.

Circumstances of the Offences

[5] I have derived the following recitation of the facts from the Agreed Statement of Facts.

[6] VR is the mother of the complainant, SR. SR at all relevant times was 4 years of age and in junior kindergarten. DCH was SR's piano teacher.

[7] In January 2018, SR missed a piano lesson due to illness. On February 18, 2018, DCH went to SR's house for a make-up lesson, and was in her home for approximately 2 hours. DCH asked for and received the WIFI password from VR.

[8] DCH did not provide any piano instruction that day. Instead, he played with SR in the basement. He and SR read books and painted a teapot set. VR remained on the main floor, keeping open the door to the basement, and she periodically checked on DCH and SR who were otherwise alone. At some point, VR was interrupted by the phone and because she was preparing smoothies, leaving DCH and SR unmonitored for approximately 15 minutes. Afterwards, SR was "acting up" more than usual.

[9] VR made a "snack" for SR and invited DCH to join them. SR was sent to her room because of her behaviour and while upstairs SR asked to use the washroom. Before VR responded, DCH went upstairs and spoke with SR while standing in the washroom doorway. SR was sitting on the toilet.

[10] On March 1, 2018, VR and SR were "Face Timing" with SR's father (who was out of the country) and SR blurted out that some girls suck on a boy's puta. In the context of the family communications, "puta" meant penis.

[11] After ending the video conversation, VR asked SR where she had heard about sexual activities of this nature, and SR told her VR that DCH had shown her some videos on his phone.

SR described the videos as depicting "girls" performing oral sex on "boys," "boys" ejaculating, and "people" using sex toys that look like penises. SR also said that she saw people spending time naked in the living room. SR demonstrated to VR what she saw in the videos by lying on her back with her legs spread apart, while at the same time simulating the movements of sexual intercourse. SR added that DCH asked her whether she had seen her daddy do that, referring to the videos. When VR asked SR why she didn't tell her mother about the videos, SR said that DCH asked her to stay and watch the videos, that "it would make her smarter." It is unclear whether the videos that DCH showed SR were of adults, children, or both, as SR could not recall the age of the "boys" or the "girls" depicted in the videos.

[12] The next morning, after calling her lawyer, VR contacted the Calgary Police Service, and spoke with Detective Ralstin of the Calgary Police Service Child Abuse Unit.

[13] On March 3, 2018, Detective Ralstin completed an interview with SR at the Sheldon Kennedy Child Advocacy Centre.

[14] After the interview, SR told VR that "girls do that to boys but it doesn't taste good," referring to oral sex.

[15] On the same day, Detective Ralstin arrested DCH at his residence for "corrupting morals" under s.163(1) of the *Criminal Code*. DCH was searched as an incident to his arrest and a black Samsung Galaxy Note S3 cell phone was seized from front pant pocket. The electronic contents of the phone were not immediately searched.

[16] After contacting legal counsel by telephone, DCH spoke to Detective Ralstin and advised as follows:

- He did not suffer from mental health issues or addiction to drugs or alcohol that might impair his ability to make a statement;
- He is not aware of any child pornography on his cellular telephone;
- He knows that it is wrong to show child pornography to a child;
- The allegation likely came from SR, a private student. He has become acquainted with her and her family. She is always friendly and likes to hug;
- He has taught make-up lessons and has been alone with her on one occasion when he was teaching a make-up lesson at her home. He assumes that he allegations come from this one time as there wasn't any other situation where he would have had the opportunity;
- During the make-up lesson at SR's house, he read a book about Johannes Brahms. SR was off watching television and he was watching YouTube videos on his phone. The videos depicted pornographic interactions between adult and teenage strangers. There is a chance that SR saw the videos of girls performing oral sex while SR looked over his shoulder
- When asked if he has urges, he responded "everyone has urges."

[17] After the interview with police, DCH was released on a Promise to Appear and Undertaking to a Police Officer.

[18] On March 8, 2018, the police successfully obtained a search warrant to search the contents of DCH's cell phone. DCH was the owner and exclusive user of the phone, and DCH admitted that he had knowledge, consent, and control over his cell phone.

[19] The Internet browsing history and metadata recovered from the phone demonstrated that DCH had used the phone to browse the Internet for child pornography videos, images, and stories, dating back to May 1, 2014. The web browsing history demonstrated that DCH had accessed approximately 1,356 images and videos of child pornography and that he had downloaded some child pornography into hidden folders.

[20] DCH downloaded his child pornography files onto his phone by using the Internet browser, a MEGA privacy application, as well as Dropbox. DCH extracted archived files containing child pornography videos to view them. The extracted videos themselves were copied and stored in a hidden folder on his phone. DCH downloaded approximately 119 videos of child pornography between December 26, 2017 and February 21, 2018. Approximately 87 videos were downloaded on February 18, 2018 between 1:40 a.m. and 1:53 a.m. The videos have names such as "PTCH" which stands for "pre-teen hard core," "gentle penetration," 5yo pussy rubs," and "4yo_cute_girl_suck." These names are consistent with child pornography.

[21] The child pornography images DCH accessed and possessed depicted mostly females, ranging from babies to approximately 12 years old. Most of the images and the videos focused on babies to girls approximately 6 years old, engaging in explicit sexual activity, such as vaginal penetration, anal penetration, digital penetration, inserting objects in the vagina and anus, masturbating and fellatio (with adults and other children of the same and opposite sex. They also depict bondage and posing.

[22] The forensic examiner also recovered from DCH's phone, a video recording DCH made of SR on February 18, 2018 at 2:42 p.m. The 1 minute and 31 second video shows SR identifying herself and completely undressing. As SR undresses, DCH whispers that SR is beautiful. He then focusses the camera on the area immediately above the belly button to just below SR's knees as DCH whispers "nice." While SR continues undressing she tells DCH that when he puts it on YouTube, he has to "load it." DCH then directs her to turn around a second time and bend over so he can see her bum. The recording focuses on SR's vaginal and anal area while she is bent over. While SR is undressed, DCH directs her to touch him as he points to his erect penis, which remains covered by his clothing. The recording abruptly stops.

[23] DCH made certain that the door to the basement area was closed while he recorded the video of SR, and he copied the video of SR from the phone's default folder to a hidden folder which contained other child pornography.

[24] The police obtained a further search warrant on July 17, 2018 for DCH's home computer. No further evidence was discovered.

[25] SR was re-interviewed by the police on August 29, 2018. SR disclosed that DCH asked her to take her clothes off and that he asked her to perform oral sex on him. She stated that this was the only time he asked her to touch him.

[26] DCH was re-arrested by police when he was "invited" to attend and meet with police on September 5, 2018. He was re-arrested for sexual assault, sexual interference, invitation to sexual touching, making child pornography, possession of child pornography, and accessing child pornography. Once again, DCH spoke with legal counsel.

[27] DCH was interviewed by the police for a second time. DCH admits that the statements he made were voluntary.

[28] DCH advised Detective Ralstin of the following:

- The cell phone belonged to him and nobody else used it;
- He said this was all a "giant misunderstanding;"
- He has taken counselling which helps with "bottling up" his emotions;
- The video of SR is on his phone, which was synced to his Gmail on his home computer. He removed it from his Gmail account when he saw it was there;
- He admitted that SR saw a pornographic video while she was in his company and care;
- DCH said that when Detective Ralstin looked at the images of the video and not just the audio he would know whether SR touched him;
- DCH does not deny that he directed SR to touch him. DCH does not deny that the direction was for SR to perform oral sex;
- When asked why SR would say that a penis doesn't taste good when you put it in your mouth," DCH said that there would be a good explanation given in court;
- Despite Detective Ralstin telling DCH that SR's parents are worried sick about what happened to SR, about what she may have seen in the videos, and whether SR is confused, along with having concerns about the statement made by SR that a penis doesn't taste good – DCH responds by saying that he will give his story later.
- DCH declined the opportunity to review the video of child pornography from his cell phone but admitted being aware of the video. DCH did not want to review the video "for his own sanity and personal feeling." He added that he "didn't want to subject himself to seeing that type of content." Detective Ralstin played the audio recording. When asked whether DCH had put the video on YouTube, he would not respond.

[29] The Crown filed a representative sample of child pornography at the sentencing hearing, including the video of child pornography that DCH made of SR.

Circumstances of the Offender

[30] DCH is 35 years old and lives in Calgary, Alberta. He has no prior criminal record. He has one older brother. DCH indicates that his home life was tense, and that his father gambled, abused alcohol, and was violent towards DCH's mother. DCH's mother confirms the abuse and says that DCH was victim to both physical and sexual abuse (the sexual abuse having been perpetrated by another family relative). DCH is currently single, having been involved in three intimate relationships that each lasted a few years, and DCH presently resides with his father. He and his brother have become estranged since the circumstances of the present offences became known and DCH describes his relationship with his brother (confirmed by his mother) as being dysfunctional since childhood, with DCH often on the receiving end of his brother's humiliating and abusive show of power. His parents are both supportive.

[31] DCH obtained his high school diploma and went on to obtain degrees in Music and Education at the University of Calgary.

[32] DCH has been employed as a tow driver since July of 2018.

Pre-Sentence Report

[33] At my direction a Probation Officer prepared a pre-sentence report. The report writer indicates that DCH has accepted responsibility for his actions and has significant insight into the factors that lead to his offending behaviours. According to the writer, DCH has insight into the "significant degree of harm caused to the named victim in two charges" and that DCH "expressed a fear that [SR's] childhood would be irrevocably impacted by his actions." DCH apologized throughout his interview, saying that he "feels that being forthright with others and accepting the consequences for his actions are steps he can take to make amends."

[34] DCH identified stress as a key concern in his life. In this context, DCH identified four unhealthy manners in which he has responded to stress in the past: gambling, video games, unhealthy behaviours with food/fitness, and the use of pornography coupled with masturbation.

[35] DCH, after the criminal charges has sought out and attended to counselling sessions with a counsellor at the Baxter Forensic Group. DCH's counsellor reports that DCH has been open and hard working, and that the counsellor would be willing to accept DCH as a patient upon his release through the Forensic Assessment and Outpatient Service (FAOS).

[36] DCH says that a family member sexually assaulted him from when he was 2 years old until he was 5 years of age. The report writer says that DCH has learned that his prior sexual victimization played a significant role in addressing his triggers.

[37] DCH indicates that pornography became a problem for him after his previous engagement to be married ended in 2013. His use of pornography progressed from what he described as "tame/normal" to depictions of demeaning rape/servitude until he eventually began to access child pornography. DCH told the Probation Officer that the demeaning adult pornography was his means of coping with his emotions of anger, rage, and betrayal that he felt over his failed marital engagement.

[38] DCH says that he has not accessed pornography since he was arrested and charged by the police in 2018. Instead, DCH indicates that he has turned to peer support groups.

[39] In the "identified needs and proposed conditions" portion of the presentence report, the Probation Officer indicates that DCH's identified needs have diminished since the offence dates because of DCH's motivation for counselling. DCH's present needs are said to include his family relationships, and a need for continued intervention in the "helpful areas of social and cognitive skills, and attitudes, despite his gains in these areas." According to the Probation Officer DCH's areas of strengths include his social influences, employment, and appropriate anger management."

[40] As the Crown pointed out in its submissions, DCH remains in need of significant intervention with respect to his offending behaviour, although I do accept that this would necessarily include the work that DCH has done on his own personal issues, at least as a starting point.

Pre-Sentence Risk and Mental Health Assessment Psychiatric Report

[41] A psychiatric report was prepared by Dr. Denis Morrison on July 3, 2020. Dr. Morrison interviewed DCH by telephone on three occasions and met with him on one occasion, totalling some five hours.

[42] While there is some duplication between the psychiatric report and the presentence report in the review of DCH's antecedent family history, Dr. Morrison addressed DCH's mental health diagnosis and opined as to the risk of DCH reoffending as informed by psychometric testing and professional judgment.

[43] DCH told Dr. Morrison that he turned to adult pornography after his relationship ended in 2012 to "fill the sexual void." DCH lamented not being able to start a family and to be a father, and said that he was nurturing emotions such as anger and rage against women.

[44] After a brief reconnection of his relationship following the termination of his marital engagement, DCH reported a sense of betrayal and resentment that precipitated his interest in child pornography.

[45] DCH said he lost interest in adult women and most alarmingly said that he had a fantasy of being a dad, and that his fantasy included him being a father to SR.

[46] DCH admitted that the night before videotaping SR with his phone camera that he had viewed child pornography with great intensity. He said that he had shown SR photos of his vacation in Belize, and that he had videos showing oral sex on his phone. DCH told Dr. Morrison, "I knew it was wrong" … "If I had said no to see (sic) the videos, she could betray me, blow my cover, so I showed them to her" … He also told SR that "many girls don't like the taste of the milk of men."

[47] DCH also told Dr. Morrison that SR "wanted to become older, to play with other people or older people?... the YouTube video triggered the wanting of doing a video like the girl on You Tube… I did not touch her inappropriately; my prior hugs were never inappropriate." DCH acknowledged his risk in the basement with the door closed was immense, that SR's mother could have come down at any time, but that his sex drive likely was very high and his judgment was inappropriate but subjugated to the power of his sex drive. DCH told Dr. Morrison that SR "wanted to make a request of a video of herself undressed, wanting to go on YouTube," while acknowledging that he had an erection. DCH explained, "I loved her like a daughter, then I found her sexually appealing."

[48] Dr. Morrison's stated diagnosis, expressed in terms of a reasonable medical certainty, is summarized as follows:

> There is a presence of Pedophilic disorder, heterosexual, possibly nonexclusive, meaning attracted to adult females. There is a presence of Personality disorder, unspecified or mixed, with obsessive-compulsive features, dependent and avoidant features, with query PTSD (Post traumatic stress disorder) of a sexual nature having occurred early on in this offender's life story and narrative.
>
> Diagnosis of pedophilic disorder in DSM V:
>
> A. Over a period of at least 6 months, recurrent, intense sexually arousing fantasies, sexual urges, or behaviours

involving sexual activity with a prepubescent child or children generally 13 or younger.

B. The individual has acted on these sexual urges, or the sexual urges or fantasies cause marked distress or interpersonal difficulty.

C. The individual is at least 16 years of age and at least 5 years older than the child or children in criterion A.

[49] As to the necessary risk assessment, Dr. Morrison was of the view that the risk for the further accessing of child pornography assessed from a conservative cautious approach was likely moderate to high. The risk assessment for relapse into noncontact and contact sexual offences was moderate from a structured professional judgment viewpoint.

[50] When considering the risk posed by DCH, Dr. Morrison identified the following factors as being important:

Strength factors:

- LS/RNR strength factors such as mostly access to counselling/psychotherapy with Mr. Harbourne, gaining some insight into his condition, strong support from his family, counsellor, trust in counsellor, working conditions. The LS/RNR samples many of the major and minor risk factors in order to provide comprehensive risk/needs assessment. As a psychometric test, the LS/RNR focusses mostly on needs and types of interventions and responsivity to such management interventions;
- attended Soul Care 3 conference at Saint Albert in March 2020;
- personal/family support such as mother;
- no history of violent offences;
- no prior criminal documented history, absence of prior entries;
- deterrent power of sentencing;
- not being allowed access to Internet devices including social media.

Weakness factors:

- young age of the victim;
- the invitation to touching, leads to risk present and ongoing of sexual contact offence;
- a history of investigation a year before for inappropriate behaviour on a 6-year-old student;
- isolation;

- LS/RNR's description of mental health deficiencies, problems, issues and conflict: past traumas and impact, intense sex drive, anger against adult women, obsessive features of behaviour and personality such as "all or nothing" in each endeavor planned or foreseen;
- aggravation of a mental disorder;
- absence of access to treatment amenities;
- access to Internet device.

[51] Dr. Morrison recommended if DCH were to receive provincial custody that DCH should be assessed for treatment in the Rocky Mountain Program (RMP) Good Lives Program at the Calgary Correctional Centre. Dr. Morrison further noted that if DCH was not assessed as being a high needs offender he would not be admitted into the program.

[52] If sentenced to custody in a federal institution, Dr. Morrison recommended assessing DCH for treatment in the ICPM-moderate to high intensity program for sex offenders at Bowden Institution.

General Principles of Sentence

[53] Many of the important common law principles of sentencing have now been given statutory status. The guiding principles of sentencing are set out ins section 718 to section 718.2 of the *Criminal Code.* Section 718 states:

> **718** The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
>
> **(a)** to denounce unlawful conduct and the harm to victims or to the community that is caused by unlawful conduct;
>
> **(b)** to deter the offender and other persons from committing offences;
>
> **(c)** to separate offenders from society, where necessary;
>
> **(d)** to assist in rehabilitating offenders;
>
> **(e)** to provide reparations for harm done to victims or to the community; and
>
> **(f)** to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

[54] Section 718.01 of the *Criminal Code* states:

> **718.01** When a court imposes a sentence for an offence that involves the abuse of a person under the age of eighteen years, it shall give primary consideration to the objectives of denunciation and deterrence of such conduct.

[55] Section 718.1 of the *Criminal Code* states:

> **718.1** A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[56] Section 718.2 of the *Criminal Code* states, provides in part as follows:

> **718.2** A court that imposes a sentence shall also take into consideration the following principles:
>
> **(a)** A sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
>
> **(ii.1)** evidence that the offender, in committing the offence, abused a person under the age of eighteen years;
>
> **(iii)** evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim;
>
> **(iii.1)** evidence that the offence has a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation;
>
> Shall be deemed to be aggravating circumstances;
>
> **(a)** a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
>
> **(b)** where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
>
> **(d)** an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
>
> **(e)** all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

[57] The preamble to section 718 of the *Criminal Code* states that the fundamental purpose of sentencing is the protection of society and to contribute to the respect for the law and the maintenance of a just, peaceful and safe society.

[58] As s.718.1 mandates, Parliament has made the proportionality principle the only governing principle under the *Criminal Code.* Proportionality means that any sentence imposed must properly reflect the gravity of DCH's offences and his degree of responsibility.

[59] Although sentencing is an individualized process, s.718.2(b) of the *Criminal Code* recognizes that a sentence can never be arbitrary as sentence proportionality means that any sentence imposed should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.

[60] Proportionality itself is determined by two things: the gravity of the offence and the offender's degree of responsibility. The gravity of the offence includes two components: the harm or likely harm to the victim and the harm or likely harm to society and its values: ***R v Arcand,*** 2010 ABCA 363 at para 48.

[61] As the Court of Appeal said in ***Arcand*** at paras 49-51**,** the degree of responsibility of the offender includes the *mens rea* of intent, recklessness or wilful blindness associated with the *actus reus* of the crime committed. The more harm is intended or the more that an offender is reckless or wilfully blind, the greater the moral culpability. Other factors affect culpability such as the offender's personal circumstances, mental capacity, or motive for committing the crime.

[62] The *Criminal Code,* s.718.2, directs me to take into account a number of proportionality principles, including both aggravating and mitigating circumstances of the offence or the offender, which ultimately assist in evaluating the moral blameworthiness of the offender and the gravity of the offence.

[63] When sentencing an offender to custody for multiple offences, a sentencing judge must ultimately decide whether sentences of imprisonment should be served concurrently or consecutively. s.718.3(4)(c) of the *Criminal Code* permits a sentencing judge to decide whether sentences for multiple offences are to be served concurrently or consecutively one to the other. s.718.3(7)(a) of the *Criminal Code* provides that when an accused is sentenced at the same time for more than one sexual offence committed against a child, the Court shall direct that a sentence of imprisonment if it imposes for an offence under s.163.1 be served consecutively to a sentence of imprisonment it imposes for a sexual offence under another section of this Act committed against a child. Beyond these statutory considerations, the general rule is that offences that are so closely linked to each other as to constitute a single criminal adventure may, but are not required, to be served concurrently. All other offences are to receive consecutive sentences: ***R v Friesen,*** 2020 SCC 9 at para 155.

[64] Whenever consecutive periods of imprisonment are imposed, a sentencing judge must consider the principle of totality. This is accomplished by asking whether the overall sentence is unduly long or harsh in an attempt to achieve proportionality – that is to say that the total sentence should not exceed the offender's overall culpability: ***Friesen*** at para 157.

[65] The totality principle is one example of the restraint principle. Parliament recognized the principle of restraint when it added ss.718.2(d) and (e) to the *Criminal Code.* As the Alberta Court of Appeal importantly observed in ***Arcand*** at para 53 the restraint principle does not conflict with the proportionality principle, "in fact, restraint is firmly imbedded within, and central to, the proportionality principle."

[66] In the circumstances of this sentencing, in addition to the sentencing principles found in s.718 of the *Criminal Code,* I must be particularly mindful of s.718.01, which directs that I must give primary consideration to deterrence and denunciation as the three offences here involve the abuse of a person under eighteen years.

A Renewed Approach to Sentencing for Sexual Offences Against Children

[67] On April 2, 2020, in ***R v Friesen,*** the Supreme Court of Canada allowed an appeal from a sentence of 4 ½ years for a sexual assault committed upon a four-year-old child. In doing so, the Court restored the original sentence of six years. The sexual offence involved Mr. Friesen asking

the child's mother to bring the child into the bedroom so they could force their mouths onto her vagina and so that he could force his penis into her vagina. The mother brought the sleeping child into the bedroom, removed her diaper, and laid her naked on the bed. The child began to cry and tried to flee the bedroom. Mr. Friesen and the mother prevented her from escaping. As the child was in distress and screaming, Mr. Friesen repeatedly directed the mother to force the child's head down so that he could force his penis into her mouth. The child's screams awoke the mother's friend and eventually Mr. Friesen fled the residence.

[68] In allowing the appeal from sentence, the Supreme Court engaged in a comprehensive review of how Courts should approach offences involving the sexual exploitation of children and made it clear that custodial sentences must increase. At para 5 of ***Friesen,*** the Supreme Court clearly stated as follows:

> …we send a strong message that sexual offences against children are violent crimes that wrongfully exploit children's vulnerability and cause profound harm to children, families, and communities. Sentences for these crimes must increase. Courts must impose sentences that are proportional to the gravity of sexual offences against children and the degree of responsibility of the offender, as informed by Parliament's sentencing initiatives and by society's deepened understanding of the wrongfulness and harmfulness of sexual violence against children. Sentences must accurately reflect the wrongfulness of sexual violence against children and the far-reaching and ongoing harm that it causes to children, families, and society at large.

[69] Chief Justice Wagner and Justice Rowe, writing for the full Court, emphasized that the protection of children must constitute "one of the essential and perennial values of Canadian society" (***Friesen*** at para 42) and stressed the importance of sentencing judges properly understanding the wrongfulness of sexual violence against children and the harm it causes. The Court explained that sexual violence against children is wrong because it invades their personal autonomy, violates their bodily and sexual integrity, and wounds dignity (***Friesen*** at paras 50-51). Personal autonomy refers to the child's right to develop to adulthood free from sexual interference and exploitation by adults (***Friesen*** at para 52).

[70] As importantly, at paragraphs 56 and 58, the Court explained that the emphasis on personal autonomy, bodily integrity, sexual integrity, dignity, and equality requires courts to focus on psychological harm, and not simply physical harm. As the Court observed, emotional and psychological harm is often more pervasive and permanent, and is particularly pronounced for children.

[71] I also take into consideration these additional considerations from the Supreme Court's decision in ***Friesen*** for the purposes of sentencing DCH:

- The text of s.718.01 of the *Criminal Code* constitutes Parliament's decision to prioritize denunciation and deterrence for offences that involve the abuse of children by requiring those sentencing principles to be given "primary consideration." The objective of separation from society is closely related and when appropriate can be used as the means to reinforce and give practical effect to deterrence and denunciation. This is a reasoned response to the serious harm such offences cause to children and denunciation "embodies the communicative and educative role of law.

Where Parliament has indicated which sentencing, objectives are to receive priority in certain cases, the sentencing judge's discretion is thereby limited, such that it is no longer open to the judge to elevate other sentencing objectives to an equal or higher priority. Nonetheless, other factors may still be accorded significant weight (including rehabilitation and *Gladue* factors) (paras 101-105);

- The *Criminal Code* recognizes the harm is not limited to the direct victim. Parents, caregivers, and family are victims in their own right. Beyond the harm to families and caregivers there is harm to society as a whole (paras 62-64);
- The sexual abuse of children is especially wrongful because of the innate power balance, and children are especially vulnerable among those they trust (paras 65-67);
- Sentences must recognize and reflect the harm that sexual offences cause to children and the wrongfulness of sexual violence (para 74);
- Sentences must be commensurate with the gravity of sexual offences against children. Courts must recognize and give effect to (1) the inherent wrongfulness of these offences; (2) the potential harm that flows from these offences; and, (3) the actual harm;
- Sexual violence against children potentially causes several forms of harm: 1) harm that manifests itself during childhood, and 2) long-term harm that only becomes evident during adulthood (paras 79-80):
- Courts should consider actual harm where possible. Where direct evidence of harm is not available, harm may be found from the factual circumstances such as a breach of trust or grooming, multiple instances of sexual violence, and the young age of the child. Direct evidence from children or caregivers is not required to find actual harm (para 86);
- Courts should not use stereotypes to minimize the wrongfulness of sexual violence against children (para 87). Applying force of a sexual nature to a child is highly blameworthy because an offender is or ought to be aware that his action will profoundly harm the child. The intentional sexual exploitation and objectification is highly blameworthy because children are so vulnerable (paras 89-92);
- New technologies have enabled new forms of sexual violence against children and provided sexual offenders with new ways to access children (para 47). The Supreme Court recognized in ***R v Sharpe,*** 2001 SCC 2 that the legislated scheme to protect children is meant to protect the personal autonomy, bodily integrity, sexual integrity, dignity, and equality of children. The production of child pornography traumatizes children and violates their autonomy and dignity by treating them as sexual objects, causing harm that may stay with them for their entire lifetime (para 51).

- In ***Sharpe***, the Supreme Court stated at para 189 that child pornography threatens the psychological and physical security of children by undermining children's right to life, liberty and security as guaranteed by s.7 of the Canadian Charter of Rights and Freedoms. Moreover, at para 103, the Supreme Court observed that child pornography is reasonably thought to promote cognitive distortions, fuel fantasies that incite offenders to offend, be used to groom and seduce victims, and children are abused in the production of child pornography. Finally, in ***Sharpe***, the Supreme Court recognized that sexual violence can interfere with children's fulfillment and healthy and autonomous development to adulthood particularly when children are developing and learning to overcome adversity. This comment was repeated in ***Friesen*** at para 58.
- Mid-single digit penitentiary terms for sexual offences against children are normal and upper-single digit and double-digit penitentiary terms should be neither unusual nor reserved for rare or exceptional circumstances (paras 113-114);
- Where there is an increased likelihood of re-offending, separation from society should be emphasized. The likelihood of re-offending is also relevant to rehabilitation because it offers long-term protection. Rehabilitation may weigh in favour of a reduced period of incarceration followed by probation. At the same time, depending on the risk to reoffend, the imperative of providing protection means that treatment in prison. In some cases, the only way to achieve protection may be to impose a lengthy sentence (para 124);
- There is a "spectrum" of trust relationships and they should not all be treated the same. Any breach of trust is likely to increase the harm to the victim and thus the gravity of the offence. The focus is the extent to which the trust relationship was violated. A child will likely suffer more harm from a close relationship and a higher degree of trust such as with family members, caregivers, teachers, and doctors. The abuse of a trust relationship exploits children's particular vulnerability to trust adults, which is especially morally blameworthy (paras 125-130);
- Duration and frequency can significantly increase the harm to the victim (paras 131-133);
- The age of the victim is also a significant aggravating factor. When the victim is particularly young, the gravity of the offence and the moral blameworthiness of the offender is increased (paras 134-136);
- Courts should not assume that there is any clear correlation between the type of physical act and the harm to the victim (paras 137-146);
- A guilty plea in the face of an overwhelming case is entitled to less weight; however, a guilty plea does have other advantages that count in mitigation such as saving court resources and providing a degree of finality to the victims (para 164);

- Remorse is a relevant mitigating factor that gains significance when it is paired with insight and some indication that the offender has "come to realize the gravity of the conduct, and as a result has achieved a change of attitude or imposed some self-discipline which significantly reduces the likelihood of further offending" (para 165).

[72] The Supreme Court also stressed at paragraph 95 that Parliament has mandated that sentences for sexual offences against children must increase by increasing maximum sentences and prioritizing denunciation and deterrence. As the Court said, the repeated increases of maximum sentences meant that Parliament wished for such offences to be punished more harshly, which means that courts should generally impose harsher sentences than in those cases that preceded the increase in maximum sentences. This is because proportionality should be viewed through the lens of a new understanding as to the gravity of such offences.

[73] As the Court noted, sentences for sexual offences against children have been increasing since 1987. In 2005, Parliament increased the maximum sentence for the offence of invitation to sexual touching from 6 months to 18 months when the Crown elected to proceed by summary conviction. Once again, in 2015, Parliament saw fit to increase the maximum sentence from 10 to 14 years for sexual offences against children, including invitation to sexual touching in those situations where the Crown proceeded by indictment and from 18 months to 2 years a day when prosecuted by summary conviction.

[74] Maximum sentences for child pornography offences have also been increasing since 2005. On November 1, 2005, a 5-year maximum sentence applied for accessing child pornography when the Crown proceeded by indictment. The making of child pornography carried a maximum of 10 years when the Crown proceeded by indictment. A maximum sentence of 18 months applied when the Crown proceed by summary conviction. In July 2015, the *Tougher Penalties for Child Predators Act* (Bill C-26) came into force. The new legislation made making and distributing child pornography strictly an indictable offence with a maximum of 14 years.

A Preliminary Evidential Comment

[75] Near the beginning of Defence Counsel's sentencing submissions, Counsel asserted that the Court could only consider the presentence report, and the psychiatric report (FAOS) only insofar as those reports were either mitigating or in support of the lack of a mitigating factor, and not necessarily in support of an aggravating factor.

[76] At the time, I invited counsel to specifically identify what material was objected to in the reports, and suggested that the Crown would have the opportunity to decide if it wanted to call evidence in a so-called *Gardiner* hearing, a hearing named after a Supreme Court of Canada decision: ***R v Gardiner,*** [1982] 2 SCR 368. The legal notion behind a *Gardiner* hearing is simply that the Crown must prove beyond a reasonable doubt any aggravating factor on sentencing that it wishes to rely upon: s.724 of the *Criminal Code*. s.724(3)(a) provides that where there any dispute with respect to a fact, the disputing party must request that evidence be adduced as to the existence of the fact unless the court is satisfied that sufficient evidence was adduced at trial.

[77] Defence Counsel, in response to the Court's question, said that it was not implying that it was engaging s.723 of the *Criminal Code*; nor, was DCH requesting a *Gardiner* hearing, instead

counsel said that DCH was not contesting the reports before the Court, but was contesting the inferences that could be drawn by me from the reports and the victim impact statements. I agree that the question of what inferences may be drawn is something that I must decide.

[78] In the context of this evidential discussion, I would draw the parties attention to the recent Alberta Court of Appeal decision in ***R v BRS,*** 2020 ABCA 29. In the circumstances of that appeal, the Court of Appeal considered the respondent's position that psychological harm with forced sexual intercourse is not inevitable but must be proven. The victim impact statement before the sentencing judge described psychological harm over a long period of time suffered by the complainant. The respondent did not challenge the contents of that presentence report at the time of sentencing.

[79] The Alberta Court of Appeal at paragraph 26 cited numerous appellate decisions, including three from the Alberta Court of Appeal, holding that the accused is required to give the Crown notice that the information sought to be relied upon as aggravating is under dispute. The Court also said at paragraph 27, that the decision not to challenge the evidence suggesting psychological harm was a "sound decision, as such harm was not only foreseeable but is expected when a young woman is subjected to forcible sexual intercourse."

Victim Impact Statements

[80] The Crown Prosecutor produced and read two victim impact statements at the sentencing hearing, one from SR's mother and one from SR's father.

[81] As expected, the statements were difficult to listen to and spoke of betrayal along with the loss of parental security. VR, the mother, described her world as collapsing, and wrote about her feelings of self-blame for not being able to protect her child. VR mused about how DCH's actions will affect her daughter long-term, and at the same time described how DCH's actions had harmed her own mental health including: a lack of sleep, nightmares, and a constant questioning of what she might do in the future to protect her daughter.

[82] AR, SR's father, described trusting DCH and befriending him. AR spoke about how DCH's status as a public-school music teacher caused him to trust DCH. After the initial feelings of anger that came with the betrayal of his trust, AR wrote about feelings of shame, inadequacy, guilt, incompetence, anguish, paranoia, and depression. Understandably, like VR, AR questions how he could keep his daughter safe and laments the loss of AR's innocence.

[83] The victim impact statements collectively speak quite powerfully to the psychological harm that DCH has done to this close-knit family. In my view it would be difficult to overstate the significance of the psychological harm that DCH caused to this family. This family has lost its trust. The parents feel inadequate and ashamed. They wonder what they did wrong when the question should only be what DCH did wrong. Both parents have lost their sense of security, and are left second-guessing what they could have done to keep their young and vulnerable daughter safe. Unfortunately, this sense of shame as experienced by many innocent victims is all too common.

[84] Beyond this consideration, DCH's actions have served to harm society. As the Crown argues, it takes a "village to raise a child" in the sense that we all rely upon others to guide, inspire, educate, and protect our children. DCH in his offending has gravely injured societal trust. When parents cannot trust people with their children, especially people in positions of trust

such as teachers, the harm to society is nearly as immediate as the harm done to the sexually abused child. Beyond that consideration, and nearly as insipidly, the sexual abuse of children fosters a society where adults (especially men, because men are most commonly the sexual offenders against children) are afraid to interact with children, or even to be kind, because of the fear that such interactions will be inappropriately misjudged as being something suspicious or even nefarious.

Determination of a Fit Sentence

The Offender's Sentencing Authorities

[85] In support of the offender's submission as to a fit and proper sentence, DCH asked me to consider several sentencing authorities. I will briefly summarize some of them. I have considered them all.

[86] In ***R v JDM,*** 2014 ONCJ 29, JDM pleaded guilty to five counts, involving the making of child pornography, possession of child pornography, accessing child pornography, and two counts of failing to abide by court orders. The Crown sought a sentence of 3-5 years, noting that the accused had reoffended since having been convicted previously for possession of child pornography. The defence sought a sentence of two years less a day followed by three years probation.

[87] The Court agreed with the defence position.

[88] The offences themselves involved using a software program to access the Internet and using a file-sharing program to make available images of child pornography for others on several occasions. At the time of his arrest, JDM was in possession of six "thumb drives" containing images of child pornography.

[89] The sentencing judge found several aggravating features including: some of the images involved essentially the torture of young children for sexual gratification, the previous conviction for possession, the re-offending despite an unblemished treatment record over a period of one year, and the finding that JDM had developed a scheme to evade police detection while still on probation. The sentencing judge found some mitigating factors as well: the guilty plea, the expression of remorse, JDM was a survivor of sexual abuse, JDM is "making strides" to deal with prior abuse, and JDM did not have any personality disorders substance abuse, along with a finding that there was "no hint of violence."

[90] In the result, the sentencing judge was persuaded by the number of years of supervision the Defence suggestion entailed, along with the prospects of successful rehabilitation. A sentence of 2 years less one day custody followed by 3 years probation was imposed.

[91] In ***R v Theobold,*** [2013] OJ No 6149, the accused pleaded guilty to possessing and making available child pornography. The accused was described as a 33-year-old woman of apparent good character and significant community support.

[92] The collection of child pornography was massive, including 22,096 still images (primarily of the sexual abuse of young children) and 288 videos including torture, painful penetration of children, including children crying. There were also text stories.

[93] The accused made images available through a file sharing program.

[94] The sentencing judge held that the Crown demonstrated the following aggravating factors: the size of the pornography collection, the nature of the collection which the sentencing judge described as "monstrous", the degree of organization involved in the collection, the length of time that the offence went on for, the fact that images were shared, and the sentencing judge's finding that the accused was a danger to children. The sentencing judge held that good character is often mitigating but not for this type of offence.

[95] As to mitigating factors, the sentencing judge emphasized the taking of responsibility and the early guilty plea. As well the judge in considering specific deterrence noted the loss of employment and the loss of reputation, along with the willingness to engage in rehabilitation.

[96] The Defence sought 2 years incarceration followed by probation and the Crown 4 years incarceration. The sentence imposed was 3 ½ years.

[97] In ***R v Schledermann,*** 2014 ONSC 674, the accused pleaded guilty to three offences: possession of child pornography, making child pornography available, and voyeurism. The accused admitted to using the Internet to download and share child pornography images (a large quantity of images and movies). He also made a movie from his apartment of his 13-year-old step-granddaughter dressing and undressing. The step-granddaughter had stayed with the accused for six months when dealing with parental conflict.

[98] A sentence of 4 years was imposed on the 72-year-old offender. One of the aggravating features identified by the sentencing judge was the anxiety and panic attacks suffered by the young victim, along with the trust issues that the victim had developed. The sentencing judge found that the accused's age and lack of prior criminal record were mitigating.

[99] In ***R v Lewis,*** 2013 ONCJ 579, the accused entered guilty pleas to charges of possessing and making available child pornography. The collection involved 253 images and 207 videos of child pornography, including 62 videos that he made available to an undercover police account. The contents included: images and videos of boys engaged in sex acts (oral and anal sex) with each other and with young girls and adult males, and an adult male urinating into the mouth of a boy who appears to about 8 years of age.

[100] The sentencing judge imposed a sentence of 15 months custody followed by three years probation based upon the need to exercise restraint with a first offender with "an impeccable reputation and community supports, demonstrated remorse, and insight with a motivation to take treatment. The sentencing judge was also influenced by a diagnosis suggesting a low risk to reoffend.

[101] In ***R v Wright,*** 2012 ONCJ 698, the accused entered pleas of guilty to one count of possession of child pornography and a further count of making it available. The Crown proceeded summarily. The combined total of child pornography totaled 404 videos and 40 images from two laptops. Both laptops shared files using peer to peer software.

[102] The sentencing judge described the sentencing as "troublesome" and found that the facts were serious given the nature of the charges and the size of the collection. However, the sentencing judge noted that the accused had taken counselling to understand why he became involved in such activities and that he continued to address his issues.

[103] The sentencing judge imposed a sentence of 12 months incarceration followed by 3 years of probation.

[104] In ***R v Bock,*** 2010 ONSC 3117, the accused pleaded guilty to possessing child pornography, making available child pornography, and accessing child pornography. The accused was discovered at a time that he was found sharing 190 child pornography pictures and videos. Later, at the time of the execution of a search warrant, the accused was found sharing 110 child pornography videos with other users of an Internet network. The accused shared child pornography over a 2 ½ year span or 241 days, and had a collection of 1,000 child pornography videos.

[105] The sentencing judge found mitigating factors to be the general good character of the accused and an unblemished lifetime employment record. The accused's guilty plea was also identified as a mitigating factor. A sentence of 2 years and 9 months custody was imposed.

[106] In ***R v Connor,*** [2009] OJ No. 6369, the accused was convicted of offences relating to child pornography, marihuana and weapons. On the child pornography counts (two counts of possession and two counts of making), the Crown sought 3 to 4 years custody. The accused sought 2 years less a day followed by 3 years probation.

[107] The child pornography collection was described by the sentencing judge as being "vile" and large constituting at least 270 child pornography videos. The videos depicted sexual abuse, involving some children as young as toddlers and the sentencing judge described the videos as involving a wide range of depravity. The accused actively sought out the child pornography on the Internet, and his collection was obtained via a file sharing programme which meant that the accused's collection was in turn also shared.

[108] The sentencing judge said that the most mitigating factor was the fact that Mr. Connor is a first-time offender and was otherwise of blameless character. The sentencing judge also noted that the accused had considerable support from the community. After reviewing the sentencing authorities, a sentence of 3 years custody was imposed upon the accused.

What is a fit and proper sentence?

[109] The Crown's submission as to sentence, excluding requested ancillary orders, is as follows:

Count 1: Section 152 – Invitation to Sexual Touching	2 - 2 ½ years
Count 2: Section 163.1(2) - Making child pornography	2 – 2 ½ years
Count 3: Section 163.1(4.1) – Accessing child pornography	1 ½ - 2 years
Total Sentence	5 ½ - 7 years
Global sentence (reduced pursuant to the totality principle)	5 years

[110] DCH asks me to a sentence him to 2 to 3 years incarceration, and does not oppose the Crown's request as to ancillary orders.

Consecutive vs. Concurrent Sentences and Totality

[111] As I consider the question of DCH's global sentence, I must first consider the proper approach to multi-count sentencing.

[112] The Crown asks that I impose consecutive sentences, and identifies the Alberta Court of Appeal decision in ***R v BSM,*** 2011 ABCA 105 at para 13 as authority for its position. In that sentence appeal, the Alberta Court of Appeal held that consecutive sentences were appropriate in those circumstances, which involved sentencing the offender for the touching of a child for a sexual purpose as opposed to the wholly distinct sentencing for making child pornography.

[113] More recently in ***R v Vigon,*** 2016 ABCA 75 at para 22, the Alberta Court of Appeal confirmed that it is an error in principle to impose concurrent sentences for distinct criminal offences.

[114] When I ultimately consider the principle of restraint in sentencing, I note that reducing a global consecutive sentence for its totality is only appropriate in those circumstances where the resulting sentence is not proportionate to the offender's moral blameworthiness considering the overall gravity of the offences: ***R v Tettersell,*** 2012 ABCA 57.

[115] DCH acknowledges that s.718.3(7)(a) of the *Criminal Code* requires me to impose a consecutive sentence for at least one of the child pornography offences because of the concurrent conviction for a sexual offence in relation to SR. He asks me to sentence DCH in relation to the two child pornography charges concurrently.

[116] I reject this argument for two reasons. First, there is a clear legal and factual distinction between the making of child pornography and the accessing child pornography generally. Second, as I identified while hearing sentencing submissions, DCH accessed child pornography over nearly a four year period and therefore it cannot be properly argued that the single instance where DCH made pornography carries much of a temporal connection.

[117] In the result, I agree with the Crown that the sentences that I must now impose for the three offences before the Court must be imposed consecutively as the three offences are factually and legally distinct. As a result, I will approach sentencing by first considering the fit and proper sentence for each of the three offences, following which I will have a "last look" to determine whether the resulting sentence is offensive as being too high when unadjusted for totality.

What is a Fit and Appropriate Sentence for the Invitation to Sexual Touching?

[118] The Crown in its submissions referred me to numerous sentencing authorities regarding the conviction that involved DCH asking SR to touch him sexually. I will briefly review those sentencing authorities before moving on to determine a fit and proper sentence for this particular offence.

[119] In ***R v DARK,*** 2017 MBQB 139, the accused was convicted of one count of sexual assault, one count of sexual interference and three counts of invitation to sexual touching as well as two counts of making sexually explicit material available to a person under 18 years. The accused was a member of the family and regarded as the victim's stepdad. He stayed at home while the children's mother went to work and looked after the children after school. The accused showed sex movies/pornography to the children under the guise of teaching them about sex. He

watched sex movies with the children naked, at least from the waist down, and masturbated. He told I.S. and R.S. to engage in sexual acts while he watched. The trial judge was also satisfied that the accused invited R.S. to touch his penis and that R.S. did touch his penis. The accused was sentenced to 2 years custody for the invitation to sexual touching. He threatened the children to not tell anyone. He was sentenced to 14 years incarceration, which was reduced to 11 years to reflect totality. The Court of Appeal at 2018, MBCA 133, reduced the sentence to 9 years (on the issue of concurrent vs. consecutive sentences). The Court of Appeal did not reduce the 2 year sentence for the invitation to sexual touching.

[120] In ***R v Merkl,*** 2017 MBQB 197 the offender was sentenced for invitation to sexual touching, sexual interference, sexual assault, exposure of his sexual organs to a person under 16, and making sexually explicit material available to a person under 16 years of age. The accused was convicted after trial. He was a babysitter for a 6 year old and a 4 year old. He showed the children a video of adults and teenagers engaged in various sexual acts. He suggested that the sexual acts were things that children could do. He asked the 6 year old if her vagina was like in the videos, and when she told him that he should not be watching the videos, he reassured her that it was safe to do so and that she should not tell anyone. After watching the video, the 4 year old pulled the accused's penis out of his pants and masturbated him. The 4 year old said that happened a total of 4 times. The accused was 34 years old and had no prior criminal record. The presentence report suggested a tumultuous upbringing, including being the victim of a sexual assault. The Court noted that accused was in a position of trust, the predatory nature of his behaviour, the very young age of the children and the lack of remorse. A global sentence of 44 months custody was imposed, with a sentence of 14 months custody imposed for the invitation to sexual touching. He was sentenced to 1 year for showing explicit material to a child. The sentence was not reduced for totality and the Manitoba Court of Appeal confirmed the sentence: ***R v Merkl,*** 2019 MBCA 15.

[121] The Crown also referred me to ***R v Levin,*** 2015 ONCJ 290, which dealt with sentencing in the context of convictions for possession of child pornography, making child pornography and counselling sexual assault. The charges arose from on-line chatting with an undercover officer. The Crown argues, and I agree, that there is some comparability in the counselling offence, where the accused counselling an undercover police officer (role-playing a mother) on how she could get her 8 year old daughter used to sex and advising the mother as to several ways in which the mother could touch her child sexually. A search warrant revealed 79 child pornography files on the offender's computer covering all levels of child pornography. The case generated significant publicity and this public scorn. He was a first-time offender, pleaded guilty and expressed remorse. While sentenced to three years globally, the accused received consecutive sentences of six months custody for possession of the child pornography, 1 year for making child pornography, and 18 months custody for the counselling offence.

[122] As a starting point for considering a fit and appropriate sentence, I acknowledge as I have earlier reviewed, that s.718.01 of the *Criminal Code* directs that I must prioritize deterrence and denunciation in circumstances such as these which involve the abuse of a 4 year old girl.

[123] What does this mean?

[124] The purpose of deterrence is to discourage individuals from offending. There are two forms of deterrence: specific and general. Specific deterrence is aimed at the individual being sentenced, and it works to specifically deter that person from engaging in that offending

behaviour in the future. General deterrence, on the other hand, is intended to send a preventative message to the public that serves to prevent people from offending in the first place. Denunciation, on the other hand, communicates a collective statement of society's condemnation of the offender's behavior: ***R v M(CA),*** [1996] 1 SCR 500 at para 81, meaning that an offender "should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law".

[125] On the present facts, DCH argues that the gravity of his offence is reduced because the evidence does not demonstrate that the young 4 year old victim placed her mouth on DCH's penis in response to his invitation. In my view, while I agree that actual physical contact would tend to increases the gravity of this offence, I must be careful not to use the lack of physical contact to overly minimize the gravity of the offence, and at the same time I must recognize that DCH's moral blameworthiness remains nearly, but not, the same. In concluding that the moral blameworthiness is often greater when actual sexual contact occurs, I recognize the added moral blameworthiness of an accused permitting a child to proceed with sexual contact (and not stopping the contact from occurring) after having issued the invitation.

[126] In my view there is a danger in sentencing precipitated by placing too much emphasis upon whether the sexual contact physically occurred, as I must concurrently consider the actual and anticipated psychological harm to SR, along with the harm done to the family, and more broadly the harm done to societal values.

[127] It is clear in these circumstances that DCH's invitation for SR to touch him has resulted in actual harm. As the Supreme Court of Canada directed in ***Friesen***, I must consider the harm caused by DCH's breach of trust. Not only did DCH abuse the trust given to him by the family and SR, he exploited that trust in grooming SR by using pornography to normalize his requests that the victim should undress and sexually touch him. DCH groomed SR by playing a pornographic video depicting oral sex, which incited the 4-year-old SR's curiosity and interest and promoted SR to take her clothes off for the camera. The video depicted a young girl who was quite eager to please and eager to emulate what DCH had shown to SR on his phone. There can be no question in these circumstances that DCH created SR's cooperation by careful grooming.

[128] As I have earlier reviewed in detail, the Supreme Court in ***Friesen*** has urged sentencing judges to place greater emphasis on the degree to which sexual "violence" invades personal autonomy, bodily and sexual integrity, and wounds dignity. The Supreme Court has clearly indicated that children have a *Charter*-protected right to be free of sexual exploitation, manipulation, or interference from adults. In the context of DCH's sexual abuse of SR, I find that "violence" does not necessarily require physical touching.

[129] I must, when considering the gravity of the offence, recognize that the Supreme Court has asked judges to focus on the psychological harm that arises whenever an adult sexually abuses a child, and especially when a trusted adult abuses a child. In this regard, the Supreme Court has said that sentencing judges err when they place too great an emphasis on the nature of the physical sexual contact. With this consideration in mind, I am of the view that I must not place too great an emphasis on the lack of physical contact between DCH and SR.

[130] In coming to this conclusion, I note that the Supreme Court in ***Friesen*** cautioned provincial appellate courts concerning the temptation to define sentencing ranges on factors such as whether sexual penetration occurred or in that sense the type of sexual activity at hand. One of

the reasons that the Supreme Court provided for this caution was the Court's concern that sentencing judges might assume that there is some correlation between the nature of the physical act itself, and the resulting psychological harm to the victim. While, I must consider the risk of greater harm from specific physical acts, such as penetration, it is a myth that the mere sexually touching of a child is less harmful. In my view, it would equally be a myth, for me to regard DCH's actions in requesting that SR perform fellatio upon him, combined with exposing SR to suggestive pornography, would necessarily be less psychologically harmful than if actual sexual touching had occurred. I would add, without putting too much emphasis on it, that the offence itself does not require as an essential element that physical contact occur; the offence was complete when DCH uttered the invitation to SR.

[131] DCH acknowledged in argument before me the likelihood of ongoing sexual harm, but argues that I cannot possibly at this stage know the degree to which SR will be psychologically harmed.

[132] While I agree with DCH that it is impossible to know the degree to which SR will suffer psychologically in the future, as it is almost always the case that the extent of future psychological harm cannot be precisely predicted, this does not mean that a judge cannot or should not consider the certainty of psychological harm when assessing the gravity of the offence.

[133] As I consider DCH's moral blameworthiness, it is not mitigating that DCH would not have known the degree to which he was harming SR either presently or in the future. His blameworthiness lies in the demonstrated indifference to this consequence, which tends to increase his moral blameworthiness instead of decreasing it. DCH placed his need for incomprehensible sexual gratification in priority to a very young child's right to sexual and bodily integrity, while at the same time not knowing the extent to which he would psychologically harm her. DCH, at the time of offending, was indifferent to that harm.

[134] I accept DCH's argument as to the Crown's inability to prove the degree of psychological injury, but only to a very limited extent, as I do find this submission to be overly compelling for the reasons I have just outlined.

[135] In determining what constitutes a fit and proper sentence for this sexual offence, I must consider several aggravating factors.

[136] DCH was in a position of trust in relation to SR. This is a statutorily proscribed aggravating factor under s.718.2(iii) of the *Criminal Code*; DCH as a piano teacher, held a trusted position which permitted him unsupervised access to SR, and created the conditions where SR's mother trusted DCH to be alone with SR in the basement. DCH was trusted and he gravely misused that trust.

[137] Not only did DCH breach the trust of the victim and her family, he also breached societal trust. Parents must trust others to help care for, educate, and otherwise develop children into well-adjusted adults. With the breach of this trust comes grave harm to society. The offence is grave, and DCH's moral blameworthiness is partially informed by the choice that he made to prefer his own sexual gratification over the evident harm that DCH inflicted on SR, her family, and society. As the Alberta Court of Appeal noted in ***R v CPS,*** 2010 ABCA 313, "…children are particularly vulnerable members of society, especially when they are abused by those whose responsibility is to protect them."

[138] When considering the question of DCH's moral blameworthiness, I find that an unimpaired intellect informed DCH's actions, and that once he was alone with SR in the basement his actions became calculated. I agree with DCH that the Crown failed to demonstrate beyond a reasonable doubt that DCH's actions were either preplanned or premeditated. In coming to this conclusion, I find that I am unable to draw all of the inferences that the Crown wishes me to draw.

[139] The Crown argues that DCH downloaded 87 videos on February 18, 2018 between 1:40 a.m. and 1:53 a.m. in anticipation of the make-up lesson later that day. That, and the request for the WIFI password, upon arriving at SR's home was all part of a plan that culminated in DCH grooming SR by showing her videos, and manipulating SR into believing that the activities she saw were normal. In addition, the Crown points out that SR talked about videos depicting ejaculation, the use of sex toys and oral sex. DCH ensured that he closed the basement door to hide his planned activities. He told SR to watch the videos and that it would make her smarter. He convinced SR to undress to make a video like the ones that she saw, and requested SR to touch his penis to emulate the videos that SR had been shown. The Crown argues that careful planning and deliberation engaged in by DCH speak to a high level of moral blameworthiness.

[140] I do not find beyond a reasonable doubt that DCH downloaded the 87 videos in anticipation of using those videos to groom SR. The Crown's submission that 87 videos were downloaded as a part of a plan to groom SR, does not to my mind adequately explain the sheer volume of the downloads, nor does it explain why DCH needed to add additional videos to his phone. Nor am I convinced by DCH's simple request for the WIFI password, as it seems to me that such a request is all too common place in modern society such that I could likely could take judicial notice of the frequency of such requests.

[141] On the other hand, I do find that once alone in the basement with SR, DCH's actions became calculated. I accept that DCH showed SR the pornographic video to groom her, that he took steps to normalize the idea of sexual interactions as between adults and children, and that DCH closed the basement door to avoid detection. I find that SR was inspired to undress by the pornography that DCH showed her, and that DCH's request to SR to touch him was something that DCH had already made SR familiar with.

[142] I do not agree with Defence Counsel that DCH acted impulsively. He played with SR for a period, he had the foresight to close the basement door to secrete his actions, and he engaged in grooming behaviours. It is not a realistic suggestion to suggest that DCH's actions were impulsive in the sense they were spontaneous or not considered. Nor can it be realistically argued that DCH's actions were the actions of someone who merely acted or reacted without any forethought. In my view, Dr. Morrison's diagnosis explains DCH's actions, DCH is a pedophile with a personality disorder who remains at moderate risk to reoffend sexually with a child.

[143] SR's age is also a significant aggravating factor. As the Supreme Court of Canada said in ***Friesen,*** there is a corresponding increase in moral blameworthiness when a victim is particularly young. It is also aggravating that DCH used a grooming technique to convince a vulnerable child that taking off her clothes was not only normal, but something that would make her "smarter."

[144] I should add throughout my reasons that I am mindful not to "double count" the aggravating factors.

[145] I must consider the mitigating factors.

[146] While some of the case law indicates that the lack of a criminal record is properly viewed as a mitigating factor, in my view, while the lack of previous criminal record is a relevant sentencing factor, it is perhaps best described as the absence of an aggravating factor.

[147] It is also relevant for sentencing purposes that DCH is of previous good character but his prior good character in these circumstances does not significantly reduce what would otherwise be a proportionate sentence. I say this because DCH's former good character does not operate to either explain or to reduce his overall moral blameworthiness.

[148] If DCH's suggestion is, on the other hand, that his previously unblemished good character operates to potentially reduce his sentence on the basis that those with no prior convictions might be deterred and denounced by lighter penalties, and the related suggestion that the need to separate the him as an offender from society is not as pronounced, I can accept that submission as expressing a proper sentencing sentiment. I agree generally with the decision of Justice Antonio (as she then was) regarding the proper and improper use of the previous "good character" of an offender as a factor in the sentencing context: ***R v Shrivistava,*** 2019 ABQB 663 at paras 70-93.

[149] It is also relevant for me to consider ***R v BSM,*** wherein the Alberta Court of Appeal noted at paragraph 16 that "previous good character is common in child sexual assault cases. So previous good character would not take on much below the starting point, not significantly reduce what would otherwise be a higher sentence."

[150] When I consider DCH's claim as to his good character, the point in ***BSM*** is illustrated. DCH accessed child pornography for nearly four years before it was discovered. The legal authorities are replete with examples of offenders who live such double lives.

[151] I do accept that DCH's guilty plea is mitigating. The guilty plea, although not early, does save court resources and bring some finality to proceedings. It also serves as an acknowledgement by DCH of the harm done, although I find that the mitigation of the guilty plea here is somewhat lessened because as the Supreme Court in ***Friesen*** held, a guilty plea in the face of an overwhelming case should be given less mitigating weight.

[152] I also accept that DCH is remorseful and has shown some insight into his offending behaviour. DCH apologized to the Probation Officer who wrote his presentence report and at the time of his sentencing hearing for some length, and I do believe that he seemed to be sincere. DCH also acknowledged the great harm that he had done to the victim, the family, and society. That is to his credit.

[153] At the same time, Dr. Morrison assessed DCH as being of moderate risk to reoffend by a "noncontact" or "contact" sexual offence. DCH may be remorseful, but he still presents as an ongoing risk to society.

[154] It is also noteworthy, as argued by the Crown, that as Dr. Morrison noted at page 8 of his report, DCH indicated that he showed SR family photos of his vacation in Belize at Christmas 2016, which were apparently located on his phone in close proximity to oral sex videos. DCH rationalized his behavior by stating that he was obligated to show SR the oral sex videos as he was concerned that SR could blow his cover and betray him. It is relevant for sentencing purposes, that DCH would engage in "victim blaming" as it signals to me that DCH lacks full

insight into his behaviour. As the Crown points out, the 4-year-old SR did not choose to see the videos; instead, DCH was essentially suggesting that "she wanted it."

[155] The explanation given by DCH as to why he felt compelled to show SR the pornographic videos makes little sense. The notion that DCH had to show the videos or his cover would be "blown" is nonsensical, as DCH had not done anything at that point in time of a criminal nature, and it is difficult to understand how DCH's refusal could result in a 4 year old determining that contraband was present on the phone and reporting its presence.

[156] DCH also engaged in victim blaming by suggesting that it was SR who wanted to be on YouTube. These examples cause me to question whether DCH has actually taken responsibility, as putting the blame on a 4 year old victim would suggest otherwise.

[157] I am also concerned about DCH's deep-seated anger that he has expressed against adult women generally, and the fantasies that he has expressed concerning fatherhood, particularly the suggestion that he made that he viewed himself both as a father to SR followed by the suggestion made by DCH that he was sexually attracted to SR.

[158] In my view, DCH obviously needs greater treatment, not only for his past personal issues, but for the issues relating to his sexual misconduct and his pedophilic disorder. I am concerned that DCH's thought processes remain disordered.

[159] I also accept as mitigating to a very small degree that DCH had been on relatively restrictive bail conditions. DCH's legal counsel did not press this argument to any great extent, but I do consider this submission only to a very small degree.

[160] I also find that it is mitigating that DCH is motivated to be treated and has taken some steps on his own to engage in treatment.

[161] I am satisfied that given the grievous nature of this offence and what I find to be a calculated, but not premediated level of moral blameworthiness, that DCH must be separated from society to properly express denunciation and deterrence, and to properly protect the public. I find that a fit and proper sentence for this offence is one of 2 years incarceration.

What is a Fit and Proper Sentence for the Making of Child Pornography?

[162] Once again, denunciation and deterrence are the paramount considerations in the sentencing of those who make child pornography. The comments I made when considering the aggravating and mitigating factors generally continue to apply, and I need not repeat my recitation of the aggravating and mitigating factors here except to add further comments as required, or to address any differences.

[163] Chief Justice Fraser of the Alberta Court of Appeal has said that as a general principle those who make child pornography will receive greater sentences than those in possession of child pornography, especially in the context of a commercial operation for profit: ***R v Hewlett,*** 2002 ABCA 179 at para 27.

[164] The production of child pornography in and of itself harms the victim but in many cases the perpetual circulation or distribution of the resulting images or videos on the Internet produces lasting harm that cannot ever be fully eradicated, much like a wound that continually festers and scabs but never heals. Child pornography once made is intended to, and does work, to stimulate the ongoing appetite of consumers for the material which can only be described as pernicious and offensive. This, in turn, encourages the making of still greater amounts of child pornography.

[165] In the present circumstances, there is no evidence that the video DCH made of SR found its way onto the Internet or is otherwise available for further dissemination. Nor, is there evidence that the video was ever at risk of finding its way onto the Internet.

[166] I agree with the Crown generally that it is important for me to consider that Parliament has been working steadily to increase the maximum sentences available for those who offend against the child pornography provisions in the *Criminal Code.* ***Friesen,*** directs that I must consider Parliament's legislative attempts to increase the length of potential sentences.

[167] I also note that s.163.1(2) has as its legislative goal the prevention of activity that seeks to normalize the sexual exploitation of children. The Supreme Court of Canada in ***Sharpe*** at paragraph 235**,** identified the potential harm to vulnerable children by noting that the prohibition against possessing child pornography helps to prevent the sexual abuse to children that results from its production.

[168] In this sentencing decision, I have already found that DCH used child pornography to normalize the sexual suggestions that he made to SR, and it was this effort that prompted SR to be agreeable as to the suggestion that she be videotaped in a manner that DCH found to be sexually stimulating. DCH directed SR to bend over so he could concentrate his phone camera on SR's buttocks and vaginal area. His focus was disgusting and humiliating as much as it could be described as depraved. DCH suggested that SR would be "smarter" by watching the pornography that he showed her and the necessarily implication is that SR should participate so as leave her ignorance behind. DCH not wishing to be overheard whispered that he found SR to be beautiful. In short, DCH did all that he could to ensure that SR would remain complaint in his efforts to make child pornography.

[169] The Crown brought to my attention a few comparator cases for my consideration that I will briefly summarize.

[170] In ***Tettersell,*** a decision that I have briefly referred to earlier, the Alberta Court of Appeal imposed four 2 year sentences (served consecutively) for a particularly serious case of making, possessing, and distributing child pornography, along with a conviction for sexual touching. The pornography collection amassed over three years included the following: 32,277 child pornography images, and 2,450 child pornography movies. Mr. Tettersell made 16,202 of these images and videos available over the Internet. The sentencing judge noted that the collection depicted the most explicit behaviour involving young children. The accused made some child pornography himself in that he took and traded naked photos and movies of his friend's son. Mr. Tettersell pleaded guilty, had no prior criminal record, minimized responsibility for his actions, and was treatable notwithstanding he presented as a high risk for reoffending. On appeal, the Court of Appeal increased the sentence to 8 years, holding that the sentencing judge made an error by imposing concurrent rather than consecutive sentences.

[171] In ***R v Hunt,*** 2002 ABCA 155, the accused had a photography business and was hired to take pictures to be made public on a site called "Nudes and More." Mr. Hunt was to receive a percentage of the revenues generated. Three people: 15, 16 and 17 years of age attended the photography shoot. Mr. Hunt's wife mentioned that they looked young. Between July 1 and September 7, 1999, he photographed 549 scenes including lesbianism, masturbation, oral-genital sex and the use of sexual instruments as well as explicit sexual activity of a young women with an adult female. The Court of Appeal said that it was obliged to consider the Crown's sentencing position at trial and on appeal. The Court of Appeal substituted an 18 month Conditional

Sentence Order with 18 months custody. The Court said this was at the lower end of the spectrum but noted that Mr. Hunt was cooperative in mitigation.

[172] The companion case is ***R v Hewlett,*** 2002 ABCA 179. Mr. Hewlett had been told that one of the people photographed was 15 years old. Mr. Hewlett said they could work around it. Mr. Hewlett arranged for the taking and printing of photographs, advertised for models, met the interested models and retained Mr. Hunt to photograph the models. Mr. Hewlett appealed his 5-year sentence based on parity. The Court of Appeal reduced the sentence to 3 ½ years.

[173] In ***R v GJM,*** 2015 MBCA 103, the Manitoba Court of Appeal considered a sentence appeal of several offences. The accused pleaded guilty to making child pornography by using image altering computer software to transfer images of himself and the face of his best friend's prepubescent daughter to 14 images of child pornography he possessed. He then altered the images to make it appear that the young girl was performing fellatio on him. He also surreptitiously recorded the genitalia of three 8 year-old girls, including his twin daughters with a hidden camera in the bathroom. The accused was sentenced to 3 years for the making of child pornography. The accused also pleaded guilty to possession of child pornography. A total of 16,896 images of child pornography (6,935 unique and 9,961 duplicates) and 139 videos (134 unique and 5 duplicates) were seized. He was sentenced to 18 months for possession of child pornography. The global sentence was 9 years and 3 months, which was reduced to 8 years 9 months for reasons of totality. The Court of Appeal reduced the sentence to 7 years 3 months on the basis that the combined sentence was unduly harsh. The Court confirmed that consecutive sentencing was appropriate. The accused was 40 years of age and had no prior criminal record. He was motivated to treatment and was likely to respond well. Similarly, he was assessed as a moderate-high to high risk for children. The court considered that the accused had suffered from his crimes through the loss of family, friends and employment. The Court considered the accused's collection did not involve violence although it was still relatively depraved having regard to the nature of the acts committed and the age of the girls involved.

[174] As I consider a fit and proper sentence for DCH's making of child pornography, I am cognizant that to some significant extent the aggravating and mitigating features of the making of the video of SR are interwoven with the invitation from DCH to SR that she should perform oral sex on him. On the other hand, I have determined that the making of child pornography by DCH is a distinct offence such that it requires a consecutive sentence. In imposing sentence, however, I must be careful to inadvertently sentence for the same aggravating features twice.

[175] I am also mindful that although this offence, although it involves a very young and susceptible child that DCH stood in a position of trust to, the offence itself involved a single instance, and there was no evident commercial purpose. Nor, can I say that there is any evidence that the video of SR was either intended to or would have ended up on the Internet. These considerations distinguish the sentencing at hand to some significant degree from some of the decisions that I have just referred to. On the other hand, I must consider Parliament's increase of the maximum penalties available and the recent directions from the Supreme Court of Canada in ***Friesen.***

[176] While I agree generally with the position of the Crown regarding the range of sentencing the Crown proposes, I would here reduce the sentence because of the interplay between the aggravating and mitigating factors that I considered when sentencing DCH to 2 years custody for inviting SR to touch him, and the making of the video of SR. This is because I find there is some

factual overlap, but not as extensive a factual overlap as was considered in ***R v Boucher,*** 2020 ABCA 208 at para 27.

[177] In the result, I would impose a sentence of 1 year incarceration, which is to be served consecutively to the 2 year sentence imposed on Count 1.

What is a Fit and Appropriate Sentence for Accessing Child Pornography?

[178] It is apparent that the courts have not had difficulty identifying the harm caused by child pornography both at an individual level and a societal level. Child pornography most often involves sexual offences perpetrated against vulnerable children beyond simply recording or otherwise depicting their exposed bodies. It is in this sense that the consumers of child pornography not only encourage the production and distribution of still more child pornography, but the consumers also encourage or abet sexual offending against children - often in the vilest ways imaginable.

[179] As the Crown argued, the Supreme Court of Canada in ***Friesen,*** made specific reference to cases involving online sexual abuse, including child luring and distribution of child pornography. The Supreme Court specified that the principles outlined were relevant to sentencing of numerous offences involving the sexual exploitation of children, including child pornography: ***Friesen*** at para 44.

[180] The Court wrote concerning technology and how the prevalence of such technology has enabled new forms of sexual violence against children and permitted sexual offenders with new ways to access and distribute child pornography. At the same time, the Supreme Court has stressed that technology makes the offences against children qualitatively different since the online distribution of images or videos means that a child must endlessly repeat the original sexual violence, since the child must live with the reality that others may have access to the sexual violence in a never-ending fashion: ***Friesen*** at para 48-49.

[181] I agree with the Crown that the nexus between the harms described in ***Friesen*** and child pornography offences is such that child pornography sentences should generally be increased. It is evident that the supply and demand created by those who possess and distribute child pornography *fuel* its production. As I have said, and as the Supreme Court has recognized, those who possess and distribute child pornography are *indirectly* responsible for the harm of sexual violence depicted in the images and videos, and are *directly* responsible for the emotional and psychological harm induced to victims that flow from having their abuse publicly broadcast: ***Friesen*** at paras 56 and 58.

[182] Deterrence and denunciation are always the paramount considerations when sentencing for child pornography, but I must in every sentencing decision always consider all sentencing principles. Most often cited, as a useful guide to determine the factors most relevant to sentencing in child pornography offences, is the helpful summary provided by Justice Molloy in ***R v Kwok,*** [2007] OJ No 457 (ONSC). I have taken these factors into account. The following are the aggravating factors cited by Justice Molloy:

1. a criminal record for similar or related offences;
2. involvement in the production or distribution of the material;
3. the size of the collection;

4. the nature of the collection (including the age of the children involved and the relative depravity and violence depicted);
5. the extent to which the offender is seen as a danger to children (including whether he is a diagnosed paedophile who has acted on his impulses in the past by assaulting children); and
6. whether the offender has purchased child pornography thereby contributing to the sexual victimization of children for profit as opposed to merely collecting it by free downloads form the Internet.

[183] The Crown, once again, provided me with a number of comparator cases.

[184] The first is ***R v Andrukonis,*** 2012 ABCA 148. In the circumstances of that appeal, the Alberta Court of Appeal upheld a one year sentence for an offender who pled guilty to being in possession of a collection (465 images, 106 videos) of child pornography on his computer for a period of 12-18 months. The majority of the child pornography depicted the sexual exploitation of young children and babies involved in explicit sexual acts including fellatio and cunnilingus, and ejaculation onto the body and faces of children. Penile and digital penetration is also depicted. Some of the child pornography was said to extend to sadistic sexual abuse. The accused was 40 years old, married with 2 children, had no prior criminal record, and maintained steady employment. The past sexual abuse was not accepted as a rationalization or justification for the offender's behaviour. The sentencing judge questioned the depth of the offender's insight or remorse. The Court of Appeal dismissed a request to reduce the sentence of 1 year in addition to 3 years probation.

[185] In ***R v Hammond,*** 2009 ABCA 415, an offender accessed 456 images and 106 unique videos of child pornography over a period of a couple of years was sentenced on appeal to 12 months incarceration. The child pornography was particularly abhorrent. The videos were between 3 minutes to 45 minutes in length and the children depicted ranged from children to teenagers. The material encompassed a broad spectrum of activity and included brutal sexual violence, which the offender used as a source of sexual stimulation. The offender was 61 years of age, well-educated with no prior criminal record, and what the sentencing judge says was evidently good skills that he used in society. In increasing the sentence from 90 days custody and 3 months probation, the Court of Appeal said at paragraph 12: "It follows from this that, in principle, a sentencing court that is dealing with a person who has, quite volitionally over a long period of time, made recreational use of the products of actual child debasement and abuse must receive condign punishment."

[186] In ***R v Gauthier,*** 2008 ABCA 39, the Alberta Court of Appeal upheld a 1 year sentence for an offender with a substantial child pornography collection (2,000 images, 100 videos), most of which involved children aged 4-10 engaged in a variety of sexual activity with adult males. The accused was 42 years old at the time of the offence and had seven unrelated prior criminal convictions. He pled guilty, claimed to be affected by medical conditions. He had a favourable pre-sentence report and forensic sentence report which indicated a low risk of reoffending.

[187] More recently in ***R v Rogers,*** 2018 ABQB 871, the accused pleaded guilty to possession and accessing child pornography at the opening of trial. He was found guilty of distributing child pornography after trial. The accused had been accessing and collecting child pornography for close to a decade. The nature of his collection was dehumanizing. He made his collection

available for several weeks through a file sharing network. He possessed over 57,000 category 1 and 2 images and over 4,300 category 1 and 2 videos of child pornography. The accused was 46 years old, unemployed, and has ADD and bi-polar disorders. The sentencing judge gave little mitigation to the guilty pleas. The size and collection of child pornography was aggravating. The sentencing judge said that this was one of the largest collections of child pornography referenced in the sentencing cases. The judge said that the fact that none of the child pornography was purchased was a neutral factor. The accused was sentenced to 6 years incarceration, consisting of 3 ½ years for the possession, 1-year concurrent for accessing and 2 ½ years consecutive for making available, all of which was reduced to 5 years in light of the totality principle.

[188] In ***R v Clayton,*** 2012 ABCA 384, the Alberta Court of Appeal upheld a 3 year global sentence imposed by Eidsvik J after trial. The 29 year old accused, over a period of 10 months, participated in two Internet file sharing groups that possessed and distributed child pornography (4,600) images on two computers. The images included children of both genders and some involved graphic sexual activity with adults and bondage, though most were "posed" photographs. The offender chatted online with at least 213 people on 34 days, including undercover officers. The chats included pornographic preferences. Justice Eidsvik imposed a sentence of 1 year for possession and accessing, to be served concurrently; and, 2 years consecutive for the offence of distribution. The offender was described as having significant social support and no criminal history.

[189] In ***R v John,*** 2018 ONCA 702, the Ontario Court of Appeal, after striking down the mandatory minimum for possession of child pornography, sentenced the accused to 10 months imprisonment after trial. Mr. John's child pornography collection consisted of 50 images and 89 videos of child pornography. The collection depicted children between 2 and 4 years old subjected to explicit sexual activity (anal and vaginal penetration). The accused was 31 years old at the time of sentencing. He suffered from mental health issues, and was employed. He was remorseful. The Court considered the accused's extensive efforts at rehabilitation.

[190] As can be seen from the review of the sentencing authorities submitted by both DCH and the Crown, there seldom is any perfect sentencing comparator. The cases do provide guidance, however, as to the relevant sentencing principles and are helpful as to the general range of sentencing to help determine sentencing parity, although I do accept the guidance provided by ***Friesen*** as to the intended increases in child sexual abuse sentencing.

[191] I will not repeat the mitigating factors that I have found to apply and continue to apply.

[192] As I determine a fit and proper sentence for DCH's accessing of child pornography I will not repeat my earlier comments regarding the scope of the harm done by child pornography, and the impact of child pornography upon the vulnerability of children. This is not a victimless crime. The accessing of child pornography is in and of itself child sexual abuse. Even worse, all children whose images are placed on the Internet, must live with the knowledge that an unknown number of strangers may by the minute, if not the second, view their sexual exploitation over and over. This effectively means that the victim is revictimized in an endless loop. The psychological harm must be regarded as immense.

[193] The facts admitted to by DCH demonstrate that he accessed child pornography for a period of nearly 4 years, dating as far back as May of 2014. That is obviously aggravating.

[194] The accessing of child pornography by DCH of 1,356 images and videos should not be described as either modest, nor at the highest levels of activity described in the sentencing authorities.

[195] In addition to accessing of child pornography by DCH generally, DCH downloaded 119 videos of child pornography relating to very young victims, and the images depicted mostly females ranging from babies to 12 years of age. The images were vile, depicting vaginal penetration, anal penetration, digital penetration, and the use of objects to similarly penetrate those bodily areas. The images involved sexual acts with adults and other children, along with bondage and posing.

[196] I must also consider that Dr. Morrison is of the opinion that DCH is of moderate to high risk to access child pornography in the future.

[197] There is nothing in the evidence from the perspective of this offence to suggest that DCH was not responsible for his actions. I find that DCH was always completely cognitively aware of his efforts to access child pornography and the efforts he made to download selected child pornography files. At the same time, DCH was fully aware of the wrongfulness of his actions, and this is evidenced by steps that he took to avoid detection such as by using a privacy application and by the storing of the extracted videos on his phone in a hidden folder.

[198] In the end result, I am of the view that a fit and proper sentence in relation to Count 3 is a sentence of 1 ½ years incarceration to be served consecutively to both Counts 1 and 2.

The Global Sentence of 4 ½ Years Incarceration

[199] The resulting sentence is one of 4 ½ years incarceration.

[200] I must now consider the question of totality by taking "one last look."

[201] In my view, the overall sentence of 4 ½ years incarceration is a fit and proper sentence, and the exercise of restraint when considering a fit and proper sentence for individual counts has resulted in a global sentence that does not offend the totality principle. As I have said, I have approached the matter of sentence with an ongoing awareness not to double count the aggravating features of DCH's offences, as I assessed both the gravity of the offences along with DCH's overall moral blameworthiness.

Ancillary Orders

[202] As I mentioned DCH does not oppose the Crown's application for several ancillary orders. I agree that all are appropriate in the circumstances and I would make the following additional orders:

a) I order the forfeiture of all seized property including prohibited material pursuant to s.490.1 and s.164.2 of the *Criminal Code*;

b) I further order the forfeiture of all sealed exhibits. The sealed exhibits will be returned to the Crown upon the expiration of the Appeal period and then may be disposed of as the Attorney General of Alberta directs;

c) I order that DCH will provide a sample of his DNA suitable for inclusion in the DNA data bank pursuant to s.487.051 of the *Criminal Code* (all offences are primary designated offences);

d) I order that DCH shall entre into an order under Form 52 requiring DCH to comply with the *Sex Offender Information Registration Act* for life (all counts are designated offences;

e) I order pursuant to s.109 of the *Criminal Code*, that you are prohibited from possessing any firearm, other than a prohibited firearm or restricted firearm, and any cross-bow, restricted weapon, ammunition, and explosive substance for a period commencing today and not ending earlier than ten years after your release from imprisonment. I further prohibit you from possessing any prohibited firearm, restricted firearm, prohibited weapon, prohibited device, and prohibited ammunition for life.

f) I order pursuant to s. 161(a) – (d) that DCH during his time in custody and for 15 years thereafter is prohibited from:

    i) Attending a public park or public swimming area where persons under the age of 16 years are present or can reasonably be expected to be present, or a daycare centre, schoolground, playground or community centre;

    ii) Being within two kilometres of any dwelling-house where SR resides;

    iii) 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;

    iv) Having any contact – including communicating by any means – with a person who is under the age of 16 years, unless the offender does so in under the supervision of that child's parent or guardian, or another responsible adult over the age of 18 years, as may approved in writing from time to time by the child's lawful parent or guardian;

    v) Using the Internet or other digital network, except as may be approved by subsequent Order of this Court, with 14 days notice to be given to the Alberta Attorney General accompanied by a filed written application with a supporting affidavit.

[203] I recommend that Correctional Services Canada consider placing DCH at the Bowden Institution, and that DCH be considered for treatment in the ICPM-moderate to high intensity program for sex offenders.

Heard on the 7th day of February, 2020 and the 31st day of August, 2020.
Dated at the City of Calgary, Alberta this 3rd day of September, 2020.
Given orally on the 3rd day of September 2020.

D.A. Labrenz
J.C.Q.B.A.

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