

CANADA / JUDGMENT

R. v. B.T.

2021 BCSC 948

COURT

Supreme Court of British Columbia

DECIDED

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2021 BCSC 948 R. v. B.T.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. B.T.,

2021 BCSC 948

Date: 20210416

Docket: 48937-2

Registry: Prince George

Regina

v.

B.T.

Restriction on Publication: Pursuant to 486.4 C.C.C.

Before: The Honourable Madam Justice Donegan

(appearing by videoconference)

Oral Reasons for Sentence

Counsel for the Crown:

E.A. Sukkau

Counsel for the Accused appearing by videoconference:

M.W. James

Place and Date of Hearing:

Prince George, B.C.

April 9, 2021

Place and Date of Judgment:

Prince George, B.C.

April 16, 2021

- [1] These Reasons for Sentence were delivered as oral reasons. They have since been edited for distribution.

Introduction

- [2] B.T. is a 36-year-old first-time offender who committed serious sexual crimes against a vulnerable young child. On June 12, 2020, I convicted him of sexually touching, interfering, and assaulting this child, as well as making, possessing and accessing pornographic photographs of her. B.T. is here today to be sentenced. Applying the principles in *Kienapple v. R.* [1975], 1 S.C.R. 729, pending the expiry of the appeal period, I am entering a conditional stay of proceedings in relation to Counts 2 and 3.
- [3] At the outset, I wish to address the attendance of myself, B.T. and his counsel today by way of videoconference. I appeared at the sentencing hearing last week, and am appearing today, by way of videoconference from a courtroom in Kamloops, pursuant to s. 715.26(1) of the Criminal Code [Code], with the consent of all parties. I am keenly aware that my appearing personally for the sentencing phase of this proceeding is very important to the process, not only to B.T., but to the community, to the victim, to her family, to B.T.'s family, and to witnesses as well. I have decided to preside remotely from my home courtroom only because of the COVID-19 pandemic. Rather than further delay a proceeding that has suffered from COVID-19-related delays already, I find that it is necessary to preside remotely from another, safe, suitable location. I appreciate B.T. and both counsels' consent to my attendance this way.
- [4] B.T. and his counsel were both in personal attendance in Prince George for last week's hearing. He and his counsel are both from the Lower Mainland and are appearing by videoconference today in a courtroom in Abbotsford, with the consent of the Crown and the approval of the court.
- [5] I am satisfied that B.T.'s desire to attend this final phase of his trial by video-link in this manner is grounded in valid and legitimate reasons that do not offend public policy. I am satisfied that to allow him to do so would be very beneficial to him, as it allows for him and members of his family, two of whom are in ill health, to safely be present during what I appreciate is a difficult time for B.T. and his family. I am satisfied there are compelling reasons to grant this request.

- [6] My task today is one of the most difficult a sentencing judge can have. B.T. is a first-time offender who suffers from certain mental disabilities and personal circumstances that make him, in some ways, a vulnerable person. On the other hand, he committed serious crimes where he repeatedly sexually victimized a very vulnerable young child in her own home. The competing tensions in this case are no better demonstrated than by the parties' positions on the appropriate sentence. The Crown seeks a global sentence of no less than ten years imprisonment and no more than 13 years imprisonment. The defence seeks a global sentence of no less than two years less one day, followed by three years' probation, to no more than three years' imprisonment. Considering totality, the defence submits the appropriate global sentence is two years less a day followed by three years' probation.
- [7] To craft a proportionate sentence in accordance with the purpose, principles, and objectives the law requires in each unique case has been described as one of the most delicate and difficult stages of the criminal justice process in Canada. Although this task is governed by s. 718 of the Code, and although the objectives set out in those sections guide courts and are clearly defined, sentencing nonetheless involves, by definition, the exercise of a broad discretion by the court in balancing all of the relevant factors in order to meet the objectives being pursued in sentencing: *R. v. Lacasse*, 2015 SCC 64 at para. 1.
- [8] Fundamental to this task is to ensure the sentence is proportionate to the gravity of the offence and the degree of responsibility of the offender.

The Circumstances of the Offences

- [9] The circumstances of these offences are set out in detail in my Reasons for Judgment at trial indexed at *R. v. B.T.*, 2020 BCSC 1185. There is no need for me to review them in full here, but I will summarize them.
- [10] B.T. lived with his cousin's family in Prince George for a period of time between October 2015 and May 2018. He was in his early to mid-30s at the time. His cousin's young daughter, A., also lived in the home. She was between five and seven years of age at the time of B.T.'s offending against her.
- [11] During this timeframe, B.T. took many pornographic photographs of A. with his cellular telephone, posing her to expose her vagina. He took the photographs mostly in her bedroom, but in other places of the home as well, on many different occasions. B.T. told her not to tell anyone what he was doing. He downloaded some of these pornographic images of A. from his cellular phone to his computer and deleted them from his phone. He saved some images to his computer, along with other child pornography images not of A., where he later accessed them.
- [12] On one occasion in May 2018, when A. was alone in the home for a short period of time, B.T. went into her bedroom and tried to penetrate A.'s vagina with his penis. She was seven years old. Even though she told him no and that what he was doing was hurting her, he persisted and told her that they were going to do this even if she said no. He told her that they would

continue to try to do this, that is penetrate her, on a regular basis. Fortunately, a police investigation ensued shortly thereafter. B.T. was removed from the home and he did not get that opportunity.

Impact on A. and the Family

- [13] I have evidence about the impact of these crimes upon A. and her family from multiple sources. I saw and heard them testify at trial. They filled out formal victim impact statements, which are before me. Her parents spoke to a probation officer who communicated their comments in a pre-sentence report, which is also before me. They also spoke to Crown counsel.
- [14] These crimes are inherently violent. They can, and often do, have a crippling effect upon the psychological and emotional well-being of the victim. Many courts have recognized that this harm can be particularly long lasting and pronounced in children, and that it can interfere with their development into healthy, autonomous adults. A single instance of sexual violence against a child can permanently alter their life, but many victims can and do go on to live healthy and meaningful lives with fulfilling and loving relationships. It is sometimes difficult to determine the nature and extent of the harm at the time of sentencing when the victim is still a child.
- [15] A. is still a young child. She was between the ages of five and seven when these sexually violent events happened to her. I saw her testify at trial, at a time when she was nine years old. I also saw her video-recorded statement to police where she explained what B.T. had done to her. This was at a time when she was seven years old.
- [16] A. is, in many ways, remarkable. She is remarkable for her resiliency and for her courage. What struck me when I watched her recorded statement at trial and heard her testify was how matter of fact, how normal, how everyday, the events she described were to her. That she portrays these events as normal or ordinary does not mean she has not suffered actual harm. I am satisfied she has. B.T. was a trusted family member. As I will discuss further in these reasons, I am satisfied that he was in a position of trust to her - not a traditional or classic position of trust, much lower on the spectrum of trust relationships as that is described in *R. v. Friesen*, 2020 SCC 9, but nevertheless in a position of trust. He befriended A. He watched movies with her, he played with her and took her for walks. In other words, he groomed her.
- [17] During this time, he took many, many pornographic photographs of her when he was alone with her. The photographs show A. clearly at different ages and at different locations in their house. B.T. normalized this activity over the years and normalized her keeping their secret from her parents. When he took an opportunity one day to attempt to penetrate her vagina with his penis, he caused her physical pain. She told him it hurt and he told her that, regardless of her protests, he was going to do this into the future.

- [18] A. filled out her formal victim impact statement herself. Under the heading "Emotional Impact", she simply wrote, "My feelings and emoshens (sic)". I can appreciate that she may not know how to articulate those feelings and emotions.
- [19] Mr. and Mrs. D. told the probation officer who prepared the pre-sentence report that they have not seen any emotional, behavioural, or other changes in their daughter since the time of the offences. They report that their daughter has been "very stable" since 2018 and has not attended any counselling. Mrs. D. told the report writer that A. appears more "annoyed" than anything since the time of the offences. I am sincerely hopeful that A.'s current resiliency will continue, but in the circumstances, I think there is a reasonably foreseeable potential that she may, as she matures, recognize that what occurred to her was not normal and may well suffer some of the well-recognized forms of harm that flow from sexual violence perpetrated against children.
- [20] I am satisfied that the impact of B.T.'s crimes have been felt not only by A., but by the entire D. family. I saw Mr. and Mrs. D. testify. I saw their pain, their feelings of betrayal by a family member they trusted. I saw Mr. D.'s father, A.'s grandfather, testify too. He was the person who left A. alone in the house with B.T. for a few minutes while he waited for her to change into her swimsuit to go to the water park with him. B.T. took that narrow window of opportunity to try and penetrate her. He questioned B.T. at the time about why he was upstairs with A. To me, his pain seemed very real.
- [21] Mrs. D. communicated some of this in her victim impact statement. She wrote that she felt "betrayed by a family member who we thought we could trust and who we allowed to live in our home." She further expressed fears for the security of herself and her daughter, writing that she and A. want no contact with B.T. "due to his temper and repeated attempts to put the blame for his crimes on us."
- [22] Mr. D., the offender's cousin and A.'s dad, left his formal victim impact statement blank, simply checking or marking the box that reads, "I would like to present my statement in court." Crown counsel noted that Mr. D. was present in court at the sentencing hearing. She noted that he was invested in this process and that it was communicated to her that he continues to feel the impact of a family that is broken because of B.T.'s actions.

B.T.'s Circumstances

- [23] I have a significant amount of information about B.T., his life, and his circumstances through a pre-sentence report prepared by probation officer, Katja Fuess, dated August 19, 2020, a psychological assessment prepared by Dr. A. Murray Ferguson, a registered psychologist with the Forensic Psychiatric Services Commission dated September 16, 2020, letters from family and friends of B.T., recent medical records regarding attendances at the hospital, as well as very thorough submissions of counsel.

- [24] B.T. is currently 36 years old. He was born in New Westminster and raised in various communities around the Lower Mainland. He has one brother. His parents separated when B.T. was about 14 years old and he then lived with his mother. He was not all that close to his family. He described to the pre-sentence report author that his relationship with his mother was "okay", but his father was described as abusive and violent towards him and his mother as well, which B.T. believes was the reason for his parents' divorce. B.T. also relates that he suffered abuse at the hands of his brother as well.
- [25] B.T. struggled socially and academically as a child and described himself as a loner. He received some learning support in high school, but did not graduate. He struggled, it is reported, with writing and fine motor skills. He also had challenges with aggression as a child and youth, which led to suspensions at school and police calls to his home on a few occasions.
- [26] It was noted in a 1998 B.C. Children's Hospital ("BCCH") report that when B.T. was 14 years old, his father had some concerns about his "inappropriate" viewing of women, particularly when they were at his father's pool. The report also noted that B.T. was engaging in stalking-like behaviours of females on the in-patient unit at BCCH while he was admitted.
- [27] B.T. moved to Prince George when he was 20 years old because rent was cheaper and he had family there. He stated that he has moved back and forth a few times since then, but has been living with his father and stepmother in the Lower Mainland for some time now.
- [28] In terms of employment, B.T. has had two jobs. The first was at a gas station for about six months. He later worked at an organic bakery doing a couple of short periods of employment there in Langley. One of the letters of support tendered by B.T. is from the owner of that organic bakery. She is very supportive.
- [29] B.T. has not worked since he was about 26 years old and currently receives the Persons with a Disability Pension ("PWD") through the provincial government. He has received this since he was 19 years old.
- [30] B.T. has had no difficulties with substance misuse. His physical health is reportedly fine. He was diagnosed with Autism Spectrum Disorder ("ASD"), as well as Attention Deficit Hyperactivity Disorder ("ADHD"), as an adolescent. He was not provided with resources when he was young to manage his ASD or ADHD. He has, however, recently engaged with a counsellor through Delta Mental Health, but has otherwise not been provided with, or engaged in, any supports for these conditions.
- [31] I saw B.T. testify at trial. He was responsive to questions and did not appear or express that he struggled with comprehension or understanding. As noted in the reports, B.T. struggles with written language and fine motor skills. He also struggles with social cues, picking up tone and body language and expressing his emotions. B.T. also advises, through counsel, that he can become over-stimulated and overwhelmed easily, particularly in stressful situations. His family and community supports describe him as someone whose maturity

and intellectual level is less than his physical age. They advise counsel that they believe his levels are akin to a younger teenager.

- [32] To the pre-sentence report author, B.T. denied ever experiencing depression, describing himself as "odd and lazy". He did acknowledge periods of suicidal ideation over the past ten to 15 years, but told the probation officer that these are rare events and that he typically goes to sleep and feels better when he wakes up.
- [33] I appreciate that this changed somewhat since the time the pre-sentence report was written. B.T. has, I accept, experienced anxiety since his arrest. His depression and suicidal ideation have increased in severity since his convictions. He has had two admissions to Abbotsford Regional Hospital under the Mental Health Act for suicidal ideation. He has tried overdosing on sleeping pills and has threatened to kill himself with a shotgun. He struggles with insomnia.
- [34] B.T. denies deviant sexual arousal such as sexual arousal to violence, to rape, non-consensual sex, exhibitionism, voyeurism, or pedophilic arousal. B.T. claimed to have been shown a video of child pornography when he was 14 years old and reported that it still disturbs him. He maintains that he accesses only adult pornography and will "back out of a video" if he sees that it involves kids. B.T. has not been in an intimate relationship and has not been sexually active with another person.
- [35] B.T. currently lives with his father and stepmother in the Lower Mainland. They are supportive of him, as are B.T.'s mother and stepfather. Unfortunately, both his father and stepfather have serious health issues at the moment. B.T.'s father's prognosis is particularly tragic. He has recently been advised that he may only have perhaps a year to live. This weighs heavily on B.T., particularly with his impending incarceration.
- [36] B.T. is not working, as I have indicated, but he has had short periods of short-term employment in the past. His plan, once released from jail, is to go back to school to obtain his GED, to obtain part-time employment, and to get the healthy support he needs from the autistic community moving forward. He wants to build friendships and learn more about his disability and obtain programming to help him.
- [37] B.T. has difficulty socializing with others and relied, before his bail conditions prevented him from doing so, on being able to access the internet for his socialization.
- [38] This offender has no criminal record. He has also been on bail for these offences for about three years and has complied with all of the conditions required of him.
- [39] B.T. submitted four letters of support. The first is from his friend, A.M., who has known B.T. for about ten years. The second is from his stepmother, A.T. The third is from T.B. She is A.M.'s mother and B.T.'s former employer. The final letter is from K.K., the partner of B.T.'s stepbrother, as I understand it, and she has known B.T. for about a year now.

- [40] These letters describe B.T. in positive ways. They describe him as caring, selfless, kind, a responsible employee, among other things. They all feel these offences are out of character for B.T. and express support for him in the future.

Dr. Ferguson's Assessment

- [41] Dr. Ferguson was asked to assess B.T.'s mental health, his risk of recidivism, and to make recommendations for treatment, if appropriate. Dr. Ferguson conducted psychological testing of B.T. In addition to the documentary information he was provided, and this is detailed at pages 1 and 2 of his report, he had B.T. undergo testing utilizing the Paulhus Deception Scale ("PDS") and the Personality Assessment Inventory ("PAI") questionnaire on July 14, 2020. Dr. Ferguson then conducted a two-and-a-half-hour clinical assessment interview of B.T. on July 15, 2020.
- [42] Dr. Ferguson's eight-page report is before me. Neither counsel took any issue with the admissibility of any aspect of the report or any of the opinions it contains.
- [43] In the first few pages, Dr. Ferguson detailed the personal information B.T. provided to him, much of which I have canvassed already. He outlined the results of B.T.'s psychological testing beginning at page 4. He began with the PAI results.
- [44] Dr. Ferguson described the PAI as a self-report questionnaire that reliably measures personality functioning and the presence of psychiatric symptoms. He administered the test to further assess B.T.'s current mental state and personality functioning.
- [45] Dr. Ferguson reports that the results of the PAI suggest that B.T. responded appropriately to the item content and did so in a consistent manner, but that the validity scale suggests that B.T. may not have completed the PAI in a completely forthright manner. The results indicate a defensiveness about particular shortcomings, as well as exaggerations of certain problems. B.T.'s responses suggest that he has a tendency to portray himself in a more positive light than may be actually the case, and that he appears to be somewhat reluctant to recognize faults or problems in himself.
- [46] Despite the level of defensiveness, Dr. Ferguson reported that B.T. also indicated some problems with greater intensity than is typical of such a defensive pattern, including thoughts of death or suicide, feelings of helplessness, poor anger control, failures in close relationships, preoccupation with physical functioning, poor social skills, physical signs of depression, poor sense of identity and suspiciousness. However, the results are also indicative of concern about B.T. portraying himself in a more pathological manner in some areas than may actually be the case.
- [47] B.T.'s responses are suggestive of someone with relatively mild or transient depressive symptoms associated with pessimism and thoughts of worthlessness, hopelessness and personal failure. He opined that B.T. generally has a harsh, negative self-evaluation and is prone to being self-critical. His interpersonal style is best characterized as being cold and

unfeeling, and others are likely to see him as being stern, punitive and unable to display affection or commit to interpersonal relationships. He is not intimidated by confrontation and is likely to be verbally aggressive at low levels of provocation and readily displays anger.

- [48] Dr. Ferguson reported that B.T. does not present as motivated for treatment and that his responses suggest that he is satisfied with himself and is not experiencing marked distress.
- [49] Dr. Ferguson also administered the PDS, a 40-item scale that measures one's tendency to give socially desirable responses in assessment situations. It consists of two subscales: the self-deceptive enhancement scale, which is the tendency to give honest but inflated self-descriptions, and the impression management scale, which is the tendency to give inflated self-descriptions to an audience.
- [50] Dr. Ferguson found that B.T. scored relatively highly on the impression management score, but not on the self-deceptive enhancement score. He opined that such a pattern of responding is suggestive of individuals who are aware of their shortcomings but want to appear publicly acceptable.

- [51] Dr. Ferguson outlined his diagnostic impressions at page 5 of his report. He wrote:

B.T. presents with historical diagnoses of ADHD and Autism Spectrum Disorder (formerly Asperger's disorder). He also presents with symptoms of anxiety and depression but did not impress as meeting the criteria for formal diagnoses.

- [52] When Dr. Ferguson spoke with B.T., he asked him about the crimes for which he has now been convicted. B.T. expressed anger and denied committing the offences. He repeated what he had asserted at trial, that he was framed by A.'s mother because she hates him and wanted him out of the house. He also told Dr. Ferguson that A. had, while they were living together in the same home, walked in on him a few times while he was masturbating and watching pornography, but that he covered himself up and closed the computer immediately. He did not testify about these events at trial.
- [53] Dr. Ferguson conducted a risk assessment. At pages 5-7 of his report, he outlined the tools and guidelines he used and the opinions that he reached. First, he utilized an actuarial tool called the Static-99R, which is designed to assist in the prediction of sexual recidivism among adult males who have been charged with at least one sexual offence against a child or non-consenting adult. Dr. Ferguson explained that this assessment is based upon static or unchangeable risk factors found to be related to recidivism and that it provides explicit rules for combining risk factors to obtain specific probability estimates. The tool, he explained, consists of ten items and produces estimates of future risk based on the number of risk factors present in any one individual. These risk factors include the presence of prior sexual offences, having committed a current non-sexual violent offence, having a history of non-sexual violence, the number of previous sentencing dates, current age, having male victims, having never lived with a partner for two continuous years, having a history of non-contact sexual offences, having unrelated victims, and having stranger victims.

- [54] Dr. Ferguson found that the results of this static test placed B.T. in the low-risk category for sexually violent recidivism based on his age and his not meeting the criteria for any of the other risk factors on the instrument.
- [55] Dr. Ferguson then outlined his use of the Risk for Sexual Violence Protocol ("RSVP"), a set of evidence-based, structured, professional judgment guidelines that facilitate comprehensive assessments and management of the risk of sexual violence in clinical and forensic settings. It can be used with men aged 18 and over who have a known or suspected history of sexually aberrant behaviour.
- [56] Dr. Ferguson explained that the RSVP consists of 22 factors organized around five domains. Those five domains are as follows: sexual violence history (five factors); psychological adjustment (five factors); mental disorder (five factors); social adjustment (four factors); and manageability (three factors).
- [57] With respect to Sexual Violence History, Dr. Ferguson found that B.T. does not meet the criteria for any of the items. For Psychological Adjustment, he found four of the items relevant to B.T. (extreme minimization or denial of sexual violence, attitudes that support or condone sexual violence, problems with self-awareness and problems with stress and coping). Regarding the Mental Disorder domain, Dr. Ferguson found three of the items relevant to B.T. (sexual deviance, major mental illness, and violent or suicidal ideation). In terms of the Social Adjustment domain, he found three of the factors relevant to B.T. (problems with intimate relationships, problems with non-intimate relationships, and problems with employment). With respect to Manageability, he found two of the items relevant to B.T. (problems with planning and problems with treatment).
- [58] Dr. Ferguson went on to discuss these five domains in detail. He observed that while B.T. has no history of convictions for sexual offences, he also found the sexually inappropriate behaviour exhibited by B.T. as a teenager concerning. He noted that B.T. denies committing these offences and continues to blame the victim's mother for concocting a story. While B.T. denied these offences and claims sexual abuse is abhorrent, he impressed Dr. Ferguson as having little concern for such offending and as holding some attitudes that minimize the seriousness of such behaviour.
- [59] Dr. Ferguson found B.T.'s concerning behaviour when he was an adolescent suggestive of some level of support for sexual violence, but also noted the absence of any indication of whether these behaviours persisted between his early adolescence and the offences before the court. Dr. Ferguson found B.T. has limited self-awareness about sex, his sexual needs and sexuality in general. He found that he also has limited understanding of how ASD and ADHD impact his general functioning and socialization. He also found that B.T. has limited coping and stress-management skills, and while he denied using sex as a coping mechanism, the doctor noted that B.T. acknowledges that he uses masturbation and pornography to manage boredom. Dr. Ferguson opined that while there is no clear indication of sexual deviance, per se, that there were concerns about sexualized staring and

stalking of females before, and this raises some concern about B.T.'s sexual arousal.

- [60] Dr. Ferguson further noted that B.T. presents with ADHD and ASD, which are likely to impact his thinking, impulsivity and judgment. He opined that B.T. may struggle with empathy and understanding the consequences of his actions, failing to appreciate how sexual violence impacts victims and others. He observed that B.T. also has a history of aggression and violence as a youth and experiences suicidal ideation at times, though he denies, at least to Dr. Ferguson, any intent or plan. He noted that B.T. has no history of intimate relationships, nor has he been sexually active with another person and impressed Dr. Ferguson as struggling to meet his sexual needs in appropriate ways. He also struggles significantly, Dr. Ferguson wrote, with non-intimate relationships, something that Dr. Ferguson called a hallmark symptom of ASD.
- [61] Dr. Ferguson also noted that employment had been a problem for B.T., with few jobs, that he currently receives PWD and that presents with difficulties in planning and setting goals to work towards. He observed that B.T. reported that he spends his days playing video games with little thought to the future, although I do pause here to note that this seems to have changed somewhat since the time of this report.
- [62] Dr. Ferguson noted, as well, that B.T. has had some very limited mental health treatment in the past and, at times, his compliance was also limited. He had not sought out treatment services as of the time of the report.
- [63] On a more positive note, Dr. Ferguson also took into account that B.T. did not impress him as an antisocial individual and noted he had no criminal record. He also noted he has no problems with substance abuse, he appears to be following the conditions of his bail order, and appears to have good support from his family.
- [64] In the end, Dr. Ferguson opined that the results of the structured risk assessment suggest that overall B.T. is at low-moderate risk of sexual violence.
- [65] Dr. Ferguson summarized his opinions at page 7:

SUMMARY/ RECOMMENDATIONS:

B.T. presented as a 36-year old male currently before the courts, awaiting sentencing after having been found guilty of one count each of Sexual Interference, Invitation to Sexual Touching, Sexual Assault, Making Child Pornography, Possession of Child Pornography and Access Child Pornography.

B.T. was born and raised in the Lower Mainland and is the younger of two boys in his family. He had a somewhat difficult childhood, characterised by physical abuse from his father, parental separation and a difficult relationship with his brother. B.T. struggled socially and was diagnosed with Autism Spectrum Disorder and ADHD. He also struggled academically at school and did not complete his education. It appears that he also had some behavioural challenges, including aggression and violence as a child and youth. He has a limited employment history and currently

receives the PWD. B.T. has no history of problematic substance use. There also do not appear to be any physical health concerns.

B.T. has never been in an intimate relationship, nor had a sexual partner. He reached puberty in his teenage years and impressed as having an average to above average sex drive. He has viewed pornography since he was 18 years old. He denied deviant sexual arousal including paedophilic arousal. B.T. impresses as having very limited knowledge and understanding of healthy positive sexual behaviours and impressed as possibly getting most of his sexual knowledge from pornography. He appears to have limited skills in developing relationships, intimate or otherwise and struggles to meet his sexual needs in an appropriate manner, save for masturbation. These social and relationship difficulties are hallmarks of ASD and B.T. is likely to continue to struggle with these moving forward.

With respect to B.T.'s offending, he completely denied committing his index offence, thus could give no reasons for his behaviour. It seems that B.T.'s offences were the results of inappropriate means of meeting sexual needs that he was struggling to meet and opportunistic. He impressed as being very self-focused and lacking in concern for the victim of his offence. As noted above, he impressed as having significant deficits in his understanding of sex and appropriate sexual behaviour, as well as a very poor understanding and appreciation of the negative consequences of his behaviour and the psychological impacts for victims of sexual assault. He presents with a lack of empathy though this may in part be attributable to ASD. Nonetheless, B.T.'s poor understanding of sex, sexuality, and lack of understanding and appreciation of the impact of sexual assault/abuse on victims and the seriousness of sexual offending are likely to perpetuate his risk.

[66] In light of all of this, Dr. Ferguson made a number of recommendations. He wrote:

1. B.T. would benefit from participation in a sex offender treatment program. However, given his apparent difficulties with learning as well as impact of ASD on his interpersonal functioning, he would likely require a modified program to help him better understand, learn and consolidate the material.

Should he be given a custodial sentence, programs are offered in both the federal and provincial correctional systems. In the provincial systems, B.T. may be able to attend the Forensic Psychiatric Services Commission, Sex Offender Program (FSOP) at Ford Mountain Correction Centre. However, if he is unable to attend the group in custody as a result of the length of sentence and availability of the in-custody group, he can also participate in community-based group offered through the Forensic Regional Clinics upon his return to the community. Should B.T. be given a community-based disposition, it is recommended that he be referred to the community based FSOP. However, should a modified FSOP not be available B.T. would benefit from individual sex offender treatment as part of the above program. Of note, B.T. denies committing his index offences and he may be a difficult individual to engage in a treatment program as a result.

2. B.T. has limited employment history and would benefit from assistance with finding ongoing employment. He is likely to require a supported environment but the consistency and routine of a regular job would be positive for B.T. B.T. would also benefit from support in completing his high equivalency and receiving his GED. This would likely improve his prospects for employment and overall self-confidence.
 3. In the context of B.T.'s diagnosis of ASD and the impact that has on his social/interpersonal skills, decision making and judgement, he is likely to be a vulnerable individual within the prison system. He also acknowledged significant anxiety about prison and presents with poor coping and stress management skills. Should he be given a custodial sentence, B.T. will require significant support and services in order to successfully navigate the prison environment and his term of incarceration.
- [67] I turn now to the positions of the parties. My brief summary does not do justice to counsel's thorough and excellent submissions. What follows here is simply a summary.

Positions of the Parties

- [68] The Crown submits that a sentence of seven to ten years imprisonment for Count 1, consecutive to a three-year global sentence for Counts 4, 5 and 6 would be a proportionate sentence. Ms. Sakkau argues that these sentences would adequately address the objectives of denunciation and deterrence, which must be given primacy in this case, and takes into account the several aggravating factors in this case, balanced with some mitigating factors as well. The Crown emphasizes the gravity of these offences and B.T.'s high moral culpability in committing them. Ms. Sukkau submits that the sentence she proposes is in keeping with the Supreme Court of Canada's recent guidance in Friesen.
- [69] The defence acknowledges that the objectives of denunciation and deterrence require primacy in this case, but Mr. James urges me not to lose sight of other important objectives in this case, including rehabilitation and the important need for restraint. Mr. James recognizes the seriousness of the offences and that there is a potential for harm to develop for A. in the future, but he submits that the gravity of the offences is attenuated by the minimal or lack of any actual harm suffered by her. He also argues that B.T.'s moral culpability is significantly attenuated as a result of his mental health conditions, his cognitive limitations and his other personal circumstances. Mr. James emphasizes the many mitigating factors, such as B.T.'s young mental age, his lack of criminal record, his strong family support, his low risk to re-offend, to name a few.
- [70] In the end, the defence submits that a proportionate global sentence would be a period of imprisonment of two years less a day followed by a three-year probation order. Mr. James argues that this sentence is also a sentence in keeping with the Supreme Court of Canada's recent guidance in Friesen.

Legal Parameters and Principles

- [71] Section 151 of the Code carries a maximum sentence of 14 years imprisonment. The mandatory minimum sentence of one year imprisonment it had carried was struck down in *R. v. Scofield*, 2019 BCCA 3. A conditional sentence order ("CSO") is not an available sanction: s. 742.1(c) of the Code.
- [72] Section 163.1(2) of the Code carries a minimum sentence of one year imprisonment and a maximum sentence of 14 years imprisonment.
- [73] Section 163.1(4) of the Code carries a maximum sentence of ten years of imprisonment. The mandatory minimum sentence of one year imprisonment it had carried was struck down in *R. v. Hamlin*, 2019 BCSC 2266.
- [74] Section 163.1(4.1) of the Code carries a maximum sentence of ten years imprisonment. There too the mandatory minimum sentence of one year imprisonment was struck down recently in *Hamlin*.
- [75] The determination of a just and proportionate sentence is a highly individualized exercise that goes beyond any mathematical calculation. Many courts have recognized that imposing a just and proportionate sentence in serious cases such as this is among the most challenging responsibilities a judge can have. It involves a careful balancing of a variety of factors in the context of a particular set of circumstances in respect of a particular offender. This balancing process occurs within a legislative framework informed by common law principles. That framework is set out in s. 718 of the Code.
- [76] Section 718 of the Code provides that the fundamental purpose of sentencing is to "protect society and to contribute to respect for the law and the maintenance of a just, peaceful, and safe society by imposing just sanctions ". This is to be achieved by imposing sentences that have one or more of the following objectives:
- (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
 - (b) to deter the offender and other persons from committing offences;
 - (c) to separate offenders from society, where necessary;
 - (d) to assist in rehabilitating offenders;
 - (e) to provide reparations for harm done to victims or to the community; and
 - (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.
- [77] Section 718.01 requires the court to give primary consideration to the objectives of denunciation and deterrence when imposing a sentence for an offence that involved abuse of a person under the age of 18 years, which is the case here.

- [78] The objectives of sentencing are given "sharper focus" in s. 718.1, which mandates that a sentence be "proportionate to the gravity of the offence and the degree of responsibility of the offender". This proportionality principle is fundamental in Canadian law. Thus, whatever weight a judge may wish to accord to the objectives identified in s. 718, the resulting sentence must respect the fundamental principle of proportionality: *R. v. Nasogaluak*, 2010 SCC 6 at para. 40.
- [79] Section 718.2 of the Code provides a non-exhaustive list of secondary sentencing principles for the court to consider, including the aggravating and mitigating circumstances, the principles of parity and totality, that an offender should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances, and to consider all available sanctions other than imprisonment that are reasonable in the circumstances: *Nasogaluak* at para. 40.
- [80] With respect to the aggravating factors set out in subsection (a) of s. 718.2, subsections (ii.1) and (iii) are relevant to this case in that B.T. abused a person under the age of 18 years, and that in committing the offence, he abused a position of trust or authority in relation to the victim.
- [81] Regarding the principle of parity found in s. 718.2(b), while it is important to respect this principle, I am mindful that I am not to lose sight of the individualized nature of the assessment before me, an assessment that requires me to weigh the objectives of sentencing in a manner that best reflects the circumstances of this case and of this offender: *Nasogaluak* at para. 43.
- [82] Subsection 718.2(c) outlines what is referred to as the totality principle, which requires that where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh.
- [83] Section 718.2(d) and (e) emphasize the need for restraint in the use of imprisonment. These provisions require that an offender not be deprived of liberty if less restrictive sanctions are appropriate in the circumstances, and that all available sanctions other than imprisonment that are reasonable in the circumstances and consistent with the harm done to victims or the community should be considered for all offenders, with particular attention to the circumstances of Indigenous offenders. B.T. is not an Indigenous offender.
- [84] Though not in force at the time of B.T.'s offences, a relatively new provision, s. 718.04 came into force in September 2019, and it provides:

718.04 When a court imposes a sentence for an offence that involved the abuse of a person who is vulnerable because of personal circumstances -- including because the person is Aboriginal and female -- the court shall give primary consideration to the objectives of denunciation and deterrence of the conduct that forms the basis of the offence.

- [85] The child in this case is not Indigenous, but is vulnerable. This provision represents a codification of applicable sentencing principles involving the abuse of vulnerable persons. Although not in force at the time of B.T.'s offending, the principles apply: *R. v. Milne*, 2020 BCSC 2101 and *R. v. C.C.C.*, 2021 BCSC 599 at para. 28.
- [86] Also relevant to this case is s. 718.3(7)(a) of the Code, which requires that when a court sentences an offender at the same time for more than one sexual offence committed against a child, the court shall direct that the sentence of imprisonment it imposes for a pornography offence be served consecutively to the other sexual offence.
- [87] Again, the proportionality principle in s. 718.1 is fundamental to all of this. The principle, and its interplay with the sentencing objectives and other principles was explained by LeBel J. in *R. v. Ipeelee*, 2012 S.C.C. 13 at para. 37:
- [37] The fundamental principle of sentencing (i.e., proportionality) is intimately tied to the fundamental purpose of sentencing -- the maintenance of a just, peaceful and safe society through the imposition of just sanctions. Whatever weight a judge may wish to accord to the various objectives and other principles listed in the Code, the resulting sentence must respect the fundamental principle of proportionality. Proportionality is the sine qua non of a just sanction. First, the principle ensures that a sentence reflects the gravity of the offence. This is closely tied to the objective of denunciation. It promotes justice for victims and ensures public confidence in the justice system. As Wilson J. expressed in her concurring judgment in *Re B.C. Motor Vehicle Act*, 1985 CanLII 81 (SCC), [1985] 2 S.C.R. 486, at p. 533:

It is basic to any theory of punishment that the sentence imposed bear some relationship to the offence; it must be a "fit" sentence proportionate to the seriousness of the offence. Only if this is so can the public be satisfied that the offender "deserved" the punishment he received and feel a confidence in the fairness and rationality of the system.

Second, the principle of proportionality ensures that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender. In this sense, the principle serves a limiting or restraining function and ensures justice for the offender. In the Canadian criminal justice system, a just sanction is one that reflects both perspectives on proportionality and does not elevate one at the expense of the other.

- [88] The Supreme Court emphasized this again in *Lacasse*, instructing sentencing courts that proportionality is to be determined both on an individual basis, that is in relation to the offender himself, and to the offences committed by that person, and by comparison with sentences imposed for similar offences committed in similar circumstances. The Court explained that the concepts of individualization and parity of sentences must be reconciled for a sentence to be proportionate: para. 53.

Consideration of R. v. Friesen

- [89] The Supreme Court of Canada has provided recent guidance on sentencing for sexual offences involving children in Friesen. The Court began with the following:
- [1] Children are the future of our country and our communities. They are also some of the most vulnerable members of our society. They deserve to enjoy a childhood free of sexual violence. Offenders who commit sexual violence against children deny thousands of Canadian children such a childhood every year. This case is about how to impose sentences that fully reflect and give effect to the profound wrongfulness and harmfulness of sexual offences against children.
- [90] In restoring the six-year sentence that had been imposed upon Mr. Friesen in the trial court, the Court undertook a wide-ranging analysis to provide guidance to sentencing courts and appellate courts across the country in this area.
- [91] Mr. Friesen had pleaded guilty to one count of sexual interference and one count of attempted extortion. While engaged in sexual intercourse with the mother of a four-year-old child, he instructed the mother to bring the child into their bedroom where they subjected the child to sexual violence. The child's screams drew the attention of the mother's friend, who removed the child from the room. This prompted Mr. Friesen to threaten the mother that if she did not bring the child back for further abuse, he would tell her friend that she had sexually abused her friend's infant child. Mr. Friesen was 29 years old and had no prior criminal record. He had a difficult childhood filled with physical and sexual abuse and neglect. He had mental health challenges, no community supports, lacked insight into his offending, and was considered a high risk to re-offend.
- [92] Justice Marchand, as he then was, recently summarized the guidance provided by the Court in Friesen. In C.C.C., he wrote, in part:
- [51] In the case of sexual offences against children, the overarching objective of sentencing is to protect children from exploitation and harm. Sentences must reflect the inherent wrongfulness and harmfulness of sexual violence against children.
- [52] Children are highly vulnerable and experience disproportionate rates of sexual violence. This is particularly true amongst Indigenous and other structurally disadvantaged people.
- [53] Exploiting a child's vulnerability to satisfy an adult's need for sexual gratification is highly morally blameworthy, especially when perpetrated by a person in a position of trust and/or in a child's home. Children should be treated as persons with equal dignity and not as sexual objects to be used by adults.
- [54] Sexual violence violates the personal autonomy, bodily integrity, sexual integrity, dignity and equality of children. In addition to physical harm, sexual violence is traumatizing to children and can cause a wide range of life-altering emotional and psychological harms, including post-traumatic stress disorder, substance abuse, mental illness, anxiety,

depression, low self-esteem, anger, self-harming behaviours, and problems forming interpersonal relationships. These harms can perpetuate gender and heritage-based inequities and have ripple effects through families and communities.

- [55] Offenders are or ought to be aware of the profoundly adverse effects associated with sexual violence against children. This knowledge amplifies the moral blameworthiness of sexually offending against children.
- [56] The gravity of an offence has subjective and objective elements.
- [57] The subjective gravity is determined through an examination of the circumstances surrounding the commission of the offence. Elements such as the offender's likelihood to reoffend, the abuse of a position of trust or authority, the nature, duration and frequency of the abuse, and the age of the victim must all be considered.
- [58] The objective gravity is determined through a consideration of relevant Code provisions. Parliament's decisions to increase maximum punishments and to prioritize denunciation and deterrence reflects society's increasing recognition of the seriousness of sexual offences against children and the need to impose more severe sanctions.
- [59] As a result of all of the above, the Court in Friesen held that an upward departure from prior sentencing precedents and ranges is required. While the Court declined to define a national range for sexual interference, the Court held at paras. 111-112 that cases such as *R. v. Williams*, 2019 BCCA 295 [Williams No. 1] and *R. v. Vokey*, 2000 NFCA 14, inappropriately constrained the discretion of sentencing judges to impose proportionate sentences.
- [60] In *Williams No. 1*, the British Columbia Court of Appeal suggested that sentences should exceed three years for sexual interference only in "rare circumstances". In *Vokey*, the Newfoundland and Labrador Court of Appeal held that, absent "special circumstances", the range for sexual assault of a child involving intercourse and abuse of a position of trust is three to five years.
- [61] At paras. 115-117 of *Friesen*, the Court directed that provincial appellate courts revise sentencing ranges to ensure that sentencing ranges for sexual offences against children increase relative to sentencing ranges for similar sexual offences against adults. The Court held that stronger sanctions were necessary for sexual offences against children "to reflect Parliament's recognition of the inherent vulnerability of children and the wrongfulness of exploiting that vulnerability."
- [62] Notably, the Court singled out the decisions of our Court of Appeal in *R. v. G.M.*, 2015 BCCA 165 and *Scofield*, in which the Court of Appeal established a sentencing range for "sexual assault involving intercourse" of two to six years for both adult and child victims. At para. 118 of *Friesen*, the Court emphasized that the separation in sentencing ranges is to be achieved by increasing the range of sentences imposed where the victim is a child and not by decreasing the range of sentences imposed where the victim is an adult.

[63] The Court added:

[114] [M]id-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. We would add that substantial sentences can be imposed where there was only a single instance of sexual violence and/or a single victim, as in this case, Woodward, and L.M. In addition, as this Court recognized in L.M., maximum sentences should not be reserved for the "abstract case of the worst crime committed in the worst circumstances" (para. 22). Instead, a maximum sentence should be imposed whenever the circumstances warrant it (para. 20).

[64] While the Court highlighted many factors that increase the moral blameworthiness of those who sexually offend against children, the Court also took pains to ensure sentencing courts do not ignore factors that may reduce an offender's moral culpability. The Court held:

[91] These comments should not be taken as a direction to disregard relevant factors that may reduce the offender's moral culpability. The proportionality principle requires that the punishment imposed be "just and appropriate . . . , and nothing more" [cites omitted]. First, as sexual assault and sexual interference are broadly-defined offences that embrace a wide spectrum of conduct, the offender's conduct will be less morally blameworthy in some cases than in others. Second, the personal circumstances of offenders can have a mitigating effect. For instance, offenders who suffer from mental disabilities that impose serious cognitive limitations will likely have reduced moral culpability [cites omitted].

[66] To reinforce this message, the Court held:

[104] Section 718.01 thus qualifies this Court's previous direction that it is for the sentencing judge to determine which sentencing objective or objectives are to be prioritized. 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 (Rayo, at paras. 103 and 107-8). However, while s. 718.01 requires that deterrence and denunciation have priority, nonetheless, the sentencing judge retains discretion to accord significant weight to other factors (including rehabilitation and Gladue factors) in exercising discretion in arriving at a fit sentence, in accordance with the overall principle of proportionality (see R. v. Bergeron, 2013 QCCA 7, at para. 37 (CanLII)).

[93] I agree with Justice Marchand's summary of the Court's guidance in Friesen.

[94] Also relevant is the Court's discussion in Friesen about the abuse of trust factor. The Court wrote:

[125] We also wish to offer some comments on the factor of the abuse of a position of trust (Criminal Code, s. 718.2(a)(iii)). Trust relationships arise in varied circumstances and should not all be treated alike . . . Instead, it makes sense to refer to a "spectrum" of positions of trust . . . An offender may simultaneously occupy multiple positions on the

spectrum and a trust relationship can progress along the spectrum over time . . . In some cases, an offender's grooming can build a new relationship of trust, a regular occurrence in child luring cases where children are groomed by complete strangers over the Internet, or move an existing trust relationship along the spectrum. Even where grooming does not exploit an existing relationship of trust or build a new one, it is still aggravating in its own right.

- [126] Any breach of trust is likely to increase the harm to the victim and thus the gravity of the offence. As Saunders J.A. reasoned in *D.R.W.*, the focus in such cases should be on "the extent to which [the] relationship [of trust] was violated" . . . The spectrum of relationships of trust is relevant to determining the degree of harm. A child will likely suffer more harm from sexual violence where there is a closer relationship and a higher degree of trust between the child and the offender . . . This is likely to be the case in what might be described as classic breach of trust situations, such as those involving family members, caregivers, teachers, and doctors, to [name] a few.
- [95] Child pornography degrades, dehumanizes and objectifies children. It has been described by various courts as inherently harmful and its very existence as violating the dignity and equality rights of children, preying on their vulnerabilities: *R. v. Athey*, 2017 BCCA 350 at para. 34, citing *R. v. Sharpe*, 2001 SCC 2.
- [96] The Court in *Friesen*, referencing *Sharpe*, discussed these harms further at para. 51:
- [51] The prime interests that the legislative scheme of sexual offences against children protect are the personal autonomy, bodily integrity, sexual integrity, dignity, and equality of children. This Court recognized the importance of these interests in *Sharpe* in the context of the production of child pornography. As this Court reasoned, the production of child pornography traumatizes children and violates their autonomy and dignity by treating them as sexual objects, causing harm that may stay with them for their entire lifetime . . . Sexual violence against children is thus wrongful because it invades their personal autonomy, violates their bodily and sexual integrity, and gravely wounds their dignity . . .

Sentencing Authorities

- [97] Both counsel have provided a number of sentencing authorities for my consideration.
- [98] Ms. Sukkau has provided the following: *C.C.C.*; *R. v. R.J.H.*, 2021 BCCA 54; *R. v. Williams*, 2020 BCCA 286; *Friesen*; *R. v. Patel*, 2020 BCCA 92; *R. v. Scofield*, 2019 BCCA 3; *Hamlin*; *Athey*; *R. v. E.S.*, 2017 BCCA 354; *R. v. S.L.D.*, 2017 BCPC 349; *R. v. Vautour*, 2016 BCCA 497; *R. v. R. (E.R.D.)*, 2016 BCSC 684; *R. v. W.(D.L.)*, 2014 BCSC 43; and *R. v. Stuckless*, [1998] O.J. No. 3177 (ONCA).

- [99] Some of these authorities were provided for their general principles. While acknowledging that no case is factually on all fours, the Crown submits that in addition to Friesen, three of these authorities in particular support the range of sentence the Crown seeks in this case: C.C.C.; Athey; and E.S.
- [100] In C.C.C., the offender was convicted of sexual interference of his young and highly-vulnerable step-granddaughter to whom he was in a position of trust. Over the course of several months, he repeatedly forced the 11-year-old child to touch his penis and had vaginal intercourse with her through the use of physical force and verbal abuse. The offender was an Indigenous 65-year-old residential school survivor who had overcome many hurdles to lead a largely prosocial life. He had no related or recent criminal record, had family and community support, expressed some remorse, and was considered a low risk to re-offend. He was willing to engage in some sex offender treatment. Justice Marchand sentenced that offender to five years in prison. Gladue factors played an important role.
- [101] In Athey, the offender pleaded guilty to possessing and making child pornography and to sexually touching a child under the age of 16. The victim was between four and six years old at the relevant time and was the daughter of the neighbours of Mr. Athey and his wife. The Atheys often babysat the child and her brother and were considered close friends, almost like family. Mr. Athey, an Indigenous offender, was between the ages of 40 and 43 over the relevant period. He came from a violent, chaotic and alcoholic household, and he suffered sexual abuse as a child. He had an unrelated and dated criminal record.
- [102] Mr. Athey's offences came to light after images of child pornography led to his IP address. A search of his computer and related items uncovered 2300 still images and 27 video recordings containing child pornography. The victim, the child, featured in more than 200 of the images, many of which Mr. Athey had distributed over the internet. Mr. Athey himself was featured abusing a female child.
- [103] Mr. Athey received a global sentence of eight years imprisonment (five years for the sexual interference offence and three years consecutive for the making and possessing child pornography). The Court of Appeal upheld these sentences. I note this case pre-dates Friesen.
- [104] In E.S. (again a pre-Friesen decision), the offender pleaded guilty to sexual exploitation of a young person while in a position of trust or authority and to making child pornography. This offender had repeatedly sexually assaulted his step-daughter when she was between the ages of 12 and 17 years old. The abuse was extremely serious and included instances of forced sexual intercourse, resulting in a pregnancy and secret abortion when the victim was 17. This offender also secretly filmed and photographed these sexual acts. His risk for future misconduct sexually was found to be low-moderate to moderate. He was sentenced to seven and a half years imprisonment (six years for sexual exploitation and 18 months for making child pornography).

- [105] Mr. James relies upon a number of case authorities as well. In addition to Friesen and Williams, he relies on *R. v. Roth*, 2020 BCSC 2200; Scofield; *R. v. Horswill*, 2019 BCCA 2; *R. v. R.(E.R.D.)*, 2016 BCSC 684; *R. v. F.J.C.*, 2018 BCSC 2367; *R. v. K.M.*, 2017 ONSC 4769; *R. v. C.R.A.*, 2020 BCPC 171; *R. v. C.F.*, 2020 ONSC 5975; *R. v. R.D.*, 2017 ONSC 6375; *R. v. B.A.S.*, 2019 BCPC 47; *R. v. Bolderson*, 2018 BCPC 268; Swaby; *R. v. Cole*, 2021 BCSC 293; Hamlin; *R. v. J.M.H.K.*, 2021 BCPC 50; and *R. v. Belcourt*, 2010 ABCA 319.
- [106] Mr. James also provides some of these authorities for general principles and their application in specific cases, but relies upon several of them to support the range of sentence that the defence seeks. He too recognizes that no two circumstances are identical and readily acknowledges the distinctions between the authorities. I have read and reviewed all of the authorities that Mr. James has provided and identified in his submissions, but here will only highlight a few upon which he places particular reliance. I have considered them all.
- [107] In *Roth*, the 38-year-old offender was convicted of historical sexual interference and invitation to sexual touching of a child. He had done so six times between the years of 2000 and 2007, when the child was between the ages of six to nine years old and Mr. Roth would have been, if my math is right, in his late teens and early twenties. Mr. Roth was the child's babysitter. This offender had a learning disability, was emotionally, psychologically and cognitively described as having shortcomings, had little insight into his offending and was found to be an average risk to re-offend. He had no prior criminal record and maintained himself on bail without any violation for over two years. In that case, the Crown sought a sentence of 18 months imprisonment, concurrent on each count, followed by three years' probation. The defence sought a lesser sentence of 12 months incarceration. In the end result, Mr. Roth was sentenced to 16 months imprisonment, followed by three years probation.
- [108] In *Scofield*, the first-time offender was 22 years old at the time of the offences. He was charged on a six-count indictment with sexual offences involving two 15-year-old girls. As a result of a plea negotiation with the Crown, he pleaded guilty to two counts of sexual interference and the Crown agreed not to seek a sentence of longer than the one-year mandatory minimum. The sentencing judge struck down the mandatory minimum one-year sentence as unconstitutional and imposed a six-month CSO.
- [109] Central to the court's decision was his conclusion that Mr. Scofield's moral culpability was significantly reduced as a result of his cognitive deficits. Mr. Scofield was found to be significantly cognitively impaired, described as having a "severely diminished level of cognitive and executive decision-making abilities" and found to have an IQ of 59. There was evidence before the court that Mr. Scofield suffered from fetal alcohol spectrum disorder and that his cognitive abilities were in the extremely low ("mild mental retardation") to borderline range in intellectual functioning, placing him in the second percentile. He was found by the experts to meet all three DSM criteria for a diagnosis of "mental retardation".

- [110] An assessment of Mr. Scofield's brain function indicated significant impairment in cognition, core academic skills, executive functioning, memory, communication, adaptive function and attention and activity level. Testing also disclosed that he may have mild neurological abnormality in sensory and motor movement, and incomplete brain development.
- [111] In that case, the court also received an opinion from a registered psychologist that Mr. Scofield's cognitive deficits influenced his behaviour and were a causal factor in his commission of the offences. The doctor felt that his offending behaviour was not a direct result of his disability, but that it probably influenced his offending behaviour to some degree.
- [112] The court found that Mr. Scofield's intellectual deficits caused him to not understand the significance of the victims' ages or understand that his acts were potentially harmful to them as 15-year-old girls. His disabilities and impaired executive decision-making brought his maturity and reason to that of a much younger person, described by the sentencing judge as the same or even less mentally mature than the victims, and well within the five-year age exception found in s. 150.1(2.1) of the Code. In the circumstances, the court found that his moral blameworthiness was diminished.
- [113] The sentencing judge also found Mr. Scofield's circumstances to constitute "exceptional circumstances" justifying a sentence below the range of sentences for those offences. Of note, the sentencing judge went on to say "these circumstances would not warrant the same period of custody as someone who, for example, abused a six-year-old relative": para. 99.
- [114] The Court of Appeal allowed the Crown's appeal and found a one-year CSO to be a fit and proportionate sentence. In doing so, the Court found no error in the judge's conclusion that Mr. Scofield's moral blameworthiness was reduced, observing that there was an evidentiary basis to support the judge's finding of a causal link between Mr. Scofield's offending and his significant cognitive deficits.
- [115] In R.(E.R.D.), the offender pleaded guilty to a single instance of sexual interference of a young victim. He challenged the mandatory minimum sentence of one year imprisonment. It was within this context, the constitutional challenge, that the court found that an appropriate sentence in that case would be in the range of nine to 18 months imprisonment.
- [116] This particular offender was 29 years old, had no criminal record and suffered from the lowest level (or least impaired level) of ASD. The offender acknowledged touching the child on one occasion, indicating that his motivation for doing so was curiosity.
- [117] The forensic psychiatrist in that case discussed the offender's ASD as impacting his social skills, rendering him unable to live on his own or lacking the capacity to feel empathy. The position taken by the Crown at sentencing was that the appropriate sentence was in the range of 16 to 18 months imprisonment followed by three years probation.

- [118] Regarding child pornography offences, the defence relies upon Swaby. In Swaby, the offender pleaded guilty to possession of a large quantity of disturbing child pornography. The Crown proceeded summarily. The sentencing judge found the mandatory minimum sentence of 90 days imprisonment was unconstitutional as it applied to Mr. Swaby, and instead imposed a CSO and a term of probation. The Crown's appeal was dismissed.
- [119] Mr. Swaby was 23 years old at the time of the offence. He was found to have significant and serious cognitive and intellectual impairments, as well as other mental health concerns, including auditory hallucinations. He was described as being "childlike" as a result of his mental impairments.
- [120] In Cole, the offender appealed a sentence imposed upon him by a judge of the Provincial Court following his entry of a guilty plea to a single charge of possession of child pornography. The Crown proceeded summarily and sought, in front of the sentencing judge, an eight-month CSO, followed by a two-year probationary period. The defence urged the imposition of a two-year suspended sentence.
- [121] On appeal, Justice Williams found the sentence imposed, a six-month CSO, was a fit one. The offender was 33 years of age and suffering from cerebral palsy. He experienced frontal lobe seizures as well, and was considered to fall within the autism spectrum. The evidence before the court established that his mental functioning fell at the level of a ten to 14-year-old. His circumstances were found to be "exceptional circumstances" and his moral culpability significantly reduced.
- [122] As this sampling of the authorities relied on by counsel demonstrate, sentencing is a highly individualized process. The authorities show a diverse range of circumstances and outcomes for each unique offender.
- [123] Overall, though, I am of the view that the circumstances in the case at bar and of this particular offender are more in line with some of the authorities presented by the Crown, although they do have some differences as well.
- [124] I find the authorities relied upon by the defence distinguishable in many respects. Many of the authorities pre-date Friesen, they involve guilty pleas, involve very different circumstances, and very different offenders. Some involve plea negotiations and very different Crown positions.
- [125] For example, Scofield, a case relied upon heavily by B.T., is very distinguishable. Mr. Scofield's mental deficits were far more pronounced and significant than B.T.'s and there was evidentiary support for a finding that they were causally linked to his offending. Mr. Scofield engaged in sexual activity with two 15-year-old girls and, while he was chronologically 22 years old, he was cognitively their age or less. He could not understand the implications of their ages. He pled guilty after a plea negotiation with the Crown, where the Crown agreed to seek no more than the mandatory minimum sentence of one-year imprisonment.

- [126] On the other hand, B.T. is in his early thirties, offended against a child between the ages of five and seven multiple times. While he does suffer from ASD and ADHD which, as Dr. Ferguson opined, likely impacts his thinking, impulsivity, and judgment and causes him to struggle with empathy and understanding the impact sexual violence has on victims, I am unable to conclude there is any causal relationship between his offending against A. and his mental disabilities. In short, B.T. is a very different offender than Mr. Scofield and committed very different offences than Mr. Scofield did.
- [127] Cole and Swaby are also very different in both the nature of the offences, the manner in which the Crown proceeded, the circumstances and factors at play, the mental disabilities at play, and the exceptional circumstances that were found in those cases.

Analysis

[128] I see the mitigating factors in this case as follows:

1. B.T.'s relatively young age makes rehabilitation a realistic prospect;
2. B.T.'s lack of any criminal history;
3. B.T.'s mental disabilities - although there is no causal relationship between his offences and his disabilities, I am satisfied that his disabilities are a mitigating factor that slightly reduce his moral blameworthiness;
4. B.T. experienced a difficult childhood involving abuse and lack of resources to manage his ASD and ADHD;
5. B.T. will struggle in a custodial setting. As Dr. Ferguson explained, B.T.'s diagnosis of ASD and the impact that has on his social and interpersonal skills, his decision making, and judgment is likely to make him a vulnerable individual within the prison system. He will experience anxiety and will require significant support and services while there. I also consider that B.T. is likely to lose his father while he is in custody, which is an additional negative repercussion for his crime for which he will suffer;
6. B.T.'s good compliance with restrictive conditions while on bail;
7. The support he has from his family and other community members. I am satisfied that support will be there for him when he is released from prison;
8. B.T.'s recent steps in seeking to manage his ASD, as well as his willingness to access more supports for that condition, his pro-social plans for upgrading his education and obtaining employment, and engaging with his community upon his eventual release;
9. Dr. Ferguson's opinion that he is low to moderate risk to re-offend. I am satisfied that while there are some risk factors in this case, this is nevertheless a mitigating factor.

[129] There are several aggravating factors as well, all of which I am convinced of beyond a reasonable doubt. I find Judge Koturbash's categorization of certain of these factors in S.L.D. a helpful way to organize the aggravating factors in this case.

1. The nature of the acts and escalation of invasiveness - B.T. took many pornographic photographs of A. over a long period of time and eventually escalated to attempting to have penetrative sex with her when she was seven years old.
2. Breach of trust - I am satisfied the Crown has proven beyond a reasonable doubt that B.T. was in a position of trust or authority over A., but on the low end of the trust spectrum described in Friesen. B.T. was not in a classic or traditional position of trust to A. He was, however, an older cousin living in the family's home, left alone with her on multiple occasions and entrusted with her care.
3. Age and vulnerability of the victim - This is a statutorily aggravating factor, but I also note that A. was at a very tender age throughout all of B.T.'s offending behaviour against her and very vulnerable.
4. The impact on the victim - As I have discussed earlier.
5. Frequency and duration of the making of the child pornography - B.T. took numerous pornographic photographs of A. over a long period of time. Not only does this increase the severity of the impact upon A., but it also demonstrates an inability or unwillingness to control and end B.T.'s behaviour.
6. Grooming behaviour - B.T. engaged in grooming behaviour with A.
7. Psychological manipulation - I am satisfied that B.T. engaged in psychological manipulation beyond a reasonable doubt. B.T. befriended this young child. He told her not to tell others about the photographs he was taking of her. He told her they were going to do this even if she said no, with regard to penetrative sex. The burden of keeping this secret from her parents is one that no child should have to bear.
8. Location of the offences - These offences occurred in A.'s home, mostly in her bedroom, a place that children should feel safe and secure.
9. Child Pornography Collection - There were hundreds of images, the majority of which were photographs of A. exposing her vagina. There were photographs of other children, not A., as well.

[130] Denunciation and deterrence are the primary sentencing objectives here. The legislation requires it and the circumstances demand it. However, B.T.'s personal circumstances including all of the mitigating factors, must also be considered, making rehabilitation an important objective, as well. Restraint is also important, particularly in light of the fact that I find B.T.'s high level of moral blameworthiness is attenuated slightly as a result of his mental disabilities.

- [131] I am to impose a proportionate sentence that reflects the gravity of B.T.'s offences as well as his degree of responsibility.
- [132] His offences are grave. He repeatedly victimized a vulnerable young child in her home over a long period of time. Not only are these offences inherently wrongful and violent in all of the ways described by the Court in Friesen, but this child and her family suffered actual harm and there is a reasonably foreseeable potential for harm that flows from B.T.'s sexual violence against her as well. While the actual harm and the potential for future harm may not be certain at this stage because of A.'s young age, and may not be as significant as suffered and expected to be suffered by victims in some of the authorities before me, I find that it is actual and foreseeable potential harm nonetheless.
- [133] B.T.'s moral responsibility for committing these offences is high, although it is attenuated slightly by his mental disabilities that Dr. Ferguson opines likely impact his thinking, impulsivity, empathy, and understanding of the consequences of his actions. Although his moral blameworthiness is lessened slightly, it goes without saying that the intentional sexual exploitation and objectification of children is highly blameworthy conduct, precisely because children are vulnerable and because there is such a profound power imbalance between a child and an adult. B.T. used his location in his cousin's home to gain access to a very young child for terrible purposes. He manipulated, exploited and preyed upon A. many times, over a long period, when he took pornographic photographs of her. He stored some of these images to view them again. He also accessed and viewed other pornographic images of other unknown children.
- [134] B.T. also tried to have sexual intercourse with A., then seven year old, on one occasion, despite her protestations of pain. Furthermore, B.T. enlisted A.'s help in keeping this a secret. To borrow the words of Justice Baird in *R. v. Scribner*, 2020 BCSC 1685 at para. 21, this shows "a persistent determination on B.T.'s part to achieve his harmful and illegal purpose, and a commitment to sexual offending that requires sharp and decisive correction".
- [135] B.T., I am going to ask you to please stand, sir.
- [136] Having considered all of the principles, objectives, and factors I must, exercising the maximum degree of restraint that I consider to be appropriate in the circumstances, and giving you the benefit of every consideration, I find that three years' imprisonment is a proportionate sentence in respect of Count 1, the count of sexual interference. I find that two years' imprisonment is a fit and proportionate sentence for each of Counts 4, 5, and 6. These latter three sentences are to be served concurrently to one another, but consecutively to Count 1. This means that your aggregate sentence, your total sentence, is five years' imprisonment.

- [137] I am satisfied that the aggregate sentence of five years respects the proportionality principle, in that the overall sentence is commensurate with the gravity of these offences and your degree of responsibility. It is not unduly harsh.
- [138] To summarize, I find this is a sentence that reflects the gravity of the offences you have committed, while not exceeding what is appropriate given your moral blameworthiness in this case. It is, I find, at the low end of the range of sentences for these crimes, but I think it is a sentence that considers all aggravating and mitigating factors I have outlined, and is crafted to achieve the primary objectives of denunciation and deterrence, while not losing sight of rehabilitation and the need for restraint. Although it is an individualized sentence, I think it also satisfies the principle of parity and does not, overall, offend the totality principle.
- [139] B.T., it is my sincere hope that you will be provided with the supports that you require while in custody. It is also my sincere hope that you will avail yourself of all supports and programming available to you in order to find a way to accept responsibility for what you have done.
- [140] You can have a seat, sir, while I impose the ancillary orders.
- [141] In accordance with s. 743.21 of the Code, I hereby order you to have no communication with A. and Mrs. D. while you are in prison.
- [142] These are all primary designated offences for the purposes of the provision of DNA. In accordance with s. 487.051(1) of the Code, I make an order in Form 5.03 authorizing the taking of samples of bodily substances from you for the purpose of registration in the DNA National Data Bank.
- [143] These offences are also designated offences under s. 490.01 of the Code. In accordance with s. 490.013(2.1) of the Code, I am ordering you to comply with the requirements of the Sex Offender Information Registration Act for life.
- [144] In accordance with s. 109 of the Code, 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 of 10 years. You are prohibited from possessing any prohibited firearm, restricted firearm, prohibited weapon, prohibited device, and prohibited ammunition for life.
- [145] There will be victims of crime surcharges that you will be required to pay. Given your personal circumstances, I am extending the time to pay to 36 months following your release from custody.
- [146] I turn now to the orders sought under s. 161 of the Code. The Crown seeks orders pursuant to s. 161 to prohibit B.T. from engaging in various forms of conduct that would give him access to children under the age of 16. The defence agrees the order sought should be made, but disputes the duration of all but one.

[147] Section 161 of the Code provides:

161 (1) When an offender is convicted, or is discharged on the conditions prescribed in a probation order under section 730, of an offence referred to in subsection (1.1) in respect of a person who is under the age of 16 years, the court that sentences the offender or directs that the accused be discharged, as the case may be, in addition to any other punishment that may be imposed for that offence or any other condition prescribed in the order of discharge, shall consider making and may make, subject to the conditions or exemptions that the court directs, an order prohibiting the offender from

- (a) attending a public park or public swimming area where persons under the age of 16 years are present or can reasonably be expected to be present, or a daycare centre, schoolground, playground or community centre;
- (a.1) being within two kilometres, or any other distance specified in the order, of any dwelling-house where the victim identified in the order ordinarily resides or of any other place specified in the order;
- (b) 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;
- (c) having any contact -- including communicating by any means -- with a person who is under the age of 16 years, unless the offender does so under the supervision of a person whom the court considers appropriate; or
- (d) using the Internet or other digital network, unless the offender does so in accordance with conditions set by the court.

[148] Section 161(2) sets out the duration of such prohibitions:

- (2) The prohibition may be for life or for any shorter duration that the court considers desirable and, in the case of a prohibition that is not for life, the prohibition begins on the later of
 - (a) the date on which the order is made; and
 - (b) where the offender is sentenced to a term of imprisonment, the date on which the offender is released from imprisonment for the offence, including release on parole, mandatory supervision or statutory release.

[149] Justice Fisher recently discussed the principles that inform the s. 161 analysis in *R. v. R.J.H.*, 2021 BCCA 54.

- [150] In that case, the 25-year-old first-time offender pleaded guilty to possessing and making available or distributing child pornography. The offender was sentenced to an aggregate of 30 months' imprisonment, and orders prohibiting his contact with children pursuant to ss. 161.1(a) to (c) were imposed for a duration of 25 years. The duration of the orders was appealed. Fisher J.A. concluded that the 25-year terms went beyond what was a reasonable attempt to minimize the risk in this case and reduced the duration to 15 years.
- [151] Referring to the leading case in this area, *R. v. J.K.R.*, 2016 SCC 31, Fisher J.A. reiterated that these orders have an overarching protective function to shield children from sexual violence. They constitute punishment, are imposed in furtherance of the purpose and principles of sentencing, and have a significant impact on the liberty and security of the offender: paras. 15-17. They are orders that should be carefully tailored to the circumstances of the offender and the nature and risk the offender poses to children upon release into the community: para. 18.
- [152] The Court also discussed the required evidentiary basis, where the focus of the inquiry should lie, and the principles that should inform the scope and duration of the orders at para. 19:
- [19] The evidentiary basis will naturally include everything that is considered for the overall sentence. However, given the protective function of s. 161 prohibitions, the focus should be on the offender's specific risk and what is reasonably required to minimize that risk in the offender's particular circumstances. As the court in *A.(R.K.)* held, it is not necessary for the offender to have a record of related convictions or to have committed the offence in one of the proscribed circumstances set out in s. 161(1). In my view, the scope and duration of the prohibition is informed primarily by the nature and extent of the risk, with emphasis on the risk factors particular to the offender and the pool of potential victims. The duration should also take into account the length of the sentence, the age of the offender upon release into the community, and the prospects for rehabilitation.
- [153] Justice Fisher concluded her review of the applicable principles by emphasizing the importance of considering the analytical approach and principles outlined in *Friesen* at paras. 20-21:
- [20] Finally, it is important to take into account the principles expressed in *Friesen* when considering s. 161 orders. While *Friesen* did not address these orders, the court's message that sentences "fully reflect and give effect to the profound wrongfulness and harmfulness of sexual offences against children" is important. Although the guidance provided in *Friesen* was focused on sentencing principles for the offence of sexual interference, the court made it clear that the principles are relevant to sentencing for other sexual offences against children, including child pornography offences: see *Friesen* at para. 44 and footnote 2.
- [21] Moreover, as this court held in *Williams*, the analytic approach in *Friesen* that focuses on the protection of children from sexual exploitation should inform the s. 161 analysis established in *K.R.J.*, and reliance on precedents that pre-date *Friesen* may be of limited

assistance to sentencing judges and appellate courts. I note as well that an emphasis on the protection of children from wrongful exploitation and harm takes on increased importance the higher the risk of re-offence and the younger the victim: see Friesen at paras. 123, 134-135.

- [154] Here, the scope of the orders is not necessarily in issue. The parties agree the orders ought to be made, but it is the duration, primarily with respect to four of the orders sought, that is in issue.
- [155] Regarding the orders in dispute, the Crown submits that the appropriate duration is ten years. The defence submits that the appropriate duration for orders made pursuant to subsections (a) and (c), and is three is three years and for an order made pursuant to subsection (e), the appropriate duration is five years.
- [156] B.T. is considered to be at low to moderate risk to re-offend, but it must be recognized that he not only possessed and accessed child pornography, he had direct contact with a very young and vulnerable child. He actually made child pornography of her many, many times, and he tried to vaginally penetrate her. He currently lacks insight into his offending. This lack of insight will pose some challenges for his future rehabilitation and his ability to lower his risk of recidivism.
- [157] I also consider that B.T.'s offending was opportunistic in nature. He did not seek out his victim in the community, but rather took the opportunity her presence in the home in which he lived gave him. This suggests that perhaps there is a narrowly-defined pool of potential victims. However, I am also mindful that B.T. was also in possession of pornographic images of children that were not of A., suggesting that the nature and extent of the risk he poses is likely broader than this narrow group.
- [158] B.T. will be in his late 30s or perhaps early 40s when he is released from custody, with many years ahead of him in the community. His prospects for rehabilitation are really unknown at this point. I also consider that B.T.'s ASD makes it difficult for him to socialize with individuals and a large part of his social interaction has been online.
- [159] I am satisfied that in all of the circumstances of this case, orders of ten years duration are appropriate on the disputed sections. In my view, this duration makes a reasonable attempt to minimize the risk in this case, but I will make them subject to certain exceptions.
- [160] Pursuant to s. 161 of the Code, you are prohibited from:
- a) attending a public park or public swimming area where persons under the age of 16 years are present or can reasonably be expected to be present, or a daycare centre, schoolground, playground or community centre for a period of 10 years;
 - b) being within two kilometres of any dwelling-house where A. D. and/or her mother Sarah D. ordinarily resides for a period of 20 years;

- c) seeking, obtaining, or continuing any employment, whether or not the employment is remunerated, or becoming or being a volunteer in a capacity, that involves being in a position of trust or authority towards persons under the age of 16 years, for a period of ten years.
- d) having any contact -- including communicating by any means -- with a person who is under the age of 16 years, for a period of ten years; and
- e) using the internet or other digital network for the purpose of communicating with a person under the age of 16 years for a period of 10 years.

[161] Except in the following circumstances:

- a) during lawful employment, with the circumstances of employment being approved in advance in writing by the court, your probation officer, your parole officer, a member of the Royal Canadian Mounted Police, or the person to whom you are reporting under the Sex Offender Information Registration Act. You must carry a copy of the written permission with you; and
- b) as approved in advance in writing by the court, your probation officer, your parole officer, a member of the Royal Canadian Mounted Police, or the person to whom you are reporting under the Sex Offender Information Registration Act. You must carry a copy of the written permission with you.

[162] Also, pursuant to s. 743.2 of the Code, I direct the Court Services Branch to forward copies of the pre-sentence report and psychological assessment marked as exhibits at this sentencing hearing to the Correctional Services of Canada.

[163] I think the final matter to address pertains to forfeiture and destruction of certain exhibits. Mr. James, I did not hear anything specifically from you regarding the order of forfeiture and destruction that is being sought by the Crown in this case.

[164] CNSL M. JAMES: Yes, My Lady, no position. The only item that B.T. had requested was that his music be taken off of the computer for his retention, but obviously everything else to be destroyed, but that's our submissions.

[165] THE COURT: All right, I will then accede to the Crown's application and order that, pursuant to ss. 164.2(1) and 490.1 of the Code, the following items seized by the RCMP in the course of this investigation will be forfeited to Her Majesty and disposed of as the Attorney General directs:

- a) the Cooler Master CPU, RCMP Property Number 1816715, Exhibit 1;
- b) the Apple telephone, RCMP Property Number 1816715, Exhibit 7; and
- c) the LG telephone, RCMP Property Number 1816715B, Exhibit 1.

[166] That completes all of the ancillary orders. Counsel, is there anything that I have overlooked before we adjourn?

[DISCUSSION RE TERM OF SOIRA ORDER]

[DISCUSSION RE ENTERING OF ORDERS]

[167] THE COURT: Madam Registrar, I will include in my order pursuant to s. 743.2, an order directing Court Services Branch to also forward the signed copy of the SOIRA order that has been imposed today to the Correctional Service of Canada for B.T.'s signature. Counsel will get a copy as well. If there is some difficulty in having B.T. sign this order, counsel, I am sure you will bring it to my attention and we can meet again.

[168] CNSL M. JAMES: Certainly, My Lady.

[169] CNSL E. SUKKAU: Thank you.

[170] THE COURT: With that, all that is left is to thank you both, counsel. I know you both were not trial counsel, but you did an exceptional job at this sentencing hearing and I thank you for your attention to it.

[171] CNSL M. JAMES: Thank you, My Lady.

[172] CNSL E. SUKKAU: Thank you.

"S.A. Donegan J."

DONEGAN J.

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