

CANADA / JUDGMENT

R. v. Brown

2020 BCSC 2168

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 2168 R. v. Brown

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Brown,

2020 BCSC 2168

Date: 20200813

Docket: 16396-3

Registry: Powell River

Regina

v.

Nathanial Don Brown

Restriction on Publication: Pursuant to 486.4(2) C.C.C.

Section 16(4) Sex Offender Information and Registration Act ("SOIRA"): This section provides that no person shall disclose any information that is collected pursuant to an order under SOIRA or the fact that information relating to a person is collected under SOIRA

Before: The Honourable Mr. Justice Schultes

Oral Reasons for Sentence

Counsel for the Crown:

R.M. Opel

Counsel for the Accused:

C.L. Hodson

Place and Date of Hearing:

Powell River, B.C.

July 6, 2020

Place and Date of Judgment:

Powell River, B.C.

August 13, 2020

Introduction

- [1] On July 6 of this year, Mr. Brown entered guilty pleas to the following offences, all of which were committed between January 1, 2016, and April 4, 2019, in Powell River: sexual exploitation of C.B. contrary to s. 153 of the Criminal Code; sexual interference with H.C. contrary to s. 151; sexual interference with M.C. contrary to the same section; making child pornography contrary to s. 163.1(2); and possessing child pornography contrary to s. 163.1(4).
- [2] All of these offences except the last one have a maximum sentence of 14 years. Possessing child pornography has a maximum of 10 years.

Circumstances of the Offences

- [3] These were helpfully dealt with by admissions of fact, which I will summarize.
- [4] H.C. was between 10 and 13 years old during the period set out in the indictment. The offences in relation to her came to light beginning on April 3, 2019, when she did not return home from school and her mother located her at Mr. Brown's house. She displayed such agitated behaviour when she came home that the RCMP had to apprehend her under the Mental Health Act. The next day, her mother read her diary and found references to being in bed naked with Mr. Brown. Her mother contacted the RCMP. Meanwhile, H.C. ran away from school and told a school official that she was going to the place she had been the previous night, and that she had been promised a new cellphone.
- [5] The RCMP located her near the school. She told them she was waiting for her friend "Nat", whom I infer was Mr. Brown. They apprehended her again and took her to the hospital. She had a note with her from Mr. Brown, in which he apologized to her for his behaviour and provided his phone number.
- [6] H.C. gave a statement to the investigators describing what is summarized in the admissions as "a series of attendances at Mr. Brown's house during which Mr. Brown engaged in inappropriate sexual conduct." This included an incident she described in which she awoke to find him performing anal intercourse on her, ignoring her request to stop until she yelled at him to do so. She also described that he would be naked in her presence, during which times he would kiss her, and would sleep naked with her during what she described as

"sleepovers", kissing her and touching her breasts with his hands and mouth.

- [7] For his part, Mr. Brown admitted to investigators that he had had a sexual relationship with H.C. that began when she was 11. This included his admission of an incident of anal intercourse. His position was that it had not been his idea to engage in the sexual acts, but that he had just "let stuff happen."
- [8] An initial search of Mr. Brown's cellphone found multiple videos of an unclothed young female performing fellatio on an unclothed adult male. Detailed examination of that phone and other electronic devices in his home carried out pursuant to a search warrant revealed the recordings that constitute evidence of offences against his daughter C.B., and H.C.'s younger sister M.C., as well as with respect to the possession of child pornography offences.
- [9] The depictions of C.B., who was between seven and 10 years old during the period set out in the indictment, are conveyed by the following excerpt from the admissions:

Several of the images and videos that meet the definition of child pornography are of C.B. and depict her performing fellatio on Mr. Brown. In the various videos Mr. Brown instructed [her] how to perform fellatio, told her not to stop when she tried to, yelled at her when she threw up because of the act, and told her to "hurry up before it goes in your bum". In one video [C.B.'s brother] S.B. came into the room and Mr. Brown said, "S, don't worry about it, keep going." During an interview on April 17, 2019, C.B. disclosed performing fellatio on Mr. Brown when she was 10 years old.

- [10] M.C. was between six and nine during the period set out in the indictment. She was depicted in two of the videos. In one, she was lying in bed when Mr. Brown pulled down her pajamas and exposed her vagina. The second one showed him touching her vagina.
- [11] In total, there were 749 images, videos, or text pages that meet the definition of child pornography, the vast majority on Mr. Brown's laptop. The Crown provided descriptions of a sampling of other contents of these materials besides the videos of C.B. and M.C. They consisted of videos of sexual activity between adult males and male children, and of female children exposing themselves and touching each other's vaginas.

Victim Impact

- [12] H.C. and M.C.'s mother provided a victim impact statement specifically in relation to H.C. She explained that H.C. was introduced to Mr. Brown through M.C., who was a classmate of Mr. Brown's daughter, C.B., and who had playdates and sleepovers at his house. H.C. began accompanying her sister to these events.
- [13] Beyond the obvious extreme harmfulness of Mr. Brown's actions to any young person, the victim impact statement reveals that H.C. had a particular vulnerability, in that she had been suffering from mental illness since she was five years old. This manifested itself in outbursts of anger and an inability to regulate her emotions. While these offences were occurring, her mother described H.C.'s outbursts as becoming "insanely volatile" and she began engaging in

other ominous behaviour, such as spreading her feces around, urinating on certain objects, touching her sister inappropriately, and searching out urination-related pornography on the internet.

- [14] H.C.'s behaviour escalated to a degree that her mother had to quit her job to provide full-time support. H.C. ended up being voluntarily placed in the care of the Ministry of Children and Families and undergoing an extended trauma assessment at Children's Hospital. Her situation was exacerbated when she was mistreated in a temporary care placement in Vancouver. This required her mother to return her to Powell River where the same serious behavioural difficulties continued.
- [15] The disclosure of the offences caused this acting out to escalate even more. A further revelation was that H.C. had contracted gonorrhea, which required treatment. In her current placement home, which is a more beneficial one for her, H.C. has confided that she thinks constantly of sexual matters. She will be receiving specific psychological treatment targeted at sexual trauma.
- [16] She has also told her mother that during the time she was with Mr. Brown, she believed his sexual behaviour was acceptable and that he cared for her.
- [17] Other significant detrimental effects of the offence on H.C. are how far she has fallen behind in her schooling, which I infer was due to the number of interventions that have been required, and the impairment of her relationship with the rest of her family, especially because she cannot safely be left alone with the other children.
- [18] H.C.'s mother did not provide a victim impact statement in relation to her other daughter, M.C. She advised Crown counsel that M.C. has not said anything to her or M.C.'s father about her offences, and they are not sure how aware she is of what occurred. They are going to wait and see what emerges over time.
- [19] C.B. and her brother are now in the care of their mother, who lives outside of British Columbia. C.B.'s own statement is concise enough to quote in its entirety:

My dad made me suck his penis. He didn't let me go to school. He took naked pictures of me. And it makes me feel sad. It makes it hard to spend time with friends and it's all bad.

- [20] Her mother described the difficulties that C.B. has had adjusting since coming to live with her. C.B. lacked basic personal care skills, such as bathing herself and brushing her own teeth, and was far behind academically. Things have improved markedly in those areas over the past year however, and her attitude in the home and in relation to her other family members is described as positive. She still has outbursts relating to Mr. Brown's sexual behaviour towards her. When the COVID-19 situation eases enough to make it possible, her mother will be enrolling her in counselling to, as her mother described it, "help her cope with the guilt and shame and teach her healthy coping mechanisms".

Circumstances of the Offender

- [21] Mr. Brown is now 43 years old. He has no previous criminal record.
- [22] He is originally from this area and spent his early childhood on Texada Island. He never had any contact with his father and was raised by his mother and grandmother, mainly by the latter while his mother worked. From the ages of five to 15, he lived with his grandmother, together with his younger sister and another younger family member whom his grandmother was also raising, in Vernon, while his mother remained here. When his grandmother died, he returned to Powell River to live with his mother and her new partner.
- [23] When he moved back here as a teenager, he had trouble connecting socially with other people. This is consistent with his counsel's description of him as being "somewhat of a loner" and spending much of his time alone earlier in his childhood.
- [24] He fell short by one course of finishing his Grade 12. He pursued training as a mechanic, including an apprenticeship in Alberta, but did not ultimately see that program through. He worked as a janitor for four years in Grande Prairie, Alberta, and then worked at a Walmart in that province, where he met the woman who would become his wife, and the mother of C.B. and her brother. They then moved to Texada Island together to start a family. He describes them being together for about 10 years. During that time he worked successfully as a line cook in this area.
- [25] According to his counsel, his former spouse went back to Alberta when their relationship ended in 2012. The two children remained with him and he was awarded custody of them. He decided to quit his job in order to fulfil the role of a full-time single father. He relied on unemployment benefits, then social assistance, supplemented by support from food banks and local churches. The difficulty of his situation was compounded by the fact that his younger child, C.B.'s brother, has severe autism and requires ongoing care.
- [26] His counsel advises that during this time, Mr. Brown became severely depressed and, in the course of that depression, "lost his way", leading him to commit these offences. Mr. Brown expresses his profound regret for his actions and their effects on the victims, his counsel indicates, and recognizes that he needs help to address his underlying issues and "return to normal" from the divergent path that led him to this offending.
- [27] His counsel puts forward as an indication of this remorse the fact that, from the beginning, this matter was always going to be resolved by guilty pleas. Mr. Brown did not seek his release on bail pending that resolution or seek to hold a preliminary inquiry. The delays between the laying of the charges and the current process resulted from the need to complete disclosure of the contents of the electronic devices, which can be a cumbersome process, and the practical issues raised by COVID-19. He then pleaded guilty on the first opportunity that the court was available for him to do so.
- [28] To the extent that inferences about remorse can be drawn from an offender's emotional state during sentencing proceedings, which I will say more of later, I should note that he appeared to be tearful and overcome with emotion throughout the initial hearing.

- [29] While there are no rehabilitative programs focused on sexual offending available on remand, Mr. Brown's counsel stresses that the time he has spent there has not been wasted, because he pursued numerous other beneficial programs to aid in his general rehabilitation. These have included completion of the missing course needed for high school graduation and programs designed to assist in such areas as relationships, communication, substance use, health, and employability.
- [30] When he is released he hopes to return to the area to assist his mother, who is now becoming elderly. He also intends to re-engage with cooking as a career, as he was having some success in it at the time he gave it up.
- [31] As of the sentencing hearing, he had spent 460 days in presentence custody. Since then, he has spent another 37 days, including today, for a total of 497 days. It is common ground that he is entitled to the usual 1.5 days' credit for every day served, which totals 745 days of credit, or two years and 15 days.
- [32] No presentence report or psychological assessments were prepared for this sentencing. Mr. Brown's counsel advised that Mr. Brown was not required to comply with an interview for any assessment, and that regardless he will be assessed for treatment within the institution to which he is sentenced. His counsel emphasizes that nothing other than a lengthy period of custody is a possible outcome here, unlike those cases in which assessments are needed before sentence is imposed in order to tailor the sentence, or subsequent probation conditions, to any identified risk factors.
- [33] Given the unlikelihood that Mr. Brown would consent to being interviewed, Crown counsel saw no value in pursuing an assessment.

Positions

Crown

- [34] The Crown seeks an overall sentence in the range of eight to nine years, suggesting that the higher end of that range is most appropriate. Crown counsel took that position before the release of the Supreme Court of Canada's decision in *R. v. Friesen*, 2020 SCC 9, which commented on the proper sentencing considerations when dealing with sexual assaults against children, but in the best traditions of the Crown she does not seek to resile from it.
- [35] She agrees that Mr. Brown's guilty pleas, which conserved court resources and avoided the children having to come to court, are mitigating factors, as is his lack of a previous criminal record. Aggravating factors submitted by the Crown are the number of victims, their relatively young ages, and the fact that a breach of trust was part of these offences, which is a statutory aggravating factor, in C.B.'s case because she is his own daughter, and in H.C. and M.C.'s cases because they were in his care while they were at his home. In addition, the children were not just harmed physically by his actions, including the STI that he gave H.C., but also emotionally.

- [36] She submits that Mr. Brown has permanently altered the children's lives and that we have no idea how they will ultimately be impacted by his actions.
- [37] A further concern is that, as far as we know on the existing evidence, he remains a high risk to reoffend.
- [38] Overall, the Crown submits that the gravity of the offences is high and that Mr. Brown's degree of responsibility for them is great. The absence of overt violence or threats does not detract from the overall wrongfulness of sexual violence against children, she emphasizes.
- [39] Crown counsel is not as concerned with the configuration of the sentences, in terms of whether they are imposed consecutively or concurrently, as she is with the overall totality of the sentence that is imposed. (That approach is shared by the defence.)
- [40] In addition to the sentences of imprisonment, the Crown seeks relevant ancillary orders for DNA data banking, lifetime registration under the Sex Offender Information Registration Act, a firearms prohibition, an order of no communication with the victims during the custodial portion of his sentence, and a lifetime order governing his conduct in circumstances posing risk to young persons, pursuant to s. 161 of the Code.
- [41] Crown counsel sought to support her position by referring to several cases.
- [42] In *R. v. L.V.R.*, 2016 BCCA 86, the offender had appealed from his seven-year, 97-day sentence for sexual offences against a victim in relation to whom he had previously stood in the role of a father. He had been convicted after a trial. His personal details are not included in the appeal judgment. The offences consisted of incidents during visits to his home, when the victim was between 10 and 16 years old. He engaged in oral sex, and vaginal and occasionally anal intercourse with her. On the last occasion before he was caught, he attempted to sexually touch a friend she had brought home to stay at his home. He also threatened to cause bodily harm to his former spouse's fiancé. After his offences came to light, the investigators found 34 nude photos of the victim and a video of the offender having sex with her in his possession.
- [43] The Court of Appeal dismissed the appeal from sentence, except from correcting an error in the allocation of presentence custody. On the structure of the sentences, the Court held that it had been open to the judge to impose a consecutive sentence for the offences relating to the making of child pornography, noting that the gravamen of those offences was distinct from the sexual offences against the victim, and that the judge had a broad discretion to determine an effective global sentence.
- [44] In *R. v. Athey*, 2017 BCCA 350, the offender had appealed from a global sentence of eight years, consisting of five years for sexual interference, three years consecutive for making child pornography, and one year concurrent for possessing such material. The sentences had been imposed following guilty pleas. He was between 40 and 43 years old when he committed the offences. He was from an Indigenous background and his criminal record was unrelated to sexual offending. The victim was the daughter of his neighbours and close

friends. She was between four and six years old during the offences, which occurred when the victim and her brother were being babysat by him. The sexual activity included digital vaginal penetration and anal penetration, having her perform fellatio on him, performing cunnilingus on her, and ejaculating on her. He video-recorded these activities and traded them for other child pornography on the internet. The offences came to light when images of this abuse were identified in another country and traced back to this offender. He possessed 2300 images and 27 videos of child pornography.

- [45] His background had been very difficult. He had grown up in an alcoholic and abusive home, from which he was removed when he was 15, and had been sexually abused twice himself - as a small child and then as a teenager. A psychological report found him to be a "low-moderate" risk for future sexual misconduct, although one disconcerting aspect of the report was his apparent projection of some blame onto the victim for initiating sexual contact from time to time. A Gladue report revealed that did not feel he belonged in his Indigenous community or in the non-Indigenous world.
- [46] The Court of Appeal rejected the argument that the sentencing court had only paid lip service to the Gladue factors. The Court concluded that the judge had striven to give effect to them to the extent possible, but had found that the offender's conduct and moral blameworthiness, as well as the Code's requirement that predominant weight be given to deterrence and denunciation, required the sentences that were imposed. The Court did not disturb them.
- [47] In *R. v. J.B.*, [2020] O.J. No. 310 (C.J.), a recent trial-level sentencing from Ontario, an overall sentence of nine years and three months was imposed on an offender, for making videos of himself sexually abusing two female children he was babysitting in his home. One child was nine years old and the other was 14 but had developmental delays. The offender disputed the allegations underlying one of the counts but was found, following a sentencing hearing, to have committed the acts alleged by the Crown.
- [48] The children were sleeping at the time of the offences. The offender's actions included fondling their vaginal areas, inserting his finger and in one case a felt pen into their vaginas, performing cunnilingus, simulating intercourse with them, and masturbating over them. Ominously, he also possessed a video of himself putting his hand down the diaper of a sleeping nine-month-old child during a New Year's Eve party. He also collected child pornography from the internet, including over 1800 videos. The offender was 37 years old at the time and had grown up in an abusive home. He had a previous criminal record, but nothing related to sexual offending. A "sexual behaviour assessment" found him to present a well-above-average risk for sexual offending. A particular concern of the sentencing judge was the minimization of the offences that the offender engaged in.

- [49] The Crown relies on these cases to demonstrate that (1) sentences close to or equivalent to the ones they are seeking here have been imposed or upheld for offences against (and production of child pornography involving) a single victim or a single main victim; and (2) that where two victims were involved the sentence exceeded the higher end of that range, as in the J.B. case.
- [50] The more general authority provided by the Crown is Friesen, in which the Supreme Court of Canada reaffirmed the inherent seriousness of sexual offences against children and offered clear guidance on the approach that sentencing courts should take to these offences. For our purposes, the essential points arising from Friesen are as follows:
- Sexual offences against children interfere with their personal autonomy, bodily integrity, sexual integrity, dignity, and equality, and can cause serious emotional and psychological harm, which may be more pervasive and permanent in its effect than physical harm. They can damage children's relationships with their families and caregivers, and in turn damage communities and society as a whole. These kinds of offences exploit the vulnerability of children and, because they are predominantly committed by offenders who are known to their victims and often exploit a position of trust, they can seem invisible to society (paras. 63-64).
 - The harmfulness and wrongfulness of sexual offences against children must be reflected when applying the proportionality principle in sentencing. Specifically, the sentence imposed must reflect the normative character of the offender's actions and the consequential harm to children and their families, caregivers, and communities. The inherent wrongfulness of such acts forms a key component of their normative character. The reasonably foreseeable potential harm that flows from sexual violence must be considered when assessing the gravity of the offence, and of course victim impact statements will offer the best evidence of the actual harm that has been suffered to that point (paras. 76-77; 84-85).
 - Offending against children is highly morally blameworthy because the offender is or ought to be aware that this action will profoundly harm the child. More basically, such offences are highly morally blameworthy because children are so vulnerable. This does not mean however, that factors that legitimately decrease the moral blameworthiness of offenders should be disregarded (paras. 88, 90-91).
 - Parliament has mandated that sentences for sexual offences against children should increase by amendments to the Criminal Code that increase the maximum sentences available and require that priority be given to the sentencing objectives of denunciation and deterrence. Despite this, the Court rejected the Crown's invitation to set a "national starting point" or sentencing range for these offences, concluding that this function is best left to provincial appellate courts (para. 106). However, the Court offered specific guidance in three areas.

· First, an upward departure from previous precedents may be required in order to impose a proportionate sentence, because of Parliament's decision in 2015 to increase maximum sentences and the courts' deeper understanding of the gravity and harmfulness of sexual offending against children. As the Court put it:

Courts should accordingly be cautious about relying on precedents that may be "dated" and fail to reflect "society's current awareness of the impact of sexual abuse on children" . . . Even more recent precedents may be treated with caution if they simply follow more dated precedents that inadequately recognize the gravity of sexual violence against children . . . Courts are thus justified in departing from precedents in imposing a fit sentence; such precedents should not be seen as imposing a cap on sentences . . .

In this regard, appellate decisions that purport to restrict sentencing discretion in such matters, such as imposing a maximum range within the maximum provided for the offence, also raise concerns (para. 108-112).

· Secondly, sexual offences against children merit more severe punishment than sexual offences against adults, as the sentencing ranges, the emphasis of denunciation and deterrence, and the identification of the aggravating factor of breach of trust by Parliament all indicate. Any provincial sentencing ranges that purport to treat child and adult victims the same way should be revised accordingly (paras. 115-117).

· While not representing any kind of checklist, some significant factors in arriving at a fit sentence listed by the Court are: the likelihood of reoffending; the abuse of a position of trust or authority; the duration and frequency of the incidents; the age of the victim; and the degree of physical interference with the victim. (In identifying this last factor as a legitimate aggravating one, the Court cautioned strongly against defining a range of sentence solely according to the type of physical acts it captures, since harm can result regardless of the specific acts involved (paras. 121-147).

· Finally, remorse expressed by an offender "gains added significance when it is paired with insight and signs that the offender has 'come to realize the gravity of the conduct and, as a result, has achieved a change in attitude or imposed some self-discipline which significantly reduces the likelihood of further offending'", citing *R. v. Anderson* (1992), 74 C.C.C. (3d) 523 (B.C.C.A.), at p. 536 (para. 165).

[51] On the specific facts of *Friesen*, the Court restored the six-year sentence imposed on an offender who had committed acts of sexual violence on a single occasion, against the four-year-old child of a woman he had met through online dating, with the participation of the mother in the offence.

Defence

- [52] Mr. Brown's counsel does not deny that a significant federal sentence must be imposed here, but he submits that a slightly lower range, that of seven to eight years, appropriately addresses all of the applicable sentencing objectives as they were outlined by the Crown and in keeping with the case authorities.
- [53] To the mitigating factors conceded by the Crown, Mr. Brown's counsel adds the community support that will be available from his mother when he is released.
- [54] While counsel provided some additional authorities to assist in identifying the correct range, he stressed the importance of considering Mr. Brown's specific circumstances and those of the offences, rather than focusing excessively on drawing comparisons with other decisions.
- [55] The first case relied on is the decision of *R. v. B.C.M.*, 2008 BCCA 365. There the Court dismissed an appeal from a six-year sentence for two counts of sexual interference, a count of making child pornography, and one of possessing it. These sentences followed guilty pleas by the 41-year-old offender, who had no previous record. The offences were committed against two of the daughters of the offender's common law spouse, over a two-year period beginning when they were six and eight years old respectively. The acts consisted of fellatio, cunnilingus, digital penetration, and masturbation by hand and with his penis against their labia. He admitted to 15 to 25 incidents with one child and about 15 with the other. He also took still photos and a video of himself engaging in sexual activities with one of them. Investigation revealed a collection of several hundred photos constituting child pornography and numerous videos that involved what was described as "the sexualization of children".
- [56] The Court noted the difficulty in deriving assistance from the sentencing authorities that had been cited, both because of the wide variety of circumstances that they represented and because the then-recent enactment of the Code's required emphasis on denunciation and deterrence in offences against children cast doubt on the decisions that preceded it. The Court also considered the principle of totality in relation to the sentencing judge's decision to impose three years for the sexual offences and, based on the finding that it represented an elevated level of abuse, a three-year consecutive sentence for making child pornography. A sentencing judge's broad discretion to fashion a fit overall sentence in cases in which consecutive sentences are potentially available was once again affirmed.
- [57] Following up on that last point, as I said previously counsel submits that the configuration of the respective sentences is less important than the overall length of sentence that Mr. Brown ultimately receives. He also candidly concedes that the *B.C.M.* decision may now be somewhat dated in light of the comments in *Friesen* that I have referred to.
- [58] *R. v. B.C.L.*, 2010 BCCA 183, was an appeal from an effective seven-year sentence that had been imposed following guilty pleas to sexual interference and making child pornography. The offender had made his four-year-old daughter masturbate and fellate him and touched

her genitals with his penis. He also made her four-year-old playmate masturbate him and made short videos of them masturbating him and took pictures of them naked. He was 62 years old and had somewhat dated previous convictions for the offences of committing an indecent act, indecent assault, and gross indecency in the 1970s and 1980s.

- [59] The Court dismissed the appeal, finding that the significant difference between the case before it the six-year sentence that was previously upheld in B.C.M. was that the current appellant was a repeat offender. The Court also drew a distinction between that appellant's circumstances and another previous decision, in which a 15-year sentence had been upheld, on the basis that the appellant's pornographic recordings of the victims, while obviously highly distasteful, were not carried out with any kind of commercial motive. Mr. Brown's counsel submits that a similar distinction can be drawn here, as well as with the decision of Athey that was relied on by the Crown, in that Mr. Brown did not engage in any uploading of his recordings to the internet.
- [60] In *R. v. K.R.J.*, 2014 BCCA 382, the appeal was against a total sentence of nine years, imposed following guilty pleas to incest and making child pornography. (There was also a Crown appeal of the sentencing judge's finding that the amendments to s. 161 are not retrospective, which I do not have to deal with.) The 38-year-old offender, whose previous conviction was for arson, had made video recordings on three separate days that showed him inserting his penis in his three-year-old daughter's vagina. He also took photos of his daughter and her half-sister when she was slightly older and included them in a binder of child pornography that he kept. He had grown up in an emotionally-abusive home and struggled with severe anxiety and depression.
- [61] Concluding that the sentence was not unfit, Justice Groberman, in the majority on the issue of the sentence appeal, considered, among other things, the age of the victim, which was a factor that he said greatly aggravates the offence; the fact that the offender was effectively his daughter's sole guardian at that time; his previous awareness that he was attracted to young girls and his involvement in the counselling process on that issue; and the fact that he took and preserved a recording of the sexual offending. Groberman J.A. also cited the comments from *R. v. Rich*, 2014 BCCA 24, which resonate in light of the Friesen decision, agreeing that "as society becomes more aware of the impact of sexual abuse on children, there has been an escalation in the severity of sentences imposed where children are the victims of sexual offences."
- [62] Most significantly from Mr. Brown's point of view, Groberman J.A. commented that a nine-year sentence "currently represents the high end of the appropriate range for the nature and circumstances of the offence and of the offender."

- [63] Mr. Brown's counsel also cited the L.V.R. decision, which was in the Crown's authorities and which I have previously summarized. He emphasized the fact that the seven-year, 97-day sentence was imposed after a trial, unlike the present guilty pleas, and that there are some factual parallels to the present case, although that offender was a stepfather rather than a biological father (in the case of C.B.).
- [64] While conceding the clear message provided by Friesen, Mr. Brown's counsel observes that the decision does not require the provincial ranges of sentences that are currently in existence to be completely discarded. They maintain their relevance and should be considered when arriving at fit sentences.
- [65] In reply, the Crown points out that three of the decisions relied on by the defence predate the most recent 2015 amendments that were found to be of such crucial importance in Friesen, and that both B.C.M. and B.C.L. commit the error identified in Friesen - of defining the harmfulness of an offence by its ostensible severity or of drawing distinctions in seriousness based solely on the physical actions involved.

Discussion

- [66] I agree with the mitigating factors conceded by the Crown: Mr. Brown's guilty plea, which I accept was intended from the outset and which benefited the victims and their family members by avoiding their participation as witnesses, and his lack of a prior criminal record. It is not clear how much community support his mother will be able to provide, given the sparse information presented and his representations that she is becoming elderly and may require his care, but I am willing to accept that her presence still places him in a more favourable situation than someone with no family connections in the community whatsoever. To his apparently sincere expression of remorse should be added his efforts while on remand to embrace the rehabilitative programs that were available, which I find is the type of concrete action by an offender to actually demonstrate remorse that was referred to in Friesen.
- [67] With respect to aggravating factors, the nature of the offence charged itself shows Mr. Brown's position of trust in relation to his own daughter. Whether or not similar charges could have been laid in relation to H.C. and M.C., he was still, practically speaking, in a position of trust with respect to them when they were visiting or staying at his home. While the number of incidents involving H.C. and C.B. are not precisely expressed in the admissions, Mr. Brown's statements describe an ongoing sexual relationship with H.C., which he described beginning when she was 11 years old. She was 13 when the offences came to light. This suggests quite an extended duration and a meaningful number of repetitions of the acts.

- [68] The terms "several" and "various" are used to describe the videos of C.B. performing fellatio on her father and she disclosed having done so when she was 10. She had reached that birthday the September before the disclosure, so it is reasonable to infer some repetition of those acts towards during that time period as well.
- [69] The incidents with respect to M.C. support a finding of two specific incidents, and cannot be considered as having the same range of duration and frequency.
- [70] The degree of interference by Mr. Brown with H.C. and C.B. was high. Both fellatio and anal intercourse are highly intrusive and degrading acts, which intruded significantly into the protected realm of their physical and sexual autonomy and dignity. He persisted in anal intercourse despite H.C.'s initial protests, and coerced C.B. into continuing the fellatio in one video with the threat of carrying out anal intercourse. He gave H.C. a sexually-transmitted infection. He required C.B. to perform fellatio on him in the presence of her younger brother, who suffers from severe autism. These are all serious aggravating factors.
- [71] The harm to H.C. as a result of these offences, including Mr. Brown persuading her that the acts were justified and that he cared for her, is fairly described as devastating. An offender takes his victim as he finds her, and Mr. Brown initiated a child who was already suffering from mental illness, and was therefore inherently more vulnerable, into a world of adult sexuality. As her mother compellingly described in the victim impact statement, the results have been catastrophic.
- [72] C.B., it would appear, also struggles with guilt and shame as a result of her father's degrading treatment of her, although fortunately it does not appear to have disrupted her life as completely as it has H.C.'s.
- [73] The effects on M.C. remain unknown at this point, and one hopes that the activities depicted on video represented the full extent of Mr. Brown's offending against her, and that she will remain unaware of it.
- [74] Because of his position with respect to assessments, we have no information on which to assess Mr. Brown's likelihood of reoffending, which Friesen identifies as a relevant consideration. While a willingness to engage sexually with children to this extent suggests an entrenched sexual attraction to them, there may also be situational factors that would reduce the risk of repetition if they are controlled in the future. Unfortunately, the absence of an assessment means that such potential protective factors, which could be addressed in the rehabilitative process have not yet been identified. I think the only conclusion that can be safely drawn at this point is that the sentencing objective of isolating Mr. Brown from society, to ensure that his potential to harm children is properly addressed through institutional programs, must be a pressing one.
- [75] The statutorily-emphasized objectives of deterrence and denunciation are obviously the most pressing ones here. Those potential offenders with the susceptibility to engaging in this type of conduct must receive a clear message that they will be dealt with severely by the

courts. Mr. Brown specifically must receive the message, if he has not received it already, that his primary objective for the rest of his life must be maintaining himself in a condition in which he is not likely to repeat such acts. Society must also express its collective condemnation of offences in which adults use children as objects of sexual gratification.

- [76] Mr. Brown's age, demonstrations of remorse, and lack of prior criminal record suggest that rehabilitation does remain a viable possibility, especially since he has a marketable employment skill, the absence of which is a major stumbling block in the rehabilitation of many offenders. But in these circumstances, and given the other factors, it cannot be the predominant objective of sentencing. Indeed his counsel does not suggest otherwise.
- [77] In addition to the attributes of proportionality referred to in Friesen, the aggravating factors that I have identified lend a particularly significant degree of gravity to these offences in the normative sense, and his coercive and manipulative actions to carry them out increase his degree of responsibility.
- [78] As Friesen and other recent decisions of the Supreme Court of Canada indicate, parity with similar offences and offenders is an aspect of the core sentencing requirement of proportionality. To the extent that similar sentences for similar offences and offenders are categorized in the ranges of sentence established by the Court of Appeal, I think that those decisions that predate the 2015 amendments to maximum sentences must be treated with caution in light of Friesen, as the Crown submits. In particular, the comments in K.R.J. about nine years being the high end of the appropriate range may be the kind of discretion-reducing appellate comment that Friesen has discouraged.
- [79] All of that acknowledged, I think that the range identified by the Crown, which overlaps at its lower end with the defence range, appropriately reflects the recent increase in maximum sentences and the increase in court and societal awareness of the harmfulness of this type of activity, as described in Friesen.
- [80] While I find that the upper end of that range being sought is in most respects justified, in relation to the circumstances of offence and offender and the applicable sentencing principles, I think it would fail to credit him sufficiently for the benefits of his guilty pleas, which were intended from the outset, both as a demonstration of remorse and in its avoidance of any court involvement by these children, especially the very troubled H.C., the offences against whom could probably not be proven through video evidence alone. In comparison to other similar cases, it would also exceed somewhat the duration and frequency of his offending, as it can be inferred from the available evidence. I conclude that eight years would be an appropriate overall sentence for Mr. Brown's offending.
- [81] It would have been open to me to impose consecutive sentences with respect to each victim here, given the distinct personal and trust relationship with the appellant and the harm that he inflicted on each being distinct in nature: *R. v. Badhesa*, 2019 BCCA 70 at paragraph 16.

[82] Similarly, even though they appear to have arisen as part of the overall context of his offending against the victims, in particular C.B., the making of child pornography count could be characterized as serving different societal interests from the sexual exploitation and sexual interference counts, and representing a distinct escalation of conduct, rather than a linked series of acts within a single endeavour, as the case law describes it, thus meriting consecutive sentences. That has been the result in some of the Court of Appeal decisions that have been cited. The same would be true of the possession count, with only the recordings of C.B. contained within Mr. Brown's collection linking the accumulation of that material to the other offences.

[83] However, configuring the sentences in that manner would lead to a total sentence that exceeds what I have determined is appropriate, and reducing the individual sentences to fit within an overall eight-year sentence while remaining consecutive to each other would have a distorting effect on their relationship to the underlying offending, so it is necessary to achieve the objective of totality by making them run concurrently to each other.

[84] Thus, before considering presentence custody, I would have imposed the following sentences:

- Count 2, sexual exploitation of C.B., eight years' imprisonment;
- Count 3, sexual interference with H.C., five years' imprisonment concurrent;
- Count 4, sexual interference with M.C., two years' imprisonment concurrent;
- Count 7, making child pornography, four years' imprisonment concurrent;
- Count 10, possession of child pornography, two years' imprisonment concurrent.

[85] Applying credit for 745 days of presentence custody, I impose the following sentences. I should say, Madam Clerk has all of this:

- Count 2, sexual exploitation of C.B., five years and 350 days' imprisonment;
- Count 3, sexual interference with H.C., three years and 350 days' imprisonment;
- Count 4, sexual interference with M.C., imprisonment for one day;
- Count 7, making child pornography, one year and 350 days' imprisonment;
- Count 10, possession of child pornography, imprisonment for one day.

All of these sentences will be served concurrently with each other.

[86] These are primary designated offences and so, pursuant to s. 487.051, the number of samples as are reasonably required for the purposes of forensic DNA analysis will be taken from Mr. Brown.

- [87] Because Mr. Brown has been convicted of more than one designated offence under s. 490.011(1), pursuant to s. 490.013(2.1), he will comply with the Sex Offender Information Registration Act for life.
- [88] While it is probably undesirable in the broader scheme of things for Mr. Brown to ever possess firearms, no particular basis on which to impose a lifetime prohibition for these first convictions has been shown. Therefore, pursuant to s. 109(2), he will be prohibited from possessing any of the items set out in subsection (a) for 10 years following his release, and the items set out in subsection (b) for life.
- [89] Pursuant to s. 743.21, he will have no contact with C.B., H.C., or M.C. during the custodial period of his sentence.
- [90] With respect to the proposed lifetime s. 161 order, I observe that the Court of Appeal in *Athey* concluded that the 20-year period that had been imposed in that case was excessive. The Court referred to previous decisions holding that such a duration should be reserved for the worst-case offender, and pointed out that the previous Court of Appeal case in which a lifetime ban was upheld involved a diagnosed pedophile, who had both a relevant record and a previous conviction for breaching the section. The appellant's prohibition was reduced to 10 years, and that period appears appropriate here as well.
- [91] Accordingly, Mr. Brown will be subject to the prohibition order pursuant to s. 161(1) for a period of 10 years. The victims listed under subsection (a.1) will be C.B., H.C., and M.C., and the distance from their respective dwelling houses that he must maintain will be two kilometres. I decline to designate any person as being appropriate to supervise contact with persons under 16 years. Pursuant to subsection (d), the conditions under which Mr. Brown may use the internet or a digital network is that he may use them while he is engaged in paid employment, if such use is required for such employment, and then only in accordance with the directions of his employer.
- [92] I thank counsel for their helpful submissions. Ms. Opel, do you wish to stay the other counts?
- [93] MS. OPEL: That's correct, My Lord.
- [94] THE COURT: All right. Thank you both very much.
- [95] MS. OPEL: Thank you, My Lord.
- [96] MR. HODSON: Thank you, My Lord.

"Schultes J."

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