

CANADA / JUDGMENT

R. v. W.H.**2024 BCSC 336**

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Supreme Court of British Columbia

DECIDED

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2024 BCSC 336 R. v. W.H.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. W.H.,

2024 BCSC 336

Date: 20240216

Docket: 42444-4

Registry: Courtenay

Rex

v.

W.H.

Restriction on publication: A publication ban has been imposed under s. 486.4 of the Criminal Code, R.S.C. 1985, c. C-46 restricting the publication, broadcasting or transmission in any way of evidence that could identify a complainant or witness, referred to in this judgment by the initials O.H. This publication ban applies indefinitely unless otherwise ordered; For publication purposes, para. 89(c)-(q) has been redacted.

Corrected Judgment: The text of the judgment was corrected at paragraphs 72, 83, 87, 98, 89-93 and 162 on May 29, 2024.

Before: The Honourable Justice Winteringham

Oral Reasons for Judgment

Counsel for the Crown:

T.G. Morgan

Counsel for the Accused:

J. Watt

Place and Dates of Hearing:

Nanaimo, B.C.

January 8-12, 15-16,

and 18-19, 2024

Place and Date of Judgment:

Courtenay, B.C.

February 16, 2024

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[1] This decision was delivered in the form of Oral Reasons for Judgment. They have since been edited for the purpose of publication.	

I. OVERVIEW

- [2] On November 7, 2022, the accused, W.H., pleaded guilty to seven sexual offences involving his young son, O.H. Four of the sexual offences occurred over a three-and-a-half-year period, starting when O.H. was three years of age. Three of the offences, all relating to the making and distributing of child pornography, including videos capturing the sexual offences to O.H., occurred over about a six-month period.
- [3] After his guilty plea, the Crown indicated its intention to seek a declaration that W.H. be found to be a dangerous offender. On February 8, 2023, I granted an order pursuant to s. 752.1(1) of the Criminal Code, R.S.C. 1985, c. C-46, for the purpose of conducting an assessment of W.H. Dr. Kulwant Riar, a psychiatrist, performed the assessment and filed a report dated May 3, 2023. W.H., as is his right, elected not to participate in an interview with Dr. Riar. Dr. Riar's assessment was thus completed without the benefit of meeting W.H.

[4] On July 6, 2023, the Attorney General of British Columbia consented to an application pursuant to s. 753 of the Criminal Code that W.H. be declared a dangerous offender.

[5] In its notice of application dated July 7, 2023, the Crown sought the following order:

That [W.H.] be declared a dangerous offender pursuant to s. 753(1) of the Criminal Code and, in accordance with s. 753(4.1) of the Criminal Code, that a sentence of detention in a penitentiary for an indeterminate period be imposed unless it is satisfied by the evidence adduced during the hearing of the application that there is a reasonable expectation that a lesser measure under s. 753(4)(b) or (c) will adequately protect the public against the commission by [W.H.] of a serious personal injury offence.

[6] I start these reasons with the positions of the Crown and W.H. I then turn to an overview of the legal principles governing an application such as this. I will then set out the circumstances of the predicate offence and W.H.'s history. I will turn to the evidence tendered at the hearing, including the psychiatric opinions. Finally, I will provide my analysis of the designation stage and the penalty stage.

[7] However, before I commence, I wish to address terminology.

[8] Language matters: *R. v. Barton*, 2019 SCC 33, paras. 205-207. There is much that has been written about the use of the term "child pornography." For example, Chief Justice Charbonneau, in *R. v. LaPlante*, 2022 NWTSC 9, stated it this way:

[6] The images and videos that we are talking about in these cases generally, and in this case in particular, are images and videos of children being sexually assaulted. That is what this material should be called.

[7] I do not have the power to change the language of the Criminal Code, of course. That is up to Parliament. But I do have the power to choose the words I use in my own decisions and I will therefore use the expression "child sexual abuse material" wherever possible in this decision.

[9] In this case, W.H. is charged with offences in the Criminal Code using the terminology of "child pornography." Where possible, I have tried to use child sexual exploitation material ("CSE Material") throughout these reasons.

II. POSITIONS OF THE PARTIES

[10] W.H. pleaded guilty to the following offences:

- a) From December 1, 2015-May 15, 2020, W.H. did commit sexual assault of O.H. contrary to s. 271 of the Criminal Code;
- b) From December 1, 2015-May 15, 2020, W.H. did for a sexual purpose touch O.H., a person under the age of 16 years, contrary to s. 151 of the Criminal Code;

- c) From December 1, 2015-May 15, 2020, W.H. did for a sexual purpose, invite O.H., a person under the age of 16 years, to touch W.H., contrary to s. 152 of the Criminal Code;
 - d) From December 1, 2015-May 15, 2020, W.H. committed incest with O.H. contrary to s. 155(2) of the Criminal Code;
 - e) From December 1, 2019-May 15, 2020, W.H. made available sexually explicit material to O.H., a person under the age of 18 years, for the purpose of facilitating an offence under ss. 151 or 152 or 271 with respect to O.H. contrary to s. 171.1(1)(a) of the Criminal Code;
 - f) From December 1, 2019-May 15, 2020, W.H. made child pornography, contrary to s. 163.1(2) of the Criminal Code; and
 - g) From December 1, 2019-May 15, 2020, W.H. did distribute, import or export child pornography contrary to s. 163.1(3) of the Criminal Code.
- [11] Pursuant to s. 753(1)(b) of the Criminal Code, the Crown seeks that W.H. be declared a dangerous offender. If the declaration is made, the Crown seeks an indeterminate sentence.
- [12] At the outset, it is important to acknowledge the small group of individuals targeted by the dangerous offender provisions. To that end, I agree with Mr. Watt's characterization of the legislation, stated in his written submission as follows:

The dangerous offender legislation was intended to capture a relatively small number of offenders, most of whom have committed a relatively large number of very serious offences, and whose actions show strong evidence of a pattern that is likely to continue: [R. v. Walsh, 2017 BCCA 195] at para. 18. The Court has held that that it is designed to segregate a small group of highly dangerous criminals posing threats to the physical or mental well-being of their victims: Walsh at para. 57. Further [to] that, in the spectrum of offenders, the dangerous offender legislation is designed to target--and capture--those clustered at or near the extreme end: Walsh at para. 17.

- [13] The parties agree that the offence enumerated in count 1 of the Indictment constitutes a serious personal injury offence within the definition in s. 752(b) of the Criminal Code. The Crown contends that pursuant to s. 753(1)(b) of the Criminal Code, W.H. by his conduct in any sexual matter including that involved in the commission of the offence for which he has been convicted, has shown a failure to control his sexual impulses and a likelihood of causing injury, pain or other evil to other persons through failure in the future to control his sexual impulses.
- [14] In brief, the Crown takes the position that W.H. is uniquely dangerous. The Crown stated its position this way:

It is past peradventure that [W.H.] is entrenched in his existential stance with respect to his views about his sexual expression, both historically and prospectively. His cognitive distortions with respect to his offending are persistent and pervasive. His troublesome plight is ego syntonic - he sees nothing morally wrong in his world view - indeed it is society that must adjust: "the only way

I can co-exist in society is if there is a recognition that there should be some form by which I can express myself sexually." These present circumstances render W.H. completely and pathologically intractable - as a corollary, he is presently untreatable.

[15] The Crown also seeks the following ancillary orders:

- a) A mandatory firearms prohibition, pursuant to s. 109(1) of the Criminal Code, for life;
- b) A mandatory order pursuant to s. 760 that a copy of all reports and testimony given by psychiatrists, psychologists, criminologists and other experts and any observations of the court with respect to the reasons for the finding, together with the transcript of the trial be forwarded to the Correction Service of Canada ("CSC");
- c) W.H. comply with the terms of the Sex Offender Information Registration Act, S.C. 2004, c. 10 for life, pursuant to s. 490.012(1) of the Criminal Code;
- d) An order authorizing the taking of the number of samples of bodily substances that is reasonably required for the purpose of forensic DNA analysis, pursuant to s. 487.051(1) of the Criminal Code;
- e) An order pursuant to s. 743.21 prohibiting communication, directly or indirectly, with O.H.; and
- f) Victim fine surcharge pursuant to s. 737.

[16] W.H. takes the position that he does not meet the statutory criteria warranting a dangerous offender declaration. W.H. contends that he is a first-time offender, was a relatively young man when the offending conduct commenced and that his offending is limited to pedophilic incest. He submits that the crown has failed to establish the criteria essential to a dangerous offender designation. He submits that he should be sentenced for the offences to which he pleaded guilty in the traditional way and that a sentence of ten years, less credit for pretrial custody, be imposed.

[17] W.H. submits that he has admitted to sexually offending against his son commencing in December 2016 (and not December 2015 as pleaded in the Indictment). As will be seen throughout these reasons, I have found that W.H.'s offending commenced in December 2016.

[18] W.H.'s position is based on the fact that he comes to this sentencing hearing without a criminal record and that he was 25 or 26 years old when his criminal behaviour commenced. He agrees that the sexual offending occurred over about three-and-a-half years, that there is but one victim, and that after he was arrested and released on bail, there had been no further offending or any bail violation leading to a breach finding or otherwise.

- [19] W.H. agrees that if he is not found to be a dangerous offender, the Court could nevertheless find him to be a long-term offender pursuant to s. 753.1(1). W.H. opposes a long-term offender designation. If the Court finds W.H. to be a long-term offender, then the Court shall impose a determinate sentence. W.H. submits if the Court determines that the Crown has proven he should be designated as a long-term offender, then a long-term supervision order should be granted for a period of five years and not ten years as suggested by the crown.
- [20] In sum, W.H. takes the position that he should not be declared a dangerous offender or a long-term offender and argues for a ten-year sentence, less enhanced credit for time spent in pre-trial custody.
- [21] W.H. does not dispute the ancillary orders sought.

III. GENERAL LEGAL PRINCIPLES - DANGEROUS OFFENDER REGIME

- [22] The dangerous offender and long-term offender provisions of the Criminal Code are set out in Part XXIV.
- [23] In *R. v. Boutilier*, 2017 SCC 64, the Supreme Court of Canada ("SCC") described the first stage being a consideration of whether the offender meets the criteria under s. 753(1) of the Criminal Code for designation as a dangerous offender (the designation stage) and the second stage involving a determination of what sentence to impose under ss. 753(4) and (4.1) of the Criminal Code (the penalty stage).
- [24] Justice Fitch made clear in *R. v. White*, 2022 BCCA 91, drawing from the SCC jurisprudence, that dangerous offender proceedings are comprised of two stages, a designation stage and a penalty stage. At para. 2 of *White*, Fitch J.A. stated:
- [2] At the designation stage, the judge determines whether the statutory criteria for a dangerous offender finding have been proved beyond a reasonable doubt. If so, the proceeding moves to the penalty stage where the judge determines whether the future risk the offender has been found to pose can be adequately managed without imposing an indeterminate period of incarceration.
- [25] The first step in determining whether W.H. meets the criteria for designation as a dangerous offender is to consider whether he has committed a "serious personal injury offence". Section 752 of the Criminal Code defines "serious personal injury offence" for the purposes of Part XXIV as including (among other things):
- a) an offence involving the use of violence against another person, or an offence that endangered the life or safety of another person or that was likely to inflict severe psychological damage (for which the person could be sentenced to ten years or more);
 - b) sexual assault;
 - c) sexual assault with a weapon;

- d) causing bodily harm in the course of sexual assault; and
- e) threatening bodily harm to a third party other than the complainant in the course of a sexual assault.

[26] It is not disputed that sexual assault constitutes a serious personal injury offence.

[27] The next step is to determine, under s. 753(1), whether W.H. "constitutes a threat to the life, safety or physical or mental well-being of other persons," based on evidence establishing, pursuant to the criteria as stipulated by s. 753(1)(b). Here, the Crown relies on a s. 753(1)(b) which provides:

That the offence for which [W.H.] has been convicted is a serious personal injury offence described in paragraph (b) of the definition of that expression in section 752 and [W.H.] by [his] conduct in any sexual matter including that involved in the commission of the offence for which [he] has been convicted, has shown a failure to control [his] sexual impulses and a likelihood of causing injury, pain or other evil to other persons through failure in the future to control [his] sexual impulses

[28] The dangerous offender designation is one of the most onerous sentences that can be imposed in our criminal justice system. It involves imposing a sentence of an indeterminate length, which is dependent upon review by the National Parole Board.

[29] Because of the severity of the potential sentence, the sentencing judge must look to more than simply whether statutory criteria have been satisfied. The sentencing judge must not make such a designation if a lesser penalty would still satisfy the general principles and objectives of sentencing, including protection of the public and whether it is possible to impose a less restrictive sentence.

[30] The overarching purpose of the dangerous offender provisions is the protection of society from the risk presented by violent offenders at risk of reoffending. As stated by the SCC in *R. v. Jones*, [1994] 2 S.C.R. 229, 1994 CanLII 85 (S.C.C.):

[124] The overriding aim is not the punishment of the offender but the prevention of future violence through the imposition of an indeterminate sentence. An indeterminate sentence is not an unlimited sentence. If, in the case at hand, the psychiatrists testifying on behalf of the accused are correct in their assessment that Mr. Jones will be fit to be released in ten years, then he will be liberated at that time. The offender faces incarceration only for the period of time that he poses a serious risk to the safety of society. In the interim, it is hoped that he will receive treatment that will assist him in controlling his conduct. To release a dangerous offender while he remains unable to control his actions serves neither the interests of the offender nor those of society.

[Emphasis added.]

[31] Upon finding at the first stage that an offender meets one or more of the requirements for a dangerous offender designation, the sentencing judge has three options, which are set out in s. 753(4) as follows:

(4) If the court finds an offender to be a dangerous offender, it shall

- (a) impose a sentence of detention in a penitentiary for an indeterminate period;
- (b) impose a sentence for the offence for which the offender has been convicted--which must be a minimum punishment of imprisonment for a term of two years--and order that the offender be subject to long-term supervision for a period that does not exceed 10 years; or
- (c) impose a sentence for the offence for which the offender has been convicted.

[32] A regular determinate sentence under s. 753(4)(c) and a long-term offender designation under s. 753(4)(b) cannot be imposed unless the evidence establishes a reasonable expectation that such a sentence will adequately protect the public. Section 753(4.1) states:

The court shall impose a sentence of detention in a penitentiary for an indeterminate period unless it is satisfied by the evidence adduced during the hearing of the application that there is a reasonable expectation that a lesser measure under paragraph (4)(b) or (c) will adequately protect the public against the commission by the offender of murder or a serious personal injury offence.

[33] The constitutionality of the dangerous offender provisions was considered by the SCC in *R. v. Lyons*, [1987] 2 S.C.R. 309, 987 CanLII 25 (S.C.C.). More recently, Boutilier revisited and affirmed the ruling in *Lyons* that the designation criteria are constitutional.

[34] The four criteria for the dangerous offender designation developed by the SCC include: (1) a conviction for a serious personal injury offence (which is an objective test); (2) evidence of a broader pattern of violence beyond the predicate offence; (3) a high likelihood of harmful recidivism; and (4) a requirement that the pattern of conduct is substantially or pathologically intractable. The last two criteria are forward looking and address the future risk represented by the offender.

[35] The burden is on the Crown to establish beyond a reasonable doubt that the dangerous offender criteria have been met. The SCC noted in *Lyons* that predicting the future can never be an exercise of certainty:

[93] However, as Holmes has reminded us, the life of the law has not been logic: it has been experience. The criminal law must operate in a world governed by practical considerations rather than abstract logic and, as a matter of practicality, the most that can be established in a future context is a likelihood of certain events occurring. To doubt this conclusion is, in actuality, to doubt the validity of the legislative objectives embodied in Part XXI, for to require certainty in such matters would be tantamount to rendering the entire process ineffective.

[94] Moreover, I am not convinced, even as a matter of logic, that the appellant's submission is sound. It seems to me that a "likelihood" of specified future conduct occurring is the finding of fact required to be established; it is not, at one and the same time, the means of proving that fact. Logically, it seems clear to me that an individual can be found to constitute a threat to society without insisting that this require the court to assert an ability to predict the future. I do not find it illogical for a court to assert that it is satisfied beyond a reasonable doubt that the test of dangerousness has been met, that there exists a certain potential for harm. That this is really only an apparent paradox is aptly captured by Morden J. in *R. v. Knight* (1975), 27 C.C.C. (2d) 343 (Ont. H.C.), at p. 356:

I wish to make it clear that when I refer to the requisite standard of proof respecting likelihood I am not imposing on myself an obligation to find it proven beyond a reasonable doubt that certain events will happen in the future--this, in the nature of things would be impossible in practically every case--but I do refer to the quality and strength of the evidence of past and present facts together with the expert opinion thereon, as an existing basis for finding present likelihood of future conduct.

[Emphasis in original.]

[36] Once the criteria are met, a judge shall designate an offender as dangerous only if they are satisfied beyond a reasonable doubt that the offender actually constitutes a future threat to safety in light of all the relevant evidence: *Boutilier* at para. 41. A prospective assessment of future risk posed by an offender is embedded within the dangerous offender criteria: *Boutilier* at paras. 44-45. An offender will not be designated as dangerous if their treatment prospects are so compelling that the sentencing judge cannot conclude beyond a reasonable doubt that they present a high likelihood of harmful recidivism or that their violent pattern is intractable: *Boutilier* at para. 45. Treatment prospects that fall below this threshold will still be relevant in choosing the sentence required to adequately protect the public: *Boutilier* at para. 45.

[37] In *Boutilier*, at para. 27, the SCC defined "intractable" conduct as "behavior that the offender is unable to surmount". This is a prospective analysis. The sentencing judge must be satisfied that this will be the case into the future and not solely consider whether the offender's conduct has been intractable in the past.

[38] It is important to bear in mind the distinction between a dangerous offender designation from a long-term offender designation. As set out in *Boutilier*, the SCC made clear that the threshold is high and that both regimes are aimed at small and distinct groups of persistent criminals with a propensity for committing violent crimes against the person. At para. 75, the Court said this:

[T]he dangerous offender designation criteria are more onerous than the long-term offender criteria. In particular, under s. 753(1), the sentencing judge must be satisfied that "the offender constitutes a threat to the life, safety or physical or mental well-being of other persons", whereas under s. 753.1, the sentencing judge must merely be satisfied that "there is a substantial risk that

the offender will reoffend". As explained above, when read properly, s. 753(1) limits the availability of an indeterminate detention under s. 753(4) and (4.1) to a narrow group of offenders that are dangerous per se. It therefore cannot be said that both regimes target the same offenders.

[39] Though expert psychiatric evidence is vital in making decisions under these provisions, the decisions as to whether the criteria have been met and whether to make the designation rest with the judge.

[40] When dealing with an application for a dangerous offender declaration under s. 753(1), the Crown must prove all elements beyond a reasonable doubt: Boutilier at paras. 36 and 41.

[41] I turn to a consideration of some of the authorities considering the pertinent provision at issue here, being s. 753(1)(b). As stated earlier, the crown must prove beyond a reasonable doubt that:

- a) The offence which W.H. has been convicted is a serious personal injury offence as set out in s. 752(1); and
- b) W.H., by his conduct in any sexual matter including the commission of the offence for which he has been convicted, has shown a failure to control his sexual impulses and a likelihood of causing injury, pain or evil to other persons through failure in the future to control his sexual impulses (R. v. Schwartz, 2000 BCSC 40 at para. 26; R. v. Dadmand, 2018 BCSC 729 at para. 25).

[42] Sexual assault is enumerated as a primary designated offence in s. 752(a).

[43] In Dadmand, the Court made clear that the concept of likelihood has been oft considered in the dangerous offender context--it has been held to be "more than simply a possibility it means more probably than not" (at para. 27.)

[44] R. v. Lynch, 2022 ONCA 136, provides a helpful distillation of the operation of s. 753(1)(b) and what the Crown must prove pursuant to this provision.

[45] In Lynch, the appellant was convicted of sexual assault and various prostitution-related offences in relation to a 14-year-old at the time of the offence. The sentencing judge designated the appellant as a dangerous offender after concluding the elements under s. 753(1)(b) of the Criminal Code had been satisfied:

- a) the appellant had been convicted of a sexual assault which was a serious personal injury offence; and
- b) by his conduct in any sexual matter he had shown a failure to control his sexual impulses and a likelihood of causing injury, pain or other evil to other persons through a failure in the future to control his sexual impulses.

[46] The appellant contended that the sentencing judge erred:

- a) by relying on conduct that did not demonstrate a failure to control his sexual impulses; and
- b) in imposing a dangerous offender designation and indeterminate sentence in the face of evidence that his risk of sexual reoffence was manageable.

[47] The Ontario Court of Appeal allowed the appeal, concluding that the sentencing judge erred in concluding, on the evidence before her, that the appellant had shown a likelihood of causing injury, pain or other evil to other persons through failure in the future to control his sexual impulses.

[48] Justice van Rensburg, for the majority, provided the following helpful framework when dealing with s. 753(1)(b). Justice van Rensburg stated:

[48] It is important to preface the consideration of this issue - that is, whether the elements for a s. 753(1)(b) dangerous offender designation were made out on the evidence relied on by the sentencing judge - with the understanding that the dangerous offender provisions must be interpreted strictly so as to remain within their constitutional bounds. In Boutilier, Côté J., writing for the majority, confirmed that the 2008 amendments to the dangerous offender provisions, like the 1977 regime they replaced, target "a small group of persistent criminals with a propensity for committing violent crimes against the person": at para. 3. The careful tailoring of the legislation to limit its reach is fundamental to its constitutionality: *R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 339; Boutilier, at paras. 28, 34.

[49] Section 753(1)(b) is addressed at a particular kind of offender - one who has engaged in a pattern of behaviour showing a failure to control sexual impulses, and who because of that, constitutes a future risk. The elements of this provision have always included a reference to the offender's lack of control over his or her sexual impulses. See M. Cole, "Dangerous and Long-Term Offenders" in D. Cole and J. Roberts, eds., *Sentencing in Canada, Essays in Law, Policy and Practice* (Toronto: Irwin Law, 2020) at pp. 293 to 297, where the author outlines the history of this section, beginning with its origins in the Criminal Sexual Psychopath Act, an Act to amend the Criminal Code, S.C. 1948, c. 9, which allowed preventive detention for an individual "who by a course of misconduct in sexual matters has evidenced a lack of power to control his sexual impulses and who as a result is likely to attack or otherwise inflict injury, loss, pain or other evil on any person".

[50] In Boutilier, the Supreme Court dealt with a dangerous offender designation under s. 753(1)(a)(i) of the Code, which expressly speaks of the need for a "pattern of repetitive behaviour". The court affirmed, however, that all cases under s. 753(1) require that the offender engaged in a pattern of dangerous conduct. The court noted that s. 753(1)(b) required "in addition to evidence of a pattern of past conduct, an independent assessment of future risk": at para. 38. Accordingly, to support a designation under s. 753(1)(b), after proving that the offender has been convicted of an offence under ss. 271, 272 or 273 of the Code, the Crown must prove, beyond a reasonable doubt, both a pattern of offending in the past showing a failure to control sexual impulses (which can be found in the circumstances of the predicate offence or the offender's "conduct in any sexual matter"), and a prospective risk of harm to

others through a failure to control sexual impulses.

- [51] In many of the reported cases of dangerous offender designations under s. 753(1)(b) or its equivalent, there was no dispute about whether the offender's past conduct reflected a failure to control sexual impulses, and there was clear evidence of a pattern of such conduct. In *R. v. Currie*, [1997] 2 S.C.R. 260, for example, it was undisputed that the offender, who was a pedophile and hebephile, with a long history of sexual offences, some of which were extremely violent, engaged in sexually impulsive criminal behaviour. A biological anomaly in the offender's brain made his deviant sexual impulses uncontrollable and he was described as having a sexually impulsive and volatile nature. Similarly, in *R. v. Skookum*, 2018 YKCA 2, 45 C.R. (7th) 168, the Crown proceeded with a dangerous offender application under s. 753(1)(b) after the offender's third conviction for sexual assault, where the predicate offence involved a sexual assault on a teenaged acquaintance with whom he had sexual intercourse after she had blacked out from drinking, and there had been an earlier conviction for sexual assault on a four-year-old in which he claimed to be "out of control" during an alcoholic blackout.
- [52] In a recent decision, the British Columbia Court of Appeal, in allowing an appeal from a dangerous offender designation and directing a new hearing, addressed the "failure to control sexual impulses" element of s. 753(1)(b), and in particular the evidence relevant to the assessment of the offender's future risk of reoffending. In *R. v. Patel*, 2020 BCCA 92, [2020] B.C.J. No. 432, the offender (who identified as male at the time of her convictions and as female at the dangerous offender hearing) had been convicted of sexual offences in relation to a 13-year-old. The pattern of behaviour that formed the basis for the dangerous offender application was a series of sexual assaults by the offender, who was assessed as having hebephilia with a probable paraphilic disorder. The sentencing judge had characterized the predicate offences as serious sexual offences committed to satisfy the offender's sexual impulses. At issue in the appeal was the evidence relevant to the assessment of the offender's prospective risk under s. 753(1)(b).
- [53] Fitch J.A., for the majority, concluded that the sentencing judge erred in relying on a prior conviction for manslaughter in her consideration of the risk of reoffence in the context of s. 753(1)(b), where the Crown had conceded that there was no evidence that the manslaughter offence was driven or motivated by a sexual impulse. Referring to authorities from across Canada, he observed that "the assessment of future risk must be tied to the past type of criminal behaviour anchoring the application that an offender be designated 'dangerous'", and that this principle has also been applied in the context of dangerous offender applications under s. 753(1)(b): at paras. 220-224. He noted that the predicate offence "must form part of a pattern of behaviour that gives rise to the likelihood that the same type of behaviour will continue in the future", and that "the Crown must prove beyond a reasonable doubt the likelihood that the offender's past failure to control his or her sexual impulses will manifest itself in the future.": at para. 225.

- [54] The error in Patel was for the sentencing judge to rely on other violent conduct that "did not arise out of a failure to control sexual impulses" in assessing the offender's prospective risk when determining whether she was a dangerous offender.
- [55] In my view, the sentencing judge made a similar error in this case, when she relied on conduct that was unrelated to the appellant's failure to control sexual impulses in the assessment of his prospective risk under s. 753(1)(b).
- [49] In sum, s. 753(1)(b) requires proof "in addition to evidence of a pattern of past conduct, an independent assessment of future risk": (Boutilier at para. 38). Accordingly, to support a designation under s. 753(1)(b), after proving that the offender has been convicted of an offence under ss. 271, 272 or 273 of the Criminal Code, the Crown must prove, beyond a reasonable doubt, both a pattern of offending in the past showing a failure to control sexual impulses (which can be found in the circumstances of the predicate offence or the offender's "conduct in any sexual matter"), and a prospective risk of harm to others through a failure to control sexual impulses.
- [50] I will say more about the opportunity to offend later in these reasons. However, as I set out the governing authorities, I have also considered the remarks of Justice Holmes (as she then was) in Schwartz at para. 27 where she stated:

The accused may be found a dangerous offender although his failure to control his sexual impulses arises only in certain opportunistic circumstances [R. v. Kelman (1971), 4 CCC (2d) 8 (BCSC), p. 10-11]

- [51] In addition, Justice Fisher provided a helpful overview of the dangerous offender provisions in R. v. Awasis, 2020 BCCA 23. With respect to the prospective risk requirement, she identified what was required as follows:
- [70] Integral to the designation stage is an assessment of future risk. As the Supreme Court of Canada confirmed in Boutilier, an offender cannot be designated as dangerous unless he is shown to present a high likelihood of harmful recidivism and that his violent conduct is intractable. Accordingly, a judge must conduct a prospective assessment of dangerousness -- which necessarily involves the consideration of future treatment prospects -- before designating an offender as dangerous: Boutilier at paras. 45-46. This requirement applies with equal force to designations under both s. 753(1)(a) and (b): R. v. Skookum, 2018 YKCA 2 at para. 57.

[Emphasis added.]

- [52] In R. v. Patel, 2020 BCCA 92 at para. 212, the court noted that in order for the Crown to meet its burden under s. 753(1)(b), the court must be satisfied that the past harmful conduct is "of a particular kind, rooted in behaviour so intractable that it can safely be concluded that the same type of conduct is likely to manifest itself in the future."

- [53] Again, the designation stage necessarily involves a consideration of treatment prospects to determine whether or not the offending behaviour is "intractable": Boutilier at para. 46. Where a court finds there is a reasonable doubt as to whether the future treatment prospects for an offender means his behaviour is not intractable and it should not designate him as a dangerous offender: R. v. Smarch, 2020 YKCA 7, at para. 64.
- [54] In sum, the designation stage is concerned with assessing the future threat posed by the offender, while the penalty stage is concerned with imposing the appropriate sentence to manage the established threat: Boutilier at para. 31.
- [55] I will say more about the applicable legal principles regarding the statutory criteria of s. 753 after I set out the evidence.

IV. CIRCUMSTANCES OF THE PREDICATE CRIMINAL OFFENCES

A. Overview

- [56] The Crown called six witnesses on the dangerous offender application.
- [57] Cst. Brennen was the primary investigator and interviewed W.H. on May 16, 2020 (following his arrest and during the search of W.H.'s residence); on May 17, 2020 (when W.H. was asked to attend at the detachment so Cst. Brennen could assess whether he was at risk of self-harm); and, on June 17, 2021 (following W.H.'s arrest for the offences relating to the making and distribution of the CSE Material).
- [58] Dr. Mandeep Singh Saini testified. At one point in the proceedings, counsel for W.H. (not counsel at the dangerous offender hearing) sought an assessment on the issue of whether W.H. was criminally responsible at the time of the offences. Dr. Saini testified about his findings regarding his assessment.
- [59] Dr. Riar conducted the s. 752.1 assessment and he testified about his findings.
- [60] The Crown called witnesses from corrections including:
- a) Tami Collishaw who testified about W.H.'s time in pretrial custody at Vancouver Island Regional Correctional centre;
 - b) Shannon Plumptom who testified about correctional programming. She is a supervisor at CSC and testified about programming available.
 - c) Claire McKenzie, the regional manager of the conditional release program with the Parole Board of Canada, testified about parole eligibility and various types of graduated release.
- [61] W.H. declined to participate in the s. 752.1 assessment. He was not obliged to participate and no adverse inference can be drawn from his failure to do so. At the same time, an individual who does not participate in the assessment process is not entitled to the benefit of the most favourable inferences in the face of knowledge gaps flowing from their non-participation: R. v. M.O.B., 1999 BCCA 84; R. v. McDonald, 2015 BCSC 2088 para. 37.

[62] W.H.'s father, D.H., testified at the hearing. He described in some detail his involvement with W.H. after W.H. was arrested, including his time in the community while on release conditions. He also described his views of W.H.'s performance after he was arrested in June 2021 and held in custody up to this hearing. D.H. assured the Court that he would be the first to report W.H. to the authorities if he committed any further sexual offences.

B. Circumstances of the offences

1. Admissions of Fact

[63] As I have noted, W.H. pleaded guilty on November 7, 2022 to four sexual offences involving O.H. and three CSE Material offences, including making videos of O.H. being sexually assaulted and then distributing video recordings of the sexual offending by W.H. against O.H.

[64] W.H. described the sexual offences and his views relating to those offences, in quite a bit of detail when he was interviewed by Cst. Brennen. Dr. Riar had the benefit of viewing the video-recordings of these interviews. Indeed, his opinion is based, in large part, on his observations of W.H. during these interviews.

[65] It is thus useful to set out the content of the videos in some detail and I will do that shortly.

[66] However, I start with Admissions of Fact.

[67] W.H. was born in 1990 and will turn 34 years old later this year.

[68] O.H. was born in 2013. W.H. had sole custody of O.H. since July 2014 up to the time of his arrest on May 16, 2020. From July 2014-May 2020, O.H. lived with W.H. in Victoria, Langford and Courtenay, BC.

[69] Between December 1, 2016-May 14, 2020, W.H. committed incest and sexual interference against O.H. W.H. forced anal intercourse approximately 30 times since approximately December 2017. W.H. objects to the use of the word "force" suggesting O.H. somehow consented to the conduct. At no time did O.H. have the capacity to consent hence the use of the word "force." W.H. also committed sexual touching against O.H. many times. W.H. forced O.H. to perform fellatio on W.H. approximately 24 times. W.H. performed fellatio on O.H. approximately 24 times.

[70] Between December 1, 2019-May 14, 2020, W.H. showed O.H. sexually explicit material (child pornography as defined in the Criminal Code) on three separate occasions, through the use of electronic devices, such as an iPad.

[71] Between December 1, 2017-May 14, 2020, W.H. made CSE Material by video-recording himself having anal and oral intercourse with O.H. This occurred dozens of times.

- [72] Between December 1, 2019-May 14, 2020, W.H. distributed, transmitted and exported the CSE Material to a handful of anonymous contacts on a file sharing program called [redacted]. These contacts, in turn, distributed, transmitted and exported this CSE Material to other users. To this day, the CSE Material of O.H. continues to be distributed millions of times on the internet.
- [73] At this stage, I pause to comment on an unrelated investigation into offences regarding the possession of CSE Material. It is not disputed that the CSE Material depicting O.H. was seized during this unrelated investigation. This is not to suggest that W.H. was in any involved in directly providing the seized items to the suspect--only to say that the images continue to be available to those wishing to access the CSE Material. W.H. does not suggest otherwise.
2. W.H.'s sexual offences are reported to the RCMP
- [74] In or about May 2020, W.H.'s former girlfriend (S.S.) reported to a friend (K.P.) that W.H. was committing sexual offences against O.H. K.P. reported the allegations to the RCMP (Comox Valley detachment).
- [75] In response to the police report, Cst. MacQuarrie interviewed O.H. At the time of the police interview, O.H. was a few weeks shy of his 7th birthday.
- [76] During the interview, O.H. disclosed to the police that W.H. had sexual intercourse with S.S. in front of O.H.; that W.H. put his penis in O.H.'s bum; that W.H. put his penis in O.H.'s mouth; and W.H. put O.H.'s penis in his mouth.
- [77] O.H. provided some details regarding the sexual offences. I have decided to include excerpts from O.H.'s interview with Cst. MacQuarrie. I have done so because, in my view, it demonstrates well the pernicious nature of W.H.'s offending against O.H.

S.M.[1]: Like when you said you saw your dad putting his penis in [S.S.'s] vagina would, were they touching bums? No? Okay. Do sometimes penises go in bums?

O.H.: Mmm hmm.

S.M.: Yeah? Okay. And is that something your dad taught you? Yeah. Okay. Is that something that you, he puts, does he do that to you?

O.H.: Is it okay to tell you?

S.M.: Oh yeah you can tell me anything. Okay. Tell me more about that?

O.H.: Mmm, I don't have anything to say about it.

S.M.: Okay. When does that happen?

O.H.: Um.

S.M.: Do you need to think about it?

O.H.: Mmmhmm.

S.M.: Is it um in your house?

O.H.: Mmm hmm.

S.M.: Yeah okay and where would you be in your house?

O.H.: In, usually in my room.

S.M.: In your room. Okay and what does your dad say to you?

O.H.: Doesn't really say anything.

S.M.: Oh okay. What does he do?

O.H.: [inaudible]

S.M.: Well okay what, is it, do you remember like is it day time or night time or?

O.H.: Daytime usually. Actually sometimes it's in night time.

S.M.: Night time.

O.H.: When I was three.

S.M.: Oh okay.

O.H.: Yeah 'cause sometimes I make, well because I, because sometimes and it hurts a little bit and it's easier when it's at night time.

S.M.: It's easier.

O.H.: Yeah because it doesn't hurt as much.

S.M.: Oh, why do you think that is?

O.H.: What?

S.M.: Why do you think it doesn't hurt as much at night time.

O.H.: I'm as ... like I'm asleep, if he doesn't wake me up with it.

S.M.: Oh. Okay. So how do you know he's doing that?

O.H.: He tells me.

S.M.: Oh he does?

O.H.: He tells me in the morning.

S.M.: Oh okay.

O.H.: And sometimes I wake up too just a tiny little bit.

S.M.: Okay.

O.H.: And I go back to sleep.

S.M.: Okay. Um and what about his bum? Does anything go into his bum? No. Um, does he put his penis anywhere else? No? Oh okay. Not your armpit? Mmm, your ear?

O.H.: Ha, ha, ha.

S.M.: How about your mouth?

O.H.: Uh is it okay to tell?

S.M.: Is it, does it, yeah it's okay to tell me. His penis goes in your mouth? Okay. Thank you for sharing that.

O.H.: Okay. I don't really have anything to talk about.

S.M.: Is that, are those thi... is that something that you're not allowed to talk about?

O.H.: What?

S.M.: Does your dad tell you not to talk about that? Oh.

O.H.: He does, told me not to talk about that.

S.M.: Okay and does he say anything? Like that will happen if you talk about it?

O.H.: No.

S.M.: Does he have a name for [it]? No? Okay. But he puts his penis in your mouth? Okay. Do you ever have [to] put your penis anywhere?

O.H.: Mmm.

S.M.: No? Okay. Not in his mouth?

O.H.: Is it okay to tell you?

S.M.: Yeah, absolutely.

O.H.: Yeah.

S.M.: Yeah, you put your penis in his, uh sorry, you put your, yeah you put your penis in his mouth. Okay. Do you put your penis anywhere else?

O.H.: Mmm.

S.M.: No? Okay. Um and does that stuff happen just with your dad? Okay. Anybody else?

O.H.: Anybody else?

S.M.: Yeah. Does that happen with your mom? No? You're sure? Okay, does your mommy know about that stuff? No? Okay. So you have not told your mom that your dad does that stuff to you? No. Okay. What about [S.S.]?

O.H.: Oh she knows about [it].

S.M.: She does? Oh okay, how does she know?

O.H.: Uh my dad told her.

S.M.: Oh okay and you know that?

O.H.: Mmm hmm. My dad told me that my dad told her.

S.M.: Oh okay. Wow. He tells you a lot of stuff.

O.H.: Yeah he, he doesn't keep any secrets from me, unless it's a surprise.

S.M.: Right. Okay. So when he puts his penis in your bum is, does he call that a secret?

O.H.: Mmm hmm.

S.M.: No? Okay. Well thanks for sharing with me. Feels like it was hard work.

O.H.: Yeah he calls that a se ... he called it a secret.

S.M.: He calls it a secret, okay. Well do you know about good secrets and then bad secrets? Ever heard that before? Like a good secret might be like what you're talking about, like a present.

O.H.: Yeah what about that secret?

S.M.: Well do you think what your dad does to you might be called a bad secret?

O.H.: What do you mean?

S.M.: Well do you think that's like the name for it?

O.H.: No.

S.M.: No? Okay.

O.H.: I think it's understandable.

S.M.: You think it's understandable? Okay. Does your dad say why he does that?

O.H.: What?

S.M.: Does your dad say why he does that to you?

O.H.: What do you mean?

S.M.: Like does he say why he puts his penis in your bum?

O.H.: Mmm well, well he, we both like it.

S.M.: You both like it? Okay.

O.H.: Yep.

S.M.: Does your bum hurt sometimes?

O.H.: It hurts when it goes in but after it comes out it feels really good.

S.M.: Oh okay.

O.H.: And the more it hurts when it's in, the more it feels good when it's out.

[Emphasis added.]

[78] A medical doctor and forensic nurse examiner examined O.H. the day before the interview with Cst. MacQuarrie. DNA swabs were obtained from O.H.'s genital and anal region. W.H.'s DNA was located on the genital swab.

3. W.H.'s police interviews

[79] W.H. provided statements to the police on four occasions. Each is relevant to the dangerous offender designation. W.H.'s statements are lengthy and comprehensive. I have found that the statements provide a significant window into W.H.'s offending.

a) May 16, 2020 (police detachment)

[80] W.H. was arrested on May 16, 2020. He provided a statement to Cst. Brennen that same day. Initially, W.H. denied any wrongdoing. The following excerpts set out his denial:

I like younger guys 100%. I'm not going to lie about that. I don't have to hide that...But not children. Not babies. You know, not somebody who is my son. That's ridiculous;

I would never text her [S.S.] for instance, hey let's let's fuck [O.H.] together;

Daddy's never done anything;

Yeah, but I did not anally penetrate my son. I do not fuck my son.

It's ... That's messed up.

That's completely false [W.H. putting his penis in O.H.'s mouth] 100%.

Daddy does not put my penis in his bum.

[81] After W.H. had denied any sexual misconduct, Cst. Brennen showed W.H. clips from O.H.'s video-recorded interview, including excerpts where O.H. disclosed W.H.'s sexual offending. W.H. then started to confess, stating:

. You want the full confession, I have been loving him for a long time. I've never hurt him. You know it hurts his bum a little bit which is why I pull out and I am gentle with it;

I love my boy. I'll love him for the rest of my life it's a fucking horrible feeling right now knowing that I'm not going to be able to continue to cause you guys are going to do everything in your power to keep me away, permanently.

I've, to be honest with you, this isn't the end of the fight. I will continue to support my feelings of love for the rest of my life;

I've been incestual since I was five years old it's been a part of my life since before I can remember;

It's always part of my interests my primary interest I am incestual I love my family;

It's not a normal thing to do I'm going to fight all the way until this gets legal;

[O.H.] wants to play and he asks, daddy, we can do it at night time you know. And he waits up and he has a fun time doing it too so, it's not like he's screaming and he's yelling and I'm hurting him It's not hell, it's love man;

It's not hell, it's love man even though it's fucked up love for somebody who doesn't experience it;

Cause there are people like me who are very bad and the reality of the situation too people who want to hurt children not me, but people do;

I've been a boy pedophile truly since I was 5 years old;

I'm very happy as I am you know there is nothing I can do to change myself I am as I am and no judgment or hate is going to change me.

[82] As for the sexual offences, W.H. stated the following:

W.H. had anal intercourse with O.H. multiple times two days before his arrest;

O.H. was eager for anal intercourse when he returned from his mom's care;

W.H. goes as fast as he can because O.H. likes it being faster;

There's nothing W.H. can do to change himself; he's been a boy pedophile since he was five years old;

[83] During the first interview, W.H. confessed to video-recording some of the sexual acts. He told Cst. Brennen that he uploaded and distributed the videos on a sharing platform called [redacted] and that he had been doing this for a couple of years. He stated that he and O.H. were very popular and the videos would receive a million views in a week and a half. W.H. also told Cst. Brennen that he showed O.H. a lot of "child pornography" videos to show O.H. that there are other people like them.

b) May 16, 2020 Statement - During search of W.H.'s residence

[84] After Cst. Brennen concluded the interview, the police sought and obtained W.H.'s consent to search his residence. W.H. fully cooperated in providing access to the police to search his residence. During the search, W.H. offered information to the police and helped them locate certain items, including electronic devices, that may have been relevant to the investigation. W.H. commented during the search, stating:

My love is not a perversion. It's a very serious deep love for my boy;

People are very sad in my world. I'm not one of those people. I found peace with myself;

He's not a boy who's abused. He's a boy who is loved. There's a difference. And it's hard to see that difference when the law states things a certain way.

You know anal sex causes a bit of pain but I'm always extremely, extremely gentle with my son and it's always welcome. There's never a time I say hey boy, bend over and I'm taking you. he's ready, he's asking for it. He's happy and he's always been happy.

[85] Towards the end of the first interview, Cst. Brennen had told W.H. he would be released on conditions, including conditions that he could not contact O.H. After the police completed the search of W.H.'s residence, he was released on those conditions.

c) May 17, 2020 Interview to check for W.H.'s wellness

[86] Cst. Brennen testified that he reached out to W.H. the next day, May 17, 2020. He was concerned that he had not inquired about W.H.'s mental well-being and wanted to do so. At about 10:30 p.m., W.H. voluntarily attended at the RCMP detachment, in response to Cst. Brennen's inquiry. Cst. Brennen told W.H. that he could leave anytime and he did not need to speak with him if he did not want. W.H. revealed further details. He stated the following:

I am a rarity in the field because a lot of people are not quite as handsome and that's what made sharing the pornography special and to show O.H. that it was part of the world;

My sexuality has been everlasting. There's never been a part of my life where it's not been a part of me I am not sick;

It's also just a matter of having the ability to distance myself from him. A child's sexual urges are not equal to an adult and though he was willing and a participant in a lot of the things that we were doing and happily. I'm very, very happy and proud to say even if you guys got out of him that you know he was hurt in any way, you know, I know for a fact day after day sitting with him that he loved the hell out of me and he never asked me to stop. He never asked me to go away and if he did ask me for temporarily, I don't want to right now daddy was always ready to step away and I'd go jerk off to porn that would be enough to satisfy me until he was ready again.

If I told you that I sat there a hundred times and told him "no" would you believe me? Probably not. And even with all my desires and all the things I had in my entire life, I still held back When I was with his mother, I didn't do anything because I loved the hell out of her and I wanted to try to change myself and when I was by myself and a hundred times saying no, it finally became yes. It was very, very very difficult for me to face that I crossed a boundary that I understood immediately as I crossed it that it was gonna bring you to my door. And I did it all out of love.

d) June 17, 2021 interview conducted after W.H. charged with further offences

[87] The police seized W.H.'s electronic devices. It took considerable time to complete the forensic examination of the devices. In February 2021, Cst. Brennen was granted a production order for records related to W.H.'s account on the [redacted] platform. Consistent with his earlier statements, Cst. Brennen noted that W.H. had deleted chats. With the help of law investigators from New Zealand, Cst. Brennen was able to obtain 12 videos of W.H. sexually assaulting O.H. (ten images were also collected in relation to W.H. sexually assaulting O.H.). Two other videos did not involve W.H. or O.H. but rather were of other adult males sexually assaulting children.

[88] Cst. Brennen interviewed W.H. again after his arrest for the offences arising from the CSE Material. But I start with a description of the electronic material seized and examined.

[89] The videos were not played during the hearing because W.H. admitted that Cst. Brennen's descriptions constituted an accurate description of the contents of the videos. Cst. Brennen's description (as set out in the Admissions of Fact) are reproduced below. I have included the descriptions in these reasons because they show a stark difference between W.H.'s description of the impact of his sexual abuse on O.H. and that captured in the video-recordings. The CSE Material captures the degree of the sexual offending against O.H. Cst. Brennen described the images as follows:

a) [redacted] is a video that is 3:53 minutes long. O.H. presents in a shower, blindfolded with straps around his head. W.H. erect penis is close to O.H.'s face. W.H. is rubbing his penis. W.H. puts his penis in O.H.'s mouth. W.H. thrusts his penis into O.H.'s mouth, using his hands to pull O.H.'s head toward him. W.H.'s penis bends on several occasions under the pressure of pulling O.H. towards him. W.H. removes his left hand from behind O.H.'s head and begins violently shaking O.H.'s head back and forth on his penis. W.H. keeps pulling on O.H.'s head causing W.H.'s penis to hit O.H.'s face. O.H. appears to be trying to pull away. O.H.'s hands are tied behind his back. O.H. tries to move the blindfold without his hands and says "I can see a little bit". W.H. pulls O.H.'s head and mouth back onto his penis further than before. W.H. puts his right hand behind O.H.'s head and controls O.H.'s head motion this time violently pulling O.H.'s head back and forth at a rapid rate, causing his penis to bend. W.H. uses both hands on the back of O.H.'s head and pulls his face down on his penis with great force then releases the pressure allowing O.H.'s head to go back up. W.H. slaps his penis on O.H.'s chin several times while still holding the back of his head. W.H. tells O.H. to stick out his tongue which O.H. does. W.H. is still holding the back of O.H.'s head. W.H.

begins moving O.H.'s head back and forth on his penis. W.H. pulls O.H. head and thrusts his penis in a single motion and then holds O.H.'s head on his penis. W.H. ejaculates in O.H.'s mouth and ejaculate can be seen coming out of O.H.'s mouth. O.H.'s begins to spit the ejaculate out. O.H.'s appears to be gasping for air as ejaculate is coming out of his mouth. W.H. still has his right hand under the back of O.H.'s head and is thrusting towards O.H.'s face. O.H.'s states "oh my gosh that felt [indecipherable]. The video ends with W.H.'s penis on O.H.'s right shoulder and W.H. hand pulling O.H.'s face towards his groin.

- b) [redacted] is a video of W.H. and O.H. that is 26 seconds in length. In the video, O.H. can be seen masturbating W.H.'s penis with his hand. W.H. has been seen talking and pointing with his right hand "on my shaft, on my shaft". O.H. then uses both his hands to masturbate W.H. W.H. ejaculates onto his own stomach.

[Paragraphs (c)-(q) have been redacted for publication purposes.]

[90] There were 100 logins from an iPad and iPhone on W.H.'s [redacted] account from December 11, 2019-May 12, 2020.

[91] The series of videos and pictures of O.H. and W.H. were designated [redacted] on the Interpol Internet Child Sexual Exploitation database. BC Integrated Child Exploitation Victim Identification received information from Australia investigators that two previously unidentified series (designated [redacted]) were the same child, O.H. In total, an additional 15 videos were added to the series [redacted]. The videos included O.H. being subjected to forced anal penetration by W.H. The penetration was with W.H.'s penis and fingers.

[92] BC Integrated Child Exploitation unit determined this material had been uploaded to [redacted] (a dark web site known for child exploitation material) on December 2, 2019. This material has ended up on other networking sites, [redacted] and [redacted], with the latter being the largest Dark Web Child exploitation website in the world with over four million users.

[93] The [three] series [redacted] have been and continue to be circulated throughout the internet countless times.

- i. June 17, 2021 Interview following arrest for the "child pornography" offences

[94] Cst. Brennen informed W.H. that he was being arrested for production of child pornography, distribution of child pornography and making sexually explicit materials available to a child. During this interview, W.H. spoke about the different sorts of viewers of CSE Material. He stated that the police should be concerned with those users who glorified violence against children. He stated:

The least of [the police] worries is a pedophile who loves one of those child[ren];

People deserve to be safe, people deserve to be themselves. I cannot change, you know you want to sign me up for some sexual change program. It doesn't work, we all know that, you know you cannot give me a shot and make it go. You gotta live with me man, you know and I'm not here to hurt people, I'm not here to hurt my son. I could have hurt him many times I just want to be myself and have a right to be somewhere other than a prison cell as myself.

I'm a confessed pedophile. I have been since I was eighteen years old. I hooked up with guys who are fifty, forty-five years old since I've been a very young boy and told my entire family about it right from the start about pedophilia, not so much incest.

[the incestual feelings] never went away. I wanted more babies, a bigger family and [O.H.'s mother] wanted to escape it;

[95] W.H. repeated his description of the sexual offending and included the following details:

- a) He started sexually touching O.H. when he was approximately two-and-a-half years old;
- b) According to W.H., S.S. told him he could start having sex with [their unborn male child] at one-and-a-half years;
- c) The sexual touching started with little blow jobs here and there;
- d) O.H. was not too crazy about the taste of sperm at the time. As soon as that would be done, O.H. would have an erection and W.H. would suck O.H. off;
- e) There would be licking, kissing, analingus and touching;
- f) He groomed O.H. "to a T";
- g) Anal sex was one of those things that started more into the five, six-year-old range but they did it when O.H. was resting. O.H. would prefer if he was opened prior to initiating it [anal sex] fully awake;
- h) When you're sleeping, a child can fit a nine-inch dildo in their anus at two years old without waking up, without moving, without pain;
- i) O.H. would ask W.H. to do it; the last time they had anal sex, W.H. gave it to O.H. literally, not as hard as W.H. could but, hear as hard as W.H. would, like a person who W.H. was being gentle with;
- j) O.H. just loves it when its painless; and
- k) W.H. did bondage with O.H. W.H. would tie O.H.'s hands behind his back willingly.
- e) W.H.'s comments at Judicial Interim Release

- [96] On June 21, 2021, W.H. appeared before the Honourable Judge Wolfe in the BC Provincial Court in Courtenay. Judge Wolfe ensured W.H. had an opportunity to consult a lawyer if he wished. W.H. insisted that he proceed without a lawyer. W.H. made a couple of comments during the judicial interim release hearing that are worthy of mention.
- [97] W.H.'s first comment was made after the prosecutor described the video with O.H. and W.H. and described earlier in these reasons (at para. 89). This description can only be characterized as abhorrent. Yet W.H. stated in the transcript of the bail hearing, "[O.H.] was fine."
- [98] During his submissions at the bail hearing, W.H. stated the following:

I do recognize how serious my offences are. I do recognize the impact on my son's life. I do recognize absolutely the necessity of remorse. I do not stand here apologetically crying because it is important, as a self-represented litigant, to remain objective. However, my son is my best friend. He is the absolute adoration of my life. Every single heartbeat, I miss him. I cannot express to you the pain that I feel every single day, having the sexuality that I have, and having a child who was as excited and eager to experience it with me.

All being said, I made choices. Those choices were not the right choices and I stand here hoping to continue to be as accountable as possible. When I was first arrested, it was the same then. There is talk of a lack of remorse. There is talk of a lack of feeling towards the impacted child and my son's life. All being said, Your Honour, my son is thriving. He is doing very well. He is excelling in school. He is excelling in sports. He is excelling in every single aspect of his life. That is one of the many reasons, anyways, that I feel very proud of my son. That is not to say that I am proud of my actions. Now, as the prosecutor has described in great detail, I have confessed to all of the crimes. Every single detail that they have currently collected most recently has already been previously confessed to. Now, as he described, [redacted] is an application that is an encryption platform that you are not able to access the information from if you do not have the password and an email address. Both of those things, the email and the password, were provided to the police to ensure accountability. I am not requesting to be released so I can continue a criminal life.

I have no interest to be around children. The only interest I have is my child, and that is the reality of it. I do want to be a part of my son's life in the future. I recognize that any further investigations, any further accusations, any further charges, will only hinder my ability to be present in my son's life. When he speaks of me today, Your Honour, he speaks of love. He speaks of happiness. He speaks of peace and kindness. These are things we experience together. Now, I do understand a lot of the video files and things that I view are extremely abhorrent.

When you are not a paedophile, when you are not gay, it is difficult to view a penis being inserted into a child or a man altogether. My child has never been forced. It's never a matter of crying or pain. And that's when I say that I don't have remorse towards hurting him. It's just to say that I never physically did it. Even in the talk of aggression and pushing too hard, the [redacted] video ended with a big smile on his face and saying [redacted] with happiness. It's an example of our experiences. It is an example of our life together.

All being said, I do realize, happy or not, it's child abuse. I have come to learn and acknowledge many different aspects of the process here in court, and in psychology, that present abuse regardless of physical force. That was not something I was fully aware of prior to my arrest. This is the continuation of my psychological assessments, of my priest talks. It allows me to build insight and it allows me to prepare for a life like the prosecutor said.

[99] During his submissions and his plea for release, W.H. referred to sessions he was having with his psychologist and how he was gaining insight into his offending. He told Judge Wolfe that he was having an assessment with his psychologist, who "I have been in a relationship now with for eight months and we will be doing our final assessment here within the next month."

[100] I will say more about this, but W.H. represented to Judge Wolfe that he was attending with a psychologist and that there was to be a final assessment within the next month. This submission is inconsistent with D.H.'s testimony about the state of W.H.'s psychological treatment. D.H. made clear that W.H. had ended the sessions with Dr. Ferguson before W.H. was arrested in June 2021. He did not know why but knew they had ended because D.H. had been paying for them.

[101] This misrepresentation to the court is concerning.

[102] Also during the bail hearing, W.H. stated that he had made choices with his son but not with other children. He wanted the court to understand that he was not a threat to other children in the community. He told the judge that he had abided by his release conditions for over a year. He stated:

There has been absolutely no discussion whatsoever about me breaking my conditions or doing anything of an illegal nature. I am a man of the law. I do respect the law, but I respect my son's affection far more, and I will go to prison for the rest of my life. I will die in prison to give my son his truth.

[103] At the bail hearing, W.H. seemed to blame another person for "sexualizing O.H.". W.H. submitted:

My son was out of my care. He was sexualized by his mother's boyfriend. At that point, he returned to my house and when he returned to my house and requested sexual activity, I loved him for it. And I do admit that I shouldn't have. I should have set boundaries that were more appropriate. I should have moved forward with the courts, reporting [the mother's boyfriend].

[104] W.H. ended his submission by telling the court that "my son is, by all means, not an aggravated victim, as far as I've been told."

[105] Judge Wolfe ordered W.H.'s detention. W.H. has been in custody since June 21, 2021. He sought a review of his detention pursuant to s. 525 of the Criminal Code. His detention order was confirmed by a BC Supreme Court Judge.

4. Other statements from W.H.

[106] In the Admissions of Fact, text communications between W.H. and S.S. were presented. The messages suggest that S.S. was attempting to conceive and that she and W.H. had discussed having a baby together, referred to as "Sebastion." The text messages reveal W.H.'s desire for S.S. to become pregnant. The Crown suggests that an inference to draw from the texts is that W.H. was planning to sexually assault this child as he had with O.H.

[107] I agree that the text communications are disturbing, particularly in light of W.H.'s comments about "Sebastion" during his police interview.

C. W.H. complied with his release conditions from May 17, 2020-June 17, 2021

[108] W.H. asks the Court to consider his confession and cooperation as important factors in the designation and penalty aspects of the dangerous offender criteria. He asks the Court to consider his statements to Cst. Brennen, including providing his electronic devices and passwords. He also signed a waiver, consenting to the search of his residence. W.H. assisted the police as they searched for items in his home. On May 16, 2020, W.H. did not say anything about an inability to control his sexual impulses or an inability to comply with release conditions.

[109] His release conditions did not include a curfew or electronic monitoring. In addition, provincial corrections did not deem it necessary to issue a public safety alert indicating W.H. was residing in the community. W.H. asks the Court to consider this as strong evidence that he can comply with conditions. The history of his release conditions demonstrate that he would seek an amendment to the conditions if necessary. For example, he was initially released on a condition that restricted his use of electronic devices. In order to engage with his disclosure materials, W.H. knew that he needed access to a computer. As such, he sought an amendment to his conditions granting him this access.

[110] I agree that he took the appropriate steps to amend his conditions to ensure his ongoing compliance.

[111] His bail supervisor had commented adversely on W.H.'s departure from BC to Ontario. Again, I agree with W.H.'s submission that he did what was required of him with respect to his travel to Ontario. When the bail supervisor became concerned about his whereabouts, they requested his return--and he complied with this request.

- [112] Shortly after Cst. Brennen released him in May 2020, W.H. went to the emergency department seeking mental health support. W.H. submits that this demonstrates a willingness to engage with treatment. D.H., a medical doctor in Ontario, suggested W.H. attend at the emergency room. Based on the Ontario medical model, D.H. believed that this would be a step in the right direction for W.H. and that he would be able to access mental health support by first attending at the emergency room. It turned out that the emergency physician was not able to provide a referral for W.H. based on the information that was provided to him from W.H.
- [113] W.H. submits that there is nothing in the evidence that suggests he was resistant to treatment or did not seek treatment. He says the evidence is to the contrary. The attendance at the emergency room is but one example. In addition, W.H. stated that he saw Dr. Ferguson, a psychologist for 10 or 12 sessions.
- [114] Dr. Ferguson's records were not presented as evidence at the hearing. I am thus unable to determine the number of sessions W.H. attended with Dr. Ferguson. D.H. testified about W.H.'s efforts in this regard. It seems clear that W.H. went to see Dr. Ferguson but refused to continue with the sessions after a period of time. I am unable to determine what caused W.H. to terminate the sessions--only that he did. I will address this later in these reasons.
- [115] In sum, W.H. submits that the Court can consider his compliance while on release conditions as evidence that he can control his urges--that is, he can control himself and can be in society--safely.
- [116] When he was arrested on June 17, 2021 with respect to the CSE Material charges, W.H. granted permission to Cst. Brennen to search his computer. Cst. Brennen examined the computer and did not locate any offence-related material during his computer search. W.H. says this is further evidence of compliance and cooperation with the authorities. W.H. also says that he told Cst. Brennen during the interview on June 17 about his sessions with Dr. Ferguson. This demonstrates, he submits, the fact that he was taking steps (of his own volition) to address his offending behaviour.
- [117] In sum, W.H. asks the Court to consider his blemish-free performance while released in the community. Further, he submits that he sought psychological treatment on his own and has developed insight into his offences and offending behaviour.

D. W.H.'s performance during his time in pre-trial custody

- [118] W.H. submits that his performance in pre-trial custody similarly reflects an individual keen to gain insight into his offending. He has been in custody for over 30 months.

- [119] Ms. Colishaw testified about his performance while in pre-trial custody. She described W.H. as low-key with an unremarkable pre-trial custodial history. She reviewed the logs and noted that he worked well with staff and other inmates and was able to follow the rules of the institution. During cross-examination, she agreed that W.H. was a model inmate. W.H. had completed some life-skills programming
- [120] I will say more about Dr. Saini's report shortly. However, it is relevant at this stage simply to note that W.H. was a resident of the Forensic Psychiatric Hospital ("FPH") for about six weeks so Dr. Saini could conduct his assessments. Dr. Saini agreed that W.H. was cooperative and participated fully in the meetings with him. He agreed there were no issues at all regarding his conduct while at FPH. That is, there was no evidence of inappropriate behaviour or sexual deviance.

E. D.H.'s Evidence

- [121] Before addressing the expert evidence, I will turn to the testimony of D.H. D.H. is a medical doctor but he testified at the hearing as a father. He was able to provide the Court some collateral information that was not available to the assessors. He also described his observations of W.H. both while he was growing up and with respect to his interaction with O.H. D.H. did not observe any unusual or odd behaviour regarding W.H.
- [122] By way of background, D.H. and W.H.'s mother (C.P.) were married for 14 years. They had four sons together, W.H. is the second youngest son. D.H. and C.P. separated when W.H. was four years old. For three years after separation, the boys stayed with C.P. When C.P. moved to Toronto, the boys ended up living with D.H. W.H. lived with D.H. from the age of 11 to 19 years when W.H. moved so he could attend a post-secondary institution.
- [123] D.H. did not notice anything unusual about W.H. during his adolescence. He testified that W.H. was a swimmer and played road hockey. He said he was a good student, although did not work as hard as he could. During his police interview, W.H. described engaging in sexual behaviour with older men while he was an adolescent. D.H. testified that he did not see any "odd behaviour" on the part of W.H.
- [124] During his police interviews, W.H. suggested that his family knew at least something about his pedophilia.
- [125] D.H. denies this. He testified that he did not observe anything odd or unusual about his son and was adamant that he knew nothing about W.H.'s pedophilia.
- [126] D.H. described W.H.'s early adult years. He testified that W.H. dropped out of university and travelled for a period of time. He met O.H.'s mother and they ended up working on a farm with W.H.'s younger brother. D.H. testified that W.H. and O.H.'s mother moved away from the farm following a disagreement with W.H.'s brother. D.H. believed that the brothers' disagreement related to issues about farming. This is different than what was described by W.H. in the police interview. W.H. seemed to suggest that he moved away from the farm

because of issues relating to his sexuality and reports to W.H.'s mother about these issues. At one point, W.H. told Cst. Brennen that he intended to leave O.H.'s mother and O.H. Though somewhat unclear in the interview, W.H. described packing his bags and informing D.H. that he was leaving. He instructed D.H. to give his allowance to O.H.'s mother. W.H. stated it this way:

C.B.[2]: But is, is are the sexual acts happening at this point in time?

W.H.: M sexual acts are privately occurring very, very rarely, say I'm holding on to him in my hands

W.H.: And he rubs up against my crotch And I get an erection That's the type of activity that we had started at that period You know there wasn't, there wasn't blow jobs and this and that and the other going on. There was a period where we're new to this, you know like I would walk around naked all day long

W.H.: Every day, go to the nude beaches, all the way through his young life, also through my entire adult life. I there was a period where he had grabbed on to my penis, not in a sexual way

C.B.: Yeah

W.H.: But more in a curious way

C.B.: Okay

W.H.: And that for me wasn't enough to be consent in my view of it

C.B.: Okay

W.H.: You know, I do have a view of consent.

C.B.: Okay

W.H.: It's not just take what you want

C.B.: Right, okay. so a at that time, so this is something that, [O.H.'s mother] knows at this time?

W.H.: [O.H.'s mother] knows at this time only that I have sexual attractions to my son

C.B.: Okay

W.H.: Th that I have sexual attractions towards children and that I have sexual attractions towards men, and she also knows that I'm so willing to protect my son at this point that I would give up all of my money. I gave him my entire allowance And I was going to be moving out homeless, just on my own

C.B.: Okay

W.H.: My already organized it with my dad as well, I said Dad... all my money goes towards [O.H. and O.H.'s mother]

C.B.: Okay

W.H.: I don't get anything anymore, it's theirs, I'm leaving I want to protect my son.

C.B.: Okay

W.H.: Yeah. Bags were packed at the door, as I was ready to leave after making that deal, and I received a phone call and my brother was dead.

C.B.: Okay

W.H.: The brother who was threatening to expose me.

C.B.: Okay

W.H.: Suddenly everything changed.

C.B.: Right

W.H.: The risk was gone, I could stay with my family. It was a beautiful gift

C.B.: Okay

C.B.: So then, so then uh so you were, you were ready to leave and then

W.H.: Bags packed at the door, I was hugging my son goodbye. Kiss on the lips saying please God give me peace. I go to pick up my bag and I receive a phone call, your brother's dead.

C.B.: Okay, okay and then what happens from there?

W.H.: And then from there I decide to reunite

[127] D.H. was cross-examined about W.H.'s comments noted above, particularly with respect to W.H.'s statement that "[his brother's death] was a beautiful gift." D.H.'s impression was that his brother's death destabilized W.H. D.H. believed that W.H. had not started sexually assaulting O.H. until after the death of his brother. D.H. testified that this belief was based on W.H.'s report to him, wherein W.H. stated that he had not been hurting O.H. until he moved to Victoria. D.H. agreed that W.H. was living in Victoria at the time of the brother's death.

[128] D.H. believed that W.H.'s reference to "beautiful gift" meant that he did not need to leave O.H. W.H. had planned on leaving O.H. instead of sexually assaulting him. At the time of the brother's death, W.H. told D.H. that he had affections towards O.H. but he had not yet acted them out. D.H. thus believed that the "beautiful gift" reference was one that allowed W.H. to stay with his son.

- [129] D.H. testified that W.H. told him that he had not been hurting O.H. until he moved to Victoria. His brother died when W.H. was in Victoria. The "beautiful gift" comment was that he could stay with O.H.--because he had not been hurting O.H. when he learned about brother's death.
- [130] D.H. seemed to agree that the "beautiful gift" comment meant that W.H. could remain undetected in his entrenched view of pedophilia--that he was able to continue with his deception. Though I note that D.H. adamantly rejected the suggestion that W.H. was "entrenched" in his views of pedophilia.
- [131] In my view, D.H.'s answer to this line of cross-examination was somewhat confusing. However, D.H. agreed that W.H. had deceived him many times. As someone who had been deceived by W.H., D.H. knew that he would have to be on guard to detect any deceptions in the future.
- [132] D.H. sat through the entirety of the hearing, including the video recordings of his son. He is thus fully informed about the seriousness of the offences W.H. committed. D.H. is nonetheless committed to supporting his son. He testified that he would not abandon him, even after learning the details supporting the convictions. He intends to support his son, emotionally and financially, and asks the Court to take this into account when assessing whether W.H. can be managed in the community. D.H. states that this support includes making psychological resources and treatment available to W.H., particularly in light of Dr. Riar's opinion that W.H. requires psychotherapy.
- [133] D.H. testified about changes he had observed in his son's presentation since his arrest. He testified that he observed a change in attitude and behaviour with W.H. D.H. testified about losing W.H.'s brother and compared his younger son's death to the loss of W.H. He testified about conversations he had with his son about "getting help" and that his impression was that W.H. was motivated.
- [134] He also provided some details about W.H.'s treatment with Dr. Ferguson. He testified that it simply was not working between the two of them--that his son was not getting the help he needed. He believed Dr. Ferguson had provided only one diagnosis beyond commenting on the intelligence of W.H. D.H. respected W.H.'s decision that he not continue with Dr. Ferguson.
- [135] W.H. asks the Court to be careful about drawing inferences from the absence of Dr. Ferguson's evidence. Again, I will address this submission shortly.
- [136] D.H. was adamant that he believed W.H.'s attitudes and beliefs had changed--that certain beliefs were no longer paramount in their conversations. He also believed that his son was sincere. He believed that jail had an impact on W.H. and his impression was that nothing like this would happen again. He acknowledged that he had been deceived by his son in the past. He agreed that he had never observed W.H. treat O.H. in anyway that was untoward. He never observed anything out of the ordinary to be occurring.

- [137] D.H. testified that he speaks to his son almost daily and has been supporting him since his arrest in May 2020.
- [138] W.H. wrote a document that was referred to as a "manifesto" during the hearing. W.H.'s writings were provided to Dr. Saini in March 2022. D.H. was cross-examined about some of these entries, including W.H.'s statement that he had deceived D.H. "more than he can see." D.H. agreed that W.H. had deceived him in the past. But he believed in his son when W.H. told him that he wanted treatment and was prepared to change.
- [139] Despite the suggestion during cross-examination that W.H. remained "entrenched", in his views about pedophilia, D.H. disagreed. He testified that W.H.'s language had changed. Though he wishes to advocate on behalf of those diagnosed with pedophilia, W.H. also wishes to pursue treatment.

V. EXPERT EVIDENCE

- [140] I turn to a review of the expert evidence presented during the hearing. I have assessed the expert evidence bearing in mind the sage words of Justice Code in *R. v. P.G.*, 2013 ONSC 589, at para. 27. In *P.G.*, Code J. said this:

there are many aspects to this case that do not require the assistance of psychiatric opinion. As Ewaschuk J. put it in *R. v. Moore* (1984), 10 C.C.C. (3d) 306 (Ont. HCJ) in a passage quoted with approval by the Supreme Court of Canada in *R. v. Lyons*:

I accept the submission that the evidence of a psychiatrist, psychologist or criminologist is at times highly speculative and in certain instances a lay person is in as good a position to make a prediction as to future dangerousness. In the final say, the court must be so satisfied and not the expert witness.

- [141] Justice Code's words are apt. I have examined the evidence of Drs. Saini and Riar accordingly. I also agree that there is a fulsome evidentiary record available to me that assists with the various elements to be proven.

A. Dr. Mandeep Singh Saini

- [142] After he was detained, W.H. sought an assessment about criminal responsibility.
- [143] To that end, Dr. Saini met with W.H. and prepared a report dated May 19, 2022. In my view, Dr. Saini's opinion is limited as was the purpose of his evaluation. That is, Dr. Saini was not retained to provide an opinion about future risk. I have thus examined his evidence in the context of the purpose for which it was intended. In my view, Dr. Saini's opinion assists because it provides some background information about W.H.'s perspective about the sexual offending.

[144] Dr. Saini interviewed W.H. three times, totalling three hours and 15 minutes. Dr. Saini referred W.H. to Dr. N. Druhn, a registered psychologist, for personality and psychopathy assessments. I appreciate that Dr. Saini's use of the psychology assessments are limited accordingly. I have not relied on the opinions in Dr. Saini's report about the results of the personality and psychopathy assessments.

[145] Dr. Saini relied on the report to crown counsel and a report from a healthcare worker at the Comox Valley Hospital which was reproduced in Dr. Saini's report as follows:

W.H. told [the healthcare worker] that the sexual activity with his son was consensual and said he was not remorseful at all, because he was coming from a place of love. that he had attended the ER at the time [because] he wanted to get this off his chest and that his family advised him to come to the ER.

[146] Dr. Saini also referred to W.H.'s writings. He summarized W.H.'s writings as follows:

in the letter, [W.H.] referred to pedophilia, his desire to advocate for pedophiles, and said God had made him incestual and gay. Under the title "truth is Justice", he identified with being a pedophile and appealed for due process and the opportunity to explain himself. Later in the writings, [W.H.] referred to the index charges and amongst other statements, he declared that he did not force anal sex on the victim but rather allowed the victim [to] initiate anal sex.

[147] W.H. described details of his adolescence and young adulthood. With respect to O.H., Dr. Saini summarized W.H.'s remarks as follows:

[W.H.] said he had contemplated having sex with his son for considerable time before he actually did for the first time. He disagreed with the assertion, in the charges laid, that his sexual activity started in December 2015 and insisted it started 12 to 18 months later than this. In reference to the pattern of sexual activity with his son, W.H. said, "we had sex every couple of weeks, steady, from the time he was four years old. Prior to that, it was intermittent. I had started to look at child pornography again, to try and satisfy my urges, because I knew that a serious crime would mean serious time...We had between 50 and 60 sexual encounters all together. The majority of these were sexual touching and oral sex (he clarified that his son performed fellatio on him and vice versa). Penetrative sex started when he was four... anal sex happened 20 or 30 times...anal sex was less often than oral sex and touching... I did not push this on him quickly. it was a matter of comfort, for us both. I didn't want to push things. I realize that the Court doesn't see that our relationship could be mutual.

[148] Dr. Saini reported that during his stay at FPH, there was no evidence of any disturbance in mood such as elation, irritability or depression. Throughout the extended interviews, Dr. Saini did not see any evidence of any disorganization in W.H.'s thinking. W.H. did not present with any psychotic-spectrum symptoms, including delusional beliefs or hallucinatory experiences. Rather, "[W.H.'s] sense of entitlement and his belief that he is special and unique, particularly with respect to sexual development, were recurrent themes in our meetings."

- [149] Dr. Saini was of the opinion that W.H. met the DSM-5 criteria for a diagnosis of Pedophilic disorder.
- [150] No one has suggested otherwise and this diagnosis is not challenged in the evidence.
- [151] Dr. Saini stated that a formal diagnosis of a DSM-5 personality disorder could not be made with any reasonable degree of medical certainty. However, Dr. Saini wrote that the interviews he conducted with W.H. and the psychological assessment by Dr. Druhn, highlight his antisocial and narcissistic personality traits, and clinically significant features of psychopathy. On this aspect of Dr. Saini's opinion, I have placed little weight except to note that the PCL-R assessment is confirmatory of Dr. Riar's assessment.
- [152] The parties do not really disagree about the limitations of Dr. Saini's opinion. He was retained for a specific purpose, that is to provide an opinion about criminal responsibility and mental disorder, and conducted the assessment in accordance with this task. I have not placed any weight on Dr. Saini's opinions about risk or risk management.
- [153] I agree with the Crown's submission, however, that Dr. Saini's evidence does demonstrate a consistent articulation of W.H.'s beliefs about pedophilia and that W.H. repeated to Dr. Saini what could be characterized as a crusade to legalize pedophilia. In his discussions with Dr. Saini about this belief system, W.H. made clear that he understood it was legally wrong but not morally wrong. W.H. submitted that this point is one that mattered because it demonstrated W.H.'s ability to abide by court ordered conditions. He demonstrated that since "he has been caught" he has not offended.
- [154] I would add to this submission a disturbing point. I have found that W.H. took steps to hide his conduct after he had disclosed his pedophilic thoughts to those close to him. The evidence establishes that he was sexually attracted to O.H. when O.H. was very young. He took some steps to control his sexual urges, including taking steps to move out of the residence where O.H. lived. However, he gave in to his urges when he learned that the threat of his brother's "outing" had died with him. His change of heart, after seemingly acknowledging his threat to O.H., is disturbing.
- [155] Dr. Saini's opinion about W.H.'s presentation bears repeating and I accept Dr. Saini's opinion on this point. Dr. Saini testified that what stood out for him in the interviews was the sense of importance W.H. had and his disregard for the impact of his actions on the victim. He also testified that W.H. made clear that W.H. had initiated the assessment because he wanted to challenge the laws respecting pedophilia and that this was a "platform" for him. Dr. Saini reported that W.H. spoke openly about his offending and displayed no emotion nor empathy with respect to the harm he had caused to O.H.

B. Dr. Kulwant Riar

[156] Dr. Riar testified at the hearing. He was qualified to provide opinion evidence in the diagnosis of mental health disorders including evaluation and treatment of those with mental health disorders; forensic risk assessment, the prediction and management of individuals; identification of the elements of the individuals' past sexual behaviour and risk factors; and, treatment and interventions to manage the risk while in custody and in the community.

[157] Dr. Riar prepared a report dated May 3, 2023. At the outset of his report, Dr. Riar conceded that it is pertinent to conduct an interview of the individual and in this case, W.H. had declined to participate in the assessment. Dr. Riar also noted that there was a paucity of collateral information, especially relating to W.H.'s early life. Dr. Riar stated however, that there was enough information to form an opinion, especially because of the three police interviews he observed.

[158] In his report, Dr. Riar set out his conclusions. I have reproduced the entirety of this portion of his report because there was significant cross-examination about his conclusions. In the report, Dr. Riar set out his conclusions as follows:

In my view, [W.H.] has narcissistic personality disorder. This personality disorder is defined as a pervasive pattern of grandiosity (in fantasy or behaviour), the need for admiration and lack of empathy, beginning by early adulthood and present in a variety of contexts. There are nine different contexts. To qualify for the disorder, one needs five. In W.H.'s case, he has six to seven very strong traits and two to three somewhat milder. I believe his narcissistic personality disorder is either an aggravating factor in his beliefs regarding pedophilia and incest or these beliefs are the product of his narcissistic personality disorder.

In addition, he has pedophilic disorder, non-exclusive type where he is not only attracted to children sexually but also adults. His pedophilic interests seemed to be limited to incest, at least with the present knowledge about him. He also has marijuana use disorder, most likely to a moderate severity.

As far as treatment is concerned, ideally, he needs treatment for all of his conditions. Practically, there are two hindrances in treating at least two of his disorders. The first hindrance is that he lacks insight into his narcissistic personality disorder and pedophilic disorder as being problematic in his life. The second hindrance is that both of these disorders are quite difficult to treat, even after having insight and participation by the individual in treatment. At this moment, I consider W.H. as not amenable for treatment. If this changes in the future, then he should be considered for treatment.

The treatment for narcissistic personality disorder is psychotherapy-based treatment, which can be lengthy and there are no real methods to predict that it could be helpful. The treatment for pedophilia is a multipronged treatment. It consists of psychotherapy, medical treatment (antiandrogen medication and most importantly, monitoring of the individual. He should engage in psychotherapy preferably initial in a group treatment program for pedophilia, supplemented and followed by individual psychotherapy.

Group treatment is time-limited treatment, but individual psychotherapy can be extended over a long period of time. The duration is determined by the treating therapist, depending upon the benefit of the treatment. In case the person has benefitted from treatment to a point of having sufficient control to curb their sexual impulses and behaviours, then consideration for discontinuation of psychotherapy is warranted. On the other if there is no benefit, then it can be discontinued too and should be replaced by having close monitoring and external control on the person to keep community at large safe.

At this moment, as mentioned earlier, [W.H.] has no insight or motivation to stop his pedophilic behaviours or seek treatment. If he is released in the community without treatment, he should be monitored closely about his whereabouts and associations, and he should be ordered not to be in contact with children under the age of sixteen.

As far as treatment of cannabis use disorder, again, he has to agree to curb his use of cannabis and can go through counselling or a self-help group. Although in my view the use of cannabis did not have much bearing on his attitudes, sexual attraction toward his son and related-behaviours, it most likely was an aggravating factor.

As far as his risk of future offending is concerned, although the sexual risk assessment scale shows a low moderate risk of him offending in the future, my professional judgement guides me to put his risk at rather high. If [W.H.] has the opportunity in the future to be with young children, including his own children or children of people he knows, it is very likely that he will groom them, which would likely lead him to acting against them sexually. To avoid this scenario, it is paramount that he should be kept away from young people, especially under the age of sixteen, so that he does not have the opportunity to act against them. His risk of offending violently determined to be moderate by level of his psychopathy but in my view chances of him committing a violent crime randomly is low but there are higher chances of its happening in pursuit or commission of a sex crime.

[Emphasis added.]

[159] It is useful to comment at the outset on Dr. Riar's evidence about individuals who have sexual thoughts about children but do not act on those thoughts. He testified that he has patients who have sexually disordered thoughts about children but have not acted on those thoughts. He clarified that people who "cross the line" are diagnosed as having pedophilic disorder.

- [160] Despite extensive cross-examination on this point, Dr. Riar maintained that W.H. has acted on his pedophilic thoughts about children and thus is not considered in the same category as those who have never acted on their sexually disordered thoughts. I accept Dr. Riar's evidence that this distinction is relevant to my assessment.
- [161] Dr. Riar provided his diagnosis of narcissism for W.H. and agreed that narcissism is ego-syntonic in nature. That is, the person accepts who they are and finds fault in the outside world and values. Dr. Riar testified that this was evident during W.H.'s police interview. His impression was that W.H. acknowledged his offending but that there was no embarrassment or shame--that he appeared proud and celebratory of his actions.
- [162] Dr. Riar testified that W.H. showed a lack of understanding of the harm caused to O.H. He commented that W.H. stated, "amazing child, sex, everything involved" without acknowledging the harm to O.H. Indeed, Dr. Riar agreed this was ego-syntonic--seeing nothing wrong. He was trying to impress people that there was nothing wrong with the conduct--the grandiosity of it. At the bail hearing, after the prosecutor described in detail the [redacted] video, W.H. uttered, "he was fine." This comment was made even after W.H.'s 10 or 12 sessions with Dr. Ferguson--indicative of less insight than that submitted by W.H. during the hearing. I accept Dr. Riar's assessment about "less insight."
- [163] The PCL-R and Static 2002-R assessments were described. Dr. Riar scored W.H. on the PCL-R assessment in the "late twenties". He scored W.H. at the low-moderate risk of offending in the future using the Static 2002-R assessment instrument.
- [164] In his report, and confirmed in his testimony, Dr. Riar concluded that W.H. had a narcissistic personality disorder and pedophilic disorder. He stated that both disorders are notoriously difficult to treat. He was of the view that W.H. lacked insight into his disorders and he thus had no motivation to stop his conduct or seek treatment. As a result, clinically, Dr. Riar assessed W.H.'s risk as "rather high."
- [165] Dr. Riar was concerned about treatability in light of W.H.'s statement that he wanted to fight for pedophilia. When asked about W.H.'s advocacy of pedophilia and incest, Dr. Riar testified that he had seen lots of people but he had not seen this psychopathology before, describing it as one of the rarest ones.
- [166] He agreed that prediction of risk was hard. He testified about mitigating risk and having to take care of aggravating and causative factors. Dr. Riar was of the opinion that W.H. was not taking responsibility at all for his sexual offending against O.H. He was cross-examined extensively on this point, particularly because W.H. had pleaded guilty to all of the charges and had confessed to the police about what he had done to O.H.
- [167] Dr. Riar agreed that legally, the guilty plea was an expression of remorse but "morally - I don't know."

- [168] He was cross-examined about the fact that he had not interviewed W.H. However, Dr. Riar stated that there was enough information available to make a diagnosis. He testified that although it was important to conduct an interview to understand W.H.'s present mental state, he believed he had enough information from the lengthy interviews and W.H.'s admissions.
- [169] Also with respect to risk, Dr. Riar was concerned about W.H.'s evidence regarding S.S. and the imaginary "Sebastian" (the child W.H. said he hoped to conceive with S.S.) The Crown submitted that Dr. Riar's evidence on this point was a manifestation of dangerousness. W.H. told Cst. Brennen that he was keen to get S.S. pregnant so they could have "sexy babies" noting as well that S.S. had told W.H. he could "fuck their unborn child." I agree with Dr. Riar's opinion that W.H.'s comments here are concerning.
- [170] Dr. Riar was cross-examined about the realities of aging--that is, the body slows down and people get wiser. Dr. Riar agreed that aging has some mitigating factors but the interest does not go away. Dr. Riar agreed that W.H.'s diagnosis of pedophilia appeared to be limited to incest and that the literature indicated incest-related pedophilia was in the lowest category for reoffending.
- [171] Dr. Riar was skeptical about W.H.'s efforts at "treatment." Dr. Riar cautioned that W.H.'s motives were complex. For example, he attended at the emergency room in May 2020, after his arrest, because his family wanted him to go. Dr. Riar questioned whether these steps were genuine. He was of the view that the evidentiary record revealed W.H.'s manipulation and impression management at times. Dr. Riar questioned W.H.'s sincerity in going to the emergency room and consulting with Dr. Ferguson. I accept Dr. Riar's opinion about W.H.'s sincerity about treatment is complex.
- [172] W.H. expressly justified his conduct with his son, describing it as a very loving relationship though Dr. Riar agreed that W.H. had not stated that he was going to continue to "offend" against his son.
- [173] Dr. Riar was pressed about his opinion that W.H. was not amenable to treatment, in part because he believed there was nothing wrong with his actions.
- [174] Dr. Riar agreed during cross-examination that the following factors indicated W.H. could be managed in the community in the sense that it had to be "hand on shoulder" type of management:
- a) Emotional and financial support from his family;
 - b) Though guarded, the fact of the guilty plea, though still questioning whether a moral admission had also been made;
 - c) Steps to go to the emergency room and attend 10 or 12 sessions with Dr. Ferguson; and

- d) Adherence to bail conditions with no evidence of offending during the year following his arrest.

[175] Again, Dr. Riar qualified his evidence regarding each of these factors.

[176] W.H. challenged Dr. Riar's opinion about risk submitting that his opinion about risk was, in a sense, inconsistent with the facts established on this evidentiary record. W.H. took the position that the evidentiary record established certain facts and once those facts were taken into account, Dr. Riar's opinion about risk had to be assessed accordingly. These facts include:

- a) W.H. was a first-time offender without any criminal associations or antisocial conduct otherwise displayed;
- b) W.H. had confessed to the crimes and Dr. Riar agreed that those who confess fall into lower category of risk than those who deny;
- c) W.H. had been released on bail and had committed no offences during his time on bail;
- d) W.H. was diagnosed with pedophilic disorder nonexclusive to male and female and limited to incest and that this category of offenders fall into the lowest rate of recidivism;
- e) Pursuant to the Static 2002-R assessment, W.H. was scored in the low to moderate risk of reoffending;
- f) W.H.'s body will change around the age of forty placing him at a lower risk to reoffend; and
- g) W.H. had not offended against other children.

[177] W.H. submitted that despite agreeing with the above factors, Dr. Riar maintained his opinion that W.H.'s risk was "rather high." W.H. submitted that the court is not bound to accept Dr. Riar's opinion and that the court is obliged to reach its own conclusion of risk based on the totality of the evidence.

[178] W.H. submitted that Dr. Riar provided an opinion at times without any evidentiary foundation to support it, for example the conclusion that if W.H. was around other children, he would likely groom them and sexually offend against them.

[179] I do not agree that W.H.'s offending can be classified as narrowly as suggested by W.H. I accept that W.H. did not plead guilty to possession of child pornography. But his use of the CSE Material (in addition to making and distributing the CSE Material with O.H.) is a factor I have considered in my assessment of dangerousness.

- [180] With respect to the diagnosis of narcissistic personality disorder, W.H. cross-examined Dr. Riar on the use of the PCL-R assessment. Ultimately, W.H. submitted that this diagnosis should cause the Court to pause, in part because Dr. Riar did not meet with W.H. and conceded that there was a paucity of collateral information. Dr. Riar also agreed that W.H.'s lack of sympathy, insight, embarrassment understanding empathy--may not be solely associated to personality disorder but rather could also be indicative of pedophilic disorder.
- [181] W.H. submitted that Dr. Riar's opinion was further undermined by the diagnosis of cannabis use disorder, stating that there was zero evidence that W.H. committed these offences while under the influence of cannabis.
- [182] Regarding treatment, Dr. Riar was cross-examined about his opinion that W.H. was not amenable to treatment. W.H. questioned how it was that Dr. Riar could reach that opinion considering that it was contrary to the evidentiary record presented. In particular, the evidence supported a finding that W.H. had sought assistance by attending the emergency room and that he had consulted on numerous occasions with a psychologist and while at pre-trial, he had requested access to a psychologist but learned that type of counseling/treatment was not available in the institution.
- [183] Further, W.H. submits that despite Dr. Riar's assumption that he is not amenable to treatment, Dr. Riar did not provide any evidence about whether W.H. could be released into the community. W.H. takes the position that Dr. Riar did not provide any evidence that W.H. could not be released into the community and could be managed in the community. The corrections evidence indicated that the available programming could be completed within a year in the institution and then maintained after W.H. completed his sentence.
- [184] Despite finding W.H. to be high risk, Dr. Riar never stated that W.H. could not be released. Again, W.H. submits that he is a first-time offender and that the period of time when he started offending was when he was 25 or 26 years old. He is at the lowest risk to reoffend based on the fact the offences are incest-related. Dr. Riar's failure to consider the fact that W.H. had not reoffended while on bail, that he had demonstrated no sexual deviance or inappropriate behaviour since his arrest.
- [185] In sum, W.H. takes the position that Dr. Riar's opinion of "rather high risk" should be given little weight. The underlying assumptions on which Dr. Riar rests his opinion are not consistent with the evidence established at this hearing.
- [186] I wish to touch on one topic that was raised several times during Dr. Riar's cross-examination and again in closing submissions. That is, whether W.H. had masturbated to images of O.H. and, if he had, the impact on Dr. Riar's diagnosis. I have not placed any weight on this evidence. That is because I was invited to speculate about what W.H. may have done with the pornographic images of O.H. I simply do not know on the record before me. I understand Dr. Riar's point. That is, if it was established that W.H. had masturbated to the images then this conduct would be worrisome. However, that is not the evidence before me and I decline to draw an inference that W.H. had done so.

[187] I have found that much of Dr. Riar's opinion is based on the evidentiary record as presented. I accept Dr. Riar's opinion about narcissistic personality disorder and pedophilia. I also find, as did Dr. Riar, that there is ample evidence to support the opinion that W.H. is not amenable to treatment. Particularly considering his statements over time. I make this finding with one caveat that I will address shortly.

C. Evidence of Corrections Witnesses

[188] Ms. Plumpton and Ms. McKenzie both work in the CSC and testified about programming. There was some overlap in their testimony and I will focus simply on the program streams described.

[189] Ms. Plumpton provided evidence about treatment programs available within the correctional institutions and while on parole. In particular, she described the initial assessment performed at intake at the Regional Reception and Assessment Centre ("RRAC"). The following are then offered to the offender:

- a) Ten-session primer (either at RRAC or another institution);
- b) Regular core programming is divided into medium intensity (50 sessions) and high intensity (100 sessions) groups;
- c) Once core programming is completed, the offender is moved into a 12-session maintenance program;
- d) In the institution, an offender can take the primer and the core programming only once during their sentence. An offender can take the maintenance program as many times as they need it; and
- e) The community maintenance program runs for 12 sessions.

[190] Ms. Plumpton testified that the resources available in the community are finite. She stated that reporting frequency can be adjusted, there is no "hand on shoulder" monitoring.

VI. ANALYSIS

A. Dangerous Offender Designation

1. Serious Personal Injury Offence

[191] The first step in determining whether W.H. meets the criteria for designation as a dangerous offender is to consider whether he has committed a "serious personal injury offence." It is not disputed that sexual assault meets the statutory requirement.

[192] I find W.H. has committed a serious personal injury offence.

2. Criteria pursuant to s. 753(1)

- [193] The next step is to determine, under s. 753(1), whether W.H. "constitutes a threat to the life, safety or physical or mental well-being of other persons" based on evidence establishing one of four stipulated criteria. Here, the Crown relies on the failure to control sexual impulses and a likelihood of causing future harm pursuant to s. 753(1)(b).
- [194] To obtain a designation of dangerousness resulting from sexual behaviour under s. 753(1)(b), the Crown must establish that W.H. has shown a failure to control his sexual impulses and a likelihood of causing injury, pain or other evil to other persons through his failure in the future to control his sexual impulses (*R. v. Currie*, [1997] 2 SCR 260, 1997 CanLII 347 (S.C.C.) at para. 20).
- [195] As made in clear in *Awasis*, integral to the designation stage is an assessment of future risk. As the SCC confirmed in *Boutilier*, W.H. cannot be designated as dangerous unless he is shown to present a high likelihood of harmful recidivism and that his violent conduct is intractable. Accordingly, I must conduct a prospective assessment of dangerousness--which necessarily involves the consideration of future treatment prospects--before designating W.H. as dangerous: *Boutilier* at paras. 45-46. This requirement applies with equal force to designations under both ss. 753(1)(a) and (b): *R. v. Skookum*, 2018 YKCA 2 at para. 57.
- [196] As stated earlier, the Ontario Court of Appeal in *Lynch* set out a useful framework setting out the Crown's burden when pursuing a dangerous offender designation under s. 753(1)(b). As stated in *Boutilier*, the SCC dealt with a dangerous offender designation under s. 753(1)(a) (i) of the Criminal Code, which expressly speaks of the need for a "pattern of repetitive behaviour". The Court affirmed, however, that all cases under s. 753(1) require that the offender engaged in a pattern of dangerous conduct. The Court noted that s. 753(1)(b) required "in addition to evidence of a pattern of past conduct, an independent assessment of future risk": at para. 38.
- [197] In accordance with *Lynch* and *Boutilier*, to support a designation under s. 753(1)(b), after proving that the offender has been convicted of an offence under ss. 271, 272 or 273 of the Criminal Code, the Crown must prove, beyond a reasonable doubt, both a pattern of offending in the past showing a failure to control sexual impulses (which can be found in the circumstances of the predicate offence or the offender's "conduct in any sexual matter"), and a prospective risk of harm to others through a failure to control sexual impulses.
3. Pattern of offending showing a failure to control sexual impulses
- [198] I deal first with the Crown's obligation to prove, beyond a reasonable doubt a pattern of offending in the past showing a failure to control sexual impulses. This obligation can be based in the circumstances of the predicate offence of W.H.'s conduct in any sexual matter.

[199] In many of the reported cases of dangerous offender designations under s. 753(1)(b) or its equivalent, there was no dispute about whether the offender's past conduct reflected a failure to control sexual impulses, and there was clear evidence of a pattern of such conduct. For example, in *Currie*, it was undisputed that the offender, who was a pedophile and hebephile, with a long history of sexual offences, some of which were extremely violent, engaged in sexually impulsive criminal behaviour.

[200] I turn to examine the evidentiary record on the issue of whether the Crown has proven W.H.'s past conduct establishes a failure to control sexual impulses and a that there was clear evidence of a pattern of such conduct.

[201] W.H. admitted that his offending against O.H. commenced in December 2016 (when O.H. was three years old) and continued up to the days before his arrest in May 2020.

[202] The evidentiary record on this point is overwhelming that W.H. failed to control his sexual impulses. The evidence establishes the following:

- a) W.H. knew he was sexually attracted to O.H. and indeed stated that he had taken some steps to try and control himself from acting on his desires, including taking some preliminary steps to leave the residence where O.H. was living with his mother;
- b) W.H. relinquished his preliminary plan to leave O.H. when he learned that his brother had died. This evidence comes from W.H.'s statements to the police and others about his intentions about living with O.H. It was difficult to ascertain whether W.H. thought he should leave the residence to protect O.H. so that W.H. would not give in to his impulses or to protect O.H. (and himself) from a child protection investigation. Whatever W.H.'s intention, he gave into his sexual impulses;
- c) There is some evidence that W.H.'s sexual offending commenced before his brother died. Again, this evidence comes from W.H.'s police statement and it is equivocal. I have thus found that based on the totality of the evidence presented, W.H.'s sexual offending commenced around the time of his brother's death and certainly by December 2016;
- d) W.H. said he groomed O.H. "to a T." This much was evident when considering some aspects of the offending. For example, W.H. stated that he showed "child pornography" to O.H. so that O.H. could see that others were engaged in the same type of sexual conduct as O.H. and his father. O.H. described W.H. anally penetrating him at night time so it did not hurt as much. O.H. told Cst. MacQuarrie the night time events happened when he was three. O.H. revealed that W.H. told him "it was a secret." O.H. did not tell anyone about what his father was doing to him; and
- e) W.H. memorialized his sexual offending to his son by recording it. W.H. then distributed it on the internet for anyone to view. Justice L'Heureux-Dube, in separate reasons written in *R. v. Sharpe*, 2001 SCC 2, noted that "pornography that depicts real children is particularly noxious because it creates a permanent record of abuse and exploitation." For the majority, McLachlin C.J. addressed the harm experienced by a child whose sexual abuse is recorded,

stating at para. 92, "the child must live in the years that follow with the knowledge that the degrading photo or film may still exist, and may at any moment be being watched and enjoyed by someone." W.H. does not dispute that the images tendered at this hearing continue to be available on the Internet. The ongoing abuse and exploitation of O.H. thus carries on.

[203] In sum, the Crown has proven beyond a reasonable doubt W.H.'s past conduct establishes a failure to control sexual impulses and that there was clear evidence of a pattern of such conduct. The sexual abuse of O.H. commenced in December 2016 and occurred with significant frequency until May 2020, from when he was three years of age to the time he was just turning seven years old. The conduct was pervasive and repeated, based on W.H.'s admission, several times per month. It is clear from the police interviews and statements to others that W.H. knew he was a pedophile and took no steps to actually protect his son. His statement that he was about to leave O.H. when he learned his brother died demonstrates, in my view, how cunning W.H. can be.

[204] I would pause to address W.H.'s lack of criminal record at the time of his arrest in May 2020. I will deal with the impact of the lack of record later in the reasons.

[205] In my view, W.H.'s absence of criminal record has little significance in the circumstances presented here--that is, the first offence occurred in December 2016 and the offending carried on, unabated, for three and half years (*R. v. R.M.*, 2019 BCCA 409, at para. 23). As noted by Clayton Ruby et al, *Sentencing*, 9th ed. At s. 8.16:

The absence of a criminal record is a mitigating factor on sentencing in that it reinforces the argument that the accused is of good character and reputation. Such a consideration is appropriate to an isolated criminal act or one that is committed on the spur of the moment in the context of an otherwise blameless record.

[206] As noted, where the offending is repeated and occurs over a lengthy period of time, the lack of criminal record loses much of its force (Ruby at s. 8.17).

[207] It is astonishing that W.H. was able to offend against O.H. uninterrupted for three-and-a-half years. O.H. abided by his father's instruction to keep things a secret. At the time, W.H. appeared to be W.H.'s only caregiver and the one person O.H. should have been able to trust. W.H. abused that trust--over and over again.

4. Likelihood of harm to others through failure to control sexual impulses

[208] The real issue on this dangerous offender application is whether the Crown has proven beyond a reasonable doubt that W.H., by his conduct in relation to the sexual offending against O.H., has shown a likelihood of causing injury, pain or other evil to other persons through his failure in the future to control his sexual impulses. This criterion is future-oriented and takes into account W.H.'s future treatment prospects.

- [209] In Boutilier, the Court repeatedly cautioned that to ground a finding of dangerousness, the Crown has to establish beyond a reasonable doubt a high likelihood of harmful recidivism [emphasis added]: at paras. 26-27, and 45-46.
- [210] In my view, Boutilier establishes that the term "likelihood" in the dangerous offender context is a very high standard that at a minimum should be equated with probability.
- [211] Boutilier also made clear that the Crown must establish that W.H.'s behaviour is "intractable." Intractable conduct is behaviour that the offender is unable to surmount: Boutilier at para. 27. Rather than merely looking at whether the offender's conduct has been intractable in the past, the sentencing judge must assess the matter prospectively and be satisfied that the conduct will be intractable into the future. As explained in Lyons at para. 43, the Court must be satisfied that the pattern of conduct is "substantially or pathologically intractable."
- [212] W.H. contends that the Court consider his past conduct, his time while on bail and the evidence demonstrating a willingness to engage with treatment to support his submission that the Crown has not established that his behaviour is intractable.
- [213] To that end, W.H. relies on the fact that he does not have access to the one person he offended against, that his diagnosis of pedophilia is restricted to incest, that he abided by his release conditions for over a year, as well as his consistently strong performance while incarcerated.
- [214] Rather than merely looking at whether W.H.'s conduct has been intractable in the past, I must assess the matter prospectively and be satisfied that the conduct will be intractable into the future.
- [215] Bearing in mind the burden on the Crown, I must consider whether W.H. is a future threat after a prospective assessment of risk including future treatment prospects.
- [216] I turn to Dr. Riar's opinion.
- [217] Dr. Riar diagnosed W.H. with a narcissistic personality disorder and with pedophilic disorder, non-exclusive type. Dr. Riar noted that W.H.'s pedophilic interests seemed to be limited to incest. Dr. Riar also diagnosed W.H. with cannabis use disorder. I agree with W.H. on this point that there is not a demonstrated correlation between the offending conduct and use of marijuana and as such, I have not placed any weight on this aspect of Dr. Riar's opinion.
- [218] Dr. Riar was cross-examined at length about his diagnosis regarding narcissistic personality disorder, pedophilia and risk. In particular, he was examined about the accuracy of the assessments performed, including the PCL-R and Static 2002-R assessments.
- [219] Dr. Riar scored W.H. in the "late-twenties" on the PCL-R assessment. His view was that this score placed W.H. in the category of "moderate risk of offending violently in the future."

[220] With respect to the Static 2002-R assessment, Dr. Riar noted that this scale depended on historical static factors and there was little information available for W.H. Nonetheless, his score indicated that he was rather at the low moderate risk of offending in the future.

[221] Dr. Riar made clear that he gave W.H. the benefit where information was missing. During cross-examination, he noted that W.H.'s score would only have gone up if he received the missing information.

[222] With respect to his risk of future offending, Dr. Riar's professional judgment "guides me to put his risk at rather high." Dr. Riar reached this conclusion even though the sexual risk assessment scale showed a low moderate risk of him offending in the future. Dr. Riar was of the view that if W.H. had the opportunity in the future to be with young children, including his own children or children of people he knows, it is very likely that he will groom them, which would likely lead him to act against them sexually. On this point, Dr. Riar wrote:

to avoid [sexual offending against children], it is paramount that he should be kept away from young people, especially under the age of sixteen, so that he does not have the opportunity to act against them. His risk of offending violently determined to be moderate by level of his psychopathy but in my view chances of him committing a violent crime randomly is low but there are higher chances of its happening in pursuit or commission of a sex crime.

[223] I address two aspects of Dr. Riar's opinion that find support in the evidentiary record.

[224] First, I agree with Dr. Riar's characterization of W.H. as depicted in the lengthy police interviews, both in May 2020 and June 2021. I agree that W.H. was glib, articulate, facile and displayed superficial charm. He was not embarrassed or ashamed of what he was revealing and added details to some of his experiences with others when it came to his offending against O.H., including the use of CSE Material in an effort to "normalize" what W.H. was doing to O.H. I agree that W.H. was manipulative at times. I also agree that, at least during the interviews, he seemed to display little or no remorse or guilt for what he had done. It is concerning that he wanted to advocate for pedophilia and tried on multiple occasions to justify what he had done to O.H. For example, he suggested that the police were failing in their obligation to pursue those who were violent with children and not people like him who only loved O.H. I agree that W.H., during the police interviews, did not have any insight into the harm he was causing to O.H., both physically and psychologically. This was not a private matter between W.H. and O.H. as W.H. tried to depict it. Rather, W.H. wanted to share the abuse on the internet.

[225] Second, and despite his statement that he knew he was a pedophile from his teenage years, W.H. maintains a lack of insight into this diagnosis that is extremely troubling. I find that W.H. historically demonstrated a total lack of insight into his diagnosis. His desire to advocate for pedophiles ignores the other half of the equation. That is the child. The child who has no power and no ability to consent to the acts performed. W.H.'s distribution of the videos of O.H. onto the internet demonstrate W.H.'s complete and total disregard for his

son. The conduct was always solely about W.H.'s sexual impulses and desires. W.H. demonstrated a wanton disregard for the best interests of his son. For W.H. to suggest that O.H. somehow consented reveals the insidious nature of W.H.'s offending against his son.

- [226] I have considered D.H.'s testimony on this point of W.H.'s views of his offending. That is, D.H.'s impression is that W.H.'s views of pedophilia have changed. I am not so sure. D.H. testified that he was careful how he communicated with his son for fear of "setting him off." D.H. was trying to maintain communication with his son and made clear in his testimony that he avoided discussions that could cause W.H. to withdraw from him. I appreciate D.H.'s candour in this regard. However, it has caused me to assess his evidence about W.H.'s current views of pedophilia with caution. D.H. did not press W.H. on these important points. I also conclude that D.H. agreed during cross-examination that W.H. continues to want to advocate for pedophilia and legislative change.
- [227] The evidence about Dr. Ferguson and W.H.'s termination of these sessions is similarly troubling. D.H. was paying for the sessions but not surprisingly, did not speak to Dr. Ferguson about W.H.'s progress. D.H. stated it would have been improper for Dr. Ferguson to have spoken to him about the sessions. However, D.H.'s evidence was that W.H. had terminated this relationship because it was not working out. D.H. did not press W.H. on his decision to stop attending. W.H. told D.H. that the sessions were not helping him and he did not want to continue. D.H. said that explanation from W.H. was "good enough for him."
- [228] At one point during submissions, W.H. suggested that the system did not provide adequate resources for supporting those diagnosed with pedophilia. The problem with this submission is that W.H. had the great fortune of being fully resourced. His father had paid him an allowance all of his adult life, ranging from \$5,000-\$10,000 per month. He paid for Dr. Ferguson's treatment. The point was that W.H. was not actively engaged in treatment while he was in the community demonstrates that W.H. continues to lack insight into his diagnosis.
- [229] I accept D.H.'s testimony that W.H. was not attending treatment at the time of his arrest in June 2021. I have found that though W.H. attended some sessions with Dr. Ferguson, W.H. had terminated the relationship. Despite having adequate resources from his father, he chose not to pursue treatment. His complaints about the lack of resources are viewed in that context.
- [230] Dr. Riar identified the relevant risk factors and considered future risk in light of W.H.'s diagnosis. Dr. Riar believed that his narcissistic personality disorder was foundational and is relevant to W.H.'s risk and future treatment and management considerations.

- [231] Dr. Riar noted two hindrances in treating the narcissistic personality disorder and pedophilia. The first, he said, was his lack of insight into his narcissistic personality disorder and pedophilic disorder as being problematic in his life. The second hindrance is that both of these disorders are quite difficult to treat, even after having insight and participation by the individual in treatment.
- [232] I address both.
- [233] Dr. Riar found that W.H. was not amenable for treatment. I agree with W.H.'s submission that W.H. had indicated a willingness to engage in treatment when he consulted with Dr. Ferguson. I agree however, that the only conclusion to be drawn from this fact is that W.H. attended, quit and then did not pursue treatment when he had the resources and ability to do so. I have found, nonetheless, that there is some evidence that W.H. may consider engaging in treatment in the future.
- [234] Though W.H. professes that he now understands the harm he caused to O.H., I am not so sure. W.H.'s statement to Cst. Brennen and to others establishes that he is cunning. He has said things in the past to those in authority when he wants to manipulate a particular end. For example, he told Judge Wolfe that he was seeing a doctor. According to his father's evidence, he was not. W.H. disclosed his attendance with Dr. Ferguson when he thought it would benefit him. However, I am prepared to find that the fact of his attendance establishes at least minimally, some insight that he now accepts he requires professional treatment--for both disorders.
- [235] With respect to treatment options, I accept Dr. Riar's opinion that both disorders are difficult to treat, even with insight and participation in treatment. The treatment for narcissistic personality disorder is psychotherapy-based treatment, which can be lengthy and whether it would assist is uncertain. The treatment for pedophilia is a multipronged treatment consisting of psychotherapy, medical treatment (antiandrogen medication) and monitoring.
- [236] Of some significance is the amount of time required for treatment to have any impact. The undisputed evidence before me is that treatment can be extended over a long period of time. The psychotherapy could commence as group treatment supplemented by individual psychotherapy. Close monitoring was recommended as well.
- [237] I accept Dr. Riar's opinion at the time it was made that W.H. was not amenable to further treatment. The Court now has the benefit of D.H.'s evidence on this point. Though I have found D.H.'s evidence has significant limitations, I am of the view that I must consider it in light of the issue of intractability.

- [238] I have considered the evidence about eventual control of risk in the community. W.H. has expressed, through his counsel and to the Court, some, albeit limited, insight into the harm he has caused and a willingness to make change. I am unable to determine based on the evidence presented whether this willingness to make change related to himself or the laws that stop him.
- [239] The dismal prospects for eventual control of risk as expressed by Dr. Riar cause me incredible pause about this aspect of the analysis.
- [240] When I consider the Crown's burden at this stage and the SCC's comments in Boutilier, I have determined that a likelihood of harmful recidivism and intractability have not been established to the extent necessary. I come to that conclusion based on the totality of the evidence. However, I mention three primary points here.
- [241] First, the jurisprudence is clear that a dangerous offender designation is reserved for a relatively small number of offenders, most of whom have committed a large number of very serious offences and whose actions show strong evidence of a pattern that is likely to continue. I accept that the dangerous offender legislation is designed to target and capture those clustered at the extreme end.
- [242] Second, as I examine this section of the Criminal Code, I have considered that on the evidence before me, W.H. was released on bail conditions, for over a year, and was able to live without committing offences. Though I have great trepidation about his performance with treatment, I have placed some weight on the fact that he attended multiple sessions with a psychologist following his arrest.
- [243] Third, I agree that W.H. has now spent considerable time in custody and his time in this pre-trial facility had been unremarkable. I appreciate there was some evidence about giving up lucrative jobs while at the institution but I have not found that evidence assisted the Crown with its burden.
- [244] Dr. Riar's opinion that W.H. was not amenable to treatment must be viewed in context. That is, Dr. Riar wrote his opinion on May 3, 2023. Dr. Riar agreed that it was good news if W.H. was now amenable to treatment. Though I have not concluded W.H. has the eagerness I was urged to find, I am satisfied that there is some willingness to participate in programming. He has spent almost three years in pre-trial custody. D.H. testified that this has been a time of reflection for W.H. He had not ever spent time in custody and these past years in jail were difficult for him.
- [245] As I have said, the significance of the absence of a criminal record is diminished in light of the years of W.H.'s abuse to O.H. However, the fact that W.H. has not yet participated in correctional programming is a factor that I have considered. This is not a case where W.H. has attended correctional programming and failed by re-offending. This will be W.H.'s first attempt at the core correctional programming for sexual offenders. Any willingness on his part to engage with the teachings offers some hope for his future.

- [246] Overall, looking at both the facts and the psychiatric evidence on the record before me, I do not find beyond a reasonable doubt that there is a high likelihood that W.H. will cause injury, pain or other evil to other persons through failure in the future to control his sexual impulses. Nor can I find that his behaviour is intractable. Based on the evidence before me, the Crown has not established that W.H. poses the "tremendous risk" required before the designation of dangerousness must be imposed.
- [247] I come to this conclusion with some trepidation. The Crown advanced a very strong submission that the Court should simply listen to what W.H. has said all these years, from the outset. That is, that: he loves his son and will love him for the rest of his life, this isn't the end of the fight, he will fight all the way to this gets legal, he does not care about the rest of the process, and has been loving him for a long time.
- [248] These statements, however, were made early on in this proceeding. Though aspects of W.H.'s views about pedophilia remain, the Court has also been presented with some evidence that W.H.'s views have subsided, somewhat. The Crown submits that there is no cogent evidence that there is a reasonable expectation that he will rise above his urges. However, the legislation makes clear that this is not W.H.'s burden to bear when it comes to the designation of dangerousness.
- [249] Thus, the application to have W.H. designated as a dangerous offender is dismissed. I turn now to the issue of whether W.H. should be designated as a long-term offender.

B. Long-Term Offender Application

- [250] Pursuant to s. 753(5)(a) of the Criminal Code, the Court may treat the dangerous offender application as a long-term offender application, after not finding W.H. to be a dangerous offender.
- [251] Pursuant to s. 753.1(1), a court may impose a long-term offender designation where the Crown establishes three things beyond a reasonable doubt:
- a) It would be appropriate to impose a sentence of two years or more for the predicate offence;
 - b) There is a substantial risk that W.H. will reoffend; and
 - c) There is a reasonable possibility of eventual control of the risk in the community.
- [252] I have no difficulty finding that the Crown has satisfied the statutory criteria beyond a reasonable doubt. I am granting the application that W.H. be declared a long-term offender.
- [253] For the reasons set out shortly, the Court will be imposing a sentence of more than two years for the predicate offence.
- [254] Section 753.1(1)(b) provides that the second prerequisite for finding someone to be a long-term offender is that the court must be satisfied that there is a substantial risk that the offender will re-offend.

- [255] Section 753.1(2) provides one method by which the substantial risk of re-offending may be established. However, a finding under s. 753.1(2) is not in itself a necessary prerequisite to finding someone to be a long-term offender. It is only one means by which the element under s. 753.1(1)(b) may be established.
- [256] In the present case, I am satisfied, without resort to s. 753.1(2), that there is a substantial risk that W.H. will re-offend. The evidence of Dr. Riar, along with the evidence of W.H.'s statements to the police and others, the evidence of his misconduct with O.H., and the evidence of his making and distributing video-recordings of his offences, clearly establishes that there is a substantial risk that he will re-offend.
- [257] However, I also find that the substantial risk may be established by reference to s. 753.1(2). With respect to s. 753.1(2)(a), W.H. has been convicted of one of the listed offences, namely, sexual assault. With respect to s. 753.1(2)(b)(i), I find that W.H. has shown a pattern of repetitive behaviour, of which his offences against O.H. forms a part, that show a likelihood of his causing injury or inflicting psychological damage on other persons. The sexual offences that form part of his offending show a persistent pattern of W.H. having a pedophilic attraction to his young son and then acting on those impulses when O.H. was three years old. In my view, the harm to O.H. was extreme. I do not require a victim impact statement to make that determination. With respect to the potential for severe psychological damage, I can state it no better than Justice Trotter in *R. v. Snowden*, 2023 ONCA 768, where Trotter J.A. stated at paras. 91 and 93:

Canadian criminal law has long recognized the different ways in which a person may cause harm to another. An individual may be the sole cause of another person's harm, a co-perpetrator of that harm, or they may contribute to, or exacerbate, an existing harm.

Applied to the context of child pornography, the initial harm lies in the sexual assault of the infant or child. Added to this is the related harm of recording this abuse. This harm is different in kind, but still an extension of the sexual abuse. Similarly, the sharing of recordings with others furthers or perpetuates the harm caused by the initial recording and underlying abuse. Accessing and possessing child pornography fulfills the objective of the person who shares it or makes it available. Indeed, this market for child pornography, whether for purchase, trade or otherwise, may motivate those who make it available, and in turn, those who create it. Accessing and possessing child pornography may further harm the children depicted in the child pornography where they become aware that their image has been accessed or possessed. Thus, cognizable harm has the potential to extend beyond the initial abuse involved in creating child pornography. It may not be the same type of harm at each stage, but it need not be to remain within the ambit of conduct that inflicts or is likely to inflict severe psychological damage.

- [258] For much the same reasons, I also find that the conditions in s. 753.1(2)(b)(ii) are satisfied. W.H.'s conduct in the sexual matters relating to O.H., when taken together with all the other evidence of his sexual misconduct, show a likelihood of his causing injury, pain or other evil to persons in the future through similar offences.

[259] I agree with Dr. Riar that W.H.'s views about pedophilia and the fact that he acted on those views for many years with his son establish this point.

[260] The final prerequisite for finding that a person is a long-term offender is set out in s. 753.1(1)(c), namely, the court must be satisfied that there is a reasonable possibility of eventual control of the risk in the community. "Satisfied" in this context does not connote a standard of proof beyond a reasonable doubt: *R. v. F.E.D.*, 2007 ONCA 246.

[261] As Justice Southin explained in *R. v. Wormell*, 2005 BCCA 328 at paras. 32-34, there is no burden of proof in the classic sense in the assessment of the future:

The task of the court from beginning to end is to ask itself, "Am I satisfied that there is a reasonable possibility of eventual control of the risk in the community?" If the judge concludes that he or she is not so satisfied then the judge cannot designate the offender a long-term offender.

In my opinion, it is not right to approach this with burden of proof at the back of one's mind. Burden of proof, whether it is proof beyond a reasonable doubt or on a balance of probabilities, directs itself to determining past events.

While on a dangerous offender application the Crown must prove beyond a reasonable doubt past conduct of the accused which it says is relevant, there can be no burden of proof in the classic sense in the assessment of the future.

[262] The court may only find a reasonable possibility of eventual control if it can be effected within the parameters of the appropriate fixed sentence and long-term supervision order. In the words of Justice Newbury in *R. v. B.A.P.*, 2005 BCCA 121 at para. 30:

In the case at bar, I would emphasize the word "reasonable" as a qualifier of "possibility" and the phrase "within the terms of the long-term offender provisions". Again, the Crown is not required to prove absolute intractability to meet its burden. If, as in this case, there is a "possibility" of future treatment, but it is unlikely that such treatment or control can be effected within the parameters of the appropriate fixed sentence and supervisory conditions in the community, a long-term offender designation is not appropriate.

[263] No one can predict the future with certainty. However, in the present case there is evidence from which I am satisfied that there is a reasonable possibility of controlling W.H.'s risk of re-offending within the parameters of a long-term supervision order.

[264] The evidence before me, including that of Dr. Riar, emphasizes a substantial risk that W.H. will reoffend and that his risk involves violent reoffending. However, I have concluded that there is a reasonable possibility of eventual control of the risk in the community. I am also satisfied that a long-term sentencing order ("LTSO") will adequately protect the public against the commission of a serious personal injury offence.

- [265] I have based this finding on the totality of the evidence presented. I accept that it will not be common for a first-time offender to be designated a long-term offender as the designation will only be appropriate in exceptional cases: *R. v. C.R.G.*, 2019 BCCA 463, at paras. 21 and 26.
- [266] I have found that this is an exceptional case. The features of this case take it beyond the ordinary. In particular, the factors I consider to render it exceptional include O.H.'s young age, from the time the offending commenced until it concluded; the pervasiveness of the conduct over three years; that W.H. at the time of the offences, was O.H.'s sole caregiver and O.H. should have been protected not exploited; video-recording the sexual assaults and then distributing them on the internet. W.H.'s statements that O.H. was "consenting", was somehow complicit and that W.H. knew what he was doing was wrong. He stated as much when he tried to explain why he intended to leave O.H.
- [267] Some of the other features that I highlight include the following:
- a) W.H. is an intelligent person. He has the ability to participate in correctional programming and make use of the concepts he learns. He undoubtedly has the ability to understand and apply the teachings;
 - b) W.H. has a view of pedophilia that encapsulates only his perspective of the world and demonstrates an absolute callous indifference to others, including O.H.--W.H. has demonstrated an intransigent refusal to consider the impact his criminal offending has had on his son;
 - c) In considering W.H.'s remorse, W.H. made a statement to the Court that despite his views that one or two facts were "askew", he appreciated that O.H. was a little boy, a very young boy who deserved better. This is a vague statement but in my view, it does provide some indication that W.H. may now have some appreciation of the severe harm he caused to O.H.; and
 - d) That said, W.H. seems to have demonstrated at least some insight in that he recognizes a need for change. I am hopeful that from the programming, he will gain the valuable life skills so necessary, such as empathy for others, looking beyond his own desires, and taking account of others.
- [268] The length of this order, as well as his age, should allow for W.H. to address the risk factors identified by Dr. Riar and as revealed in the evidence presented, so that he can return to society as a contributing member and not otherwise.
- [269] I am granting a LTSO for ten years. The length of this order is based on the opinion of Dr. Riar and based on the facts as I have found them. I have concluded that time is required for W.H. to complete correctional programming, including the maintenance programming. Once he has completed programming, assuming he agrees to participate, corrections and the parole board can make the appropriate decisions about how W.H. can best be monitored in the community. I accept that time is required for programming to complete. I

also accept Dr. Riar's opinion that both disorders are difficult to treat. His opinion included a long road. And should treatment be somehow compromised, the LTSO can be fashioned so that conditions can be included to ensure public safety.

[270] I do not agree with the defence position that five years would be sufficient for the LTSO in part because D.H. has warranted he will continue to support W.H. once he is released in the community. For the reasons stated earlier, I am of the view that despite D.H.'s hopeful intention that he has the ability to adequately provide the protection necessary, W.H. has deceived his father for his entire life. Indeed, D.H. was unaware of anything untoward occurring between W.H. and O.H. even though he said they spent time together (on ski trips and otherwise). It was not until W.H.'s arrest that D.H. learned anything about the sexual offending. D.H. candidly admitted that he was careful not to push W.H. for fear of W.H. withdrawing from him. I appreciate that D.H. has developed skills so that he can maintain a relationship with W.H. However, those skills are not necessarily consistent with the sort of monitoring Dr. Riar envisioned. Though I accept that "hand on shoulder" is not feasible, D.H.'s ability to provide any protection regarding W.H.'s risk is minimal. That is not to devalue D.H.'s contribution to his son's emotional and financial well-being.

[271] I have decided that ten years is required to achieve that which is needed to ensure public safety. All emphasized the importance of allowing time for W.H. to engage in treatment and, once released, demonstrate an ability to function pro-socially in the community. The length of the LTSO also allows for the protection of the public by ensuring there are controls moving forward.

VII. DETERMINATE SENTENCE

[272] I turn now to assess what is a just and fit sentence for the offences before the Court.

[273] The principles of sentencing have evolved in the Canadian common law and are now largely codified in the Criminal Code. Section 718 of the Criminal Code provides that the fundamental purpose of sentencing is to contribute to respect for the law and the maintenance of a just, peaceful, and safe society. As set out in s. 718, the objectives of sentencing include the denunciation of unlawful conduct; deterrence of the offender and others from committing other offences; separation of the offender from society where necessary; rehabilitation of the offender; reparation for harm done; and promotion of a sense of responsibility in the offender, including acknowledgment of the harm done.

[274] The overall animating principle of sentencing is that the sentence imposed must be proportionate to the gravity of the offence and the degree of responsibility of the offender, which is articulated under s. 718.1 of the Criminal Code.

[275] Section 718.2 of the Criminal Code sets out a number of specific principles that a court must consider when imposing sentence, and these include:

- a) the principle that a sentence should be increased or reduced to take account of any mitigating or aggravating circumstances the court finds to exist in respect of the matter before it;
- b) the parity principle, which requires that a sentence should be similar to sentences imposed on similar offenders for similar offences in similar circumstances;
- c) the totality principle, which requires that where consecutive sentences are imposed, the total sentence should not be unduly long or harsh;
- d) the restraint principle, which requires that an offender should not be deprived of liberty if a less restrictive sanction is appropriate; and
- e) the principle that all available sanctions other than imprisonment should be considered if they are reasonable and consistent with the harm done.

[276] Section 718.2(a) of the Criminal Code enumerates a number of statutory aggravating and mitigating circumstances that will increase or decrease the length of a sentence to be imposed.

[277] Crown and defence counsel agree that I should direct a conditional stay of count 2 of the Indictment pursuant to the principles enunciated in *R. v. Kineapple*, [1975] 1 S.C.R. 729, 1974 CanLII 14 (S.C.C.). Counsel also agree that the time imposed for counts 1, 3 and 4 should be concurrent to each other. As for counts 5, 6 and 7 (the child pornography related offences), counsel agree the sentence should be consecutive to counts 1, 2 and 4.

A. Crown's Position and Authorities

[278] The Crown's primary position is that there be a dangerous offender designation and indeterminate sentence (alternatively, designation of long-term offender with a ten-year LTSO). Failing which, the Court should impose a sentence of twenty years.

[279] This position is based on the authorities identified below. At the outset, the Crown cautioned the Court against over-valuing the guilty plea. The Crown took the position that the plea was entered just days before the trial was set to commence. Though W.H. was self-represented, the Crown maintained its position that this was an overwhelming case, the plea came at the last moment and preparation was well underway to organize the testimony of O.H. The Crown asserts that the timing of the plea may well support the notion of legal accountability but it is uncertain whether W.H. was taking moral responsibility for the offences.

[280] I accept that W.H.'s guilty plea can be used to demonstrate some remorse though I agree it came late in the day and that a sentencing judge need not give the same effect to every such plea: *R. v. R.M.*, 2019 BCCA 409, at para. 6.

[281] As I must, I have considered the principles of sentencing articulated by the SCC in *R. v. Friesen*, 2020 SCC 9. Justice DeWitt-Van Oosten provides an important recent analysis of the principles enunciated in *Friesen* in *R. v. C.K.*, 2023 BCCA 468. Citing paras. 58-59 of *C.K.*, DeWitt-Van Oosten J.A. stated a sentencing judge must demonstrate that they have engaged in a close examination of the offender's moral blameworthiness in the consideration of the *Friesen* factors:

the harmfulness and the wrongfulness of an offender's conduct must be closely examined when determining a fit sentence for a child sexual offence. It is not enough to acknowledge the relevance of these considerations. The harms that flow from the conduct and the wrongfulness (or blameworthiness) of the offender's actions must be analyzed and applied to the individual circumstances of the case. Critically, they must be reflected in the sentence itself: *R. v. SADP*, 2021 MBCA 22 at para. 34; *Nystrom* at para. 53.

As aptly noted by the Ontario Court of Appeal in *R. v. T.J.*, 2021 ONCA 392 [T.J.]:

[39] *Friesen* does not simply contain a list of principles and factors to be mentioned in a sentencing decision; it insists that those factors be reflected in a sentence that is of sufficient length to recognize them.

[Emphasis added.]

[282] A succinct summary of the relevant factors that are engaged in the assessment of an offender's moral blameworthiness can be found in para. 71 of the judgment where DeWitt-Van Oosten J.A. observes in *C.K.*:

[71] Assessing an offender's personal responsibility for a crime must consider the offender's state of mind and acts at the time of the offence: *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500 at para. 79, 1996 CanLII 230. Relevant factors include: the level of planning and/or intentionality brought to the crime; the degree, nature and extent of the offender's personal participation in the offence; the means or method by which the crime was committed; the motive or reasons for the offender's participation; the offender's awareness of the legal and moral wrongfulness of their conduct; their awareness of the actual or reasonably foreseeable harms flowing from their conduct (immediate and long-term); and their persistence in perpetrating the offence despite that awareness. See, for example, *R. v. Okimaw*, 2016 ABCA 246 at para. 85 and *R. v. Vader*, 2019 ABCA 488 at para. 16.

[283] After concluding that the sentence was demonstrably unfit, DeWitt-Van Oosten J.A. then engaged in a review of post-*Friesen* authorities to determine a fit sentence for this offender: paras. 97-115. Significantly, in reviewing a plethora of authorities, the Court has confirmed that: (i) a substantial penitentiary term is no longer treated as unusual or reserved for rare or exceptional circumstances, even for a first offender (para. 112); (ii) three-and-a-half years imprisonment for child sexual offending of the nature involved in this case is at the low end of the range, even for a first offender (para. 116); and (iii) but for a number of personal mitigating circumstances enumerated at para. 117, a sentence closer

to five years imprisonment would have been a fit sentence.

[284] The Crown asks the Court to consider these principles in assessing a fit sentence. In support of its position the Crown relies on a number of authorities, including those that I highlight below:

- a) R. v. O., 2020 ABQB 497 where the sentencing judge imposed a sentence of 14 years for sexual interference and incest related offences that occurred over a four-year period starting when the victim was nine years old;
- b) R. v. E.A.V., 2022 ONCJ 545 where the sentencing judge imposed a sentence of 18.5 years less pre-trial custody for sexual offences involving his step-daughter who the accused impregnated;
- c) R. v. L.M., 2008 SCC 31 upheld the sentencing judge's decision to impose a sentence of ten years (then the maximum) for sexual assault of his four-year-old daughter and making, distributing and possessing child pornography; and
- d) In R. v. T.A.P., 2023 BCSC 316, Justice Ker imposed a sentence of 18 years for incest, sexual assault, sexual touching, sexual interference and making child pornography in relation to three minor victims. The accused was the father of one of the victims. Justice Ker provides a helpful comment about the impact of Friesen at para. 26 of T.A.P.

[285] I agree with Ker J. that denunciation and deterrence are the primary objectives of sentencing for sexual offences against children, given the wrongfulness of such offences and the serious physical and psychological harm they cause. At para. 105 of Friesen, the SCC explained that "denunciation embodies the communicative and educative role of the law. [Denunciation] reflects the fact that Canadian criminal law is a "system of values."" Further, where a denunciatory sentence is imposed, it represents the condemnation of offenders whose offences have "encroached on our society's basic code of values. the protection of children is one of the most basic values of Canadian society": See also Friesen at paras. 101-105. Also, at para. 96 of T.A.P.:

Sexual assault of a child is a crime that is so abhorrent to Canadian society that society's condemnation of those who commit such offences must be communicated in the clearest of terms: Friesen at para. 105.

B. Defence Position and Authorities

[286] As I have said, W.H. seeks a sentence of ten years less enhanced credit for time served. He submits that the authorities relied on by the Crown are distinguishable. W.H. sets out that the maximum penalty for sexual assault and incest with a person under the age of 16 years both carry a maximum penalty of 14 years (the incest charge has a minimum sentence of five years). The child pornography offences have a maximum sentence of 14 years. W.H. cites two reasons in particular. First, the authorities do not reflect the mitigating factor of a guilty plea. That is a significant distinction.

[287] Second, the Crown's authorities involved multiple victims.

[288] W.H. provided a number of authorities in support of his position. He focused his submissions on the following:

- a) In *R. v. MacKay*, 2022 BCCA 374, the sentencing judge found that an appropriate range for sexual assault against minors was 6-9 years. The accused did not have the benefit of a guilty plea and received a sentence of six years on each of the two counts for the two victims, consecutive for a total sentence of 12 years. Following an appeal, the court did not disturb the sentence, noting at para. 46 that the range for similar offences was between 6-9 years;
- b) In *T.A.P.*, the sentencing judge imposed a global sentence of 18 years. This was a case of sexual assault and incest involving three young victims and the offending conduct occurred over many years. Again, there was not a guilty plea. The offender received 10 years for incest, 6 and 7 years for sexual assault and 5 years for invitation to sexual touching;
- c) In *R. v. B.D.M.*, 2021 BCSC 1738, the offender was found guilty of repeated acts of sexual assault and incest against his young granddaughters over many years. He was sentenced to five years for incest and a global sentence of eight years,
- d) In *R. v. H.C.T.T.*, 2020 BCCA 366, the offender received a 7.5-year sentence, upheld on appeal for repeated sexual assaults and incest against his daughter; and
- e) In *R. v. M.S.*, 2017 ONCJ 479, the offender pleaded guilty to multiple charges including sexual assault, incest and making child pornography of his four-year-old daughter. He was sentenced to a total of ten years; eight years on each count of incest and sexual assault and two years each for making and distributing child pornography.

[289] W.H. submits that these authorities support a range of 9-13 years for sexual assault and incest and considering the child pornography offences will be consecutive to the sexual offences. As a result of the mitigating factors here; in particular that W.H. is a first-time offender and he pleaded guilty, he should be sentenced to ten years.

VIII. DECISION

[290] Upon consideration of the cases cited, I have determined that the range of sentence appropriate for sexual assault and incest in the circumstances presented here is 10-12 years.

[291] I base this determination on the factors identified in *Friesen* and the plethora of cases that have followed, including the principles enunciated in the cases relied on by counsel. In particular, I have considered each of the factors identified in *Friesen*. I address each of the factors set out in *Friesen*.

[292] First, for the reasons set out in the paragraphs above, I have found that there is a substantial risk that W.H. will reoffend. I rely on those findings here.

- [293] Second, at paras. 125-130 of Friesen, the SCC referred to the spectrum of trust relationships. The closer the relationship and the higher the degree of trust between the child and the offender, the greater the likelihood the child will suffer more harm from the sexual violence. The abuse of a position of trust increases both the harm to the victim and gravity of the offence. As Ker J. noted in T.A.P., it may inhibit children from reporting abuse, particularly where the perpetrator lives with the victim and is a parent or caregiver. As here. The abuse of a position of trust increases the offender's degree of responsibility and enhances moral blameworthiness. I agree with Ker J. where she stated that "all things being equal, the abuse of a position of trust to commit a sexual offence against a child should result in a lengthier sentence than where an offender is a stranger to the child." Here, W.H. repeatedly sexually offended against O.H. while in O.H.'s home--a place where he should have felt safe. This in circumstances where W.H. was the only adult with primary responsibility over O.H.'s care. W.H. told O.H. to keep the "secret." I find the breach of trust relationship between W.H. and his son is an aggravating factor. W.H.'s degree of responsibility for the offences he committed and his moral blameworthiness are extremely elevated.
- [294] I next consider frequency and duration. At paras. 131-133 of Friesen, the Court notes that the frequency and duration of sexual violence against a child can significantly increase the harm to the victim. The immediate harm is compounded by the number of the assaults committed. Long-term emotional and psychological harm is also compounded where the sexual violence is repeated and prolonged. This factor further increases an offender's moral blameworthiness, as additional harm to the victim is a reasonably foreseeable consequence of multiple violations of the victim's physical and sexual integrity.
- [295] As Chief Justice Wagner and Justice Rowe noted in Friesen:
- [133] In sum, sexual violence against children that is committed on multiple occasions and for longer periods of time should attract significantly higher sentences that reflect the full cumulative gravity of the crime. Judges cannot permit the number of violent assaults to become a statistic. Each further instance of sexual violence traumatizes the child victim anew and increases the likelihood that the risks of long-term harm will materialize. Each further instance shows a continued and renewed choice by the offender to continue to violently victimize children. As Abella J.A. (as she then was) wrote in Stuckless (1998), where the offender has committed numerous assaults, the court cannot shy away from assessing the full dimensions of the wrong but must give effect to the "staggering" and "systematic" nature of the sexual violence in the sentence imposed (p. 116).
- [296] In this case, the sexual violence occurred repeatedly for three-and-a-half years starting when O.H. was just three years old and only stopping when W.H. was reported to the police. The offending began when O.H. was but a very small child. The sexual offending was repeated, and included anal intercourse.

- [297] As noted in Friesen, sexual violence committed against children on multiple occasions and for long periods of time should attract significantly higher sentences that reflect the compounding effect or cumulative gravity of the offending: paras. 131-133. To this end, W.H. sexually assaulted his son and every time he did so, to merely satisfy his own depraved sexual urges. That choice was repeatedly made over the span of years (as in T.A.P.)
- [298] Another factor outlined in Friesen is the age of the victim, which can be a significant aggravating factor: paras. 134-136.
- [299] The degree of physical interference is recognized as an aggravating factor. However, in Friesen the Court warned against placing undue emphasis on the type of physical interference at the expense of the psychological harm caused by less physically invasive acts. In other words, the Court warned against creating a hierarchy of the types of sexual offending, with penetrative acts as the most serious and less physically invasive acts lower on the scale.
- [300] In this case, O.H. was repeatedly abused over three years. The degree of physical interference is significant as it involved repeated acts of anal intercourse. In the video, O.H. was seen to be bound while W.H. forced his penis into O.H.'s mouth. This conduct represents a level of violence on a very young child is a further aggravating feature to the degree of physical interference involved.
- [301] Further, there is the added element of psychological harm for O.H. that the images are still available on the internet. For the rest of his life, O.H. may wonder where the images have gone and if W.H. or others are viewing them.
- [302] In my view, the evidence of grooming can be considered as an aggravating factor: Friesen at paras. 153-154. Here, O.H. did not have the capacity to consent. W.H.'s suggestion otherwise demonstrates the risk identified earlier in these reasons and formed the basis, in part, for the finding that W.H. be designated a long-term offender.
- [303] I turn now to outlining the mitigating circumstances. I have credited W.H. for pleading guilty, though I agree with the Crown that the guilty plea came very late in the day. However, the plea meant that the Crown did not need to make a decision about whether to call O.H. to testify at the trial. I have also considered the fact that W.H. does not have a criminal record, though I agree this factor is diminished as a mitigating factor because of the duration of the sexual offending.
- [304] Relying on the principles set out in the authorities above and the mitigating and aggravating factors, I have found that 12 years is a just and fit sentence for the incest and sexual assault convictions. I have found that ten years is a fit sentence for the sexual invitation conviction. Those sentences are to run concurrently to one another. I have found that ten years is a just and fit sentence for the child pornography offences in counts 5, 6 and 7 of the Indictment. That is to be consecutive to counts 1, 3 and 4. However, I have reduced

the overall sentence to take into account the totality principles. I would thus reduce the total sentence to 18 years. I will also allow credit for time served in pre-trial custody.

[305] The sentence reflects that there is some prospect for rehabilitation considering the fact that W.H. did not reoffend during the time he was on bail and the availability of the correctional programming to address the underlying factors of his criminal behaviour; that he appears to have some support in the community from his father; and W.H.'s age upon release.

[306] After reducing the total sentence based on the totality principle, and based on the authorities cited in this section of the reasons, I impose the following sentence:

- a) Count 1 - sexual assault contrary to s. 271 - ten years;
- b) Count 3 - sexual invitation contrary to s. 152 - ten years;
- c) Count 4 - incest - ten years;

[307] The sentences for counts 1, 3 and 4 are concurrent to each other.

- a) Count 5 - making child pornography available to O.H. contrary to s. 171.1 - eight years;
- b) Count 6 - making child pornography contrary to s. 163.1(2) - eight years;
- c) Count 7 - distributing child pornography contrary to s. 163.1(3) - eight years.
- d) The sentences for counts 5, 6 and 7 are concurrent to each other but consecutive to the sentence imposed for counts 1, 3 and 4. The total sentence is 18 years (ten years for the sexual offending and eight years consecutive for the child pornography convictions).

[308] At the time of the delivery of these reasons, W.H. had spent 975 days in pre-trial custody. Allowing enhanced credit of 1.5 as allowed for in the Criminal Code, W.H. would receive credit of 1,462 days and I am granting that credit accordingly.

[309] In addition, I will make the following ancillary orders:

- a) Lifetime firearms prohibition, pursuant to s. 109(1) of the Criminal Code;
- b) An order pursuant to s. 760 that a copy of all reports and testimony given by psychiatrists, psychologists, criminologists and other experts and any observations of the Court with respect to the reasons for the finding, together with the transcript of the trial be forwarded to the Correction Service of Canada;
- c) W.H. is to comply with the terms of the Sex Offender Information Registration Act, S.C. 2004, c. 10, for life, pursuant to s. 490.012(1) of the Criminal Code;
- d) An order authorizing the taking of the number of samples of bodily substances that is reasonably required for the purpose of forensic DNA analysis, pursuant to s. 487.051(1) of the Criminal Code;

- e) An order pursuant to s. 743.21 prohibiting communication, directly or indirectly, with O.H; and
- f) Victim fine surcharge pursuant to s. 737.

IX. Disposition

[310] In sum, I have concluded that the Crown has not proven beyond a reasonable doubt that W.H. satisfied the criteria for a dangerous offender designation. However, I have concluded that the Crown has proven beyond a reasonable doubt the criteria that W.H. be designated a long-term offender, and I make that declaration accordingly.

[311] With respect to the sentence, I have imposed a determinate sentence of 18 years less credit (1,462 days) for pretrial detention allowing for enhanced credit. The total amount of time to serve is therefore 14 years and five months. The LTSO will be for ten years.

"Winteringham J."

[1] S.M. refers to Cst. MacQuarrie.

[2] C.B. refers to Cst. Brennen.

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