Court of Queen's Bench of Alberta

Citation: R v Melrose, 2021 ABQB 73

Date: 20210201
Docket: 171024508Q1
Registry: Edmonton

Between:

Her Majesty the Queen

Crown

- and -

Michael Mathew Melrose

Accused

Restriction on Publication

Identification Ban – See the *Criminal Code*, section 486.4.
By Court Order, information that may identify the victim must not be published, broadcast, or transmitted in any way.
NOTE: This judgment is intended to comply with the identification ban.

Reasons for Judgment
of the
Honourable Mr. Justice W.N. Renke

[This decision was delivered orally, in abbreviated form, in accordance with R v Lawrence, 2020 ABCA 268 at paras 21 – 24. A copy of the full reasons was filed with the Court and provided to the parties. I reserved the right to make grammatical and stylistic changes and to correct typographical errors.]

[1] Mr. Melrose pled guilty to two counts on an Indictment averring that he between July 7, 2017 and July 12, 2017, at or near Edmonton, Alberta

- did, for a sexual purpose, unlawfully touch, directly or indirectly, with a part of the body or with an object, a part of the body of [the Complainant], a person under the age of sixteen years, contrary to section 151 of the *Criminal Code* of Canada (count 2), and
- did, by means of telecommunication, communicate with a person who was, or who the accused believed was, under the age of sixteen years, for purpose of facilitating the commission of an offence under section 151 ... with respect to that person, contrary to section 172.1(1)(b) of the *Criminal Code* of Canada (count 3).

[2] Mr. Melrose was 27 years old. The Complainant was 13. Mr. Melrose and the Complainant had sexual intercourse once. Mr. Melrose suffers from a significant permanent cognitive impairment. His mental age falls between 8 ½ to 11 years old.

[3] The mandatory minimum sentence for the s. 151 offence was struck down by the Court of Appeal in ***R v Ford***, 2017 ABCA 87 at paras 13-18. Mr. Melrose must be sentenced for this offence.

[4] Section 172.1(2)(a) establishes a mandatory minimum sentence of imprisonment for a term of one year for commission of an offence under s. 172.1(1)(b). Mr. Melrose filed a constitutional challenge to the mandatory minimum sentence. I must determine whether the mandatory minimum sentence violates Mr. Melrose's right not to be subjected to cruel and unusual punishment, as protected under s. 12 of the *Charter*. Mr. Melrose must be sentenced for this offence as well.

[5] The Crown submits that the s. 172.1(2)(a) mandatory minimum sentence does not violate s. 12 of the *Charter*. A sentence of one year imprisonment is not grossly disproportionate to the sentence appropriate for Mr. Melrose's circumstances or an offence committed in reasonably foreseeable circumstances. The Crown urges a sentence for Mr. Melrose of 24 months incarceration, being one year imprisonment for each offence, consecutive, followed by three years probation: Crown Brief at paras 1, 65, 67, 81.

[6] The Defence urges a sentence of imprisonment in the intermittent range of 30-90 days for the s. 151 offence and 3 years probation for the s. 172.1(1)(b) offence: Defence Brief at paras 31, 135.

[7] After briefly reviewing the sentencing framework and the Supreme Court's guidance for sexual offence sentencing in ***R v Friesen***, 2020 SCC 9, I will follow the process set out in ***R v Nur***, 2015 SCC 15 at para 46. I will determine the proportionate sentences for Mr. Melrose. I will then determine whether the mandatory minimum sentence for the s. 172.1(1)(b) offence would be a "grossly disproportionate" sentence for Mr. Melrose. If not, I will consider whether the mandatory minimum sentence would be grossly disproportionate in reasonably foreseeable applications of s. 172.1(1)(b). See ***R v Morrison***, 2019 SCC 15, Moldaver J at para 144; ***R v Hilbach***, 2020 ABCA 332 at para 35; ***R v EJB***, 2018 ABCA 239, leave app denied 2019 CanLII 45254, at paras 56-57; ***Ford*** at para 10; ***R v Stephenson***, 2019 ABCA 453 at para 13.

[8] The Crown has not advanced a s. 1 argument, should I find that the mandatory minimum sentence limits s. 12: Crown Brief at para 48.

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I. Sentencing Framework

[9] A review of the sentencing framework is warranted since the issue of whether the mandatory minimum sentence violates s. 12 requires a comparison to the proportionate sentence for Mr. Melrose and proportionality is embedded in the sentencing framework, and since Mr. Melrose must be sentenced for both offences.

[10] Section 718 of the *Criminal Code* encapsulates the four main elements of sentencing. Sentences for offences are "to protect society and to contribute … to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the … objectives [listed in s. 718]." First, s. 718 recognizes the fundamental purpose or justifying aim of sentencing, social protection and the maintenance of a just, peaceful and safe society. Second, s. 718 refers to "sanctions," the tools of sentencing that include (e.g.) imprisonment, fines, and probation. Third, s. 718 refers to "just sanctions." I will elaborate below, but a "just sanction" is (it might go without saying) a sanction provided by law and is, importantly, a proportionate sanction. Fourth, s. 718 provides that just sanctions serve one or more of the objectives listed in s. 718, and thereby promote the fundamental purpose of sentencing. The objectives set out in s. 718 are as follows:

> (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
>
> (b) to deter the offender and other persons from committing offences;
>
> (c) to separate offenders from society, where necessary;
>
> (d) to assist in rehabilitating offenders;
>
> (e) to provide reparations for harm done to victims or to the community; and
>
> (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

[11] I will discuss some features of the sentencing framework, particularly respecting proportionality and particularly relevant to Mr. Melrose's circumstances.

A. Proportionality

1. Dimensions of Proportionality

[12] Proportionality is the fundamental principle of sentencing: ***R v Hajar***, 2016 ABCA 222 at para 136; ***R v Hamlyn***, 2016 ABCA 127 at para 7; ***R v Safarzadeh-Markhali***, 2016 SCC 14 at paras 70-71.

[13] A "just" sanction is a proportionate sanction. A proportionate sentence is "just" because the punishment "fits" the crime. The punishment must be neither excessive nor inadequate. Proportionality ensures that the punishment is what the offender "deserves."

[14] Proportionality has two dimensions, captured in s. 718.1 of the *Criminal Code*:

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

Justice Wagner described proportionality in this way in ***R v Lacasse***, 2015 SCC 64 at para 12:

> The more serious the crime and its consequences, or the greater the offender's degree of responsibility, the heavier the sentence will be. In other words, the severity of a sentence depends not only on the seriousness of the crime's consequences, but also on the moral blameworthiness of the offender.

See ***R v Ipeelee***, 2012 SCC 13, LeBel J at paras 36, 37.

[15] The "gravity of the offence" concerns what the offender did wrong: ***R v Arcand***, 2010 ABCA 363 at para 57.

[16] The "degree of responsibility" concerns the moral culpability of the offender in committing the offence.

[17] That is, the "gravity" aspect focuses on the act and its consequences or on what was done and the "responsibility" aspect focuses on the actor, how the act was done, why the act was done, and by whom the act was done.

[18] As s. 718.2(a) directs, the assessment of the gravity of the offence and the degree of responsibility of the offender is informed by "any relevant aggravating or mitigating circumstances relating to the offence or the offender." Justice Kalmakoff wrote as follows in ***R v TF***, 2019 SKCA 82 at para 54,

> [54] …. In this way, s. 718.2(a) dovetails with the fundamental principle of proportionality. Mitigating factors are those which tend to decrease either the gravity of the offence or the degree of responsibility of the offender. Aggravating factors are those which tend to increase the gravity or degree of responsibility.

[19] Since offences are committed in particular circumstances by particular individuals, it follows that the determination of a proportionate sentence is "highly individualized:" ***Nur*** at para 43. That is, an effect of proportionality is the individualization or case-by-case determination of sentences: ***R v Ramsay***, 2012 ABCA 257 at para 20; ***Arcand*** at para 66; ***R v Suter***, 2018 SCC 34 at para 4.

2. Assessing the Gravity of the Offence

[20] Assessing the gravity of the offence requires consideration of

- the nature of the offence itself, its act element and fault element, as this reflects on the inherent wrongfulness of the offence
- the harm radiating from the offence, from the victim to the broader and (ultimately) national communities and to social values – harm may be actual or potential (risked, and more or less probable)
- the penalty for the offence, as an indication of Parliament's assessment of the potential wrongfulness and harm associated with an offence (see ***Friesen*** at para 96)
- as provided in s. 718.2(a), "aggravating or mitigating circumstances relating to the offence or the offender."

3. Assessing the Degree of Responsibility

[21] The degree of responsibility goes to the offender's level of fault in committing the offence. Chief Justice Fraser commented in ***R v Laberge***,1995 ABCA 196 at para 7 that "for sentencing purposes, one must make a clear distinction between fault in terms of an offender's *mens rea* at the time of commission of an offence and fault in terms of the offender's overall moral blameworthiness for the crime. The two are not the same." The Court of Appeal confirmed in ***Hamlyn*** at para 12 that "[t]he greater the harm intended or the greater the degree of recklessness or wilful blindness, the greater the moral culpability: ***Arcand***, para 58." All other things being equal, the greater the fault, the greater the justified punitive response; and the more definite, conscious, or deliberate the purpose or intention, the greater the justified punitive response: ***R v Martineau***, [1990] 2 SCR 633, Lamer CJC at 645. Fault lies along a continuum.

(a) Psycho-Social Factors

[22] Psycho-social factors may affect an offender's culpability, specifically his or her decision-making. If an offender has been exposed to anti-social behaviour, if the exposure was broad and long, the offender may have learned a repertoire of only anti-social behaviours and little else. The offender's practical possibilities of action or horizons of actions may be limited. Further, chronic exposure to bad decision-making by others and lack of reinforcement of good decision-making may make it easier for an offender to make bad decisions or to make decisions without consideration of consequences. Justice LeBel wrote as follows in paras 73 and 77 of ***Ipeelee***:

> [73] First, systemic and background factors may bear on the culpability of the offender, to the extent that they shed light on his or her level of moral blameworthiness …. Canadian criminal law is based on the premise that criminal liability only follows from voluntary conduct. Many Aboriginal offenders find themselves in situations of social and economic deprivation with a lack of opportunities and limited options for positive development. While this rarely - if ever - attains a level where one could properly say that their actions were not voluntary and therefore not deserving of criminal sanction, the reality is that their constrained circumstances may diminish their moral culpability. As Greckol J. of the Alberta Court of Queen's Bench stated, at para. 60 of *R. v. Skani*, 2002 ABQB 1097, 331 A.R. 50, after describing the background factors that lead to Mr. Skani coming before the court, "[f]ew mortals could withstand such a childhood and youth without becoming seriously troubled." Failing to take these circumstances into account would violate the fundamental principle of sentencing — that the sentence must be proportionate to the gravity of the offence *and the degree of responsibility of the offender*. The existence of such circumstances may also indicate that a sanction that takes account of the underlying causes of the criminal conduct may be more appropriate than one only aimed at punishment *per se* …. [emphasis in original]
>
> [77] …. Furthermore, there is nothing in the ***Gladue*** decision [[1999] 1 SCR 688] which would indicate that background and systemic factors should not also be taken into account for other, non-Aboriginal offenders. Quite the opposite. Cory and Iacobucci JJ. specifically state, at para. 69, in ***Gladue***, that "background

> and systemic factors will also be of importance for a judge in sentencing a non-aboriginal offender".

See ***R v Shrivastava***, 2019 ABQB 663, Antonio J, as she then was, at paras 83-84; ***Friesen*** at para 174 (a "traumatic and painful childhood involving physical, emotional and sexual abuse" as a mitigating factor).

(b) Factors bearing on Cognition and Decision-Making

[23] Cognitive difficulties or mental illness falling short of supporting an NCR finding may dispose an offender to make poor choices, choices made without sufficient assessment of the wrongfulness or harm that may flow from conduct. Those affected by such factors are, to that extent, less blameworthy than those not beset by such factors. Such offenders' responsibility is diminished. All other things being equal, the greater the magnitude of cognitive deficits, the lower the degree of responsibility: ***Morrison***, Karakatsanis J at para 183; ***Ramsay*** at paras 21, 25; ***R v Tremblay***, 2006 ABCA 252 at para 7; ***R v Muldoon***, 2006 ABCA 321 at para 10; ***R v Virani***, 2012 ABCA 155 at para 16; ***R v Ayorech***, 2012 ABCA 82 at para 12; ***R v Shevchenko***, 2018 ABCA 31 at paras 25, 28; ***R v Scofield***, 2019 BCCA 3 at paras 64, 76; ***Hajar*** at para 120(b).

4. Proportionality and Sentencing Objectives

[24] Factors relevant to the assessment of the gravity of an offence and the degree of responsibility of an offender in committing the offence may engage particular sentencing objectives. For example, the more serious the offence and the higher the degree of responsibility associated with committing that offence, the stronger the link to the objectives of denunciation and deterrence, which, in turn may attract more severe punishment in the form of longer periods of imprisonment.

[25] The *Criminal Code* priorizes the objectives of denunciation and deterrence for identified offences. See, e.g., ss. 718.01-718.04.

[26] A just sanction must be proportional, regardless of the objective or objectives served by the sanction.

5. Proportionality and Parity

[27] Section 718.2(b) provides that "a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances." This paragraph evokes the principle of parity.

[28] The Supreme Court wrote as follows in ***Friesen*** at paras 31-33:

> [31] Sentencing judges must also consider the principle of parity: similar offenders who commit similar offences in similar circumstances should receive similar sentences. This principle also has a long history in Canadian law ….
>
> [32] Parity and proportionality do not exist in tension; rather, parity is an expression of proportionality. A consistent application of proportionality will lead to parity. Conversely, an approach that assigns the same sentence to unlike cases can achieve neither parity nor proportionality (*R. v. L.M.*, 2008 SCC 31, [2008] 2 S.C.R. 163, at paras. 36-37; ***R. v. Ipeelee*** ... at paras. 78-79).

> [33] In practice, parity gives meaning to proportionality. A proportionate sentence for a given offender and offence cannot be deduced from first principles; instead, judges calibrate the demands of proportionality by reference to the sentences imposed in other cases. Sentencing precedents reflect the range of factual situations in the world and the plurality of judicial perspectives. Precedents embody the collective experience and wisdom of the judiciary. They are the practical expression of both parity and proportionality.

See also ***Lacasse*** at para 2.

6. Proportionality and Restraint

[29] Section 718.2 requires sentencing judges to take into account the following additional principles:

> (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
>
> (e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders;

and

> (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh.

Paragraph (c) evokes the "totality" principle, in its statutory form, dealing with consecutive sentences. It is complemented by a common law totality principle, dealing with (typically) several offences amounting to a "single transaction:" see ***R v Boucher***, 2020 ABCA 208 at para 27; ***R v Ranger***, 2014 ABCA 50 at paras 49-50; ***R v May***, 2012 ABCA 213 at paras 7-15.

B. Pre-Offence and Post-Offence Factors

[30] Some pre-offence and post-offence factors considered in sentencing do not relate or do not relate directly to the offender's degree of responsibility in committing the offence, but may nonetheless be relevant to the offender's blameworthiness or to the objectives appropriate to the offender's sentence or both.

1. Pre-Offence Factors

[31] Pre-offence factors include

- age (particularly the youth of the offender – see ***Friesen*** at para 174)
- criminal record.

[32] If an offender's age is close to the age of majority, an argument for reduced responsibility based on immaturity may (but not must) be available: see ***Shrivastava*** at paras 52-55 (describing circumstances when age would *not* mitigate). A younger offender may be a good candidate for rehabilitation.

[33] An offender is not to be re-punished for past offences. A record for related offences, though, may be relevant to specific deterrence of the offender. Past sentences have not educated

the offender sufficiently. A lack of prior offences may go to rehabilitative potential or to restraint in punishment, as the offender may be deterred by a lighter penalty: ***Shrivastava*** at para 71.

[34] Justice Antonio observed in ***Shrivastava*** that prior "good character" is frequently taken to have a mitigating effect in sentencing, but points out that this may be an unprincipled use of personal history evidence: see paras 72-93.

2. Post-Offence Factors

[35] Post-offence factors include

- guilty plea
- cooperation with the authorities
- pre-sentencing rehabilitative steps
- remorse.

[36] These factors tend to mitigate by showing remorse and insight into responsibility. Remorse, in turn, shows that the offender is a good candidate for rehabilitation, and shows that the objective of acknowledgement of harm and promotion of a sense of responsibility has already been at least partially fulfilled.

[37] ***Friesen*** confirmed that "[a] guilty plea is a recognized mitigating factor." ***Friesen*** also confirmed, though, that the weight of a guilty plea may be diminished if the Crown's case is "overwhelming:" at para 164; see ***TF*** at paras 45-46. The timing of a guilty plea is also relevant. Generally, the earlier the guilty plea, the stronger its mitigating weight (e.g. as a "sincere indication of remorse"): see ***R v Cowell***, 2019 ONCA 972, Trotter JA at para 102; ***TF*** at para 44.

[38] Nonetheless, I note the comments by our Court of Appeal in ***R v SLW***, 2018 ABCA 235 at paras 32-35:

> [32] Courts treat guilty pleas as mitigating because they are "a genuine demonstration of remorse and a positive step towards rehabilitation": *R v Gaya*, 2010 ONSC 434 at para 53 …. A guilty plea also mitigates because it saves judicial resources and it eliminates the uncertainties inherent in the trial process: *R v Edgar*, 2010 ONCA 529 at para 111 ….
>
> [33] The Crown urges that we give the guilty plea minimal credit because the Crown's case was overwhelming. While we accept that a guilty plea in the face of a weak Crown case is often especially mitigating, it does not follow that a guilty plea in the face of a strong Crown case is of little value. No matter how strong the case, a guilty plea is the waiver of the most fundamental right of any criminal accused: the right to put the Crown to its proof at a fair and public trial. No matter how strong the case, a guilty plea remains a sign of remorse. And no matter how strong the case, a guilty plea spares victims the trauma of testifying in open court. Experience also teaches that even those prosecutions that seem overwhelming may encounter unforeseen obstacles that make it hard to prove the case beyond a reasonable doubt, such as the death of a key witness. A guilty plea offers certainty in a process where there is always litigation risk. A guilty plea always has some value.

> [34] Many cases against the accused are overwhelming because – as in this case – the accused has confessed to investigators. Sentencing judges typically give greater credit for earlier guilty pleas because they reflect an earlier acceptance of responsibility; it would be ironic indeed if an offender were afforded less credit for a guilty plea because they had accepted responsibility at one of the earliest stages possible, during their interview with the police.
>
> [35] On a more practical level, guilty pleas have always served the utilitarian function of conserving scarce court and prosecution resources. Particularly in the post-*Jordan* era, we would be reluctant to adopt any principle that is a disincentive to accused persons taking responsibility for their actions and instead, perversely, operates as an incentive to "roll the dice" at trial because a guilty plea offers little mitigation when the Crown's case is strong ….

[39] As indicated at para 34 of ***SLW***, cooperation with the police through confession is a mitigating factor. The offender concretely demonstrated taking responsibility for his or her offence: ***TF*** at paras 44-45.

[40] ***Friesen*** also confirmed that remorse is a mitigating factor, but its weight increases when "paired with insight" and with signs that the offender has changed his attitude and has taken steps to reduce the likelihood of further offending: at para 165. An offender, for example, may have, on his or her own, taken steps to address the "root causes" of his or her offending, as by attending addictions treatment or counselling.

3. Risk of Re-Offending

[41] The higher the risk of re-offending, the greater the concern for sentencing purposes.

[42] An offender cannot receive a disproportionate sentence just because there is a substantial risk that he or she will re-offend. The offender is sentenced for this offence, not potential offences. The dangerous offender and long-term offender proceedings are available should the offender's conduct and disposition make "standard" sentencing inadequate.

[43] A high risk of re-offending may engage the objective of separation or incapacitation for the sake of public safety. Specific deterrence, stopping this offender from re-offending, would be engaged by a high risk of re-offending. Rehabilitation, the need for programming, may be engaged, but rehabilitation may require the secure setting of imprisonment. This issue was considered in ***Friesen*** at para 124:

> [124] The offender's likelihood to reoffend is clearly also relevant to the objective of rehabilitation in s. 718(d) of the *Criminal Code*. Courts should encourage efforts toward rehabilitation because it offers long-term protection (***Gladue***, at para. 56). Rehabilitation may also weigh in favour of a reduced term of incarceration followed by probation since a community environment is often more favourable to rehabilitation than prison (see *Proulx*, at paras. 16 and 22). At the same time, depending on the offender's risk to reoffend, the imperative of providing immediate and short-term protection to children may preclude early release. In these cases, efforts at rehabilitation must begin with such treatment or programming as is available within prison (see *R. v. R.M.S.* (1997), 92 B.C.A.C. 148, at para. 13). In some cases, the only way to achieve both short-term and long-term protection of children may thus be to impose a lengthy sentence (see *R.*

> *v. Gallant*, 2004 NSCA 7, 220 N.S.R. (2d) 318, at para. 19, per Cromwell J.A., as he then was).

[44] A low risk of re-offending could incline towards lower periods of imprisonment or perhaps no imprisonment at all. But again, a sentence must still be proportionate. A sentence that is too low may be just as disproportionate as a sentence that is too high.

C. Actual Impact

[45] The actual impact of the sentence on the individual is also a relevant factor, described in the cases as "collateral consequences." Once again, the peculiar effects of a sentence on an individual do not justify a disproportionate sentence (particularly one that is excessively lenient). Actual effects may be taken into account in determining sentence, so long as the sentence remains proportional. In ***SLW***, the Court of Appeal wrote as follows at para 39:

> [39] .... When determining the appropriate sentence for an individual offender, a court may take into account the collateral consequences of the sentence or the underlying conviction, so long as the sentence imposed is proportionate to the gravity of the offence and the degree of responsibility of the offender. This point was stated by Wagner J (as he then was), speaking for the Supreme Court in *R v Pham*, 2013 SCC 15 at para 11, [2013] 1 SCR 739, a case dealing with the impact of a sentence on the immigration status of the offender ....

The personal circumstances of an offender may cause a typically proportionate sentence to have a significantly disproportionate impact on that offender. A sentencing court may therefore consider the nature, conditions, and duration of a sentence as it affects the particular accused: ***R v Morrisey***, 2000 SCC 39 at para 41.

II. Sexual Offences Against Children

[46] Mr. Melrose has been convicted of two sexual offences against a child. The landscape of sentencing for sexual offences against children has been modified by ***Friesen***. I will set out some important statutory provisions, describe the lessons of ***Friesen***, then point to some aspects of sentencing left untouched by ***Friesen*.**

A. Particular Statutory Rules

[47] Section 718.2(a) sets out provisions particularly applicable to sexual offences against children:

> (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and ….
>
> > (ii) evidence that the offender, in committing the offence, abused the offender's intimate partner or a member of the victim or the offender's family,
> >
> > (ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,
> >
> > (iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,

> (iii.1) evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation ....
>
> shall be deemed to be aggravating circumstances.

[48] Section 718.01 confirms the seriousness of offences involving the abuse of children and provides an "ordering" of sentencing objectives for such offences (see ***Friesen*** at paras 101-102):

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

At para 104 of ***Friesen***, the Supreme Court stated that for offences falling within s. 718.01, a sentencing judge does not have authority to priorize the sentencing objective or objectives on a case-by-case basis. This section limits judicial discretion, "such that it is no longer open to the judge to elevate other sentencing objectives to an equal or higher priority."

[49] Nonetheless, the Supreme Court also confirmed that despite s. 718.01, "the sentencing judge retains discretion to accord significant weight to other factors (including rehabilitation and ***Gladue*** factors) in exercising discretion in arriving at a fit sentence, in accordance with the overall principle of proportionality ...."

B. *Friesen's* Lessons

[50] The overarching message of ***Friesen*** for sentencing judges is set out at para 5:

> [5] .... sexual offences against children are violent crimes that wrongfully exploit children's vulnerability and cause profound harm to children, families, and communities. Sentences for these crimes must increase. Courts must impose sentences that are proportional to the gravity of sexual offences against children and the degree of responsibility of the offender, as informed by Parliament's sentencing initiatives and by society's deepened understanding of the wrongfulness and harmfulness of sexual violence against children. Sentences must accurately reflect the wrongfulness of sexual violence against children and the far-reaching and ongoing harm that it causes to children, families, and society at large.

In para 1, the Chief Justice and Justice Rowe wrote that "[t]his case is about how to impose sentences that fully reflect and give effect to the profound wrongfulness and harmfulness of sexual offences against children."

1. Scope

[51] ***Friesen's*** guidance applies to sexual interference and related offences such as invitation to sexual touching (s. 152), sexual exploitation (s. 153(1)), sexual assault (s. 271), and child luring (s. 172.1).

2. Sexual Offences Against Children and Proportionality

[52] In ***Friesen***, the Supreme Court sought to correct underestimations of the gravity of sexual offences against children, misinterpretations of offenders' degrees of responsibility, and

misapplications of aggravating and mitigating factors respecting offenders' responsibility. The Court elaborated on the wrongfulness and harm caused by these offences: at paras 50, 75.

[53] Wrongfulness and harm must be gauged against the "prime interests" protected by the sexual offence legislative regime – "the personal autonomy, bodily integrity, sexual integrity, dignity, and equality of children:" para 51.

(a) Gravity of the Offence

[54] The wrongfulness of sexual offences against children lies in the offences' repudiation of the fundamental value of protecting children: at para 65. Instead of protecting children because of their vulnerability, offenders take advantage of children's vulnerability to commit offences: at paras 64-67. The offences violate children's rights to equality and dignity.

[55] Applying force of a sexual nature to a child is inherently wrongful as it is inherently violent. The violence is aggravated by its sexual nature: at para 77. Further, sexually exploiting a child is inherently wrong as it is inherently exploitative of the child's vulnerability: at para 78.

[56] Harm to children's protected interests caused by sexual offences is not only physical but emotional and psychological: para 56. Children may be seriously harmed without being physically harmed: at para 82.

[57] Harm may be potential or actual, and may manifest during childhood or later in adulthood: at paras 79-81.

[58] Harm caused is a "key determinant" of the gravity of an offence. Evidence of actual harm must be considered in sentencing: at para 85. Harm may not be apparent at the time of sentencing. The Supreme Court stated that "courts must consider the reasonably foreseeable potential harm that flows from sexual violence against children when determining the gravity of the offence:" at para 84.

[59] Additional harm may be caused to children's relationships with their families and caregivers and other social relationships: at paras 60, 61.

[60] The "ripple effects" of sexual violence against children may make a child's parents, caregivers, and family members "secondary victims:" at para 63.

(b) Degree of Responsibility

[61] The wrongfulness and harmfulness of sexual violence against children must be taken into account in assessing the offender's degree of responsibility: at para 87.

[62] At para 88 of ***Friesen*** we read that "[i]ntentionally applying force of a sexual nature to a child is highly morally blameworthy because the offender is or ought to be aware that this action can profoundly harm the child." The Court did not elaborate on the nature of the objective language, but went on to confirm that courts "must take into account the harm the offender intended or was reckless or wilfully blind to" (intention, recklessness, and wilful blindness are each subjective concepts).

[63] Blameworthiness follows from the exploitation of the victim by the offender – "the offender is treating the victim as an object and disregarding the victim's human dignity:" at para 89.

[64] Further, blameworthiness is magnified because the victim is a child, by definition vulnerable: at para 90.

(c) No Actual Victim

[65] ***Friesen*** dealt explicitly with police sting operations, when no child is actually injured or involved in the transactions leading to arrest. At para 93, the Court wrote that "[a]lthough the absence of a specific victim is relevant, it should not be overemphasized in arriving at a fit sentence. The accused can take no credit for this factor." Hence, the absence of victim does not diminish the offender's degree of responsibility.

[66] Further, the context of child luring offences is the "unprecedented access" sexual offenders have to actual children through the Internet. Child luring "should never be viewed as a victimless crime:" at para 94.

3. Factors Bearing on a Fit Sentence

[67] In ***Friesen***, the Court commented on a non-exhaustive list of factors relevant to sentencing for sexual offences against children.

(a) Risk of Reoffending

[68] An enhanced risk of reoffending may engage the objective of separating the offender from society to ensure public protection. A low risk of reoffending may support a rehabilitative sentence with a lesser period of incarceration: at paras 122-124.

(b) Abuse of Position of Trust or Authority

[69] Trust relationships exist on a spectrum. An offender's place on the spectrum may vary over time: at para 125. A breach of trust increases harm to the victim and the gravity of the offence: at paras 126, 153. It also increases the offender's degree of responsibility, by entailing the breach of a duty owed to the child not owed by a stranger: at para 129. "[A]ll other things being equal, an offender who abuses a position of trust to commit a sexual offence against a child should receive a lengthier sentence than an offender who is a stranger to the child:" at para 130.

(c) Duration and Frequency

[70] Greater frequency and longer duration may increase harm: at para 131. Increased harm magnifies the gravity of the offence and increases the offender's moral blameworthiness.

(d) Age of the Victim

[71] Offences against younger victims have increased gravity because of the victims' deeper vulnerability and demonstrate enhanced moral blameworthiness: at para 135.

[72] The Court cautioned, though, that courts must "be particularly careful to impose proportionate sentences in cases where the victim is an adolescent:" at para 136. The Court is concerned that disproportionately low sentences have been imposed in these cases, even though "adolescents may be an age group that is disproportionately victimized by sexual violence."

(e) Degree of Physical Interference

[73] The degree of physical interference is an aggravating factor: at paras 138-139, 145.

[74] However, the Court "strongly caution[ed] provincial appellate courts about the dangers of defining a sentencing range based on ... the specific type of sexual activity at issue." Statute does

not now distinguish between types of sexual acts. Such distinctions have been abolished and should not be revived in sentencing jurisprudence: at para 141. Further, "courts should not assume that there is any clear correlation between the type of physical act and the harm to the victim:" at para 142. Emotional and psychological damage should not be underemphasized. See para 144. A "hierarchy of physical acts" should not be established: at para 146.

[75] ***Friesen*** also cautioned courts not to use language that minimizes, normalizes, or eroticizes inherently violent conduct: at para 147.

(f) Victim Participation

[76] Persons under age 16 cannot consent to sexual activity. Courts should therefore not analogize a child's participation to consent. *De facto* consent is not and cannot be a mitigating factor, either respecting the gravity of the offence or the degree of responsibility of the offender: at para 149. There is no defence of "implied consent" in Canadian law: at para 151. Victim participation "is not a legally relevant consideration at sentencing:" at para 150. I note that this aspect of ***Friesen*** aligns with Alberta appellate jurisprudence. See ***Hajar*** at paras 40, 52, 82-83, 88-94, 97-98, 102; ***EJB*** at para 42.

[77] Victim participation does not mean that an offence is free from physical or psychological violence: ***Friesen*** at para 152. The Court did observe that victim participation may "coincide with the absence of certain aggravating factors, such as additional violence or unconsciousness:" at para 150. The absence of an aggravating factor is not a mitigating factor.

[78] Victim participation may be induced by grooming or a breach of trust. These are aggravating factors: at para 153.

[79] The Court confirmed that victim participation should not distract from adults' responsibility to refrain from sexual violence against children. "Adults, not children, are responsible for preventing sexual activity between children and adults:" at para 154; see also ***EJB*** at para 42.

4. Increased Sentences

[80] ***Friesen*** states that an "upward departure from prior precedents and sentencing ranges may well be required to impose a proportionate sentence:" at para 107.

[81] The upward departure is supported for two main reasons. First, ***Friesen*** confirms that the understanding of the wrongfulness and harmfulness of sexual offences against children has deepened, as discussed above: at para 110. Precedent may be "dated," and even recent decisions may rely on dated precedents.

[82] Second, the Court aligned itself with Parliament's approach to sentencing for sexual offences against children. (***R v Lemay***, 2020 ABCA 365 at para 42: "Parliament has responded; the courts must as well.")

[83] ***Friesen*** confirmed two Parliamentary initiatives respecting sentencing for sexual offences against children. Parliament has increased maximum penalties for sexual offences against children. Maximum sentences are "one of Parliament's principal tools to determine the gravity of [an] offence:" at para 96. An increase to maximum sentences shows that Parliament wants these offences punished more harshly: at paras 97, 99; see ***Lacasse*** at para 7. The last set of increases occurred in 2015. At para 100, ***Friesen*** directed that "[t]o respect Parliament's decision to increase maximum sentences, courts should generally impose higher sentences than

the sentences imposed in cases that preceded the increases in maximum sentences." See also para 109 and ***Lemay*** at para 48.

[84] In addition, as indicated above, Parliament added s. 718.01 to the *Criminal Code* in 2005. This section "confirms the need for courts to impose more severe sanctions for sexual offences against children:" at para 101.

5. More Severe Punishment for Sexual Offences Against Children vs. Adults

[85] ***Friesen*** states that "[s]exual offences against children should generally be punished more severely than sexual offences against adults:" at paras 107, 117. By "generally," I read the Court to qualify greater punishment by "all other things being equal" (so far as equivalences may be determined).

[86] The Court looked to s. 718.01, the statutory identification of aggravating circumstances in s. 718.2(a)(ii.1) and (iii), and the maximum sentences for younger victims as opposed to older victims: at para 116.

6. Similar Treatment for Sexual Interference and Sexual Assault

[87] ***Friesen*** directs courts not to discount sexual interference in comparison to sexual assault. The offences have the same maximum offences for victims under age 16, the elements of the offences are similar, and convictions can often be supported by the same facts: at paras 119-120.

7. No Specified Length of Sentence

[88] The Supreme Court declined to create a "national starting point or sentencing range for sexual offences against children:" at para 106. This is "best left to provincial appellate courts."

[89] However, at para 114, the Court indicated that "mid-single digit penitentiary terms for sexual offences against children are normal and ... upper-single digit and double-digit penitentiary terms should be neither unusual nor reserved for rare or exceptional circumstances."

C. *Friesen* and Sentencing Principles

[90] It is fair to observe that for sexual offences against children, ***Friesen*** marks an important stage in the evolution of sentencing. There is pre-***Friesen*** and post-***Friesen***. However, ***Friesen*** remains embedded in the traditional sentencing framework.

[91] The overall point of ***Friesen*** is that sentences should conform to a proper understanding of the gravity of sexual offences against children in light of the wrongfulness and harms of these offences and the degree of responsibility of offenders, also in light of wrongfulness and harm, without inappropriate discount based on misapplied aggravating and mitigating factors: at para 50. All other things being equal, sentences for these offences should increase: at para 5.

[92] ***Friesen***, then, was focused on matters increasing sentence or on factors that improperly decreased sentence. It did not focus on matters that would legitimately decrease sentence.

[93] ***Friesen*** adjusted the proportionality analysis as applied to sexual offences against children to ensure that the wrongfulness and harm associated with sexual offences against children are properly appreciated, but confirmed the basic requirement that sentences be proportional to the gravity of the offence and the degree of blameworthiness of the offender: at paras 5, 75. At para 30 the Court wrote as follows:

> [30] All sentencing starts with the principle that sentences must be proportionate to the gravity of the offence and the degree of responsibility of the offender. The principle of proportionality has long been central to Canadian sentencing (see, e.g., *R. v. Wilmott*, [1966] 2 O.R. 654 (C.A.)) and is now codified as the "fundamental principle" of sentencing in s. 718.1 of the Criminal Code.

[94] ***Friesen*** confirmed

- the subprinciple of parity, subject to the warning about out-of-date decisions: at paras 31, 33.
- that "the degree of exploitation" inherent in sexual offences against children "may vary from case to case:" at para 78.
- that, despite s. 718.01, "the sentencing judge retains discretion to accord significant weight to other factors (including rehabilitation and ***Gladue*** factors) in exercising discretion in arriving at a fit sentence, in accordance with the overall principle of proportionality:" at para 104. [emphasis added]
- the relevance of cognitive disability as affecting the degree of responsibility of the offender: at para 88 ("save for possibly certain rare cases, offenders will usually have at least some awareness of the profound physical, psychological, and emotional harm that their actions may cause the child" [emphasis added]). At para 91, we read the following:

  > [91] These comments should not be taken as a direction to disregard relevant factors that may reduce the offender's moral culpability. The proportionality principle requires that the punishment imposed be "just and appropriate . . ., and nothing more" (*M. (C.A.*), at para. 80 (emphasis deleted); see also *Ipeelee*, at para. 37). First, as sexual assault and sexual interference are broadly-defined offences that embrace a wide spectrum of conduct, the offender's conduct will be less morally blameworthy in some cases than in others. Second, the personal circumstances of offenders can have a mitigating effect. For instance, offenders who suffer from mental disabilities that impose serious cognitive limitations will likely have reduced moral culpability (***R. v. Scofield*** ... at para. 64; ***R. v. Hood***, 2018 NSCA 18, 45 C.R. (7th) 269, at para. 180). [emphasis added]

- the continued applicability of ***Gladue***: at para 92.
- that it is inappropriate for courts of appeal to "artificially constrain sentencing judges' ability to impose a proportionate sentence," although what the Court had in mind was restrictions on exceeding a cap on sentences: at paras 111, 112. At para 114, when declining to establish a range or outline circumstances in which substantial sentences should be imposed, the Court wrote "[n]or would it be appropriate for any court to set out binding or inflexible quantitative guidance - as Moldaver J.A. wrote in *D. (D.)*, "judges must retain the flexibility needed to do justice in individual cases" and to individualize the sentence to the offender who is before them (at para. 33)." [emphasis added] ***Friesen*** therefore confirmed that

sentences must be individualized for the specific offence and the specific offender.

- the continued relevance of the objective of rehabilitation even in cases of sexual offences against children, and stated that "[r]ehabilitation may ... weigh in favour of a reduced term of incarceration followed by probation since a community environment is often more favorable to rehabilitation than prison ...:" at para 124.

[95] ***Friesen*** commented on maximum sentences for offences and on increases in maximum sentences as supporting increased sentences (see, e.g., paras 98, 100), but said nothing about mandatory minimum sentences.

III. Facts and Evidence

[96] The information about the offence and Mr. Melrose came in the form of an Agreed Statement of Facts (ASoF), the testimony of Dr. Marc Nesca, the exhibits (including a video of Mr. Melrose's interview by police and Dr. Nesca's Forensic Neuropsychological Assessment Report (FNR)), and the submissions of counsel.

[97] No Victim Impact Statement was filed.

[98] I have considered the following *Criminal Code* provisions respecting evidence and fact-finding in sentencing hearings:

> 723 (1) Before determining the sentence, a court shall give the prosecutor and the offender an opportunity to make submissions with respect to any facts relevant to the sentence to be imposed.
>
> (2) The court shall hear any relevant evidence presented by the prosecutor or the offender ....
>
> (5) Hearsay evidence is admissible at sentencing proceedings, but the court may, if the court considers it to be in the interests of justice, compel a person to testify where the person
>
> > (a) has personal knowledge of the matter;
> >
> > (b) is reasonably available; and
> >
> > (c) is a compellable witness.
>
> 724 (1) In determining a sentence, a court may accept as proved any information disclosed at the trial or at the sentencing proceedings and any facts agreed on by the prosecutor and the offender ....
>
> (3) Where there is a dispute with respect to any fact that is relevant to the determination of a sentence,
>
> > (a) the court shall request that evidence be adduced as to the existence of the fact unless the court is satisfied that sufficient evidence was adduced at the trial;
> >
> > (b) the party wishing to rely on a relevant fact, including a fact contained in a presentence report, has the burden of proving it;

> (c) either party may cross-examine any witness called by the other party;
>
> (d) subject to paragraph (e), the court must be satisfied on a balance of probabilities of the existence of the disputed fact before relying on it in determining the sentence; and
>
> (e) the prosecutor must establish, by proof beyond a reasonable doubt, the existence of any aggravating fact or any previous conviction by the offender.
>
> 726.1 In determining the sentence, a court shall consider any relevant information placed before it, including any representations or submissions made by or on behalf of the prosecutor or the offender.

A. The Events

[99] Mr. Melrose met the Complainant in the summer of 2017. Mr. Melrose was 27. The Complainant was 13. They met in person, apparently on the street (by the "red bench"). Mr. Melrose knew that the Complainant was under 16 years old, believing her to be 14: ASoF para 17(b). The Complainant knew that Mr. Melrose was 27: ASoF para 14(f).

[100] Mr. Melrose told Dr. Nesca that when he met the Complainant she was with a friend, and asked him for a cigarette (this was confirmed in his statement). This first encounter was brief: FNR p. 5. [Dr. Nesca was repeating Mr. Melrose's account, but hearsay was admissible in these proceedings and I had no reason to doubt the reliability of the information Mr. Melrose provided to Dr. Nesca, particularly given the corroboration in the statement.]

[101] Mr. Melrose and the Complainant messaged one another.

[102] Mr. Melrose reported to Dr. Nesca that he saw the Complainant and her friend the next day. Later (no date was specified), the Complainant attended at Mr. Melrose's apartment: FNR p. 6.

[103] On her second visit to Mr. Melrose's apartment, "she openly proclaimed her love for him and they engaged in sexual intercourse:" FNR p. 6. This occurred in July 2017. Mr. Melrose used a condom. See ASoF para 28.

[104] The Complainant had been living with her mother. On July 12, 2017, her mother called the police because the Complainant had not been home in several days and her mother feared she was with Mr. Melrose. Her mother had permitted the Complainant to use her iPad. She had seen Facebook Messenger conversations of a concerning nature between the Complainant and Mr. Melrose: ASoF para 3. These messages are appended to the Agreed Statement of Facts (the Messages).

[105] The Messages included affirmations of affection, comments about the parties' continued relationship, references to having a baby together, references to meeting and to having physical contact, and references to what does appear to be the use of condoms.

[106] In the afternoon of July 12, Cst. Witwer attended Mr. Melrose's residence. The Complainant was not there. Mr. Melrose was arrested.

[107] The Complainant's mother located the Complainant elsewhere and advised the police of her location. A police officer picked up the Complainant and transported her to the Zebra Child Protection Centre for a video-recorded interview.

[108] In her interview, the Complainant stated (among other things) that she was dating Mr. Melrose, they had intimate contact (but not sex), she wanted to have a child with him in the future, and that she knew he was 27: ASoF at paras 14, 15.

[109] Mr. Melrose's residence was searched under a warrant. A used condom was seized, as well as computer devices. Another warrant was obtained to permit forensic examination of the computer devices and that examination was performed. Neither warrant was challenged.

[110] Mr. Melrose was held overnight and was interviewed by Det. Hauptman in the morning of July 13. He was *Chartered* and cautioned. The admissibility of this interview was not challenged. Mr. Melrose stated the following (among other things): He had a learning disability. He believed the Complainant was 14. After the interviewing officer had described the law concerning consent, he denied having touched the Complainant "like that." He had held hands with the Complainant and had kissed her. The Complainant had wanted to date him. The Complainant had been with him at about 1 p.m. on the day he was arrested.

[111] The interview turned to the seized used condom. In the words of the Defence Brief at para 9,

> Mr. Melrose initially denied having any sexual contact with [the Complainant]. He then gave an absurd set of rapidly evolving explanations for why there was a used condom in his apartment before ultimately admitting that he had sexual intercourse with [the Complainant].

I find this to be an accurate description of the relevant portion of Mr. Melrose's statement.

[112] Mr. Melrose acknowledged having sent the Messages to the Complainant.

[113] The Complainant provided a DNA sample. The used condom was sent for DNA analysis and was found to bear the DNA of two persons, the Complainant and an unknown male. Mr. Melrose admitted that he was the male whose DNA was found on the condom.

[114] The s. 151 offence was established on the basis of Mr. Melrose having had sexual intercourse with the Complainant. She could not consent, given the ages of the parties.

[115] The s. 172.1(1)(b) offence was established on the basis of the Messages between Mr. Melrose and the Complainant. The Messages represented telecommunications for the purpose of facilitating an offence under s. 151 of the *Criminal Code*.

B. Mr. Melrose's Circumstances

[116] Aside from Dr. Nesca's testimony and the recorded statement, the information about Mr. Melrose's circumstances came onto the record through unsworn documentary evidence. I consider the contents of the records to be reliable. The Crown did not seek to cross-examine any of the authors of the documents.

1. Early Years Assessments

[117] In March 1999, when Mr. Melrose was 9 years old, he was assessed by Dr. Rosemary Moulden, a psychologist. He was found to have a full scale IQ score of 48, putting him below the

0.1 percentile. He was classified as having a "moderate (trainable) handicap:" Exhibit 4, Moulden Psychological Assessment Results and Report (Moulden Report). In her report, Dr. Moulden referred to an assessment of Mr. Melrose's intellectual ability in 1995, when he was nearly 6, by Dr. David Piercey. Dr. Piercey had found that his full scale IQ score was 54. Again, he was in the "trainably handicapped" range. Dr. Piercey's findings were not otherwise in evidence.

[118] Dr. Moulton administered the Vineland Adaptive Behaviour Scales. Mr. Melrose's Adaptive Behaviour Composite score indicated delayed skills in his overall adaptive functioning: Moulton Report, p. 3. His strongest score was in the socialization domain, at the 14th percentile (moderately low). His composite score was at the 1st percentile.

[119] In his Forensic Neuropsychological Assessment Report (to be discussed below), Dr. Nesca referred to a neurodevelopmental assessment report prepared by Dr. Patton on September 21, 2004. This report was not otherwise in evidence. Dr. Nesca reported that Dr. Patton noted that Mr. Melrose exhibited low frustration tolerance, limited attention span, difficulty understanding instructions, and delayed speech development. Dr. Patton's opinion was that Mr. Melrose's difficulties were organic: FNR p. 3. In testimony, Dr. Nesca clarified that the "organic" finding indicated that Mr. Melrose's difficulties were structural, not transient resolvable states.

2. Capacity Assessment Report, 2017

[120] After Mr. Melrose was charged, on September 27, 2017, a Capacity Assessment Report was prepared by a psychologist, Kristi-Anna Steiestol, to support an application for the Appointment of Guardian and Trustee for Mr. Melrose: Exhibit 5. While prepared for another purpose, this document has the added reliability of having been specifically prepared by an expert for review by a judge.

[121] Ms. Steiesol reported that Mr. Melrose "has a well-documented history of learning problems, low cognitive functioning, as well as poor adaptive, coping and life skills." He lacks numeracy skills. He has been financially exploited by acquaintances on numerous occasions. (Ms. Steiesol was repeating unattributed third-party information at this point.) Ms. Steiesol stated that a functional inquiry at the time of the Capacity Assessment

> revealed a lack of understanding and appreciation of factors and information relevant to making personal decisions .... He was unable to fulfill basic skills required for independent living .... Michael acknowledged and gave examples whereby even in situations that he does have some degree of understanding, he does not always make decisions that are in his best interests.

Ms. Steiestol confirmed that Mr. Melrose's impaired cognitive functioning is permanent.

[122] On May 17, 2018, Justice M.E. Burns granted a Guardianship and Trusteeship Order for Mr. Melrose, appointing his mother as Guardian and Trustee and his father as Alternate Guardian and Trustee.

3. Mental Health Update, 2020

[123] A Mental Health Update Report dated October 19, 2020 was provided by Dr. Natasha Egeli, a psychologist. She has provided counselling to Mr. Melrose for 3 years. She stated that

> due to his limited cognitive capacity, Michael requires healthy environments to be successful and is vulnerable to making poor decisions without adequate support or if influenced negatively by others.

She also stated that "[i]n every session, he has expressed remorse over the events leading to his court case. He has clearly stated that what he did was wrong, he will never repeat this behaviour, and he regrets his acts and the hurt he has caused others."

4. Dr. Marc Nesca

[124] Dr. Nesca testified. He was qualified as a clinical forensic psychologist. He holds a PhD in Clinical Psychology from the University of Manitoba. Currently he is an Associate Professor and Head of the Criminal Justice Program, Faculty of Humanities and Social Sciences, Athabasca University. He has been in private practice since 1997, performing civil and criminal assessments and consultation services. He is registered with the Canadian Psychological Association and the American College of Forensic Psychology. He has worked in hospital forensic and psychiatric units and with the Correctional Service of Canada. He has published (whether as sole, first, or co-author) some 17 articles, as well as book chapters and reviews. His second book is in press. He has given numerous presentations to justice system audiences. He has been qualified to provide expert testimony in the Alberta Provincial Court and the Alberta Court of Queen's Bench.

[125] Dr. Nesca's FNR was dated September 22, 2019. The FNR was based on interviews with Mr. Melrose and his parents on September 7, 2018 and September 6, 2019, Mr. Melrose's completion of test batteries, and a review of documents described in the FNR.

(a) Police Interview

[126] Dr. Nesca observed the video of Mr. Melrose's police interview. He stated that it "reveals a developmentally delayed accused with a generally child-like demeanour .... During [the] last segment of the interview, he presents as an agitated, overwhelmed child .... Later ... [he] becomes agitated almost to the point of incoherence:" FNR p. 2. Dr. Nesca testified that Mr. Melrose presented as a child who knows he is in trouble. He lied like a child. Mr. Melrose's thinking was child-like, distorted, and ineffectual. I find that Dr. Nesca's observations were accurate.

(b) Clinical Observations

[127] In Mr. Melrose's attendances with Dr. Nesca, Mr. Melrose gave answers to questions that were "concrete and simple." While Mr. Melrose's insight into personal needs was adequate, "his judgment was grossly impaired." He "could not complete a simple reasoning task that is routinely completed by patients who have suffered a significant brain injury:" FNR p. 3. Dr. Nesca also referred to "a relative inability to anticipate consequences:" FNR p. 13. Dr. Nesca testified that Mr. Melrose was unable to solve simple problems or to anticipate problems.

[128] Mr. Melrose's affect was anxious. "He impressed as literally terrified of the legal system:" FNR, p. 3. Fear dominated his emotional presentation: FNR p. 13. Dr. Nesca confirmed this judgment in testimony.

[129] Mr. Melrose does not have reality-altering mental illness. His thoughts, though, "were simple and child-like."

[130] Dr. Nesca noted that Mr. Melrose exhibited depression and that he is currently on anti-depressants: FNR pp. 4, 5.

(c) Tests

[131] Formal testing disclosed that Mr. Melrose had a full scale IQ of 54. This score falls in the "extremely low" range of general intellectual abilities and puts Mr. Melrose below the 1st percentile. "In more practical terms, these test results indicate that approximately 99% of the general population can reasonably be expected to have a higher IQ than Mr. Melrose:" FNR p. 6. Dr. Nesca testified that a score could not get worse statistically. Mr. Melrose is at the bottom of the measurement range.

[132] Dr. Nesca stated that Mr. Melrose's IQ corresponds to a mental age that falls in the range of 8 ½ to 11: FNR p. 13.

[133] Dr. Nesca commented in testimony that Mr. Melrose's IQ test results have been consistent since 1995, through Dr. Moulden's 1999 testing, to his testing in 2018. Dr. Nesca did not consider the difference between Dr. Moulden's finding of a full scale IQ score of 48 and his own finding of 54 to be significant. The difference falls within the scope of measurement error. The testing instrument used in 1995 by Dr. Piercey was not the same as the testing instrument used later.

[134] According to a standardized test of academic achievement, Mr. Melrose's reading ability respecting single words is at a grade 4 level and his mathematical ability at a grade 3 level: FNR p. 6. When words are placed in context, Mr. Melrose is able to understand sentences at a grade 3 level: FNR p. 7.

[135] Dr. Nesca administered the Neuropsychological Assessment Battery (NAB) of tests, "developed for the comprehensive assessment of a wide range of neurocognitive functions:" FNR p. 7. Mr. Melrose's overall performance fell in the severely impaired range, with a percentile ranking of 0.4. "We can [reasonably] expect 99.5% of the population to perform better on this battery of tests:" FNR pp. 7, 14. His neurocognitive functions are globally impaired. Dr. Nesca testified that Mr. Melrose functions at the level of a child.

[136] Mr. Melrose's results on the Orientation group of NAB tests (orientation to self, time, place, situation) fell in the severely impaired range. He was incompletely oriented to time and place: FNR p. 7.

[137] Mr. Melrose's performance on the Attention group of tests fell in the severely impaired range. He has considerable difficulties with attentional processes. His auditory attention span, visual scanning ability, working memory, and memory for patterns are all limited, with performance not rising above the 1st percentile. On the daily living task for this test module, assessing his attention to detail, capacity for selective attention, and ability to accurately scan his environment, Mr. Melrose's performance fell in the severely impaired range, at a percentile rank of less than 1.0: FNR p. 8.

[138] Mr. Melrose's score for the Language module fell in the severely impaired range, showing significantly diminished speech output, and impaired auditory comprehension, word finding, and reading comprehension. On the daily living task for this test module, relating to auditory and reading comprehension, simple mathematical calculations, and speech output, Mr. Melrose's results fell within the severely impaired range, below the 1st percentile.

[139] Mr. Melrose's score for the Memory module fell in the moderately-to-severely impaired range. He struggled to acquire information and forgot what he learned over a relatively brief

interval: FNR p. 8. On the daily living task for this test module, his performance fell in the impaired range: FNR p. 9.

[140] Mr. Melrose's score for the Spatial Skills module fell also fell in the moderately-to-severely impaired range. He had impaired visuospatial skills, attention to detail, and visuoconstructional abilities. His performance on the daily living task for this module fell within the moderately-to-severely impaired range.

[141] In terms of his executive functions, Mr. Melrose's test performance showed significant impairment in the areas of planning, foresight, problem solving, and concept formation, as well as in the areas of mental flexibility, self-monitoring, and verbal fluency: FNR p. 9.

[142] Dr. Nesca wrote that (FNR p. 14)

> The impact of these deficits is likely to be pervasive and profound. Social judgment, decision-making, impulse control and the ability to anticipate consequences can all be expected to be impaired, with deficits amplified in real world settings that are more complex and chaotic than relatively sterile testing conditions.

[143] Dr. Nesca continued:

> Given the depth of Mr. Melrose's deficits, and his very limited IQ, I am doubtful that he is capable of fully appreciating the potential psychological consequences for a minor of a sexual relationship with an adult. I am equally doubtful that he fully appreciates the significance of the age difference between he and the victim. More directly, while I have no doubt that Mr. Melrose understands, in a concrete sense, that he is older than the victim, I do not believe that he is capable of truly appreciating the psychosocial differences between an adult male and a 13 year-old female, or the potentially negative psychological consequences of a sexual relationship between the two ....

[144] Dr. Nesca testified that because of Mr. Melrose's concrete thinking and because his contact with the Complainant did not involve physical injury, he would not appreciate that the event would be otherwise damaging.

[145] Dr. Nesca confirmed in testimony that Mr. Melrose did not have the ability to anticipate long-term consequences to the Complainant.

[146] When asked in direct whether Mr. Melrose would understand that sex with a minor is morally wrong, Dr. Nesca said that morality is highly abstract. He did not think Mr. Melrose could appreciate the moral wrongfulness. He thinks of his misconduct in concrete terms.

[147] In cross-examination, Dr. Nesca testified that Mr. Melrose would appreciate wrongfulness in a "gross sense." He understands that he is in trouble. He understands not to go near people of a certain age. He can parrot back information, but he does not have the cognitive ability to fully appreciate consequences. Dr. Nesca did not believe that Mr. Melrose would understand the emotional harm to a girl of the Complainant's age or the harm to her development. Mr. Melrose would understand making her feel bad, but nothing beyond that.

[148] Dr. Nesca agreed with the Crown that lack of insight by offenders is not rare. But for most offenders, this lack of insight "comes from a different place." [By that I understood Dr. Nesca to mean that Mr. Melrose's lack of insight is a function of his cognitive deficits. Other

offenders' lack of insight may be a function of (e.g.) moral deficits (priorization of self and self-gratification) or insufficient attention to or appreciation of the facts of their offending, or wilful blindness.]

[149] When asked whether Mr. Melrose's use of condoms demonstrated impulse control and awareness of physical consequences, Dr. Nesca responded that Mr. Melrose would understand that he should use a condom so he would not make a baby or get sick. A 10 or 11 year old would understand this, said Dr. Nesca.

[150] When asked whether any programming would give Mr. Melrose greater insight, Dr. Nesca said none would. Mr. Melrose's condition is static and no programming will improve his overall level of functioning. He is capable, though, of learning new things, of acquiring new information.

(d) Risk Assessment

[151] Dr. Nesca's risk assessment for Mr. Melrose had two steps. The first involved a review of risk factors applicable to the general population of sexual offenders. The second focused on risk factors relevant for intellectually disabled sexual offenders.

[152] In cross-examination, Dr. Nesca confirmed that the particular method of risk assessment he employed has been validated. All of the risk variables used have been empirically validated. The variables are "robust." The list he uses is derived from R.K. Hanson, a leader in the risk assessment field. Some variables used in other testing tools, variables that Dr. Nesca did not use in his assessment, have been found not to be predictive of recidivism. Dr. Nesca stated that there is broad agreement in the current literature about these "excluded factors." Dr. Nesca stated that he could say this without hesitation, having presented on this matter the day before he testified in this case.

[153] Dr. Nesca stated that the re-offence rate for male sexual offenders with unrelated girl victims is approximately 9% over 5 years and 13% over 10 years. This is the baseline re-offence rate. It shows the average risk of a group of offenders with similar victim profiles. Dr. Nesca stated that the baseline re-offence rate has questionable relevance to Mr. Melrose, since the proportion of intellectually disabled offenders in the derivation sample is unknown: FNR p. 10.

[154] At the first step of the risk assessment, Dr. Nesca assessed the presence of risk factors empirically linked to sexual offence recidivism. The risk factors can be grouped under the following categories (FNR p. 11):

- sexual criminal history
- sexual deviance
- lifestyle instability/criminal orientation
- intimacy deficits
- poor response to treatment or supervision
- poor problem-solving skills
- young age.

[155] Dr. Nesca identified only one risk factor concerning Mr. Melrose, poor problem-solving skills. Dr. Nesca wrote as follows (FNR p. 11):

> This variable ... is universally present in cases involving intellectually impaired offenders. In this case, the negative impact of this variable is negated by the Guardianship order that is in place and the very close supervision that Mr. Melrose's parents exercise over his behaviour. Even allowing for active and legally meaningful problem solving deficits, this risk profile is benign, leading logically to the conclusion that Mr. Melrose poses a low risk of recidivism.

[156] The second step of the risk assessment, focusing on risk factors relevant for intellectually disabled sexual offenders, relied on a framework developed by Phenix and Sreenivasan in 2009. The risk factors are grouped under the following categories (FNR pp. 11-12):

- global risk factors (dovetails with the first step of the analysis)
- diagnostic risk factors (e.g. psychopathy, pedophilia)
- social skills deficits
- behavioural tendencies
- knowledge levels pertaining to sexual behaviour
- treatment progress (only if in active treatment)
- release environment
- acute dynamic risk factors (variable mental and behaviour states based on, e.g., loss of employment, substance abuse).

Dr. Nesca stated that individual variables in each domain are rated as present or absent. The greater the number of present variables, the higher the risk in that area. The review of all domains leads to a risk designation of low, moderate, or high: FNR p. 12.

[157] Dr. Nesca considered three domains to have absent variables, indicating low risk – global risk (see the step one assessment), knowledge levels pertaining to sexual behaviour, and release environment. Mr. Melrose's release environment would include, in Dr. Nesca's estimation, "considerable family and community support and a highly structured environment." Even if he does not receive a custodial sentence, "he will ... be under some form of mandated supervision:" FNR p. 13. The variables in this domain are negative, indicating low risk.

[158] Dr. Nesca considered the other domains to have present variables, but all produced low risk ratings.

[159] The diagnostic risk factor was engaged by Mr. Melrose's depression.

[160] The social skills deficit risk factor "is concerned with deficits leading to the association with children or an inability to form peer relationships." Dr. Nesca indicated that variables in this domain include, e.g., "long term institutionalization, sexually exploiting lower functioning peers, and lack of assertiveness:" FNR p. 12. The only variable present was lack of assertiveness. In cross-examination, Dr. Nesca clarified that the "sexually exploiting lower functioning peers" variable concerned (e.g.) in an institutionalized setting, higher functioning individuals targeting lower-functioning individuals.

[161] The behavioural tendencies domain focuses on "variables that undermine self-control." These include lack of assertiveness, pathological impulsiveness, low frustration tolerance, and

difficulty delaying sexual gratification: FNR p. 12. Again, according to Dr. Nesca, "[a]ssertiveness deficits are the only difficulty in this group of variables:" FNR p. 12. Dr. Nesca conceded in cross-examination that Mr. Melrose's impulse control was lower than average, but his impulse control was not pathologically impaired. He was not "a walking impulse." He did not operate in an "I walk, I see, I take" manner.

[162] The only variable present under acute dynamic risk factors was Mr. Melrose's "negative emotional state," as he is depressed, terrified of incarceration, and highly stressed: FNR p. 13. The single present variable in this domain indicates low risk.

[163] Dr. Nesca's overall conclusion, taking into account both analytical steps, was that Mr. Melrose poses a low risk of recidivism: FNR pp. 13, 15.

[164] Dr. Nesca "expected" that Mr. Melrose's "intense fear of incarceration" will produce a "powerful personal deterrent effect, further reducing his risk for re-offence:" FNR pp. 13, 15.

[165] In cross-examination, Dr. Nesca was asked whether any particular type of punishment would bring home to Mr. Melrose not to commit the offences again. Dr. Nesca responded that the arrest process itself was terrifying to Mr. Melrose. Mr. Melrose was literally terrified of going to jail. Deterrence is based on that emotional impact.

[166] The Crown asked Dr. Nesca what could be done to manage the risk to the public posed by Mr. Melrose, what could be done in Mr. Melrose's best interests – what would be ideal? Dr. Nesca stated that Mr. Melrose is fully managed now.

[167] What would have to continue would be constant supervision (including video surveillance, monitoring behaviour 24/7), supportive counselling, being part of the Chrysalis program [which I understood to be a program for developmentally-challenged adults], and having decisions made by someone else. All of these matters are currently being addressed. Dr. Nesca could think of nothing to add, from a risk management perspective. Currently Mr. Melrose's risk is well-managed.

(e) The Offences

[168] Dr. Nesca referred to the offences having occurred when "Mr. Melrose became involved in a romantic relationship with a 13 year-old girl:" FNR p. 1. "The romantic nature of this involvement and plans for a long term relationship are captured in paragraph 9 of the Agreed Statement of Facts:" FNR p. 2. The offences were "a case of misguided romantic attraction rather than predatory sexual exploitation:" FNR p. 15.

[169] Dr. Nesca stated that Mr. Melrose and the Complainant "reportedly fell in love immediately ('when we first saw each other'):" FNR pp. 5, 15. Mr. Melrose described his feelings for the Complainant as "intense and overwhelming:" FNR p. 5. Dr. Nesca testified that for Mr. Melrose this was a "first love fantasy." In cross-examination, he said that this was a "child-like fantasy" involving marriage and children, without an appreciation of what any of this means. What happened was "falling in love" in a "childish way." Two individuals of the same maturity level came together in a child-like fashion and weaved their fantasies together.

[170] In cross-examination, Dr. Nesca stated that Mr. Melrose did not "groom" the Complainant, in the sense of leading her to a situation.

[171] In Dr. Nesca's view, if the circumstances are seen as romantic attraction, Mr. Melrose's attraction was limited to the individual Complainant. He was not "out there looking," he did not cast a "predatory net."

[172] In cross-examination, Dr. Nesca testified that he did not consider Mr. Melrose to have engaged in "luring" conduct. This was not an Internet offence. There were no indications of concerns respecting luring.

[173] When asked in cross-examination why the "romantic event" would not likely be repeated, what about the Complainant made it unlikely that the event would be repeated, Dr. Nesca referred first to the deterrent effect. Mr. Melrose now knows what can occur. Dr. Nesca then said that romantic attractions are peculiar to the individuals involved, in contrast to libidinal or predatory attractions.

(f) Messages between Mr. Melrose and the Complainant

[174] Dr. Nesca reviewed the Messages attached to the Agreed Statement of Facts.

[175] Dr. Nesca stated that "[c]onsistent with the victim's age and Mr. Melrose's mental age, their romantic text message exchanges are rather childish and, in my view, provide behavioral evidence of Mr. Melrose's cognitive limitations."

[176] In cross-examination, Dr. Nesca stated that he had no concern that Mr. Melrose was "speaking down" to the Complainant. Rather, the evidence indicates his level of functioning.

5. Additional Pre- and Post-Conviction Factors

[177] Mr. Melrose has no prior criminal record. He has neither reoffended nor been charged with an offence after the material events occurred.

[178] He pled guilty on October 18, 2019, before trial. He waived his preliminary inquiry.

[179] Dr. Egeli reported that that "[i]n every [counselling] session, he has expressed remorse over the events leading to his court case. He has clearly stated that what he did was wrong, he will never repeat this behaviour, and he regrets his acts and the hurt he has caused others." Dr. Nesca stated that Mr. Melrose "regrets becoming involved with the [Complainant] and that he determined to avoid sexual contact with anyone under the age of 18:" FNR p. 6.

[180] Mr. Melrose did admit his wrongdoing in his interview with the police, after having first offered his ineffectual lies.

[181] Mr. Melrose had been living with his older brother in an apartment. His brother worked during the day, leaving Mr. Melrose unsupervised. After Mr. Melrose was charged, he moved home with his parents. He severed connections with former associates to avoid negative influences. He is now under his parents' constant supervision. Their supervision is both direct and through security cameras installed in their home: FNR pp. 4, 5.

[182] Dr. Nesca reported that Mr. Melrose has a part-time job, a position he has held for about two years. His job is government-funded.

[183] He attends regular counselling sessions with a psychologist and participates in a community support group for intellectually disabled individuals. This program is government-funded and provides guidance respecting social behaviour and the maintenance of appropriate

social relationships: FNR p. 4. Dr. Nesca stated that the counselling is "to help him manage the stress of his legal circumstances:" FNR p. 5.

[184] Mr. Melrose has complied with all interim release conditions.

IV. Proportionate Sentences for Mr. Melrose: Assessment

[185] I will begin with a discussion of some important facts before turning to the determination of Mr. Melrose's sentences.

A. Discussion

[186] The facts relevant to the two offences are intertwined. Some aggravating and mitigating factors are relevant to both offences, some factors are relevant to only one offence.

1. Mr. Melrose's Conduct

(a) Age

[187] Mr. Melrose was 27. The Complainant was 13. Mr. Melrose knew that she was under age 16, although he thought she was 14. Mr. Melrose was about twice as old as the Complainant. The age difference is an aggravating factor: ***EJB*** at para 46.

[188] The Complainant was young, substantially younger than the age of consent. She was not very young, a pre-teen. Her young age is accounted for in the offences themselves. I would not add another level of aggravation because she was (just) 13, since that would involve a form of double counting (once for the offence itself, the second if the age were aggravating). That said, ***Friesen*** does warn against improperly underestimating the wrongfulness and harm of offences against adolescent victims: at para 136. The lack of aggravation in no way mitigates the gravity of the offence.

(b) Sexual Conduct

[189] Mr. Melrose and the Complainant had sexual intercourse once. They also engaged in non-intrusive physical acts, including hand-holding and kissing. The gravity of the offence is aggravated by the sexual intercourse.

[190] Mr. Melrose's sexual interference with the Complainant was non-consensual. "*De facto*" consent cannot be a mitigating factor: ***Friesen*** at para 149; ***Ford*** at para 23; ***Hajar*** at paras 6, 9.

[191] It was Mr. Melrose's responsibility to say No and to prevent and avoid sexual contact with the Complainant: ***Friesen*** at paras 153-154. At para 154, the Court adopted the observations of Justice Fairburn (as she then was) in ***R v JD***, 2015 ONSC 5857 at para 25: "It is the legal responsibility of adults who are faced with children who already exhibit signs of struggle, to protect them."

[192] The sexual conduct was a form of violence. "[V]iolence is always inherent in the act of applying force of a sexual nature to a child:" ***Friesen*** at para 77; see ***Hajar*** at para 115. The violence was not only physical but psychological. ***Friesen*** warned against establishing a hierarchy of physical acts: at para 146. The point was not to downgrade the seriousness of intrusive sexual acts but to ensure that the malign effects of acts other than penile penetration are not ignored: at para 146.

[193] A condom was used. That avoided the aggravating factors of exposing the Complainant to the risks of pregnancy or sexually transmitted disease.

[194] The sexual contact was objectively exploitative (setting aside Mr. Melrose's appreciation of the nature of the interaction) and inherently wrongful. "Courts must always give effect to the wrongfulness of this exploitation in sentencing, even if the degree of exploitation may vary from case to case ...:" ***Friesen*** at para 78. The exploitation was inherent in the act of sexual interference. In ***Hajar***, the Court of Appeal wrote at para 106 that

> [106] .... In prohibiting all sexual activity between children and adults while excepting close-in-age relationships, Parliament deliberately rejected the absence of exploitation as a defence to sexual interference. It did so because it recognized the obvious. As noted, all sexual acts between a child and an adult outside the close-in-age exception are *inherently exploitative* ....

See also para 115. I will return to the issue of the "degree of exploitation" below.

(c) Frequency

[195] That the sexual intercourse occurred once only is not a mitigating factor. The focus is on harm rather than on the number of incidents: ***Lemay*** at para 55. The restriction to a single occurrence points to a lack of aggravation by additional sexual conduct.

[196] Repetition would have increased both the gravity of the offence and the degree of responsibility of the offender: ***Boucher*** at para 24, but there is no "linear mathematical relationship between the number of assaults and the sentence." Justice Pepall recognized in ***R v Stuckless***, 2019 ONCA 504 at para 135-7 that even one instance of sexual abuse can permanently alter the course of a child's life.

(d) Duration

[197] On the evidence, the interactions between Mr. Melrose and the Complainant occurred over a brief period, some days, in Mr. Melrose's estimation, one week. The evidence did not permit findings relating to the precise dates of types of contact between Mr. Melrose and the Complainant, but the physical acts occurred within the time range set out in the Indictment, July 7 to July 12, 2017 and doubtless they interacted over a few days before that. The brevity of the period of interaction, again, points to a lack of aggravation by prolonged interaction.

(e) Harm

[198] No victim impact statement was filed. Direct evidence of the actual harm caused by Mr. Melrose's conduct was not available.

[199] Nonetheless, the likelihood or risk of harm is inherent in the sexual interference offence: ***Hajar*** at para 61; ***R v DSC***, 2018 ABCA 335 at paras 21, 23. I must consider the reasonably foreseeable harm that will follow from Mr. Melrose's conduct: ***Friesen*** at para 84. This harm may manifest during the remainder of the Complainant's childhood (see ***Friesen*** at para 80) and adulthood (see ***Friesen*** at para 81). The Court of Appeal stated in ***Hajar*** at para 65 that "in sentencing for major sexual interference, the sentencing judge *must* take into account the likelihood of serious psychological or emotional harm to the child victim irrespective of the child's [ostensible] consent."

[200] I do note that Justice Bielby had suggested in ***Hajar*** at para 199 that while "engaging in premature sexual activity by a child may well harm that child, such harm could be of a significantly different nature and degree where that sexual activity arises in an atmosphere absent exploitation."

(f) Lack of Some Additional Aggravating Factors

[201] Some additional aggravating factors relating to sexual interference with a child were absent. The absence of these aggravating factors did not mitigate what Mr. Melrose actually did to the Complainant. "The absence of an aggravating factor is not a mitigating factor:" ***Friesen*** at para 150. The purpose of referring to non-mitigating factors is to assist in delineating the nature of Mr. Melrose's conduct and to distinguish the circumstances of his offence from the circumstances of other offenders who have committed similar offences.

[202] First, Mr. Melrose's conduct involved no "gratuitous" violence, no violence other than the violence inherent in the sexual contact itself. I bear in mind that "[t]he fact that additional forms of violence such as weapons, intimidation, and additional physical assault may not be present does not provide a basis to ignore the inherent violence of sexual offences against children ...:" ***Friesen*** at para 152.

[203] Second, I find (and the Crown did not argue otherwise) that Mr. Melrose's relationship with the Complainant did not evolve into one of trust or authority as regards the Complainant.

[204] Third – and I acknowledge the need for caution, since sexual interference is always inherently exploitative (to some degree) – Mr. Melrose's conduct was not accompanied by the aggravating factors of coercion, compulsion, trickery, lies, or manipulation. Neither, on the evidence, did the use of drugs or alcohol play a role in facilitating the sexual contact. Again, these absent aggravating factors do not mitigate what actually happened.

(g) Exploitation and "Relationship of Genuine Affection"

[205] As the Court of Appeal recognized in ***Hajar***, "[o]f course, the sexual activity between an adult offender and child victim inevitably arises in some kind of context:" at para 125. In this case, according to Dr. Nesca and the Defence, the context was a relationship of genuine affection, a childlike romantic relationship between two individuals of similar intellectual functioning: see, e.g., Defence Brief at paras 43-47.

[206] The Court of Appeal cautioned that "[g]reat care must be taken when this claim is made:" ***Hajar*** at para 123. The claim may turn out to be, in effect, a disguised version of a *de facto* consent claim, a means of shifting blame to the complainant, and a means of obscuring harm: see paras 124-126. At para 127, we read the following:

> [127] .... given the vulnerability of children and the power imbalance between the adult offender and child victim, it is difficult to understand how any "relationship" involving major sexual interference can be properly characterized as one of "genuine affection". Looming large here is the romanticized notion of two children in love whose mutual love is interrupted by the intervention of (unduly concerned) parents or teachers leading to criminal charges (that would not have happened except for their intervention). But when a claim is made that a "relationship of genuine affection" is a mitigating factor in sentencing an adult offender for major sexual interference of a child victim, a sentencing court must set aside speculative scenarios about star-crossed lovers and deal with the reality

> before it. That will include several issues. From whose perspective is this "relationship" to be judged: adult offender or child victim? And when is that to be assessed? After the crime has been prosecuted? Or at an earlier time when the child has no understanding of his or her victimization? And most difficult yet, what exactly constitutes a "relationship of genuine affection" when an adult sexually abuses a child?

At para 130, the Court stated that "[i]f a sentencing judge is faced with the claim that a relationship of genuine affection was involved and it ought to mitigate sentence, the judge will necessarily need to consider the questions raised above."

[207] The Court of Appeal, though, did confirm that a relationship of genuine affection could exist and that such a relationship could have some significant mitigating value. The majority stated at para 130 that

> [130] .... we have concluded that a relationship of genuine affection, even if found to exist, may – but not must – be a mitigating factor in sentencing ....

and continued at para 131:

> [131] ... we agree with our colleague Bielby JA that, in certain circumstances, the sentencing judge may well conclude that there is an established relationship of genuine affection that developed naturally between the parties and within which the relevant circumstances arose that warrants mitigation of sentence. In that event, the sentencing judge may, depending on all the circumstances, determine that the nature of the relationship is such that it should be a weighty factor in mitigation of sentence ....

[208] At para 178, Justice Bielby accepted that it was "possible" that a relationship of genuine affection could be recognized if

- that relationship was of some considerable duration, and
- the age difference between complainant and accused was not significantly greater than the five-year "close-in-age" defence.

[209] At para 179, Justice Bielby listed some factors that could be considered on whether a relationship was exploitative (as opposed to a relationship of genuine affection):

- the relative ages and maturity levels of the parties
- the existence of any mental or physical disability or learning delay on the part of either party
- the nature and duration of any prior ongoing relationship between the parties including whether it was based on mutual affection
- the presence or absence of any attempt by the accused to entice other adolescents into sexual conduct in the same time frame as that in question
- the presence or absence of internet sexualization or grooming by the offender, or of luring including via the internet

- the creation of child pornography using images of the complainant, where not separately charged
- the use of violence, threats or force in the commission of the offence or to secure the complainant's continued participation or silence
- any criminal record, especially in relation to convictions for related types of offences
- a significant age difference between offender and complainant (i.e. well above the minimum five-year difference, which is an essential element of the offence).

[210] I do not consider Dr. Nesca's characterization of the relationship as "romantic" to be in the nature of an expert opinion. There was no suggestion that there are any validated empirical means used by the psychological profession to distinguish "romantic" from "non-romantic" attitudes. Rather, the characterization falls to common sense, informed by the legal guidance provided by the Court of Appeal.

[211] It is true that Mr. Melrose's mental age was near (actually below) the Complainant's chronological age. Further, as indicated above, there were no indicia of exploitation beyond the inherent exploitation of sexual interference. However, Mr. Melrose's mental age was 8 1/2 to 11. That is not the age of romance. The relationship was very brief. No non-intimate relationship preceded the intimate relationship. On Mr. Melrose's telling, the sexual intercourse occurred at the Complainant's second visit to his home. There was no evidence of what they talked about, about what shared interests they might have had (e.g. music or movies), no reference to any activities they might have done together, besides watching a movie together once (with others present). Whatever language they might have used in the Messages, this relationship was not "romantic." I find, on the evidence, that on Mr. Melrose's side, the relationship was founded not on love but hormones. Operationally, he exhibited intense focused desire, improperly directed at a child. I do not find that this was a genuine relationship of affection.

[212] My conclusion is in line with the Court of Appeal's comments in ***Ford*** at paras 26-28:

> [26] On the day of the offence, the parties barely knew each other; they had met only once before. And, although they had apparently communicated daily for two to three months prior to meeting, we are not told of the nature of those communications. They may have been completely superficial and not meaningful at all. Without evidence of more substantial communications that might reasonably form the basis of a genuinely affectionate relationship, such a finding is unreasonable.
>
> [27] This is not to say, as the trial judge put it, that a "middle-class, Romeo and Juliet type" standard is imposed in order to find a relationship of genuine affection. Relationships formed online are not precluded from being found to be relationships of genuine affection. It is ultimately a matter of proof where the existence of such a relationship is disputed. If evidence had been introduced to show a sustained emotional connection between the parties, this, in addition to the willing participation of the complainant in the sexual act and the absence of grooming, manipulation or exploitation, may have supported a finding that the relationship was one of genuine affection. Also, the longer the relationship without a sexual encounter, the more likely it is to be one of genuine affection: *R*

> *v Boriskewich*, 2017 ABPC 202. Conversely, the fact the relationship between an adult and a child became sexual the first time they met in person militates against a finding that it was one of genuine affection.
>
> [28] Infatuation and similar fleeting emotions, alone or together, are not sufficient to make the relationship one of genuine affection that would mitigate the sentence to be imposed.

[213] All of this being said, in the circumstances, the degree of exploitation involved in the offence was low. Moreover, Mr. Melrose did have cognitive deficits that accompanied his offending. Mitigation lies in those cognitive deficits, not in the claimed romantic attachment. I will discuss mitigation and those deficits below.

2. The Messages

[214] The Crown considered Dr. Nesca's view that Mr. Melrose had not committed a "luring" offence to be problematic. On the one hand, Dr. Nesca was right. Mr. Melrose did not "lure" the Complainant via the Internet. On the other hand, the Crown was right. Dr. Nesca presupposed an outmoded understanding of the s. 172.1(1)(b) offence: see ***R v Legare***, 2008 ABCA 138, affd 2009 SCC 56 at para 56 (CA) [subsequently cited to the SCC unless otherwise indicated]. The offence captures conduct broader than "luring," narrowly understood.

[215] Receipt by an underage complainant of communications themselves may cause harm: ***Friesen*** at para 82. In this case, the Messages attesting to the parties' relationship and their ambition to one day have a child may have induced harm – though, again, on the record there was no evidence of actual harm.

[216] However, the role of the Messages in the progress of events was, I find, secondary and incidental.

[217] Mr. Melrose met the Complainant by happenstance. She and her friend asked him for a cigarette. Their interaction was not initiated through online communications. On the evidence, Mr. Melrose was not online searching for a young victim or any companion generally. He did not seek the Complainant out specifically. The Messages disclosed nothing predatory.

[218] There was no evidence that Mr. Melrose engaged in "grooming" the Complainant, in the sense of leading or manipulating her into doing anything. His fault was culpable acquiescence: ***Friesen*** at paras 153-154.

[219] The Messages contained mostly mutual confirmations of affection. No explicit language was used. Sexual relations were not referred to, save respecting the baby and the implied reference to the condoms. The Complainant did state at one point that she was going to take a shower and Mr. Melrose stated that he wished he was there so he could rub her back.

[220] The evidence supported no finding that Mr. Melrose deceived the Complainant or promised material reward to her. He did not cause her to send photographs or perform sexual acts through his communications.

[221] The Messages were sent over a short period.

[222] Some online communication may have preceded the sexual intercourse. Those communications were not before me. Given the Crown's burden of proof on aggravating facts, I draw no inferences about the purposes or effects of those absent messages. The Messages

appended to the Agreed Statement of Facts were sent after that incident. I infer this from the reference to what I interpret to be the four condoms, used, on the evidence, in connection with the sexual intercourse. The Messages that were before me supported the s. 172.1(1)(b) conviction, as facilitating later sexual interference, but not that the Messages facilitated the sexual intercourse.

3. Mr. Melrose's Cognitive Abilities

[223] Mr. Melrose's full scale IQ score put him at or below the 1st percentile. His scores have been consistent since the 1990s. Cognitively, he is an outlier, at the far end of the left tail of the IQ distribution.

[224] The Crown sought to show that Mr. Melrose was not as afflicted as Dr. Nesca would have allowed: Crown Brief at para 15. The Crown pointed out that Mr. Melrose was "living on his own." That is not exactly accurate. He was living with his brother. That arrangement, as it turns out, was a mistake. The error made by Mr. Melrose's family (we did not have their testimony, but their error may have been based more on hope than experience) is not proof that they, the persons who knew him best, had a more elevated opinion about his capacities than Dr. Nesca.

[225] The Crown pointed out that Mr. Melrose was able to create and further a relationship with the Complainant and to "convince" her to have sex with him. My finding that the degree of exploitation was low is a finding that little in the way of "convincing" took place – although that, I hasten to add, is made in response to the Crown's sought inference, not to point to a mitigating factor.

[226] The Crown pointed out that Mr. Melrose knew enough to wear a condom. Dr. Nesca offered the opinion, that I accept, that this precaution reflected only his mental age, not some elevated form of risk-management thinking.

[227] Mr. Melrose works part-time, but he has a government supported position.

[228] Mr. Melrose could text or message and carry on a conversation, but the Messages themselves are evidence of his low level of language mastery. Dr. Nesca denied that Mr. Melrose was "talking down" to the Complainant in his texts. His Messages were consistent with his test scores.

[229] On the evidence, Mr. Melrose could not have appreciated the psycho-social harms to the Complainant that his conduct risked. His thinking is concrete. He did not fully understand the implications of an adult having sex with a child, the significance of the age difference between himself and the Complainant. He did not understand the types of harms risked by his conduct.

[230] There was a suggestion that Mr. Melrose did not appreciate harm beyond physical harm. I find that he did have sufficient moral sense to know that what he did was wrong (s. 16(1) did not apply to him). His lies when interviewed by the police, ineffectual as his lies were, were still intentional tactics to cover up wrongdoing. The lying did not display sophisticated thinking. Dr. Nesca was right that 3-year olds lie. We develop the capacity to lie early. A 3-year old may lie to cover up wrongdoing, just like an older person. But even a 3-year old has some sense of right and wrong. That is why they lie, to cover up their wrongs. Mr. Melrose's lies showed that he knew that having sexual relations with a child was wrong. ***Friesen*** stated that "[t]he protection of children is one of the most fundamental values of Canadian society:" at para 65. Mr. Melrose likely did not think in terms of "values" or "Canadian values," but he did appreciate the more

fundamental moral truth that abusing children is wrong. That is not to say that he appreciated all the reasons why it is wrong.

[231] Mr. Melrose's wrongdoing must be understood from his perspective, from within the framework within which he could understand right and wrong.

[232] I agree with Defence counsel that because of his cognitive deficits, Mr. Melrose's moral blameworthiness fell at the lowest end of the culpability spectrum.

[233] Because Mr. Melrose could not appreciate harm or wrongfulness beyond a basic level, his culpability is much reduced. Mr. Melrose is the exceptional case presupposed by the Supreme Court in ***Friesen*** at para 88:

> [88] Intentionally applying force of a sexual nature to a child is highly morally blameworthy because the offender is or ought to be aware that this action can profoundly harm the child. In assessing the degree of responsibility of the offender, courts must take into account the harm the offender intended or was reckless or wilfully blind to (***Arcand***, at para. 58; see also *M. (C.A.)*, at para. 80; ***Morrisey***, at para. 48). For sexual offences against children, we agree with Iacobucci J. that, save for possibly certain rare cases, offenders will usually have at least some awareness of the profound physical, psychological, and emotional harm that their actions may cause the child .... [emphasis added]

[234] On the evidence, I find that Mr. Melrose did not, in fact, advert to the psychological and emotional harms risked by his conduct. He was not aware that his actions could profoundly harm the Complainant. He was not reckless, knowing of the prospect of those harms and proceeding regardless. He was not wilfully blind, perceiving the need for determining whether his conduct would cause those harms but deliberately refraining from making inquiries because he did not want to know the truth: ***R v Briscoe***, 2010 SCC 13, Charron J at para 22; ***Morrison*** at para 100.

[235] On the evidence, I find that Mr. Melrose could not have adverted to the psychological and emotional harms risked by his conduct. I do not find that he "ought to have been aware" of the risks of harm borne by his conduct. His cognitive limitations prevented the objective standard of the "reasonable person" from applying to him. Comments of Justice McLachlin in ***R v Creighton***, [1993] 3 SCR 3, made in a different context should apply respecting sentencing as well, as a matter of consistency and principle:

> An accused can only be held to the standard of a reasonable person if the accused was capable, in the circumstances of the offence, of attaining that standard. Consequently, in determining whether a reasonable person in the circumstances of the accused would have foreseen the risk of death arising from the unlawful act, the trier of fact must pay particular attention to any human frailties which might have rendered the accused incapable of having foreseen what the reasonable person would have foreseen. If the criminal law were to judge every accused by the inflexible standard of the monolithic "reasonable person", even where the accused could not possibly have attained that standard, the result, as Stuart notes, would be "absolute responsibility" for such persons: *Canadian Criminal Law: A Treatise* (2nd ed. 1987), at p. 192. H. L. A. Hart advanced a similar argument in "Negligence, *Mens Rea* and Criminal Responsibility" in *Punishment and Responsibility* (1968), at p. 154:

> If our conditions of liability are invariant and not flexible, i.e. if they are not adjusted to the capacities of the accused, then some individuals will be held liable for negligence though they could not have helped their failure to comply with the standard ....

4. Risk of Reoffending

[236] I shall comment on three features of Mr. Melrose's risk of reoffending.

[237] First, Mr. Melrose's cognitive condition is permanent. It will not improve, although his conduct and decision-making can improve, if modestly, through the acquisition of new information. There is, despite his organic dysfunction, some room for progress, for rehabilitation. There was no suggestion in the evidence that incarceration promised better rehabilitative progress for Mr. Melrose than supervision in the community.

[238] Second, I find that Mr. Melrose's risk to reoffend is low. The assessment of Mr. Melrose's risk itself has several features.

[239] Dr. Nesca's risk assessment method, as the Crown explored in cross-examination, is not the only risk assessment method, and may not be the typical risk assessment method for sexual offenders. See, e.g., ***R v Scrivens***, 2019 ABQB 700 at paras 399-416; 417-499. Dr. Nesca, though, defended his approach and I accept his method and his conclusion that Mr. Melrose poses only a low reoffence or recidivism risk.

[240] Dr. Nesca deployed the "romantic" characterization in the risk assessment. He did not consider Mr. Melrose to be at risk of engaging with other underage victims because of the exclusivity inherent in a romantic relationship. Mr. Melrose's relationship was with the Complainant and was limited to the Complainant. Other underage girls, then, were not at risk from Mr. Melrose.

[241] But again, what occurred was not "romance." Mr. Melrose encountered the Complainant, some communication occurred, and sexual intercourse soon followed. They did not know one another. They did not link their experiences and interests. The Complainant was simply a young female person who paid attention to Mr. Melrose. His emotional reaction would have been the same regardless of who the young woman was. His failure to control his impulses would have occurred had connection and opportunity occurred respecting another young woman.

[242] The Crown, in my view, assessed Mr. Melrose's response to the Complainant in this way. The Crown, though, moved from that assessment to the conclusion that Mr. Melrose was predatory. I do not draw that inference. No evidence supported a finding that Mr. Melrose was particularly (exclusively/primarily) interested in young women of around age 13. While we do not have much evidence, my view is that Mr. Melrose would have reacted much the same way had the Complainant been 15 or 17 or 21. Further, Mr. Melrose did not initiate contact with the Complainant or manufacture or manipulate the Complainant into the circumstances that led to Mr. Melrose offending. And further, Mr. Melrose was 27. This is his first offence. He has, according to information provided to Dr. Nesca, had other sexual partners. There was no suggestion that these relationships violated the law. His offence did occur in a particular and peculiar context.

[243] Third, I find that means are available to manage Mr. Melrose's risk of reoffence acceptably.

[244] Dr. Nesca commented – and this is borne out by Mr. Melrose's need for counselling – that Mr. Melrose is terrified by the prospect of incarceration. The threat of jail is a specific deterrent for Mr. Melrose.

[245] More importantly, Mr. Melrose's risk can be managed by strict conditions of supervision and restrictions on his activities. Mr. Melrose's risk has been successfully managed over the period of his pre-sentencing release. He will need someone to watch over him for many years, until time and age impose their own internal constraints: see ***Scrivens*** at para 371.

5. Actual Impact

[246] Mr. Melrose's cognitive and executive functioning deficits are relevant to the actual impact on him of incarceration.

[247] I do not have expert evidence that specifically dealt with "the likely negative impact to the Accused of being sentenced to a lengthy period of imprisonment in a provincial correctional facility:" ***R v Esposito***, 2020 ABQB 165, Gates J at para 97. I am able to draw the necessary inferences from the record, including Mr. Melrose's recorded statement.

[248] I have taken into account that the psychological conditions that led to Mr. Melrose offending are the very conditions that support inferences of the devastating effects of imprisonment on Mr. Melrose. He is not in the position of a sexual offender who manifested some physical condition for the first time when he was due for trial or sentencing.

[249] Dr. Nesca referred to Mr. Melrose as being terrified of jail. Mr. Melrose is in counselling because of this fear.

[250] The Capacity Assessment Report referred to Mr. Melrose having been taken advantage of by others. This claim was hearsay and not particularized, but it makes perfect sense. As in the outside world, so in the more intense and concentrated microcosm of prison. Were Mr. Melrose in general population, a sure prediction is that he would be taken advantage of. He would be a child among men. Many of those men will be in prison precisely because of their inclination or lack of disinclination to take advantage of others. Mr. Melrose would be harmed, emotionally, psychologically, and likely physically, should he be sentenced to any significant period of imprisonment.

[251] The actual impact of incarceration on an offender should be taken into account in determining a proportionate sentence. See ***Ayorech*** at para 13:

> [13] ... the effect of the imprisonment should be taken into account when it would be disproportionately severe because of the offender's mental illness. Ayorech's mental disorders have left him vulnerable, such that Dr. Santana opined that he "was ill equipped to survive in the prison system" ....;

Scofield at para 67:

> [67] The judge also found that incarceration would likely be harmful to Mr. Scofield given his impairments, lack of maturity, and vulnerability:
>
> > [106] Mr. Scofield would not do well in an institutional setting and it would likely inhibit his rehabilitative potential. It would be difficult and disruptive for him and he would likely be subjected to hostility from other inmates. I must balance the impact of a period

> of incarceration against the impact of keeping him in a stable, supportive environment where he is under the supervision of his mother and partner ....; and

Esposito at para 96:

> [96] .... Given my earlier findings regarding his significant intellectual deficiencies and child-like attitude and demeanour, sentencing this individual to any significant period of imprisonment would be very much like placing a young teenager in an adult correctional facility.

[252] I suggest that implicit in ***Ipeelee*** is the general point that psycho-social constraint and disadvantage is relevant not only to moral blameworthiness, to the degree of responsibility for committing an offence, but to the nature of the appropriate, the meaningful, sanction. Justice LeBel wrote at para 73 that "[t]he existence of such circumstances may also indicate that a sanction that takes account of the underlying causes of the criminal conduct may be more appropriate than one only aimed at punishment *per se*," and quoted a passage from ***Gladue*** (para 69) where Justices Cory and Iacobucci wrote that

> it is incumbent upon the sentencing judge to consider these factors in evaluating whether imprisonment would actually serve to deter, or to denounce crime in a sense that would be meaningful to the community of which the offender is a member. In many instances, more restorative sentencing principles will gain primary relevance precisely because the prevention of crime as well as individual and social healing cannot occur through other means.

B. Sentences

1. Sentencing Positions of the Crown and Defence

[253] The Crown urges a global sentence of 24 months incarceration followed by 3 years probation, with ancillary orders. Sentences of imprisonment for one year consecutive should be imposed for each of the s. 151 and s. 172.1(1)(b) offence.

[254] The Defence urges a sentence of imprisonment in the intermittent range of 30-90 days for the s. 151 offence and 3 years probation for the s. 172.1(1)(b) offence.

2. Factors Applicable to Both Offences

(a) Comparator Sentencing Decisions

[255] I should and I will consider the sentencing decisions relied on by counsel, as required by the parity principle. ***Friesen*** at paras 31-33.

[256] I have kept in mind that while like cases should be treated alike, unlike cases should be treated differently. Since sentencing does turn on the circumstances of particular offences and particular offenders, proportionality should not be sacrificed to uniformity. See ***Lacasse*** at para 58:

> [58] There will always be situations that call for a sentence outside a particular range: although ensuring parity in sentencing is in itself a desirable objective, the fact that each crime is committed in unique circumstances by an offender with a unique profile cannot be disregarded.

[257] I have also kept in mind that pre-2015 decisions have (or may have) reduced weight, since the maximum penalty for the offences increased in 2015. I have also kept in mind that pre-***Friesen*** decisions may have reduced weight, since those decisions may not reflect the perspectives found in ***Friesen***.

(b) Pre- and Post-Conviction Factors

(i) Criminal Record

[258] Mr. Melrose had no criminal record. The absence of a criminal record tends to show that specific deterrence is not a sentencing objective.

(ii) Cooperation with the Authorities

[259] Mr. Melrose confessed in his police interview, after his ineffectual lies.

(iii) Guilty Plea

[260] Mr. Melrose entered an early guilty plea. He waived his preliminary inquiry.

[261] I acknowledge the Crown's observation that Mr. Melrose's guilty plea was a form of bowing to the inevitable. The Crown's case was strong, given Mr. Melrose's confession and the DNA evidence.

[262] Nonetheless, Mr. Melrose did spare the Complainant from testifying at both trial and preliminary inquiry and did spare the administration of justice the time and expense of a preliminary inquiry and trial: see ***Hajar*** at para 163. I refer to the passage from ***SLW*** quoted above. Mr. Melrose waived his most fundamental legal right and eliminated otherwise ineluctable litigation risk – "[a] guilty plea always has some value:" at para 33.

[263] Moreover, there is a certain unfairness in discounting the weight of a guilty plea because of the strength of the Crown's case. The offender who pleads guilty, one might say, is properly acknowledging responsibility for committing the offence, satisfying an objective of sentencing that contributes to public safety. An offender should not be penalized for doing the right thing. This is particularly so, as ***SLW*** emphasizes, because the "right thing" does not match the offender's "rights thing" – the offender is constitutionally entitled to a trial. The offender has surrendered that right by doing what is right.

[264] I this case, I accept that Mr. Melrose's early guilty plea as evidence of remorse and as an appropriate acknowledgement of responsibility. It has substantial mitigating weight.

(iv) Other Indicia of Remorse

[265] Mr. Melrose's remorse was reported by Dr. Egeli and Dr. Nesca.

[266] Mr. Melrose has operationalized his remorse through his conduct. He has modified his living arrangements, accepted Guardianship and Trusteeship, and attended counselling.

[267] The Crown points out that Mr. Melrose's remorse must be qualified, in that he lacks the ability to appreciate the full significance of his offence and the harms that his conduct caused or risked. I find that Mr. Melrose has shown the remorse that he can and he has done what he can to show his remorse. We could not expect more from him (in this as in other contexts, ought implies can). It is not as if he can fully understand his wrongdoing but has refused to accept what he has done: see, in contrast, ***Shrivastava*** at paras 22, 49.

(v) Family and Community Support

[268] Mr. Melrose has strong family and community support. This could not affect the gravity of the offence or his degree of blameworthiness or even his remorse *per se*, but this support does go to the issue of the appropriate sanction for Mr. Melrose. His family has been there for him since his offence. His parents have re-taken parental supervision of their now adult child. They are, in effect if not in law, offering themselves as sureties for his compliance with conditions that may need to be imposed.

(c) Statutory Directions

(i) Section 718.2(a)

[269] Section 718.2(a) sets out provisions particularly applicable to sexual offences against children. In my view, on the evidence, the sole s. 718.2(a) aggravating factor that might be asserted against Mr. Melrose is set out in subparagraph (ii.1):

> (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender ….
>
> > (ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years ....

The Complainant was under 18. She was 13.

[270] I take the Defence point that I should avoid double-counting of age as an aggravating factor. Part of the *actus reus* for both offences is the age of the Complainant. The Complainant's age is therefore built into the gravity of the offences. But as indicated above, I do take the age difference between Mr. Melrose and the Complainant to be an aggravating factor. Section 718.2(a)(ii.1), in my opinion, does not add a further aggravating factor to either offence.

(ii) Section 718.01

[271] Section 718.01 confirms the seriousness of offences involving the abuse of children and provides an "ordering" of sentencing objectives for such offences (see ***Friesen*** at paras 101-102):

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

For both offences, I must give "primary consideration to the objectives of denunciation and deterrence."

[272] In addition to the comments from ***Friesen*** reviewed above, I acknowledge the observations of Justice Wagner, as he then was, in ***Lacasse*** at para 6:

> [6] While it is normal for trial judges to consider sentences other than imprisonment in appropriate cases, in the instant case, as in all cases in which general or specific deterrence and denunciation must be emphasized, the courts have very few options other than imprisonment for meeting these objectives, which are essential to the maintenance of a just, peaceful and law-abiding society.

[273] Nonetheless, these sentencing objectives do not overwhelm or trump proportionality. To arrive at a just sentence, a sentencing court must consider the degree of responsibility of the

offender. That involves, even for serious offences, taking due account of cognitive deficits. ***Hajar*** itself recognized this at paras 51 (footnote 34), 120, 164, 179 (Bielby JA). See also ***Ford*** at para 32. Justice Moldaver (then of the Ontario Court of Appeal) confirmed that even when denunciation and deterrence have sentencing priority, exceptional circumstances may demand a departure from what denunciation and deterrence would otherwise dictate. See ***R v Woodward***, 2011 ONCA 610 at para 72:

> [72] .... Absent exceptional circumstances, in the case of adult predators, the objectives of sentencing commonly referred to as denunciation, general and specific deterrence and the need to separate offenders from society must take precedence over the other recognized objectives of sentencing. [emphasis added]

And again, ***Friesen*** recognized in para 104 that "while s. 718.01 requires that deterrence and denunciation have priority, nonetheless, the sentencing judge retains discretion to accord significant weight to other factors (including rehabilitation and ***Gladue*** factors) in exercising discretion in arriving at a fit sentence, in accordance with the overall principle of proportionality."

[274] I refer as well to ***SLW*** at para 29:

> [29] For the most serious offences against children, the principles of deterrence and denunciation will often overwhelm other factors: Clayton C Ruby *et al*, *Sentencing*, 9th ed (Toronto: LexisNexis, 2017) at §23.390 ..., citing Code, s 718.01. However, mitigating factors may influence the quantum of sentence. As Tallis JA of the Saskatchewan Court of Appeal stated in *R v Gordon* (1984), 34 Sask R 232 at para 6, 11 WCB 366 (CA):
>
> > The principle of sentencing which emphasizes the need generally to express society's revulsion for crimes of this kind by the imposition of a lengthy custodial sentence is not a principle which demands a rigid and inflexible adherence to it in all cases involving the commission of such offences, regardless of the circumstances. The factors of deterrence and denunciation which the court must apply should be balanced against all other considerations properly taken into account in the sentencing process. [emphasis added]

(iii) Cognitive Deficits and Denunciation and Deterrence

[275] Denunciation and deterrence have attenuated purchase when the offender suffers from serious cognitive deficits: ***Shevchenko*** at paras 25, 26; ***R v Resler***, 2011 ABCA 167 at para 14; ***Ayorech*** at para 11; ***Scofield*** at para 75.

[276] Cognitive deficit lowers blameworthiness and responsibility. Hence, the offender's conduct calls for less denunciation or condemnation. There is less blameworthiness to denounce or condemn. Societal values must still be validated or confirmed, but that general need does not translate into a requirement to treat a particular offender as if he or she did not suffer from an extraordinary condition.

[277] Significant cognitive deficits makes an offender unlike other potential offenders, whose psychological conditions would not be (for the most part) exceptional. General deterrence loses its grip. If an offender is not similar to other offenders because of cognitive deficits, a lower

punishment for that offender is not unfair to other offenders and that offender's punishment does not send a message to other differently-situated offenders. That offender is not an example for dissimilar offenders: ***R v Belcourt***, 2010 ABCA 319 at para 8.

[278] Specific deterrence may be attenuated as well, because an offender with cognitive deficits may have diminished capacity to change (keeping in mind that this factor linked to a high risk of reoffending could engage separation or incapacitation as a dominant sentencing objective).

(d) Cognitive Deficits

[279] Mr. Melrose's cognitive deficits, discussed above, substantially diminished his blameworthiness and responsibility. Mr. Melrose has admitted committing the offences. But his blameworthiness was much less than the blameworthiness of a "normal" adult offender who would have known or should have known of the full wrongfulness and harms associated with a sexual relationship with a 13 year old. See ***Ford*** at paras 32, 42-43.

3. Section 151 Offence

(a) No Mandatory Minimum Sentence

[280] The one-year mandatory minimum sentence for the s. 151 offence was struck down in ***Ford***.

(b) Starting Point

[281] The 3-year starting point for an act of major sexual interference applies in this case: ***Hajar*** at paras 10-11, 81. The starting point is premised on no gratuitous violence and no prior record. It is not based on a guilty plea, so a guilty plea may mitigate.

(c) Wrongfulness and Harm

[282] The Defence fully conceded that the s. 151 offence was a serious offence: Defence Brief at para 40, 42.

[283] The Complainant did not testify and did not submit a Victim Impact Statement. Nonetheless, as discussed above, the sexual contact with the Complainant was a form of violence against a child who could not consent. The sexual contact was inherently exploitative, to the degree that the exploitation was inherent. As indicated, Mr. Melrose's interaction with the Complainant was not accompanied by any form of scheming or manipulation. He approached the Complainant as an 8 ½ to 11 year old boy in a man's body.

[284] ***Hajar*** states that that, regardless of proof of actual harm, "in sentencing for major sexual interference, the sentencing judge must take into account the likelihood of serious psychological or emotional harm to the child victim irrespective of the child's [ostensible] consent." The sexual interference was inherently harmful. The Crown observed correctly that "the harms identified in ***Friesen*** do not magically go away, from the perspective of the complainant, merely because of the more limited cognitive capacity of the offender:" Crown Brief at para 58.

[285] However, the assessment of blameworthiness is not locked to the actual or potential effects on the Complainant. The Crown is right about harm, but the assessment of harm does not exhaust the proportionality assessment.

(d) Neutral Factors

[286] Mr. Melrose has no prior record. That does not mitigate as it is built into the starting point. I note the lack of the following aggravating factors.

[287] The offence involved no gratuitous violence, as discussed above.

[288] Mr. Melrose used a condom. That avoided the aggravating factor of exposure to risk through unprotected sex.

[289] The sexual contact occurred once only, avoiding aggravation through repetition.

[290] The interaction between Mr. Melrose and the Complainant was brief, probably in excess of the time span set out in the Indictment (5 days) but not much more. Again, aggravation through prolonging the interaction was avoided.

[291] Mr. Melrose's conduct was not accompanied by the aggravating factors of coercion, compulsion, trickery, lies, or manipulation. Drugs or alcohol did not facilitate the sexual contact.

[292] The absence of these aggravating factors did not mitigate.

(e) Aggravating Factors

[293] The age difference between Mr. Melrose and the Complainant was an aggravating factor.

[294] The sexual contact, aside from some non-invasive contact that was not detailed in the evidence, was sexual intercourse. That was seriously intrusive and inherently harmful conduct.

(f) Mitigation: Cognitive Deficits

[295] As discussed above, Mr. Melrose's blameworthiness is radically diminished by his cognitive deficits. He could not know the full significance of what he did. He should not be punished as if he could.

(g) Other Mitigating Factors

[296] Mr. Melrose had no criminal record. He confessed to the police. He waived his preliminary inquiry. He entered an early guilty plea, to which I attach significant mitigating weight. He has expressed his remorse in words and in his actions, through modifying his living arrangements, accepting Guardianship and Trusteeship, and attending counselling.

[297] Mr. Melrose's risk of reoffending is low and can be and has been managed by out-of-prison conditions. Mr. Melrose has good family and community support.

[298] I have concluded, on the evidence, that a period of imprisonment that would involve any prolonged exposure of Mr. Melrose to other inmates would damage him emotionally, psychologically, and likely physically. He is at particular and unusual risk because of his particular and unusual cognitive deficits.

(h) Penal Objectives

[299] Section 718.01 priorizes denunciation and deterrence for the s. 151 offence. These penal objectives, in turn, support a sentence of imprisonment. Priorization of these objectives, however, does not exclude considerations of other factors or justify the imposition of a disproportionate sentence.

(i) Comparator Sentences

[300] The circumstances of ***Hood*** were significantly different from the present circumstances, but the Nova Scotia Court of Appeal remarked (in *obiter*) that sexual interference involving low levels of blameworthiness could attract dispositions of probation with conditions to a short period of incarceration with probation. Justice Karakatsanis agreed in ***Morrison*** at para 184.

[301] Of greater significance is the Court of Appeal's decision in ***Ford***. The decision is recent, from a court whose jurisprudence is aligned with and prefigured the approach in ***Friesen*** (starting-points, perhaps, aside). I acknowledge that the Court of Appeal has warned against overreliance on typical sentence appeal decisions, since appellate decisional factors not directly bearing on the precise calibration of fitness of sentence may play a role in dispositions. Nonetheless, both counsel and the trial courts continue to look for guidance in the broad appellate jurisprudence, conscious of the risk of overreliance.

[302] The circumstances of ***Ford*** are roughly similar to the present circumstances. The offender was convicted of sexual interference. The trial judge had sentenced the offender to 6 months imprisonment followed by 3 years probation. In ***Ford***,

- the offender was 20, the complainant 13
- the "relationship" commenced on-line and on-line communications continued for about 2 months before the offender and complainant met in person
- at their first meeting, they kissed
- at their second meeting, they had sexual intercourse in a public washroom (at this point, "they barely knew each other:" at para 26)
- the offender had a minor criminal record
- the offender did not plead guilty
- the offender had suffered from a brain tumor when 14 – this arrested his mental age at age 14 or 15: at para 39
- the offender's psychologists observed that "[i]f he is sentenced to a prison term, we doubt he will survive as he will be prone to exploitation/manipulation, and violation. He is at risk of suicide and mixing with this cohort will intensify his risk for self-harm:" at para 40
- the offender was unemployable and received AISH.

The Court found that the trial judge had wrongly found that the offender and complainant had a relationship of genuine affection. Nonetheless, "even with that mistake ... the sentence is not unfit in the circumstances of this case, particularly in light of the unfortunate personal characteristics of the [offender]:" at para 44. If the sentence were adjusted to correct for the error, the period of imprisonment would have been increased to nine months. But because the offender had already served his sentence and was complying with probation, the Court declined to re-incarcerate him.

[303] I accept Defence counsel's contention that Mr. Melrose's circumstances were more compelling than Ford's:

- Mr. Melrose pled guilty. No preliminary inquiry was held. A guilty plea, I note, received considerable weight in ***Hajar***. It was a "key" mitigating factor: at para 163.
- Ford was not remorseful. He was "sly, stubborn, and defiant:" ***R v Ford***, 2017 ABQB 322 (***Ford (QB)***) at para 42. Mr. Melrose is remorseful and has confirmed remorse through his actions.
- Ford had a minor criminal record. Mr. Melrose had none.
- In ***Ford***, some months of online communication preceded the sexual contact. That was not the subject of a separate count (see ***Ford (QB)*** at para 14). In the present circumstances, contact was not initiated online and the online contact was brief and, as I have found, secondary.
- Most importantly, while Ford had suffered serious cognitive and impulse-control damage, on the evidence, Mr. Melrose's damage is more severe, putting him significantly below the 14-15 year range, at the 8 ½ to 11 year range.

(j) Sentence

[304] In my opinion, the statutory priorities of denunciation and deterrence and the invasiveness of Mr. Melrose's conduct warrant a period of imprisonment. The Defence conceded that some jail time was required to address the seriousness of Mr. Melrose's offence: Defence Brief at para 123.

[305] Further, while I acknowledge that Mr. Melrose is terrified of imprisonment, that element of specific deterrence would be attenuated if Mr. Melrose were not in fact imprisoned. He would no longer face an imminent threat of imprisonment. Mr. Melrose is a concrete thinker. Prior to sentencing, he faced concrete risk. If he were not to be sentenced to a period of imprisonment for this offence, the risk would become hypothetical and of decreased salience as time went on. Actual imprisonment will have a more profound and lasting effect than imprisonment threatened but avoided. Specific deterrence will be supported by a period of imprisonment.

[306] How long should that period of imprisonment be? The sentence must be proportionate to the gravity of the offence and Mr. Melrose's degree of responsibility. His conduct was wrongful and risked harming the Complainant. He had sexual intercourse with the Complainant. That was inherently damaging. He was 27 and she was 13. Their interaction was inherently exploitative. No factors, though, aggravated Mr. Melrose's wrongdoing beyond the inherent wrongfulness and harms of his conduct (again, that does not mitigate but assists in locating on the spectrum of wrongdoing and harm). Mr. Melrose pled guilty early, entirely sparing the Complainant from testifying. He is remorseful. Steps have already been taken to ensure supervision and direction for his life and I am convinced his parents will continue to follow through on their commitments to their son. Most importantly, Mr. Melrose's degree of blameworthiness was significantly attenuated by his cognitive deficits. Holding him to the standard of a less damaged offender would be wrong. The punishment would not fit the crime, as committed by this offender.

[307] In my opinion, a period of imprisonment of 90 days, to be served intermittently, will simultaneously and proportionately accomplish the objectives of denunciation, deterrence both general and specific, and rehabilitation. The period of imprisonment will express society's condemnation of Mr. Melrose's conduct and serve as a warning to others that similar conduct,

even attended by a low level of blameworthiness, will attract a sentence of imprisonment. Actually serving time will strongly impress on Mr. Melrose that he did wrong and that he should not repeat his conduct. The intermittent sentence, particularly served in this time of pandemic, will also reduce Mr. Melrose's contact with the general prison population. The intermittent sentence will protect him from disproportional effects of imprisonment. It will reduce the risk that he will be taken advantage of or harmed, or that he will receive schooling in criminality or acquire unhelpful associations. He will be able to attend work and counselling while he is not in custody.

3. Section 172.1(1)(b) Offence

(a) Mandatory Minimum Sentence

[308] Under s. 172.1(2)(a),

> (2) Every person who commits an offence under subsection (1)
>
> > (a) is guilty of an indictable offence and is liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year.

(b) Relevance of Sexual Interference

[309] An important consideration in the sentencing for the s. 172.1(1)(b) offence is that the circumstances relevant to this offence are distinct (if not separable) from the circumstances of the s. 151 offence. Mr. Melrose shall be sentenced for the s. 151 offence. Circumstances particularly relevant to sentencing for the s. 151 offence should not be double-counted in sentencing for the s. 172.1(1)(b) offence. See, e.g., ***R v Shyback***, 2018 ABCA 331 at para 23.

[310] A foundation for the sexual interference conviction and sentencing is that Mr. Melrose and the Complainant had sexual intercourse. That fact should not be used to aggravate the gravity of Mr. Melrose's s. 172.1(1)(b) offence, and not only because this would amount to double-counting.

[311] The Messages were created after the sexual intercourse occurred, and referred back to it. The Messages did not facilitate the commission of that act of sexual interference. There may have been some additional online communications between Mr. Melrose and the Complainant, but these communications were not in evidence and I can draw no inferences about the nature and content of these messages.

[312] However, the sexual intercourse is contextually relevant to the s. 172.1(1)(b) offence, even if not an aggravating factor. It helps explain parts of the Messages, and is relevant to show that the Messages were communications within a sexualized relationship. But again, there is no aggravation. This is only evidence supporting the commission of the offence and the propriety of Mr. Melrose's guilty plea.

(c) Seriousness of the Offence

[313] Justice Moldaver confirmed in ***Morrison*** at paras 39 and 40 that

> [39] .... Parliament created [the "luring"] offence to combat the very real threat posed by adult predators who attempt to groom or lure children by electronic means. As this Court explained in *Levigne*, the offence seeks to protect children by "identify[ing] and apprehend[ing] predatory adults who, generally for illicit

> sexual purposes, troll the Internet to attract and entice vulnerable children and adolescents": para. 24.
>
> [40] To achieve this purpose, s. 172.1 criminalizes conduct that precedes the commission, or even the attempted commission, of certain designated offences, most of which involve sexual exploitation of children. It thereby creates an essentially inchoate offence - that is, a preparatory crime that captures conduct intended to culminate in the commission of a completed offence .... There is no requirement that the accused meet or even intend to meet with the other person with a view to committing any of the designated offences: see ***Legare***, at para. 25. The offence reflects Parliament's desire to "close the cyberspace door before the predator gets in to prey": para. 25.

[314] The conduct targeted by the offence is manifestly harmful and wrongful, and s. 172.1(1)(b) is a very serious offence: ***Morrison***, Karakatsanis J (dissenting but not on this point) at para 176; ***Hajar*** at para 155.

[315] Multiple forms of harm may be caused by the offence.

[316] If an offender communicates with a child, a further offence may be attempted or accomplished, or no offence may even be attempted.

[317] Even if the offender pursues no further offence, the child faces the harms caused by the communications themselves. The communications would be exploitative, involving deceit or manipulation or both. The communications may expose the child to or involve the child in sexualized communications.

[318] If the offender pursues a further offence, the child faces the harms caused by the communications and the harms caused by the offence or by any steps taken by the offender to commit the offence. Even if the offender is intercepted before causing any actual harm to the child, the offender will have created the risks of harm inherent in the offence pursued.

[319] The offender may not actually communicate with a child, as when the offender is caught by a police sting. No actual harm is caused to a particular child. This does not make the offence a "victimless" crime ("child luring should never be viewed as a victimless crime:" ***Friesen*** at para 94). The offender seeks a victim, but was wrong about whether he actually acquired one. The victim existed in his imagination and in the representation by the undercover officer. The offender's communications still posed risks to children. The offender's dangerous communications simply missed their mark, and reached not prey but another sort of hunter.

[320] The sting circumstances expose the importance of the fundamental blameworthiness or culpability that attracts criminal liability for s. 172.1(1) offences.

[321] Culpability attaches to the intentionality of the offender (who knows the victim is underage), extending back from the intention to commit an offence, to the intention to attempt to commit an offence, to the intention to facilitate the commission of an offence.

[322] In ***Legare*** at para 33, Justice Fish referred to the "policy considerations governing offences of this kind," and quoted Professor Andrew Ashworth:

> ... inchoate crimes are an extension of the criminal sanction, and the more remote an offence becomes from the actual infliction of harm, the higher the degree of

> fault necessary to justify criminalization. (*Principles of Criminal Law* (6th ed. 2009), at p. 456)

In the paradigm case of an online predator seeking child victims, luring or grooming them step by small step, following the long-term plan, the high level of subjective fault even at the very earliest steps of the plan is clear.

(d) Levels of Blameworthiness

[323] But just as in the case of other offences, a distinction must be drawn between the *mens rea* required for conviction for a s. 172.1(1)(b) offence and the level of blameworthiness or degree of responsibility relevant to sentencing.

[324] It is not the case that all offenders who commit a s. 172.1(1)(b) offence have the same level of blameworthiness.

(i) *LFW*

[325] A comment attributed to Justice L'Heureux-Dubé is sometimes misused in this context. In ***R v LFW***, 2000 SCC 6 at para 31, we read "[a]s to moral blameworthiness, the use of a vulnerable child for the sexual gratification of an adult cannot be viewed as anything but a crime demonstrating the worst of intentions." A s. 172.1(1) offence involves the use of child for sexual gratification. If this *ipso facto* demonstrated "the worst of intentions," no distinctions could be drawn for sentencing purposes. All intentions would be "the worst." But first, Justice L'Heureux-Dubé was technically in the dissent in this case (a 4:4 split). Second, the quotation is in fact from Justice Cameron, whose language approved by Justice L'Heureux-Dubé. Third, a specific offender was contemplated as the context for the comment in question. The full quotation is as follows:

> 30 I also agree with Cameron J.A. that the trial judge did not give sufficient weight to the moral blameworthiness of the offender, who engaged in offensive and demeaning behaviour with a young person over whom he had significant power as an older relative and neighbour, and who indicated no remorse even upon conviction for the offences. This offends the proportionality principle set out in s. 718.1 of the *Criminal Code*, R.S.C., 1985, c. C-46, which establishes the fundamental principle that the court must impose a sentence proportionate to the gravity of the offence and the degree of responsibility of the offender. [emphasis added]
>
> 31 Recognizing that there is no presumption in favour of incarceration for certain types of offences, I adopt the following comments of Cameron J.A., at p. 148:
>
> > ... I do start from the premise that sexual assault of a child is a crime that is abhorrent to Canadian society and society's condemnation of those who commit such offences must be communicated in the clearest of terms. As to moral blameworthiness, the use of a vulnerable child for the sexual gratification of an adult cannot be viewed as anything but a crime demonstrating the worst of intentions.

I refer to ***Quinn v Leathem***, [1901] AC 495 (HL) [[1901] UKHL 2, BAILII] at 506: "every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found."

(ii) Specific Intent Offence

[326] Section 172.1(1)(b) is a specific intent offence.

[327] One might argue, not without support, that a specific intent offence requires proof of a "high" level of *mens rea* and so proof of a specific intent offence entails proof of a high level of fault or culpability. For example, we read in ***Morrison*** at para 153 that proof of child luring "requires a high level of *mens rea* and involves a high degree of moral blameworthiness." In ***EJB*** at para 43 the Court of Appeal writes that s. 153 "is a specific intent offence and the respondent's blameworthiness is accordingly high;" and at para 59 that the trial judge failed "to consider that specific intent is required for sexual exploitation bringing with it a high degree of moral blameworthiness." Further, Prof. Ashworth, quoted in ***Legare***, referred to the increased fault required to anchor liability the further an offence extends from actual commission.

[328] Most offences are "general" intent offences requiring proof only of the *actus reus* and the intent to commit the *actus reus*. Often general intent offences are accompanied by additional intent or purpose (or motive), that provide the reasons for committing the offence. We typically commit acts for reasons. The Crown, though, is not responsible for proving that additional intent or purpose (hence, "motive – always relevant, never essential"). A specific intent offence, expressly or by interpretation, requires proof of not only the intent to commit the *actus reus*, but proof of an additional intent or purpose. A specific intent offence is not necessarily a more blameworthy intentional act than a general intent offence committed for an invidious purpose (that purpose could be established in sentencing).

[329] I suggest that the blameworthiness of specific intention lies not so much in the existence of additional intention or purpose, but in the content of the intention or purpose in context – for example, touching a child "for a sexual purpose" (as in ***EJB***). That is, what is important to the degree of blameworthiness analysis is not so much the fact of an additional intention but what that additional intention is.

[330] Further, what may be encompassed by doing an act for a particular purpose may be broad, not at all singular or uniform. Section 172.1(1)(b) is a case in point. An offence is committed if

- an accused communicated by a means of telecommunication (an intentional act)
- with another person believed by the accused to be under age 16 (belief being subjectively determined)
- the communication was for the purpose of facilitating the commission of a listed offence.

Certainly, a high degree of moral blameworthiness would attach to the intentions of a paradigm case Internet predator, even at the stage of facilitation of a listed offence (let alone at the stages of attempt or commission). But does commission of the offence always require a "high level of *mens rea*" and involve a "high degree of moral blameworthiness"?

[331] Justice Moldaver had remarked in ***Morrison*** on the breadth of offences listed in s. 172.1(1): at para 146. But in addition to that breadth, the notion of "facilitation" has a broad denotation. Facilitation runs the gamut from the impulsive (albeit still intentional) to the carefully calculated. Proof of facilitation does not require proof of sophisticated or complex planning. To "facilitate" means to make easier. It includes

> helping to bring about and making easier or more probable - for example, by "luring" or "grooming" young persons to commit or participate in the prohibited conduct; by reducing their inhibitions; or by prurient discourse that exploits a young person's curiosity, immaturity or precocious sexuality: ***Legare*** at para 28; see ***Legare (CA)*** at para 65-66.

According to Justice DiTomaso in ***R v Allen***, 2017 ONSC 3798 at para 253,

> [253] Facilitating, in its context here, means lowering a child's inhibitions and defences, desensitizing a child to sexual discourse and inculcating in a child the belief that sex with an adult would be desirable. In this way, the predator can more easily commit the prohibited sexual acts with the child when they meet. The persuasion has all been done in advance.

[332] Proof of facilitation does not require proof

- of sexually explicit language. Justice Fish observed in ***Legare*** at para 29 that "those who use their computers to lure children for sexual purposes often groom them online by first gaining their trust through conversations about their home life, their personal interests or other innocuous topics." The offence embraces conduct that serves to create a "climate of acceptance of abuse:" ***Legare (CA)*** at para 61.
- that an offender met or intended to meet the victim with a view to committing any of the specified secondary offences: ***Legare*** at para 25; see para 34. In Justice Watson's words, facilitation is not "dependent upon the present intent of the accused to specifically achieve the physical conduct contemplated by [the specified] offences," or a "present intention to meet the child communicated with: ***Legare (CA)*** at paras 52, 62.
- that the accused actually intended to carry out physical contact with the specific child: ***Legare (CA)*** at paras 55 and 60. Proof of a present intention to commit a secondary offence would be sufficient to establish the requisite mental element, but is not necessary: ***Legare (CA)*** at para 67.
- as regards the specified ss. 151 or 152 offences, that the accused believed that the other person "would immediately respond positively to the invitation, incitement, or counselling:" ***Legare (CA)*** at para 64. The accused may need first to have developed a relationship with the child.
- that an accused's acts be "objectively capable of facilitating the commission of the specified secondary offence with respect to the underage person concerned:" ***Legare*** at para 42.

[333] My point is that the mere fact that s. 172.1(1)(b) creates a specific intent offence does not, by virtue of the requirement of proof of a specific intent, particularize the degree of

blameworthiness of the offender, beyond the minimum *mens rea* required for conviction for the offence. The specific intent feature of the offence is not, by itself, a signal that a threshold of high blameworthiness has been established.

(e) Harm

[334] Mr. Melrose did communicate with the Complainant through messages. But as I concluded above, these communications were secondary to the s. 151 offence. Mr. Melrose met the Complainant in person. She asked for a cigarette. He was not engaged in predatory luring. There was no evidence that he was lurking on the Internet, searching for victims.

[335] The sexual intercourse followed personal attendances by the Complainant at his residence, although some communications that were not in evidence appear to have been sent between the first meeting and the personal attendances.

[336] The Messages referred to intercourse that had occurred but did not facilitate its occurrence. The Messages were "after the fact" of the sexual intercourse.

[337] The Messages did involve Mr. Melrose expressing his feelings for the Complainant and did concern, in part, their continuing relationship, including the prospect of later having a baby. Mr. Melrose's Messages were not manipulative and contained no lies meant to induce the Complainant to act against her interests. The Messages, for the most part – and aside from their aspect as facilitating or making easier unlawful sexual contact with the Complainant – reflected Mr. Melrose's actual emotions respecting the Complainant. (I note that Mr. Melrose made some claims in the course of his interview that he was not telling the Complainant the truth at points during their messaging. However, I find that he was not being truthful with the interviewer. Mr. Melrose's claims were part of his ineffective effort to get himself out of trouble.)

[338] There was no evidence of the actual harm caused to the Complainant by Mr. Melrose's Messages. I do take into account that some harm was caused to the Complainant by the Messages. The context of the Messages was sexualized. The Complainant talked about her sexual future with Mr. Melrose. This sort of talk could not have failed to harm a 13 year old. Harm was caused, but the harm fell at the low end of the spectrum of harms that could have been caused.

(f) Aggravating Factors

[339] The sole aggravating factor I discern, in addition to the facts supporting the conviction, is the age difference between Mr. Melrose and the Complainant.

(g) Neutral Factors

[340] I consider the following factors to be neutral, in the sense that they show the absence of aggravation (without being mitigating):

- the Messages contained no explicit sexual talk
- the Messages were not lengthy and reflected an interaction that lasted only a few days
- Mr. Melrose's online communications involved no requests for performances or for photographs or videos

- the Messages showed no coercion, compulsion, trickery, lies, or manipulation – beyond the inherently exploitative nature of the Messages, which I find to be at a low degree. In particular, I find that Mr. Melrose was not "talking down" to the Complainant.

(h) Mitigating Factors

[341] The main mitigating factor is that the Messages were written by an individual who, as has been discussed above, had and could have had only a very limited appreciation of the wrongfulness of his conduct and of the harm he could have caused to the Complainant. His blameworthiness in communicating with the Complainant was highly attenuated by his cognitive deficits. He should not have talked (e.g.) about having a baby with the Complainant. He has admitted this was wrong. But he knew and could have known not much more about why this was wrong.

(i) Other Mitigating Factors

[342] Again, Mr. Melrose had no criminal record, he confessed to the police, and he waived his preliminary inquiry. He entered an early guilty plea, a significant mitigating factor. He has expressed remorse in words and actions. His risk of reoffending is low and can be and has been managed by out-of-prison conditions. Mr. Melrose has good family and community support.

[343] A period of imprisonment involving any prolonged exposure of Mr. Melrose to other inmates would damage him emotionally, psychologically, and likely physically. He is at particular and unusual risk because of his particular and unusual cognitive deficits.

(j) Penal Objectives

[344] Section 718.01 priorizes denunciation and deterrence for the s. 172.1(1)(b) offence.

[345] Even without this statutory provision, in its ordinary instantiations, sentencing for this offence would serve denunciation and deterrence. In ***Hajar***, the Court of Appeal wrote as follows at para 155:

> The ease with which this offence can be committed and its prevalence and long reach are all factors which speak to the need for this Court to strongly discourage and denounce this modern criminality.

See also ***R v Paradee***, 2013 ABCA 41 at paras 12-14. At para 15, the Court noted that "general deterrence is particularly important for crimes involving premeditation and persistence. Denunciation, for its part, reminds the public that the offence is a serious crime, and not technical or minor." Justice Moldaver wrote as follows in ***Woodward*** at para 76:

> ... when trial judges are sentencing adult sexual predators who have exploited innocent children, the focus of the sentencing hearing should be on the harm caused to the child by the offender's conduct and the life-altering consequences that can and often do flow from it. While the effects of a conviction on the offender and the offender's prospects for rehabilitation will always warrant consideration, the objectives of denunciation, deterrence, and the need to separate sexual predators from society for society's well-being and the well-being of our children must take precedence.

[346] Nonetheless, denunciation must be denunciation of the offender's wrongdoing, not of some notional offender's wrongdoing. What Mr. Melrose did wrong and the level of condemnation appropriate to his acts must be considered. Moreover, the deterrent effect of a sentence is muted when an offender is significantly dissimilar to other potential offenders.

(k) Comparator Sentences

[347] ***Hajar*** stated that a range of 2-4 years "might well be justified in order to deter and denounce adult sexual offenders who view children as easy prey:" at para 167. Justice Moldaver referred to a range of 3-5 years in ***Woodward*** at para 58.

[348] The comparator cases provided to me gave little assistance. ***R v Hepburn***, 2010 ABCA 157 and ***Paradee*** are out-of-date and concern far more serious circumstances than the present case. ***R v Martial***, 2018 ABCA 201 is more recent, but turns on more serious circumstances (including breach of trust, long duration, and multiple sexual contacts). ***Lemay*** is recent but also turns on more serious circumstances (including long duration, multiple sexual contacts, possession of intimate images, role of online communications in initiating sexual contact). ***R v Reeves***, 2020 ABQB 78, is also recent, but again turns on more serious circumstances (breach of trust, sought photographs, provided alcohol).

[349] The circumstances reviewed by Judge Gaschler in ***R v ER***, 2019 ABPC 292 have features closer to the present case than the foregoing cases. In ***ER***, the 56-year old offender sent some 20 messages to the 15-year old complainant over 5 weeks. The messages were not graphic or explicit but did refer to physical contact with the complainant and did involve sexualized comments about the complainant. There was no misrepresentation, manipulation, or coercion. The offender had no criminal record and entered an early guilty plea. No contact between the offender and the complainant occurred. Judge Gaschler considered the fit sentence to be four months imprisonment followed by 18 months probation.

[350] In the present case, sexual contact occurred, but Mr. Melrose shall be sentenced separately for that. The sexual contact provided context only for the s. 172.1(1)(b) offence. Mr. Melrose was much younger than ER. ER did not suffer from organic cognitive deficits. ER's messages were sent over a longer period than Mr. Melrose's.

(l) Sentence

[351] I will determine the appropriate sentence for the s. 172.1(1)(b) offence at this point, then address in the next section whether the mandatory minimum sentence is grossly disproportionate to the proportionate sentence.

[352] I have taken the following into account:

- the sexual intercourse that occurred between Mr. Melrose and the Complainant does not aggravate the offence although it has contextual relevance and permits the Messages to be properly understood
- the Messages played only a minor and secondary role in the interactions between Mr. Melrose and the Complainant. Mr. Melrose did not initiate contact online. Any online messages sent before the Messages were not in evidence. The Messages did not facilitate the sexual intercourse that occurred.

- the harm caused by Mr. Melrose's communications, on the evidence and lack of evidence, was limited
- the sole aggravating factor was that Mr. Melrose was 27 and the Complainant was 13
- aggravating factors were absent, in that the Messages and the interactions between Mr. Melrose and the Complainant occurred over only a few days, the Messages did not contain any explicit language, Mr. Melrose's online communications involved no requests for performances or for photographs or videos, the Messages demonstrated no coercion, compulsion, trickery, lies, or manipulation beyond the inherently exploitative nature of the Messages, which I find to be at a low degree (although these considerations do not mitigate)
- Mr. Melrose had no criminal record, he confessed to the police, and he waived his preliminary inquiry. Mr. Melrose pled guilty early and he is remorseful. He has had and will continue to have the support of his parents
- the critical mitigating circumstances, again, concerned Mr. Melrose's severe cognitive and executive deficits. His degree of blameworthiness was significantly attenuated by his cognitive deficits
- because of these deficits, a period of imprisonment involving any prolonged exposure of Mr. Melrose to other inmates would damage him emotionally, psychologically, and likely physically.

[353] Denunciation and deterrence must receive primary consideration. But given the low level of harm and blameworthiness, denunciation is muted. As regarding the s. 151 offence, general deterrence has little purchase, because Mr. Melrose's circumstances are very unusual. His sentence is not a message to typical "normal" potential offenders.

[354] Proportionality cannot be displaced by sentencing objectives that do not, in themselves, play a part or serve as factors in determining a proportionate sentence.

[355] Further, while the circumstances only weakly engage denunciation and deterrence, the circumstances strongly engage the principle of restraint, expressed in ss. 718.2(d) and (e):

> (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
>
> (e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders ....

See ***R v Proulx***, 2000 SCC 5, Lamer CJC at para 17. Section 718.2 requires that sentencing judges take these principles into consideration. Section 718.01 does not eliminate that requirement.

[356] In my opinion, in all the circumstances, Mr. Melrose's violation of s. 172.1(1)(b) does not warrant a period of imprisonment. In my opinion, the public interest would be best served by suspending the passing of sentence for this count and by requiring Mr. Melrose to abide by the terms of a probation order for 3 years.

[357] I do acknowledge that

> the innate character of a probation order is such that it seeks to influence the future behaviour of the offender. More specifically, it seeks to secure "the good conduct" of the offender and to deter him from committing other offences. It does not particularly seek to reflect the seriousness of the offence or the offender's degree of culpability. Nor does it particularly seek to fill the need for denunciation of the offence or the general deterrence of others to commit the same or other offences: ***R v WBT***, 1997 CanLII 9813 (SK CA), Bayda CJS at para 30, quoted with approval in ***Proulx*** at para 32.

Is a probation order precluded by s. 718.01? In my view, it is not. Giving "primary consideration" cannot mean imposing a period of imprisonment in all cases, regardless of the circumstances of the offence and the offender. Primary consideration may yield the conclusion, as in this case, that imprisonment is not warranted. Section 718.01 does not establish a punitive island within the sentencing framework. Other elements of the sentencing framework continue to apply.

[358] The probation order will come into force on today's date. I have not set the commencement date after Mr. Melrose's period of imprisonment for the s. 151 offence, because he will serve that sentence intermittently and will therefore be bound by a probation order when not confined. Since the intermittent sentence incorporates a probation order, I cannot make another probation order consecutive to that initial probation order: ***R v Duffett***, 2007 NLCA 19; ***R v TSL***, 1988 CanLII 7135, 46 CCC (3d) 126 (NS CA) at 127-128 (CCC). Moreover, I must avoid the prospect of, in effect, establishing a period of probation in excess of three years: see *Criminal Code*, s. 732.2(2)(b) and ***R v Winchera***, 2003 ABCA 18. The terms governing Mr. Melrose's intermittent sentence and the probationary terms applying during the period of the intermittent sentence shall be embedded in the probation order, pursuant to s. 732.1(3)(h) of the *Criminal Code*.

(m) Reasonably Foreseeable Applications

[359] Since the sentence for the s. 172.1(1)(b) offence that I consider proportionate is less than the mandatory minimum sentence, there is no need to go on to consider reasonably foreseeable applications of the s. 172.1(1)(b) offence. Mr. Melrose's own circumstances are sufficient to highlight the breadth of applications of the mandatory minimum sentence to offences exhibiting little harm and low offender blameworthiness.

[360] I therefore turn to the question of whether the mandatory minimum sentence of imprisonment for a term of one year is a grossly disproportionate sentence for Mr. Melrose, in all the circumstances.

V. Mandatory Minimum Sentence for the s. 172.1(1)(b) Offence

[361] Is the mandatory minimum sentence of 1 year imprisonment a grossly disproportionate sentence, in light of my determination of a proportionate sentence for Mr. Melrose's offence?

[362] Before addressing this question, a logically prior issue must be addressed: Is it appropriate for me to consider the constitutionality of the mandatory minimum sentence when its constitutionality was recently confirmed by Justice Clackson in ***Reeves***? I recognize that I must abide by the principle of comity, and not depart from the decision of a Justice of my Court

without cogent reasons: ***R v Scarlett***, 2013 ONSC 562 at paras 43-44; ***Re Hansard Spruce Mills Ltd***, 1954 CanLII 253 (BC SC), [1954] 4 DLR 590 and paras 222-225 (CanLII); ***R v Scrivens***, 2018 ABQB 1027 at paras 36-38.

[363] The assessment under s. 12 of the *Charter* turns on the comparison of a statutory minimum sentence with the sentence otherwise proportionate to the offence and offender. Materially different circumstances of an offence and offender could affect the determination of whether the mandatory minimum sentence would be grossly disproportionate in that different set of circumstances. The Supreme Court observed in ***Nur*** at para 71 and the Court of Appeal reminded us in ***Ford*** at paras 10 and 19, that

> ... *stare decisis* does not prevent a court from looking at different circumstances and new evidence that was not considered in the preceding case. A court's conclusion based on its review of the provision's reasonably foreseeable applications does not foreclose consideration in future of different reasonable applications.

I am, of course, entirely hesitant to revisit a determination made by one of our most senior and respected judges. But my decision relates to circumstances that were not raised before Justice Clackson, circumstances that were not hypothesized as a reasonably foreseeable application of the impugned law, but circumstances that actually occurred. These new circumstances call for a new comparison between the proportionate sentence for this offender in these circumstances and the mandatory minimum sentence.

[364] I shall therefore proceed with the comparison required by s. 12 of the *Charter*.

A. Test

[365] Section 172.1(2)(a) provides as follows:

> (2) Every person who commits an offence under subsection (1)
>
> > (a) is guilty of an indictable offence and is liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year ....

I have found that a proportionate sentence for Mr. Melrose's s. 172.1(1)(b) offence is suspending the passing of sentence and a period of probation. Would imposing the mandatory minimum sentence established under s. 172.1(2)(a) amount to "cruel and unusual" punishment?

[366] Chief Justice McLachlin described the test I must apply in paras 23 and 24 of ***R v Lloyd***, 2016 SCC 13:

> [23] .... the court must ask whether the mandatory minimum requires the judge to impose a sentence that is grossly disproportionate to the offence and its circumstances .... The question, put simply, is this: In view of the fit and proportionate sentence, is the mandatory minimum sentence grossly disproportionate to the offence and its circumstances? If so, the provision violates s. 12.
>
> [24] This Court has established a high bar for finding that a sentence represents a cruel and unusual punishment. To be "grossly disproportionate" a sentence must

> be more than merely excessive. It must be "so excessive as to outrage standards of decency" and "abhorrent or intolerable" to society ....

At paras 32 and 33, the Chief Justice indicated that a grossly disproportionate sentence would "shock the conscience" of Canadians. See ***Ford*** at para 10; ***Hilbach*** at para 31; ***R v Hills***, 2020 ABCA 263 at paras 37-38; ***Stephenson*** at para 12; ***Morrison*** at para 143.

[367] One year imprisonment stands in stark contrast to no imprisonment and probation. But is the period of imprisonment merely excessive, merely more severe, merely more onerous, simply a greater punishment than the punishment I would have assigned, a punishment that is not proportionate but not so disproportionate as to be constitutionally intolerable? The burden lies on Mr. Melrose to establish the alleged gross disproportionality.

B. Factors

[368] A mandatory minimum sentence is not grossly disproportionate just because it is disproportionate. That is, gross disproportionality should not be determined on proportionality considerations alone. A gross disproportionality assessment, though, should not be a s. 1 assessment and considerations proper to a s. 1 assessment should not be deployed before there has been a finding of a rights limitation: see, e.g., ***Esposito*** at para 106. Yet s. 12 requires a normative assessment ("what counts as 'cruel and unusual'?"), and therefore a form of internal balancing, internal, that is, to the section itself.

[369] In pre-***Lloyd*** and ***Nur*** cases, some additional factors relevant to the gross disproportionality assessment were identified, including

- whether the punishment reflects recognized sentencing principles or penological goals,
- whether the punishment is necessary to achieve the purposes of the mandatory minimum sentence or whether there are valid effective alternatives to the mandatory minimum sentence, and
- comparisons with punishments imposed for other similar offences.

See ***R v Goltz***, [1991] 3 SCR 485, Gonthier J at 500 and ***Nur***, 2013 ONCA 677, Doherty JA at para 78; ***Morrisey*** at para 28; ***R v Sutherland***, 2019 NWTSC 48, Charbonneau J at para 16.

[370] I will address these considerations.

1. Seriousness of the Offence and Denunciation and Deterrence

[371] No one would dispute the need for the s. 172.1(1) offences. The offences criminalize a new form of criminality, or an old form of criminality using new methods. The harm caused by this criminality is severe. The wrongfulness of the criminality is obvious. ***Friesen*** reviewed the wrongfulness and harms.

[372] No one would dispute that such offences, easy to perpetrate from behind the cloak of a keyboard or touchpad and parasitic on the ubiquitous cellphones and social media habits of target victims, must be denounced and must be deterred and heavy sentences are a way to do both. The Court of Appeal expressed this point in ***Hajar*** at para 70:

> [70] Courts may not be able to stop those intent on abusing children. But given the scope of harm caused by crimes involving child sexual abuse, those

> determined to commit them should know that, as stated in *D(D)*, *supra* at para 45: "... prey upon innocent children and you will pay a heavy price!"

One might also look to ***EJB*** at para 73:

> [73] .... The aspiration of the provision, and Parliament's will, is that people in this position will regulate their behaviour and do their duty respecting a young person. The minimum sentence signals that adults who knowingly exploit young people for a sexual purpose can expect to go to prison. There is no policy error in such an unambiguous message.

The priorization of denunciation and deterrence for sexual offences against children in s. 718.01 makes complete sense. The evils of online depredation are real and serious and demand a strong penal response.

[373] In that context, is a mandatory minimum sentence like that in s. 172.1(2)(a) justified? Certainly it has denunciatory and deterrent effects (or such effects are presupposed by sentencing). Online predators may feel that they will not get caught. Their desires may be hard to resist. But a mandatory minimum sentence gives online predators the choice to refrain from offending or face at least some significant jail time, regardless of any mitigating circumstances they might be able to deploy before a court. There will be no negotiation, no bargaining past that minimum sentence. They cannot avoid paying that "heavy price."

[374] Would striking down the mandatory minimum sentence weaken the deterrence that a mandatory minimum sentence would bring?

[375] Striking down a mandatory minimum sentence leaves the offence intact and leaves the maximum sentence intact. Sentences may be significant, increased as directed by ***Friesen***. Discipline would be imposed on sentencing judges by the guidance of ***Friesen*** and by courts of appeal. Loss of the mandatory minimum no more drains deterrent effect from s. 172.1(1)(b) offences than deterrent effect is lacking for the vast majority of offences that have no mandatory minimums.

[376] While the "valid alternative" issue may be properly a s. 1 issue, a repair that could preserve mandatory minimum sentences is available, as discussed in ***Lloyd*** at para 36:

> Another solution would be for Parliament to build a safety valve that would allow judges to exempt outliers for whom the mandatory minimum will constitute cruel and unusual punishment .... It allows the legislature to impose severe sentences for offences deemed abhorrent, while avoiding unconstitutionally disproportionate sentences in exceptional cases. The residual judicial discretion is usually confined to exceptional cases and may require the judge to give reasons justifying departing from the mandatory minimum sentence prescribed by the law. It is for the legislature to determine the parameters of the residual judicial discretion.

See ***Morrison*** at para 148. Another solution is to narrow the conditions of application of the mandatory minimum sentence so that it only catches offenders who deserve the mandatory minimum sentence: ***Nur*** at para 117; ***Ford*** at para 10.

[377] Law-makers may be of the view that the exception would become the rule. Offenders would rush to shoe-horn themselves into an exception to the mandatory minimum sentence or to evade the application of the mandatory minimum sentence criteria. But armed with ***Friesen***,

sentencing judges should be trusted to identify the exceptional and the unexceptional, as they do for other offences. There is still the discipline of appellate review.

[378] Even if denunciation and deterrence would be impaired without a mandatory minimum sentence just as it is (and I recognize that this assumption is not grounded in empirical research), the ends served by the mandatory minimum punishment would not justify all adverse effects on sentenced offenders. This is why we have a s. 12. In particular, the promotion of general deterrence does not immunize mandatory minimum sentences from a finding of unconstitutionality. Chief Justice McLachlin wrote as follows in ***Nur*** at para 45:

> [45] General deterrence - using sentencing to send a message to discourage others from offending - is relevant. But it cannot, without more, sanitize a sentence against gross disproportionality: "General deterrence can support a sentence which is more severe while still within the range of punishments that are not cruel and unusual" ([***Morrisey***] ... at para. 45, per Gonthier J.). Put simply, a person cannot be made to suffer a grossly disproportionate punishment simply to send a message to discourage others from offending.

2. Seriousness of the Offence and Baseline Blameworthiness

[379] A different approach would be to argue that the minimum *mens rea* for the s. 172.1(1)(b) offence supports a one year mandatory minimum sentence. Reference would be made, again, to the "high level" of *mens rea* associated with the offence. And again, conviction requires proof that

- an accused communicated by a means of telecommunication (an intentional act)
- with another person believed by the accused to be under age 16 (belief being subjectively determined)
- the communication was for the purpose of facilitating the commission of a listed offence.

One might argue that the multiple aspects of *mens rea* that must be present restrict the application of the offence to the limited number of offenders who can be proved to have had known or intended all of these elements at the material time. The offence excludes those with lesser blameworthiness who did not know or intend all of these elements. Further, the existence of all these elements shows a sufficient degree of intentional, purposeful wrongdoing so that – particularly given the priority of denunciation and deterrence – a mandatory minimum sentence of one year imprisonment is justified. Prof. Ashworth's point can be revisited: "the more remote an offence becomes from the actual infliction of harm, the higher the degree of fault necessary to justify criminalization:" ***Legare*** at para 33. As the s. 172.1(1)(b) offence may concern conduct remote from the actual infliction of harm, the fault must be high. High enough so that one year imprisonment would not be grossly disproportional.

[380] But just because an offence applies to conduct remote from the actual infliction of harm, the degree of fault is not necessarily high. Prof. Ashworth's point is that higher fault is necessary to *justify* criminalization. Higher fault, though, in the sense of elevated criminal intentionality, may not always be required to justify criminalization. My argument above was that the "facilitation" aspect of the s. 172.1(1)(b) *mens rea* does not necessarily call for a high level of planning or deliberation. An offender's facilitation may – and this is likely the image commonly

in mind when the application of the offence is considered – involve a scheme, a series of manipulations and misrepresentations, inducements and encouragements. Or the facilitation may be Mr. Melrose describing his feelings in a few childish and misspelled words. Parliament sought with the "luring" offences to close the online portal before predators could move through it. Parliament backed up from actual harm to the beginnings of predation, to facilitation – which can take many forms, of various levels of sophistication and blameworthiness. I suggest that the justification for attaching potential criminal liability to facilitation does not or does not necessarily lie in the intentional fault of that conduct but in the risks or danger even mere facilitation begins to set in motion. Parliament's strategy was not wrong, and the approach will certainly capture offenders with any degree of sophistication, but the strategy also sweeps in those with no degree of sophistication, such as Mr. Melrose.

[381] Justice Moldaver warned that s. 172.1(1) had this breadth in ***Morrison*** at para 146:

> [146] .... Moreover, s. 172.1's scope encompasses situations potentially ranging from a single text message sent by a 21-year-old young adult to a 15-year-old adolescent, to those involving numerous conversations taking place over weeks or months between a middle-aged mature adult and a 13-year-old child.

Justice Karakatsanis made a similar point at para 179:

> [179] The offence of child luring can be committed in various ways, under a broad array of circumstances and by individuals with a wide range of moral culpability. This alone makes the provision vulnerable to constitutional challenge because such laws almost inevitably capture cases where the mandatory minimum sentence will be grossly disproportionate (see, e.g., ***Lloyd***, at para. 35; ***Nur***, at para. 82; *Smith*, at p. 1078). Simply put, if the offence casts a wide net, this increases the likelihood of it catching individuals whose conduct will not warrant punishment remotely close to that required by the mandatory minimum sentence.

And at para 182:

> [182] As outlined above, s. 172.1(1) captures a wide variety of communications. The offence can be committed by individuals who use the Internet to target children for the purpose of physically exploiting them or, conversely, by individuals who have no intention of meeting their victims in person. Similarly, the duration of the communication may vary significantly. While, in some cases, the offender will have engaged in an extended dialogue with the victim in order to "groom" him or her, the offence can equally be made out through a short series of messages lasting only a few minutes. As my colleague points out, it can capture a single text sent by a 21-year-old adult to a 15-year-old adolescent or multiple conservations taking place over a long period between a mature adult and a 13-year-old child (Moldaver J.'s reasons, at para. 146) .... These factors may impact the level of harm caused by the offence, thereby informing what constitutes a fit and proportionate sentence ....

[382] In my opinion, the baseline *mens rea* for the s. 172.1(1)(b) offence, the subjectivity that must be established for conviction, does not in all instances justify the imposition of a period of imprisonment of at least one year.

3. Other Cases and Other Offences

[383] It is fair to observe that the courts across Canada have not spoken with a single voice on the issue of mandatory minimum sentences for sexual offences against children. By way of illustration:

[384] Justice Moldaver, writing for the majority, considered arguments for and against the constitutionality of the s. 172.1(2)(a) mandatory minimum sentence in ***Morrison***, while Justice Karakatsanis found that the mandatory minimum sentence violated s. 12. The mandatory minimum sentence in s. 172.1(2)(a) was *not* found to violate s. 12 by the majority in ***Cowell***, by Justice Clackson in ***Reeves***, or by Justice Charbonneau in ***Sutherland***. The mandatory minimum sentence was struck down in ***Hood***, ***R v Faroughi***, 2020 ONSC 780, ***R v Saffair***, 2019 ONCJ 861, and ***R v BS***, 2018 BCSC 2044.

[385] ***Ford*** struck down the s. 151(a) mandatory minimum sentence, as did ***Hood***, ***Scofield***, and ***R v JED***, 2018 MBCA 123.

[386] ***Reeves*** struck down the s. 152(a) mandatory minimum sentence.

[387] The Court of Appeal upheld the s. 153(1.1)(a) mandatory minimum sentence in ***EJB***.

C. Cruel and Unusual?

[388] In my opinion, if a reasonable ordinary Canadian, informed of sentencing law principles, the purpose of the s. 172.1(1)(b) offence, the elements of the offence, and the pertinent case law, were to be told that an offence had been committed under s. 172.1(1)(b)

- by an offender with severe cognitive deficits, with a mental age of 8 ½ to 11 years, with very little appreciation of the wrongfulness and harmfulness of his conduct
- who sent some online messages over a period of a few days to a complainant
- the messages sent were not sexually explicit, and involved no manipulation, coercion, or misrepresentation
- the messages did not precede sexual intercourse that had occurred between the offender and the complainant
- the offender had no criminal record, pled guilty at an early opportunity, was remorseful, and presented a plan to deal with the circumstances that led to his offence,
- and the offender was to be sentenced to one year imprisonment for sending the online messages,

that reasonable Canadian would be shocked and would find that punishment cruel. That punishment would so far outweigh the punishment the offender deserved that the punishment would be intolerable. The punishment would be “grossly disproportionate” to the fit punishment for the offender. I find that the one year imprisonment dictated by the mandatory minimum sentence would be grossly disproportionate to the gravity of Mr. Melrose’s offence and his degree of responsibility.

[389] I therefore find that the mandatory minimum sentence set out in s. 172.1(2)(a) of the *Criminal Code* violates Mr. Melrose’s right not to be subjected to any cruel and unusual

treatment or punishment and that s. 172.1(2)(a) is of no force or effect under s. 52(1) of the *Constitution Act, 1982*.

VI. Sentences

A. Count 2 and 3 Sentences

[390] On count 2 of the Indictment, I sentence Mr. Melrose to 90 days imprisonment, to be served intermittently at such times specified by order and that he comply with the conditions prescribed in a probation order when not in confinement during the period that the sentence is being served.

[391] I hereby order that Mr. Melrose shall serve his sentence on an intermittent basis by reporting to the Fort Saskatchewan Correctional Centre at 8 p.m. on Friday the 29th day of January 2021 for incarceration, to be released at 4 p.m. on Sunday, the 31st day of January, 2021 and to report in like manner until the sentence is served according to law. The probation terms covering the period of Mr. Melrose's intermittent sentence shall be embedded in the terms of the probation order set for count 3.

[392] On count 3 of the Indictment, I hereby suspend the passing of sentence and direct that Mr. Melrose be released on the conditions of a probation order, described below. The probation order shall come into force on today's date.

B. Terms of Probation Order

[393] [*The terms of the probation order were worked out with the input and consent of counsel.*] The terms of the probation order are set out in Schedule A.

VII. Ancillary Orders

A. Victim Fine Surcharge

[394] No victim fine surcharge is payable, based on the dates of the offences and ***R v Boudreault***, 2018 SCC 58.

B. DNA Order

[395] As both the s. 151 and s. 172.1(1)(b) offences are primary designated offences under s. 487.04, I make a DNA order under s. 487.051(1) in form 5.03 authorizing the taking of samples of bodily substances from Mr. Melrose as required for the purpose of forensic DNA analysis.

C. SOIRA Order

[396] As both the s. 151 and s. 172.1(1)(b) offences are "designated offences" under paragraph (a) of the definition of "designated offence" in s. 490.011, I make a SOIRA order under s. 490.012 in form 52 requiring Mr. Melrose to comply with the *Sex Offender Information Registration Act* for life, pursuant to s. 490.013(2.1).

D. Firearms Prohibition

[397] As the s. 151 offence was an indictable offence involving the use of violence under s. 109(1)(a.1), I make an order under ss. 109(1) and (2) prohibiting Mr. Melrose from possessing

(a) any firearm, other than a prohibited firearm or restricted firearm, and any crossbow, restricted weapon, ammunition and explosive substance during the period that

(i) begins on the day on which this order is made, and

(ii) ends 10 years after the completion of Mr. Melrose's 90 day intermittent sentence for the s. 151 offence; and

(b) any prohibited firearm, restricted firearm, prohibited weapon, prohibited device and prohibited ammunition for life.

E. Section 161 Order

[398] I grant an Order of Prohibition under s. 161 of the *Criminal Code*, without Defence objection, on the following terms:

- Mr. Melrose is prohibited from seeking, obtaining or continuing any employment, whether or not the employment is remunerated, or becoming or being a volunteer in a capacity, that involves being in a position of trust or authority towards persons under the age of 16 years;
- Mr. Melrose is prohibited from having any contact - including communicating by any means - with a person who is under the age of 16 years, unless the offender does so under the supervision of one of his parents, Deborah Anne Pettipas or Eric Vincent Pettipas.

The duration of the Order is for life.

F. Forfeiture

[399] All seized property is forfeited to the Crown.

Heard on the 18th day of October, 2019 and the 23rd day of October, 2020.
Written Submissions filed on the 6th and 20th days of November, 2020.
Delivered on the 25th day of January, 2021.
Dated at the City of Edmonton, Alberta this 1st day of February, 2021.

W.N. Renke
J.C.Q.B.A.

Appearances:

James Rowan
Alberta Crown Prosecution Service
Specialized Prosecutions
for the Crown

Evan McIntyre
Pringle Chivers Sparks Tesky
Barristers
for the Accused

Schedule A

Probation Order Terms

The probation order that applies during the period of Mr. Melrose's intermittent sentence and thereafter shall include the following terms. For administrative purposes, the terms may be set out in an "intermittent sentence and probation order."

- Mr. Melrose shall serve his sentence on an intermittent basis by reporting to the Fort Saskatchewan Correctional Centre at 8 p.m. on Friday the 29th day of January 2021 for incarceration, to be released at 4 p.m. on Sunday, the 31st day of January, 2021 and to report in like manner until the sentence is served according to law.

- You shall keep the peace and be of good behavior.

- You shall appear before the court when required to do so.

- You shall notify the court or your probation officer in advance of any change of name or address, and promptly notify the court or your probation officer of any change in employment or occupation.

- You shall report to a probation officer within 5 working days of January 25, 2021. Thereafter you shall report as required.

- You shall reside with Eric Pettipas or Deborah Pettipas or either of them or at such address for which you have written approval from your probation officer and you shall not change that residence without prior written consent of your probation officer.

- You shall attend for such assessment, counselling or treatment as may be directed by your probation officer or approved by the Province of Alberta, including

    - psychiatric/psychological counselling
    - alcohol/drug abuse programming
    - domestic violence treatment
    - anger management programming

  and the Chrysalis program, if approved.

- You shall provide satisfactory written proof of attendance of programs to your probation officer, you shall complete programs by the date specified in writing by your probation officer, and you shall provide satisfactory written proof of such completion by the date requested in writing by your probation officer.

- You shall sign such release or waiver of information as requested by your probation officer providing access to information required by your officer to properly supervise you.

- You shall have no contact or communication whatsoever, either directly or indirectly, with the Complainant or any person under the age of 16 or who you believe to be under the age of 16 unless under the supervision of one or both of Eric Pettipas or Deborah Pettipas.