Court of Queen's Bench of Alberta

Citation: R v BTQ, 2018 ABQB 521

Date: 20180718
Docket: 150820934Q1
Registry: St. Paul

Between:

Her Majesty the Queen

Crown

- and -

BTQ

Offender

Restriction on Publication

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By Court Order, information that may identify the victims must not be published, broadcast, or transmitted in any way.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

Reasons for Sentence
of the
Honourable Mr. Justice W.A. Tilleman

Introduction

[1] On October 19, 2017, I found Mr. Q guilty of sexual interference and sexual assault of EW, sexual interference and sexual assault of DS, and two counts of sexual assault of NS. Mr. Q lived with the three victims. He was the foster father of NS and DS and the step-father of EW.

[2] This is my decision on his sentence.

Circumstances of the Offences

[3] Mr. Q committed numerous and regular sexual assaults of NS, including rubbing NS's vagina, oral sex, anal and vaginal penetration, and anal and vaginal intercourse. The sexual assaults of NS occurred over a span of approximately ten years from 2005 to 2015 in the towns of St. Paul and Saddle Lake First Nations. NS's memory of the sexual assaults began when she was between five and seven years old and did not end until she ran away from home. Over the years the sexual assaults escalated in frequency to daily intercourse. Mr. Q apparently video or phone/device recorded one of the assaults of NS involving vaginal penetration when she was 14 years old.

[4] Mr. Q committed numerous and regular sexual assaults of EW, including rubbing his penis on EW's private parts and sexual intercourse. The sexual assaults of EW occurred over a span of approximately nine years from 2000 to 2008 in Saddle Lake First Nations. The sexual assaults of EW began with fondling when she was four or five years old and escalated to sexual intercourse when she was seven or eight. The sexual assaults increased in frequency over the years and did not stop until Mr. Q kicked EW out of the house when she was 13 or 14 years old.

[5] Mr. Q told NS and EW that the sexual assaults were a secret. When NS was young and she questioned the sexual activity, Mr. Q threatened, "If you want it to be rape, I'll show you rape." Mr. Q lied to NS and told her that she could not get pregnant due to his diabetes. He told EW that he was sick and if EW told her Mom about the sexual assaults then they would all be sick.

[6] Mr. Q's behaviour was planned and manipulative. For example, if EW asked for lunch money or to play with a friend, Mr. Q would first put her on his lap and rub his penis against her. He stashed hair elastics in his home and vehicle which he then used to maintain an erection during the sexual assaults, and he used inducements of candy to engage in sexual activity.

[7] Mr. Q committed two incidents of sexual assault of DS. The first incident he rubbed his hand under her panties, and the second incident he moved his hand over her breasts. The sexual assaults of DS occurred between 2007 and 2008 in Saddle Lake First Nations when DS was 13 or 14 years old.

Principles of Sentencing

[8] The fundamental principle of sentencing is proportionality; a sentence must be proportionate to both the gravity of the offence and the degree of responsibility of the offender: s718.1 of the *Criminal Code*, RSC 1985, c C-46. Understandably, a sentence should not exceed what is just and appropriate, having regard to the moral blameworthiness of the offender and the gravity of the offence. The sentence should reflect moral culpability. The entire process of

sentencing is not exclusively about the offender, it is also about harm to the victim and the community.

[9] Additional principles of sentencing are listed in s718.2 of the *Code*:

> **(a)** a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
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> ...
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> (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,
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> ...
>
> shall be deemed to be aggravating circumstances;
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> **(b)** a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
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> **(c)** where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
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> **(d)** an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
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> **(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.

[10] For offences against children, primary consideration is given to the objectives of denunciation and deterrence: s718.01 of the *Code*. The protection of children is just one of many core values that are fundamental to our society. Denunciation is meant to communicate society's belief in those core values and to expressly condemn the offensive behaviour. Deterrence refers to the hope that the sentence will deter both the offender and other members of the public from engaging in such conduct.

The Law

Sexual Interference

[11] At the time the offences were committed (from 2000 to 2008), s151(a) specified that the maximum punishment for sexual interference of a victim less than 14 years of age was 10 years imprisonment. The mandatory minimum at the time was 45 days. In 2008, s151 was amended to increase the age of consent from 14 to 16 years of age.

[12] As I explain below, the starting point for a single sexual assault on a child is four years. And, our Court of Appeal has said the starting point for a major sexual assault on a child applies equally to sexual interference: ***R v LMR*** 2010 ABCA 286 at paras 12-15. For context, the Alberta Court of Appeal established a starting point of three years imprisonment for major sexual interference in ***R v Hajar***, 2016 ABCA 222 at para 81. The Court of Appeal also defined the category of major sexual interference at para 53:

> Sexual interference constitutes a major sexual interference where the sexual interference is a serious violation of the physical and sexual integrity of the child and is of a nature or character such that a reasonable person could foresee that it is likely to cause serious psychological or emotional harm, whether or not physical injury occurs. Vaginal intercourse, anal intercourse, fellatio and cunnilingus all fall into this category. Thus, major sexual interference includes, but is not limited to, these sexual acts.

[13] The starting point assumes the adult offender does not have a prior record, did not plead guilty to the offence, and the offence did not involve the use of gratuitous violence such as threats, intimidation or overcoming resistance: ***Hajar*** at para 81.

[14] I note that the maximum and minimum punishments for sexual interference had increased by the time ***Hajar*** was decided. However, the starting point is not a fixed, mandatory number. As explained in ***Hajar***, "a starting point is just that, a starting point, not an ending point. Sentencing remains within the good judgment, transparently explained, of the sentencing judge. The result must always be a proportionate sentence": at para 131.

Sexual Assault

[15] Section 271 of the *Criminal Code* was amended twice during the time Mr. Q committed the sexual assaults of EW, DS and NS. In 2012, the *Safe Streets and Communities Act,* SC 2012, c 1, introduced a mandatory minimum sentence of one year imprisonment if the victim is less than 16 years old. In 2015, the *Tougher Penalties for Child Predators Act*, SC 2015, c 23, increased the maximum penalty to 14 years imprisonment if the victim is less than 16 years old. This last change came into force on July 17, 2015.

[16] The sexual assaults of EW occurred between 2000 and 2008 and the sexual assaults of DS occurred between 2007 and 2008. The maximum punishment for sexual assault at the time was 10 years imprisonment.

[17] I found Mr. Q guilty of the sexual assault of NS between January 1, 2005 and June 30, 2015. The increase in the maximum penalty from 10 years to 14 years came into force 17 days after the offence was committed so it does not apply in this case. Therefore, Mr. Q is liable to a minimum punishment of one year imprisonment and a maximum punishment of 10 years imprisonment for the sexual assaults of NS.

[18] ***R v Sandercock*** (1985), 62 AR 382 (Alta CA), established a starting point of three years imprisonment for a major sexual assault on an adult. The Court of Appeal confirmed the starting point in ***R v Arcand***, 2010 ABCA 363 at para 169, making it clear that the starting point is *not* based on a guilty plea.

[19] A major sexual assault is described in ***Arcand*** at para 171 as:

> ... the sexual assault is of a nature or character such that a reasonable person could foresee that it is likely to cause serious psychological or emotional harm, whether or not physical injury occurs. The harm might come from the force threatened or used or from the sexual aspect of the situation or from any combination of the two. A major sexual assault includes but is not limited to non-consensual vaginal intercourse, anal intercourse, fellatio and cunnilingus.

[20] In recognition of the wide range of possible behaviours considered to be sexual assault, the Court of Appeal established a four year starting point for the specific category of a single major sexual assault of a child committed by a person in a position of trust: ***R v S(WB)*** (1992), 127 AR 65 (Alta CA) at para 42. This starting point of four years for a major sexual assault on a child was confirmed by the Court of Appeal in ***R v GRB***, 2013 ABCA 93 at paras 24, 26.

[21] In terms of what is encompassed by sexual assault, it does not need to include what was called rape, attempted rape, buggery, cunnilingus, or fellatio. Digital penetration and simulated intercourse count as major sexual assault as they are a major violation of one's body, violating a person's freedom of choice and sexual autonomy: ***Arcand*** supra, at para 176. See also ***R v Watson*** 1994 ABCA 234 at para 2:

> In cases with children of this age, where there is digital penetration of any kind, it is prima facie a serious violation of the sexual integrity of the victim and constitutes a major sexual assault. In the case of a charge of sexual touching where the circumstances amount to a serious violation of the sexual integrity of the child victim, the sentence will be treated at least as seriously as in the case of a sexual assault, bearing in mind that the maximum penalty for sexual assault and sexual touching is the same, namely, ten years.

[22] Aggravating factors can increase the sentence beyond the four-year starting point. Repeated assaults, abusive behaviour over time, and the young age of the victims are all aggravating factors.

Kienapple Principle

[23] The "*Kienapple* principle" requires that there should not be multiple convictions for the same delict: ***R v Kienapple***, [1975] 1 SCR 729. The *Kienapple* principle applies when there exists both a factual and a legal nexus between the offences: ***R v Prince***, [1986] 2 SCR 480.

[24] When the *Kienapple* principle applies, a conditional stay is entered for the less serious charge: ***R v Terlecki*** (1983), 4 CCC (3d) 522 (Alta CA), aff'd [1985] 2 SCR 483.

[25] The offences of sexual interference and sexual assault are substantially the same, and in this case, are based on the same factual foundation. As discussed above, the maximum punishment for the offences are the same. A conviction of sexual interference necessarily implies the assault of a child by an adult, whereas a conviction of sexual assault does not. For this reason, the sexual assault charges in relation to EW and DS will be conditionally stayed in accordance with the *Kienapple* principle.

[26] I disagree with the suggestion by Defence counsel that the *Kienapple* principle applies to one of the sexual assault charges in relation to NS. Count 7 relates to sexual assaults of NS that occurred at or near Saddle Lake First Nations. Count 10 relates to sexual assaults of NS that occurred at or near St. Paul. The required factual nexus does not exist: see ***Prince*** at para 492.

Case Law

[27] In ***R v AA***, 2015 ABQB 376, the accused pled guilty to four counts of sexual interference relating to his two sons and a nephew. The sexual assaults occurred hundreds of times over a few years. The assaults involved touching and masturbation and included threats, bribes and some violence. The accused received a global sentence of 8 years.

[28] I disagree with the claim by Defence counsel that the aggravating factors found in ***AA*** do not exist in Mr. Q's case and that Mr. Q's sentence should therefore be less than eight years. In both cases the sexual assaults were committed by an adult in a position of trust and started when the victims were young and unable to escape the abuse. However, the abuse of EW and NS was more serious and lasted longer than the abuse in ***AA***. Also, the mitigating factor of a guilty plea does not exist in the case at hand.

[29] In ***R v GRB***, 2013 ABCA 93, the accused pled guilty to two counts of sexual interference of his step-granddaughter. The step-granddaughter was abused between the ages of four and twelve while she lived with the accused. The abuse occurred more than 100 times and included touching and oral sex. The Court of Appeal applied the aggravating and mitigating factors of the case to the four-year starting point and stated that an appropriate sentence would be eight to ten years.

[30] Although the Court of Appeal stated that the appropriate sentence would be eight to ten years, the Court ultimately varied the sentence to four years: at paras 27-28. There were a number of factors that lead to this lower sentence, including the fact that the Crown prosecutor at the sentencing hearing had only proposed a two and one-half to three year sentence. The Court of Appeal took into consideration the fact that resolution of the issue had taken six years; the respondent was then 73 years old and suffered from age-related health issues. The Court noted that the respondent attended counselling and had family who sought reconciliation.

[31] The facts in the current case are more serious than in ***GRB.*** Mr. Q sexually assaulted three children in his care and the assaults of EW and NS included many occurrences of anal and vaginal intercourse. Furthermore, the recommended sentence of eight to ten years in ***GRB*** is based on a guilty plea.

[32] In ***R v AB***, 2005 ABCA 102, the Court of Appeal upheld a global sentence of 15 years. The accused was found guilty after a trial of three counts of rape, four counts of indecent assault, two counts of assault and two counts of uttering threats to cause serious bodily harm. The victims were the four nieces and two nephews of the accused. One of the victims was abused from the age of two years old.

[33] In ***R v RBL***, 2005 ABPC 63, the accused was sentenced to 14 years for the major sexual assaults of his son, daughter, step-daughter, and a 12 year old girl left in his care. The abuse spanned 16 years and both the daughter and step-daughter became pregnant and had abortions at a young age. The accused's sentence was significantly reduced due to his timely guilty plea. The Court of Appeal confirmed that the sentence imposed in this case was within the acceptable range for an offence of this kind: ***R v ACS***, 2007 ABCA 367.

Position of the Crown

[34] The Crown suggests that if the sentences are considered separately, then a global sentence of 24 years of incarceration would be fit and proper. However, taking into account the

totality principle, the Crown recommends incarceration of 15 to 17 years less credit for time served. The Crown also requests a DNA order, a lifetime SOIRA order (though the Crown dropped this in oral argument), and a section 161 order for life.

[35] The Crown highlighted a large number of aggravating factors: Mr. Q was in a position of trust with each victim, sexual assaults were committed in the sanctity of the victims' home, and two of the victims were frequently assaulted from a young age over a period of nine or more years. The Crown argues that there are no mitigating factors and no factors in the accused's background which explain or excuse his offences.

Position of the Defence

[36] The Defence argues that a proper sentence would be 11-12 years but after totality, would be eight years less time served. The Defence suggests the *Kienapple* Principle applies to the sexual interference of EW, the sexual interference of DS, and one of the sexual assaults of NS.

[37] The Defence claims that the *Gladue* Report identifies a number of relevant factors, including: Mr. Q was sexually abused as a child by a family friend, several of his relatives attended residential schools, his father suffered from alcohol abuse, and the impact of alcohol and drugs in his community.

Aggravating and Mitigating Circumstances

[38] I only need to consider the aggravating and mitigating circumstances that are not already factored into the starting point. The four-year starting point from ***S(WB)*** is based on a single, major sexual assault of a child by a person in a position of trust. The starting point assumes the offender does not have a prior criminal record and did not plead guilty. (Mr. Q has a criminal record but on unrelated matters and it is dated.)

[39] Similarly, the three-year starting point from ***Hajar*** assumes the adult offender does not have a prior record and did not plead guilty to the offence. However, in ***Hajar***, the starting point does not assume the offender is a person in a position of trust.

[40] In relation to the major sexual assaults of NS and the major sexual interference of EW the aggravating factors are still:

- the extreme youth of the victims when the abuse began;
- the victims were assaulted in the sanctity of their home;
- the number of assaults (hundreds of assaults);
- the severity of the assaults;
- the length of time during which the abuse continued (9-10 years);
- the fact that contraceptives were not used, exposing the girls to unwanted pregnancies and sexually transmitted diseases;
- the lies about the risks of pregnancy due to the accused's feigned illness;
- the potential of a recorded incident on a device that induces trauma of not knowing whether a recording will surface in the future;
- the manipulative behaviour designed to silence the victims and induce compliance; and
- the position of trust due to Mr. Q's role as EW's step-father.

[41] The sexual assaults of DS were not major sexual assaults so the four-year starting point does not apply. In relation to the sexual assaults of DS, the aggravating factors are still:

- the youth of the victim;
- the violation of trust by a person in the role of a parent; and
- the victim was assaulted in the sanctity of her home.

[42] There are no mitigating factors.

Gladue Factors

[43] Mr. Q is an indigenous man of Plains Cree descent; he has Treaty status and he is a member of Saddle Lake First Nation. What is important is understanding Mr. Q's personal circumstances and his history. See ***R v Laboucane*** 2016 ABCA 176. A *Gladue* report was submitted to provide details of Mr. Q's personal circumstances and background. I have summarized Mr. Q's *Gladue* report below.

Community History and Profile

[44] The Plains Cree were nomadic and they followed the migration patterns of the buffalo. The Northern Plains Cree, including the Onahaminahos (Little Hunter) Saddle Lake Cree Band and the Seenum Whitefish (Goodfish) Lake Cree Band, signed Treaty Number 6 in 1876. Treaty Indians were required to live on reserves and give up their rights to their hunting grounds. The Plains Cree were discouraged from following their traditional cultural and spiritual ways. Government officials appointed Indian Agents who controlled those living on the reserves.

[45] Saddle Lake is located approximately 220 km north east of Edmonton, Alberta. Indigenous groups in the Saddle Lake area had contact with European Canadians before 1789. The North West Company and Hudson Bay established several forts in the area in the late 1700's and early 1800's. The livelihood for many Indians and Metis changed from hunting and gathering to trapping and providing food for the fur trade, working at company forts and transporting freight.

[46] By 1870 the buffalo had disappeared and many of the Plains Cree were starving. Treaty 6 signatories were encouraged to become farmers. Farming on the reserve was not a success. Conditions became very poor at Saddle Lake after World War II. Ninety percent of the Saddle Lake Reserve was on some form of social assistance by 1965. Band members suffered from poor health, alcoholism and high rates of unemployment. There was a high drop-out rate among school children.

[47] Saddle Lake First Nations is now comprised of two separate administrations, each with their own chief and council: the Saddle Lake Band with 7,656 members, and the Whitefish (Goodfish) Band with 2,378. The Saddle Lake First Nations has its own Health and Wellness Centre and four schools. Oil and gas exploration and production has provided off-reserve employment for many Band members.

Residential Schools

[48] By 1894 it was compulsory for all Indian children under the age of 16 to attend industrial or boarding schools in Canada. Methodist children from Saddle Lake were originally sent to Red Deer Industrial School. Catholic children from Saddle Lake were sent to Lac La Biche Boarding School until the Blue Quills Indian Residential School was built in St. Paul in 1931.

[49] In general, the students did not progress academically at residential schools. Children at residential schools received only a half day of instruction. The afternoons were used for farm work and household chores. It is reported that the residential schools were underfunded and struggled to hire and retain qualified staff. Many students complained of severe punishment by the teachers.

[50] In 1970, the Saddle Lake First Nations took over the ownership and operations of its school. They were the first native community to take control of their children's formal education.

Family

[51] Mr. Q's maternal family were members of Saddle Lake First Nation. His mother attended Blue Quills Indian Residential School for nine years. His paternal family were members of Frog Lake First Nation but his grandfather transferred to Saddle Lake First Nation. Mr. Q's paternal grandfather was a trapper. His paternal grandmother attended Edmonton Indian Residential School in St. Albert, Alberta, and his paternal great-grandfather attended Emmanuel College (Indian Boys Industrial School) in Prince Albert, Saskatchewan.

[52] Mr. Q was raised on the reserve in Saddle Lake by his mother and father. His parents had four children (one died as an infant) and adopted two children of relatives. Mr. Q's father worked for many years as the driver of the Band's water truck and as a guard at the St. Paul police detachment. His mother was primarily a stay-at-home mother.

[53] Mr. Q reported life at home was "okay" although he remembers that when he was younger his father was an alcoholic. When his father was drinking, Mr. Q's mother would take the children to her parents' home. Mr. Q's grandparents passed away when he was in his early 20s. Mr. Q remains close to his family members.

Personal

[54] Mr. Q reported that a family friend sexually abused him on a few occasions when he was less than ten years old. His parents did not believe Mr. Q. The abuse was not reported to the police and the family friend was never charged. Mr. Q never spoke with a counsellor about the abuse.

[55] Mr. Q has a grade 10 education. He was suspended from school for several months after an incident in grade 11 and he never returned. Mr. Q recalled school as being a positive experience. He does not remember experiencing any discrimination or bullying. He played hockey, baseball and football as a youth.

[56] After Mr. Q quit school he was hired at the St. Paul Adolescent Treatment Centre. He worked as a casual staff member and then a counsellor's aide. He worked at the treatment centre on and off for 10 years. Mr. Q has worked at a number of jobs: he worked in construction building and repairing homes, he drove a tow truck, and he worked on a road construction crew.

[57] Mr. Q has been involved in a number of serious accidents – he suffered a knee injury as a child when he was hit by a drunk driver, he suffered a head injury in a skidoo accident several years ago, he had two toes amputated, and he suffered another head injury in a quad accident a year ago. Mr. Q is diabetic and lapsed into a diabetic coma last year. Three years ago Mr. Q's doctor advised him not to work due to the severity of his diabetes.

[58] Mr. Q lived a high-risk lifestyle as a teenager; he used illicit drugs, drank alcohol and drove while impaired. He claims the last time he drank alcohol was over 10 years ago. Mr. Q has

never been assessed or treated for a mental health disorder. He reported having a difficult time when some of his cousins or close friends died of suicide or drug overdose. Three of Mr. Q's uncles have died in the last few years.

[59] Mr. Q was raised in the Christian faith and he accompanied his paternal grandmother to church on Sundays. Mr. Q stopped attending church a year ago after his brother got sick. Mr. Q has also attended sweat lodge ceremonies at Frog Lake in Saskatchewan over the past three years.

Analysis

The Gravity of the Offence

[60] It is fundamental that the sentence must be proportionate to the gravity of the offence and degree of responsibility of the offender. With this in mind, the sexual assault of a child is an extremely *grave* offence, especially when the offender is in the position of a parent to the child. Mr. Q was responsible for the care and protection of the three victims. Instead, through multiple assaults, he manipulated the girls and took advantage of their youth and innocence. The sexual assaults of NS and EW started at a very young age and continued for many years, increasing in both frequency and severity. NS testified that "it just became a regular thing."

[61] The Court of Appeal addressed the harm caused by a sexual assault in ***Arcand*** at paras 176, 177 and 179:

> [176] [...] When an offender commits a major sexual assault, including rape, against a person, this act of violence causes harm. It is harm to both the victim and society. A major sexual assault constitutes a serious violation of a person's body and an equally serious violation of their sexual autonomy and freedom of choice. These breaches of one's physical integrity and privacy are indisputable and undeniable. That harm, and it is substantial, is inferred from the very nature of the assault. Add to this the serious breach of a person's human dignity and the gravity of a major sexual assault perpetrated on a victim becomes readily apparent.
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> [177] In addition to this very grave harm, there is also intrinsic to major sexual assaults the *likelihood of other very real psychological or emotional harm.* That includes fear, humiliation, degradation, sleeplessness, a sense of defilement, shame and embarrassment, inability to trust, inability to form personal or intimate relationships in adulthood with other socialization problems and the risk of self-harm or even suicide. While these effects fall into the psychological or emotional harm category, they may be equally or even more serious than the physical ones but much less obvious, *indeed even unascertainable at sentencing.*
>
> [179] There is another aspect of the harm caused by an offender who commits a major sexual assault. That is the harm caused to society by this kind of criminal activity. Harm to one member of the community affects the rights and security of others. This is particularly striking in cases involving violence against women.

[footnotes omitted]

[62] The harm to a child victim is even more serious. A child victim often suffers significant physical and psychological harm, and may never be able to form loving, caring relationships as an adult. As the Court of Appeal explained in ***Hajar***, "many victims of child sexual abuse have something very important stolen from them – their childhood": at para 62.

[63] The harm caused by major sexual interference or major sexual assault of a child extends beyond the child victim-and, there is harm inherent in the crime itself when children are involved. The child's family and community are significantly harmed: "Harm to any child in the community affects the rights and security of everyone because perpetrators of crimes against children strike a blow directly at one of the core values in our society – protection of children": ***Hajar*** at para 68; see also ***Arcand*** at paras 67 and 174 regarding harm to the community.

[64] In this case there are no mitigating factors to reduce the gravity of the offences. There are many aggravating factors. I consider the major sexual interference of EW and the major sexual assaults of NS to be at the high end of the range in terms of severity of the offence.

[65] I describe the awful impact these crimes have had on the victims next. In doing this I am fully aware that one of the most significant factors in assessing the gravity of the offence is the degree of harm to the victim: ***R v Nickel***, 2012 ABCA 158 at para 11.

[66] The Victim Impact statements indicate significate psychological and emotional trauma:

> J.S., indicated a lot of anger towards the accused and that he fears for his family's safety;
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> M.A., has severe anxiety and trust issues; she is on drugs for anxiety and depression;
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> E.W., is depressed with anxiety; she is on drugs and alcohol; and has become a cutter;
>
> D.S., is depressed and has a lot of trouble trusting men. She says she is quite fearful he will find her and her family and cause more harm;
>
> N.S., dropped out of school; has anxiety and depression; has flashbacks, lives with sadness, has a hard time leaving the house; has fears and worries about future harm. She states she will always feel trapped by memories of these horrible things that messed up her life.

The Offender's Degree of Responsibility, Pre-Sentence Report, and Gladue Analysis

[67] In discussing remorse, I am mindful of the case of ***R v Ambrose*** 2000 ABCA 264 at para 85 where Fraser, CJA dissenting but not on this point, said "[l]ack of remorse should not be used to impose a sentencing surcharge on top of what would otherwise be an appropriate sentence." I have structured Mr. Q's sentence with this principle in mind.

[68] Mr. Q has not shown any remorse for his actions. He did say he was sorry when he spoke to the Court. Yet, he totally disagrees with the circumstances of the offence and that statement was placed prominently on the envelope handed to the Judge. There has been no mention of any attempts made by Mr. Q to seek professional help. Because of his health concerns, Mr. Q's time

in custody has not been pleasant. He was hospitalized in January not only for reasons related to his foot, but for ulcers, gastro problems; bedsores and other problems. Also, he has had chronic kidney disease, renal decline, bruising and a variety of other issues including cardiac arrest twice. His foot is sore or in decline; he has parts of his body swollen or veins distended requiring surgery. He has fluid buildup in the abdomen requiring surgery, a liver biopsy and partially collapsed lung, and so on. Currently, he is on dialysis three times a week and his time in jail has been very unpleasant because of his health related conditions some of which pre-existed custody.

[69] Nevertheless, the Crown has argued that there are no factors in Mr. Q's background which explain or excuse his offences. I agree. However, a *Gladue* analysis is still important and it is more than simply looking into an offender's past for an excuse. A *Gladue* analysis must take an in-depth look at the Aboriginal heritage and the unique circumstances of the offender to provide the necessary context for an appropriate sentence: ***R v Ipeelee***, 2012 SCC 13. A causal link between the offences and the *Gladue* factors is not required: ***Ipeelee*** at para 83.

[70] The central purpose of the *Gladue* analysis is to achieve a sentence that is proportionate to the gravity of the offence and the offender's degree of responsibility: ***R v Swampy***, 2017 ABCA 134. There are two steps to the analysis: (1) consider whether *Gladue* factors are relevant to the offender's culpability, and (2) identify appropriate sentencing sanctions for the circumstances of the offender: ***R v Okimaw***, 2016 ABCA 246 at paras 87 – 90.

[71] I recognize as did the Crown and Defence that Mr. Q's childhood was informed by the multiple intergenerational traumas his family has suffered. At least three generations of Mr. Q's family attended Residential Schools. These schools removed children from their homes and destroyed the family unit. Parents did not have the opportunity to raise their children, and in turn, children did not have the opportunity to learn from their parents. Relationships were damaged and cultural identities were lost. Children often returned to broken families with a poor education and stories of abuse. The adverse effects of the Residential Schools continue to be felt today by Mr. Q, his family and his community.

[72] Additional traumas Mr. Q's family has suffered include the transition his grandfather made from a traditional lifestyle of hunting and trapping to living on a reserve. Mr. Q's family lived through the extreme poverty and poor health conditions of the Saddle Lake community in the late 1940's to the 1960's. Many community members struggled with alcoholism and unemployment. Mr. Q's father was an alcoholic when Mr. Q was young.

[73] I find the multiple intergenerational traumas that Mr. Q and his family have experienced are relevant to and reduce Mr. Q's moral culpability. Reduced moral culpability is one aspect of the proportionality analysis and has a "reductive effect upon the determination of a fit and proper sentence": ***Swampy*** at para 37.

[74] The second step in the *Gladue* analysis is to identify appropriate sentencing sanctions for the circumstances of the offender. In this case, the only appropriate sentencing sanction is incarceration. This is necessary not only to meet the primary objectives of denunciation and deterrence, but also to acknowledge the significant and irreparable harm done, in a case like this, to the victims, their family and their community. The victims have made it clear to me, and I accept, they are permanently scarred and left with a lifetime of anxiety, fear, and depression.

Sentence

[75] Mr. Q committed repeated assaults; he assaulted one of the victims hundreds of times, and another, perhaps the same but in any event, too many times to count. Sentencing cannot be a mathematical multiplier or it would be unduly harsh or disproportionate. An appropriate global sentence must clearly be imposed.

[76] Former Chief Justice Lamer discussed the totality principle in ***R v M(CA)***, [1996] 1 SCR 500 at para 42:

> The totality principle, in short, requires a sentencing judge who orders an offender to serve consecutive sentences for multiple offences to ensure that the cumulative sentence rendered does not exceed the overall culpability of the offender. As D. A. Thomas describes the principle in *Principles of Sentencing* (2nd ed. 1979), at p. 56:
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> > The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate sentence is "just and appropriate".
>
> Clayton Ruby articulates the principle in the following terms in his treatise, *Sentencing*, *supra*, at pp. 44-45:
>
> > The purpose is to ensure that a series of sentences, each properly imposed in relation to the offence to which it relates, is in aggregate "just and appropriate". A cumulative sentence may offend the totality principle if the aggregate sentence is substantially above the normal level of a sentence for the most serious of the individual offences involved, or if its effect is to impose on the offender "a crushing sentence" not in keeping with his record and prospects.

[77] Ultimately, the end sentence cannot result in a term of jail that encourages individuals to multiply their crimes and thus defeat principles of deterrence: see ***R v Cameron*** (1995), 136 Nfld & PEIR 105 at para 54, (PE SCAD). Cases such as ***R v LaBerge***, 1995 ABCA 196, demonstrate the importance of respecting society's core values, including the protection of children from the hands of strangers or, even worse, parents. When a child has been harmed, a denunciatory sentence is required to maintain public confidence in the administration of justice. And I clearly point out and stress these assaults on children harm society. Deterrence has to be given sufficient weight, not lip-service: ***Arcand*** at paras 176 – 181, 277.

[78] Based on the above analysis, a fit and proper sentence for the sexual interference of EW and the sexual assaults of NS is eight years and six months each. The sentence would have been ten years each if not for Mr. Q's reduced moral culpability flowing from his Aboriginal heritage and the multiple intergenerational traumas affecting him and his family. I find the appropriate sentence for the sexual interference of DS is six months.

[79] During oral submissions, both counsel pointed out the recent operation of *Code* section 718.3(7)(b) and the effect it now has on mandating consecutive sentences when children are involved. Whether 718.3(7)(b) applies retrospectively or not, I have determined that the factual

matrix of this case and a proportionate sentencing response to the gravity of the offence and the blameworthiness of the offender, necessitates consecutive sentences for Mr. Q, and I need not therefore consider this section further.

To be clear, I sentence Mr. Q as follows:

- Count 1: sexual interference of EW, 8.5 years;
- Count 2: sexual assault of EW, conditionally stayed;
- Count 3: sexual interference of DS, 6 months consecutive;
- Count 4: sexual assault of DS, conditionally stayed;
- Count 7: sexual assault of NS at Saddle Lake First Nations, 8.5 years consecutive; and
- Count 10: sexual assault of NS at St. Paul, 8.5 years concurrent to count 7.

[80] The sentence as defined above results in 17 years and 6 months imprisonment. Section 718.2(c) of the *Criminal Code* requires me to adjust this global sentence if the total effect is unduly long or harsh.

Previously, in paragraph 68 above, I described the health conditions suffered by Mr. Q while incarcerated awaiting sentencing. To be fair, his counsel did admit the foot problems and diabetes problems and others like some vascular problems raised by the Crown, all of which including some other injuries pre-dated jail. I do note the caution that the Court of Appeal has expressed to trial judges in discounting sentences for health difficulties. Specifically, I refer to ***R v Millward*** 2000 ABCA 308 at para 7 as follows:

> The only circumstance which might weigh in favour of a conditional sentence is the fact that *Millward* has some health problems – a heart condition and hepatitis A. However, while relevant, this factor is not one which is sufficient in our view to outweigh the factors which warrant a sentence of actual imprisonment, particularly since health care services are available to inmates in the prison system requiring treatment.

Further, there were submissions that Mr. Q's medical needs are in fact being accommodated in the prison system, that the treatment will continue into a hospital or with doctors where needed. Also, his day-to-day life would still have required some of these treatments due to significant pre-existing health conditions. (For these conditions, see pp 16, 17 PSR). As it relates to sentencing, the B.C. Court of Appeal also spoke about health concerns in ***R v. Potts*** 2011 BCCA 9 at para 84:

> It is relatively rare for the health of an offender to be taken into account in sentencing but there are cases in which an offender's health may be relevant. Although an offender's health status may be relevant at sentencing, in general these matters are best considered as part of the overall circumstances of the offender, rather than as a basis for deducting time from an otherwise appropriate sentence. There are cases in which an otherwise fit sentence may be reduced on compassionate grounds, but such reduction must be based on current, clear and convincing evidence.

And the Nlfd Court of Appeal raised health concerns of someone with HIV, in ***R v. Mercer*** 1993 CarswellNfld 109 (NLCA) at para 102-103, leave to appeal to SCC refused [1993] SCCA 449:

> These factors must evoke residual feelings of sorrow towards Mr. Mercer irrespective of his atrocious conduct. Any such sentiments, however, must cede to the imperative of public protection. It is vital that persons similarly situate who might otherwise be inclined to emulate Mr. Mercer's conduct understand that they risk incurring a period of imprisonment commensurate with their conduct...

That said, and recognizing as I do that appellate courts have indicated medical problems cannot override section 718, I do point out that I am aware of the fact that jail will be more difficult for him as opposed to a healthy person and it is a circumstance along with his pre-existing conditions, I have taken into account in my analysis.

In accordance with this and out of respect for the totality principle[1], and the principle of "no free rides" regarding multiple offences and victims, I reduce Mr. Q's sentence to 13 years and six months, less time served at an enhanced rate of one and one-half days for each day spent in custody.

[81] I revoked Mr. Q's bail on October 19, 2017, when I found him guilty of these offences. ***R v BTQ*** 2017 ABQB 715. He has now spent 260 days in jail, which equates to a credit for time served of 390 days. By my calculation, Mr. Q has 12 years and 5 months remaining to be served.

Ancillary Orders

[82] Defence and Crown agree that Mr. Q is required to give a sample of his DNA pursuant to s487.051(1) of the *Criminal Code* and he is to do so. Also, I impose a 109 weapons prohibition order. Additionally, I would have ordered him to be entered on the sexual offender information registry for life (SOIRA) under section 490.012 of the *Code, but for* the decision of Justice Moen in ***R v Ndhlovu***, 2018 ABQB 277 where she struck down that provision.

[83] The Crown seeks a 161 order prohibiting, among other things, Mr. Q's attendance at public facilities or public areas. The defence disagrees, in part, because while children were involved, his activities with them took place in the home as opposed to outside of the home or in public areas. Having considered arguments on both sides, I exercise my discretion and grant the order for life[2]. I do this, in part, because of the horrific nature of these offences which I conclude were predatory and clearly involved children. While the offences occurred in the house, the risk that they would occur outside the house, remains.

[84] In view of Mr. Q's incarceration, the victim fine surcharge will be imposed $200 on each count, deemed default per one day, concurrent to the total sentence, no time to pay.

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[1] See ***R v Roy***, 1988 ABCA 197

[2] Section 161 order to be made using the version of section 161 in force before August 9, 2012 in light of ***R v KRJ***, 2016 SCC 31

Heard on the 5th and 6th day of July, 2018.
Dated at the Town of St. Paul, Alberta this 18th day of July, 2018.

W.A. Tilleman
J.C.Q.B.A.

Appearances:

Randall Brandt and Jordan Kerr
for the Crown

Jerred L.T.T. Moore
for the Offender