



**IN THE COURT OF APPEAL  
OF NEWFOUNDLAND AND LABRADOR**

**Citation:** *R. v. Clarke*, 2021 NLCA 8

**Date:** January 29, 2021

**Docket Number:** 201801H0105

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**BETWEEN:**

ORAL CLARKE

APPELLANT

**AND:**

HER MAJESTY THE QUEEN

RESPONDENT

**Coram:** Green, O'Brien and Goodridge JJ.A.

**Court Appealed From:** Provincial Court of Newfoundland and Labrador  
Corner Brook 2018 NLPC 1318A00203

**Appeal Heard:** September 23, 2020

**Judgment Rendered:** January 29, 2021

**Reasons for Judgment by:** Goodridge J.A.

**Concurred in by:** Green and O'Brien JJ.A.

**Counsel for the Appellant:** Rosellen Sullivan

**Counsel for the Respondent:** Sheldon Steeves

**Authorities Cited:**

**CASES CONSIDERED:** *R. v. A.B.*, 2015 NLCA 19; *R. v. Friesen*, 2020 SCC 9; *R. v. Lacasse*, 2015 SCC 64; *R. v. Morrison*, 2019 SCC 15; *R. v. Carter*, 2019 NLCA 39; *R. v. Nightingale* (2013), 332 Nfld. & P.E.I.R. 60 (N.L.P.C.); *R. v. White*, 2013 NLTD(G) 30; *R. v. Mills* (2015), 364 Nfld. & P.E.I.R. 237 (N.L.P.C.); *R. v. Rafiq*, 2015 ONCA 768; *R. v. Carter* (2018), 145 W.C.B. (2d) 548 (N.L.P.C.); *R. v. Dominaux* (2017), 136 W.C.B. (2d) 218, (N.L.P.C.); *R. v. Rice* (2012), 331 Nfld. & P.E.I.R. 282 (N.L.P.C.); *R. v. Chicoine*, 2019 SKCA 104; *R. v. Hammermeister*, 2016 ABCA 302; *R. v. Harris*, 2019 ONCA 193; *R. v. A.H.*, 2018 ONCA 677; *R. v. Rezaie* (1996), 31 O.R. (3d) 713 (Ont. C.A.); *R. v. Suter*, 2018 SCC 34; *R. v. Smith*, 2013 NLTD(G) 43; *R. v. R.M.*, 2015 NLTD(G) 35; *R. v. S.*, 2017 NLTD(G) 206; *R. v. Hutchings*, 2012 NLCA 2, 316 Nfld. & P.E.I.R. 211 (N.L.C.A.); *R. v. Martin*, 2018 NLCA 12; *R. v. O'Quinn*, 2017 NLCA 10; *R. v. Gucciardi*, 2017 ONCJ 770 (Ont. C.J.); *R. v. Rogers*, 2018 ABQB 871; *R. v. Kerr*, 2017 NLTD (G) 107; *R. v. Crocker* (1991), 93 Nfld. & P.E.I.R. 222; *R. v. S.C.*, 2019 ONCA 199; *R. v. Conti*, 2019 QCCA 2108; *R. v. Roberts*, 2019 NLCA 43.

**STATUTES CONSIDERED:** *Criminal Code*, R.S.C. 1985, c. C-46; *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11; *Tougher Penalties for Child Predators Act*, S.C. 2015, c. 23.

**REASONS FOR JUDGMENT****Goodridge J.A.:****INTRODUCTION**

[1] This sentence appeal involves consideration of the sentencing principles of parity and totality, and the application of those principles in situations where Parliament has mandated consecutive sentences and mandatory minimum terms.

[2] The appellant seeks leave, and if leave is granted, appeals the eight-year sentence imposed following his guilty pleas to four counts of internet luring of a child for the purpose of accessing child pornography (s. 172.1(1)(a) of the *Criminal Code*), one count of making sexually explicit material available to a child (s. 171.1(1)(b)), and one count of accessing child pornography (s. 163.1(4.1)). The four counts of luring involved four different children – B.I., L.G., T.W., and D.R. The children ranged in age from 12 to 15. The duration of

the luring activity varied among the victims – the briefest duration was two days and the longest was eight months. There was no in-person contact with the children, and no direct request for in-person contact.

[3] The appellant says the trial judge erred in his assessment of aggravating factors, his application of the parity principle (initial sentences for each offence not in parity with comparable cases), and his application of the totality principle (aggregate sentence unduly harsh or crushing). The eight-year sentence was higher than what the Crown had recommended and, as the Crown acknowledged in its factum, is one of the highest aggregate sentences imposed for these offences in this jurisdiction.

### **LEAVE TO APPEAL**

[4] Leave to appeal is required because this is an appeal as to sentence only (s. 675(1)(b)). The test to be applied is whether the appeal is frivolous in the sense of having no arguable basis or sufficient merit (*R. v. A.B.*, 2015 NLCA 19, at paragraph 15). In my view, that test is satisfied here. A review of the trial judge's decision and various comparable sentencing authorities, leads to the conclusion that, on the facts here, there is an arguable basis for the appellant's submission that the aggregate sentence of eight years is demonstrably unfit.

[5] I would grant leave to appeal.

### **OFFENCES**

[6] The police investigation into the appellant's illicit activities began on November 23, 2015. There had been a complaint that an unknown person, using the pseudonym Ammon Charlebois, was engaged in child luring through Facebook and Skype. The appellant was the person behind that illicit activity. His computer was seized under court order. A forensic analysis of the computer revealed that the appellant had engaged in child luring of six female children.

[7] Charges flowing from this police investigation were filed on various dates, with six separate Informations. The Informations with the charges relating to the youngest and oldest child victims (two counts of internet luring and one count of possessing child pornography) were addressed first, and are not part of this appeal. The appellant pleaded guilty to those earlier charges, as he did for

the current matters that are the subject of this appeal. The earlier charges resulted in a sentence of three years and two months.<sup>1</sup>

[8] The Informations with the charges relating to the remaining four victims were addressed subsequently, and resulted in an additional eight-year sentence, consecutive to the earlier sentence. That eight-year sentence is the subject matter of this appeal.

[9] The facts surrounding each offence were read into the record at the sentencing hearing, and confirmed by the appellant. There were no victim impact statements detailing the harm suffered by the victims, but there is no doubt that harm resulted. In *R. v. Friesen*, 2020 SCC 9, Wagner C.J.C. and Rowe J., for the Court, noted at paragraph 5 that “sexual offences against children are violent crimes that wrongfully exploit children's vulnerability and cause profound harm to children, families, and communities.”

[10] The appellant's luring activity, using Facebook and Skype, was for the purpose of accessing child pornography. The appellant told two of the four victims that he was 16 years old, and implied to the other two that he was a teenager, even though he was a senior citizen.

[11] The luring of B.I., age 12 at the time, occurred over a 12-day period between October 9 and October 21, 2014 and included an unspecified number of requests for nude images of B.I. In addition to the general requests for nude images, the appellant made specific requests that B.I. show her breasts, pull down her pants, and pull down her younger sister's pants. B.I. did not send any nude pictures but she did send images in which she was not fully clothed, and on one occasion, she undressed on live webcam while the appellant watched.

[12] The luring of L.G., age 15 at the time, occurred over a two-day period between May 30 and June 1, 2015 and included an unspecified number of requests for L.G. to send nude images of herself. L.G. did not comply with the requests but instead sent a single image of herself wearing a brassiere.

[13] The luring of T.W., age 14 at the time, occurred over a 10-day period between November 14 and 24, 2015 and included at least four requests for T.W. to send sexually explicit images, including images of her vagina, her breasts, and her boyfriend's penis. T.W. believed that she had sent the appellant a single

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<sup>1</sup> The sentencing decisions for these earlier matters are filed as 2017 NLPC 1317A00102 and 2018 NLPC 1317A00793.

topless image of herself, although that image was not recovered by police during the computer search.

[14] The luring of D.R., age 12 at the time, occurred over an eight-month-period between July 25, 2015 and March 27, 2016 and included 30 requests for D.R. to send sexually explicit images, including close-ups of her genitalia. The appellant also requested that D.R. record an image of herself urinating and requested that she insert household items into her vagina. D.R. responded with 112 images of child pornography. On one occasion, the appellant sent D.R. a sexually explicit image in an effort to have her send nude images in return.

### **APPELLANT**

[15] At the time of sentencing, the appellant was 66 years old, married, with two adult children. The appellant was an active volunteer within his community and was a successful businessperson. He volunteered through a local service group and a local food bank, and he worked as a self-employed owner/operator of a local restaurant franchise. The appellant had no prior convictions, other than those in relation to the first two child victims, and no indications of a predisposition toward this type of criminal activity. The appellant stated during his interview for the pre-sentence report that this criminal activity began out of boredom, while he was recovering from open-heart surgery. It started with the viewing of pornography on the internet and then moved into internet luring, using Facebook and Skype.

[16] The appellant expressed some remorse and regret for his actions; he accepted responsibility; and he pleaded guilty.

### **SENTENCING PROCEEDINGS**

[17] At the sentencing hearing, the Crown noted that, by virtue of various provisions of the *Criminal Code*, the minimum sentence that the judge could impose would be five years. This was the aggregate from the combined effect of consecutive sentences mandated by section 718.3(7)<sup>2</sup> and the minimum sentences mandated by ss. 172.1(2)(a), 171.1(2)(a), and 163.1(4.1)(a). The Crown asked the judge to impose a sentence of six to seven years.

[18] Counsel for the appellant argued that a sentence of six to seven years, as proposed by the Crown, or even the lesser sentence of five years, would amount

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<sup>2</sup> Section 718.3(7) came into force on July 16, 2015 as part of the *Tougher Penalties for Child Predators Act*, S.C. 2015, c. 23.

to cruel and unusual punishment in the context of these crimes. He asked the judge to strike down the relevant *Criminal Code* provisions establishing the mandatory minimum and consecutive sentences, on the basis that the resulting sentence of five years would violate section 12 of the *Canadian Charter of Rights and Freedoms* – “Everyone has the right not to be subjected to any cruel and unusual treatment or punishment”. The appellant submitted that a sentence of one year, served consecutive to the three years and two months sentence relating to the first two victims, would have been adequate. In his view, this additional sentence would take into account the principle of totality and would recognize the various mitigating circumstances that were in play. In oral submissions, appellant’s counsel suggested to the trial judge “at a maximum, another 12 months onto the 38 for a total of 50 ... is an appropriate sentence”.

[19] The judge declined to strike down the *Criminal Code* provisions establishing mandatory minimum and consecutive sentences for these child sexual offences and he imposed a sentence of eight years. The sentence included seven years for the luring offences, one year consecutive for accessing child pornography, and two years concurrent for making sexually explicit material available to a child. The breakdown of the individual sentences imposed at trial, *after the adjustment for totality*, is as follows:

- Luring of B.I. for the purpose of accessing child pornography s. 172.1(1)(a) – two years;
- Luring of L.G. for the purpose of accessing child pornography s. 172.1(1)(a) – one year consecutive;
- Luring of T.W. for the purpose of accessing child pornography s. 172.1(1)(a) – one year consecutive;
- Luring of D.R. for the purpose of accessing child pornography s. 172.1(1)(a) – three years consecutive;
- Making sexually explicit material available to D.R. for the purpose of commission of the offence of invitation to sexual touching s. 171.1(1)(b) – two years concurrent;
- Accessing child pornography from D.R. s. 163.1(4.1) – one year consecutive.

## ISSUES

[20] The appellant raises the following issues for this appeal:

- i. Did the trial judge err in his findings of the aggravating factors?

- ii. Did the trial judge err in his application of the parity principle when establishing the initial sentences for each offence?
- iii. Was the sentence imposed unduly harsh or crushing and therefore demonstrably unfit?

[21] As noted above, these issues collectively engage the sentencing principles of parity and totality, and the application of those principles in situations where Parliament has mandated consecutive sentences and mandatory minimum terms.

## **STANDARD OF REVIEW AND LAW**

[22] Sentencing is an individualized process, one in which a sentence is tailored to reflect the gravity of the offence and the particular circumstances of the offender. For this reason, sentencing decisions attract a high level of deference. Except where a sentencing judge makes an error of law or principle that has an impact on the sentence, an appellate court may not vary the sentence unless it is demonstrably unfit (*R. v. Lacasse*, 2015 SCC 64, at paragraphs 11 and 44).

[23] If a sentence is demonstrably unfit or if a sentencing judge made an error in law or principle that had an impact on the sentence, an appellate court can intervene and perform its own sentencing analysis to determine a fit sentence (*Friesen* at paragraph 27 and *Lacasse*, at paragraph 43). In that event, the principles of sentencing are applied afresh to the facts, without deference to the existing sentence.

[24] The assessment of whether a sentence is demonstrably unfit focuses on the fundamental principle of proportionality. A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. A sentence will only be demonstrably unfit if it constitutes an unreasonable departure from this principle (*Lacasse*, at paragraph 53).

## **ANALYSIS**

### **Did the trial judge err in his findings of aggravating factors?**

[25] If the rationale for deviating from an established range of sentence involves erroneous consideration of an aggravating factor, then that could justify appellate intervention “where it appears from the trial judge's decision that such an error had an impact on the sentence” (*Lacasse*, at paragraph 44).

[26] In this matter, the trial judge's rationale for imposing initial sentences for the luring offences, before adjusting for totality, at the top of, and above, the established range of sentence, involved erroneous consideration of the appellant's *modus operandi* as an aggravating factor. The method employed by the appellant was not an exceptional – or even unusual – use of the internet to communicate with children for the purpose, in this case, of accessing child pornography. It was the same method employed by the offenders in all of the sentencing precedents referenced by the judge, and is the method contemplated by, and implicit within, the *Criminal Code* provision that makes internet luring a criminal offence.

[27] The trial judge indicated that the appellant's method of knowingly embarking on a systematic process of grooming these children for the purpose of accessing child pornography "significantly increases [his] moral responsibility for the offences and this factor must be reflected in the sentence I impose" (decision of the trial judge, at paragraph 132). The duration, nature and frequency of the luring activity would be aggravating, but the basic method of knowingly engaging these children in communication on the internet is the nature of the crime. It is not an aggravating factor.

[28] The established range of sentence for internet luring is one to two years, based on the comments of Karakatsanis J. (in a concurring judgment) at paragraph 177 of *R. v. Morrison*, 2019 SCC 15: "In most cases proceeding by indictment, the appropriate range will be from 12 to 24 months". The trial judge determined that the appropriate sentences for the appellant, before adjusting for totality, would be two years each for the internet luring of T.W., L.G., and B.I. and three years for the internet luring of D.R. It was an error, justifying appellate intervention, for the judge to rely on this aggravating factor to justify initial sentences at the top, and above, the established range of sentence.

[29] An error at the start of the sentencing process can carry through and impact the result. In this case, the erroneous reliance on *modus operandi* as an aggravating factor, in setting these initial sentences, carried through the totality analysis and had an impact on the ultimate sentences imposed for the internet luring of B.I. and D.R. – two years and three years respectively. This error justifies appellate intervention.

**Did the trial judge err in his application of the parity principle?**

[30] The parity principle is set out in section 718.2(b) of the *Criminal Code*: “a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances”.

[31] To assist compliance with the parity principle, judges examine sentencing precedents that engage similar facts and circumstances. No two cases are exactly alike, and accordingly, judges have considerable scope to apply the parity principle in a manner that suits the individualized features of a particular case. As noted in *Lacasse*, at paragraph 60, and *R. v. Carter*, 2019 NLCA 39, at paragraph 22, “deviation from a sentencing range is not synonymous with an error of law or an error in principle”.

[32] The judge referred to, and analyzed, seven sentencing precedents that involved internet luring, and had some similarities to our facts and circumstances – *R. v. Nightingale* (2013), 332 Nfld. & P.E.I.R. 60 (N.L.P.C.), *R. v. White*, 2013 NLTD(G) 30, *R. v. Mills* (2015), 364 Nfld. & P.E.I.R. 237 (N.L.P.C.), *R. v. Rafiq*, 2015 ONCA 768, *R. v. Carter* (2018), 145 W.C.B. (2d) 548 (N.L.P.C.), *R. v. Dominaux* (2017), 136 W.C.B. (2d) 218, (N.L.P.C.) and *R. v. Rice* (2012), 331 Nfld. & P.E.I.R. 282 (N.L.P.C.). The *Carter* decision was varied on appeal, but for the other six decisions, the initial sentences imposed for internet luring (before totality) had a range of 11 to 24 months, with the average sentence at 15 months.

[33] The more recent authority on the sentence range for the offence of internet luring comes from the Supreme Court of Canada’s 2019 decision of *Morrison*, referenced above. In that case Karakatsanis J. recognized that the appropriate range for most luring offences, when proceeding by indictment, is from 12 to 24 months. The sentences imposed on the appellant for the two internet luring charges dealt with earlier (not part of this appeal), at 12 and 18 months, were within that general range.

[34] The trial judge, using the seven precedents referenced in paragraph 32 above, arrived at initial sentences for the appellant’s internet luring (before adjusting for totality) at two years each in respect of the internet luring of T.W., L.G., and B.I. and three years in respect of the internet luring of D.R. The final sentence, after the totality analysis, for the internet luring of B.I. and D.R. remained at two years and three years respectively. Only one of the seven precedents relied upon imposed a sentence of two years (*Rafiq*), and the others were lower. The initial sentences that the judge set for all four internet luring

offences were not in parity with the precedents relied upon. They were unreasonably high initial sentences and this unreasonably high starting point affected the ultimate sentences imposed for the internet luring of B.I. and D.R. There was nothing in the circumstances relating to the offences or the offender which pushed the sentences to the top of, or over, the upper end of the range.

[35] *Rafiq*, the only example of a two-year sentence, is distinguished because there was a significant aggravating factor that is not present in this case. Strathy C.J.O., writing the appeal decision for a unanimous panel in *Rafiq*, found that the judge failed to account for a significant aggravating factor, namely, that the offender had convinced the victim to make and distribute child pornography, an offence under s. 163.1 of the *Code*. In the case before this Court, the appellant was charged, convicted, and sentenced (12 months) for a separate offence under s. 163.1, and accordingly, that related activity would not be an aggravating factor impacting the sentence for the internet luring charge.

[36] The trial judge in the current matter justified the higher initial sentences, in part, because “many of these precedents occurred before the mandatory minimum sentence of one year incarceration was imposed by Parliament” (decision of the trial judge, at paragraph 117). That is a correct statement because an inflationary increase to a previously established sentence range can arise from a legislated increase to the statutory minimum or maximum sentence. At paragraph 97 of *Friesen*, Wagner C.J.C. and Rowe J., writing for a unanimous court stated: “An increase in the maximum sentence should thus be understood as shifting the distribution of proportionate sentences for an offence”. The range has shifted upward in consequence for many sexual offences involving child victims.

[37] For internet luring, a minimum one-year sentence was established in 2012 and an increase in the maximum sentence was established in 2015. There are several sentencing decisions subsequent to the legislated change to the minimum sentence that reflect an upward shift. Examples include *R. v. Chicoine*, 2019 SKCA 104, one year for each count of child luring; *R. v. Hammermeister*, 2016 ABCA 302, one year for each count of child luring; *R. v. Harris*, 2019 ONCA 193, 18 months for one count of child luring; *R. v. A.H.*, 2018 ONCA 677, 15 months for one count of child luring. The decision of the Supreme Court of Canada in *Morrison* was subsequent to the legislated change to the maximum sentence. The established range after legislated changes to the mandatory minimum and mandatory maximum for child luring, when proceeding by indictment, is 12 to 24 months, with the typical sentence closer to the lower end of that range.

[38] In the context of these charges and under these particular circumstances, the trial judge's justification for the higher initial sentences, the *modus operandi* as an aggravating factor, and the inflationary adjustment in response to the 2012 establishment of a minimum sentence, was an error. That error resulted in initial sentences on the internet luring charges (before totality) that were excessive, and that error influenced the totality analysis and the ultimate sentence imposed.

**Was the sentence imposed unduly harsh or crushing and therefore demonstrably unfit?**

[39] This Court can also intervene, in addition to the circumstances where an error in law or principle is established, if the outcome is demonstrably unfit. In this case, I am of the view that there was an error in principle, and that error translated to an aggregate sentence that was demonstrably unfit – the eight-year sentence for these crimes in these circumstances is manifestly excessive.

[40] The concept of “demonstrably unfit” was discussed by Laskin J.A. in *R. v. Rezaie* (1996), 31 O.R. (3d) 713 (Ont. C.A.), at 720, and that discussion was referenced with approval in *R. v. Suter*, 2018 SCC 34. At paragraph 152 of *Rezaie*, Laskin J.A. stated:

... [A]n appellate court cannot interfere unless the sentence is "clearly unreasonable", "clearly or manifestly excessive", "clearly excessive or inadequate", "demonstrably unfit" or a "substantial and marked departure". Whatever the phrase, the bottom line is the same: appellate courts should defer to sentences imposed by trial judges unless the sentence is outside an acceptable range.

[41] The Crown concedes that the two-year sentence imposed for making sexually explicit material available to D.R. was demonstrably unfit. The sentence was so excessive that it meets the very high threshold to permit appellate intervention, as discussed in *Lacasse* at paragraph 52. I agree with, and accept, that concession from the Crown.

[42] The police investigation identified only one occasion where the appellant sent D.R. a sexually explicit image. For that one occasion, the mandatory minimum of six months concurrent, as suggested by the Crown, is a fit and appropriate sentence. Even with that concession, the aggregate sentence imposed by the trial judge for the appellant's crimes relating to these four victims remains at eight years. That is because the sentence imposed for making sexually explicit material available was concurrent with all the other consecutive sentences.

[43] This eight-year sentence, when added to the sentences imposed at the earlier hearings for the other two victims, means that the appellant's overall jail term, flowing from this police investigation of his computer activity, is eleven years and two months. There are sentencing decisions in this jurisdiction involving sexual crimes against children that have attracted sentences at this level, but these involve physical contact with the children, significantly more serious criminal activity, longer duration of the criminal deeds, much higher moral gravity, and in several of the cases, more victims.

[44] *R. v. Smith*, 2013 NLTD(G) 43, resulted in a sentence of 11 years for multiple counts of indecent assault, and sexual assault continuing over a 20-year period. There were 13 child victims. The criminal acts included genital fondling, masturbation, fellatio, and anal intercourse.

[45] *R. v. R.M.*, 2015 NLTD(G) 35, resulted in a sentence of six years following convictions on three counts of sexual assault, three counts of sexual touching, two counts of invitation to sexual touching and two counts of uttering threats. There were three child victims; the sex crimes against these children were frequent and continued over a period of several years; the criminal acts included oral sex, digital vaginal penetration, and anal intercourse.

[46] *R. v. S.*, 2017 NLTD(G) 206, resulted in a sentence of 10 years following convictions on eight counts of indecent assault and four counts of gross indecency. There were five child victims; each child was indecently assaulted multiple times, sometimes on a weekly basis; the duration of the criminal activity was several years; the criminal acts included fondling, anal intercourse, oral sex, and simulated intercourse.

[47] These three sample decisions illustrate that, in the recent past, criminal activity which attracted a sentence duration at the level imposed on the appellant is significantly more egregious in comparison, and involves significantly higher levels of moral gravity. Even allowing for the new mandate from Parliament regarding consecutive sentences, the court's deeper understanding of the harmfulness of sexual offences against children, and the call to increase the sentences for child sexual offences (see paragraph 151 of *Friesen*), the aggregate sentence imposed in this current matter is excessive.

[48] The police investigation revealed that the appellant engaged in this illegal activity, off and on, over a 17-month period, during which time he communicated over the internet with six children, four of whom were the victims in the current matter under appeal. There were no requests for physical

contact with the victims, and there were mitigating factors (expression of some remorse, acceptance of responsibility, and guilty pleas). The sentence was not proportionate to the moral gravity of the offences, or the moral blameworthiness of the appellant. The penalty has to fit the circumstances of the offences and offender, and the aggregate sentence imposed on the appellant here is demonstrably unfit.

[49] As a result of these errors, the sentence must be set aside and reconsidered based on proper principles.

### **FIT SENTENCE**

[50] The sentencing process, because there are multiple offences, engages the principles set out in *R. v. Hutchings*, 2012 NLCA 2, 316 Nfld. & P.E.I.R. 211 (N.L.C.A.). There is a three-step process (*R. v. Martin*, 2018 NLCA 12 at paragraph 10; *R. v. O'Quinn*, 2017 NLCA 10, at paragraph 18): first, determine the appropriate sentence for each individual offence by applying the proper sentencing principles; second, consider whether any of the individual sentences should be made consecutive or concurrent on the ground that they constitute a single criminal venture, and third, if there are consecutive sentences, consider application of the totality principle. This third step, the “one last look”, is to assess whether the aggregate sentence is just and appropriate and not excessive, and reflects the overall culpability of the offender (see paragraph 26 of *Hutchings*).

#### **FIRST STEP – APPROPRIATE SENTENCES FOR INDIVIDUAL OFFENCES**

##### **Child Luring s. 172.1(1)(a)**

[51] The mandatory minimum sentence for child luring, when the proceeding is by indictment, is one year.

[52] Child luring must be dealt with seriously by the courts to ensure that children, as vulnerable members of our society, are safeguarded against predators who abuse the internet to lure children. This general view was recently emphasized by the Supreme Court of Canada in *Friesen* at paragraph 82: “Even in child luring cases where all interactions occur online, the offender's conduct can constitute a form of psychological sexual violence that has the potential to cause serious harm”. The establishment of the one-year minimum sentences for child luring (when proceeding by indictment) and the consequential upward trend in sentences, reflect an increased emphasis on deterrence and denunciation to guard against this potential for serious harm to children.

[53] As noted above, in most cases proceeding by indictment, the appropriate range for child luring will be from 12 to 24 months (*Morrison*, at paragraph 177). The facts and circumstances surrounding the four luring charges are such that all fall within this broad range. Mitigating factors that apply to all charges include the appellant's expression of some remorse and regret for his actions; the acceptance of responsibility; and the guilty pleas. The absence of record prior to the 2015 police investigation is a positive indicator for rehabilitation. The objective of the luring was to access child pornography. The pre-sentence report discloses that the appellant's spouse remains highly supportive. That support improves prospects for rehabilitation. Aggravating factors include: the communication with D.R. occurred over a long period of time; the appellant encouraged D.R. to perform an indecent sexual act on herself; and the appellant encouraged B.I. to perform an indecent act on her sister.

[54] The agreed facts did not disclose the number of luring messages for the purpose of accessing child pornography with L.G. and T.W., but did disclose that there were at least four such exchanges with T.W. and 30 with D.R. The duration of the luring activity, as noted above varied among the victims (L.G. – two days; T.W. – ten days; B.I. – twelve days; and D.R. – eight months).

[55] In the 2018 Ontario Court of Appeal decision of *A.H.* (referenced in paragraph 37 above), a 15 month sentence imposed at trial was upheld on appeal. In that case, the luring activity was for the objective of sexual touching; the duration was two months; and there were six luring type messages sent by the offender. There was no acceptance of responsibility; there was no expression of remorse; and there was no guilty plea. While these three mitigating factors were not present in *A.H.*, they are present here. In addition, the Court of Appeal in *A.H.* noted that the offender was in a position akin to a fiduciary relationship with the victim, as she was a friend of his children and had frequent in person contact with the victim. That aggravating factor is not in play for the appellant.

[56] *R. v. Gucciardi*, 2017 ONCJ 770 (Ont. C.J.), was cited in *A.H.* In that case, the offender was sentenced to 12 months for luring activity that continued over three weeks; the luring exchanges included direct requests for in person contact for the purposes of sexual intercourse and included a video of the offender masturbating. There were mitigating factors not present in *A.H.* but present in *Gucciardi* and in the current matter: guilty plea, expression of remorse, and supportive family. The Ontario Court of Appeal referred to *Gucciardi* for comparison, to illustrate that the lower sentence of 12 months was justified there because of the mitigating factors.

[57] Guided by these precedents, a just sentence for the appellant, regarding the luring of L.G. and T.W. is 12 months each, luring of B.I. is 14 months, and luring of D.R. is 18 months.

**Making sexually explicit material available to a child s. 171.1(1)(b)**

[58] The mandatory minimum sentence for making sexually explicit material available to a child, when the proceeding is by indictment, is six months.

[59] The police investigation identified only one instance where the appellant sent D.R. a sexually explicit image. For the single incident, the mandatory minimum of six months, as suggested by the Crown, is a fit and appropriate sentence.

**Accessing child pornography s. 163.1(4.1)**

[60] The mandatory minimum sentence for accessing child pornography, when the proceeding is by indictment, is one year.

[61] The charge for accessing child pornography arises from the appellant luring D.R. (age 12 at the time) into sending him 112 pornographic images. The images were sent in response to requests to D.R. for close-up images of her genitalia. The specific content of the images is unknown; they were not entered as exhibits. There was no evidence suggesting that the appellant redistributed any of the images.

[62] In *R. v. Rogers*, 2018 ABQB 871, a 46 year old offender with no criminal record pleaded guilty to possessing child pornography and accessing child pornography. The offender had been collecting child pornography for over a decade and had accessed over 57,000 images and 4,300 videos. The trial judge imposed a sentence of 12 months for accessing child pornography. The number of child pornography images accessed in *Rogers* was much larger than the collection accessed by the appellant, and there was an absence of any significant mitigating factors aside from a guilty plea made on the morning of the trial. In the current matter under appeal, the appellant has several mitigating factors.

[63] In *R. v. Kerr*, 2017 NLTD (G) 107, a 36 year old offender, with no prior criminal record, was convicted for various child sexual offences including accessing child pornography. He had accessed 470 child pornography images and 146 child pornography movies. The trial judge imposed a sentence of 12 months for accessing child pornography, to be served concurrently with an 18-

month sentence for distributing child pornography. Based on the number of images accessed, the appellant's actions were less serious.

[64] Having considered the authorities and the appellant's circumstances, a one year sentence for accessing child pornography would be appropriate in this case.

### **SECOND STEP – CONSECUTIVE OR CONCURRENT SENTENCES**

[65] Concurrent sentences may, but are not required to, be imposed where multiple convictions arise out of several offences that constitute a single criminal venture (see paragraph 47 of *R. v. Crocker* (1991), 93 Nfld. & P.E.I.R. 222). In this matter, any potential argument that the charges all flow from a single criminal venture is of limited assistance to the appellant because the option to allow concurrent sentences is eliminated by virtue of s. 718.3(7) of the *Criminal Code*, excepting for the s. 171.1(1)(b) offence – making sexually explicit material available to D.R.

[66] Regarding the s. 171.1(1)(b) offence, the trial judge concluded that “the periods of imprisonment imposed for the sections 171.1(1)(b) and 172.1(1)(a) offences should be ordered to be served on a concurrent basis to each other because of their close interrelationship” (decision of the trial judge, at paragraph 138). The Crown agrees with the trial judge's position and submits that the two offences involving D.R. as the victim, ss. 171.1(1)(b) and 172.1(1)(a) should be concurrent. I would accept that submission.

[67] The result of these consecutive sentences, and the one concurrent sentence, is that the cumulative sentence (before the totality analysis) is five years and eight months.

### **THIRD STEP – TOTALITY ANALYSIS**

[68] Where there are consecutive sentences for multiple offences, as we have here, application of the totality principle ensures that the cumulative sentence reflects the overall culpability of the offender. The totality analysis under s. 718.2(c) of the *Criminal Code* is to ensure that the cumulative sentence is not "unduly long or harsh". The approach for the totality analysis is set out in *Hutchings* at paragraph 84:

4. The approach is to take one last look at the combined sentence to determine whether it is unduly long or harsh, in the sense that it is disproportionate to the gravity of the offence and the degree of responsibility of the offender.

5. In determining whether the combined sentence is unduly long or harsh and not proportionate to the gravity of the offence and the degree of responsibility of the offender, the sentencing court should, to the extent of their relevance in the particular circumstances of the case, take account, and balance, the following factors:

- (a) the length of the combined sentence in relation to the normal level of sentence of the most serious of the individual sentences involved;
- (b) the number and gravity of the offences involved;
- (c) the offender's criminal record;
- (d) the impact of the combined sentence on the offender's prospects for rehabilitation, in the sense that it may be harsh or crushing;
- (e) such other factors as may be appropriate to consider to ensure that the combined sentence is proportionate to the gravity of the offences and the degree of the offender's responsibility.

6. Where the sentencing judge concludes, in the light of the application of those factors identified in Step 5 that are deemed to be relevant, that the combined sentence is unduly long or harsh and not proportionate to the gravity of the offences and the offender's degree of responsibility, the judge should proceed to determine the extent to which the combined sentence should be reduced to achieve a proper totality. If, on the other hand, the judge concludes that the combined sentence is not unduly long or harsh, the sentence must stand.

7. Where the sentencing court determines that it is appropriate to reduce the combined sentence to achieve a proper totality, it should first attempt to adjust one or more of the sentences by making it or them concurrent with other sentences, but if that does not achieve the proper result, the court may in addition, or instead, reduce the length of an individual sentence below what it would otherwise have been.

[69] The appellant asks the Court to apply the totality principle and order concurrency, as necessary, to arrive at an aggregate sentence of three years. This request could only be met if the Court disregarded the clear language of s. 718.3(7) which directs consecutive sentences for most child sexual offences. The appellant argues that the Court can disregard s. 718.3(7) because it is subject to the totality principle set out in s. 718.2(c):

“[C]ase law suggests that the application of s. 718.3(7) is governed by and subject to the overarching principle of proportionality as articulated in s. 718.2(c).”

[70] There are two decisions referred to by the appellant to provide support for this argument, that s. 718.3(7) is subject to the s. 718.2(c) totality principle. In *R. v. S.C.*, 2019 ONCA 199, at paragraph 17, Sharpe J.A. for a unanimous panel noted that, “[s]ection 718.3(7) must be read together with s. 718.2(c)...”

And in *R. v. Conti*, 2019 QCCA 2108, leave to appeal to the Supreme Court of Canada refused, 2020 CarswellQue 9539, a unanimous panel found that the *Criminal Code* provisions for consecutive sentences set out in s. 85 must be interpreted in light of s.718.2(c). Neither of these cases is exactly on point, and in my view neither of these cases provides a clear statement supporting the appellant's position.

[71] I agree that the provisions for consecutive sentences set out in s. 718.3(7) must be read together with s. 718.2(c), but I do not agree that the discretion available to achieve a proper totality of sentence allows a judge to disregard the provisions of s. 718.3(7) that mandate consecutive sentences. Reading ss. 718.3(7) and 718.2(c) together does not allow concurrent sentences where consecutive sentences are mandated. The language of s.718.3 (7) is clear and unambiguous: "... the court shall direct that a sentence ... be served consecutively ...". This provision eliminates judicial discretion to order concurrent sentences for the offences caught by s. 718.3(7). It is not for the courts to pass upon either the wisdom or the necessity for these provisions of the *Criminal Code*; it is for the courts to give effect to the intention of Parliament expressed in the clear language of the *Criminal Code*, except where *Charter* considerations apply.

[72] The totality analysis for the appellant is limited by the consecutive sentences established under s. 718.3(7) and by the mandatory minimum sentences established under ss. 172.1(2)(a), 171.1((2)(a), and 163.1(4.1).

[73] In conducting the totality analysis it is appropriate to address the effect of the unexpired sentence relating to the earlier matters involving the youngest and oldest child victims. In *R. v. Roberts*, 2019 NLCA 43, at paragraph 70, this Court accepted that, when an offender is being currently sentenced for multiple offences, as here, it is appropriate to address the effect of the existence of an unexpired sentence on totality when applying the *Hutchings* analytical framework. Writing for a unanimous panel in *Roberts*, Green and White JJ.A, said:

[70] ... the current sentencing process, which engages totality, focuses on the impact that the *length* of the combined sentences (including the unexpired portion of the previous sentence), if served consecutively, would have on *current* rehabilitative prospects. That is the only relevance of the previous sentence.

[74] The sentence for the appellant, flowing from the earlier convictions was three years and two months and there was still one year and eight months unexpired. This unexpired portion can be added to the current proposed sentence of five years and eight months when assessing whether the combined period of incarceration will be unduly long or harsh (*Roberts*, at paragraph 66). The combined period totals seven years and four months.

[75] The upper end of the appropriate range for most child luring cases proceeding by indictment will be 24 months. There were four luring offences and two related charges arising from the luring activity. The gravity is high, considering that the activity involved sexual offences against children and considering the potential harm to these four children that can flow from these offences. The appellant's antecedents are positive: the absence of record prior to the 2015 police investigation and a contributing member of his community. The duration of the combined sentences will have a negative impact on the appellant's prospects for rehabilitation. The appellant is a senior citizen. He has strong support from his spouse, and has reasonable prospects for rehabilitation at home. The author of the pre-sentence report noted that the appellant had agreed to attend counselling, and was a suitable candidate for community supervision. Considering all these factors, I am of the view that the combined sentence is unduly long and not proportionate to the gravity of the offences and the offender's degree of responsibility. To achieve a proper totality I would reduce the sentences for the luring of B.I. and D.R. to 12 months each, resulting in a cumulative sentence for the current matters of five years.

[76] Pursuant to s. 718.3(4)(a) of the *Criminal Code*, "[t]he court that sentences an accused shall consider directing (a) that the term of imprisonment that it imposes be served consecutively to a sentence of imprisonment to which the accused is subject at the time of sentencing". I agree with the trial judge that there is no principled basis upon which to order that the current sentence be served on a concurrent basis to the sentences previously imposed. If all these charges (the ones currently the subject of this sentencing appeal and the earlier ones relating to the youngest and oldest victim) had been heard together, consecutive sentences would have been required by virtue of s. 718.3(7). In the circumstances the five year sentence imposed here should be consecutive to the unexpired previous sentences.

## **SUMMARY AND DISPOSITION**

[77] In the result, I would grant leave to appeal the sentence and allow the appeal. In my view, the trial judge erred and the sentence of eight years must be

set aside. An appropriate sentence, taking account of the principle of totality, is five years broken down as follows:

- Luring of B.I. for the purpose of accessing child pornography s. 172.1(1)(a) – one year [reduced, for totality, from an otherwise appropriate sentence of 14 months];
- Luring of L.G. for the purpose of accessing child pornography s. 172.1(1)(a) – one year consecutive;
- Luring of T.W. for the purpose of accessing child pornography s. 172.1(1)(a) – one year consecutive;
- Luring of D.R. for the purpose of accessing child pornography s. 172.1(1)(a) – one year consecutive [reduced, for totality, from an otherwise appropriate sentence of 18 months];
- Making sexually explicit material available to D.R. s. 171.1(1)(b) – six months concurrent;
- Accessing child pornography from D.R. s. 163.1(4.1) – one year consecutive.

[78] I would not interfere with the ancillary orders made by the trial judge under ss. 737 (victim surcharge), 487.051(1) (DNA sample), 161 (prohibition on certain activities involving potential contact with children), 109(3) (weapons prohibition), 490.013(2.1) (sex offender registration).

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W. H. Goodridge J.A.

I concur: \_\_\_\_\_

J. D. Green J.A.

I concur: \_\_\_\_\_

F. P. O'Brien J.A.