SUPREME COURT OF CANADA

CITATION: R. *v.* Friesen, 2020 SCC 9

APPEAL HEARD AND JUDGMENT RENDERED: October 16, 2019
REASONS FOR JUDGMENT: April 2, 2020
DOCKET: 38300

BETWEEN:

Her Majesty The Queen
Appellant

and

Justyn Kyle Napoleon Friesen
Respondent

- and -

Attorney General of Ontario, Attorney General of British Columbia, Attorney General of Alberta, Criminal Trial Lawyers' Association and Legal Aid Society of Alberta
Interveners

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

JOINT REASONS FOR JUDGMENT: (paras. 1 to 183)
Wagner C.J. and Rowe J. (Abella, Moldaver, Karakatsanis, Côté, Brown, Martin and Kasirer JJ. concurring)

R. *v.* FRIESEN

Her Majesty The Queen *Appellant*

v.

Justyn Kyle Napoleon Friesen *Respondent*

and

Attorney General of Ontario,
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2020 SCC 9

File No.: 38300.

2019: October 16; 2020: April 2.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Criminal law — Sentencing — Considerations — Sentencing ranges and starting points — Sexual offences against children — Sentencing judge imposing six-year global sentence following accused's guilty plea to offences of sexual interference with young child and attempted extortion of child's mother — Court of Appeal reducing sentence to four years and six months — Whether sentencing ranges for sexual offences against children are still consistent with Parliamentary and judicial recognition of severity of such crimes — Whether Court of Appeal erred by interfering with sentence imposed by sentencing judge.

F encountered the victim's mother on an online dating website. One night, the mother brought F to her residence, where she and F engaged in consensual sexual intercourse in the mother's bedroom. F then told the mother to bring the victim, her four-year-old daughter, into the bedroom. F and the mother subjected the victim to sexual violence. Her screams and cries awoke the mother's friend who removed the victim from the room. F then threatened the mother that unless she brought the victim back, he would tell the mother's friend that the mother had previously sexually abused her one-year-old son.

F pled guilty to sexual interference with the victim and attempted extortion of the mother. The sentencing judge imposed a six-year sentence for sexual interference and a concurrent six-year sentence for attempted extortion. He determined that the four-to-five year sentencing starting point identified previously by the Manitoba Court of Appeal for major sexual assault committed on a young person

within a trust relationship was appropriate even though F did not stand in a position of trust to the victim. The Court of Appeal found that the sentencing judge had erred in principle by applying the starting point, which presumed the existence of a trust relationship, when the sentencing judge had found that there was none. The Court of Appeal conducted a fresh analysis and reduced the sentence to four and one-half years' incarceration for sexual interference and to eighteen months' incarceration to be served concurrently for attempted extortion. The Crown appeals to the Court from the Court of Appeal's interference with the sentence for the sexual interference offence.

Held: The appeal should be allowed and the sentence imposed by the sentencing judge for sexual interference restored.

Appellate courts must generally defer to sentencing judges' decisions and can only intervene to vary a sentence if (1) the sentence is demonstrably unfit or (2) the sentencing judge made an error in principle that had an impact on the sentence. Errors in principle include an error of law, a failure to consider a relevant factor, or erroneous consideration of an aggravating or mitigating factor. If appellate intervention is justified, the court will apply the principles of sentencing afresh to the facts, without deference to the existing sentence, even if that sentence falls within the applicable range. Where an appellate court has found that an error in principle had an impact on the sentence, it is not a further precondition to appellate intervention that

the existing sentence is demonstrably unfit or falls outside the range of sentences imposed in the past.

All sentencing starts with the principle that sentences must be proportionate to the gravity of the offence and the degree of responsibility of the offender. Sentencing judges must also consider the principle of parity: similar offenders who commit similar offences in similar circumstances should receive similar sentences. Parity is an expression of proportionality and gives meaning to proportionality in practice. A proportionate sentence for a given offender and offence cannot be deduced from first principles; instead, judges calibrate the demands of proportionality by reference to the sentences imposed in other cases. Sentencing precedents reflect the range of factual situations in the world, embody the collective experience and wisdom of the judiciary, and are the practical expression of both parity and proportionality.

Appellate courts have a dual role in sentence appeals. They correct errors in sentencing to ensure both that the principles of sentencing are correctly applied and that sentences are not demonstrably unfit, and they have a role in developing the law and providing guidance. Appellate courts will distill many precedents into a single statement, a range of sentences or perhaps a starting point, that sentencing judges can more readily use. As a general rule, appellate courts should give sentencing judges the tools to depart from past precedents and craft fit sentences when a body of precedent no longer responds to society's current understanding and awareness of the

gravity of a particular offence and blameworthiness of particular offenders or to the legislative initiatives of Parliament.

Canadian appellate courts often provide guidance in the form of ranges of sentences, which are summaries of the minimum and maximum sentences imposed in the past and serve as guides for the application of all relevant principles and objectives. Some courts use starting points as an alternative. However, sentencing ranges and starting points are guidelines, not hard and fast rules. Appellate courts cannot treat the departure from or failure to refer to either as an error in principle. Nor can they intervene simply because the sentence is different from the sentence that would have been reached had the range or starting point been applied. Appellate courts cannot interpret or apply the standard of review to enforce ranges or starting points; to do so would be to usurp the role of Parliament in creating categories of offences.

Protecting children from wrongful exploitation and harm is the overarching objective of the legislative scheme of sexual offences against children in the *Criminal Code*. At the sentencing stage, in order to effectively respond to sexual violence against children, sentencing judges need to properly understand the wrongfulness of sexual offences against children and the profound harm that they cause and give effect to both in imposing a sentence. This will help bring sentencing law into line with society's contemporary understanding of the nature and gravity of sexual violence against children and will ensure that past biases and myths do not

filter into the sentencing process. Parliament's creation of the modern legislative scheme of sexual offences against children shifted the focus of the sexual offences scheme from sexual propriety to wrongful interference with sexual integrity. The prime interests that the legislative scheme of sexual offences against children protect are the personal autonomy, bodily integrity, sexual integrity, dignity, and equality of children. Emphasis on these interests require courts to focus their attention on emotional and psychological harm, not simply physical harm. In particular, courts need to take into account the wrongfulness and harmfulness of sexual offences against children when applying the proportionality principle, as these factors impact both the gravity of the offence and the degree of responsibility of the offender and understanding them is key to imposing a proportionate sentence.

Courts must impose sentences that are commensurate with the gravity of sexual offences against children and that reflect the normative character of the offender's actions and the consequential harm to children and their families, caregivers, and communities. Specifically, courts must recognize and give effect to (1) the inherent wrongfulness of these offences; (2) the potential harm to children that flows from these offences; and (3) the actual harm that children suffer as a result of these offences. Sexual offences against children are inherently wrongful and always put children at risk of serious harm, even as the degree of wrongfulness, the extent to which potential harm materializes, and actual harm vary from case to case.

Courts must also take the modern recognition of the wrongfulness and harmfulness of sexual violence against children into account when determining the offender's degree of responsibility. Intentionally applying force of a sexual nature to a child is highly morally blameworthy because the offender is or ought to be aware that this action can profoundly harm the child, because it involves the wrongful exploitation of the child by the offender, and because children are so vulnerable. Courts must give proper weight in sentencing to the offender's underlying attitudes because they are highly relevant to assessing the offender's moral blameworthiness and to the sentencing objective of denunciation. The fact that the victim is a child increases the offender's degree of responsibility.

Parliament has determined that sentences for sexual offences against children should increase to match its view of the gravity of such offences. It has increased maximum sentences for these offences and prioritized denunciation and deterrence in sentencing. Parliament's decision to repeatedly increase maximum sentences for sexual offences against children should be understood as shifting the distribution of proportionate sentences for these offences. To respect Parliament's decision, courts should generally impose higher sentences than the sentences imposed in cases that preceded the increases in maximum sentences. Parliament's decision to prioritize denunciation and deterrence for offences that involve the abuse of children by enacting s. 718.01 of the *Criminal Code* confirms the need for courts to impose more severe sanctions for sexual offences against children.

A national starting point or sentencing range for sexual offences against children should not be created by the Court. The appropriate length and the setting of sentencing ranges or starting points are best left to provincial appellate courts. Nonetheless, to ensure that sentences for sexual offences against children correspond to Parliament's legislative initiatives and the contemporary understanding of the profound harm that sexual violence against children causes, guidance on three specific points is required.

First, upward departure from prior precedents and sentencing ranges should occur for sexual offences against children because Parliament increased the maximum sentences for these offences and because society's understanding of the gravity and harmfulness of these offences has deepened. Courts are justified in departing from dated precedents that do not reflect society's current awareness of the impact of sexual violence on children in imposing a fit sentence. There is concern about sentencing ranges based on precedents that appear to restrict sentencing judges' discretion by imposing caps on sentences that can only be exceeded in exceptional circumstances. Sexual offences against children can cover a wide variety of circumstances and appellate guidance should make clear that sentencing judges can respond to this reality by imposing sentences that reflect increases in the gravity of the offence and the degree of responsibility of the offender. Imposing proportionate sentences will frequently require substantial sentences. Parliament's statutory amendments have strengthened that message. Mid-single digit penitentiary terms for sexual offences against children are normal and upper-single digit and double digit

penitentiary terms should be neither unusual nor reserved for rare or exceptional circumstances. A maximum sentence should be imposed whenever the circumstances warrant it.

Second, sexual offences against children should generally be punished more severely than sexual offences against adults, as Parliament has determined by clear indication in the *Criminal Code*. Accordingly, provincial appellate courts are directed to revise and rationalize sentencing ranges and starting points where they have treated sexual violence against children and sexual violence against adults similarly.

Third, treating the offence of sexual interference with a child as less serious than that of sexual assault of a person under the age of 16 is an error of law. Parliament has established the same maximum sentences for both offences. The elements of the offences are also similar, and a conviction for sexual assault of a child and for sexual interference with a child can frequently be supported on the same factual foundation.

In order to promote the uniform application of the law of sentencing, the following non-exhaustive significant factors to determine a fit sentence for sexual offences against children must be considered. First, the higher the offender's risk to reoffend, the more the court needs to emphasize the sentencing objective of separating the offender from society to protect vulnerable children from wrongful exploitation and harm. Second, an offender who abuses a position of trust to commit a

sexual offence against a child should receive a lengthier sentence than an offender who is a stranger to the child. Any breach of trust is likely to increase the harm to the victim and thus the gravity of the offence, and it also increases the offender's degree of responsibility. Third, sexual violence against children that is committed on multiple occasions and for longer periods of time should attract significantly higher sentences that reflect the full cumulative gravity of the crime and the offender's increased degree of responsibility. Fourth, the age of the victim is also a significant aggravating factor because children who are particularly young are even more vulnerable to sexual violence. The moral blameworthiness of the offender is enhanced in such cases. Fifth, defining a sentencing range based on the specific type of sexual activity at issue poses several dangers. In particular, courts must be careful to avoid the following errors: attributing intrinsic significance to the occurrence or non-occurrence of sexual acts based on traditional notions of sexual propriety; assuming that there is correlation between the type of physical act and the harm to the child; failing to recognize the wrongfulness of sexual violence in cases where the degree of physical interference is less pronounced; and understanding the degree of physical interference factor in terms of a type of hierarchy of physical acts. Sixth, a child's participation is not a mitigating factor, nor should it be a legally relevant consideration at sentencing. In particular, a child's non-resistance should not be equated to "*de facto* consent"; a victim's participation should not distract the court from the harm that the victim suffers as a result of sexual violence; a breach of trust or grooming that led to the victim's participation is an aggravating factor; and, adults

always have a responsibility to refrain from engaging in sexual violence towards children.

In the present case, the Court of Appeal based its intervention on an error in principle that the sentencing judge did not make. It is not an accurate characterization of the sentencing judge's reasons that his choice of the four-to-five-year starting point demonstrated he relied on the aggravating factor of abuse of a position of trust that he had found did not exist. Rather, he determined that it was appropriate to employ a four-to-five-year starting point because the aggravating circumstances of the case warranted it. The sentencing judge sought to exercise his discretion in a way that gave effect to the principles of sentencing, in light of the circumstances of the case, and his decision should be accorded deference. He was entitled to conclude that the aggravating factors were so serious as to place the case on par with the starting point the Manitoba Court of Appeal had set for major sexual assault committed on a young person within a trust relationship. Since the Court of Appeal did not identify any other error and concluded the sentencing judge appropriately balanced the aggravating and mitigating factors, it should not have intervened. This case exemplifies the danger of treating starting points as binding laws. Rather than focusing on whether the sentencing judge chose the right starting point, the Court of Appeal should have focused on whether the sentence was fit and, most fundamentally, whether the sentencing judge properly applied the principles of sentencing.

The sentence was also not demonstrably unfit. Far from being so excessive, the sentence was on the lenient end of the spectrum of fit sentences. The sentencing judge took a careful approach to many of the significant factors previously discussed: he properly recognized the immediate and long-term harm to the victim that F's conduct caused; appreciated the incredibly aggravating nature of the victim's young age; and properly emphasized separation of the offender from society. The fact that the sentencing judge found that F did not stand in a position of trust does not make the sentence unfit. F's moral blameworthiness is heightened because he knowingly decided to exploit the mother's relationship of trust and thus was complicit in the mother's breach of trust. Even if the mother had not stood in a position of trust, the fact that F coordinated the sexual violence against the victim with the mother would be an aggravating factor. The sentencing judge properly weighed the mitigating factors against the aggravating factors and the need to prioritize denunciation and deterrence as well as separation of F from society because of the high risk he posed to children. This all supported a reasoned and principled basis to impose a substantial custodial term.

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APPEAL from a judgment of the Manitoba Court of Appeal (Monnin, Beard and leMaistre JJ.A.), 2018 MBCA 69, [2018] M.J. No. 164 (QL), 2018 CarswellMan 258 (WL Can.), varying a sentence imposed for sexual interference and attempted extortion. Appeal allowed.

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The reasons for the judgment of the Court were delivered by

THE CHIEF JUSTICE AND ROWE J. —

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I. Overview

[1] Children are the future of our country and our communities. They are also some of the most vulnerable members of our society. They deserve to enjoy a childhood free of sexual violence. Offenders who commit sexual violence against

children deny thousands of Canadian children such a childhood every year. This case is about how to impose sentences that fully reflect and give effect to the profound wrongfulness and harmfulness of sexual offences against children.[1]

[2] The accused pled guilty to sexual interference with a young child and attempted extortion of the child's mother. The sentencing judge determined that a six-year global sentence was appropriate. The Court of Appeal reduced the sentence to four and one-half years. We would allow the Crown's appeal and restore the six-year sentence.

[3] We wish to convey three overarching points in these reasons. First, we affirm the standard of review for sentencing set out in *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, and especially the guidance about how an appellate court should proceed when it identifies an error in principle.

[4] Second, we clarify the limits that appellate deference imposes on both sentencing ranges and starting points, and outline particular concerns associated with starting point sentencing.

[5] Third, we send a strong message that sexual offences against children are violent crimes that wrongfully exploit children's vulnerability and cause profound

[1] For the purposes of these reasons, the terms "child" and "children" mean persons under the age of 18. References to "boys", "girls", "young women", "young people", "youth", "teenagers", and "adolescents" should all be understood to refer to persons who are children. Where specific statutory provisions distinguish between persons under the age of 16 and persons under the age of 18, we make this clear in the reasons.

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

II. Factual Background

A. *The Offences*

[6] Friesen encountered the mother on an online dating website on June 29, 2016. On July 17, 2016, at about 1:00 a.m., the mother picked Friesen up from the bar where he had spent the evening and brought him to her residence. The mother's four-year-old daughter ("child") and her one-year-old son were also at the residence. The mother's friend was babysitting them for the evening.

[7] Friesen and the mother engaged in consensual sexual intercourse in the mother's bedroom. The mother audio-recorded what happened next on her cellphone and the transcript of the recording was admitted at the sentencing hearing. Friesen told the mother to bring the child into the bedroom so that they could force their mouths onto her vagina and so that he could force his penis into her vagina. The

mother brought the sleeping child up into the bedroom, removed her diaper, and laid her naked on the bed.

[8] The child began to cry and tried to flee the bedroom. Friesen and the mother prevented her from escaping. As the child was in distress and screaming, Friesen repeatedly directed the mother to force the child's head down so that he could force his penis into her mouth.

[9] The child's screams and cries awoke the mother's friend. She entered the bedroom, observed the sexual violence, and told the child to "come here" (A.R., at p. 97). In response, Friesen said "bring her here" (p. 97). Instead, the mother's friend removed the child from the room.

[10] With the child gone, Friesen told the mother to engage in sexual activities with him. The mother expressed regret about the violent assault on the child. In response, Friesen threatened to tell the mother's friend that the mother had sexually abused her one-year-old son. When the mother said she did not want this to happen, he told her to "relax" and masturbate herself in front of him (p. 99).

[11] Friesen then threatened the mother, repeatedly telling her that unless she brought the child back, he would tell the mother's friend that the mother had sexually abused her one-year-old son. Friesen told the mother that he intended to "fuck" and "rape" the child while "she's crying" (pp. 100 and 102). In response, the mother repeatedly asked why Friesen needed to do "that stuff" (p. 100). When the mother

raised concerns about getting one of her children back from Child and Family Services ("CFS"), Friesen indicated that he would get one of her children back for her if she returned the child to the bedroom.

[12] Friesen fled the residence when the mother's friend confronted him about the sexual violence.

B. *Information About Friesen*

[13] Friesen pled guilty to sexual interference with the child (*Criminal Code*, R.S.C. 1985, c. C-46, s. 151) and attempted extortion of the mother (*Criminal Code*, s. 346(1)). At the time of sentencing, he was 29 years old and had no prior record.

[14] Friesen's childhood was characterized by neglect and by physical and sexual violence. When he left CFS care, he became homeless and sold sex on the street to survive. He lacked a supportive social circle and experienced depression and anxiety. He told the author of the pre-sentence report that the trauma of sexual abuse that he experienced has affected him throughout his life. He said he wanted professional counselling to deal with his problems. At the sentencing hearing, he stated that he was sorry and had remorse (A.R., at p. 72).

[15] The author of the pre-sentence report assessed Friesen as a high risk to re-offend. He scored in the 94th percentile of an actuarial measure of relative risk for sexual offence recidivism. The author concluded that Friesen's level of insight into

his behaviour was "essentially nonexistent" (p. 94). He claimed to be blacked out during the offences and distanced himself from his conduct by saying it was not something he would do. He also stated that he enjoys being around children and wanted to be a role model for children. Despite reporting that he was under the influence of alcohol at the time of the offences, he also maintained that alcohol use was never a problem for him. As Friesen did not understand the risk factors that preceded the offences, there were no risk strategies in place to mitigate future risk.

III. Proceedings Below

A. *Provincial Court of Manitoba (Judge Stewart), Reasons for Sentence, March 9, 2017*

[16] In the Provincial Court of Manitoba, the Crown sought a sentence of seven years' imprisonment. Friesen suggested a sentence of a total of three years' imprisonment.

[17] Judge Stewart imposed a six-year sentence for sexual interference and a concurrent six-year sentence for attempted extortion. He identified the governing sentencing objectives as denunciation and the protection of children. Specifically, he found that the court's duty to protect children from the threat of sexual violence was "paramount" (A.R., at p. 2). He identified the young age of the child and the involvement of the mother in the sexual violence as aggravating factors. He acknowledged that Friesen's youth, lack of a prior record, and difficult and traumatic

upbringing were “important” mitigating factors (p. 2). He also accepted that Friesen did not stand in a position of trust in relation to the child. However, he found that Friesen was “in . . . denial” about his conduct and had “no insight” into his behaviour (pp. 2 and 5). Judge Stewart concluded that this lack of insight was “frightening for ongoing risk into the future” (p. 3).

[18] Judge Stewart determined that the four-to-five-year starting point for major sexual assault committed on a young person within a trust relationship by means of violence, threats of violence, or grooming, which the Manitoba Court of Appeal had identified in *R. v. Sidwell*, 2015 MBCA 56, 319 Man.R. (2d) 144, was appropriate even though Friesen did not stand in a position of trust. For Judge Stewart, the absence of a position of trust did not “chang[e] the message” of *Sidwell* because of both the harm to the child and Friesen’s moral blameworthiness. First, Judge Stewart found that Friesen’s violent conduct produced an “instant effect” of harm to the child as evidenced by her screams and cries (A.R., at p. 4). In addition to this immediate harm, Judge Stewart found that Friesen’s conduct caused “long lasting” psychological harm to the child (p. 3). He identified the child’s extreme youth as “incredibly aggravating” because it increased her vulnerability to harm (p. 3). Second, Judge Stewart determined that Friesen’s moral blameworthiness was high. He found that the nature of Friesen’s conduct was “horrific” and that it was “unbelievable” that Friesen could commit sexual violence against the child in such a manner. Judge Stewart also treated Friesen’s decision to accompany sexual violence with “a form of extortion” as “an aggravating factor” (p. 4).

[19] Judge Stewart concluded that six years' incarceration was required to protect children from risk. He reasoned that Friesen's case was "one of the worst" that he had seen (p. 5). A three-year sentence would be insufficient to communicate the wrongfulness of Friesen's conduct to both Friesen himself and the larger community. Judge Stewart determined that Friesen needed "significant help" and professional counselling that would only be accessible in a federal penitentiary to return to society without posing a risk to children (p. 5). Immediately prior to imposing sentence, Judge Stewart reiterated that the protection of children from the risk of sexual violence was the "major principle" that guided him in imposing sentence (p. 5).

B. *Manitoba Court of Appeal (Monnin, Beard and leMaistre JJ.A.), 2018 MBCA 69*

[20] Writing for the Court of Appeal, leMaistre J.A. found that appellate intervention was justified because Judge Stewart had erred in principle. She reduced Friesen's sentence to four and one-half years' incarceration for the sexual interference conviction and to eighteen months' incarceration to be served concurrently for the attempted extortion conviction. Only the Court of Appeal's interference with the sexual interference sentence was challenged on appeal to this Court.

[21] Regarding the sexual interference sentence, leMaistre J.A. accepted that Judge Stewart had appropriately weighed the aggravating and mitigating factors. However, she noted that the *Sidwell* four-to-five-year starting point presumed the

existence of a trust relationship but that Judge Stewart had found that there was no trust relationship between Friesen and the child. Accordingly, she concluded that Judge Stewart "relied upon an aggravating factor that he had found did not exist" by employing the *Sidwell* starting point and that this error had a meaningful impact on his analysis (para. 16 (CanLII)). Thus, no deference was owed and the Court of Appeal was "free to consider the matter afresh" (para. 17).

[22] LeMaistre J.A. then conducted a fresh analysis to determine a fit sentence. She accepted that the starting point for sentencing should be higher than three years because of Friesen's use of violence and the child's young age. LeMaistre J.A. assessed the aggravating and mitigating factors without reference to Judge Stewart's findings. In the course of this assessment, she characterized Friesen's use of violence as "more than what is inherent in a sexual offence" and stated that Friesen's lack of insight "impacts on his risk when in the community" (para. 28). She also accepted that it was reasonably foreseeable that Friesen's decision to involve the mother in the sexual violence would likely cause added "serious psychological or emotional harm" to the child (para. 32). She characterized the circumstances of the offences as "serious" and Friesen's responsibility as "high" (para. 31). The sexual interference alone warranted a four-year sentence, and leMaistre J.A. increased this figure by six months to account for the offence of attempted extortion, for which she sentenced the accused to 18 months' incarceration to be served concurrently. In the concluding paragraph of her reasons, leMaistre J.A. stated that Judge Stewart's error

in applying the wrong starting point for the sexual interference offence made the sentence he imposed demonstrably unfit (para. 42).

IV. Issues

[23] The Crown raised two issues:

a) Are sentencing ranges for sexual offences against children still consistent with Parliamentary and judicial recognition of the severity of these crimes?

b) Did the Manitoba Court of Appeal err by interfering with the six-year sentence the sentencing judge imposed for the sexual interference conviction?

[24] The first issue requires a broad overview of how the principles of sentencing apply to sexual offences against children. The second requires an analysis of the standard of review, the starting point method, the principles governing consecutive sentences, and the principle of totality.

V. Analysis

A. *Standard of Review*

[25] Appellate courts must generally defer to sentencing judges' decisions. The sentencing judge sees and hears all the evidence and the submissions in person

(*Lacasse*, at para. 48; *R. v. Shropshire*, [1995] 4 S.C.R. 227, at para. 46). The sentencing judge has regular front-line experience and usually has experience with the particular circumstances and needs of the community where the crime was committed (*Lacasse*, at para. 48; *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 91). Finally, to avoid delay and the misuse of judicial resources, an appellate court should only substitute its own decision for a sentencing judge's for good reason (*Lacasse*, at para. 48; *R. v. Ramage*, 2010 ONCA 488, 257 C.C.C. (3d) 261, at para. 70).

[26] As this Court confirmed in *Lacasse*, an appellate court can only intervene to vary a sentence if (1) the sentence is demonstrably unfit (para. 41), or (2) the sentencing judge made an error in principle that had an impact on the sentence (para. 44). Errors in principle include an error of law, a failure to consider a relevant factor, or erroneous consideration of an aggravating or mitigating factor. The weighing or balancing of factors can form an error in principle "[o]nly if by emphasizing one factor or by not giving enough weight to another, the trial judge exercises his or her discretion unreasonably" (*R. v. McKnight* (1999), 135 C.C.C. (3d) 41 (Ont. C.A.), at para. 35, cited in *Lacasse*, at para. 49). Not every error in principle is material: an appellate court can only intervene if it is apparent from the trial judge's reasons that the error had an impact on the sentence (*Lacasse*, at para. 44). If an error in principle had no impact on the sentence, that is the end of the error in principle analysis and appellate intervention is justified only if the sentence is demonstrably unfit.

[27] If a sentence is demonstrably unfit or if a sentencing judge made an error in principle that had an impact on the sentence, an appellate court must perform its own sentencing analysis to determine a fit sentence (*Lacasse*, at para. 43). It will apply the principles of sentencing afresh to the facts, without deference to the existing sentence, even if that sentence falls within the applicable range. Thus, where an appellate court has found that an error in principle had an impact on the sentence, that is a sufficient basis for it to intervene and determine a fit sentence. It is not a further precondition to appellate intervention that the existing sentence is demonstrably unfit or falls outside the range of sentences imposed in the past.

[28] However, in sentencing afresh, the appellate court will defer to the sentencing judge's findings of fact or identification of aggravating and mitigating factors, to the extent that they are not affected by an error in principle. This deference limits the number, length, and cost of appeals; promotes the autonomy and integrity of sentencing proceedings; and recognizes the sentencing judge's expertise and advantageous position (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 15-18).

[29] Often the sentence that the appellate court determines to be fit will be different from that imposed by the sentencing judge, and the appellate court will vary the sentence. If the sentence chosen by the appellate court is the same as that imposed by the sentencing judge, the appellate court may also affirm the sentence despite the error.

B. *Principles Governing Appellate Review and Parity*

(1) Proportionality and Parity

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

[31] Sentencing judges must also consider the principle of parity: similar offenders who commit similar offences in similar circumstances should receive similar sentences. This principle also has a long history in Canadian law (see, e.g., *Wilmott*) and is now codified in s. 718.2(b) of the *Criminal Code*.

[32] Parity and proportionality do not exist in tension; rather, parity is an expression of proportionality. A consistent application of proportionality will lead to parity. Conversely, an approach that assigns the same sentence to unlike cases can achieve neither parity nor proportionality (*R. v. L.M.*, 2008 SCC 31, [2008] 2 S.C.R. 163, at paras. 36-37; *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, at paras. 78-79).

[33] In practice, parity gives meaning to proportionality. A proportionate sentence for a given offender and offence cannot be deduced from first principles;

instead, judges calibrate the demands of proportionality by reference to the sentences imposed in other cases. Sentencing precedents reflect the range of factual situations in the world and the plurality of judicial perspectives. Precedents embody the collective experience and wisdom of the judiciary. They are the practical expression of both parity and proportionality.

(2) Role of Appellate Courts

[34] Appellate courts have a dual role in sentence appeals (*Lacasse*, at paras. 36-37). Correcting errors in sentencing ensures both that the principles of sentencing are correctly applied and that sentences are not demonstrably unfit. Appellate courts also have a role in developing the law and providing guidance. Usually, in keeping with the common law emphasis on precedent, appellate guidance reflects and summarizes the existing law. The appellate court will distill many precedents into a single statement, a range of sentences or perhaps a starting point, that the sentencing judge can more readily use.

[35] Sometimes, an appellate court must also set a new direction, bringing the law into harmony with a new societal understanding of the gravity of certain offences or the degree of responsibility of certain offenders (*R. v. Stone*, [1999] 2 S.C.R. 290, at para. 239). When a body of precedent no longer responds to society's current understanding and awareness of the gravity of a particular offence and blameworthiness of particular offenders or to the legislative initiatives of Parliament, sentencing judges may deviate from sentences imposed in the past to impose a fit

sentence (*Lacasse*, at para. 57). That said, as a general rule, appellate courts should take the lead in such circumstances and give sentencing judges the tools to depart from past precedents and craft fit sentences.

(3) Ranges of Sentence and Starting Points

[36] Canadian appellate courts often provide guidance in the form of ranges of sentences, which are "summaries of the minimum and maximum sentences imposed in the past, which serve in any given case as guides for the application of all the relevant principles and objectives" (*Lacasse*, at para. 57). Some courts, particularly Alberta's, use starting points as an alternative. Similar principles apply to either form of guidance.

[37] This Court has repeatedly held that sentencing ranges and starting points are guidelines, not hard and fast rules (*R. v. McDonnell*, [1997] 1 S.C.R. 948, at para. 33; *R. v. Wells*, 2000 SCC 10, [2000] 1 S.C.R. 207, at para. 45; *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, at para. 44; *Lacasse*, at para. 60). Appellate courts cannot treat the departure from or failure to refer to a range of sentence or starting point as an error in principle. Nor can they intervene simply because the sentence is different from the sentence that would have been reached had the range of sentence or starting point been applied (*McDonnell*, at para. 42). Ranges of sentence and starting points cannot be binding in either theory or practice, and appellate courts cannot interpret or apply the standard of review to enforce them, contrary to *R. v. Arcand*, 2010 ABCA 363, 40 Alta. L.R. (5th) 199, at paras. 116-18

and 273. As this Court held in *Lacasse*, to do so would be to usurp the role of Parliament in creating categories of offences (paras. 60-61; see also *McDonnell*, at paras. 33-34).

[38] The deferential appellate standard of review is designed to ensure that sentencing judges can individualize sentencing both in method and outcome. Sentencing judges have considerable scope to apply the principles of sentencing in any manner that suits the features of a particular case. Different methods may even be required to account properly for relevant systemic and background factors (*Ipeelee*, at para. 59). Similarly, a particular combination of aggravating and mitigating factors may call for a sentence that lies far from any starting point and outside any range (see *Lacasse*, at para. 58; *Nasogaluak*, at para. 44; *R. v. Suter*, 2018 SCC 34, [2018] 2 S.C.R. 496, at para. 4).

[39] A range or starting point should only be created for a category of offences that share enough common features that it is useful to judge them by the same rubric. When an appellate court outlines a range or starting point, it must also provide a clear description both of the category created and the logic behind it (*Stone*, at para. 245). Without this description, it can be difficult to tell when the range or starting point is appropriate and how to use it.

(4) Concerns About Starting Points

[40] Before this Court, the interveners the Legal Aid Society of Alberta ("LASA") and the Criminal Trial Lawyers' Association ("CTLA") raised broader concerns about the operation of the starting point method. Their concerns went beyond the issues that were settled in *McDonnell*. Indeed, LASA questioned whether the starting point methodology is an effective means of appellate guidance and argued that it suffers from deficiencies. The interveners suggest that starting points can fetter discretion, limit the effect of case-specific factors, and result in sentences that cluster around the starting point. They submit that the effect of starting points is an unjustified higher rate of imprisonment and the reproduction of systemic bias against Indigenous offenders. In addition, the interveners suggest starting point sentencing, with its reliance on the "typical" offender and offence, is unnecessarily complicated and hypothetical. When many mitigating factors are "built into" a starting point, the starting point can become in effect a minimum sentence.

[41] Many practitioners, judges, and academics have consistently expressed these concerns (see, e.g., A. Manson, "*McDonnell* and the Methodology of Sentencing" (1997), 6 *C.R.* (5th) 277; J. Rudin, "Eyes Wide Shut: The Alberta Court of Appeal's Decision in *R. v. Arcand* and Aboriginal Offenders" (2011), 48 *Alta. L. Rev* 987; L. Silver, *Sentencing to the Starting Point: The Alberta Debate*, May 23, 2019 (online)). We realize that the Alberta Court of Appeal has repeatedly defended the utility of the starting point methodology in the face of these concerns (see *Arcand*, at paras. 130-46; *R. v. Parranto*, 2019 ABCA 457, 98 Alta. L.R. (6th) 114, at paras. 28-38; see also P. Moreau, "In Defence of Starting Point Sentencing" (2016), 63

Crim. L.Q. 345). However, this Court has not yet addressed these concerns. We make no comment on the merits of these concerns. Nor should anything in these reasons be taken to suggest that starting points are no longer a permissible form of appellate guidance. While we have determined that this case does not provide an appropriate opportunity to assess the merits of these concerns, they raise an issue of importance that should be resolved in an appropriate case.

C. *Sentencing Principles for Sexual Offences Against Children*

[42] Protecting children from wrongful exploitation and harm is the overarching objective of the legislative scheme of sexual offences against children in the *Criminal Code*. Our society is committed to protecting children and ensuring their rights and interests are respected (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 67). As Otis J.A. stated in *R. v. L. (J.-J.)* (1998), 126 C.C.C. (3d) 235 (Que. C.A.), [TRANSLATION] "the protection of children constitute[s] one of the essential and perennial values" of Canadian society (p. 250). Protecting children from becoming victims of sexual offences is thus vital in a free and democratic society (*R. v. Mills*, 2019 SCC 22, at para. 23).

[43] This case presents an opportunity for this Court to consider the sentencing principles for sexual offences against children. Sentencing is one of the most important and "most delicate stages of the criminal justice process" (*Lacasse*, at para. 1). It is at this stage that the judge must weigh the wrongfulness of sexual violence and the harm that it causes and give effect to both in imposing a sentence (C. L. M.

Boyle, *Sexual Assault* (1984), at p. 171). It is important for this Court to provide guidance so that sentencing judges impose sentences that accurately reflect the nature of sexual offences against children and their impact on the victim (see P. Marshall, "Sexual Assault, The Charter and Sentencing Reform" (1988), 63 *C.R.* (3d) 216, at p. 219). To do otherwise would improperly permit myths that Parliament and this Court have striven to drive out of the law of evidence and substantive criminal law to simply re-emerge at the sentencing stage (R. P. Nadin-Davis, "Making a Silk Purse? Sentencing: The 'New' Sexual Offences" (1983), 32 *C.R.* (3d) 28, at p. 46). This result could undermine the credibility of the criminal justice system in the eyes of victims, their families, caregivers, and communities, and the public at large (see *Lacasse*, at para. 3).

[44] Given the facts of this case, the guidance we provide is focused on sentencing principles for the offence of sexual interference and closely related offences such as invitation to sexual touching (*Criminal Code*, s. 152), sexual exploitation (*Criminal Code*, s. 153(1)), incest (*Criminal Code*, s. 155), and sexual assault (*Criminal Code*, s. 271). However, the principles that we outline also have relevance to sentencing for other sexual offences against children, such as child luring (*Criminal Code*, s. 172.1).[2] Courts should thus draw upon the principles that we set

[2] In addition to child luring, other sexual offences against children described in the *Criminal Code* include the following: bestiality in presence of or by child (s. 160(3)); making child pornography (s. 163.1(2)); distribution of child pornography (s. 163.1(3)); possession of child pornography (s. 163.1(4)); accessing child pornography (s. 163.1(4.1)); parent or guardian procuring sexual activity (s. 170); householder permitting prohibited sexual activity (s. 171); making sexually explicit material available to child (s. 171.1); agreement or arrangement to commit a sexual offence against child (s. 172.2(1)); exposure of genitals to a person under 16 (s. 173(2)); obtaining sexual services for consideration from person under 18 years (s. 286.1(2)); material benefit from sexual services provided by person under 18 years (s. 286.2(2)); procuring — person under 18 years (s. 286.3(2)).

out in this case when imposing sentences for such other sexual offences against children. Courts may also draw upon these principles when imposing sentences for child abduction and human trafficking offences where the victim is a child and the factual foundation for the conviction involves sexual violence or exploitation.[3]

[45] We wish to make clear at the outset of our discussion of these sentencing principles that we recognize that criminal justice responses alone cannot solve the problem of sexual violence against children. Rather, guaranteeing children in Canada a childhood free of sexual violence requires coordinated action by all levels of government and by civil society across policy domains as diverse as healthcare, education, and child welfare. Nonetheless, the criminal law in general and sentencing law specifically are important mechanisms that Parliament has chosen to employ to protect children from sexual violence, to hold perpetrators accountable, and to communicate the wrongfulness of sexual violence against children. It is our duty to give Parliament's sentencing initiatives their full effect.

(1) Contemporary Understanding of Sexual Violence Against Children

(a) *Prevalence and Role of Technology*

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[3] Specifically, the following offences involve human trafficking or child abduction: trafficking of a person under the age of eighteen years (s. 279.011(1)); material benefit — trafficking of person under 18 years (s. 279.02(2)); withholding or destroying documents — trafficking of person under 18 years (s. 279.03(2)); abduction of person under age of 16 (s. 280(1)); abduction of person under age of 14 (s. 281).

[46] Because protecting children is so important, we are very concerned by the prevalence of sexual violence against children. This "pervasive tragedy that has damaged the lives of tens of thousands of Canadian children and youths" continues to harm thousands more children and youth each year (Canada, Committee on Sexual Offences Against Children and Youths, *Sexual Offences Against Children: Report of the Committee on Sexual Offences Against Children and Youths* (1984), vol. 1, at p. 29 ("Badgley Committee")). In Canada, both the overall number of police-reported sexual violations against children and police-reported child luring incidents more than doubled between 2010 and 2017, and police-reported child pornography incidents more than tripled (Canada, Department of Justice Research and Statistics Division, *Just Facts: Sexual Violations against Children and Child Pornography*, March 2019 (online), at pp. 1-2). Courts are seeing more of these cases (*R. v. M. (D.)*, 2012 ONCA 520, 111 O.R. (3d) 721, at para. 25). Whatever the reason for the increase in police-reported incidents, it is clear that such reports understate the occurrence of these offences (*R. v. L. (W.K.)*, [1991] 1 S.C.R. 1091, at pp. 1100-1101).

[47] New technologies have enabled new forms of sexual violence against children and provided sexual offenders with new ways to access children. Social media provides sexual offenders "unprecedented access" to potential child victims (*R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906, at para. 102). The Internet both directly connects sexual offenders with child victims and allows for indirect connections through the child's caregiver. Online child luring can be both a prelude to sexual assault and a way to induce or threaten children to perform sexual acts on camera (see

R. v. Woodward, 2011 ONCA 610, 107 O.R. (3d) 81; *R. v. Rafiq*, 2015 ONCA 768, 342 O.A.C. 193). The Internet has also "accelerated the proliferation of child pornography" (*R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253, at para. 114, per Deschamps J.).

[48] Technology can make sexual offences against children qualitatively different too. For instance, online distribution of films or images depicting sexual violence against a child repeats the original sexual violence since the child has to live with the knowledge that others may be accessing the films or images, which may resurface in the child's life at any time (*R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45, at para. 92; *R. v. S. (J.)*, 2018 ONCA 675, 142 O.R. (3d) 81, at para. 120).

[49] Both Parliament and the courts have begun to respond to the prevalence of, new forms of, and qualitative changes in sexual violence against children. Parliament has attempted to keep pace with these developments by amending sentencing provisions for sexual offences against children (*K.R.J.*, at para. 103). Courts too have been on a "learning curve" to understand both the extent and the effects of sexual violence against children and sentencing has evolved to respond to the prevalence of these crimes (*R. v. F. (D.G.)*, 2010 ONCA 27, 98 O.R. (3d) 241, at para. 21).

(b) *Understanding the Wrongfulness and Harmfulness of Sexual Violence*

[50] To effectively respond to sexual violence against children, sentencing judges need to properly understand the wrongfulness of sexual offences against children and the profound harm that they cause. Getting the wrongfulness and harmfulness right is important. As Pepall J.A. recognized in *R. v. Stuckless*, 2019 ONCA 504, 146 O.R. (3d) 752 ("*Stuckless (2019)*"), failure to recognize or appreciate the interests that the legislative scheme of offences protects can result in unreasonable underestimations of the gravity of the offence (paras. 120, 122, 130 and 137; see also Marshall, at pp. 219-20). Similarly, it can result in stereotypical reasoning filtering into the sentencing process and the consequent misidentification and misapplication of aggravating and mitigating factors (J. Benedet, "Sentencing for Sexual Offences Against Children and Youth: Mandatory Minimums, Proportionality and Unintended Consequences" (2019), 44 *Queen's L.J.* 284, at pp. 288 and 309; M. M. Wright, *Judicial Decision Making in Child Sexual Abuse Cases* (2007), at pp. xii-xiii and 39). Properly understanding the harmfulness will help bring sentencing law into line with society's contemporary understanding of the nature and gravity of sexual violence against children and will ensure that past biases and myths do not filter into the sentencing process (*Stone*, at para. 239; *R. v. Barton*, 2019 SCC 33, at para. 200).

(i) Personal Autonomy, Bodily Integrity, Sexual Integrity, Dignity and Equality

[51] The prime interests that the legislative scheme of sexual offences against children protect are the personal autonomy, bodily integrity, sexual integrity, dignity, and equality of children. This Court recognized the importance of these interests in

Sharpe in the context of the production of child pornography. As this Court reasoned, the production of child pornography traumatizes children and violates their autonomy and dignity by treating them as sexual objects, causing harm that may stay with them for their entire lifetime (para. 92, per McLachlin C.J., and para. 185, per L'Heureux-Dubé, Gonthier and Bastarache JJ.). Sexual violence against children is thus wrongful because it invades their personal autonomy, violates their bodily and sexual integrity, and gravely wounds their dignity (see *Sharpe*, at paras. 172, 174 and 185, per L'Heureux-Dubé, Gonthier and Bastarache JJ.).

[52] We would note that the personal autonomy interest carries a somewhat different meaning for children than it does for adults. Children under the age of 16 of course lack the capacity to consent to sexual contact with an adult. As we will explain in detail later in these reasons, a child's participation in such contact is not a mitigating factor and should never be equated to consent. Instead, personal autonomy refers to a child's right to develop to adulthood free from sexual interference and exploitation by adults (see *Sharpe*, at para. 185).

[53] In 1987, Parliament created the modern legislative scheme of sexual offences against children by enacting Bill C-15, *An Act to amend the Criminal Code and the Canada Evidence Act*, R.S.C. 1985, c. 19 (3rd Supp.). In so doing, Parliament replaced the previous offences based on the gender of the victim or the presence of penile penetration with "child-specific gender-neutral offences not dependent upon proof of penile penetration" (A. McGillivray, "Abused Children in the Courts:

Adjusting the Scales after Bill C-15" (1990), 19 *Man. L.J.* 549, at p. 556). As Professor Anne McGillivray wrote, Parliament thus shifted the focus of sexual offences against children from chastity or propriety to a "child-centred" approach that emphasizes the trauma to the child victim from all acts of sexual violence (pp. 558-60). The modern prohibition on sexual interference thereby gives effect to "Parliament's recognition that adult/youth sexual relationships are inherently exploitative" by reason of the lack of maturity, judgment, and experience of children (*R. v. George*, 2017 SCC 38, [2017] 1 S.C.R. 1021, at para. 26; *R. v. Hajar*, 2016 ABCA 222, 39 Alta. L.R. (6th) 209, at para. 229).

[54] The enactment of Bill C-15 also illustrates how Parliament sought to protect children's equality interest. Parliament enacted Bill C-15 following the reports of the Committee on Sexual Offences Against Children and Youths and the Special Committee on Pornography and Prostitution. Both reports emphasized the need for any reform of the scheme of sexual offences against children to guarantee children the equal protection of their interests in autonomy, dignity and physical and sexual integrity (Badgley Committee, vol. 1, at pp. 39 and 292; Canada, Special Committee on Pornography and Prostitution, *Pornography and Prostitution in Canada: Report of the Special Committee on Pornography and Prostitution* (1985), vol. 1, at p. 24 ("Fraser Committee"); Fraser Committee, vol. 2, at p. 563). Both reports also concluded that the failures of the existing scheme of sexual offences against children disproportionately affected girls and young women because they were disproportionately victimized (Badgley Committee, vol. 1, at p. 180; Fraser

Committee, vol. 2, at p. 573). In his speech introducing Bill C-15, then Minister of Justice Ray Hnatyshyn highlighted the conclusions of both reports. He referred to statistics from the report of the Committee on Sexual Offences Against Children and Youths showing that children are disproportionately vulnerable to sexual offences and that girls and young women are disproportionately victimized relative to boys. The Minister emphasized that the reform of the scheme of sexual offences against children would guarantee children "the equal degree of protection of the law" and provide them "more complete protection . . . from all manner of sexual abuse" (*House of Commons Debates*, vol. 1, 2nd Sess., 33rd Parl., November 4, 1986, at p. 1037).

[55] These developments are connected to a larger shift, as society has come to understand that the focus of the sexual offences scheme is not on sexual propriety but rather on wrongful interference with sexual integrity. As Professor Elaine Craig notes, "This shift from focusing on sexual propriety to sexual integrity enables greater emphasis on violations of trust, humiliation, objectification, exploitation, shame, and loss of self-esteem rather than simply, or only, on deprivations of honour, chastity, or bodily integrity (as was more the case when the law's concern had a greater focus on sexual propriety)" (*Troubling Sex: Towards a Legal Theory of Sexual Integrity* (2012), at p. 68).

[56] This emphasis on personal autonomy, bodily integrity, sexual integrity, dignity, and equality requires courts to focus their attention on emotional and psychological harm, not simply physical harm. Sexual violence against children can

cause serious emotional and psychological harm that, as this Court held in *R. v. McCraw*, [1991] 3 S.C.R. 72, "may often be more pervasive and permanent in its effect than any physical harm" (p. 81).

[57] A number of this Court's decisions provide insight into these forms of harm. In *R. v. L. (D.O.)*, [1993] 4 S.C.R. 419, L'Heureux-Dubé J. emphasized the emotional trauma that the nine-year old complainant experienced from sexual violence (pp. 439-42). Similarly, in *McDonnell*, McLachlin J. (as she then was) stressed the emotional harm of "the violation of the child victim's integrity and sense of self-worth and control over her body" that the child victim experienced as a result of being sexually assaulted while sleeping (para. 111). The likely result of the sexual assault would be "shame, embarrassment, unresolved anger, a reduced ability to trust others and fear that . . . people could and would abuse her and her body" (para. 113).

[58] These forms of harm are particularly pronounced for children. Sexual violence can interfere with children's self-fulfillment and healthy and autonomous development to adulthood precisely because children are still developing and learning the skills and qualities to overcome adversity (*Sharpe*, at paras. 158, 184-85 and 188, per L'Heureux-Dubé, Gonthier and Bastarache JJ.; G. Renaud, *The Sentencing Code of Canada: Principles and Objectives* (2009), at § 12.64). For this reason, even a single instance of sexual violence can "permanently alter the course of a child's life" (*Stuckless (2019)*, at para. 136, per Pepall J.A.). As Otis J.A. explained in *L. (J.-J.)*, at p. 250:

> [TRANSLATION] The shattering of the personality of a child at a stage where [the child's] budding organization as a person has only a very fragile defensive structure, will result — in the long term — in suffering, distress and the loss of self-esteem.

[59] In emphasizing the harmfulness of sexual offences against children, we do not intend to stereotype child victims of sexual violence as forever broken. To the contrary, it takes great "strength and courage" to survive sexual violence as a child (*R. v. J.R.G.*, [2013] B.C.J. No. 1401 (QL) (Prov. Ct.), at para. 26). Frequently, child victims make "valiant and repeated efforts to have someone believe their allegations" (I. Grant and J. Benedet, "The 'Statutory Rape' Myth: A Case Law Study of Sexual Assaults against Adolescent Girls" (2019), 31 *C.J.W.L.* 266, at p. 292 ("The 'Statutory Rape' Myth")). Many victims go on to live healthy and meaningful lives with fulfilling and loving relationships. Offenders cannot rob children of their "strength, compassion, love for others and intelligence" and "resolve to take back their lives" (*R. v. Stuckless*, 2016 ONCJ 338, at paras. 50 and 53 (CanLII), rev'd 2019 ONCA 504, 146 O.R. (3d) 752).

(ii) Relational Harm: Damage to Children's Relationships With Their Families and Communities

[60] Sexual violence causes additional harm to children by damaging their relationships with their families and caregivers. Because much sexual violence against children is committed by a family member, the violence is often accompanied by breach of a trust relationship (*R. v. D.R.W.*, 2012 BCCA 454, 330 B.C.A.C. 18, at

para. 41). If a parent or family member is the perpetrator of the sexual violence, the other parent or family members may cause further trauma by taking the side of the perpetrator and disbelieving the victim (see "The 'Statutory Rape' Myth", at p. 292). Children who are or have been in foster care may be particularly vulnerable since making an allegation can result in the end of a placement or a return to foster care (see *R. v. L.M.*, 2019 ONCA 945, 59 C.R. (7th) 410). Even when a parent or caregiver is not the perpetrator, the sexual violence can still tear apart families or render them dysfunctional (*R. v. D. (D.)* (2002), 58 O.R. (3d) 788 (C.A.), at para. 45). For instance, siblings and parents can reject victims of sexual violence because they blame them for their own victimization (see *Rafiq*, at para. 38). Victims may also lose trust in the ability of family members to protect them and may withdraw from their family as a result (*Rafiq*, at paras. 39-41).

[61] The ripple effects can cause children to experience damage to their other social relationships. Children may lose trust in the communities and people they know. They may be reluctant to join new communities, meet new people, make friends in school, or participate in school activities (C.-A. Bauman, "The Sentencing of Sexual Offences against Children" (1998), 17 *C.R.* (5th) 352, at p. 355). This loss of trust is compounded when members of the community take the side of the offender or humiliate and ostracize the child (*R. v. Rayo*, 2018 QCCA 824, at para. 87 (CanLII); *R. v. T. (K.)*, 2008 ONCA 91, 89 O.R. (3d) 99, at paras. 12 and 42). Technology and social media can also compound these problems by spreading images

and details of the sexual violence throughout a community (see *R. v. N.G.*, 2015 MBCA 81, 323 Man.R. (2d) 73).

(iii) Harm to Families, Communities, and Society

[62] The *Criminal Code* recognizes that the harm flowing from an offence is not limited to the direct victim against whom the offence was committed. Instead, the *Criminal Code* provides that parents, caregivers, and family members of a sexually victimized child may be victims "in their own right" who are entitled to present a victim impact statement (B. Perrin, *Victim Law: The Law of Victims of Crime in Canada* (2017), at p. 55; see also *Criminal Code*, ss. 2 ("victim") and 722).

[63] The ripple effects of sexual violence against children can make the child's parents, caregivers, and family members secondary victims who also suffer profound harm as a result of the offence. Sexual violence can destroy parents and caregivers' trust in friends, family, and social institutions and leave them feeling powerless and guilty (*R. v. C. (S.)*, 2019 ONCA 199, 145 O.R. (3d) 711, at para. 6; *Rayo*, at para. 39; *D. (D.)*, at para. 13). The harm to parents' relationship with their children can also be profound. For instance, children can react to the sexual violence by shutting their parents out of their lives (*Rafiq*, at para. 40). Parents and caregivers may also bear the financial, personal, and emotional costs of helping their children recover and cope with emotional and behavioural challenges (see *D. (D.)*, at paras. 11-13). In the words of one mother of a child victim, the sexual violence "has taken many years from my son's life and I know this will hurt me for the rest of my life" (*D. (D.)*, at para. 11).

[64] Beyond the harm to families and caregivers, there is broader harm to the communities in which children live and to society as a whole. Some of these costs can be quantified, such as the social problems that sexual violence against children causes, the costs of state intervention, and the economic impact of medical costs, lost productivity, and treatment for pain and suffering (see *Hajar*, at para. 68; *R. v. Goldfinch*, 2019 SCC 38, at para. 37; United Nations, *Report of the independent expert for the United Nations study on violence against children*, U.N. Doc. A/61/299, August 29, 2006, at p. 12). In particular, children who are victims of sexual violence may be more likely to engage in sexual violence against children themselves when they reach adulthood (*D. (D.)*, at paras. 37-38). Sexual violence against children can thus fuel a cycle of sexual violence that results in the proliferation and normalization of the violence in a given community (Standing Senate Committee on Human Rights, *The Sexual Exploitation of Children in Canada: the Need for National Action*, November 2011 (online), at pp. 10, 30 and 41). In short, the costs that cannot be quantified are also profound. Children are the future of our country and our communities. They deserve to have a childhood free of sexual violence (*Hajar*, at para. 44). When children become victims of sexual violence, "[s]ociety as a whole is diminished and degraded" (*Hajar*, at para. 67).

(iv) Wrongfulness of Exploiting Children's Weaker Position in Society

[65] The protection of children is one of the most fundamental values of Canadian society. Sexual violence against children is especially wrongful because it

turns this value on its head. In reforming the legislative scheme governing sexual offences against children, Parliament recognized that children, like adults, deserve to be treated with equal respect and dignity (Badgley Committee, vol. 1, at p. 292; Fraser Committee, vol. 1, at p. 24, and vol. 2, at p. 563). Yet instead of relating to children as equal persons whose rights and interests must be respected, offenders treat children as sexual objects whose vulnerability can be exploited by more powerful adults. There is an innate power imbalance between children and adults that enables adults to violently victimize them (*Sharpe*, at para. 170, per L'Heureux-Dubé, Gonthier and Bastarache JJ.; *L. (D.O.)*, at p. 440, per L'Heureux-Dubé J.). Because children are a vulnerable population, they are disproportionately the victims of sexual crimes (*George*, at para. 2). In 2012, 55% of victims of police-reported sexual offences were children or youth under the age of 18 (Statistics Canada, *Police-reported sexual offences against children and youth in Canada, 2012* (2014), at p. 6).

[66] Children are most vulnerable and at risk at home and among those they trust (*Sharpe*, at para. 215, per L'Heureux-Dubé, Gonthier and Bastarache JJ.; *K.R.J.*, at para. 153, per Brown J.). More than 74% of police-reported sexual offences against children and youth took place in a private residence in 2012 and 88% of such offences were committed by an individual known to the victim (*Police-reported sexual offences against children and youth in Canada, 2012*, at pp. 11 and 14).

[67] It is for this reason that sexual violence against children can all too often be invisible to society. To resist detection, offenders perpetrate sexual violence

against children in private, coerce children into not reporting, and rely on society's false belief that sexual violence against children is an aberration confined to a handful of abnormal individuals (see R. J. R. Levesque, *Sexual Abuse of Children: A Human Rights Perspective* (1999), at p. 11). Violence against children thus remains hidden, unreported, and under-recorded (*Report of the independent expert for the United Nations study on violence against children*, at pp. 8-9). The under-reporting of sexual violence against children is compounded by the ways in which the criminal justice system and the court process have historically failed children, including through rules of evidence premised on the assumption that children are inherently unreliable witnesses (see *R. v. Levogiannis*, [1993] 4 S.C.R. 475, at p. 483; N. Bala, "Double Victims: Child Sexual Abuse and the Canadian Criminal Justice System", in W. S. Tarnopolsky, J. Whitman and M. Ouellette, eds., *Discrimination in the law and the administration of justice* (1993), 232, at p. 233).

(v) Disproportionate Impact on Girls and Link to Violence Against Women

[68] Sexual violence also has a disproportionate impact on girls and young women. Like the sexual assault of adults, sexual violence against children is highly gendered (*Goldfinch*, at para. 37). The "intersecting inequalities of being young and female" thus make girls and young women especially vulnerable to sexual violence ("The 'Statutory Rape' Myth", at p. 292). In 2012, 81% of child and youth victims of police-reported sexual offences were female and 97% of persons accused of such offences were male (*Police-reported sexual offences against children and youth in*

Canada, 2012, at pp. 10 and 14). Sexual violence against children thus perpetuates disadvantage and undermines gender equality because girls and young women must disproportionately face the profound physical, emotional, psychological, and economic costs of the sexual violence (see *R. v. Osolin*, [1993] 4 S.C.R. 595, at p. 669; *Goldfinch*, at para. 37). Girls and young women are thus "still punished for being female" as a result of being disproportionately subjected to sexual violence (see The Hon. C. L'Heureux-Dubé, "Foreword: Still Punished for Being Female", in E. A. Sheehy, ed., *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (2012), 1, at p. 2).

[69] None of this should detract from the particular challenges that boys and young men who are the victims of sexual violence face. Victimization can be particularly shameful for boys because of social expectations that males are supposed to appear tough (Ontario, The Cornwall Public Inquiry, *Report of the Cornwall Inquiry, Phase 1: Facts and Findings*, vol. 1 (2009), at p. 28). Embarrassment, humiliation, and homophobia form a particularly toxic and stigmatizing combination for male child victims (see *L. (D.O.)*, at p. 442, per L'Heureux-Dubé J.; *R. v. Viszlai*, 2015 BCCA 495, 333 C.C.C. (3d) 234, at para. 23).

(vi) Disproportionate Impact on Indigenous People and Other Vulnerable Groups

[70] Children who belong to groups that are marginalized are at a heightened risk of sexual violence that can perpetuate the disadvantage they already face. This is

particularly true of Indigenous people, who experience childhood sexual violence at a disproportionate level (Statistics Canada, *Victimization of Aboriginal people in Canada, 2014* (2016), at p. 10). Canadian government policies, particularly the physical, sexual, emotional, and spiritual violence against Indigenous children in Indian Residential Schools, have contributed to conditions in which Indigenous children and youth are at a heightened risk of becoming victims of sexual violence (see British Columbia, Representative for Children and Youth, *Too Many Victims: Sexualized Violence in the Lives of Children and Youth in Care* (2016), at p. 8 ("*Too Many Victims*"); *The Sexual Exploitation of Children in Canada: the Need for National Action*, at pp. 29-33). In particular, the over-representation of Indigenous children and youth in the child welfare system makes them especially vulnerable to sexual violence (*Too Many Victims*, at pp. 11-12). We would emphasize that, when a child victim is Indigenous, the court may consider the racialized nature of a particular crime and the sexual victimization of Indigenous children at large in imposing sentence (T. Lindberg, P. Campeau and M. Campbell, "Indigenous Women and Sexual Assault in Canada", in E. A. Sheehy, ed., *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (2012), 87, at pp. 87 and 98-99).

[71] Children who belong to other groups that face discrimination or marginalization in society are also especially vulnerable to sexual violence. For instance, children and youth in government care are particularly vulnerable to victimization. Children who experience poverty may also face additional

vulnerability, especially children who are leaving government care (*Too Many Victims*, at pp. 8-9).

[72] Canadians with disabilities experience sexual violence during childhood at a disproportionate level (Statistics Canada, *Violent victimization of women with disabilities, 2014* (2018), at p. 9). Children and youth with disabilities are especially vulnerable because they may be perceived as easier to victimize, may not be able to fully understand or communicate what has happened to them, and face barriers to reporting ("The 'Statutory Rape' Myth", at p. 270).

[73] Similarly, LGBT2Q+ youth may be especially vulnerable because of the marginalization they continue to experience in society (*Too Many Victims*, at p. 9). Sentencing judges should be attentive to the ways in which LGBT2Q+ youth may "experience sexual assault differently than heterosexual victims" (M. Koppel, "It's Not Just a Heterosexual Issue: A Discussion of LGBT Sexual Assault Victimization", in F. P. Reddington and B. Wright Kreisel, eds., *Sexual Assault: The Victims, the Perpetrators, and the Criminal Justice System* (3rd ed. 2017), 257, at p. 269). Sexual violence may cause young LGBT2Q+ victims to experience unique forms of isolation and may negatively affect how they feel about the process of coming out. A lack of specialized services may compound these problems (see Koppel, at pp. 266-68).

(2) <u>Sentencing Must Reflect the Contemporary Understanding of Sexual Violence Against Children</u>

[74] It follows from this discussion that sentences must recognize and reflect both the harm that sexual offences against children cause and the wrongfulness of sexual violence. In particular, taking the harmfulness of these offences into account ensures that the sentence fully reflects the "life-altering consequences" that can and often do flow from the sexual violence (*Woodward*, at para. 76; see also, *Stuckless (2019)*, at para. 56, per Huscroft J.A., and paras. 90 and 135, per Pepall J.A.). Courts should also weigh these harms in a manner that reflects society's deepening and evolving understanding of their severity (*Stuckless (2019)*, at para. 112, per Pepall J.A.; *Goldfinch*, at para. 37).

(a) *Harmfulness and Wrongfulness and Proportionality Assessment*

[75] In particular, courts need to take into account the wrongfulness and harmfulness of sexual offences against children when applying the proportionality principle. Accurately understanding both factors is key to imposing a proportionate sentence (*R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773, at paras. 43-44). The wrongfulness and the harmfulness impact both the gravity of the offence and the degree of responsibility of the offender. Taking the wrongfulness and harmfulness into account will ensure that the proportionality principle serves its function of "ensur[ing] that offenders are held responsible for their actions and that the sentence properly reflects and condemns their role in the offence and the harm they caused" (*Nasogaluak*, at para. 42).

(b) *Gravity of the Offence*

[76] Courts must impose sentences that are commensurate with the gravity of sexual offences against children. It is not sufficient for courts to simply state that sexual offences against children are serious. The sentence imposed must reflect the normative character of the offender's actions and the consequential harm to children and their families, caregivers, and communities (see *M. (C.A.)*, at para. 80; *R. v. Morrisey*, 2000 SCC 39, [2000] 2 S.C.R. 90, at para. 35). We thus offer some guidance on how courts should give effect to the gravity of sexual offences against children. Specifically, courts must recognize and give effect to (1) the inherent wrongfulness of these offences; (2) the potential harm to children that flows from these offences; and, (3) the actual harm that children suffer as a result of these offences. We emphasize that sexual offences against children are inherently wrongful and always put children at risk of serious harm, even as the degree of wrongfulness, the extent to which potential harm materializes, and actual harm vary from case to case.

(i) Inherent Wrongfulness

[77] As this Court recognized in *L.M.*, violence is always inherent in the act of applying force of a sexual nature to a child (para. 26). Far from removing the violence, the sexual dimension instead aggravates the wrongfulness of the violence by adding interference with the child's sexual integrity to the interference with the child's bodily integrity. Physical contact of a sexual nature with a child always means that the offender has interfered with both the child's "security of the person from any

non-consensual contact or threats of force" and the child's bodily integrity, which "lies at the core of human dignity and autonomy" (*R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at para. 28; see also *McCraw*, at p. 83). Such physical sexual contact is also a form of psychological violence precisely because bodily and psychological integrity are closely linked (see *Ewanchuk*, at para. 28; *L.M.*, at para. 26). The degree of physical interference and the intensity of physical and psychological violence vary depending on the facts of individual cases. However, any physical contact of a sexual nature with a child always constitutes a wrongful act of physical and psychological violence even if it is not accompanied by additional physical violence and does not result in physical or psychological injury. Courts must always give effect to this inherent violence since it forms an integral component of the normative character of the offender's conduct (*M. (C.A.)*, at para. 80).

[78] The wrongfulness of the exploitation of children is also always relevant to the normative character of the offender's conduct and thus the gravity of the offence. It is inherently exploitative for an adult to apply physical force of a sexual nature to a child (*George*, at para. 26). This exploitation is rooted in the power imbalance between children and adults, the potential harm that sexual interference by adults poses to children, and the wrongfulness of treating children not as persons with equal dignity but instead as sexual objects to be used by adults. Courts must always give effect to the wrongfulness of this exploitation in sentencing, even if the degree of exploitation may vary from case to case (see *Hajar*, at paras. 106 and 111).

(ii) Potential Harm

[79] In addition to the inherent wrongfulness of physical interference and exploitation, courts have recognized that sexual violence against children inherently has the potential to cause several recognized forms of harm. The likelihood that these forms of potential harm will materialize of course varies depending on the circumstances of each case. However, the potential that these forms of harm will materialize is always present whenever there is physical interference of a sexual nature with a child and can be present even in sexual offences against children that do not require or involve physical interference. These forms of potential harm illustrate the seriousness of the offence even absent proof that they have materialized into actual harm (see *McDonnell*, at paras. 35-36).

[80] We wish to focus courts' attention on the following two categories of harm: harm that manifests itself during childhood, and long-term harm that only becomes evident during adulthood. During childhood, in addition to the inherent wrong of interference with their bodily integrity, children can experience physical and psychological harm that persists throughout their childhood (*Woodward*, at para. 72; *Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24, [2000] 1 S.C.R. 551, at para. 123, per Iacobucci J.). These forms of harm can be so profound that children are "robbed of their youth and innocence" (*D. (D.)*, at para. 10). The following list of recognized forms of harm that manifest themselves during childhood makes this clear:

> These effects include overly compliant behaviour and an intense need to please; self-destructive behaviour, such as suicide, self-mutilation, chemical abuse, and prostitution; loss of patience and frequent temper tantrums; acting out aggressive behaviour and frustration; sexually aggressive behaviour; an inability to make friends and non-participation in school activities; guilty feelings and shame; a lack of trust, particularly with significant others; low self-esteem; an inability to concentrate in school and a sudden drop in school performance; an extraordinary fear of males; running away from home; sleep disturbances and nightmares; regressive behaviours, such as bedwetting, clinging behaviour, thumb sucking, and baby talk; anxiety and extreme levels of fear; and depression.
>
> (Bauman, at pp. 354-55)

[81] Sexual violence against children also causes several forms of long-term harm that manifest themselves during the victim's adult years. First, children who are victims of sexual violence may have difficulty forming a loving, caring relationship with another adult as a result of the sexual violence. Second, children may be more prone to engage in sexual violence against children themselves when they reach adulthood (*Woodward*, at para. 72; *D. (D.)*, at paras. 37-38). Third, children are more likely to struggle with substance abuse, mental illness, post-traumatic stress disorder, eating disorders, suicidal ideation, self-harming behaviour, anxiety, depression, sleep disturbances, anger, hostility, and poor self-esteem as adults (Bauman, at p. 355; *Goldfinch*, at para. 37; *R. v. L.V.*, 2016 SKCA 74, 480 Sask.R. 181, at para. 104, citing D. Todd, "Sentencing of Adult Offenders in Cases Involving Sexual Abuse of Children: Too Little, Too Late? A View From the Pennsylvania Bench" (2004), 109 *Penn. St. L. Rev.* 487, at pp. 509-10).

[82] We would emphasize that courts should reject the belief that there is no serious harm to children in the absence of additional physical violence (Benedet, at p. 299). As we have explained, any manner of physical sexual contact between an adult and a child is inherently violent and has the potential to cause harm. 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 (see *Rafiq*, at paras. 44-45; *Rayo*, at paras. 172-74; *L.M.*, at para. 26).

[83] In many cases, it will be impossible to determine whether these forms of harm have occurred at the time of sentencing. If the victim is an adult at the time of sentencing, the court may be able to conclude that these forms of potential long-term harm have materialized into actual harm. However, as Moldaver J.A. (as he then was) recognized in *D. (D.)*, if the victim remains a child at the time of sentencing, "[t]ime alone will tell" whether that child will experience particular forms of harm as an adult (para. 38). It may also be impossible to determine the nature and extent of the harm that the victim will experience during childhood, since particular forms of harm may materialize following the date of sentencing.

[84] As a result, courts must consider the reasonably foreseeable potential harm that flows from sexual violence against children when determining the gravity of the offence. Even if an offender commits a crime that fortunately results in no actual harm, courts must consider the potential for reasonably foreseeable harm when imposing sentence (A. Manson, *The Law of Sentencing* (2001), at p. 90). When they

analyze the gravity of the offence, sentencing judges thus must always take into account forms of potential harm that have yet to materialize at the time of sentencing but that are a reasonably foreseeable consequence of the offence and may in fact materialize later in childhood or in adulthood. To do otherwise would falsely imply that a child simply outgrows the harm of sexual violence (see Wright, at p. 88).

(iii) Actual Harm

[85] When possible, courts must consider the actual harm that a specific victim has experienced as a result of the offence. This consequential harm is a key determinant of the gravity of the offence (see *M. (C.A.)*, at para. 80). Direct evidence of actual harm is often available. In particular, victim impact statements, including those presented by parents and caregivers of the child, will usually provide the "best evidence" of the harm that the victim has suffered (*R. v. Gabriel* (1999), 137 C.C.C. (3d) 1 (S.C.J. Ont.), at p. 11). Prosecutors should make sure to put a sufficient evidentiary record before courts so that they can properly assess "the harm caused to the child by the offender's conduct and the life-altering consequences that can and often do flow from it" (*Woodward*, at para. 76).

[86] Where direct evidence of the actual harm to the child is unavailable, courts should use the harm to the child as a lens through which to analyze the significance of many particular aggravating factors. Courts may be able to find actual harm based on the numerous factual circumstances that can cause additional harm and constitute aggravating factors for sexual violence against children, such as a breach of

trust or grooming, multiple instances of sexual violence, and the young age of the child. We stress that direct evidence from children or their caregivers is not required for the court to find that children have suffered actual harm as a result of sexual violence. Of course, we do not suggest that harm to the child is the exclusive lens through which to view aggravating factors.

(c) *Degree of Responsibility of the Offender*

[87] Courts must also take the modern recognition of the wrongfulness and harmfulness of sexual violence against children into account when determining the offender's degree of responsibility. They must not discount offenders' degree of responsibility by relying on stereotypes that minimize the harmfulness or wrongfulness of sexual violence against children (Benedet, at pp. 310 and 314).

[88] Intentionally applying force of a sexual nature to a child is highly morally blameworthy because the offender is or ought to be aware that this action can profoundly harm the child. In assessing the degree of responsibility of the offender, courts must take into account the harm the offender intended or was reckless or wilfully blind to (*Arcand*, at para. 58; see also *M. (C.A.)*, at para. 80; *Morrisey*, at para. 48). For sexual offences against children, we agree with Iacobucci J. that, save for possibly certain rare cases, offenders will usually have at least some awareness of the profound physical, psychological, and emotional harm that their actions may cause the child (*Scalera*, at paras. 120 and 123-24).

[89] All forms of sexual violence, including sexual violence against adults, are morally blameworthy precisely because they involve the wrongful exploitation of the victim by the offender — the offender is treating the victim as an object and disregarding the victim's human dignity (see *R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584, at paras. 45 and 48). As L'Heureux-Dubé J. reasoned in *L. (D.O.)*, "the occurrence of child sexual abuse is one intertwined with the sexual abuse of all women" precisely because both forms of sexual offences involve the sexual objectification of the victim (p. 441). Courts must give proper weight in sentencing to the offender's underlying attitudes because they are highly relevant to assessing the offender's moral blameworthiness and to the sentencing objective of denunciation (Benedet, at p. 310; *Hajar*, at para. 67).

[90] The fact that the victim is a child increases the offender's degree of responsibility. Put simply, the intentional sexual exploitation and objectification of children is highly morally blameworthy because children are so vulnerable (*R. v. Morrison*, 2019 SCC 15, [2019] 2 S.C.R. 3, at para. 153). As L'Heureux-Dubé J. recognized in *R. v. L.F.W.*, 2000 SCC 6, [2000] 1 S.C.R. 132, "As to moral blameworthiness, the use of a vulnerable child for the sexual gratification of an adult cannot be viewed as anything but a crime demonstrating the worst of intentions" (para. 31, quoting *R. v. L.F.W.* (1997), 155 Nfld. & P.E.I.R. 115 (N.L.C.A.), at para. 117, per Cameron J.A. ("*L.F.W. (C.A.)*")). Offenders recognize children's particular vulnerability and intentionally exploit it to achieve their selfish desires (*Woodward*, at para. 72). We would emphasize that the moral blameworthiness of the offender

increases when offenders intentionally target children who are particularly vulnerable, including children who belong to groups that face discrimination or marginalization in society.

[91] These comments should not be taken as a direction to disregard relevant factors that may reduce the offender's moral culpability. The proportionality principle requires that the punishment imposed be "just and appropriate . . ., and nothing more" (*M. (C.A.)*, at para. 80 (emphasis deleted); see also *Ipeelee*, at para. 37). First, as sexual assault and sexual interference are broadly-defined offences that embrace a wide spectrum of conduct, the offender's conduct will be less morally blameworthy in some cases than in others. Second, the personal circumstances of offenders can have a mitigating effect. For instance, offenders who suffer from mental disabilities that impose serious cognitive limitations will likely have reduced moral culpability (*R. v. Scofield*, 2019 BCCA 3, 52 C.R. (7th) 379, at para. 64; *R. v. Hood*, 2018 NSCA 18, 45 C.R. (7th) 269, at para. 180).

[92] Likewise, where the person before the court is Indigenous, courts must apply the principles from *R. v. Gladue*, [1999] 1 S.C.R. 688, and *Ipeelee*. The sentencing judge must apply these principles even in extremely grave cases of sexual violence against children (see *Ipeelee*, at paras. 84-86). The systemic and background factors that have played a role in bringing the Indigenous person before the court may have a mitigating effect on moral blameworthiness (para. 73). Similarly, a different or

alternative sanction might be more effective in achieving sentencing objectives in a particular Indigenous community (para. 74).

(d) *Proportionality Without a Specific Victim*

[93] Courts must give effect to the moral culpability of the offender in sentencing even where the facts giving rise to the conviction involve a police sting operation rather than a child victim. Child luring may be committed in two ways: the offender is actually communicating with an underage person, or the offender believes the person he is communicating with is under age even though this is not in fact the case. In particular, the offence of child luring is often prosecuted through sting operations: an undercover officer poses online as a child and waits for an offender to initiate communication with a sexual purpose (see, e.g., *R. v. Levigne*, 2010 SCC 25, [2010] 2 S.C.R. 3, at para. 7; *Morrison*, at para. 4). Although the absence of a specific victim is relevant, it should not be overemphasized in arriving at a fit sentence. The accused can take no credit for this factor. As such, it does not detract from the degree of responsibility of the offender for that offence. After all, to be convicted of child luring in the context of a police sting operation where the person the offender was communicating with was not in fact under age, the offender both must have intentionally communicated with a person who the offender believed to be under age

and must have had the specific intent to facilitate the commission of a sexual or other specified offence against that person (*Morrison*, at para. 153).[4]

[94] Moreover, it must be recognized that with the advent of social media, "sexual offenders have been given unprecedented access to potential victims and avenues to facilitate sexual offending," especially through child luring (*K.R.J.*, at paras. 102 and 104). Parliament designed the child luring offence to enable the police to use sting operations to "close the cyberspace door" by apprehending offenders before they can successfully target and harm children (*Levigne*, at para. 27, quoting *R. v. Legare*, 2009 SCC 56, [2009] 3 S.C.R. 551, at para. 25; see also *Levigne*, at paras. 24-29). Sting operations conducted by the police have become an important tool — if not the most important tool — available to the police in detecting offenders who target children and preventing them from doing actual harm to children (see *R. v. Alicandro*, 2009 ONCA 133, 95 O.R. (3d) 173, at para. 38). As Abella J. stated, "These sting operations are crucial in the enforcement of child luring laws since, as Doherty J.A. cogently put it, 'Children cannot be expected to police the Internet'" (*Morrison*, at para. 202, quoting *Alicandro*, at para. 38). And courts should bear this in mind when sentencing offenders who have been outed by police undercover operations. To be clear, child luring should never be viewed as a victimless crime.

[4] In addition to various sexual offences, the child luring provision also applies to the trafficking of a person under the age of eighteen years (*Criminal Code*, s. 279.011), receiving a material benefit from the trafficking of a person under the age of eighteen years (*Criminal Code*, s. 279.02(2)), and withholding or destroying documents for the purpose of committing or facilitating the trafficking of a person under the age of eighteen years (*Criminal Code*, s. 279.03(2)).

(3) Parliament Has Mandated That Sentences for Sexual Offences Against Children Must Increase

[95] Parliament has recognized the profound harm that sexual offences against children cause and has determined that sentences for such offences should increase to match Parliament's view of their gravity. Parliament has expressed its will by increasing maximum sentences and by prioritizing denunciation and deterrence in sentencing for sexual offences against children.

(a) *Increase in Maximum Sentences*

[96] Maximum sentences help determine the gravity of the offence and thus the proportionate sentence. The gravity of the offence includes both subjective gravity, namely the circumstances that surround the commission of the offence, and objective gravity (*L.M.*, at paras. 24-25). The maximum sentence the *Criminal Code* provides for offences determines objective gravity by indicating the "relative severity of each crime" (*M. (C.A.)*, at para. 36; see also H. Parent and J. Desrosiers, *Traité de droit criminel*, t. *III*, *La peine* (2nd ed. 2016), at pp. 51-52). Maximum penalties are one of Parliament's principal tools to determine the gravity of the offence (C. C. Ruby et al., *Sentencing* (9th ed. 2017), at § 2.18; *R. v. Sanatkar* (1981), 64 C.C.C. (2d) 325 (Ont. C.A.), at p. 327; *Hajar*, at para. 75).

[97] Accordingly, a decision by Parliament to increase maximum sentences for certain offences shows that Parliament "wanted such offences to be punished

more harshly" (*Lacasse*, at para. 7). An increase in the maximum sentence should thus be understood as shifting the distribution of proportionate sentences for an offence.

[98] Parliament has repeatedly increased sentences for sexual offences against children. These increases began in 1987 with Bill C-15. By abolishing the historic offences of indecent assault on a female and acts of gross indecency and creating the sexual interference offence, Parliament effectively doubled the maximum sentence from five to ten years for sexual offences against children that did not involve vaginal or anal penetration (see *L. (J.-J.)*, at pp. 240-41; Bill C-15, s. 1). Parliament has repeatedly signalled society's increasing recognition of the gravity of sexual offences against children in the years that followed. In 2005, Parliament tripled the maximum sentences for sexual interference, invitation to sexual touching, and sexual exploitation in cases in which the Crown proceeds summarily from six months to 18 months by enacting Bill C-2, *An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act*, S.C. 2005, c. 32. Finally, in 2015, Parliament enacted the *Tougher Penalties for Child Predators Act*, S.C. 2015, c. 23. This statute increased the maximum sentences of these three offences and sexual assault where the victim is under the age of 16 from 10 to 14 years when prosecuted by indictment and from 18 months to 2 years less a day when prosecuted by way of summary conviction (ss. 2-4). This statute also increased the maximum sentences for numerous other sexual offences against children as indicated in the Appendix to these reasons.

[99] These successive increases in maximum sentences indicate Parliament's determination that sexual offences against children are to be treated as more grave than they had been in the past. As Kasirer J.A. (as he then was) reasoned in *Rayo*, the legislative choice to increase the maximum sentence for child luring [TRANSLATION] "must be understood as a sign of the gravity of this crime in the eyes of Parliament" (para. 125). We agree with Pepall J.A.'s conclusion in *Stuckless (2019)* that Parliament's legislative initiatives thus give effect to society's increased understanding of the gravity of sexual offences and their impact on children (paras. 90, 103 and 112).

[100] To respect Parliament's decision to increase maximum sentences, courts should generally impose higher sentences than the sentences imposed in cases that preceded the increases in maximum sentences. As Kasirer J.A. recognized in *Rayo* in the context of the offence of child luring, Parliament's view of the increased gravity of the offence as reflected in the increase in maximum sentences should be reflected in [TRANSLATION] "toughened sanctions" (para. 175; see also *Woodward*, at para. 58). Sentencing judges and appellate courts need to give effect to Parliament's clear and repeated signals to increase sentences imposed for these offences.

(b) *Prioritization of Denunciation and Deterrence in Section 718.01 of the Criminal Code*

[101] Parliament's decision to prioritize denunciation and deterrence for offences that involve the abuse of children by enacting s. 718.01 of the *Criminal*

Code confirms the need for courts to impose more severe sanctions for sexual offences against children. In 2005, Parliament added s. 718.01 to the *Criminal Code* by enacting Bill C-2. In cases that involve the abuse of a person under the age of 18, s. 718.01 requires the court to give "primary consideration to the objectives of denunciation and deterrence of such conduct" when imposing sentence.

[102] The text of s. 718.01 indicates that Parliament intended to focus the attention of sentencing judges on the relative importance of sentencing objectives for cases involving the abuse of children. The words "primary consideration" in s. 718.01 prescribe a relative ordering of sentencing objectives that is absent from the general list of six objectives in s. 718(a) through (f) of the *Criminal Code* (Renaud, at § 8.8-8.9). As Kasirer J.A. reasoned in *Rayo*, the word "primary" in the English text of s. 718.01 [TRANSLATION] "evokes an ordering of the objectives . . . that is . . . relevant in the [judge's exercise of discretion]" (para. 103). This ordering of the sentencing objectives reflects Parliament's intention for sentences to "better reflect the seriousness of the offence" (*House of Commons Debates*, vol. 140, No. 7, 1st Sess., 38th Parl., October 13, 2004, at p. 322 (Hon. Paul Harold Macklin)). As Saunders J.A. recognized in *D.R.W.*, Parliament thus attempted to "re-set the approach of the criminal justice system to offences against children" by enacting s. 718.01 (para. 32).

[103] Section 718.01 should not be interpreted as limiting sentencing objectives, notably separation from society, which reinforce deterrence or denunciation. The objective of separation from society is closely related to deterrence

and denunciation for sexual offences against children (*Woodward*, at para. 76). When appropriate, as discussed below, separation from society can be the means to reinforce and give practical effect to deterrence and denunciation.

[104] Section 718.01 thus qualifies this Court's previous direction that it is for the sentencing judge to determine which sentencing objective or objectives are to be prioritized. Where Parliament has indicated which sentencing objectives are to receive priority in certain cases, the sentencing judge's discretion is thereby limited, such that it is no longer open to the judge to elevate other sentencing objectives to an equal or higher priority (*Rayo*, at paras. 103 and 107-8). However, while s. 718.01 requires that deterrence and denunciation have priority, nonetheless, the sentencing judge retains discretion to accord significant weight to other factors (including rehabilitation and *Gladue* factors) in exercising discretion in arriving at a fit sentence, in accordance with the overall principle of proportionality (see *R. v. Bergeron*, 2013 QCCA 7, at para. 37 (CanLII)).

[105] Parliament's choice to prioritize denunciation and deterrence for sexual offences against children is a reasoned response to the wrongfulness of these offences and the serious harm they cause. The sentencing objective of denunciation embodies the communicative and educative role of law (*R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, at para. 102). It reflects the fact that Canadian criminal law is a "system of values". A sentence that expresses denunciation thus condemns the offender "for encroaching on our society's basic code of values"; it "instills the basic set of

communal values shared by all Canadians" (*M. (C.A.)*, at para. 81). The protection of children is one of the most basic values of Canadian society (*L. (J.-J.)*, at p. 250; *Rayo*, at para. 104). As L'Heureux-Dubé J. reasoned in *L.F.W.*, "sexual assault of a child is a crime that is abhorrent to Canadian society and society's condemnation of those who commit such offences must be communicated in the clearest of terms" (para. 31, quoting *L.F.W. (C.A.)*, at para. 117, per Cameron J.A.).

(4) Specific Guidance on Sentence Increases

[106] We would decline the Crown's invitation to create a national starting point or sentencing range for sexual offences against children. Generally speaking, this Court is reluctant to pronounce on the specific length of sentence. The appropriate length and the setting of sentencing ranges or starting points are best left to provincial appellate courts (*R. v. Gardiner*, [1982] 2 S.C.R. 368, at pp. 396 and 404). These courts "are in the best position to know the particular circumstances in their jurisdictions" (*Lacasse*, at para. 95). Indeed, a degree of regional variation for sentences is legitimate (*M. (C.A.)*, at para. 92). We would nonetheless emphasize that the guidance we provide about Parliament's legislative initiatives and the contemporary understanding of the wrongfulness and harmfulness of sexual violence against children applies across Canada.

[107] We are determined to ensure that sentences for sexual offences against children correspond to Parliament's legislative initiatives and the contemporary

understanding of the profound harm that sexual violence against children causes. To do so, we wish to provide guidance to courts on three specific points:

(1) Upward departure from prior precedents and sentencing ranges may well be required to impose a proportionate sentence;

(2) Sexual offences against children should generally be punished more severely than sexual offences against adults; and,

(3) Sexual interference with a child should not be treated as less serious than sexual assault of a child.

(a) *Upward Departure From Prior Precedents and Sentencing Ranges*

[108] Courts can and sometimes need to depart from prior precedents and sentencing ranges in order to impose a proportionate sentence. Sentencing ranges are not "straitjackets" but are instead "historical portraits" (*Lacasse*, at para. 57). Accordingly, as this Court recognized in *Lacasse*, sentences can and should depart from prior sentencing ranges when Parliament raises the maximum sentence for an offence and when society's understanding of the severity of the harm arising from that offence increases (paras. 62-64 and 74).

[109] This guidance from *Lacasse* applies to sexual offences against children. As noted previously, Parliament's decision in 2015 to increase maximum sentences for sexual offences against children should shift the range of proportionate sentences

as a response to the recognition of the gravity of these offences. Sentences should increase as a result of this legislative initiative (*Rayo*, at para. 175). In certain cases, a sentencing judge [TRANSLATION] "must feel free to impose sentences above" a past threshold (*R. v. Régnier*, 2018 QCCA 306, at para. 78 (CanLII)). As the Quebec Court of Appeal has reasoned, courts must give "the legislative intent its full effect" and should not feel bound to adhere to a range that no longer reflects Parliament's view of the gravity of the offence (para. 40). Such a range may in fact be "obsolete and must be revised upwards" (para. 30).

[110] A second reason why upward departure from precedents may be required is that courts' understanding of the gravity and harmfulness of sexual offences against children has deepened, as we have sought to explain above. As Pepall J.A. observed in *Stuckless (2019)*, there has been a considerable evolution in Canadian society's understanding of the gravity and harmfulness of these offences (para. 90). Sentences should thus increase "as courts more fully appreciate the damage that sexual exploitation by adults causes to vulnerable, young victims" (*Scofield*, at para. 62). Courts should accordingly be cautious about relying on precedents that may be "dated" and fail to reflect "society's current awareness of the impact of sexual abuse on children" (*R. v. Vautour*, 2016 BCCA 497, at para. 52 (CanLII)). Even more recent precedents may be treated with caution if they simply follow more dated precedents that inadequately recognize the gravity of sexual violence against children (*L.V.*, at paras. 100-102). Courts are thus justified in departing from precedents in imposing a

fit sentence; such precedents should not be seen as imposing a cap on sentences (see *Stuckless (2019)*, at paras. 61-62, per Huscroft J.A.).

[111] We thus wish to express our concern about sentencing ranges based on precedents that appear to restrict sentencing judges' discretion, for example, by imposing a cap of three to five years on sentences that can only be exceeded in exceptional circumstances. For instance, the British Columbia Court of Appeal has set a range for sexual interference of one to three years and has suggested that only in "rare circumstances" would a sentence above three years be justified (*R. v. Williams*, 2019 BCCA 295, at para. 71 (CanLII)). Similarly, the Newfoundland Court of Appeal has held that the range for sexual assault of a child involving both "intercourse" and abuse of a position of trust is three to five years and that "special circumstances" are required to depart from this range (*R. v. Vokey*, 2000 NFCA 14, 186 Nfld. & P.E.I.R. 1, at para. 19).

[112] It is inappropriate to artificially constrain sentencing judges' ability to impose a proportionate sentence in this manner. As this Court's decision in *L.M.* makes clear, sentencing judges must have the ability to impose substantial sentences for sexual offences against children when the gravity of the offence and the degree of responsibility of the offender so demand (para. 30). There is no requirement for there to be rare or special circumstances in order to impose a substantial sentence where that substantial sentence is proportionate.

[113] Much like the offence of impaired driving causing death, sexual offences against children can cover a wide variety of circumstances (see *Lacasse*, at para. 66). Appellate guidance should make clear that sentencing judges can respond to this reality by imposing sentences that reflect increases in the gravity of the offence and the degree of responsibility of the offender. In *M. (C.A.)*, for instance, this Court upheld the sentencing judge's determination that the objectives of deterrence, denunciation, and the protection of society required a 25-year global sentence for an offender who committed several sexual offences against multiple children (see para. 94). Likewise, in *L.M.*, this Court upheld a 15-year global sentence for multiple sexual offences against a single child victim as necessary to advance these same sentencing objectives (see para. 30). We would also commend the decisions of the Ontario Court of Appeal in *D. (D.)*, *Woodward*, and *S. (J.)* as examples of appropriate appellate guidance, with the caution that the 2015 statutory amendments were not yet in effect at the time of the offences in these cases.

[114] *D. (D.)*, *Woodward*, *S. (J.)*, and this Court's own decisions in *M. (C.A.)* and *L.M.* make clear that imposing proportionate sentences that respond to the gravity of sexual offences against children and the degree of responsibility of offenders will frequently require substantial sentences. Parliament's statutory amendments have strengthened that message. It is not the role of this Court to establish a range or to outline in which circumstances such substantial sentences should be imposed. Nor would it be appropriate for any court to set out binding or inflexible quantitative guidance — as Moldaver J.A. wrote in *D. (D.)*, "judges must retain the flexibility

needed to do justice in individual cases" and to individualize the sentence to the offender who is before them (at para. 33). Nonetheless, it is incumbent on us to provide an overall message that is clear (*D. (D.)*, at paras. 34 and 45). That message is that mid-single digit penitentiary terms for sexual offences against children are normal and that upper-single digit and double-digit penitentiary terms should be neither unusual nor reserved for rare or exceptional circumstances. We would add that substantial sentences can be imposed where there was only a single instance of sexual violence and/or a single victim, as in this case, *Woodward*, and *L.M.* In addition, as this Court recognized in *L.M.*, maximum sentences should not be reserved for the "abstract case of the worst crime committed in the worst circumstances" (para. 22). Instead, a maximum sentence should be imposed whenever the circumstances warrant it (para. 20).

(b) *Sexual Offences Against Children Merit More Severe Punishment Than Sexual Offences Against Adults*

[115] We are also concerned that some courts appear to have adopted sentencing ranges that treat sexual violence against children in a manner similar to sexual violence against adults. For instance, in Alberta, the starting point for both "major sexual assault" of an adult victim and "major sexual interference" with a child victim is three years (*Hajar*, at paras. 2 and 12). Likewise, the British Columbia Court of Appeal has established a sentencing range for "sexual assault involving intercourse" of two to six years that it has applied in cases involving both child and

adult victims (*R. v. G.M.*, 2015 BCCA 165, 371 B.C.A.C. 44, at para. 22 (adult victim); *Scofield*, at para. 59 (child victim)).

[116] While sexual violence against either a child or an adult is serious, Parliament has determined that sexual violence against children should be punished more severely. First, Parliament has prioritized deterrence and denunciation for offences that involve the abuse of children (*Criminal Code*, s. 718.01). Second, Parliament has identified the abuse of persons under the age of 18 as a statutory aggravating factor (*Criminal Code*, s. 718.2(a)(ii.1)). Third, Parliament has identified the abuse of a position of trust or authority as an aggravating factor; this is more common in sexual offences against children than in sexual offences against adults (*Criminal Code*, s. 718.2(a)(iii); *L.V.*, at para. 66). Fourth, Parliament has used maximum sentences to signal that sexual violence against persons under the age of 16 should be punished more severely than sexual violence against adults. The maximum sentence for both sexual interference and sexual assault of a victim under the age of 16 is 14 years when prosecuted by indictment and is 2 years less a day when prosecuted summarily. In contrast, the maximum sentence for sexual assault of a person who is 16 years or older is 10 years when prosecuted by indictment and 18 months when prosecuted summarily (see *Criminal Code*, ss. 151(a) and (b), and 271(a) and (b)). This is a clear indication in the *Criminal Code* that Parliament views sexual violence against children as deserving of more serious punishment. These four legislative signals reflect Parliament's recognition of the inherent vulnerability of children and the wrongfulness of exploiting that vulnerability.

[117] Accordingly, we would direct provincial appellate courts to revise and rationalize sentencing ranges and starting points where they have treated sexual violence against children and sexual violence against adults similarly. We agree with the Saskatchewan Court of Appeal that "assaults against a child should normally warrant a stronger sanction" than assaults against an adult (*L.V.*, at para. 101). As Richards C.J.S. wrote, "sentencing results should reflect this reality" so that they give effect to the will of Parliament as expressed in ss. 718.01 and 718.2(a)(ii.1) and (iii) of the *Criminal Code* (para. 102). A sentencing range or starting point that does not give effect to Parliament's directions is founded on a false logic and should not be relied on (see *Stone*, at para. 245).

[118] We would emphasize that nothing in these reasons should be taken either as a direction to decrease sentences for sexual offences against adult victims or as a bar against increasing sentences for sexual offences against adult victims. As this Court recently held, our understanding of the profound physical and psychological harm that all victims of sexual assault experience has deepened (*Goldfinch*, at para. 37). In jurisdictions that have erroneously equated sexual violence against children with sexual violence against adults, courts should correct this error by increasing sentences for sexual offences against children — not by decreasing sentences for sexual offences against adults.

(c) *Sexual Interference and Sexual Assault Should Be Treated Similarly*

[119] Finally, we would direct appellate courts not to discount sexual interference in comparison to sexual assault. The British Columbia Court of Appeal appears to have done this by setting a range of two to six years for "sexual assault involving intercourse" in cases involving child victims while setting a range of one to three years for sexual interference (see *Scofield*, at para. 59; *Williams*, at para. 71).

[120] It is an error of law to treat sexual interference as less serious than sexual assault. As stated above, Parliament has established the same maximum sentences for both sexual interference and sexual assault of a person under the age of 16. The elements of the offence are also similar, and a conviction for sexual assault of a child and for sexual interference with a child can frequently be supported on the same factual foundation (*R. v. M. (S.J.)*, 2009 ONCA 244, 247 O.A.C. 178, at para. 8).

(5) Significant Factors to Determine a Fit Sentence

[121] We also wish to offer some comments on significant factors to determine a fit sentence for sexual offences against children. These comments are neither a checklist nor an exhaustive set of factors. Nor are they intended to displace the specific lists of factors that provincial appellate courts have set out (see, e.g., *Sidwell*, at para. 53; *R. v. A.B.*, 2015 NLCA 19, 365 Nfld. & P.E.I.R. 160, at para. 26). Instead, our aim is to provide guidance on specific factors that require "the articulation of governing and intelligible principles" to promote the uniform application of the law of sentencing (*Gardiner*, at pp. 397 and 405).

(a) *Likelihood to Reoffend*

[122] Parliament has provided in s. 718 of the *Criminal Code* that "[t]he fundamental purpose of sentencing is to protect society". As this Court held in *K.R.J.*, the wording of s. 718 demonstrates that "public protection is part of the very essence" of sentencing (para. 33). This purpose takes on particular significance when criminal offences are enacted to protect vulnerable groups such as children from harm (see *R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571, at paras. 76 and 131-32).

[123] Where the sentencing judge finds that the offender presents an increased likelihood of reoffending, the imperative of preventing further harm to children calls for emphasis on the sentencing objective of separating the offender from society in s. 718(c) of the *Criminal Code*. Emphasizing this objective will protect children by neutralizing the offender's ability to engage in sexual violence during the period of incarceration (see *K.R.J.*, at para. 52). The higher the offender's risk to reoffend, the more the court needs to emphasize this sentencing objective to protect vulnerable children from wrongful exploitation and harm (*L.M.*, at para. 30; *S. (J.)*, at paras. 39 and 84).

[124] The offender's likelihood to reoffend is clearly also relevant to the objective of rehabilitation in s. 718(d) of the *Criminal Code*. Courts should encourage efforts toward rehabilitation because it offers long-term protection (*Gladue*, at para. 56). Rehabilitation may also weigh in favour of a reduced term of incarceration followed by probation since a community environment is often more favourable to

rehabilitation than prison (see *Proulx*, at paras. 16 and 22). At the same time, depending on the offender's risk to reoffend, the imperative of providing immediate and short-term protection to children may preclude early release. In these cases, efforts at rehabilitation must begin with such treatment or programming as is available within prison (see *R. v. R.M.S.* (1997), 92 B.C.A.C. 148, at para. 13). In some cases, the only way to achieve both short-term and long-term protection of children may thus be to impose a lengthy sentence (see *R. v. Gallant*, 2004 NSCA 7, 220 N.S.R. (2d) 318, at para. 19, per Cromwell J.A., as he then was).

(b) *Abuse of a Position of Trust or Authority*

[125] We also wish to offer some comments on the factor of the abuse of a position of trust (*Criminal Code*, s. 718.2(a)(iii)). Trust relationships arise in varied circumstances and should not all be treated alike (see *R. v. Aird*, 2013 ONCA 447, 307 O.A.C. 183, at para. 27). Instead, it makes sense to refer to a "spectrum" of positions of trust (see *R. v. R.B.*, 2017 ONCA 74, at para. 21 (CanLII)). An offender may simultaneously occupy multiple positions on the spectrum and a trust relationship can progress along the spectrum over time (see *R. v. Vigon*, 2016 ABCA 75, 612 A.R. 292, at para. 17). In some cases, an offender's grooming can build a new relationship of trust, a regular occurrence in child luring cases where children are groomed by complete strangers over the Internet, or move an existing trust relationship along the spectrum. Even where grooming does not exploit an existing relationship of trust or build a new one, it is still aggravating in its own right.

[126] Any breach of trust is likely to increase the harm to the victim and thus the gravity of the offence. As Saunders J.A. reasoned in *D.R.W.*, the focus in such cases should be on "the extent to which [the] relationship [of trust] was violated" (para. 41). The spectrum of relationships of trust is relevant to determining the degree of harm. A child will likely suffer more harm from sexual violence where there is a closer relationship and a higher degree of trust between the child and the offender (see *R. v. J.R.* (1997), 157 Nfld. & P.E.I.R. 246 (N.L.C.A.), at paras. 14 and 18). This is likely to be the case in what might be described as classic breach of trust situations, such as those involving family members, caregivers, teachers, and doctors, to mention a few.

[127] The presence of a trust relationship may inhibit children from reporting sexual violence. The breach of trust may produce "feelings of fear and shame" that further discourage reporting (*Stuckless (2019)*, at para. 131, per Pepall J.A.). Threats or emotional manipulation may have a greater inhibiting impact because the victim trusts the offender (*L. (D.O.)*, at pp. 439-40, per L'Heureux-Dubé J.; *R. v. J.L.*, 2015 ONCJ 777, at para. 58 (CanLII), aff'd 2016 ONCA 593).

[128] We would add that these barriers to reporting can be particularly pronounced where the perpetrator of the sexual violence resides with the victim and is a parent or caregiver. Dependence on the perpetrator can be a serious barrier to reporting ("The 'Statutory Rape' Myth", at pp. 277 and 291). For instance, in one reported case, a teenage girl and her mother and siblings had to leave the family

residence and relocate to a women's shelter when the teenage girl told her mother that her father had sexually assaulted her (see *J.L.*, at para. 56). These fears may be especially pronounced in situations where the offender has also engaged in domestic violence (see *R. v. G.(P.G.)*, 2014 ONCJ 369, at paras. 33-34 (CanLII)).

[129] The abuse of a position of trust is also aggravating because it increases the offender's degree of responsibility. An offender who stands in a position of trust in relation to a child owes a duty to protect and care for the child that is not owed by a stranger. The breach of the duty of protection and care thus enhances moral blameworthiness (*R. v. S. (W.B.)* (1992), 73 C.C.C. (3d) 530 (Alta. C.A.), at p. 537). The abuse of a position of trust also exploits children's particular vulnerability to trusted adults, which is especially morally blameworthy (*D. (D.)*, at paras. 24 and 35; *Rayo*, at paras. 121-22).

[130] We would thus emphasize that, all other things being equal, an offender who abuses a position of trust to commit a sexual offence against a child should receive a lengthier sentence than an offender who is a stranger to the child. Many authors have expressed concern that the criminal justice system has historically failed to recognize the scale and gravity of sexual violence perpetrated within the family sphere (see Benedet, at p. 297; J. Desrosiers and G. Beausoleil-Allard, *L'agression sexuelle en droit canadien* (2nd ed. 2017), at p. 39; Todd, at p. 554). Specifically, some authors have criticized the tendency of courts to impose similar sentences on strangers and fathers for sexual offences against children, despite the fact that sexual

assaults by fathers are more likely to occur on multiple occasions (see Bauman, at pp. 358 and 364; "The 'Statutory Rape' Myth", at pp. 289-90). As Professor Craig writes, framing sexual violence against children as the product of a handful of stranger-predators fails "to recognize that child sexual abuse is often a threat that comes from within the family and not from outside of it" (p. 41). Courts should ensure that the sentences they impose do not inadvertently reinforce this myth by failing to give legal effect to the increased gravity of the offence and degree of responsibility of the offender in cases that involve the abuse of a trust relationship.

(c) *Duration and Frequency*

[131] The duration and frequency of sexual violence is a further important factor in sentencing. The frequency and duration can significantly increase the harm to the victim. The immediate harm the victim experiences during the assault is multiplied by the number of assaults. Moreover, the long-term emotional and psychological harm to the victim can also become more pronounced where the sexual violence is repeated and prolonged (see *Scalera*, at para. 123; *R. v. O.M.*, 2009 BCCA 287, 272 B.C.A.C. 236, at para. 7; Bauman, at p. 359). This increased harm magnifies the severity of the offence. It also increases the offender's moral blameworthiness because the additional harm to the victim is a reasonably foreseeable consequence of multiple assaults (see *Scalera*, at para. 123). Moreover, repeated and prolonged assaults show that the sexually violent conduct is not an isolated act, a factor which

increases the offender's degree of responsibility (see *L. (J.-J.)*, at p. 246; Parent and Desrosiers, at pp. 107-9).

[132] The duration and frequency of the sexual violence must receive weight in sentencing. Judges should not discount a sentence on the basis that the frequency or duration of the assaults shows that the offender is unable to control himself (*R. v. Stuckless* (1998), 41 O.R. (3d) 103 (C.A.), at p. 120 ("*Stuckless (1998)*"); Bauman, at p. 365). Nor should a court discount a sentence simply because numerous incidents of sexual violence are covered by a single charge instead of multiple charges. If the conviction for a single charge includes multiple instances of sexual violence, the sentencing judge is to give weight to this factor and should not analogize the case to single instance cases simply because those cases also involved only a single charge. In jurisdictions that employ starting points, courts must not simply default to the starting point but should instead be prepared to depart from it to give effect to the duration and frequency of the sexual violence (see *L.V.*, at paras. 100-101).

[133] In sum, sexual violence against children that is committed on multiple occasions and for longer periods of time should attract significantly higher sentences that reflect the full cumulative gravity of the crime. Judges cannot permit the number of violent assaults to become a statistic. Each further instance of sexual violence traumatizes the child victim anew and increases the likelihood that the risks of long-term harm will materialize. Each further instance shows a continued and renewed choice by the offender to continue to violently victimize children. As Abella J.A. (as

she then was) wrote in *Stuckless (1998)*, where the offender has committed numerous assaults, the court cannot shy away from assessing the full dimensions of the wrong but must give effect to the "staggering" and "systematic" nature of the sexual violence in the sentence imposed (p. 116).

(d) *Age of the Victim*

[134] The age of the victim is also a significant aggravating factor. The power imbalance between children and adults is even more pronounced for younger children, whose "dependency is usually total" and who are "often helpless without the protection and care of their parents" (*R. v. Magoon*, 2018 SCC 14, [2018] 1 S.C.R. 309, at para. 66). Their personality and ability to recover from harm is still developing (Renaud, at § 12.64; *L. (J.-J.)*, at p. 250). Moreover, children who are victimized at a younger age must endure the consequential harm of sexual violence for a longer period of time than persons victimized later in life.

[135] These realities flowing from the age of the victim are relevant to both the gravity of the offence and the degree of responsibility of the offender. Sexual offences against children are wrongful precisely because the perpetrators recognize and exploit children's special vulnerability (*Woodward*, at para. 72). It follows that the moral blameworthiness of the offender is enhanced when the victim is particularly young and is thus even more vulnerable to sexual violence.

[136] At the same time, courts must also be particularly careful to impose proportionate sentences in cases where the victim is an adolescent. Historically, disproportionately low sentences have been imposed in these cases, particularly in cases involving adolescent girls, even though adolescents may be an age group that is disproportionately victimized by sexual violence (Benedet, at pp. 302, 304 and 314; *L. (D.O.)*, at pp. 464-65, per L'Heureux-Dubé J.). In particular, sexual violence by adult men against adolescent girls is associated with higher rates of physical injury, suicide, substance abuse, and unwanted pregnancy (I. Grant and J. Benedet, "Confronting the Sexual Assault of Teenage Girls: The Mistake of Age Defence in Canadian Sexual Assault Law" (2019), 97 *Can. Bar Rev.* 1, at p. 5; "The 'Statutory Rape' Myth", at p. 269; *R. v. Hess*, [1990] 2 S.C.R. 906, at pp. 948-49, per McLachlin J.).

(e) *Degree of Physical Interference*

[137] Some provincial appellate courts have placed considerable emphasis on the degree of physical interference in defining a sentencing range or starting point. Often, sentencing ranges or starting points are defined in part, or even primarily, based on the type of physical interference that occurred. The following examples illustrate this:

- British Columbia: Range of two to six years for "sexual assault involving intercourse" (*Scofield*, at para. 59).

- Alberta: Three-year starting point for "major sexual assault" and "major sexual interference". Alberta courts presume that vaginal penetration, anal penetration, fellatio, and cunnilingus will constitute "major sexual assault," but there is no such presumption for other forms of sexual violence (see *Hajar*, at paras. 52-53; *Arcand*, at paras. 171-72; *R. v. G. (T.L.)*, 2006 ABCA 313, 214 C.C.C. (3d) 353, at paras. 11-12).

- Manitoba: Also employs starting points premised on the Alberta definition of "major sexual assault" (*R. v. R.W.T.*, 2006 MBCA 91, 208 Man.R. (2d) 60, at para. 4; *Sidwell*, at para. 38).

- Newfoundland and Labrador: Three to five years' range for sexual assault against a child involving intercourse and abuse of a position of trust (*Vokey*, at para. 19).

[138] We acknowledge that the degree of physical interference is a recognized aggravating factor. This factor reflects the degree of violation of the victim's bodily integrity. It also reflects the sexual nature of the touching and its violation of the victim's sexual integrity.

[139] The degree of physical interference also takes account of how specific types of physical acts may increase the risk of harm. For instance, penile penetration, particularly when unprotected, can be an aggravating factor because it can create a

risk of disease and pregnancy (see *Hess*, at p. 948; *R. v. Deck*, 2006 ABCA 92, 384 A.R. 106, at para. 20; *T. (K.)*, at para. 18). Penetration, whether penile, digital, or with an object, may also cause physical pain and physical injuries to the victim (see *Stuckless (2019)*, at para. 125, per Pepall J.A.; *T. (K.)*, at paras. 10-11). Children's bodies are especially vulnerable to physical injuries from penetrative sexual violence (see *Hess*, at p. 920, per Wilson J., and p. 948).

[140] We would not go so far in this case as to hold that defining a range or starting point according to the type of physical acts that it captures necessarily amounts to an error of law. However, we would strongly caution provincial appellate courts about the dangers of defining a sentencing range based on penetration or the specific type of sexual activity at issue. In particular, courts must be careful to avoid the following four errors.

[141] First, defining a sentencing range based on a specific type of sexual activity risks resurrecting at sentencing a distinction that Parliament has abolished in substantive criminal law. Specifically, attributing intrinsic significance to the occurrence or non-occurrence of penetrative or other sexual acts based on traditional notions of sexual propriety is inconsistent with Parliament's emphasis on sexual integrity in the reform of the sexual offences scheme. As we have explained, Parliament abolished the distinctions the *Criminal Code* formerly drew between offences based on whether penile penetration was involved. For sexual assault and sexual interference, the same maximum sentence thus applies regardless of whether

penetration was involved. Making the presence or absence of penetration the cornerstone of a sentencing range would thus bring the old substantive law back indirectly by recreating at the sentencing stage the propriety-based distinctions that Parliament abolished in the substantive law (Boyle, at p. 177; see also Nadin-Davis, at p. 46).

[142] Second, courts should not assume that there is any clear correlation between the type of physical act and the harm to the victim. In assessing the significance of the degree of physical interference as a factor, as Christine Boyle writes, "judges should think in terms of what is most threatening and damaging to victims" (p. 180). Judges can legitimately consider the greater risk of harm that may flow from specific physical acts such as penetration. However, as McLachlin J. explained in *McDonnell*, an excessive focus on the physical act can lead courts to underemphasize the emotional and psychological harm to the victim that all forms of sexual violence can cause (paras. 111-15). Sexual violence that does not involve penetration is still "extremely serious" and can have a devastating effect on the victim (*Stuckless (1998)*, at p. 117). This Court has recognized that "any sexual offence is serious" (*McDonnell*, at para. 29), and has held that "even mild non-consensual touching of a sexual nature can have profound implications for the complainant" (*R. v. J.A.*, 2011 SCC 28, [2011] 2 S.C.R. 440, at para. 63, per McLachlin C.J., and para. 121, per Fish J.). The modern understanding of sexual offences requires greater emphasis on these forms of psychological and emotional harm, rather than only on

bodily integrity (*R. v. Jarvis*, 2019 SCC 10, [2019] 1 S.C.R. 488, at para. 127, per Rowe J.).

[143] The decision of the Ontario Court of Appeal in *Stuckless (2019)* provides an example of judicial recognition that harm to the victim is not dependent on the type of physical activity involved. In that case, the offender digitally penetrated certain children, sexually touched others, and subjected others to fellatio. The sentencing judge determined the appropriate sentence for each offence largely by reference to the type of physical act involved. The majority found that the sentencing judge had erred in doing so because the sexual violence was "no less harmful to the victims" simply because it involved sexual touching or fellatio rather than penetration (paras. 68-69, per Huscroft J.A., and paras. 124-25, per Pepall J.A.). As Pepall J.A. wrote, "if sentencing courts are to focus on the 'harm caused to the child by the offender's conduct' . . ., distinctions among these forms of sexual abuse may be unhelpful and are not determinative of the seriousness of the offence" (para. 124, quoting *Woodward*, at para. 76).

[144] Specifically, we would strongly caution courts against downgrading the wrongfulness of the offence or the harm to the victim where the sexually violent conduct does not involve penetration, fellatio, or cunnilingus, but instead touching or masturbation. There is no basis to assume, as some courts appear to have done, that sexual touching without penetration can be [TRANSLATION] "relatively benign" (see *R. v. Caron Barrette*, 2018 QCCA 516, 46 C.R. (7th) 400, at paras. 93-94). Some

decisions also appear to justify a lower sentence by labeling the conduct as merely sexual touching without any analysis of the harm to the victim (see *Caron Barrette*, at paras. 93-94; *Hood*, at para. 150; *R. v. Iron*, 2005 SKCA 84, 269 Sask.R. 51, at para. 12). Implicit in these decisions is the belief that conduct that is unfortunately referred to as "fondling" or [TRANSLATION] "caressing" is inherently less harmful than other forms of sexual violence (see *Hood*, at para. 150; *Caron Barrette*, at para. 93). This is a myth that must be rejected (Benedet, at pp. 299 and 314; Wright, at p. 57). Simply stating that the offence involved sexual touching rather than penetration does not provide any meaningful insight into the harm that the child suffered from the sexual violence.

[145] Third, we would emphasize that courts must recognize the wrongfulness of sexual violence even in cases where the degree of physical interference is less pronounced. Of course, increases in the degree of physical interference increase the wrongfulness of the sexual violence. However, sexual violence against children remains inherently wrongful regardless of the degree of physical interference. Specifically, courts must recognize the violence and exploitation in any physical interference of a sexual nature with a child, regardless of whether penetration was involved (see Wright, at p. 150).

[146] Fourth, it is an error to understand the degree of physical interference factor in terms of a type of hierarchy of physical acts. The type of physical act can be a relevant factor to determine the degree of physical interference. However, courts

have at times spoken of the degree of physical interference as a type of ladder of physical acts with touching and masturbation at the least wrongful end of the scale, fellatio and cunnilingus in the mid-range, and penile penetration at the most wrongful end of the scale (see *R. v. R.W.V.*, 2012 BCCA 290, 323 B.C.A.C. 285, at paras. 19 and 33). This is an error — there is no type of hierarchy of physical acts for the purposes of determining the degree of physical interference. As the Ontario Court of Appeal recognized in *Stuckless (2019),* physical acts such as digital penetration and fellatio can be just as serious a violation of the victim's bodily integrity as penile penetration (paras. 68-69 and 124-25). Similarly, it is an error to assume that an assault that involves touching is inherently less physically intrusive than an assault that involves fellatio, cunnilingus, or penetration. For instance, depending on the circumstances of the case, touching that is both extensive and intrusive can be equally or even more physically intrusive than an act of fellatio, cunnilingus, or penetration.

[147] Finally, we would recommend that courts cease to use terms such as "fondling" or "caressing" when referring to sexual violence against children. Because sentencing is a communicative process, the language that sentencing judges use matters. Using words like "fondling" or "caressing" in the sentencing context implicitly characterizes the offender's conduct as erotic or affectionate, instead of as an inherently violent assault, as courts have recognized. Such language is misleading and risks normalizing the very conduct the sentencing judge is meant to condemn. Use of such language undermines Parliament's objective of communicating that the use of children as sexual objects for the gratification of adults is wrongful. Instead of

acknowledging the harm done to victims, such language re-victimizes victims by disguising and obscuring the violence, pain, and trauma that they experienced (see M. Lessard and S. Zaccour, "Quel genre de droit? Autopsie du sexisme dans la langue juridique" (2017), 47 *R.D.U.S.* 227, at pp. 241-42).

(f) *Victim Participation*

[148] Parliament has determined that the age of consent to sexual activity in Canada is 16 (see Bill C-2, *Tackling Violent Crime Act*, S.C. 2008, c. 6). Subject to the close in age exceptions in ss. 150.1(2.1), (2.2) and (2.3) of the *Criminal Code*, children under the age of 16 are thus "incapable of giving true consent to sexual acts with adults" (*Hajar*, at para. 40). Accordingly, courts should avoid language such as "*de facto* consent" which analogizes a child's participation to consent.

[149] Despite this, courts have at times invoked the "*de facto* consent" of a child whom Parliament has determined to be legally incapable of consenting as a mitigating factor in sentencing. Like many provincial appellate courts, we agree that it is an error of law to treat "*de facto* consent" as a mitigating factor (see *Hajar*; *Scofield*, at para. 38; *R. v. E.C.*, 2019 ONCA 688, at para. 13 (CanLII); *R. v. Norton*, 2016 MBCA 79, 330 Man.R. (2d) 261, at para. 42). To treat a victim's participation as a mitigating factor would be to circumvent the will of Parliament through the sentencing process (*Hajar*, at para. 96). It would undermine the wrongfulness of sexual violence against a child, who is under the legal age of consent, to "tel[l] the offender that, although he is technically guilty . . ., he really isn't at fault or

responsible," and that the victim is really to blame for his behaviour (Wright, at p. 100).

[150] Some courts have, while acknowledging that a victim's participation is not a mitigating factor, nevertheless treated it as relevant to determining a fit sentence (see *Scofield*, at para. 39; *Caron Barrette*, at para. 56). This is an error of law: this factor is not a legally relevant consideration at sentencing. The participation of a victim may coincide with the absence of certain aggravating factors, such as additional violence or unconsciousness. To be clear, the absence of an aggravating factor is not a mitigating factor.

[151] We would add the following to assist judges as they give practical effect to Parliament's decision that sentences for sexual offences against children must increase. First, some courts have seemed to equate a child's non-resistance with "*de facto* consent" (see *R. v. Revet*, 2010 SKCA 71, 256 C.C.C. (3d) 159, at para. 12). In addition to analogizing a child's participation to consent, this language hints at the belief that submission or a failure to resist constitutes consent, which is a pernicious myth even for adults. Judges' analyses need to be clear that there is no defence of "implied consent" in Canadian law and that a failure to resist or silence or passivity does not constitute consent (see *Barton*, at para. 98).

[152] Second, a victim's participation should not distract the court from the harm that the victim suffers as a result of sexual violence. We would thus strongly warn against characterizing sexual offences against children that involve a

participating victim as free of physical or psychological violence, as some courts appear to have done (see *Caron Barrette*, at para. 46). Instead, as the majority held in *Hajar*, "Violence is inherent in [such offences] since [they] involv[e] an adult's serious violation of a child's sexual integrity, human dignity and privacy *even in cases of ostensible consent*" (para. 115 (emphasis in original)). The fact that additional forms of violence such as weapons, intimidation, and additional physical assault may not be present does not provide a basis to ignore the inherent violence of sexual offences against children (see Marshall, at p. 220).

[153] Third, in some cases, a victim's participation is the result of a campaign of grooming by the offender or of a breach of an existing relationship of trust. In no case should the victim's participation be considered a mitigating factor. Where a breach of trust or grooming led to the participation, that should properly be seen as an aggravating factor (*R. v. P.M.* (2002), 155 O.A.C. 242, at para. 19; *R. v. F. (G.C.)* (2004), 71 O.R. (3d) 771 (C.A.), at paras. 7 and 21; *Woodward*, at para. 43). Adolescence can be a confusing and challenging time for young people as they grow and mature, navigate friendships and peer groups, and discover their sexuality. As Feldman J.A. wrote in *P.M.*, to exploit young teenagers during this period by leading them to believe that they are in a love relationship with an adult "reveals a level of amorality that is of great concern" (para. 19).

[154] Finally, a victim's participation should never distract the court from the fact that adults always have a responsibility to refrain from engaging in sexual

violence towards children. Adults, not children, are responsible for preventing sexual activity between children and adults (*George*, at para. 2; *R. v. Audet*, [1996] 2 S.C.R. 171, at para. 23). We would adopt the words of Fairburn J. (as she then was) in *R. v. J.D.*, 2015 ONSC 5857:

> Nor is it a mitigating factor that a child appears to acquiesce or even seek out the sexual attention of an adult. Where children appear to be seeking out such attention, it is often an outward manifestation of the child's confusion arising from personal difficulties. It is the legal responsibility of adults who are faced with children who already exhibit signs of struggle, to protect them. Adults who see these situations as opportunities to satisfy their own sexual urges, are no better or worse than those who take steps to actively seek out their victims. [para. 25 (CanLII)]

(6) Consecutive Sentences and Totality

(a) *Consecutive Sentences*

[155] The decision whether to impose a sentence concurrent with another sentence or consecutive to it is guided by principles. While the issue warrants further discussion in another case, the general rule is that offences that are so closely linked to each other as to constitute a single criminal adventure may, but are not required to, receive concurrent sentences, while all other offences are to receive consecutive sentences (see, e.g., *R. v. Arbuthnot*, 2009 MBCA 106, 245 Man.R. (2d) 244, at paras. 18-21; *R. v. Hutchings*, 2012 NLCA 2, 316 Nfld. & P.E.I.R. 211, at para. 84; *R. v. Desjardins*, 2015 QCCA 1774, at para. 29 (CanLII)).

[156] From the reasons of both the sentencing judge and the Court of Appeal in the present matter, it is clear that neither properly dealt with this issue. Having noted this, we will not analyze this issue further, as it does not affect the outcome of this case and was not argued adequately before us.

(b) *The Principle of Totality*

[157] The principle of totality requires any court that sentences an offender to consecutive sentences to ensure that the total sentence does not exceed the offender's overall culpability (see *Criminal Code*, s. 718.2(c); *M. (C.A.)*, at para. 42). While this principle is applied throughout Canada, there have been divergences in the methodology used by various appellate courts. Some jurisdictions require the sentencing judge to decide what would be a fit sentence *for each offence* before considering totality (see, e.g., *Hutchings*, at para. 84; *R. v. Adams*, 2010 NSCA 42, 255 C.C.C. (3d) 150, at paras. 23-28; *R. v. Punko*, 2010 BCCA 365, 258 C.C.C. (3d) 144, at para. 93; *R. v. Draper*, 2010 MBCA 35, 253 C.C.C. (3d) 351, at paras. 29-30; *R. v. J.V.*, 2014 QCCA 1828, at para. 28 (CanLII); *R. v. Chicoine*, 2019 SKCA 104, 381 C.C.C. (3d) 43, at paras. 66-68). In other jurisdictions, sentencing judges start by determining an overall fit sentence and then impose individual sentences adding up to the total (*R. v. Ahmed*, 2017 ONCA 76, 136 O.R. (3d) 403).

[158] If the sentences here had been imposed consecutively, as arguably they should have been, then it would have been necessary to apply totality. As noted above, the sentences were imposed concurrently, and thus, totality did not arise. As

these issues, while important, were not argued, we leave their consideration for another day.

D. *Application*

(1) No Error in Principle That Affected the Sentence

(a) *Starting Point*

[159] The Court of Appeal based its intervention on an error in principle that Judge Stewart did not make. LeMaistre J.A. reasoned that Judge Stewart's choice of the *Sidwell* starting point demonstrated that he relied on the aggravating factor of abuse of a position of trust that he had found did not exist (para. 16). With respect, this is not an accurate characterization of Judge Stewart's reasons. Rather, on a careful reading of the reasons, it appears that he determined that it was appropriate to employ a four-to-five-year starting point because the aggravating circumstances of the case warranted it. In other words, Judge Stewart sought to exercise his discretion in a way that gave effect to the principles of sentencing, in light of the circumstances of the case. In so doing, his decision should be accorded deference.

[160] Judge Stewart's reasons make clear his line of analysis. He specified that he found that the "nature" of the circumstances of the case made the higher starting point from *Sidwell* appropriate (A.R., at p. 5). He made specific reference to the "incredibly aggravating" fact of the child's young age and the "horrific" nature of

Friesen's conduct (pp. 3-4). He found that Friesen's lack of insight into his behaviour was "frightening" for the risk he posed to children in the future (p. 3). In these circumstances, Judge Stewart was entitled to conclude that the aggravating factors were so serious as to place the case on par with the starting point the Manitoba Court of Appeal had set for major sexual assault committed on a young person within a trust relationship by means of violence, threats of violence, or by means of grooming.

[161] Judge Stewart's reasoned choice to employ a higher starting point than the Court of Appeal preferred does not justify appellate intervention. As Sopinka J. stated in *McDonnell*, "it can never be an error in principle in itself to fail to place a particular offence within a judicially created category . . . for the purposes of sentencing" (para. 32). Since leMaistre J.A. did not identify any other error and concluded that Judge Stewart appropriately balanced the aggravating and mitigating factors, she should not have intervened. This was a function not of some mistake personally by leMaistre J.A., but rather of the legally unsound approach to starting points that she was bound to apply.

[162] This case exemplifies the danger of treating starting points as binding laws. Judge Stewart applied the guidance from *Sidwell* in a contextually sensitive and appropriate manner in light of the particular circumstances of the case before him. The Court of Appeal saw his responsiveness to the circumstances as an error in principle. Rather than focusing on whether Judge Stewart chose the right starting point, the Court of Appeal should have focused on whether the sentence was fit and,

most fundamentally, whether Judge Stewart applied the principles of sentencing properly within the exercise of his discretion.

(b) *No Double Counting*

[163] We would reject Friesen's alternative submission advanced in oral argument that Judge Stewart double counted the aggravating factors by using them both to arrive at a four-to-five-year starting point and to impose a six-year sentence. Friesen was not able to identify any specific passage that demonstrated that Judge Stewart had engaged in double counting. Instead, Judge Stewart reasoned that the aggravating factors were so significant that they not only justified a four-to-five-year starting point but also a sentence higher than that starting point. A starting point is just a guideline and Judge Stewart was entitled (indeed, he was required) to depart from it where necessary so as properly to individualize the sentence (see *Lacasse*, at para. 58). We would also note that Judge Stewart emphasized the objective of separation from society in imposing the six-year sentence.

(c) *Guilty Plea*

[164] We are unpersuaded by Friesen's argument that appellate intervention was justified because Judge Stewart did not give sufficient consideration to Friesen's guilty plea. A guilty plea is a recognized mitigating factor; failure to consider a guilty plea as mitigating can constitute an error in principle. However, even if Judge Stewart did err by failing to mention Friesen's guilty plea, we are not convinced that any such

error had an impact on the sentence (see *Lacasse*, at para. 44). The Crown's case against Friesen was overwhelming because his criminal conduct was audio-recorded. In these circumstances, Friesen's guilty plea is entitled to less weight (see *R. v. Barrett*, 2013 QCCA 1351, at para. 20 (CanLII); *R. v. Sahota*, 2015 ONCA 336, at para. 9 (CanLII)). A guilty plea does have other advantages that count in mitigation, such as saving court resources and providing a degree of finality to the victims (see *R. v. Carreira*, 2015 ONCA 639, 337 O.A.C. 396, at para. 15). However, we are not convinced that any of these advantages were sufficient such that explicit consideration of the guilty plea would have impacted the sentence.

(d) *Expression of Remorse*

[165] Finally, we do not agree with Friesen's argument that appellate intervention is justified because Judge Stewart failed to give sufficient consideration to Friesen's expression of remorse. Remorse is a relevant mitigating factor (see *Lacasse*, at paras. 77-78). However, remorse gains added significance when it is paired with insight and signs that the offender has "come to realize the gravity of the conduct, *and as a result has achieved a change in attitude or imposed some self-discipline which significantly reduces the likelihood of further offending*" (*R. v. Anderson* (1992), 74 C.C.C. (3d) 523 (B.C.C.A.), at p. 536 (emphasis in original)). Judge Stewart found that Friesen did not realize the gravity of his conduct since he was either "in . . . denial" or claimed to be "blacked out" at the time of the offences (A.R., at p. 2). Friesen thus had not achieved a change in attitude that reduced his

likelihood of further offending. To the contrary, Judge Stewart found that his insight into his behaviour was "non-existent" and that the risk he continued to pose to children was "frightening" (p. 3). In these circumstances, we are not convinced that Judge Stewart's failure to expressly mention Friesen's expression of remorse was an error in principle or that it impacted the sentence.

(2) Sentence Not Demonstrably Unfit

[166] Nor was the sentence demonstrably unfit. While the Court of Appeal took the view that the error in principle that it identified gave rise to a sentence that was demonstrably unfit, the court did not explain why the sentence was demonstrably unfit. Far from being so excessive as to be demonstrably unfit, the sentence was on the lenient end of the spectrum of fit sentences.

[167] The sentence imposed here is slightly lower than the six-and-one-half year global sentence that Moldaver J.A. of the Ontario Court of Appeal upheld in *Woodward*. Like this case, *Woodward* also involved only a single instance of sexual interference with a child by an offender who was not in a traditional position of trust. Moldaver J.A. expressed the view that the sentence in *Woodward* was "lenient" (para. 75).

[168] If anything, the circumstances of this case are more aggravating than those in *Woodward*. While there were some aggravating factors present in *Woodward* that are not present here, such as grooming, the use of electronic communications to

lure the child victim, and multiple physical acts in the single episode of sexual violence, this case contains numerous aggravating circumstances not present in *Woodward*. The victim here was only four years old. The sexual violence caused immediate pain as evidenced by the child's distress, screams, and cries. Friesen followed the sexual violence by threatening the mother in an attempt to cause her to return the child. Moreover, Friesen's decision to involve the mother in the sexual violence resulted in additional harm to the child because of the breach of trust. Comparisons in such cases have limited value. But nevertheless, they remain part of a thorough analysis.

[169] Parliament's increase of the maximum sentences for sexual offences against children confirms our view that the sentence Judge Stewart imposed was lenient. *Woodward* predated Parliament's decision in 2015 to increase the maximum sentences for sexual assault of a person under the age of 16, sexual interference, invitation to sexual touching, and sexual exploitation from 10 years to 14 years when prosecuted by indictment. By contrast, Friesen's offences post-date those increases in the maximum sentences. This would point to a higher sentence.

[170] We would also commend Judge Stewart for the careful approach he took to many of the significant factors that we have discussed in these reasons. Judge Stewart did not fixate on the fact that the physical interference was brief in duration and did not involve penetration. Instead, he properly recognized the immediate and long-term harm to the child that Friesen's conduct caused. Similarly, he appreciated

the "incredibly aggravating" nature of the child's young age (A.R., at p. 3). Moreover, he properly emphasized separation of the offender from society, first, in order to protect children from an offender whom he found to pose a high risk of reoffending and, second, in order to reinforce the importance that Friesen receive the "significant help" he required to be able to return to society without endangering children (p. 5). As Judge Stewart put it, "children, little people, have to be protected by the court" (p. 2).

[171] Nor does the fact that Judge Stewart found that Friesen did not stand in a position of trust make the sentence unfit. The intervenor the Attorney General of British Columbia submits that Friesen did in fact abuse a position of trust within the meaning of s. 718.2(a)(iii) of the *Criminal Code* because he abused the position of trust that the mother held in relation to the child. It would not be fair for us to consider this argument on appeal because it was not raised by the Crown at the sentencing hearing. There, Judge Stewart accepted that Friesen did not stand in a position of trust and, thus, it was not argued to him that the s. 718.2(a)(iii) aggravating factor applied (see A.R., at pp. 50 and 71). Nor did the Crown advance this position on appeal. We thus decline to decide whether s. 718.2(a)(iii) applies to an offender who, while not personally standing in a position of trust, abuses a third party's position of trust in relation to the victim.

[172] Regardless of whether s. 718.2(a)(iii) applies, we find that Friesen's decision to exploit the mother's relationship of trust in order to assault the child to be

highly aggravating. In his written submissions, Friesen relied on the Manitoba Court of Appeal's holding that "sexual abuse of a child by a parent is a crime like no other" (R.F., at para. 55, quoting *R. v. C.D.* (1991), 75 Man.R. (2d) 14, at para. 14). However, in no way can Friesen rely on the mother's failings to mitigate his wrongful behaviour. Rather, he sought to exploit the mother in order more cruelly to commit sexual violence against the child. Friesen's moral blameworthiness is heightened because he knowingly decided to exploit the mother's relationship of trust and thus was complicit in the mother's breach of trust. When we consider Friesen's actions "from the perspective of the victimized child," as Fraser C.J.A. proposed in *R. v. T.L.B.*, 2007 ABCA 61, 409 A.R. 40, the increased gravity of Friesen's offence is readily apparent (para. 23). It was immaterial to the child that Friesen did not stand in a position of trust in relation to her because Friesen involved her own mother in the sexual violence. There is no basis for us to conclude, as Friesen proposes, that the child suffered less harm as a result of a coordinated attack by Friesen and the child's mother than if the mother had solely perpetrated the sexual violence. We would emphasize that since the child was subjected to a coordinated assault by both her mother and a stranger, she would thus have a reason to fear both strangers and trusted caregivers.

[173] Even if the mother had not stood in a position of trust, the fact that Friesen coordinated the sexual violence against the child with the mother would be an aggravating factor. Sexual violence committed in coordination by multiple offenders is an important aggravating factor (*R. v. Kennedy* (1999), 140 C.C.C. (3d) 378 (Ont.

C.A.), at paras. 19-20). The law aims to deter offenders from acting in concert (*The Law of Sentencing*, at p. 154). Coordinated sexual violence may also cause additional emotional and psychological harm to the victim by adding to the degrading nature of the assault (*Kennedy*, at para. 18). It is clear from the audio transcript that Friesen and the mother acted together to assault the child. Friesen's decision to launch a coordinated assault together with the mother on a defenceless four-year-old child increases his moral blameworthiness.

[174] We share the Court of Appeal's view that Judge Stewart properly weighed the mitigating factors. Friesen is a relatively youthful first offender and he experienced a traumatic and painful childhood involving physical, emotional and sexual abuse. Judge Stewart was right to recognize these as "important" mitigating factors and to identify how Friesen's traumatic and abusive upbringing could "shed some light" on his actions (A.R., at p. 2). However, Judge Stewart had to weigh these against the aggravating factors and the need to prioritize denunciation and deterrence as well as separation of Friesen from society because of the high risk he posed to children. This all supported a reasoned and principled basis to impose a substantial custodial term.

[175] Finally, we would add that the six-year sentence in this case should not be considered as being reserved for the notional "worst offender." Judge Stewart did state that Friesen's case was "one of the worst that I have seen" (p. 5). Yet terms such as the "worst offence" and "worst offender" are unhelpful (see *L.M.*, at para. 20,

citing *R. v. Cheddesingh*, 2004 SCC 16, [2004] 1 S.C.R. 433, at para. 1). While this case may have been one of the worst that Judge Stewart has seen, multiple cases of objectively more grave and more morally blameworthy sexual violence against children have reached this Court during the past decades and have resulted in more severe sentences than the one Judge Stewart imposed here (see *M. (C.A.)*; *L.M.*).

(3) Additional Aggravating Factors

[176] We wish to comment, as well, on three factors that we consider aggravating, but which were not fully considered in the courts below: the potential harm to the mother from the extortion, the fact that Friesen committed the offences in the home of the child's mother, and evidence of misogynistic attitudes. We underline that we do not rely on these factors in arriving at our decision to restore Judge Stewart's sentence. Instead, we offer our comments on these factors only for the purpose of providing guidance to courts that may encounter similar factual situations.

[177] First, neither Judge Stewart nor the Court of Appeal mentioned the potential or actual harm to the mother from the extortion offence. This issue should have been addressed. The extortion offence aims to protect every person's freedom of choice from intimidation and interference (*R. v. Davis*, [1999] 3 S.C.R. 759, at para. 45). Friesen's intimidation directly targeted the mother's vulnerabilities as a parent and created a risk of psychological and emotional harm. Immediately after the mother's friend intervened, Friesen acted as if he was entitled to have the mother both continue to sexually gratify him and to return the child to him so that he could

continue to assault her. He resorted to threats when the mother began expressing regret about the assault of her daughter. He then began to threaten her to coerce her to return the child. He specifically targeted the mother's vulnerabilities as a parent both by threatening to tell the mother's friend that the mother had sexually assaulted her one-year-old son and by promising to help her get a child back from CFS. We do not have a victim impact statement from the mother.[5] However, the transcript contains evidence that could be capable of supporting a finding that these threats caused psychological harm to the mother. For instance, the mother repeatedly asked Friesen "why do you need [to] do that stuff", as the threats continued; and she later asked Friesen if she was "in trouble" (A.R., at pp. 100-101).

[178] Second, neither Judge Stewart nor the Court of Appeal mentioned the additional potential harm to both the mother and the child caused by the fact that Friesen's conduct took place in the mother's residence. While it is not clear to us from the record whether the child was residing with the mother full-time, the fact that the sexual violence took place in the mother's home was nonetheless aggravating. A parent's home is a place where the child should feel safe and secure under the care and guardianship of the parent. Accordingly, sexual violence against children that takes place in the home may be particularly damaging because it damages the child's sense of security in the home environment (Bauman, at p. 370; *R. v. M.J.*, 2016 ONSC 2769, [2016] O.J. No. 3177 (QL), at para. 31). The fact that the child was not

[5] We do not endorse the apparent refusal of the trial Crown and Judge Stewart to permit the mother to present a victim impact statement in relation to the extortion offence. We would note that neither the trial Crown nor Judge Stewart referred to the provisions of the *Criminal Code* or the *Canadian Victims Bill of Rights*, S.C. 2015, c. 13, s. 2, that govern the victim's right to present a victim impact statement to the court when they refused to permit the mother to present a victim impact statement.

only at the home but also sleeping when Friesen told the mother to bring her into the bedroom to assault her confirms this. McLachlin J.'s remarks in *McDonnell* are particularly apt:

> The assaults occurred when the young girl was helplessly sleeping, in circumstances where she could not have feared violation. The result of such an assault on a typical victim would likely have been shame, embarrassment, unresolved anger, a reduced ability to trust others and fear that even in innocent sleep, people could and would abuse her and her body. [Emphasis added; para. 113.]

[179] Moreover, neither Judge Stewart nor the Court of Appeal mentioned that the fact that Friesen threatened the mother in her own home is a statutory aggravating factor for the offence of extortion (*Criminal Code*, s. 348.1). Friesen was an invited guest in the mother's home. Notwithstanding her own wrongful actions, the mother was entitled to the law's protection and had a reasonable expectation that she would be free from such threats especially in her own residence. This factor deserved consideration.

[180] Finally, we wish to comment briefly on the statement by Friesen's former girlfriend to the author of the pre-sentence report that Friesen had a "hatred" for women (A.R., at p. 90). While we do not rely on this comment as an aggravating factor because Judge Stewart did not make any factual finding in relation to it, we do emphasize that judges should be attentive to evidence of an offender's misogynistic attitudes. Such attitudes may have a significant bearing on, among other factors, moral blameworthiness, insight and likelihood to reoffend (see *Hajar*, at para. 161).

(4) Lack of Clarity Regarding Concurrent vs. Consecutive Sentences

[181] In his initial reasons, Judge Stewart imposed a single sentence without distinguishing between the sexual interference charge and the attempted extortion charge. He did not refer to the distinct aggravating and mitigating features of the attempted extortion charge. Near the end of the hearing, the court clerk had to ask whether that sentence was concurrent for both charges.

[182] While the principles underlying concurrent and consecutive sentences and the totality principle warrant further comment and clarification by this Court, the attempted extortion charge deserved a full consideration. But, as noted above, this is not the case in which to resolve these issues.

VI. Disposition

[183] For the foregoing reasons, we would allow the appeal and restore the sentence Judge Stewart imposed for the sexual interference conviction.

Appendix – Increased Maximum Sentences for Sexual Offences against Children under the *Tougher Penalties for Child Predators Act*, S.C. 2015, c. 23

Offence	*Criminal Code* Section	On Summary Conviction		On Indictment	
		Previous Maximum Sentence	New Maximum Sentence	Previous Maximum Sentence	New Maximum Sentence
Sexual interference	151	18 months	2 years less a day	10 years	14 years
Invitation to sexual touching	152	18 months	2 years less a day	10 years	14 years
Sexual exploitation	153	18 months	2 years less a day	10 years	14 years
Bestiality in presence of or by child	160(3)	N/A [a]	N/A [a]	10 years	14 years
Order of prohibition	161	6 months	18 months	2 years	4 years
Making child pornography	163.1(2)	N/A [a]	N/A [a]	10 years	14 years
Distribution of child pornography	163.1(3)	N/A [a]	N/A [a]	10 years	14 years
Possession of child pornography	163.1(4)	18 months	2 years less a day	5 years	10 years
Accessing child pornography	163.1(4.1)	18 months	2 years less a day	5 years	10 years
Parent or guardian procuring sexual activity	170	N/A [a]	N/A [a]	10 years	14 years
Householder permitting prohibited sexual activity	171	N/A [a]	N/A [a]	5 years	14 years
Making sexually explicit material	171.1	6 months	2 years less a day	2 years	14 years

available to child					
Luring a child	172.1	18 months	2 years less a day	10 years	14 years
Agreement or arrangement to commit a sexual offence against a child	172.2	18 months	2 years less a day	10 years	14 years
Prostitution of person under 18 years of age*	212(4)	N/A [a]	N/A [a]	5 years	10 years
Sexual assault (victim under 16 years of age)	271	18 months	2 years less a day	10 years	14 years
Sexual assault with a weapon, threats to a third party or causing bodily harm (victim under 16 years of age)	272	N/A [a]	N/A [a]	14 years	Life imprisonment

Notes: a. "N/A" means one of the following:

(1) The statute did not modify the maximum sentence for the offence when the Crown proceeds summarily: bestiality in presence of person under 16 years of age (s. 160(3)); or,

(2) The offence in question can only be prosecuted by indictment: making child pornography (s. 163.1(2)), distribution of child pornography (s. 163.1(3)), parent or guardian procuring sexual activity (s. 170), householder permitting prohibited sexual activity (s. 171), prostitution of person under 18 years of age (s. 212(4)), and sexual assault with a weapon, threats to a third party or causing bodily harm (victim under 16 years of age) (s. 272).

* Parliament has repealed the offence of prostitution of person under 18 years of age (s. 212(4)): see the *Protection of Communities and Exploited Persons Act*, S.C. 2014, c. 25, s. 13.

Appeal allowed.

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