PROVINCIAL COURT OF NOVA SCOTIA
Citation: ***R. v. J.V.S.***, 2015 NSPC 73

Date: 20151102
Docket: 2696818, 2696819, 2696820, 2696821 & 2696822
Registry: Dartmouth

Between:

Her Majesty the Queen

v.

J. V. S.

Restriction on Publication: Section 486.4

Judge:	The Honourable Judge Theodore K. Tax, J.P.C.
Heard:	August 19, 2015, in Dartmouth, Nova Scotia
Decision:	August 19, 2015
Charge:	Sections 271(1); 151, 163.1(2); 163.1(4) and 266 of the Criminal Code
Counsel:	William Mathers, for the Crown Brian Church, Q.C., for the Defence

NOTICE OF BAN ON PUBLICATION

in the matter of R. v. J. S.

INFO NO.: 691218 **CASE NOS.: 2696818-2696822**

BY THE ORDER OF THE HONOURABLE JUDGE THEODORE K. TAX

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By the Court:

INTRODUCTION:

[1] Mr. J. S. has entered guilty pleas to two charges - a sexual interference charge for having touched MF, person under the age of 16 years directly with the part of his body, to wit, his penis, contrary to section 151 of the **Criminal Code** and for making child pornography, to wit, videos, contrary to section 163.1(2) of the **Criminal Code** between October 27, 2013 and February 4, 2014 at or near Dartmouth, Nova Scotia. The Crown proceeded by indictment on both of those charges, and as such, each one is subject to a minimum term of imprisonment of one year.

[2] Following the entry of the guilty pleas, the court ordered a Pre-Sentence Report to be prepared. In addition, at the request of both counsel, the court ordered a Comprehensive Forensic Sexual Behavior Assessment Report to be prepared for the sentencing hearing. Sentencing submissions were made by counsel on July 21, 2015 and the court reserved its decision until today's date.

[3] The issue for the court to determine is a fit and proper sentence taking into account all of the relevant purposes and principles of sentencing, the circumstances of the offence, the victim impact statement and the particular circumstances of the offender, Mr. J. S..

POSITIONS OF THE PARTIES:

[4] It is the position of the Crown, that there are very significant aggravating circumstances present in this case, given the fact that Mr. S. was in a position of trust relative to MF, who was approximately 9 years old at the time of these incidents, the sexual touching incidents occurred over approximately a 3 ½ month period of time and during that same time period, Mr. S. made pornographic videos of MF. The Crown Attorney submits that the relevant case law establishes that when sexual offences are committed on young children, particularly by adults who are in a position of trust to that young person, the primary focus in sentencing is on denunciation of the unlawful conduct and specific and general deterrence. In those circumstances, the Crown Attorney submits that the appropriate sentence would be in the range of 4-5 years for the section 151 **Criminal Code** offence of sexual

touching and 1 to 2 years for the making of child pornography offence contrary to section 163.1(2) **Criminal Code**. In view of the fact that Mr. S. had no prior criminal record and other mitigating factors, the Crown Attorney submits that, when the court considers the totality of the sentences to be imposed, the appropriate global sentence for these offences and this offender would be in the range of 5 to 6 years in prison.

[5] In addition, in view of the fact that both of these offences are "primary designated offences" for purposes of sentencing, the Crown Attorney seeks several ancillary orders including a DNA order pursuant to section 487.051 of the **Criminal Code**, an order to comply with the **Sex Offender Information Registration Act** ("SOIRA") and an order pursuant to section 743.21 of the **Criminal Code** which would prohibit Mr. S. from communicating, either directly or indirectly, with any victim or witness or other person identified in the order during the custodial period of Mr. S.'s sentence, subject to any terms that the court considers necessary.

[6] For his part, Defence Counsel advised the court that he has reviewed each of the ancillary orders being sought by the Crown Attorney with his client, and they do not take any issue with the imposition of those orders. However, with respect to the non-communication order, given the fact that Mr. S. and MF's mother are the parents of a young boy, counsel have indicated that they will provide the Court with the form of order that will address issues relating to Mr. S.'s efforts to communicate with his son during the period of time that he is in custody. If, however, they cannot reach an agreement about the terms of that order, then they have both acknowledged that the Court would retain jurisdiction to hear further submissions in order to determine the specific wording of the non-communication order to be made pursuant to section 743.21 of the **Criminal Code**.

[7] It is the position of the Defence that Mr. S. has admitted his guilt to the offences before the court, he has accepted responsibility for the incidents outlined in the Admissions of Fact and by doing so, neither MF, nor her mother or any other witnesses were required to attend court to establish the circumstances of the offences. While Defence Counsel acknowledges that the case law indicates that the primary purposes of sentencing in situations such as the one before the court are denunciation and deterrence, the Comprehensive Forensic Sexual Behavior Assessment Report prepared by Dr. Angela Connors indicates that Mr. S. is in need an Intensive Treatment Program and that therefore, his client's rehabilitation should also be taken into account. Defence Counsel submits that when the

mitigating factors and the principle of totality are also taken into account, a global sentence in the range of 4 to 5 years in prison would be the appropriate order to be imposed on Mr. S..

[8] Both counsel acknowledge that Mr. S. has spent a significant period of time in custody to the date of these submissions, namely from February 7, 2014 to July 21, 2015, which amounts to 530 days of pre-sentence custody. Given the recent decisions of the Supreme Court of Canada with respect to whether an offender is entitled to a credit of 1 ½ days for each day of pre-sentence custody, both counsel agree that Mr. S. would therefore be entitled to a total of 795 days or approximately 26 ½ months of pre-sentence custody, as of July 21, 2015.

CIRCUMSTANCES OF THE OFFENCES:

[9] In this case, the parties were able to reach an agreement pursuant to section 655 of the **Criminal Code** whereby Mr. J. S. admitted certain facts for the purpose of dispensing with the prove thereof at trial. In particular, the following facts were acknowledged by Mr. S.:

1. MF was born on February […], 2005;
2. From October 28, 2013 through to February 3, 2014, Mr. S. lived in an apartment in Dartmouth, Nova Scotia, with Ms. MF, her young daughter (MF) and his son;
3. While living in that apartment, Mr. S. was unemployed and cared for the two children, while their mother, Ms. MF was employed in a workplace out of their residence;
4. When these offences occurred, Mr. S. was married to Ms. MF, the mother of MF, and as such, he abused a position of trust and authority in committing these offences;
5. From October 27, 2013 through to February 4, 2014 Mr. S. sexually abused MF. Specifically, the instances which are admitted, include:
    i) Mr. S. digitally penetrated MF's vagina;
    ii) Mr. S. placed MF's hand on his penis;
    iii) Mr. S. performed oral sex on MF; and
    iv) Mr. S. rubbed his penis against MF's vaginal area and he ejaculated on her;

6. In or around January 2014, MF informed her mother that urinating caused a burning sensation and that Ms. MF located blood in her daughter's underwear;

7. From October 27, 2013 through to February 4, 2014, Mr. S. did create pornographic videos of MF. Those pornographic videos included recordings of:

    i) MF bathing;

    ii) Mr. S. removing MF's clothing and exposing her body; and

    iii) Mr. S. rubbing his penis against MF's vagina.

8. On February 7, 2014 Mr. S. was interviewed by police officers and certain parts of the transcript of that interview have been attached as Appendix "A" to the Admissions of Fact. During that police interview, Mr. S. admitted to the following actions:

    a. He rubbed his penis up against MF's clitoris and that while he did so, he ejaculated;

    b. While he was in MF's bedroom, he rubbed his penis up against the "top of her" and made a videotape of that incident, but he immediately deleted it.

    c. On another occasion, while MF was taking a bath, he concealed a video camera, recorded her taking the bath, then went to his room, masturbated and deleted the video.

    d. Finally, on another occasion, while MF was getting ready for bed, Mr. S. decided to "teach" MF what a vagina is and he pulled down her pants and underwear, showed her where her vagina is located and then took his fingers and rubbed them on and around her clitoris.

VICTIM IMPACT STATEMENT:

[10] The **Criminal Code** provides in section 722 that, in determining the sentence to be imposed on an offender, the court shall consider any statement made

in accordance with section 722(2) of the **Code** by a victim of an offence, which describes the harm done to or suffered by the victim. In this case, the Victim Impact Statement was prepared by the stepmother of MF with the assistance of Ms. MF. In that Statement, MF described disliking the food that she had eaten while she was with Mr. S. and, as a result, she has received therapy from a psychologist. She has difficulty going to sleep without her father being present and a light being on and she often wakes up screaming or crying, saying "I saw him."

[11] In addition, the Victim Impact Statement refers to financial costs which have resulted from this incident when Ms. MF, MF and Mr. S.'s son moved from the apartment where these incidents occurred, but they left behind all of their belongings which may have reminded them of those events. They have had to rely on donations for furniture, food, clothing and toys to essentially start their life over without Mr. S.. Ms. MF left her job in February 2014 for about three months to care for the children, then returned to work for two months, but since then, she has been off work to support her family, which has resulted in a very significant drop in the family's income.

CIRCUMSTANCES OF THE OFFENDER:

[12] Mr. S. is an American citizen, who is 29 years old. Since coming to Canada in December 2012, he married Ms. MF and he is the father of their son. Mr. S. has been unemployed since 2012, although he was employed for a few months in the housekeeping units at the […] in […], USA, prior to his move to Nova Scotia. Prior to that, he had been employed for six years in a housekeeping unit at the hospital in the state of […]. After he moved to Canada, Mr. S. became a stay-at-home father, looking after MF and his son, while his wife worked outside the house. He married Ms. MF in November 2012.

[13] Mr. S.'s parents are both alive, although they divorced approximately 15 years ago, and his father has since remarried. He maintains regular contact with his parents and has a brother and a sister who are a few years older than him. He described his formative years as being "rough" as his parents fought regularly and his mother was both verbally and physically abusive. Mr. S. stated that he was sexually abused as a child by a female neighbor and also indicated that he had sexually abused his sister when he was between the ages of 12 and 13. Although both of those incidents occurred many years ago, Mr. S. has only mentioned them recently.

[14] Mr. S. completed grade 8 education, but dropped out of school in grade 9 following his parent's divorce. He completed his General Equivalency Diploma in 2006 and in 2008, he commenced a one-year [...] course. Mr. S. stated that he is in good physical and mental health, and does not have any substance abuse issues. He added that he had no friends in Nova Scotia and only a few friends in the United States.

[15] Mr. S. has no prior adult criminal convictions in Canada. As stated in the Pre-Sentence Report and in Dr. Connors' report, when Mr. S. was 12 or 13 years old, he apparently sexually abused his sister, however, since the Crown Attorney has no specific information relating to the alleged incident and Mr. S. was obviously a "young person" at the time, the Crown Attorney only mentions that incident, not as a record of any prior conviction, but rather, with respect to its potential implications for Mr. S.'s rehabilitation.

[16] The Crown Attorney and Defence Counsel both referred to the Comprehensive Forensic Sexual Behavior Assessment Report prepared by Dr. Angela Connors on June 15, 2015. Dr. Connors prepared a very thorough report which described Mr. S.'s family history, educational history, employment and financial history as well as his psychiatric and mental history. After conducting a series of clinical analyses and diagnostic tests, Dr. Connors concluded that Mr. S. does not appear to pose a "high risk for nonsexual violence", and in terms of risk for sexual offending, "his risk appears robust, in the moderate-high category." Dr. Connors also noted that risk is considered highest towards an underage female with whom Mr. S. is familiar and in order to improve his capacity to "manage his active dynamic risk factors successfully" in a non-contained environment, intensive treatment is recommended. Dr. Connors' report outline's her specific recommendations with respect to treatment, access to minors, Internet access and camera possession.

RELEVANT PURPOSES AND PRINCIPLES OF SENTENCING:

[17] The fundamental purpose of sentencing as set out in section 718 of the Criminal Code is to ensure respect for the law and the maintenance of a just, peaceful and safe society. The imposition of just sanctions, requires me to consider the sentencing objectives which this sentence should attempt to achieve. In this case, our Court of Appeal has repeatedly emphasized that deterrence and denunciation in sentencing for sexual assaults against children are the primary purposes to consider, with a lesser emphasis on the rehabilitation of the offender.

[18] As our Court of Appeal has also pointed out, in cases such as **R. v. EMW**, 2011 NSCA 87, Parliament has left no doubt that when a court imposes a sentence for an offence that involved the abuse of a person under the age of 18 years, it shall give primary consideration to the objectives of denunciation and deterrence of such conduct: see section 718.01 of the **Criminal Code**.

[19] For his part, Defence Counsel does not take serious issue with those primary sentencing purposes, but submits that the court should also consider a sentence that would best assist in rehabilitating the offender.

[20] Both counsel submit that the court should also take into account the principle of proportionality found in section 718.1 of the **Code**, which requires the court to take into account the gravity of the offence and the offender's degree of responsibility for that offence.

[21] In addition, in the court's analysis to determine the "just sanction" to be imposed, section 718.2(a) of the **Criminal Code** requires the court to take into account any aggravating and mitigating circumstances and either increase or decrease the sentence based upon those circumstances. Furthermore, I must also be mindful of the principle of parity, as stated in section 718.2 (b) of the **Criminal Code,** which requires the court to consider that the sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.

AGGRAVATING AND MITIGATING CIRCUMSTANCES:

[22] As I indicated previously, in determining the appropriate sentence I must consider any aggravating or mitigating circumstances:

[23] I find that the aggravating circumstances are as follows:

- Mr. S. was in a position of trust in relation to his step-daughter, MF, and as such, in section 718.2(a)(iii) of the **Code**, Parliament has determined that abuse of that position of trust or authority in relation to the victim is deemed to be an aggravating circumstance;
- The age of the victim, MF was 8 years of old at the time of the offences, and in those circumstances, Parliament has determined in section 718.2(a)(ii.1) of the **Code** that evidence that the offender

abused a person under the age of 18 years, is deemed to be an aggravating circumstance;

- The Victim Impact Statement filed on behalf of MF provides evidence that the offence has had a significant impact on her, considering her age and other personal circumstances, on her physical and mental health, which Parliament has determined in section 718.2(a)(iii.1) of the **Code** is deemed to be an aggravating circumstance.
- The incidents which occurred over a 3 ½ month period of time represent an escalation in the seriousness of the offender's inappropriate sexual behavior towards MF and the seriousness of those incidents of sexual exploitation were exacerbated by the making of the child pornography for his own sexual gratification.

[24] I find that the mitigating circumstances are as follows:

- Although these matters were originally scheduled for a preliminary inquiry, Mr. S. re-elected to have matter proceed to trial in the Provincial Court and entered guilty pleas to the two charges before the trial commenced. As a result, Mr. S. spared MF and Ms. MF the additional trauma of having to come before the court to testify and relive the events of late 2013 to early 2014;
- Mr. S. has accepted responsibility for his actions in committing these two offences and he has expressed his remorse and shame for his behavior through his counsel in court, through his comments to the probation officer and to the Clinical Psychologist;

ANALYSIS:

[25] In order to determine the "just sanction" in any particular case, it is important for the court to consider the proportionality principle found in section 718.1 of the **Criminal Code**. In all sentencing decisions, determining a fit and proper sentence is highly contextual and is necessarily an individualized process which, as I mentioned previously, depends upon the circumstances of the offence and the particular circumstances of the specific offender. On this point, the Supreme Court of Canada has stated in **R. v. M. (CA)**, [1996] 1 SCR 500 at paras. 91 and 92, that the determination of a just and appropriate sentence requires the trial judge to do a careful balancing of the societal goals of sentencing against the moral blameworthiness of the offender and the gravity of the offence while at the

same time taking into account the victim or victims and the needs of and the current conditions in the community.

[26] The Crown Attorney and Defence Counsel have submitted cases to the court for the purpose of determining the key purposes and principles of sentencing at play in this case as well as for the purpose of considering the parity principle to compare this case to similar offenders who have committed similar offences in order to establish a range of sentence that would be proportional to the gravity of the offences and Mr. S.'s degree of responsibility. In **R. v. D.(D.)**, [2002] O. J. No. 1061 (Ont.C.A), Justice Moldaver (as he then was) clearly spelled out a framework for considering the gravity of sexual offences perpetrated on children, especially in their formative years, at para. 35-36:

> [35] We as a society owe it to our children to protect them from the harm caused by offenders like the appellant. Our children are at once our most valued and are most vulnerable assets. Throughout their formative years, they are manifestly incapable of defending themselves against predators like the appellant, and as such, they make easy prey. People like the appellant know this only too well and they exploit it to achieve their selfish ends, heedless of the dire consequences that can and often do follow.
>
> [36] In this respect, while there may have been a time, years ago, when offenders like the appellant could take refuge in the fact that little was known about the nature or extent of the damage caused by sexual abuse, that time has long since passed. Today, that excuse no longer holds sway. The horrific consequences of child sexual abuse are only too well known.

[27] In **R v. Woodward**, 2011 ONCA 610 at para. 72, Justice Moldaver reviewed his earlier remarks made in **R. v. D(D)**, *supra*, at paras. 34-38 and he succinctly summarized the plight of children, in general, who have been sexually abused by a person in a position of trust as well as the principles and objects of sentencing that must take precedence when adult offenders choose to exploit innocent young children. Moldaver JA summarized those relevant considerations and principles as follows:

> (1) Our children are our most valued and our most vulnerable assets; (2) We as a society owe it to our children to protect them from the harm caused by sexual predators; (3) Throughout their formative years children are very susceptible to be taken advantage of by adult sexual offenders and they make easy prey for such predators; (4) Adult sexual predators recognize that children are particularly vulnerable and they exploit this weakness to achieve their selfish ends, heedless of the dire consequences that can and often do follow; (5) Three such consequences are now well recognized: (i) children often suffer immediate

> physical and psychological harm; (ii) children who have been sexually abused may never be able, as an adult, to form a loving, caring relationship with another adult; (iii) children who have been sexually abused are prone to become abusers themselves when they reach adulthood; and (6) Absent exceptional circumstances, in the case of adult predators, the objectives of sentencing commonly referred to as denunciation, general and specific deterrence and the need to separate offenders from society must take precedence over other recognized objectives of sentencing.

[28] While the Ontario Court of Appeal in **D(D)** and in the **Woodward** decisions was referring to the plight of children, who have been the victims of sexual abuse in a general sense, I find that the Admissions of Fact in this case, the report of Dr. Connors and the Victim Impact Statement specifically bring into play all of those considerations and principles of sentencing in this case. Clearly, Mr. S. took advantage, for his own selfish purposes, of his position of trust with MF and there are references in the report of Dr. Connors (at pages 23, 27, 28 and 34) as to how Mr. S. exploited that position of trust to manipulate and groom MF to encourage her compliance with his sexual agenda and finally, there is the evidence with respect to the psychological harm already suffered by MF.

[29] As I mentioned previously, section 718.1 of the **Criminal Code** requires the sentencing judge to take into account the fundamental principle of proportionality, which requires the court to order a sentence that is proportionate to the gravity or seriousness of the offence and the degree of responsibility of the offender. Looking at the factors relevant to this fundamental principle in sentencing, while I find that none of the specific incidents described in the Admissions of Fact involved the more serious actions of sexual intercourse or attempting sexual intercourse with the young victim, or for that matter, physical violence to overcome any resistance to Mr. S.'s actions, there can be no doubt that he sexually abused MF on four occasions over a period of about 3 ½ months for his own sexual gratification.

[30] The objective seriousness of the sexual interference offence contrary to section 151 **Criminal Code**, which was prosecuted by indictment, has been underlined by Parliament's determination that the offender is liable to a maximum term of imprisonment of 10 years, but he or she is also subject to a minimum punishment of imprisonment of one year. Taking into account those circumstances, I find that the gravity or seriousness of this offence is very high and when I also consider Mr. S.'s actions to groom and manipulate MF, his position of trust as the stepfather of MF who was only about nine years old when Mr. S. perpetrated these

offences on her for his selfish ends, I find that his degree of responsibility for these offences is also very high.

[31] Likewise, when I consider the seriousness of the offence of making child pornography contrary to section 163.1(2) of the **Criminal Code**, which was prosecuted by indictment, the objective seriousness of that offence has also been underlined by Parliament's determination that the offender is liable to a maximum term of imprisonment of 10 years, but he or she is also subject to a minimum punishment of imprisonment of one year. The Admissions of Fact also outline how and when Mr. S. sexually abused MF by clandestinely taking pornographic videos of her while she undressed or was bathing, as well as when he was rubbing his penis against her vagina. The relevant case law involving sentencing decisions for the making, distribution and possession of child pornography clearly underlines the gravity and very serious nature of those offences.

[32] In sentencing decisions, courts at all levels have continually stressed the point that the making of child pornography involves the sexual abuse and sexual exploitation of children. Taking into account those considerations as well as the facts and circumstances of this case, I find that the sexual abuse perpetrated by Mr. S. on MF, who was and still is a young child, by taking video images of her to make child pornography is a serious crime of a very significant gravity. Furthermore, I find that Mr. S.'s making of those pornographic videos in the circumstances outlined in the Admissions of Fact, even if they were deleted within a short time after their making and not distributed further or shared with others, clearly demonstrate his manipulation and grooming of MF and taken together with the other very significant aggravating circumstances present in this case, I find that his degree of responsibility for this offence is also very high.

THE APPROPRIATE SENTENCE:

[33] During their submissions, the Crown Attorney and Defence Counsel indicated that they were not making a joint sentencing recommendation to the court based upon their careful review of the relevant case law, however, they also indicated that their sentencing submissions were not that far apart.

[34] Section 718.2(b) of the **Criminal Code** provides that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. This sentencing principle reminds the court to consider a range of sentences for each particular offence and to impose sentences which are

similar to the circumstances of the offence and the offender, bearing in mind that for each offence and for each offender, there will obviously be some, if not many, elements that are unique.

[35] As a result, similar cases which involved sexual offences against children, including the making of child pornography, while being distinguishable based upon their own unique facts and circumstances, are important to consider in attempting to achieve parity in sentencing by establishing an appropriate range of sentence for each of the offences before the court. However, as I mentioned previously, a careful review of the case law indicates that courts at all levels across the country have consistently and clearly stated that the principles of general deterrence and denunciation must be the primary focus of sentencing in cases, such as this one, which involves the sexual abuse and exploitation of the young victim by an offender who was in a position of trust with respect to that victim.

[36] Recently, in **R. v. EMW**, 2011 NSCA 87, our Court of Appeal considered a sentence appeal by the offender in a case which involved the sexual assault of his daughter who was between 9 and 11 years old at the time of the offence. In the **EMW**, the court dismissed the appeal of a sentence of 2 years in prison and noted, at para. 23 that denunciation and deterrence are to be emphasized in sentencing for sexual assaults against children. In that case, the findings of the trial judge [at para. 33] were that nature of the offence involved digital penetration of the vagina of the victim, who was his daughter, on a number of occasions, while those incidents were not planned and there was no grooming of the victim, the incidents occurred in the context where the circumstances could easily have been avoided.

[37] Furthermore, in the **EMW** case, Fichaud JA noted that the maximum sentence for the offences in question was 10 years of imprisonment, but added that a review of similar offences committed by similar offenders can establish the effective "range" for parity purposes. Justice Fichaud reviewed several Nova Scotia cases which involved different types of sexual offences in para. 30 of **EMW** and he noted that sentences can range from less than 2 years to 6 years, depending on the severity of the circumstances for sexual assaults on children. Mr. Justice Fichaud concluded, at para 30 that EMW's crime did not occupy the low-end on the range, nor was it at the high-end and ultimately, the court upheld the two-year sentence of imprisonment in a federal institution.

[38] Based upon my review of the cases referred to by the court the **EMW** case, at para. 30, I find that the appropriate range of sentence for the sexual interference

offence contrary to section 151 of the **Code** which involved several incidents of sexual touching over a period of about 3 ½ months, but did not progress to sexual intercourse or an attempt to have sexual intercourse with the young victim, would result in a period of incarceration in the range of 3 to 4 years in a federal penitentiary. I find that the sentence to be imposed upon Mr. S. should be in the middle or at the upper end of that range, as in this case, unlike the **EMW** case, I find that there was oral sex, there was exposure of Mr. S.'s penis, there was digital penetration of MF's vagina and he rubbed his penis against MF's vaginal area and ejaculated on her. In these circumstances, I find that those factual distinctions, the gravity of this offence and Mr. S.'s degree of responsibility as well as the very significant aggravating factors, with relatively few mitigating factors, militate in favor of a sentence being in the middle or the upper end of the range of 3 to 4 years in a federal penitentiary for this offence. It is also important to bear in mind objective gravity of this offence has been assessed by Parliament, where the Crown has prosecuted the case by indictment, that Mr. S. is liable to a maximum sentence of 10 years in prison, but at the same time for this offence, he is subject to a minimum term of imprisonment of one year.

[39] With respect to determining an appropriate range of sentence for the offence of making child pornography contrary to section 163.1(2) of the **Criminal Code**, as I mentioned previously, Parliament has assessed the objective gravity of that offence, where the Crown has prosecuted the case by indictment, that the offender is liable to a maximum sentence of 10 years in prison, but at the same time, he or she is also subject to a minimum term of imprisonment of one year. The Crown Attorney submits that the appropriate range of sentence for the making of child pornography offence would be in the range 1 to 2 years in prison. He also submits that the sentence should be consecutive to any sentence ordered for the sexual interference offence contrary to section 151 of the **Code**, but adds that the court should also take into account the principle of totality.

[40] For his part, Defence Counsel submits that the sentence for the this offence should be at the lower end of the range proposed by the Crown Attorney and he submits that if the court concludes that the sentence should be consecutive to the sexual interference charge, then the court should also consider the principle of totality.

[41] While the large majority of the reported cases involve the possession and distribution of child pornography, in **R. v. ASG**, 2004 NSCA 7, our Court of Appeal dismissed the offender's sentence appeal in relation to several sexual

offences, including his appeal of a two-year consecutive sentence for the offence of making child pornography. In terms of the facts relating to the making of the child pornography, the offender who had a prior record for violent crimes had surreptitiously taken photographs of little girls, approximately 5 to 8 years old, who were photographed with their clothes removed while they were asleep in several different positions. The accused admitted that he had touched the vagina of one of the young girls and had placed his penis in her hand and that he had made these photographs for a sexual purpose. In that case, Cromwell JA (as he then was) upheld the total sentence of eight years in prison, less one year for pre-sentence custody, which included a two-year consecutive sentence for the making of child pornography.

[42] In **ASG**, *supra*, at paras. 18 and 19, Justice Cromwell noted that the purpose of the totality principle was to ensure that a series of sentences, each properly imposed in relation to the offence to which it relates, is in aggregate just and appropriate. He was not persuaded that the totality of the sentences was excessive as there were several serious aggravating circumstances and multiple offences and that the circumstances of the offences and of the offender called for a strong response by the sentencing judge directed to the specific deterrence and rehabilitation of the offender and the protection of the public.

[43] Given the factual similarity between this case and the **ASG** case, with respect to the making of the child pornography and given the fact that, there is now a minimum sentence for that offence prosecuted by indictment is one year in prison, I find that the appropriate range of sentence for Mr. S. in the circumstances of this case would range from 18 months to 24 months in prison. While ASG had a prior violent conviction and his sexual offences involved his partner's young daughter as well as 5 other young girls from the neighborhood where he lived with his partner and her daughter, the circumstances of the making of the child pornography which involved his stepdaughter certainly has a factual similarity to the instant case. Once again, given the gravity of this offence and Mr. S.'s very high degree of responsibility as well as the significant aggravating factors which are present in this case and the relatively few mitigating factors, I find that the sentence for the making of the child pornography contrary to section 163.1(2) of the **Criminal Code** should be at the upper end of the range that I have proposed.

[44] In determining the fit and appropriate sentence in this case, I have considered the relevant purposes and principles of sentencing, the aggravating circumstances as well as the mitigating circumstances which I have outlined above,

the statutory minimums for the two offences before the court and the clear directions of our Court of Appeal that denunciation of Mr. S.'s reprehensible conduct, his specific deterrence and general deterrence of other like-minded individuals are the paramount sentencing considerations in cases of this nature. Having looked at the parity principle where similar offences were committed by a similar offender who was in a position of trust and took advantage of that trust to prey upon a very youthful and vulnerable child for his own sexual gratification, I find that the fit and appropriate sentence for the sexual interference offence contrary to section 151 of the **Criminal Code** is to order Mr. S. to serve a term of imprisonment of 3 ½ years or 42 months in a federal penitentiary.

[45] With respect to the fit and appropriate sentence for the offence of making child pornography contrary to section 163.1(2) of the **Criminal Code**, I have considered the paramount sentencing considerations in cases which involved the sexual abuse of a young victim by a person in a position of trust, such as Mr. S. as well as the aggravating and mitigating circumstances. Looking at all of the facts and circumstances of this case, I find that a fit and appropriate sentence for the making of child pornography which was for his own sexual gratification, which involved his sexual abuse and exploitation of an eight-year-old girl for whom he stood in a position of trust, is to order Mr. S. to serve a sentence of 21 months of imprisonment for that offence. In addition, I find that sentence for the making of the child pornography shall be served consecutively to the sentence that I have just ordered for the sexual interference charge.

[46] I find that, in the circumstances of this case, it is appropriate to order a consecutive sentence for the offence of making child pornography, as I find that the acts constituting the two offences before the court were not part of a single endeavor. Furthermore, I find that the two offences do not have a sufficiently close connection, nor do they arise from what I would consider to be the same incident or transaction. Looking at all of the facts and circumstances of this case, I find that it is appropriate to order that these two sentences should be served on a consecutive basis to each other.

[47] Since I have determined an appropriate sentence for each of the two offences before the court and also determined that those individual sentences should be served consecutive to each other, I am also required to look at the principle of totality found in section 718.2(c) of the **Code** to determine if, in the aggregate, the combined sentence is unduly long or harsh, in the sense that it is disproportionate to the gravity of the offences and the degree of responsibility of the offender.

Courts of appeal have referred to this review by the sentencing Judge as an opportunity to take "one last look" to determine if the total sentence exceeds the overall culpability of the offender, after having considered the gravity of the offences, the offender's moral blameworthiness with respect to the crimes committed and the harm done to the victim.

[48] Having considered those issues in relation to the totality principle, I find that the length of the combined sentence is not unduly harsh or disproportionate to the normal level of sentence for the most serious of the individual sentences involved in this case. Both offences for which Mr. S. has entered a guilty plea were prosecuted by indictment, and as such, they are both subject to a minimum term of imprisonment of one year. Although Mr. S. does not have a prior criminal record, the recommendations of Dr. Connors indicated that he will require a significant degree of counseling, treatment and programming. And as result, I find that the impact of the combined sentence does not reduce Mr. S.'s prospects for rehabilitation, nor does it amount, in my view, to a sentence that is harsh or crushing. As a result, I am not prepared to make any further adjustments to the combined sentence which I have just ordered Mr. S. to serve, on the basis of the totality principle.

[49] However, both counsel have submitted that Mr. S. should receive a credit of 1 ½ days for each day of his pre-sentence custody. Given the recent decisions of the Supreme Court of Canada with respect to this issue, I have no hesitation in concurring with that submission. As of July 21, 2015, Mr. S. had been in custody since February 7, 2014, which represented to a total of 530 days and with the credit of 1 ½ days for each day of pre-sentence custody, that amounted to a total credit of 795 days or approximately 26 ½ months of pre-sentence custody. Given the fact that a further 31 days of pre-sentence custody were served by Mr. S. following the submissions of counsel, I find that on the basis of 1 ½ days of credit for each day of presentence custody, he should be entitled to a further period of 47 days of pre-sentence custody, for a grand total of 842 days. Taking into account that the average month is 30 days, I find that Mr. S. should be credited with a total of 28 months of pre-sentence custody against the overall sentence of 63 months, which would result in Mr. S. being ordered to serve, on a go-forward basis, a period of imprisonment of 35 months in a federal penitentiary.

ANCILLARY ORDERS:

[50] I am satisfied that all of the preconditions to the ancillary orders sought by the Crown have been met, and I therefore also order in relation to both of these offences which are primary designated offences, pursuant to section 487.051 of the **Criminal Code** that Mr. S. provide a sample of his DNA to the appropriate authorities and I also make an order pursuant to section 490.013(2)(b) of the **Criminal Code** that Mr. S. comply with the provisions of the **Sex Offender Information Registration Act** for a period of 20 years.

[51] Furthermore, as I indicated at the outset of these reasons, I am also prepared to make an order under section 743.21(1) of the **Criminal Code** which prohibits Mr. S. from communicating, directly or indirectly with any victim, witness or other person identified in the order, during the custodial period of Mr. S.'s sentence, except in accordance with any conditions specified in that order that I consider necessary. With respect to this order, as I indicated earlier in this decision, counsel have indicated that they will attempt to provide an agreed form for the terms and conditions of that non-communication order during the custodial period of Mr. S. sentence, however, if they are not able to do so, I will retain the jurisdiction to determine the appropriate terms and conditions of that non-communication order.

[52] Finally, with respect to the Victim Surcharge under section 737(2) of the **Criminal Code**, since both offences were prosecuted by indictment, I am required to order that Mr. S. pay this surcharge for victims in the amount of $200 for each of the two offences prosecuted by indictment. Since I have ordered, on a go-forward basis, a 35 month sentence of imprisonment to be served in a federal penitentiary, I will provide Mr. S. with four years to make the payment of the total amount of $400 that I have ordered as the victim surcharge.

T. K. Tax, J.P.C.