Citation: R v Schofield, 2025 MBCA 43
Date: 20250509
Docket: AR23-30-09993

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Jennifer A. Pfuetzner
Madam Justice Janice L. leMaistre
Madam Justice Lori T. Spivak

***B E T W E E N**:*

HIS MAJESTY THE KING	)	***G. F. Wiebe, K.C.***
	)	*for the Appellant*
Respondent	)	
	)	***D. N. Queau-Guzzi***
- and -	)	*for the Respondent*
	)	
	)	*Appeal heard:*
CODY LORNE SCHOFIELD	)	***December 2, 2024***
	)	
(Accused) Appellant	)	*Judgment delivered:*
	)	***May 9, 2025***

NOTICE OF RESTRICTION ON PUBLICATION: No one may publish, broadcast or transmit any information that could disclose the identity of the victim or a witness (see *Criminal Code*, RSC 1985, c C-46, s 486.4).

On appeal from *R v Schofield*, 2023 MBKB 127 [*Schofield*]

LEMAISTRE JA

Introduction

[1] The accused seeks leave to appeal and, if granted, appeals his total sentence of eight years' imprisonment for three child sexual offences.

[2] After pleading guilty, the accused was sentenced to three years' incarceration for possessing child pornography (see *Criminal Code*, RSC

1985, c C-46, s 163.1(4) [the *Code*]), seven years consecutive for luring a child under the age of sixteen (s 172.1(1)(b)) and four years concurrent for making child pornography (s 163.1(2)). Applying the principle of totality (see the *Code*, s 718.2(c)), the judge reduced the sentence for luring to five years and the concurrent sentence for making child pornography to three years, for a total sentence of eight years. He also made ancillary orders that are not the subject of this appeal.

[3] While the *Code* provisions in effect at the time of the offences refer to child pornography, when referring to the materials that form the subject matter of the offences, I will use the term child sexual abuse and exploitation material (CSAEM).

[4] The accused appeals his sentence on the basis that the judge erred in his assessment of moral culpability by misapprehending and failing to properly consider the evidence of his mental illnesses and cognitive limitations and in his application of the legal standard. He also asserts that the judge erred by overemphasizing deterrence and denunciation and by failing to consider relevant factors when applying the principle of totality.

[5] The Crown argues that, although the judge erred by imposing a concurrent sentence for making child pornography, the total sentence is not demonstrably unfit.

[6] For the reasons that follow, I would grant leave to appeal, allow the appeal and vary the sentence. While the judge made no error in determining the accused's moral culpability, he erred in principle when sentencing the accused for multiple offences and applying the principle of totality. In my

view, the judge's error in the application of totality had a material impact on the sentence.

Background

[7] A brief description of the facts of each offence is as follows.

The Facts of the Offences

Making Child Pornography

[8] While communicating with an adult woman (the adult victim) on Snapchat, the accused disclosed that he was attracted to young girls (nine to twelve years of age), and he sent her numerous images of CSAEM, including images of female children as young as four years old engaged in sexual acts with adult men. He also told her that he wanted to have sex with an eleven-year-old child he believed was the adult victim's daughter and he asked her to give the child alcohol so he could sexually assault her. The adult victim alerted authorities to the accused's activities by making a report to cybertip.ca and by posting a screenshot of one of their conversations on Facebook.

Possessing Child Pornography

[9] The accused uploaded a CSAEM image of an adult male having intercourse with a female child on Snapchat. The RCMP became aware of this image after Snapchat reported it to the National Center for Missing and Exploited Children. While executing a search warrant at the home where the accused lived with his parents, the RCMP seized two cellphones from the accused's bedroom. After conducting a forensic analysis of the accused's cellphones, the RCMP found eighty-six images of CSAEM. The images

predominantly consisted of female children between two and fourteen years of age engaged in sexual acts with adult men and included one image of a female child who was bound and being tortured for a sexual purpose.

Luring

[10] One of the accused's cellphones also contained numerous chat communications with children between the ages of fourteen and seventeen (the chats). The chats involved explicit and graphic communications about the accused's desire to have sex with specific children and with children in general.

[11] During the chats, the accused often remarked that he wished the female children were younger, he requested and received CSAEM from children, he discussed arrangements to meet children in person, he expressed a desire to impregnate a child and his plans to do so, and he celebrated and encouraged sex between adults and children. The accused also admitted that he knew his behaviour was illegal, that his sexual interest was in children as opposed to adults and that he was a pedophile. Finally, he verbally abused and denigrated children who did not comply with his demands and he asked children not to tell anyone what he was saying to them.

The Sentencing Hearing

[12] At the time of sentencing, the accused was thirty-three years old. He had no criminal record and had been on bail for almost three years. Although the accused's parents separated shortly after his birth and he struggled in school, he lived a prosocial life and always had a close relationship with his mother. In 2018, after the accused's mother was diagnosed with cancer and

his father suffered a stroke and moved back into the family home, the accused began abusing substances. Prior to his incarceration, he assisted with his father's care. The accused has limited employment experience.

[13] The parties filed a pre-sentence report prepared by a probation officer and a psychological risk assessment (Dr. Kolton's report) prepared by Dr. David Kolton (Dr. Kolton). Dr. Kolton also provided expert evidence at the sentencing hearing regarding the accused's "psychological and cognitive presentation and risk level."

[14] Dr. Kolton's opinion was that the accused "has experienced mental health and cognitive challenges since childhood." Dr. Kolton's report stated that the accused "currently meets diagnostic criteria for Schizophrenia [a neurological and psychiatric disorder] and Alcohol Use Disorder" and that "untreated psychotic symptomology likely impair[ed] his judgment." In addition, testing indicated that the accused's IQ was seventy-four, which means that his intellectual functioning borders on impaired.

[15] The offences had a profound effect on the adult victim. She was "severely impacted" by the accused's conduct and feared for her children's safety. Community impact statements filed by the Crown describe the devastating effects of CSAEM and luring on child victims and their families. In particular, these statements discuss the prevalence of internet-based sexual offences committed against children and they reinforce that possession of CSAEM perpetuates the victimization of women and girls and that the harm caused by luring is not reduced by the lack of physical contact between the offender and the child victim.

[16] The Crown recommended a total sentence of twelve and a half years, with consecutive sentences for each of the three offences, reduced to nine years pursuant to the principle of totality. It proposed: two and a half years, reduced to two years, for possessing child pornography; four years, reduced to three years, for making child pornography; and six years, reduced to four years, for luring.

[17] The accused sought the imposition of a total sentence of two years apportioned as follows: one year for possessing child pornography, one year for luring, and one year concurrent to the sentence for luring for making child pornography.

[18] In support of his position, the accused argued that, applying the test from *R v Okemow*, 2017 MBCA 59 (at para 73) [*Okemow*]:

a) The evidence established that he suffered from schizophrenia and severe alcohol use disorder.

b) Although the evidence did not establish a nexus between these disorders and his offending, they were "destabilizing factors" that likely contributed to his criminal conduct.

c) His degree of responsibility for the offences was reduced because his disorders played a role in his criminal conduct and because he was highly intoxicated when he committed the offences, despite Dr. Kolton's testimony that the evidence did not support this latter assertion.

[19] Finally, the accused argued that his schizophrenia, severe alcohol use disorder and low IQ made him a vulnerable person.

The Judge's Sentencing Decision

[20] In his reasons for sentence, the judge carefully reviewed the circumstances of the offences, including the serious harm caused to the victims and their families, as well as to the community.

[21] The judge also carefully reviewed the accused's circumstances. He discussed the information contained in the pre-sentence report and Dr. Kolton's evidence regarding the accused's background, cognitive functioning, schizophrenia, and his history of alcohol and drug abuse. Based on the evidence, the judge concluded that the accused was a low risk to reoffend.

[22] Importantly, the judge referred to the evidence relating to the impact of the accused's cognitive issues, schizophrenia and severe alcohol use disorder on his offending. He stated (*Schofield* at paras 19-20):

> Dr. Kolton concluded that "it is likely that *substance use*, in concert with his *cognitive deficits*, significantly impaired his judgment. Forensic analysis of his devices and the content of his online communications are not suggestive of delusional beliefs being an underlying precipitant of the behavior[u]r; therefore, it is unclear to what extent *psychotic symptomology* directly impacted his behavior[u]r in relation to the current offences. It is likely that these symptoms served as a destabilizing factor, further impairing his judgment".
>
> While Dr. Kolton also concluded that [the accused] currently meets the diagnostic criteria for *schizophrenia*, he is unable to link this to his offending behaviour. He offers that "[t]he deficits associated with *schizophrenia* may contribute to a vulnerability to

> gravitate to computer use and computer-based communication because it is safer and more predictable than other forms of social communication".
>
> [emphasis added]

[23] The judge expressed concerns about the accused's attitude towards his offending reported by both the probation officer and Dr. Kolton. The judge noted that the accused did admit to the probation officer that his behaviour was wrong, but, when speaking with Dr. Kolton, he denied committing the offences, blamed his behaviour on intoxication, or blamed the charges on others.

[24] After reviewing the fundamental principle of sentencing set out in section 718 of the *Code*, the judge acknowledged that the objectives of deterrence and denunciation were primary considerations pursuant to section 718.01 and required "significant sentences" (*Schofield* at para 31). He also recognized that, in *R v Friesen*, 2020 SCC 9 [*Friesen*], "the Supreme Court directed a profound shift in how courts approach sentencing those convicted of sexual offences against children" (*Schofield* at para 27) and that the vulnerability of child sexual abuse victims increases an offender's moral blameworthiness.

[25] In accordance with this Court's decisions in *Okemow* and *R v JED*, 2018 MBCA 123 [*JED*], the judge considered whether the accused's "mental illness" (*Schofield* at para 36), "cognitive deficits" (at para 38) and "substance use" (*ibid*) impacted or contributed to his offending behaviour. He concluded that the accused's moral culpability was "reduced only marginally by his cognitive deficits" (*ibid* at para 39).

[26] Prior to considering the principle of totality, the judge imposed the following sentences: three years for possessing child pornography, seven years consecutive for luring, and four years concurrent for making child pornography.

[27] The judge agreed with counsel for the accused (not the same as counsel on the appeal) that the offence of "making child pornography is captured within the offence of luring" (*ibid* at para 43).

[28] When considering whether the sentence should be reduced for totality, the judge stated (*ibid* at para 45):

> [The accused] comes without a previous record and has a supportive family. He is being treated for schizophrenia and is taking medication. He has been on bail for three years without incident. While that is not mitigating, it speaks to his prospects for the future as do the reports before the court. In my opinion, a sentence of 10 years would be crushing for [the accused] and have a detrimental impact on his long-term prospects.

[29] The judge then reduced the sentence for luring to five years and the concurrent sentence for making child pornography to three years.

The Issues on Appeal

[30] On appeal, the accused argues that the judge erred in his assessment of the accused's moral culpability. He says that the judge either misapprehended the evidence or erred in his application of the legal standard when he found that Dr. Kolton was unable to connect the accused's offending behaviour to his schizophrenia. He also says that the judge erred when he found that the accused's schizophrenia, alcohol use disorder and low IQ *may* have contributed to his offending because the evidence from Dr. Kolton was

that these factors *likely* contributed. Next, the accused argues that the judge failed to consider all three of these factors in tandem and in accordance with the direction in *JED* at para 73. The accused contends that the judge failed to consider his use of alcohol and drugs at the time of his offending.

[31] The accused also argues that, because his moral culpability was attenuated and ought to have been reduced more than marginally, the judge should have given less weight to deterrence and denunciation. Finally, the accused asserts that the judge erred in his application of the principle of totality by failing to consider the accused's mental illnesses and cognitive delays.

[32] The Crown's position is that the judge properly assessed the accused's moral culpability and balanced the relevant sentencing principles. However, the Crown argues that the judge erred in his approach to sentencing for multiple offences by imposing a sentence for making child pornography that is concurrent to luring. It points out that not only were these offences "distinct, with separate harms, affecting different victims" but section 718.3(7) of the *Code* requires that a sentence imposed for a section 163.1 offence be served consecutively to a sentence imposed for a child sexual offence committed under another section.

[33] In my view, these arguments raise two issues: (1) whether the judge erred in his assessment of the accused's moral culpability; and (2) whether the judge erred in his approach to sentencing for multiple offences, including in his application of the principle of totality.

Standard of Review

[34] A judge's exercise of discretion in imposing sentence is entitled to deference. An appellate court should not intervene unless the judge committed a material error in principle or imposed a sentence that is demonstrably unfit (see *Friesen* at paras 26-27). In *Friesen*, the Supreme Court of Canada explained that "[e]rrors in principle include an error of law, a failure to consider a relevant factor, or erroneous consideration of an aggravating or mitigating factor" (at para 26). The weighing of relevant factors amounts to an error in principle only where the judge's exercise of discretion is unreasonable (see *ibid*).

[35] A judge's conclusions about whether the accused's moral culpability was attenuated by mental illness or any other cognitive limitation is also entitled to deference provided the judge "engage[d] in the careful fact finding described in *Okemow*" (*JED* at para 132) and those conclusions are reasonably supported by the record (see *Okemow* at para 74). The relevant questions for a judge to consider are (*ibid* at para 73):

> 1. Is there cogent evidence that the offender suffers from a recognized mental illness or some other cognitive limitation?
>
> 2. Is there evidence as to the nature and severity of the offender's mental circumstances such that an informed decision can be made as to the relationship, if any, between those circumstances and the criminal conduct?
>
> 3. Assuming the record is adequate, the sentencing judge must decide the offender's degree of responsibility for the offence taking into account whether and, if so, to what degree his or her mental illness or cognitive limitation played a role in the criminal conduct.

[36] A judge's decision on totality is discretionary and entitled to considerable deference (see *R v Rose*, 2019 MBCA 40 at para 36).

Discussion

Did the Judge Err in His Assessment of the Accused's Moral Culpability?

[37] The fundamental principle of sentencing is proportionality; a sentence must be proportionate to the gravity of the offence and the offender's degree of responsibility (see the *Code*, s 718.1). As LeBel J explained in *R v Ipeelee*, 2012 SCC 13 at para 37:

> Proportionality is the *sine qua non* of a just sanction. First, the principle ensures that a sentence reflects the gravity of the offence. This is closely tied to the objective of denunciation. It promotes justice for victims and ensures public confidence in the justice system.
> . . .
> Second, the principle of proportionality ensures that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender. In this sense, the principle serves a limiting or restraining function and ensures justice for the offender. In the Canadian criminal justice system, a just sanction is one that reflects both perspectives on proportionality and does not elevate one at the expense of the other.

[38] Factors relevant to determining the gravity of an offence include the consequences of the offender's actions on victims and public safety, the harm caused by the offence, and, in some cases, the offender's motivations (see *R v Hills*, 2023 SCC 2 at para 58).

[39] An offender's degree of responsibility is assessed "having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct"

(*R v M (CA)*, 1996 CanLII 230 at para 80 (SCC) [*M (CA)*]). It increases when the victim is a child (see *Friesen* at para 90).

[40] In *R v Bertrand Marchand*, 2023 SCC 26 at paras 34-45 [*Bertrand Marchand*], Martin J explained the inherent wrongfulness of the offence of luring and the harm it causes. She stated (*ibid* at para 35):

> The sexualization of children is itself morally blameworthy conduct. Luring invades a child's personal autonomy, sexual integrity, and gravely wounds their dignity (*Friesen*, at para. 51). Using any person as a means to an end is unethical, but an adult's manipulation of a child to satisfy their sexual urges is highly blameworthy conduct. It is for these reasons that luring is recognized as "manifestly harmful and wrongful" (*R. v. Misay*, 2021 ABQB 485, [2022] 1 W.W.R. 145, at para. 52). Even when the only interactions with the child occur online, the offender's conduct is inherently wrong because it still constitutes a form of sexual abuse (*R. v. R.S.F.*, 2021 MBQB 261, at para. 91 (CanLII)). While the degree of exploitation may vary from case to case, the wrongfulness of the exploitation of children is always relevant to the gravity of the offence (*Friesen*, at para. 78).

[41] Recently, in *R v Pike*, 2024 ONCA 608 at paras 144-56 [*Pike*], Tulloch CJA unpacked the "six distinct wrongs and harms" (at para 146) caused by the offence of possessing child pornography identified in *R v Sharpe*, 2001 SCC 2. He stated (*Pike* at para 146):

> *Sharpe* explains that Parliament criminalized possessing child pornography because the perpetrators of this offence violate children's dignity, invade their privacy, inflict severe emotional harm, instigate producers to abuse children to meet the demand for child pornography, risk inciting and facilitating other offences against children, and perpetuate pernicious messages that undermine children's humanity and equality.

[42] These comments are equally applicable to the offence of making child pornography.

[43] In this case, the judge properly recognized that the offences were serious; they involved deliberate conduct that was repeated over a number of months and they had lasting and widespread impacts on the victims. He also properly recognized that the fact that the offences involved the exploitation of children increased the accused's degree of responsibility.

[44] Although the judge did not explicitly state that he found the accused's moral culpability to be high, that view is clear from his reasons. He understood that the offences caused serious harm, attracted a higher degree of responsibility than other sexual offences and required significant sentences.

[45] The Crown argues that the gravity of the offences was serious and that the accused's moral blameworthiness was high. The accused did not dispute that the offences were serious and ordinarily attract a high level of moral culpability. His position is that his degree of responsibility was attenuated because he was intoxicated when he committed the offences and because his schizophrenia and severe alcohol use disorder contributed to his offending.

[46] In my view, the judge's finding that the accused's circumstances only warranted a marginal reduction of his high degree of responsibility is reasonably supported by the record. The judge acknowledged that "[a] fact-specific determination must be made as to whether the mental illness 'impacted the commission of the offence'" (*Schofield* at para 36) and that "[the accused] is not required to establish that his substance use, in concert

with his cognitive deficits caused the offending behaviour, but he must establish that it contributed to that behaviour" (at para 38).

[47] The judge's reasons make clear that he understood Dr. Kolton's evidence regarding how the factors figured into the accused's offending and, as he was entitled to do, he made his own determination regarding how those factors played a role and affected his moral culpability.

[48] To begin, Dr. Kolton's evidence was that the accused's text messages did not support his claim of intoxication when he committed the offences. Dr. Kolton explained that the accused's "level of cognitive functioning, his mental health disorder, and his substance use all impact his behaviour" but there was no clear evidence "that [the accused] was under the influence of some kind of delusional thinking that led to his behaviour."

[49] Dr. Kolton's evidence was clear that the accused's substance use, cognitive deficits and psychotic symptomology likely significantly impaired his judgment. However, because the accused refused to discuss his criminal conduct, Dr. Kolton was limited in his ability to provide an opinion regarding "the connection between these things" or "the extent to which they're contributing factors". In the circumstances, Dr. Kolton could only discuss the behaviour of individuals who use substances and suffer from cognitive deficits and schizophrenia in general terms.

[50] As for the relationship between the accused's offending and his schizophrenia, Dr. Kolton's evidence was that the accused's schizophrenia was likely "a destabilizing factor" that affected his judgment. However, Dr. Kolton was clear that the accused's online communications did not indicate that he was operating under any delusional beliefs when he

committed the offences. Accordingly, Dr. Kolton was unable to say to what extent the accused's schizophrenia directly affected his offending.

[51] In my view, the judge did not misapprehend Dr. Kolton's evidence as to the extent to which schizophrenia, severe alcohol use disorder and the accused's cognitive functioning affected his offending behaviour.

[52] The judge did what was required of him pursuant to the test in *Okemow* on a proper consideration of the evidence before him. He determined that the accused suffers from recognized mental illnesses and that he has a low IQ. He considered the limited evidence regarding the relationship between those circumstances and the accused's criminal conduct. While he used the term link, as did Dr. Kolton, the judge understood that the accused need only demonstrate that his schizophrenia, severe alcohol use disorder and cognitive functioning contributed to the offending behaviour. Finally, he reduced the accused's high moral culpability as a result of his "cognitive deficits" (*Schofield* at para 39).

[53] As I will explain, I am also not persuaded that the judge failed to consider the combined effect of the accused's schizophrenia, severe alcohol use disorder and low IQ; in other words, how these factors would interact cumulatively to impair the accused's judgment.

[54] In reaching his conclusion regarding the accused's moral culpability, the judge stated (*ibid*):

> Based on Dr. Kolton's evidence as reviewed above, I am satisfied that [the accused] suffers a cognitive deficit which impaired his judgment in committing these offences. However, in my opinion, his moral blameworthiness is reduced only marginally by his cognitive deficits.

[55] When reviewing Dr. Kolton's evidence, the judge referred to Dr. Kolton's opinions that the accused's "low IQ would affect all levels of his functioning, including decision-making" (*ibid* at para 16), that the accused's "substance use, in concert with his cognitive deficits, [likely] significantly impaired his judgment" (*ibid* at para 19) and that the accused's psychotic symptoms also likely impaired his judgment.

[56] While the judge could have been clearer, in my view, he used the terms cognitive deficit and cognitive deficits to refer to all three factors (schizophrenia, substance use and low IQ) and a fair reading of his reasons demonstrates that he understood the evidence that all three factors affected the accused's judgment.

[57] Finally, I am also not convinced that the judge failed to examine the effect of the accused's cognitive functioning, schizophrenia and severe alcohol use disorder on moral culpability in all three areas required by *JED*. There was no evidence that they undermined his capacity "to restrain urges and impulses" (*ibid* at para 73). The accused knew what he was doing was not only "morally wrong" but also illegal (*ibid*). He used social media platforms that hid what he was doing and in his text messages he admitted that he knew his behaviour was illegal and that he was a pedophile.

[58] In my view, the judge did not make any error warranting appellate intervention in his assessment of the accused's moral culpability. Thus, he also did not err by unreasonably emphasizing the principles of deterrence and denunciation.

Did the Judge Err in His Approach to Sentencing for Multiple Offences and in His Application of the Principle of Totality?

[59] When sentencing an offender for multiple offences, a judge must first determine whether and to what extent the offences arise out of the same event or series of events (see the *Code*, s 718.3(4)). When concurrent sentences are imposed, the judge must ensure that the length of the sentence accounts for each of the offences with no "free ride" (*R v RJ*, 2017 MBCA 13 at para 13 [*RJ*]). When a judge imposes consecutive sentences, the *Code* requires a last look at the combined sentence to ensure that it does not exceed the overall culpability of the offender (see s 718.2(c); *M (CA)* at para 42).

[60] In *RJ* at para 13, Mainella JA explained the proper approach as follows:

> The proper approach to sentencing on multiple offences is well-known. First, the judge examines the degree of nexus between the offences, as required by section 718.3(4) of the *Code*, to decide whether any or all of the offences will be served concurrently or consecutively. Second, where concurrent sentences are imposed, the judge determines a fit sentence for the most serious offence and makes the other sentences lesser in length or determines a single sentence for the set of offences. Where concurrent sentences are imposed, the judge is required to ensure that the length of the sentence does not give an offender a free ride for any criminal conduct. Alternatively, if consecutive sentences are imposed, the judge determines a fit sentence for each offence. Third, in the case of consecutive sentences, the judge totals the sentences and then gives the combined sentence a last look in accordance with the totality principle to see if the combined sentence is 'unduly long or harsh' because it exceeds the overall culpability of the offender (see section 718.2(c) of the *Code*). Fourth, where the judge determines that the combined sentence is excessive, the sentence is adjusted to the point where it is proportional to the offender's overall culpability. When a sentence is reduced to maintain the fundamental principle of

> proportionality, the judge must, as far as possible, ensure that the offender does not get a free ride on any criminal conduct.

[61] There are several factors that a judge must consider and balance on a last look for totality. These factors include (*R v Madder*, 2024 MBCA 80 at para 84; *R v GJM*, 2015 MBCA 103 at para 10):

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

[62] Other factors that have been determined to be relevant on a last look include an offender's cognitive limitations or other "mental circumstances" (*Okemow* at para 136). As explained in *Okemow*, a custodial sentence is "particularly difficult for those suffering from cognitive limitations" and may warrant an adjustment (*ibid*; see also *JED* at para 140; *Bertrand Marchand* at paras 149-51, for a discussion regarding the effects of incarceration on offenders with mental disorders in the context of an analysis as to whether a mandatory minimum sentence is grossly disproportionate).

[63] In the present case, when deciding whether to impose concurrent or consecutive sentences and determining a fit sentence for each offence, the judge stated (*Schofield* at para 43):

> Before any adjustment for totality, in my opinion, the appropriate sentence is 10 years as follows:
>
> - Possess child pornography (section 163.1(4)) – 3 years;
>
> - Luring via telecommunications, of a child under age 16 years (subsection 172.1(1)(b)) – 7 years, consecutive to the sentence for possessing child pornography; and
>
> - Make (written) child pornography (section 163.1(2)) – 4 years, concurrent. I agree that in the circumstances of this case, making child pornography is captured within the offence of luring.

[64] After considering the accused's "prospects for the future" (*ibid* at para 45), the judge concluded that a ten-year total sentence would be "crushing" (*ibid*) and would "have a detrimental impact on [the accused's] long-term prospects" (*ibid*). He then reduced the total sentence to eight years by reducing the consecutive sentence for luring to five years. He also reduced the concurrent sentence for making child pornography to three years.

[65] The accused argues that the judge failed to consider his "schizophrenia, . . . his substance use disorder, or his cognitive deficits in his consideration of totality."

[66] The judge considered a number of factors in reducing the total sentence of ten years to eight years. However, in my view, he made multiple errors in his approach to totality.

[67] First, he erred in principle by failing to account for the accused's vulnerability in his analysis of totality. The evidence before the judge was that he is a "highly vulnerable individual" for whom incarceration would be particularly difficult. Dr. Kolton testified that:

> The -- the impact of prison in the long-term, in my opinion, would be detrimental. He's an individual that suffers from a number of vulnerabilities, so both his cognitive functioning and his mental health condition mean that within a prison environment, which is very stressful and difficult to navigate for somebody who is naïve to that type of environment, it -- it puts them at risk of their mental health conditioning worsening, and it -- it tends not to be particularly rehabilitative for individuals like [the accused].

[68] The judge did consider the fact that the accused was taking medication for his schizophrenia. However, he did not consider that the accused's low IQ, schizophrenia and severe alcohol use disorder would make jail particularly difficult for him. In my view, this warranted a further reduction in the total sentence.

[69] I am also of the view that the judge erred by reducing a concurrent sentence for totality. The reduction of the sentence for making child pornography by one year did not reduce the overall combined sentence and thus did not serve the stated purpose of avoiding a crushing sentence. Nor did it meet the objectives of the principle of totality as "a particular application of the general principle of proportionality" (Clayton Ruby, *Sentencing*, 10th ed (Toronto: LexisNexis, 2020) at s 2.75; see also s 2.80). However, this error had no effect on the total sentence.

[70] Finally, I agree with the Crown's argument that the judge erred by imposing a sentence for making child pornography that is concurrent to luring.

Consecutive sentences were warranted because the offences each engaged separate harms. Moreover, although the parties did not direct the judge's attention to section 718.3(7)(a) of the *Code*, it restricted the judge's ability to impose a concurrent sentence in the manner that he did.

[71] Section 718.3(7) states:

Cumulative punishments — sexual offences against children	**Peines cumulatives : infractions sexuelles contre des enfants**
(7) When a court sentences an accused at the same time for more than one sexual offence committed against a child, the court shall direct	**(7)** Le tribunal qui inflige, au même moment, des peines d'emprisonnement pour diverses infractions sexuelles commises contre un enfant, ordonne :
(a) that a sentence of imprisonment it imposes for an offence under section 163.1 be served consecutively to a sentence of imprisonment it imposes for a sexual offence under another section of this Act committed against a child; and	**a)** que la peine d'emprisonnement qu'il inflige pour une infraction prévue à l'article 163.1 soit purgée consécutivement à celle qu'il inflige pour une infraction sexuelle prévue à un autre article de la présente loi commise contre un enfant;
(b) that a sentence of imprisonment it imposes for a sexual offence committed against a child, other than an offence under section 163.1, be served consecutively to a sentence of imprisonment it imposes for a sexual offence committed against another child other than an offence under section 163.1.	**b)** que la peine d'emprisonnement qu'il inflige pour une infraction sexuelle commise contre un enfant, à l'exception de l'infraction prévue à l'article 163.1, soit purgée consécutivement à celle qu'il inflige pour une infraction sexuelle commise contre un autre enfant, à l'exception de l'infraction prévue à l'article 163.1.

[72] The Crown did not file a cross appeal. However, the accused has put the sentence in issue and the Crown gave notice of its position. Therefore, this Court has the power to vary the concurrent sentence to a consecutive one (see the *Code*, s 687; see also *Hill v R*, 1975 CanLII 38 (SCC); *R v Christakos*, 1946 CanLII 250 (MBCA)).

Conclusion

[73] As I have explained, the judge erred by failing to impose consecutive sentences and he committed a material error by failing to consider the accused's vulnerability due to both his cognitive functioning and his mental health condition.

[74] Due to the judge's errors, the individual sentences he initially assigned to the offences are not entitled to deference. The judge erred in failing to treat them all as consecutive. Moreover, two of the sentences exceeded what was sought by the Crown. However, in fairness to the accused and in light of the fact that the Crown has not cross appealed, in sentencing afresh, I would not exceed the total initial sentence of ten years imposed by the judge.

[75] The ten-year sentence will be reduced for totality to a total sentence of seven years based on all of the factors considered by the judge, as well as the impact that imprisonment can be expected to have on the accused in light of his cognitive impairment and mental illnesses.

[76] In the result, I would grant leave to appeal and allow the appeal. I would vary the sentence by imposing the following sentences:

Offence	**Sentence (years)**	**Sentence After Totality (years)**
Luring	Four and a half	Four and a half
Making Child Pornography	Three (consecutive)	Two and a half (consecutive)
Possessing Child Pornography	Two and a half (consecutive)	Two and a half (concurrent to making child pornography)
	Total: Ten	**Total: Seven**

leMaistre JA

I agree: Pfuetzner JA

I agree: Spivak JA