PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Moorehouse*, 2024 NSPC 17

Date: 20240223
Docket: 8521357, 8521358
Registry: Shubenacadie

Between:

His Majesty the King

v.

Peter Alan Moorehouse

Judge: The Honourable Judge Marc Chisholm,

Decision: February 22, 2024

Charge: 163.1(2) Criminal Code of Canada
172.2(1)(b) Criminal Code of Canada

Counsel: Terri Lipton, for the Crown
Ian Hutchison, for the Defendant

By the Court:

Background

[1] The offender, Peter Alan Moorhouse, is before the Court for sentencing on two offences to which he pleaded guilty, namely: that he, between January 14, 2021 and January 23, 2021, at or near Enfield, Nova Scotia, did commit the offence of make child pornography, contrary to section 163.1(2) of the *Criminal Code*; and furthermore, between January 14, 2021 and January 23, 2021, at or near Enfield, Nova Scotia, did commit the offence of make arrangement or agreement to commit a sexual offence against a child, contrary to section 172.2(1)(b) of the *Criminal Code*.

[2] The Crown elected to proceed by Indictment. Each of the offences carries a maximum penalty of 14 years imprisonment and a mandatory minimum penalty of 1 year imprisonment. The defence challenged the constitutionality of the mandatory minimum sentence provisions. Briefs were filed by the defence and the Crown. However, on the third day of the sentence hearing the offender brought a motion to withdraw his challenge of the mandatory minimum sentence provisions. The motion was granted. The offender joined in the Crown recommendation for a

sentence of 12 months imprisonment on each count to be served consecutively for a total of two years imprisonment.

[3] Crown and defence counsel submitted to the court that, although this change occurred three years after proceedings began, it was the result of long and detailed resolution discussions as discussed in ***R. v. Anthony-Cook***, [2016] 2 S.C.R. 202. The court accepted counsels representations and proceeded on the basis of a joint sentence recommendation. Where there is a negotiated resolution of a case the duty of the court is to assess the fitness of the joint sentence recommendation. If the recommended sentence is within the fit range of sentence and its' imposition would not bring the administration of justice into disrepute, the court ought to accept the recommendation.

Circumstances of the Offences

[4] Counsel submitted an "Agreed Statement of Facts" which is marked Exhibit 1 on this sentencing. On February 22, 2024, the Crown and defence amended the Agreed Statement of Facts by deleting the second line in point number 11 and deleting point 12.

[5] In summary, Mr. Moorhouse admitted communicating on-line, for approximately one month, with Mr. Carlos Moraga. Each man claimed to have a

girlfriend who had an adolescent daughter living with them. The two men discussed their desires to sexually assault each of these girls. They discussed a plan to kidnap, drug, and sexually assault one of the girls. The two men met in person on one or two occasions and engaged in consensual sexual relations.

[6] Mr. Moraga was, in fact, living with his girlfriend of 10 years and her 14 year old daughter. Mr. Moorhouse had a girlfriend but she did not have a 12 year old daughter as he claimed in his emails with Mr. Moraga. Mr. Moorhouse's statements of a child in his home were untrue. The child he referred to was imaginary. Mr. Moorhouse maintained that he believed that Mr. Moraga was also discussing an imaginary child.

[7] In addition to the facts set out in Exhibit 1, the Court was given a transcript of the emails between the two men. Also, the defence presented additional facts through the expert report and testimony of Pamela M. Yates, Ph.D., R. Psych. Dr. Yates indicated in her report and testimony that the offender reported to her that he had been sexually abused as a child. Further, the offender reported to her that he was consuming alcohol heavily during the period in question. Dr. Yates opined that Mr. Moorhouse suffered from a mental health issue and substance abuse disorder which affected his involvement in these offences. The opinion of Dr. Yates and the admissibility of these facts will be addressed later in these reasons.

Victim Impact Statement

[8] A Victim Impact Statement was submitted by F.L., the former girlfriend of Carlos Moraga, and mother of the 14 year old girl who was the victim of sexual interference by Mr. Moraga, and the subject of Mr. Moraga's and Mr. Moorhouse's on-line communications. F.L. stated that, although it was nearly three years since her discovery of the inappropriate messages on Mr. Moraga's phone, "their impact still significantly affects my life". As she read the messages her body "froze" and she felt like she was in a nightmare. Each time the RCMP would call "it pulled me back into the trauma" and my body shook". Knowing their were such persons in her community made her untrusting of everyone around her.

[9] She has "been to many sessions with a trauma counsellor and a psychologist to help me process the trauma and aftermath of those events, but I know I will never be the same. My anxiety is heightened, and both myself and my daughter have dealt with depression and PTSD since these events."

[10] This court recognizes that this Victim Impact Statement focuses mainly on Mr. Moraga. However, these communications involved two parties, one of whom was Mr. Moorhouse. His involvement contributed to the harm caused to the victims. Unlike Mr. Moorhouse, Mr. Moraga was in a position of trust in relation

to the 14 year old victim and did engage in sexual interference of her. I find that the Victim Impact Statement has less weight in relation to the sentencing of Mr. Moorhouse.

Circumstances of the Offender

[11] The offender is now 50 years of age, having been 48 years old at the time of the commission of the offences. He has no prior criminal convictions. At the time of the commission of the offences the offender was the President and CEO of the Better Business Bureau of Atlantic Canada. He held that position from 2014 to 2021 when he was let go as a result of the current charges. He has an adult son who lived with him until the offences.

Presentence Report

[12] The accused was born in Ontario. The family moved to Alberta where he spent most of his younger years. He described a “fairly positive, normal..” upbringing. He stated that he “was never subject to violence, physical or sexual abuse within the home environment but stated he was the victim of sexual abuse on three occasions at the age of 12 by a grade six teacher.” He described his father as a “closet binge drinker” and his mother as a social drinker. Mr. Moorhouse

completed high school in Ontario and was noted to have been a gifted musician. Since high school he has completed several work related education programs.

[13] The accused has maintained close contact with his mother and sister. The offender's mother "was not able to identify any areas of concern and was not aware of any needs requiring supports or services for the subject. The offender's sister stated that the offences were "a huge shock for her". She indicated she was "not aware of any signs" or "creepiness" with respect to how he conducted himself. She described him as a very warm, intelligent person who is a talented musician and an excellent father.

[14] It is clear that the offender's sister was entirely unaware of his sexual activity over the past 30 years as detailed in Dr. Yates report. She has not seen evidence of excessive alcohol consumption by the offender. She described him as a "social drinker".

[15] She indicated that he disclosed to her his having been sexually abused by a teacher in his youth. She described the current offences as out of character for the accused and felt they were likely related to the abuse he suffered as a child.

[16] The offender is, currently, in a committed relationship with Amy Tughan which began in 2020. She described the offender as a "very gentle soul, who is

kind, funny and extraordinarily considerate…very thoughtful, supportive and contributing partner". Following his arrest Mr. Moorhouse shared with her the details of the offences and his childhood sexual abuse. She believes that he has been troubled for a long time because of his childhood abuse and needs therapy. She indicated that "over the past year the subject has significantly reduced his consumption of alcohol and is no longer using it as a coping mechanism."

[17] Mr. Moorhouse has a history of employment which includes several high level management positions. He lost his position with the Better Business Bureau of the Atlantic Provinces as a result of the commission of these offences. He is currently not employed.

[18] Mr. Moorhouse indicated that he enjoys "reasonably good physical health". He has Chron's disease which required the removal of most of his colon. It is currently managed with medication.

[19] Mr. Moorhouse expressed a desire to take formal mental health counselling after his sentencing is completed. For the past 2 years he has been involved with CoSA, Circle of Support and Accountability. Joe Steem, an employee of CoSA stated, "It is my considered opinion that Peter has shown exceptional commitment to the circle, together with courage in discussing difficult matters, and a

willingness to be both introspective and to consider other perspectives. Peter has been voluntarily participating in a process closely related to these principles for well over a year, providing an indication of both his character and his intent."

[20] The offender indicated that since his arrest and loss of employment he has had far fewer social contacts and has been living a "quiet life". He continues to have some involvement with a few members of his church community. Mr. Dahmes of his church community described the offender as a "good man". He does not know the details of the offences but felt that Mr. Moorhouse would benefit from counselling.

[21] When discussing the offences Mr. Moorhouse stated, at page nine, that, "...he does not remember everything as he would have been highly intoxicated at the time, but he remembers enough and has seen enough to know he communicated some horrible things. Mr. Moorhouse expressed regret for his behaviours and insisted that his actions were intended to be fictional, and were not in relation to another known individual, or with any intent of harming others." He stated, "I am completely aware of how self-harming those actions were. I have disgust and contempt for what I allowed myself to do to my life."

Psychological Assessment/Forensic Sexual Behaviour Assessment

[22] Dr. Yates, Ph.D., R. Psych. testified at the sentence hearing and when doing so adopted the content of her report, Exhibit 3.

[23] Following a voir dire the court accepted Dr. Yates as an expert in the field of forensic psychology to offer an opinion on: the administering of tests to sex offenders; the interpretation of the results of such tests; the assessment of the accused's mental health; the assessment of the accused's risk to re-offend; and the quality/suitability of treatment programs for sex offenders within and outside of correctional institutions.

[24] Dr. Yates has many years experience with Corrections Canada during which time she was involved in the design of treatment/counselling programs for sex offenders. She has prepared numerous risk assessments for sex offenders appearing before the Parole Board.

[25] She had not previously prepared a psychological/risk assessment and testified in criminal court on such a case. She had recent related, but limited, experience testifying in court in the U.S.A. on civil cases.

[26] As with any witness the Court may accept some, all or none of their evidence. The weight to be given to an expert witness' opinion is dependant on the Court's assessment of the witness' education, experience and foundation for the

opinion. The opinion must be assessed in the context of all of the evidence. Furthermore, if an expert witness demonstrates a bias or lack of objectivity it may negatively affect the weight given to their opinion.

[27] Dr. Yates indicated that, in addition to reviewing all of the information provided to her, she spent 15 hours interviewing Mr. Moorhouse. She indicated that, "This assessment relies substantially on historical data and on Mr. Moorhouse's self report during the current interview, as well as information from collateral sources."

[28] She indicated that Mr. Moorhouse reported having been sexually abused by his older brother while in their home when he was a young boy. Mr. Moorhouse's PSR reported that Mr. Moorhouse indicated that "he was never subject to violence, physical or sexual abuse within the home environment...". This statement was inconsistent with the offender's statement to Dr. Yates.

[29] Mr. Moorhouse alleged that when he was 12 years old, he was sexually assaulted on three occasions by a grade six teacher. His sister reported that he disclosed the abuse to her. At age 15, Dr. Yates opined:

> Early alleged experiences of sexual abuse then negatively impacted his sexual development, leading to confusion, psychological distress, and sexual dysfunction. In addition, Mr. Moorhouse viewed the vulnerability he experienced as being associated with the female gender, as a girl about his age at the time,

> which likely explains his initial role-playing as a 12-16 year old girl when chatting with men. When he became dissatisfied with this activity due to decreased effectiveness or lack of effectiveness, he sought out more intense experiences in the form of anonymous consensual masochistic sexual activity with men. Indeed the nature of his actions have some similarity to the alleged incidents with his gym teacher, such as having his back always to the man and avoiding eye contact." Mr. Moorhouse reported that the Covid-19 pandemic reduced his travel and, therefore, the opportunity to meet with men in his hotel room so he began meeting men at his home.

[30] The offender acknowledged that he and Mr. Moraga "engaged in consensual sexual activity on two occasions"(page 19).

[31] In relation to the circumstances of the offences, Dr. Yates noted, at page 15:

> Mr. Moorhouse was unable to explain why he did not return to role-playing a teenage girl, and why sexual abuse of girls was the subject of the messages with the other man in this matter, except to say that two very separate worlds in his life "collided". No further explanation was offered.

[32] Dr. Yates indicated that Mr. Moorhouse reported having a long period of very heavy drinking including the period of time when the offences were committed. However, he stated that, "In spite of drinking alcohol to excess, Mr. Moorhouse reported only missing work on 3 to 4 occasions over a 6 year period due to hangovers."(page 8). Mr. Moorhouse claimed that he was highly intoxicated during the commission of the offences and did not remember all of what he said.

[33] Based upon the information which she possessed Dr. Yates, at page 18, "ruled out" Sexual Masochism Disorder and Pedophilia Disorder but stated,

"...should additional information come to light that suggests the presence of deviant sexual interest in children or teens, this diagnosis should be revisited."

[34] In the final two paragraphs of her report Dr. Yates stated:

> A sexual offender-specific program such as that offered by the Correctional Services of Canada(CSC) or Nova Scotia Health/Department of Justice community-based forensic Sexual Behaviour program(FSBP) would assist Mr. Moorhouse in understanding the relationship of his behaviour to offending and to address his criminogenic needs, such as sexual and emotional regulation, effective problem-solving, and intimacy deficits/healthy relationships.
>
> "As sexual offender-specific programs are generally focussed on skills acquisition to manage risk and prevent re-offending, they do not typically include intensive therapy for the impacts of issues from early development and (alleged) sexual abuse on behaviour and personal functioning, which is also deemed to be essential in Mr. Moorhouse's case. It is therefore recommended that he participate in individual therapy for these concerns."

[35] In her testimony before this Court Dr. Yates indicated that the provincial community-based sex offender program better met the accused's needs. That evidence appeared to differ from the statements at page 26 of her report, quoted above. Dr. Yates also stated that, the accused needs psychological intervention in non-offending areas which he is unlikely to receive through CSC.

[36] Dr. Yates expressed the opinion several times that Mr. Moorhouse's risk to re-offend "can be managed in the community." The impression left by the evidence of Dr. Yates was that she was going beyond informing the Court of relevant programs and their suitability, but was promoting a result, that is, a non-custodial

sentence. This caused the Court concern with regard to the objectivity of Dr. Yates opinion evidence.

[37] Based upon extensive testing, the details of which are set out in her report, and have been reviewed by the court, Dr. Yates expressed the view that the risk of the offender committing a criminal offence was low and his risk of committing a sexual offence was low average/average.

[38] On cross-examination Dr. Yates agreed that Mr. Moorhouse's conduct, prior to his arrest, had been escalating, beginning with online behaviour, to real life encounters with men in hotel rooms, to encounters with men in his home, to online discussions of sexual abuse of teen girls. The behaviour came to a stop only because of the arrest.

[39] She indicated that research showed that 50% of "hands-off" sexual offenders go on to be "hands-on" sexual offenders.

[40] She agreed that Mr. Moorhouse had never been diagnosed with a mental health disorder. There was no evidence of cognitive issues for the offender. Mr. Moorhouse has not engaged in a treatment program for psychological issues or substance abuse.

[41] Mr. Moorhouse was very intelligent and had an excellent work record, holding several positions with a great deal of responsibility.

[42] The emails between Mr. Moorhouse and Mr. Moraga demonstrated that the offender was “attuned to raising the other man’s desires”. At page 19 of her report Dr. Yates stated, “Mr. Moorhouse also coached the other man with respect to specific sexual acts that he wished the other man to perform”.

[43] The communications between Mr. Moorhouse and Moraga were over an extended period of time and involved detailed discussions of the desire to sexually abuse adolescent girls.

[44] This Court must decide what weight ought be given to the opinion evidence of Dr. Yates. Throughout her report and testimony when expressing an opinion Dr. Yates used words such as “may”. The court viewed the language chosen to express an opinion as intentional. Dr. Yates could have stated that, in her opinion, the sexual abuse endured by the offender as a child affected his actions in relation to these offences. She could have said that, in her opinion, it was probable that the childhood abuse affected his actions in relation to the present offences. She did not. She stated that if the offender suffered sexual abuse as a child it may have affected

his behaviour in relation to these offences. The court viewed the opinion of Dr. Yates as an expression of a possibility.

[45] Second, the impression created by Dr. Yates' repeated statement that the risk presented by the offender could be managed in the community went beyond the proper role of an expert witness in a criminal proceeding. The court was left with the impression that Dr. Yates was promoting a non-custodial sentence.

[46] These concerns reduced the weight given to the opinion evidence of Dr. Yates, by the Court.

Findings of Fact

[47] When determining facts at a sentence hearing the Court is governed by section 724(3) of the Criminal Code, which provides:

> 724 (1) In determining a sentence, a court may accept as proved any information disclosed at the trial or at the sentencing proceedings and any facts agreed on by the prosecutor and the offender....
>
> (3) Where there is a dispute with respect to any fact that is relevant to the determination of a sentence,
>
> (a) the court shall request that evidence be adduced as to the existence of the fact unless the court is satisfied that sufficient evidence was adduced at the trial;
>
> (b) the party wishing to rely on a relevant fact, including a fact contained in the presentence report, has the burden of proving it;
>
> (c) either party may cross-examine any witness called by the other party;

> (d) subject to paragraph (e), the court must be satisfied on a balance of probabilities of the existence of the disputed fact before relying on it in determining the sentence; and
>
> (e) the prosecutor must establish, by proof beyond a reasonable doubt, the existence of any aggravating fact or any previous conviction by the offender.

[48] Section 723(5) permits the reception of hearsay evidence on a sentence hearing. However, when read in conjunction with section 724, I find that, if hearsay evidence is disputed, it must be proven by admissible evidence. Facts set out in a presentence report or expert report are hearsay. Therefore, unless agreed to by the prosecutor and defence, they must be proven by the party wishing to rely on the fact.

[49] The Court may receive and weigh expert opinion evidence even where the underlying facts upon which it is based are hearsay and not proven by admissible evidence. The lack of proof of the underlying facts may be considered in assessing the weight to be given to the opinion.

[50] There were three factual issues to be addressed by the court on this sentencing:

- Whether the offender knew or was wilfully blind to the fact that the 14 year old girl referred to by Mr. Moraga in his emails was a real child;
- Whether, during the time of the offences the accused was suffering from alcohol use disorder which affected his actions and reduced his moral responsibility; and

- Whether, at the time of the offences, the offender was experiencing mental health difficulty which impacted his decisions and lessened his moral responsibility for his involvement in these offences.

Court's analysis:

The offender's knowledge or belief of the existence of a real child living with Mr. Moraga

[51] In determining the first of three factual issues, The Crown acknowledged in the Agreed Statement of Facts that the twelve year old girl referred to by Mr. Moorhouse in his communications with Mr. Moraga was not a real child.

[52] The defence submitted that Mr. Moorhouse believed that the 14 year old girl referred to by Mr. Moraga was not a real child. The defence submitted that Mr. Moorhouse believed that Mr. Moraga knew the 12 year old child he referred to was not a real child.

[53] In fact, the 14 year old child referred to by Mr. Moraga was a real child. And at the sentence hearing for Mr. Moraga there was no submission that Mr. Moraga believed either child to be imaginary.

[54] I find that it would be an aggravating fact if Mr. Moorhouse knew, or was wilfully blind to the fact that the 14 year old girl referred to by Mr. Moraga was a

real child. Therefore, pursuant to section 724(3)(e) the burden rested on the Crown to prove this alleged fact beyond a reasonable doubt.

[55] The Crown position was that Mr. Moorhouse was wilfully blind to the fact that the 14 year old girl referred to by Mr. Moraga was a real child.

[56] The evidence upon which the Court must decide this issue of fact was as follows: The Agreed Statement of Facts, as amended; the transcript of the emails exchanged by the two offenders; the report of Dr. Yates which indicated that Mr. Moorhouse made a statement denying knowledge that the 14 year girl, referred to by Mr. Moraga, was a real child; and the PSR, wherein the author of the PSR indicated that Mr. Moorhouse made a statement to the same effect.

[57] The offenders statements to Dr. Yates and the author of the PSR are hearsay and not agreed to be the crown. They are, therefore, not admissible to raise a doubt regarding the accused's knowledge of the 14 year old girl.

[58] I find there is nothing in any of the communications between Mr. Moorhouse and Mr. Moraga that, in any way, suggested that Mr. Moraga was referring to an imaginary 14 year old girl. Mr. Moraga, in repeated references to his girlfriend's daughter, commented on her physical shape, her boyfriend, her behaviour, her attitude, etc. He admitted to having touched her buttocks once. Mr.

Moraga asked questions about the 12 year old girl referred to by Mr. Moorhouse. He asked the offender to send him a pair of her panties. He asked for a photo of her. The communications between Mr. Moorhouse and Mr. Moraga leave no doubt in the Court's mind that Mr. Moraga believed that Mr. Moorhouse was speaking to him about a real girl, one whom they discussed a plan to kidnap, drug, and rape. Indeed, Mr. Moraga expressed concern about going to jail if they got caught.

[59] Mr. Moorhouse had met with Mr. Moraga on one or two occasions to engage in consensual sexual relations. The email communications between them continued over a period of approximately one month, before they were discovered. Those communications demonstrated that Mr. Moorhouse was guiding the conversation. He tended to lead the discussion, including those around the sexual assault of either child and the kidnapping and sexual abuse of the imaginary 12 year old child. He was "coaching" (term used by Dr. Yates) Mr. Moraga to engage in these communications. These communications were not degrading of Mr. Moorhouse as were his earlier sexual role playing activities. He repeatedly said that he wanted to watch Mr. Moraga have sex with the child. These communications were detailed and graphic and constituted criminal offences. There was nothing in the language, the clarity of the ideas expressed, the spelling of words, or anything else on the part of the offender that raised any concern regarding his mental capacity while

participating in these crimes. There was no indication that he was intoxicated at the time. For example, when Mr. Moraga raised concern of being caught and going to jail, Mr. Moorhouse added to the plan that they give the child alcohol and or a drug so that she would not remember what happened.

[60] Mr. Moorhouse was described in the PSR as “very intelligent”. Even if, during the period in question, he was abusing alcohol, he would have had many minutes, hours, and days, to consider his communications with Mr. Moraga during the period of approximately one month while they were ongoing. At no time did he ever ask any question of Mr. Moraga about whether the 14 year old child in Mr. Moraga’s home was real. Every communication from Mr. Moraga about the fourteen year old girl in his home reflected her being a real child.

[61] Dr. Yates described Mr. Moorhouse as “over trusting” in his belief that Mr. Moraga was merely role playing and there was not a real child in his home (page 16 of the assessment).

[62] There was no evidence that during any of his earlier online sexual activities, when he was presenting himself as a 14 year old girl that the other party was aware of and knowingly participating in the charade.

[63] On the whole of the evidence at this sentence hearing I am not satisfied beyond a reasonable doubt that Mr. Moorhouse knew that Mr. Moraga was speaking about a real 14 year old child. However, the circumstances, as known by Mr. Moorhouse, were so compelling as to the fact that the 14 year old was a real child, his choice not to ask any questions was an act of wilfully blindness. I am satisfied of this beyond a reasonable doubt.

[64] In determining the second question of whether Mr. Moorhouse's alcohol use affected his decision-making in relation to the offences and lessened his moral responsibility, I find that the alleged fact that the accused was intoxicated during the commission of the offences is a matter which the defence must prove on a balance of probabilities.

[65] The Crown did not dispute the claim of the offender that he was drinking heavily during the period of the offences. However the Crown did not accept the defence allegation of fact that the offender's behaviour in relation to the offences was affected by his state of intoxication.

[66] Mr. Moorhouse is reported to have said that he was drinking alcohol heavily during the period of the offences and did not recall some of the messages he sent.

He also is reported to have said that during all of the period that he was abusing alcohol that he missed only a few days of work due to a hangover.

[67] He continued to function during this period of time, fulfilling his professional responsibilities. He would have had many hours to consider his statements to Mr. Moraga. He had many hours to review the online statements. He had many functioning hours to consider whether to continue those discussions. He did not stop until he was caught. He was caught because Mr. Moraga was caught. Mr. Moorhouse disguised his identity by using the online name, Tim Daniels.

[68] The email communications authored by Mr. Moorhouse revealed no evidence of him being intoxicated. There are no illogical statements. There are no statements that are not responsive to a comment made by the other party. There is nothing in the spelling, language, content or anything else that reflected they came from the mind of an intoxicated person.

[69] I find that, if at the time of some or all of the email messages, the offender was under the influence of alcohol, it has not been proven on a balance of probabilities that such condition affected his ability to know right from wrong nor prevented him from choosing to wilfully engage in the conversation with Mr. Moraga. I am not persuaded that, at the time of these offences, the offender was

under the influence of alcohol to an extent that lessened his moral responsibility for his involvement in these offences.

[70] In determining whether the offender's involvement in the offences was affected by earlier sexual abuse he suffered as a child and whether it lessened his moral responsibility, I find that the defence's claim that the offender's involvement in the offences was due, at least in part, to a mental health issue is a fact that the defence must establish on a balance of probability.

[71] The Crown did not dispute that Mr. Moorhouse was subject to sexual abuse as a child and is in need of counselling to address unresolved issues arising from such abuse. The Crown did not accept that at the time of the commission of these offences the offender was actively mentally ill and that condition affected his involvement in the offences.

[72] The offender reported engaging in online discussions with other men about sex which progressed to him assuming the role of an adolescent girl to gain more interaction with men interested in having sex. The accused reported that he progressed to having masochistic contact with men in his hotel room when he travelled for work. He said he took a submissive role in these encounters. Then,

during the Covid-19 pandemic, because he was not travelling for work, he began having such encounters with other men in his home.

[73] Dr. Yates opined that, if the offender was sexually abused as a child, as alleged, his online and in person sexual encounters with men may have been an attempt on his part to address unresolved issues of his sexuality. He may have taken a submissive role in these encounters to feel degraded as he claimed he did during childhood sexual abuse. Dr. Yates further opined that this history may have affected the offenders behaviour in relation to the present offences. However, she noted that Mr. Moorhouse was unable to explain why the email communications with Mr. Moraga involved discussion of the sexual abuse of adolescent girls with another adult male, except to say that his two very different "worlds collided". No explanation of this statement was provided.

[74] As previously noted the language used by Dr. Yates was that the childhood sexual abuse endured by Mr. Moorhouse may have affected his participation in the offences.

[75] Dr. Yates agreed that the offender's behaviour was escalating, from online discussions with men, to in person encounters with men in hotel rooms, to in person encounters with men in his home, and then to on line discussions with a

man regarding the sexual abuse of adolescent girls. Prior to the current offences the offender said that he engaged in activity which was abusive, debasing of him, to address his unresolved issues stemming from his childhood sexual abuse. There was nothing in the circumstances of the current offences that suggested they would be abusive or degrading of the offender. Therefore, this behaviour appeared to be inconsistent with past conduct. The explanation offered by Mr. Moorhouse was not persuasive.

[76] I find that the offender may have been sexually assaulted as a child and that the offender would benefit from psychological counselling. The evidence persuaded the court that the offender's participation in these offences, may have been influenced by unresolved issues arising from childhood sexual abuse. However, the evidence did not satisfy the court that the offender was suffering from a mental health issue that prevented him from realizing the wrongfulness of his behaviour, that prevented him from choosing whether or not to participate and continue to participate in this behaviour, nor significantly lessened his moral responsibility for such behaviour.

Position of the Parties

[77] The Crown recommended the imposition of a sentence of one year imprisonment on the section 163.1 offence just as was imposed on Mr. Moraga for his involvement in the same offence. The Crown also recommended a sentence of one year imprisonment, consecutive, on the 172.2 offence. The Crown recommended that the Court decline to conduct a section 12 Charter analysis of the mandatory minimum sentences. The Crown recommended the imposition of the usual ancillary orders.

[78] Defence initially recommended that the Court conduct a section 12 Charter analysis of the mandatory minimum penalty applicable to each offence and find the mandatory minimum sentence for each of the offences ought not be imposed. Defence recommended a suspended sentence for each of the two offence with a lengthy period of probation requiring the offender to participate in a community based sexual offender treatment program and other reasonable conditions. On the final day of the sentence hearing the defence withdrew their motion regarding the validity of the mandatory minimum sentence provisions. Defence urged the court to impose a period of imprisonment of 12 months on each offence to be served consecutively.

Principles of Sentencing

[79] Sentencing is governed by the principles and objectives set out in the *Criminal Code of Canada.* Section 718 states:

> The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
>
> (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
>
> (b) to deter the offender and other persons from committing offences;
>
> (c) to separate offenders from society, where necessary;
>
> (d) to assist in rehabilitating offenders;
>
> (e) to provide reparations for harm done to victims or to the community; and
>
> (f) to promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims or to the community.

[80] Section 718.1 provides:

> A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.
>
> Sentencing is "a highly individualized exercise, tailored to the gravity of the offence, the blameworthiness of the offender, and the harm caused by the crime: R. v. M.(C.A.), [1996] 1 S.C.R. 500)

[81] Section 718.2 provides that:

> "(a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and without limiting the generality of the foregoing
>
> .....(iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,
>
> (III.1) evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation,
>
> shall be deemed to be aggravating circumstances;

> (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
>
> (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
>
> (d) the offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
>
> (e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

[82] In relation to offences of sexual abuse of a child by an adult the primary objective is denunciation and deterrence, ***R. v. M.(D.A.)***, [1999] N.S.J. No. 468 (NSSC).

[83] In ***R. v. W.(E.M.)***, [2011] NSCA 87 (NSCA) at page 13, quoting the sentencing judge; "Society reserves its strongest sense of revulsion for those who cross the legal and moral boundary into treating children as objects of sexual gratification."

[84] While denunciation and deterrence are the primary objectives of sentence for persons who commit a sexual offence against a child, other sentencing principles are not to be excluded. When sentencing a mentally ill offender who's illness significantly affected their offending behaviour, the objective of rehabilitation should hold greater weight. (***R. v. Bertrand-Marchard*** ,[2023] SCC 26.)

[85] In ***R. v. Friesen***, [2020] SCC 9, the Supreme Court of Canada clearly communicated that sentences for offences involving the sexual abuse of children by adults were, generally, too lenient and failed to account for the harm caused to children, families and society at large. Consequently, pre-Friesen sentencing decisions must be considered carefully from this perspective.

Sentencing jurisprudence in relation to the section 163.1 offence

[86] Mr. Moorhouse admitted that over a period of one month he advocated for Mr. Moraga to initiate and participate in sexual activity with persons under the age of 18 years. Mr. Moorhouse wanted to watch.

[87] ***R. v. Smith***, [2008] O.J. No. 4558 (ONSC), The accused was a professional actor who's career ended with the commission of child sex offences and he incurred significant stigmatization. He possessed 837 images and 147 videos of child pornography. He also created child pornography. He received a total sentence of 21 months imprisonment and probation.

[88] ***R. v. Levin***,[2015] ONCJ 290. Levin was 63 years old and had a long and distinguished career in the field of education. He possessed 79 files constituting child pornography. He visited chat rooms discussing incest and sexual exploitation of children. As a result of the convictions he lost his job and his professional

reputation. Before sentencing he entered treatment. He showed genuine remorse. He was assessed as a low risk to re-offend. For possessing and making child pornography he was sentenced to 18 months imprisonment.

[89] ***R. v. Schofield***, [2023] MBKB 127. Schofield pled guilty to possession of child pornography, making child pornography, and child luring. In the course of on-line communications with an adult woman he indicated that he was attracted to younger girls and mentioned his 10 year old niece. He sent her child pornography. He asked her to give her 11 year old daughter alcohol so that he could sexually assault her, without her remembering. He expressed a desire to have sexual intercourse with the adult woman while her child watched. He engaged in sexually explicit conversations on-line with 14-17 year olds. He possessed child pornography.

[90] The Court found that the offender had a cognitive deficit which impaired his judgment in committing the offences. The offender was found to have a severe alcohol use disorder. His intellectual functioning was “bordering on impaired”. As a result of the offences he lost his job. He stopped drinking and using drugs.

[91] He was sentenced to three years for possessing child pornography, three years for making child pornography, and five years, concurrent on child luring.

[92] ***R. v. Millan***,[2022] MBPC 1. The offender pleaded guilty to several offences including the making of child pornography. His explicit on-line communications constituted making child pornography. In those communications he fantasized about children. The evidence did not prove that the children were real. At para 35 the Court stated, "While I agree that those circumstances make the production of child pornography more egregious, there is still danger in these discussions."

[93] The Court rejected the argument that this amounted to harmless discussions between two adults.

[94] The offender was sentenced to a period of imprisonment of two years for the making of child pornography.

[95] In ***R. v. Ward***, [2019] NSPC 72, the sentencing Judge considered the constitutional validity of the mandatory minimum sentence of six months imprisonment for child luring where the crown proceeded summarily. Ward was 30 years old, with no criminal record. He initiated a communication with a 14 year old who was a stranger to him.

[96] The sentencing Judge reviewed eleven decisions with sentences ranging from a suspended sentence to an 18 month conditional sentence, to a 14 month sentence of imprisonment.

[97] The sentencing Judge reviewed another thirteen decisions which considered the constitutional validity of the mandatory minimum sentence for child luring.

[98] The Ward decision and all of the cases reviewed by the sentencing Judge were pre-Friesen cases.

[99] ***R. v. Hood***, [2018] NSCA 18. In Hood the Court of Appeal dealt with the mandatory minimum sentence for child luring in circumstances where the offender was found to have a mental illness that was active at the time of the offence and contributed to the offender's behaviour.

[100] In ***Bertrand-Marchand***, supra, at para 128, the Supreme Court stated:

128...Where a mental illness existed at the time of the offence and contributed to the offender's behaviour, sentencing judges should consider prioritizing rehabilitation and treatment through community intervention."

[101] These cases are distinguishable from the present case wherein this court was not satisfied that, at the time of the commission of the offences, the offender was

suffering from a mental health condition that significantly contributed to his criminal behaviour.

Compare/Contrast Sentence of the Co-accused, Moraga, June 8, 2023 (CRT5 14906).

[102] Section 718.2(c) necessitated consideration of the case of Carlos Moraga, the co-accused.

[103] Carlos Moraga, was charged separately in relation to his criminal conduct in this matter. Mr. Moraga pleaded guilty to sexual interference of his then girlfriend's 14 year old daughter, contrary to section 151 of the *Criminal Code* and making child pornography, contrary to section 163.1 of the *Criminal Code*. Mr. Moraga did not challenge the mandatory minimum penalty provisions. Counsel presented a joint recommendation to the Court for a sentence of 27 months imprisonment. On June 8, 2023, Justice Hunt of the NSSC accepted the joint recommendation and sentenced Mr. Moraga to a period of imprisonment of 12 months on the 163.1 offence and 15 months consecutive on the section 151 offence.

[104] Justice Hunt's summary of the facts on Mr. Moraga's sentencing included that Mr. Moraga's then girlfriend contacted the police after she "found

inappropriate messages on his cellular phone regarding her 14 year old daughter". The messages were between Mr. Moraga and Mr. Moorhouse, who used the online name of Tim Daniels. They discussed their girlfriends' daughters, aged 14 years old and 12 years old respectively. "Over the course of approximately one month the accused and the other individual exchanged 248 emails. The content of these emails included the accused asking for used panties of the 12 year old as well as expressing a desire to have sexual intercourse with both the 14 year old and the 12 year old. There were further discussions around making arrangements to give the accused access to the 12 year old so he could have sexual intercourse with her. These particular discussions also included suggestions of getting the 12 year old drunk and giving her drugs so she would not remember. There were also discussions of the accused wanting to watch the other individual have sex with the 12 year old. Many of the emails were very graphic and detailed in nature. The specific and descriptive nature of the emails amounted to making child pornography."

[105] Mr. Moraga, during the emails, said that on one occasion he grabbed the buttocks of his girlfriend's daughter. In Court he also admitted to touching her breast on a separate occasion, while in their home. For that conduct he pled guilty to sexual interference.

[106] Mr. Moraga was 38 years of age at the time of the offences. His father died when he was young and he was raised by his mother in a home with no reported abuse or neglect. Mr. Moraga completed high school and through community college earned a red seal mechanic certification. He had a history of productive employment in his field and was considered a reliable and valued employee.

[107] There was a period in his past when he abused alcohol and he had a prior conviction for impaired operation of a motor vehicle. He underwent counselling for substance abuse.

[108] Prior to the offences Moraga had been in a relationship with the victim's mother for 10 years. The relationship ended as a result of the offences. At the time of sentencing Mr. Moraga had been in a new relationship for 18 months.

[109] Mr. Moraga self referred himself to a psychological counselling program which he reported to have been of benefit to him.

[110] Moraga expressed regret for his actions saying that "he got caught up in the events". He indicated that he was not now the person who engaged in these activities.

[111] Justice Hunt stated, at paragraph 16, that despite having had a number of advantages in his life Mr. Moraga “seriously violated societal norms and the criminal law in the commission of these offences.”

[112] Mr. Moraga pleaded guilty to making child pornography and sexual interference. Mr. Moorhouse pleaded guilty to making child pornography and making a plan or arrangement to commit an offence against a child.

[113] The offence to which both men pleaded guilty was that of making of child pornography. As indicated by Justice Hunt in the Moraga decision the substance of this offence was the nature and content of the email messages exchanged by the two offenders. These communications continued for about a month. They stopped only because they were discovered.

[114] Both men fully participated in these email communications. Both men claimed that their behaviour was influenced by the consumption of alcohol at the time. Both were living and working full time during the period in question.

[115] Mr. Moraga discussed wanting to have sexual intercourse with the 14 year old daughter of his girlfriend and the 12 year old described by Mr. Moorhouse. Mr. Moorhouse expressed a desire to watch that occur. This difference between physically doing the sexual assault and being present to watch and encourage did

not persuade the court that there was a significant difference in the culpability of the two men.

[116] Mr. Moorhouse claimed that his unresolved issues arising from childhood sexual abuse influenced his behaviour. The court accepted that Mr. Moorhouse may have been sexually abused as a child and may have unresolved issues as a result thereof, but it was not proven to have been a significant factor in relation to the offender's involvement in the offences. Mr. Moraga began psychological counselling after being charged and before his sentencing.

[117] Both men lost their employment and their relationship with their then partner as a result of the offences, Mr. Moraga's relationship having been of ten years duration. Both have now commenced a new relationship which in each case was considered a positive, supportive one. Mr. Moraga had found new employment. Mr. Moorhouse has not been employed since the offences. Mr. Moorhouse's position was much higher profile and has resulted in far more media attention and embarrassment.

[118] Mr. Moorhouse's forensic psychological risk assessment indicated he was a low average/average risk to re-offend sexually. For reasons previously expressed

this opinion was given limited weight. Mr. Moraga did not have a psychological assessment done.

[119] Mr. Moorhouse claimed to suffer from sexual dysfunction. If that is so, there was insufficient evidence to establish that it was relevant to his commission of these offences.

[120] As part of an overall sentence of 27 months imprisonment Mr. Moraga was sentenced to a period of 12 months imprisonment for his involvement in the offence of making child pornography. Based upon the case law reviewed by this Court for offences of making child pornography I find the sentence imposed on Mr. Moraga to be in the lower end of the sentence range.

[121] Mr. Moraga's sentence of 12 months imprisonment on the section 163.1 offence was part of a joint submission and took into account the principle of totality. There was a joint recommendation in this case for the same sentence for Mr. Moorhouse.

Decision on section 163.1 offence

[122] In relation to the offence of making child pornography, I find that Mr. Moorhouse was an equal participant with Mr. Moraga and he, like Mr. Moraga, was fully responsible for his behaviour. Mr. Moorhouse was wilfully blind to there

being a real child living with Mr. Moraga. While this court has identified differences between the two men, none of the difference warranted a different sentence being imposed on Mr. Moorhouse than that which was imposed upon Mr. Moraga. for the section 163.1 offence.

Jurisprudence Regarding Sentencing For A Section 172.2 Offence

[123] Mr. Moorhouse pleaded guilty to a second offence of creating a plan to commit a sexual offence against a person under the age of 16 years, contrary to section 172.2 of the *Criminal Code*. The plan was discussed through online communications over an extended period of approximately one month. They discussed committing a sexual assault of Mr. Moraga's girlfriend's 14 year old daughter. The more detailed discussions involved a plan wherein the offender and Mr. Moraga would kidnap, drug, and rape the 12 year old daughter of the offender's girlfriend. There was no such 12 year old child. Mr. Moorhouse knew, or was wilfully blind to the fact that Mr. Moraga was talking about a real 14 year old girl and that Mr. Moraga believed that they were talking about a real 12 year old girl.

[124] Section 172.2(2) states:

> (2) Every person who commits an offence under subsection (1)

> (a) is guilty of an indictable offence and is liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year; or

[125] In ***R. v. Parks***,[2019] ONCJ 478. The offender was found guilty of engaging in numerous, detailed emails with the mother of a child regarding the commission of an offence in relation to the child. The Court determined that a sentence of 18 months imprisonment was fit and, therefore, declined to conduct a section 12 Charter analysis regarding the mandatory minimum sentence. This decision was pre-Friesen.

[126] ***R. v. Duplessis***,[2018] ONCJ 912, Duplessis was found guilty, on summary conviction, of exchanging emails with an undercover police officer. The communications were sexual in nature and related to an offence involving a young child. It appears the child was not a real person. The communications went on for one week. The Court determined that a sentence was 15 months imprisonment was fit and, therefore, declined to engage in a section 12 Charter analysis. This decision was pre-Friesen.

[127] ***R. v. Butera***,[2021] ONCJ 155. Butera engaged in detailed, online conversations with an adult woman regarding having sex with her child. The offender did not proceed with the plan to meet her to pursue the plan. The communications came to light when he was arrested and charged with possession

of child pornography for material found on his computer. He had no criminal record and pleaded guilty. He was sentenced to 15 months imprisonment for the possession of child porn and 30 months imprisonment on the 172.2 offence. The Court found that the limited case law on the 172.2 offence reflected a range of one to two years. This decision was post Friesen. The court imposed a sentence on the 172.2 offence that was beyond the range reflected by earlier decisions.

[128] ***R.v. Wheeler***,[2017] ONSC (canlii) 86656. Wheeler engaged in online communications with an undercover police officer regarding the commission of a sexual offence on a female under 16 years of age. A forensic psychologist expressed an opinion that he did not meet the criteria for pedophilic disorder and was a low risk to re-offend. He did not abuse alcohol or drugs. He had no criminal record. He lived a pro-social life style. The Court found that a sentence of 9-12 months imprisonment was appropriate and, therefore, was not grossly disproportionate to the mandatory minimum sentence. This decision preceded ***R. v. Friesen***.

[129] Defence submitted a significant number of case decisions involving the imposition of a sentence for child luring. The factual circumstances for the luring offences have similarities to the circumstances for an offence contrary to section 172.2. The Court reviewed each of these decisions in detail. The child luring

decisions cited by the defence, with few exceptions, pre-dated the Supreme Court of Canada decision in ***R. v. Friesen***, *Supra*.

Compare/Contrast with Co-Accused Moraga

[130] Mr. Moraga, unlike Mr. Moorhouse, pleaded guilty to a sexual interference of the 14 year old daughter of his girlfriend. There were two incidents of sexual interference both of which occurred in the home. The offender was in a position of trust and authority in relation to the child, which he violated. Mr. Moraga had been in a long-term relationship with the child's mother and violated her trust in committing the offence.

[131] For the commission of the charge of sexual interference with the 14 year old daughter of his then girlfriend Mr. Moraga was sentenced to 15 months consecutive. In the view of this Court, given the nature of the offence, that the incidents occurred in the home, that the accused violated a position of trust and authority, and the harm done to the victim and her mother, the sentence was at the low end of the sentence range for such an offence.

[132] Mr. Moorhouse did not commit an offence of sexual assault or sexual interference of a child.

[133] In relation to the section 172.2 offence, Mr. Moorhouse misled Mr. Moraga about the existence of a 12 year old girl. Mr. Moorhouse expressed a desire for Mr. Moraga to have sexual intercourse with the 12 year old girl while he watched. Both men used an online name other than their own. Dr. Yates characterized Mr. Moorhouse's communication with Mr. Moraga as "coaching". This court concluded that the conversation was mainly led by Mr. Moorhouse. Mr. Moorhouse was sexually enticing Moraga in relation to the 12 year old and encouraging/supporting his misconduct in relation to the 14 year old girl.

[134] By the time the activities of the two men were discovered some specifics of the kidnapping plan had been discussed, but the plan had not progressed to details such as date, time and place. As there was not a 12 year old girl living with Mr. Moorhouse the plan, as discussed, could not have proceeded and resulted in harm to that child. It is impossible for the Court to know what would have happened next, if the communications between the two men had not been discovered. The Court cannot speculate about what might have happened if the discussions had continued. The Court must impose an appropriate sentence for what the offender is proven to have done.

[135] The law does not require proof that the offender intended to follow through with the plan, (***R. v. McSween*** (2020), 388 CCC (3d) 153 (Ont.C.A.)).

[136] The planning engaged in by the offender and Mr. Moraga involved extreme abuse of a 12 year old child. While the 12 year old child was imaginary the other was real. The offender had been told by Mr. Moraga that he had already sexually assaulted the 14 year old child. These discussions created a real and significant risk of harm to a child.

[137] Engaging in discussions to commit a sexual offence against a child is an egregious offence. This type of behaviour creates a significant risk of harm to a child. When such discussions are regarding an imaginary child, while less egregious, they nevertheless, create a risk of harm to a child, (See ***R. v. Millan***, supra).

[138] Defence urged the court to place significant weight on the objective of rehabilitation. This argument was premised, in part, on the assertion that, at the time of the offences, the offender was highly intoxicated, and that he was actively suffering from a mental health condition that influenced his actions. Those assertions were not proven on a balance of probabilities by the evidence accepted by the Court.

[139] This court has considered the unusual circumstances of the offender engaging in discussions about a plan to seriously sexually abuse a young girl who

did not exist with a man who believed the girl did exist. This court concluded that the offender would benefit from participation in a sexual offender treatment program and psychological counselling.

Decision on section 172.2 offence

[140] Based upon the preceding case law review I find that the sentence range for the commission of an offence contrary to section 172.2 is from one year to three years, depending on the aggravating and mitigating factors.

[141] Section 718.3(7) provides that the sentence for the offences before this court must be served consecutively.

[142] This Court has concluded that a fit and proportionate sentence for the offender contrary to section 172.2 offence would be a term of imprisonment of 12 months. Such a sentence reflects the circumstances of the offence and the offender. It takes into consideration the consequences suffered by the accused as a result of his arrest and charges and it balances the sentencing objectives of denunciation, deterrence and rehabilitation, placing primary emphasis on denunciation and deterrence.

[143] This Court finds that the imposition of the mandatory minimum sentence of 12 months imprisonment, consecutive, on the section 172.2 offence would not be

grossly disproportionate to the sentence that is fit and proportionate on the facts of this case. Further, the totality of the sentence for this offender, of 24 months imprisonment, would not be too long or harsh. The sentence for the 163.1 offence would be the same as imposed on the co-accused for the same offence, as the seriousness of their involvement, their backgrounds and personal circumstances did not justify a different sentence. The overall sentence for this offender would be slightly less than that of the co-accused. This is justified, in part, because the co-accused, Mr. Moraga, unlike Mr. Moorhouse, engaged in a sexual interference of a child in relation to whom he was in a position of trust and authority.

Conclusion

[144] This court sentences the offender to a period of imprisonment of 12 months on the 163.1 count and to a period of imprisonment of 12 months consecutive on the section 172.2 offence.

[145] In terms of ancillary orders:

- The offender is ordered to comply with the conditions of a SOIRA order for a term of 20 years;
- The offender is to provide a DNA sample pursuant to section 487.051 of the Criminal Code;
- The Victim Fine Surcharge is ordered waived;
- The offender is to comply with a section 161 order for a term of fifteen years; and

- All offence related property is forfeited to his Majesty the King.

Marc Chisholm, JPC