

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HIS MAJESTY THE KING

- and -

JOHN HENRY DILLON

REASONS FOR JUDGMENT

of the

HONOURABLE JUDGE ROBERT GORIN

Restriction on Publication

This decision is subject to a ban on publication pursuant to s. 486.4 CC with respect to the name of the victim as well as information that may identify this person. Some details may have been edited to ensure that the victim may not be identified.

Heard at: Yellowknife, Northwest Territories

Date of Decision: February 14, 2025

Counsel for the Crown: Morgan Fane

Counsel for the Accused: Jessi Casebeer

[Ss. 12 & 1 *Canadian Charter of Rights and Freedoms*;
s. 52 *Constitution Act, 1982*; s. 163.1(2) *Criminal Code*]

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INTRODUCTION

[1] John Dillon appears before the court to be sentenced for making child pornography, to wit photographs of a sexual organ, of a person under the age of eighteen years, contrary to s. 163.1(2) of the Criminal Code, an indictable offence that carries a mandatory minimum punishment (“MMP”) of a one-year term of imprisonment and a maximum punishment of 14 years imprisonment.

[2] Mr. Dillon asks that I find that the applicable MMP violates s. 12 of the Charter, which prohibits treatments and punishments by the state that are cruel and unusual. He asks that I find it to be of no force or effect in the present case and that I impose a conditional sentence of imprisonment of 18 to 24 months duration.

[3] The Crown takes the position that a term of imprisonment of two years less a day to be served in a prison rather than in the community – along with certain ancillary orders – is appropriate. It submits that that being the case, the question of the constitutionality of the MMP set out in s. 163.1(2) is moot and that in any

event, the MMP is not cruel and unusual. The Crown concedes that if the impugned MMP violates s. 12 of the Charter it is not saved by s. 1.

[4] For the reasons that follow, I find that;

- the issue of the applicable MMP's constitutionality is not moot in the present case;
- that the MMP is cruel and unusual and violates s. 7 of the Charter
- the MMP is not saved by s. 1; and
- a conditional sentence order of a duration of 2 years less a day is appropriate followed by 2 years of probation with certain other ancillary orders, to which I will later refer.

ANALYSIS

Facts

[5] Along with the present offence, Mr. Dillon was initially charged with other offences arising from the same circumstances, i.e., sexual assault and voyeurism by electronic means contrary to ss. 271 and 162(5) of the Code respectively. After his conviction on the present charge was entered following his guilty plea, those charges were withdrawn by the Crown. However, as pointed out by the Crown the offences those counts alleged were made out by the facts admitted by the accused. I do not criticize the Crown for withdrawing them, since the ultimate sentence would not likely have been affected had the additional convictions been entered. Nevertheless, the fact that those offences were made out is important when assessing the seriousness of the facts surrounding the offence on which I am imposing sentence.

[6] It is agreed by the Crown and Mr. Dillon that during the night February 17th, 2024, in the town of Inuvik, the victim, T.M. was staying at Mr. Dillon's home. She woke up to Mr. Dillon taking photographs of her naked body under the covers of the bed they were sleeping in and masturbating. She pretended to be asleep and later got up and left the room. Her pants were on prior to falling asleep. There had been no prior sexual activity between the two on that date. It appears the two were platonic friends.

[7] T.M. reported the incident to the Inuvik RCMP on February 24th, 2024. On March 3rd, the RCMP arrested Mr. Dillon outside of the place where he was employed. His cellular phone was seized incidentally to his arrest and later searched pursuant to a warrant. As a result of data extraction that the RCMP

forensic laboratory performed on the phone, two pictures were retrieved from February 16th. One photo depicted a hand touching between a nude person's legs. The other image was of a nude female where the photo angle was taken from behind. The pants in the photo of the nude female were the same pants T.M. was wearing in other photos of her that were on the phone. Five photos were observed that depicted a nude female with her legs spread in some of the photos, showing the female's vagina. All the photos were believed to be of the same female, T.M.

[8] On May 30th, 2024, Mr. Dillon was arrested for sexual assault and voyeurism. He was later charged with the additional offence of making child pornography. A warned statement was taken from Mr. Dillon after he spoke to a lawyer. He admitted to taking all of the photos while T.M. was asleep and confirmed that the woman in the photos was T.M.

[9] At the time of the offence, T.M. was 17 years old and Mr. Dillon was 19.

S. 12 of the Canadian Charter of Rights and Freedoms and s. 163.1 of the Criminal Code

[10] S. 12 of the Charter states:

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

[11] The relevant portions of s. 163.1 are:

163.1 (1) In this section, *child pornography* means

(a) a photographic, film, video or other visual representation, whether or not it was made by electronic or mechanical means,

(i) that shows a person who is or is depicted as being under the age of eighteen years and is engaged in or is depicted as engaged in explicit sexual activity, or
(ii) the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of eighteen years;

(b) any written material, visual representation or audio recording that advocates or counsels sexual activity with a person under the age of eighteen years that would be an offence under this Act;

(c) any written material whose dominant characteristic is the description, for a sexual purpose, of sexual activity with a person

under the age of eighteen years that would be an offence under this Act; or

(d) any audio recording that has as its dominant characteristic the description, presentation or representation, for a sexual purpose, of sexual activity with a person under the age of eighteen years that would be an offence under this Act.

(2) Every person who *makes*, prints, publishes or possesses for the purpose of publication any child pornography is guilty of an indictable offence and 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.*

[. . .]

[Emphasis Added.]

Mootness

[12] A court, in particular a statutory court, *may* decline to determine the constitutionality of a statute, where the issue in the case before the court is moot. Obviously, this would include a determination of whether an MMP violates s. 12 of the Charter. In that regard, McLachlan C.J. on behalf of the majority in *Lloyd* stated the following:

[18] To be sure, it does not follow that a provincial court judge is obligated to consider the constitutionality of a mandatory minimum provision where it can have no impact on the sentence in the case at issue. Judicial economy dictates that judges should not squander time and resources on matters they need not decide. But a formalistic approach should be avoided. Thus, once the judge in this case determined that the mandatory minimum did not materially exceed the bottom of the sentencing range applicable to Mr. Lloyd, he could have declined to consider its constitutionality. To put it in legal terms, the doctrine of mootness should be flexibly applied. If an issue arises as to the validity of the law, the provincial court judge has the power to determine it as part of the decision-making process in the case. To compel provincial court judges to conduct an analysis of whether the law could have any impact on an offender's sentence, as a condition precedent to considering the law's constitutional validity, would place artificial constraints on the trial and decision-making process.

[13] There are a number of reasons why the question of the constitutionality of the MMP set out in s. 163.1(2) is not moot in the present case. The first reason is because the MMP would eliminate the possibility of a conditional sentence. S. 742.1 of the Code sets out the preconditions for the availability of a conditional sentence. The relevant portions of the section state:

742.1 If a person is convicted of an offence and the court imposes a sentence of imprisonment of less than two years, the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the conditions imposed under section 742.3, if

(a) the court is satisfied that the service of the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2;

(b) *the offence is not an offence punishable by a minimum term of imprisonment; [. . .]*

[Emphasis Added.]

[14] Mr. Dillon submits that a conditional sentence would be appropriate considering his age, the complete absence of a criminal record, and his Indigenous background. As stated, the Crown takes the position that the seriousness of the offence requires a conventional term of imprisonment of two years less a day. It also submits that anything less than conventional imprisonment would amount to an unfit sentence. For reasons that I will later provide, I am of the view that a conditional sentence is, in fact, appropriate. In my view, for this reason alone, the issue of the MMP's constitutionality is not moot, since without the MMP a conditional sentence is available

[15] Certainly, there is jurisprudence to the effect that restrictions on the availability of conditional sentences – for example the former unavailability of conditional sentences for offences with a maximum penalty of 14 years – does not violate s. 12 of the Charter for being cruel and unusual punishment: *R. v. Neary*, 2016 SKQB 218 (CanLII), per R.S. Smith. J. Nor are they otherwise unconstitutional: *R. v. Sharma*, 2022 SCC 39 (CanLII), paras 3 & 4. However, this does not mean that the unavailability of a conditional sentence is something that the court cannot consider when determining whether the issue of an MMP's constitutionality is moot. In the present case, the constitutionality of the MMP has a direct bearing on the type of sentence that this court may impose, i.e., a conventional or conditional term of imprisonment. While the denunciatory and deterrent effects of a conditional sentence can be similar to conventional imprisonment, the ultimate impact of each on an accused, especially a young first-time offender, can be considerably different.

[16] As well, the existence of an MMP can be an important factor in determining an appropriate sentence even in cases where without the MMP, a sentence equal to or greater than the MMP would be imposed. In *R. v. Lyta*, 2013 NUCA 10, the Nunavut Court of Appeal stated:

[16] [. . .] we reject the sentencing judge's approach to statutory minimums in one respect. His reasons state that a sentence higher than the statutory minimum should be imposed only if a consideration of the sentencing principles suggests a higher sentence would be necessary. We take this to mean that an appropriate sentence can be derived from general sentencing principles, without considering that Parliament has mandated a minimum sentence. With respect, this approach seems to undervalue the existence of the statutory minimum and might be taken to mean that a higher than minimum sentence would be imposed only on an unusually bad offender committing an unusually bad offence. We do not consider that to have been Parliament's intention.

[17] Rather, the existence of a statutory minimum is a factor that must be put into the mix when applying the general sentencing provisions of the Criminal Code to a particular offender. It clearly narrows the available range of sentences and, over time, will no doubt lead to inflating sentences for such offences: *R v Guha*, 2012 BCCA 423 at para 33, 328 BCAC 303.

Therefore, the existence of an MMP must be taken into account when considering sentencing principles in general - in particular deterrence and denunciation - and may well result in more severe sentences where the statutory floor is exceeded, than those that would be appropriate in the absence of an MMP.

[17] In my view, the converse must also be true; i.e., the non-existence of an MMP should result in less severe sentences being appropriate where a statutory floor that would have been present by virtue of an MMP is equalled or exceeded; see also *R. v. Semple*, 2021 NWTTC 06, paras. 6 – 10; and *R. v. R.A.* 2019 NWTTC 10, paras 36 – 42. Certainly, crimes that require punishment greatly in excess of the MMP would not require the court to consider its constitutionality. However, that is not the case in these proceedings. While the Crown is submitting that a sentence of two years less a day of conventional imprisonment – just under twice the MMP – is appropriate, that position is still in the territorial range of prison terms. Moreover, were I to find that a term of conventional imprisonment was called for, I would impose a term considerably less than that requested by the Crown. Under these circumstances, I am unable to find that the question of the MMP's constitutionality is moot in the present instance.

Is the Applicable MMP Cruel and Unusual?

[18] In *R. v. Smith*, [1987] 1 S.C.R. 1045, the Supreme Court of Canada set out the following principles to be considered when determining the applicability of s. 12 of the Charter:

- a. In order to constitute cruel and unusual punishment an MMP must be so excessive as to outrage standards of decency;
- b. S. 12 requires that the effect of an MMP must not be grossly disproportionate to what would be appropriate;
- c. The fact that an MMP may be excessive is not in and of itself to render it cruel and unusual; and
- d. The determination of whether the MMP is necessary to achieve a valid penal purpose, where it is founded on recognized sentencing principles and whether there exist valid alternatives to the punishment imposed are all guidelines which without being determinative in themselves help to assess whether the punishment is grossly disproportionate.

[19] In the case *R. v. Nur*, 2015 SCJ No. 15, the Supreme Court held that when dealing with the question of whether an MMP violates s. 12, the court should follow a two-step process. First, the court should determine whether the applicable MMP would impose a grossly disproportionate sentence in the case before the court. If this is not the case, the court should then determine whether the MMP would result in grossly disproportionate sentences in the case of reasonably foreseeable hypotheticals.

[20] As noted at the outset, I do not find that the MMP of one year of imprisonment would be cruel and unusual in the case before the court. I say that taking into account Mr. Dillon's young age, guilty plea, lack of a criminal record, and Gladue factors. If, for the sake of analysis I were to assume that there was no MMP and a conditional sentence were unavailable, the aggravating factors and seriousness of the offence he committed are such that, in my opinion a reasonable sentence would include a jail term sufficiently close to the MMP, that I cannot say that the MMP would be grossly disproportionate in the matter before me. To be grossly disproportionate, the punishment must be more than "merely excessive" or disproportionate. The punishment must be such that it would "outrage our society's sense of decency" such that Canadians would find it "abhorrent or intolerable": *Smith* (supra) at p. 1072; *R. v. Lloyd* [2016 1 SCR 130 at para 24; *R. v. Boudreault*, 2018 SCC 58, [2018] 3 S.C.R. 599, at para 45; *R. v. Bissonnette*, 2022 SCC 23, at paras 61 & 70; *R. v. Hills*, 2023 SCC 2, at paras 109-110. That

being so, even if I were to find that a term of imprisonment less than the MMP would be appropriate, for example one of 9 months, I would not be able to find that the 12-month MMP is cruel and unusual in the case of Mr. Dillon.

[21] I must therefore consider whether the MMP would violate s. 12 in the case of reasonable hypotheticals. These reasonable hypotheticals cannot be remote or far-fetched and must be limited to situations that are likely to arise in the general day-to-day application of the law. At paragraphs 61 and 62, the court in *Nur* (supra) noted:

[61] To be sure, the language of “reasonable hypotheticals” in the context of mandatory minimum sentences and the exaggerated debate that has surrounded the term has led some to fear that the potential for finding a law inconsistent with the *Charter* is limited only by the bounds of a particular judge’s imagination. This fear is misplaced. Determining the reasonable reach of a law is essentially a question of statutory interpretation. At bottom, the court is simply asking: What is the reach of the law? What kind of conduct may the law reasonably be expected to catch? What is the law’s reasonably foreseeable impact? Courts have always asked these questions in construing the scope of offences and in determining their constitutionality.

[62] The inquiry into cases that the mandatory minimum provision may reasonably be expected to capture must be grounded in judicial experience and common sense. The judge may wish to start with cases that have actually arisen (I will address the usefulness of reported cases later), and make reasonable inferences from those cases to deduce what other cases are reasonably foreseeable. Fanciful or remote situations must be excluded: *Goltz*, at p. 506. To repeat, the exercise must be grounded in experience and common sense. *Laws should not be set aside on the basis of mere speculation.*

[Emphasis Added.]

[22] However, it is important to note that at paragraph 68, the court also stated:

[68] The reasonable foreseeability test is not confined to situations that are likely to arise in the general day-to-day application of the law. Rather, it asks what situations may reasonably arise. It targets circumstances that are foreseeably captured by the minimum conduct caught by the offence. Only situations that are “remote” or “far-fetched” are excluded [. . .]

[23] More recently in *R. v. Hills*, 2023 SCC 2, the Supreme Court added greater clarity to the approach to be taken when dealing with reasonable hypotheticals. At paragraphs 76 and 77, Martin J. on behalf of the majority stated:

[76] A reasonable hypothetical scenario needs to be constructed with care. While it may be tempting to allow the word “hypothetical” to overwhelm, it is the *reasonableness* of the scenario that must be underscored (*Nur*, at para. 57). While earlier case law did not often explain or explore what went into the construction of a reasonable hypothetical, or tended to consider hypotheticals more narrowly and at a higher level of generality, the more recent analytical approach in *Nur*, *Lloyd*, and *Boudreault* is broader and permits more detailed hypotheticals.

[77] The characteristics of a reasonable hypothetical include the following:

- (i) The hypothetical must be reasonably foreseeable;
- (ii) Reported cases may be considered in the analysis;
- (iii) The hypothetical must be reasonable in view of the range of conduct in the offence in question;
- (iv) Personal characteristics may be considered as long as they are not tailored to create remote or far-fetched examples; and
- (v) Reasonable hypotheticals are best tested through the adversarial process.

[24] In dealing with the personal characteristics of a hypothetical accused person, Martin J. said the following:

[86] This Court should not depart from the methodology and approach affirmed in *Nur*, *Lloyd*, and *Boudreault*. As a rule, characteristics that are reasonably foreseeable for offenders in Canadian courtrooms, like age, poverty, race, Indigeneity, mental health issues and addiction, should not be excluded from consideration. Proportionality, a mandatory principle of sentencing under the *Criminal Code*, requires a consideration of the gravity of the offence and the offender’s particular circumstances, which include their personal characteristics (*Nasogaluak*, at para. 42; *Ipeelee*, at para. 38). The assessment of a mandatory minimum’s constitutionality should also be similarly rooted in the realities of people’s lives.

[87] Given mandatory sentencing provisions and modern realities, there is no principled reason why race and Indigeneity may not also be relevant legal personal characteristics for reasonable hypothetical scenarios. Section 718.2 (e) of the *Criminal Code* is mandatory and was enacted to address the overincarceration of Indigenous people and their disproportionate representation in Canada’s criminal justice system. The unfortunate truth is that Indigeneity is an offender characteristic that is more than “theoretically possible”. Indigenous offenders are not only reasonably foreseeable in the sense contemplated by *Nur*, the statistics over the years demonstrate that Indigenous people are vastly overrepresented

before the courts. The same is true for Black and other racialized offenders who are overrepresented in the criminal justice system and whose experiences of historic and systemic disadvantage may reduce their moral blameworthiness (*Ipeelee*, at para. 73; *Anderson*, at para. 146; *Morris*, at para. 1.

[. . .]

[90] Including immutable personal characteristics in hypothetical scenarios strengthens the analytical device by helping courts explore the reach of the mandatory penalty. Individuals with reduced culpability may find themselves subject to mandatory minimum penalties. It is possible Parliament set penalties with a certain offender in mind without fulsome consideration of how the mandatory penalty may apply to offenders with reduced moral blameworthiness due to their disadvantaged circumstances, including marginalization or systemic discrimination.

[91] There is an important limit on the use of personal characteristics: the scenarios should not involve the most “sympathetic” offender but rather present a *reasonably foreseeable offender* (*Nur*, at para. 75). The hypothetical cannot be remote, far-fetched or utterly unrealistic (para. 76). A court should be wary of detailed scenarios that stack mitigating factors combined with an interpretation that stretches and strains the technical meaning of the offence, like certain of Mr. Zwozdesky’s hypotheticals in the companion appeal to this case (*Hilbach*, at para. 89).

[92] It makes little sense to evaluate scenarios that, based on common sense and judicial experience, appear outlandish. As Canadian courtrooms illustrate, on occasion truth may be stranger than fiction. That should not, however, become an invitation to consider every “sympathetic” case on the theory that it *could* or *might* happen one day. There may be the rare case in which all of the factors are mitigating and operate to reduce the moral blameworthiness of the offender but judicial experience points to the need to ensure the scenario as a whole is reasonably foreseeable. As McLachlin C.J. wrote in *Nur*, “[l]aws should not be set aside on the basis of mere speculation” (para. 62).

[25] An important factor which may render an MMP more vulnerable to a challenge under s. 12 of the Charter, is the scope of the prohibited activity to which it would apply. As stated by McLachlin J. in *Nur* (supra):

[82] Section 95(1) casts its net over a wide range of potential conduct. Most cases within the range may well merit a sentence of three years or more, but conduct at the far end of the range may not. At one end of the range, as Doherty J.A. observed, “stands the outlaw who carries a loaded prohibited or restricted firearm in public places as a tool of his or her criminal trade. . . . [T]his person is engaged in truly criminal conduct and poses a real and immediate danger to the public”: para. 51. At this end of the range — indeed for the vast majority of

offences — a three-year sentence may be appropriate. A little further along the spectrum stands the person whose conduct is less serious and poses less danger; for these offenders three years' imprisonment may be disproportionate, but not grossly so. At the far end of the range, stands the licensed and responsible gun owner who stores his unloaded firearm safely with ammunition nearby, but makes a mistake as to where it can be stored. For this offender, a three-year sentence is grossly disproportionate to the sentence the conduct would otherwise merit under the sentencing provisions of the *Criminal Code* .

[26] These comments were echoed in *Lloyd* (supra), where the former Chief Justice noted:

[3] As this Court's decision in *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773, illustrates, the reality is that mandatory minimum sentences for offences that can be committed in many ways and under many different circumstances by a wide range of people are constitutionally vulnerable because they will almost inevitably catch situations where the prescribed mandatory minimum would require an unconstitutional sentence. One solution is for such laws to narrow their reach, so that they catch only conduct that merits the mandatory minimum sentence.

[27] The offence for which Mr. Dillon is being sentenced, making child pornography contrary to s. 163.1, can be committed in many different ways with widely diverging levels of seriousness. The existing jurisprudence contains many examples of reasonable hypotheticals where courts have found the MMP set out in s. 163.1(2) to be grossly disproportionate. In fact, there have been no decisions from any of the courts of appeal that have found that the MMP does not violate s. 12. In *R. v. Joseph*, 2020 ONCA 733, the Ontario Court of Appeal stated:

[159] In *Lloyd*, at paras. 26-27, McLachlin C.J.C. commented in the context of a drug trafficking offence that carried a one-year minimum sentence:

On its face, a one-year sentence for an offender with a prior conviction for a drug offence who is convicted for trafficking or possession for the purpose of trafficking in a Schedule I drug, such as cocaine, heroin or methamphetamine, may not seem excessive. . . .

The problem with the mandatory minimum sentence provision in this case is that it "casts its net over a wide range of potential conduct": *Nur*, at para. 82. As a result, it catches not only the serious drug trafficking that is its proper aim, but conduct that is much less blameworthy. This renders it constitutionally vulnerable.

[160] The same is true of the minimum sentence provided for in s. 163.1(2). It catches "making" everything from the kind of shocking photographic images or

videos of active sexual violation that the trial judge appears to have been alluding to in this case, to images of teenagers that feature their sexual organs or anal regions clad in underwear, even when such images are taken for private consumption: see *Criminal Code*, s. 163.1(1). It also captures a broad range of moral blameworthiness, applying to those who capture sexualized images of others knowing that they are minors, as well as those who honestly believe that their subject is an adult but fail to take reasonable steps to ascertain whether their belief is true.

[161] It is again unnecessary to determine whether, in the circumstances, a one-year mandatory minimum sentence of imprisonment would be grossly disproportionate had Mr. Joseph only been convicted of making child pornography contrary to s. 163.1(2), for the purpose of advertising RD's sexual services with a view to his own profit. Reasonable hypotheticals demonstrate the point.

[162] Once again, the Crown takes issue with the hypothetical that the trial judge relied on in this case, an 18-year-old "photographing young women sunbathing on a beach wearing thong bikinis without determining whether they are eighteen years of age or under" [para. 80]. The Crown says that this is not an offence because there is no indication that the "dominant characteristic of the photographs . . . was the depiction, for a sexual purpose, of a sexual organ or the anal region". That, of course, depends on the nature of the photograph. Even taking a photograph with a zoom lens in a fashion that would remove any such equivocation would be unlikely to warrant anything close to a year of imprisonment.

[163] A variation of the reasonable hypotheticals used by this court in *R. v. John* (2018), 142 O.R. (3d) 670, [2018] O.J. No. 4495, 2018 ONCA 702 (C.A.), at para. 29, when striking down the six-month minimum sentence for possessing child pornography, provided for in s. 163.1(4) (a) of the *Criminal Code*, provides another example. An 18-year-old who receives a "sext" (a sexually suggestive digital image) on Snapchat (a phone application that displays images only briefly) from his 17-year-old girlfriend, and who, for his own private use, screen-captures the image after promising his girlfriend that he would not do so, has made child pornography. He does not qualify for the private use exception recognized in *R. v. Sharpe*, [2001] 1 S.C.R. 45, [2001] S.C.J. No. 3, 2001 SCC 2, at para. 116, since he does not have the consent of his girlfriend to "make" a screen-capture image. His conduct is offensive, but a year in prison for this offence is not only excessive, it would outrage society's standards of decency.

[164] One final reasonable hypothetical. Section 163.1 catches visual representations, whether or not created by mechanical means, that depict the sexual organs of a person under 18 years of age, for a sexual purpose, or that depict such persons engaged in explicit sexual activity. This includes cartoon or anime images, which are not uncommonly found in child pornography collections: see, for example, *R. v. Butler-Antoine*, [2020] O.J. No. 2504, 2020 ONCA 354 (C.A.); *R. v. Poxleitner*, [2020] A.J. No. 395, 2020 ABCA 136, 389 C.C.C. (3d)

116 (C.A.), leave to appeal to S.C.C. requested, 39333; *R. v. D. (B.)*, [2008] O.J. No. 6040 (C.J.). There are sound policy reasons for including such depictions in the definition of child pornography, as Ratushny J. explained in *R. v. Mahannah*, [2013] O.J. No. 6330 (S.C.J.), at paras. 11-15, a case where an accused with no prior record possessed only cartoon and anime child pornography, under the mistaken belief it was legal. Mr. Mahannah, who received a time-served sentence with 45 days credit for pre-sentence custody, did not make child pornography, but this line of cases leads to yet another reasonable hypothetical. Pursuant to s. 163.1(2), a trial judge would be obliged to sentence to a year in jail a person who draws for their own purposes even one lewd cartoon or anime style doodle that meets the definition of child pornography, no matter their personal circumstances or their level of moral fault.

[165] The mandatory minimum sentence in s. 163.1(2) contravenes s. 12 of the *Charter* by requiring cruel and unusual punishment in reasonable hypothetical cases. Once again, the Crown has chosen, with good reason, not to attempt to demonstrate that, if s. 163.1(2) requires grossly disproportionate sentences, this is demonstrably justifiable under s. 1 of the *Charter*. The trial judge was correct in finding the mandatory minimum sentence in s. 163.1(2) to be of no force or effect.

[28] The reasonable hypotheticals and reasoning set out in *Joseph* were followed in the cases of *R. v. K.M.*, 2022 BSCS 360, and *R. v. Alobaid*, 2024 NBKB 52 (CanLII), both of which found the MMP in s. 163.1(2) to violate s. 12 of the *Charter* and to be of no force and effect. In *K.M. Donegan J* stated:

[209] K.M. also relies on the three hypotheticals relied upon by the Ontario Court of Appeal in *Joseph*. I will address only two of these, as I find they are determinative of this issue.

Hypothetical 2: The Beach Photographer

[210] This hypothetical can be found at para. 162 of *Joseph*. This hypothetical involves an 18-year-old photographer who makes child pornography by taking non-consensual photographs while on a beach focussing on sexual areas of young women using a zoom lens without determining whether they are 18 years of age or under. The Ontario Court of Appeal found that the one-year mandatory minimum sentence for making child pornography would be grossly disproportionate for this offender.

[211] I am persuaded by the Court's analysis and determination. I agree with K.M.'s position that such a hypothetical is not fanciful or mere speculation. It represents a reasonably foreseeable offender – a person without any related criminal history who captures sexualized images of others without taking reasonable steps to ascertain whether their belief their subject is over 18 years old is true. I am satisfied that the mandatory minimum one-year sentence would not

only be unfit or disproportionate for this offender, but that it would outrage society's standards of decency.

Hypothetical 3: The "Sext" Saver

[212] In this hypothetical, an 18-year-old receives a "sext" (a sexually suggestive digital image) on Snapchat from his 17-year-old girlfriend and surreptitiously saves or screen captures the image after promising her he would not do so, thus creating novel child pornography. The offender does not qualify for the personal use exception because he did not have consent to capture the image. The Court in *Joseph* held that while this offender's conduct is offensive, "a year in prison for this offence is not only excessive, it would outrage society's standards of decency": para. 163.

[213] Again, I am persuaded by the Court's analysis and determination. I agree with K.M.'s position that such a hypothetical is not fanciful or mere speculation. It represents a reasonably foreseeable offender – an older teenager without any related criminal history who is involved in and exploring a sexual relationship with a partner near to his or her age who, in a moment, decides to disregard his or her partner's expressed wishes and screen captures the sexual image that was sent. A one-year jail sentence for this offender would not only be unfit or disproportionate, but it would outrage society's standards of decency.

[214] *These two hypotheticals, drawn from, and accepted by, the Ontario Court of Appeal's decision in Joseph, are not peripheral or far-fetched scenarios that depend upon the most sympathetic possible situations. I do not wish to be misunderstood and need to be clear that the conduct of these hypothetical offenders would be morally blameworthy and would be deserving of sanction. It is only that the mandatory minimum sentence of one year is a sanction that, I find, would shock the conscience of Canadians and constitute cruel and unusual punishment.*

[215] The mandatory minimum sentence in s. 163.1(2) contravenes s. 12 of the *Charter* by requiring cruel and unusual punishment in these two reasonable hypothetical cases. I do not diminish the harm occasioned to the hypothetical victims in these scenarios, but I cannot accept that a one-year sentence would be anything but grossly disproportionate for the hypothetical offenders.

[216] With this conclusion, I find it unnecessary to consider the balance of the hypotheticals advanced by K.M.

[217] The Crown has chosen not to demonstrate that the provision is demonstrably justified under s. 1 of the *Charter*. I declare the mandatory minimum provision in s. 163.1(2) of no force and effect pursuant to s. 52(1) of the *Charter*.

[Emphasis Added.]

[29] Suffice it to say that for those same reasons I agree with the analysis of the Ontario Court of Appeal in *Joseph*. I find the hypotheticals set out in *Joseph* to be reasonable even if not typical. To use the language in *Smith* (supra) at page 1071, and *R. v. Morrissey*, 2000 SCC 39 at para 26, the MMP in both instances would “outrage our society’s sense of decency” such that Canadians would find it “abhorrent or intolerable” and therefore be grossly disproportionate and violate s 12.

[30] The Crown and Mr. Dillon both submit that in the event of a finding that the MMP amounts to cruel and unusual punishment, s. 1 of the Charter is inapplicable. I concur.

What is an Appropriate Sentence?

[31] The crime committed by Mr. Dillon was very serious. He betrayed his friend for his own selfish gratification. He has been found guilty of making child pornography, however in carrying out that crime, he also sexually assaulted his victim and committed voyeurism. He unclothed his victim to take pictures of her. He was masturbating while he was doing so. At one point he took a picture of himself touching her between her legs while she was naked. The photograph he took in this instance was of him sexually assaulting her. Presumably he was taking the pictures for his sexual gratification at a future time.

[32] He and the victim had been friends for over 13 years. She had confided with him when she told him of past sexual abuse that she had suffered at the hands of others. She had relied on him for support. Yet when an opportunity presented itself, he betrayed her trust, sexually assaulted her and took pictures of her, all for his own sexual gratification.

[33] Based on his knowledge of her prior victimization he should have known that his betrayal would result in her suffering psychological injury. The fact that she did suffer such trauma increases the seriousness of the offence he committed.

[34] S. 718.2 of the Code lists a number of aggravating factors that are directly applicable to the present case where it states:

718.2 A court that imposes a sentence shall also take into consideration the following principles:

- (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,
[. . .]
- (ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,
 - (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, [. . .]

[35] The fact that the victim is Indigenous must also be considered. S. 718.04 of the Code states:

718.04 A court that imposes a sentence in respect of an offence that involved the abuse of an intimate partner shall consider the increased vulnerability of female persons who are victims, giving particular attention to the circumstances of Aboriginal female victims.

As well, the young age of the victim is highly relevant. S.718.01 states:

718.01 When a court imposes a sentence for an offence that involved the abuse of a person under the age of eighteen years, it shall give primary consideration to the objectives of denunciation and deterrence of such conduct.

[36] S. 718.01 and s. 718(a)(iii.1) (supra) address the additional vulnerability of young victims. More specifically, in relation to sexual offences committed on young persons, the Supreme Court in *R. v. Friesen*, 2020 SCC 9, stated:

[56] This emphasis on personal autonomy, bodily integrity, sexual integrity, dignity, and equality requires courts to focus their attention on emotional and psychological harm, not simply physical harm. Sexual violence against children can cause serious emotional and psychological harm that, as this Court held in *R. v. McCraw*, [1991] 3 S.C.R. 72, “may often be more pervasive and permanent in its effect than any physical harm” (p. 81).

[37] Mr. Dillon committed the crime of making child pornography while his victim was sleeping and in so doing committed a sexual assault against her. Unfortunately, the following words of Charbonneau J., as she then was, in *R. v.*

Ransom, 2011 NWTSC 3, (delivered orally) are as accurate today as they were 14 years ago:

The kind of incident we heard about in this trial in this courtroom this week is extremely prevalent in the Northwest Territories. It boggles the mind how prevalent it is. It has been referred to in various ways by this over the years. Words like “epidemic” and "disease" have been used. Some might think that is melodramatic or an exaggerated way to describe it, but in fact it is not. The sad reality is that these types of facts - the sexual assault of a woman who is sleeping or passed out - is a common occurrence in this jurisdiction.

[38] The victim’s vulnerability was extremely high given her age, her close friendship with the accused, the fact that she was asleep at or around the time the offence was committed, her prior victimization, and the fact that she had confided the fact of her prior victimization with the accused. It should not be surprising that the the accused’s crime has had a deep impact on her.

[39] Her victim impact statement sets out how difficult this betrayal has been for her. The trauma that she previously experienced has resurfaced. She says she has turned to alcohol and smoking to get through that trauma and that she has only recently been able to get her life back on track. She has several nightmares a week and is always checking her room to make sure no one is there or watching her. Her feelings of physical insecurity are something that she cannot shake. She had to take medication for her anxiety and has only recently been able to quit taking it. She sometimes blames herself for what happened and feels guilty for having exposed the accused. However, she realizes that these feelings are not rational in the sense that there is nothing which should justify them.

[40] S. 718.1 sets out the fundamental and overarching principle of proportionality where it states:

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[41] As I have stated, the seriousness of the offence and the moral culpability of Mr. Dillon are high. That said, I must also consider a number of attenuating factors that pertain to Mr. Dillon as an offender. He is now 20 years old and had turned 19 only a month before the offence he committed. He was completely cooperative with the police throughout their investigation and provided them with a confession following his arrest. From what the author of his presentence report states, he appears to be genuinely remorseful. He has pleaded guilty and

consequently saved his victim the painful exercise of having to relive the crime he committed against her. He has also saved the justice system, the considerable time and resources that would have been necessary had there been a trial. He has no criminal record and comes before the court being of prior good character.

[42] As stated, Mr. Dillon had turned 19 slightly more than a month before he committed the present offence. He turned 20 just under a month ago. He is currently in the process of completing his grade 12 education. He stopped attending school after being charged but plans on completing his grade 12 classes online. He has delayed his graduation due to his grades falling. However, he plans to complete his grade 12 and then ultimately enter trade school. He is described as a good student. It is noteworthy that while in school, he took the WITS program, a program “to help children prevent victimization, such as bullying, discrimination and lateral violence”; see “Pre-Sentence Report” p.6. He is presently employed at a supermarket in Inuvik, where he has worked for over a year. He was employed in retail for several years previous to his current job. He does not consume alcohol regularly but does consume cannabis. His parents describe him as a good kid who is caring, easy going, non-aggressive, very respectful, and smart.

[43] Mr. Dillon is Gwich’in. However, he was adopted at birth and was not raised in a traditional lifestyle. Still s. 718.2(e) must be considered. The subsection states:

(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

[44] The import of the foregoing subsection has been discussed at great length in well known cases such as *Gladue v. R.*, [1999] 1 SCR 688, and *R. v. Ipeelie*, 2012 SCR 13. The principles set out in those and subsequent cases also apply to the type of imprisonment as well as its duration in those cases where imprisonment is deemed necessary. The case specific factors relating to Mr. Dillon as an Indigenous offender do not appear to be extremely impactful. His upbringing and family environment have been very good. However, it appears that he has suffered at least some disconnection from his Indigenous background. Additionally, his adoptive mother advises that Mr. Dillon was diagnosed with Fetal Alcohol Spectrum Disorder (“FASD”) shortly before he was adopted. He received support from social services for FASD until he was 18 years old. His mother has also supported Mr. Dillon through her knowledge of FASD.

[45] I believe that I am able to take judicial notice of the fact that FASD affects a disproportionate number of Indigenous people and that the root cause behind this disparity is the historical injustices that have been experienced by Canada's Indigenous peoples. In any event, regardless of Mr. Dillon's indigeneity, s. 718.2(e) requires that I only impose imprisonment as a last resort having regard to the circumstances, and the harm done to the victim and the community. As stated this principle applies also to the type and duration of any imprisonment I find to be necessary. This is particularly so, in the case of a remorseful and youthful first-time offender.

[46] The Crown is correct when it submits that the fact that Mr. Dillon's making of child pornography is intertwined with voyeurism and sexual assault must be considered in arriving at a fit sentence. Mr. Fane also submits that Mr. Dillon's conduct is analogous to a major sexual assault in its blameworthiness and its harm. He points out that a sexual assault is a major sexual assault if it "is of a nature or character such that a reasonable person could foresee that it is likely to cause serious psychological or emotional harm, whether or not physical injury occurs"; see *R. v. Arcand*, 2010 ABCA 363 at para 171. He submits that Mr. Dillon's conduct and its effects on the victim meet this definition.

[47] This may well be so. However, in the case of *R. v. Parranto*, 2021 SCC 46, [2021] 3 S.C.R. 366, Brown and Martin JJ. on behalf of the majority of the Supreme Court stated:

[34] While the goal of the starting-point methodology has been framed as "uniformity of approach" (*Arcand*, at para. 92; *R. v. Johnas* (1982), 41 A.R. 183 (C.A.), para. 31), the standard of review limits its function in this regard. Certainly, it is open to appellate courts to provide guidance to assist sentencing judges in minimizing idiosyncrasies and to promote consistency in approaches to sentencing. As *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, and *Friesen* make clear, however, there is no one uniform approach to sentencing in Canada. Attempts to create a single uniform approach are therefore misguided. Different cases may require different methods, and selecting the method of sentencing is within the discretion of the sentencing judge.

[35] Moreover, it is not the role of appellate courts to enforce a uniform approach to sentencing through the application of the standard of review. Rather, the proper focus of appellate review is whether the sentence was fit and whether the judge properly applied the principles of sentencing. To be clear, those principles do not include an obligation to follow a particular uniform approach to sentencing. While promoting consistency in method of sentencing may have a role

to play in setting appellate guidance, at the stage of appellate review, focusing on uniformity of approach is apt to mislead the reviewing court. Appellate courts must guard against undue scrutiny of the sentencing judge's discretionary choice of method, as this may stray from the standard of review.

[36] The key principles are as follows:

1. Starting points and ranges are not and cannot be binding in theory or in practice (*Friesen*, at para. 36);
2. Ranges and starting points are “guidelines, not hard and fast rules”, and a “departure from or failure to refer to a range of sentence or starting point” cannot be treated as an error in principle (*Friesen*, at para. 37);
3. Sentencing judges have discretion to “individualize sentencing both in method and outcome”, and “[d]ifferent methods may even be required to account properly for relevant systemic and background factors” (*Friesen*, at para. 38, citing *Ipeelee*, at para. 59); and,
4. Appellate courts cannot “intervene simply because the sentence is different from the sentence that would have been reached had the range of sentence or starting point been applied” (*Friesen*, at para. 37). The focus should be on whether the sentence was fit and whether the judge properly applied the principles of sentencing, not whether the judge chose the right starting point or category (*Friesen*, at para. 162).

These principles settle the matter. Contrary to the Crown's submission, it is not an open question whether sentencing judges are free to reject the starting-point approach. Sentencing judges retain discretion to individualize their approach to sentencing “[f]or this offence, committed by this offender, harming this victim, in this community” (*R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 80 (emphasis in original)). There is no longer space to interpret starting points (or ranges) as binding *in any sense*.

[Emphasis In Original.]

[48] Under the present circumstances, I prefer to approach the sentence to be imposed based on what I think is a fit and appropriate sentence having regard to the seriousness of the offence and Mr. Dillon's moral culpability and personal characteristics. That said, I must follow the applicable jurisprudence that exists in this jurisdiction as well as s. 718.2(b) of the Code which provides:

718.2 A court that imposes a sentence shall also take into consideration the following principles:

[. . .]

(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances

CONCLUSION

[49] Child pornography offences are pernicious and exceedingly harmful crimes. In *R. v. Pike*, 2024 ONCA 608, the Ontario Court of Appeal extensively considered the rational behind, and sentencing for, child pornography; see paras. 143 – 165. Some of those principles are not applicable to the present case. The case specifically dealt with possession rather than the making of child pornography. However, the court’s observations were directly relevant where it stated:

[158] Parliament has responded to society’s increasing awareness of the gravity of this offence by determining that courts should punish it more severely. As this court explained in *R. v. Jewell* (1995), 1995 CanLII 1897 (ON CA), 100 C.C.C. (3d) 270 (Ont. C.A.), at p. 278, Parliament began to do so in 1993 by establishing a five-year maximum sentence for possessing child pornography when prosecuted by indictment, more than double the two-year maximum for the obscenity offence that formerly applied to making and distributing child pornography: An Act to amend the Criminal Code and the Customs Tariff (child pornography and corrupting morals), S.C. 1993, c. 46, s. 2.[16] Parliament next doubled the maximum sentence when prosecuted by indictment from the initial five-year cap to 10 years in 2015 and quadrupled the maximum sentence for summary conviction prosecutions from the initial six-month cap[17] to two years less a day in successive 2005 and 2015 increases: An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act, S.C. 2005, c. 32, s. 7(4) (“Bill C-2”); Tougher Penalties for Child Predators Act, S.C. 2015, c. 23, s. 7(2); Friesen, at paras. 96-100; Inksetter, at paras. 23-24. These increases give effect to Canada’s Rights of the Child Protocol duty to impose penalties that reflect this offence’s gravity: Hewlett, at para. 20; Bill C-2, preamble.

[159] Parliament has also recognized the gravity of this offence by directing courts via s. 718.01 of the Criminal Code to prioritize denunciation and deterrence. Prioritizing denunciation communicates that perpetrators’ sexual exploitation of children is intolerable and combats their attempts to minimize their conduct as harmless or victimless: Inksetter, at para. 16; Friesen, at para. 105; Kwok (2007), at para. 58. It sends a strong message that children are people with infinite value and dignity whose healthy development adults have a responsibility to promote, rather than property for perpetrators to acquire and exploit as if they were slaves to the perpetrators’ whims. Likewise, prioritizing general deterrence is important because, while the certainty of detection is generally more likely to deter than the severity of penalties (*R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773, at para. 113),

possession of child pornography is a difficult offence to detect. By imposing stricter sentences, courts compensate for the difficulty of detection by warning would-be perpetrators that, while there is a chance they might escape detection, they will face severe consequences if caught: *R. v. Lynch-Staunton*, [2012] O.J. No. 313 (S.C.), at paras. 56-57. Many people who possess child pornography are likely to be deterred by the prospect of strict sentences because they often are otherwise law-abiding people of good character and employment without prior convictions: *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at para. 73; Kate Warner, “Sentencing for child pornography” (2010) 84 A.L.J. 384, at p. 390.

[160] Courts must follow Parliament’s direction by placing children and the wrongs and harms that people who possess child pornography inflict on them at the centre of the sentencing process. Courts can give significant weight to the personal circumstances and mitigating factors of people who possess child pornography, and to sentencing objectives such as rehabilitation: Friesen, at paras. 91-92, 104. But it is all too easy for those considerations, which focus on the people being sentenced, to overshadow the wrongs and harms they inflict because their victims are all too often invisible. The police struggle to identify the producers of these images and the children they victimize because the producers abuse and exploit those children in private homes or in countries oceans away: *J.S.*, at para. 104; *HM Advocate v. Graham*, [2010] H.C.J.A.C. 50, 2011 J.C. 1, at para. 45. Courts must overcome this invisibility by making child victims the central focus: Friesen, at paras. 53, 67, 74-75; see also *Bertrand-Marchand*, at para. 32. That is why courts can neither prioritize other objectives to the same degree as or higher than denunciation and deterrence, nor use the personal circumstances and mitigating factors of people who possess child pornography to avoid grappling with the wrongs and harms they cause: Friesen, at para. 104; *R. v. Porte*, [2015] NSWCCA 174, 252 A. Crim. R. 294, at paras. 88, 128.

[50] I have no hesitation in finding imprisonment to be necessary in the present case. I find that to be so given the need to strongly denounce the crime Mr. Dillon committed. Additionally specific and general deterrence require it. However, I am highly concerned with the effect that a term of conventional imprisonment would have on Mr. Dillon, whether it be in the “mid-territorial” or “upper territorial” range.

[51] In *R. v. Proulx*, 2000 SCR 61, the seminal case dealing with conditional sentences of imprisonment, the court summarized the principles to be followed when considering them at para. 127.

127 At this point, a short summary of what has been said in these reasons might be useful:

1. Bill C-41 in general and the conditional sentence in particular were enacted both to reduce reliance on incarceration as a sanction and to increase the use of principles of restorative justice in sentencing.
2. A conditional sentence should be distinguished from probationary measures. Probation is primarily a rehabilitative sentencing tool. By contrast, *Parliament intended conditional sentences to include both punitive and rehabilitative aspects. Therefore, conditional sentences should generally include punitive conditions that are restrictive of the offender's liberty.* Conditions such as house arrest should be the norm, not the exception.
3. *No offences are excluded from the conditional sentencing regime except those with a minimum term of imprisonment, nor should there be presumptions in favour of or against a conditional sentence for specific offences.*
4. *The requirement in s. 742.1(a) that the judge impose a sentence of imprisonment of less than two years does not require the judge to first impose a sentence of imprisonment of a fixed duration before considering whether that sentence can be served in the community. Although this approach is suggested by the text of s. 742.1(a), it is unrealistic and could lead to unfit sentences in some cases.* Instead, a purposive interpretation of s. 742.1(a) should be adopted. In a preliminary determination, the sentencing judge should reject a penitentiary term and probationary measures as inappropriate. Having determined that the appropriate range of sentence is a term of imprisonment of less than two years, the judge should then consider whether it is appropriate for the offender to serve his or her sentence in the community.
5. As a corollary of the purposive interpretation of s. 742.1(a), *a conditional sentence need not be of equivalent duration to the sentence of incarceration that would otherwise have been imposed. The sole requirement is that the duration and conditions of a conditional sentence make for a just and appropriate sentence.*
6. The requirement in s. 742.1(b) that the judge be satisfied that the safety of the community would not be endangered by the offender serving his or her sentence in the community is a condition precedent to the imposition of a conditional sentence, and not the primary consideration in determining whether a conditional sentence is appropriate. *In making this determination, the judge should consider the risk posed by the specific offender, not the broader risk of whether the imposition of a conditional sentence would endanger the safety of the community providing insufficient general deterrence or undermining general respect for the law. Two factors should be taken into account: (1) the risk of the offender*

re-offending; and (2) the gravity of the damage that could ensue in the event of re-offence. A consideration of the risk posed by the offender should include the risk of any criminal activity, and not be limited solely to the risk of physical or psychological harm to individuals.

7. Once the prerequisites of s. 742.1 are satisfied, the judge should give serious consideration to the possibility of a conditional sentence in all cases by examining *whether a conditional sentence is consistent with the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2*. This follows from Parliament's clear message to the judiciary to reduce the use of incarceration as a sanction.

8. *A conditional sentence can provide significant denunciation and deterrence. As a general matter, the more serious the offence, the longer and more onerous the conditional sentence should be. There may be some circumstances, however, where the need for denunciation or deterrence is so pressing that incarceration will be the only suitable way in which to express society's condemnation of the offender's conduct or to deter similar conduct in the future.*

9. *Generally, a conditional sentence will be better than incarceration at achieving the restorative objectives of rehabilitation, reparations to the victim and the community, and promotion of a sense of responsibility in the offender and acknowledgment of the harm done to the victim and the community.*

10. *Where a combination of both punitive and restorative objectives may be achieved, a conditional sentence will likely be more appropriate than incarceration. Where objectives such as denunciation and deterrence are particularly pressing, incarceration will generally be the preferable sanction. This may be so notwithstanding the fact that restorative goals might be achieved. However, a conditional sentence may provide sufficient denunciation and deterrence, even in cases in which restorative objectives are of lesser importance, depending on the nature of the conditions imposed, the duration of the sentence, and the circumstances of both the offender and the community in which the conditional sentence is to be served.*

11. *A conditional sentence may be imposed even where there are aggravating circumstances, although the need for denunciation and deterrence will increase in these circumstances.*

12. No party is under a burden of proof to establish that a conditional sentence is either appropriate or inappropriate in the circumstances. The judge should consider all relevant evidence, no matter by whom it is

adduced. However, it would be in the offender's best interests to establish elements militating in favour of a conditional sentence.

13. Sentencing judges have a wide discretion in the choice of the appropriate sentence. They are entitled to considerable deference from appellate courts. As explained in *M. (C.A.)*, *supra*, at para. 90: "Put simply, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit".

[Emphasis Added.]

[52] It is often said that sentencing is an inherently subjective exercise. I accept that conditional sentences are rarely appropriate for sexual offences against children: *R. v. M.M.*, 2022 ONCA 441 at para 16. However, I find this to be one of those cases. In this case there are a number of competing factors that must be reconciled. In determining the severity of the sentence and in particular the type of imprisonment to be imposed, I am of the view that a conditional sentence would be best suited to denounce his conduct and deter him and others like him from committing similar offences, while optimizing his prospects of rehabilitation and reintegration into the community. In that regard, I think it best that he be kept in his community if possible, and with the greatest of respect to the able submissions of Mr. Fane, I am not of the view that the level of his misconduct, while certainly very serious, is such that conventional incarceration is the only option. However, I find that a conditional sentence substantially longer than the term of conventional imprisonment I would have imposed had I been limited to that option is necessary to meet the overarching principle of proportionality as well as the objectives of denunciation and deterrence. Given the fact that Mr. Dillon has been subject to a police undertaking for an extended period of time and that there have been no breaches of that undertaking I am optimistic that he will be able to abide by the terms of the conditional sentence. I find that imposing a conditional sentence would not endanger the community by putting it at any risk posed by Mr. Dillon,

[53] Therefore I am imposing a conditional sentence of imprisonment for a term of two years less a day from today's date. In addition to the statutory conditions I direct that Mr. Dillon:

- a) Report to his supervisor in person at least once per week;

- b) Take and complete any counselling or programs recommended by his supervisor;
- c) Perform one hundred (100) hours of community service work at the direction of and to the satisfaction of his supervisor, at a rate of no less than 10 hours per calendar month beginning on March 1, 2025;
- d) Have no contact or communication directly or indirectly with his victim and not to attend within 10 metres of her place of residence, employment, education, or worship;
- e) Take and complete any educational or training programs dealing with employment and/or career counselling directed by his supervisor;
- f) Make sincere efforts to find and maintain employment or enroll in a full-time educational or training program that will benefit him in finding employment;
- g) Reside where approved by his supervisor;
- h) For the first 12 months of this sentence remain inside his residence subject to the following exceptions:
 - (1) If he is attending a hospital or medical clinic due to a medical emergency for himself or a member of his immediate family who lives with him;
 - (2) If he is going directly to, at or coming directly home from a meeting with his supervisor;
 - (3) If he is attending a scheduled medical or dental or government appointment for himself or a member of his immediate family who lives with him, so long as he has notified his supervisor and obtained permission from his supervisor;
 - (4) If he has written approval from his supervisor to be outside his residence and he is carrying such written approval;
 - (5) If he is going directly to, at, or coming directly home from an interview or appointment relating to gaining employment or enrolling in any program recommended or approved by his supervisor;

- (6) If he is going directly to work, at work, or coming directly home from work;
 - (7) If he is going directly to, at, or coming directly home from an educational or training program that has been approved by his supervisor;
 - (8) If he is going directly to, at, or coming directly home from any counselling recommended by his supervisor;
 - (9) If he is going directly to, doing, or coming directly home from a location where he is doing community service work;
 - (10) If he is going directly to, at, or coming directly home from an organized sporting event that he is participating in or an exercise facility where he is doing physical exercise as long as he has told his supervisor beforehand of where he will be;
 - (11) If he is going directly to, at, or coming directly home from an organized spiritual function, assembly, or similar event, as long as he has told his supervisor beforehand of where he will be;
 - (12) Every Saturday from 10:00 a.m. to 3:00 p.m. to conduct errands and to shop for the necessities of life; and
 - (13) If he is going directly to, at, or coming directly home from attending Court if he is required to do so;
- i) For the last twelve (12) months less a day of this conditional sentence, to remain in his residence every day from 9:00 p.m. to 6:00 a.m. unless prior written permission is given by his supervisor to be out of his residence during those hours, subject to the same exceptions set out in the previous term with such modification as the circumstances require;
- j) For the purposes of this Conditional Sentence Order, the phrase “inside his residence” shall include being in the yard of his residence if the residence is a single detached dwelling;
- k) Fully cooperate with random checks by telephone and in person by his supervisor or the police to verify his compliance with this conditional sentence. This includes the requirements that:

- (1) If the police or his supervisor come to his residence, then he will come to the door of his residence personally if he is in the residence; and
 - (2) If the police or his supervisor phone his residence, then he will speak to them on the telephone if he is in the residence;
- l) Abstain absolutely from the possession or consumption of any non-prescribed illegal drugs or alcoholic beverage;
 - m) Not be in the company of, or have contact with, any person known to use or sell illegal drugs;
 - n) Sign releases in favour of his supervisor to enable the supervisor to confirm attendance at employment, school, counselling or community service; and
 - o) Carry a copy of this conditional sentence order, as well as any written authorizations provided by his supervisor, on his person at all times he is not in his residence, and provide them on demand to a peace officer.

[54] As well, a two-year term of probation will follow the conditional sentence. It will require that, along with the statutory conditions, he report to his probation officer within 48 hours of the end of his conditional sentence and have no contact or communication with his victim without the written permission of his probation officer. I allow for this exception given that I am told the victim may be appreciative of him apologizing to her in some manner.

[55] There will also be a DNA authorization as the offence committed is a primary designated offence. Additionally, I am imposing a 10-year firearms prohibition order as well. S. 109 of the Code states:

109(1) Where a person is convicted, or discharged under section 730, of
(a) an indictable offence in the commission of which violence against a person was used, threatened or attempted and for which the person may be sentenced to imprisonment for ten years or more,
[. . .]

the court that sentences the person or directs that the person be discharged, as the case may be, shall, in addition to any other punishment that may be imposed for that offence or any other condition prescribed in the order of

discharge, make an order prohibiting the person from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition and explosive substance during the period specified in the order as determined in accordance with subsection (2) or (3) , as the case may be.

Mr. Dillon committed an indictable offence, making child pornography, in which he also carried out a sexual assault. Therefore, the facts of this offence are such that in the commission of the offence of making child pornography, he used violence against his victim. In my view the prerequisites to a s. 109 firearms prohibition order are made out and a minimum 10-year firearms prohibition order is mandatory. However, I see no reason to go beyond that minimum. Given what I have heard of Mr. Dillon hunting from time to time, I grant him leave to apply to the chief firearms officer of the Northwest Territories for an exemption for the purpose of sustenance hunting pursuant to s. 113 of the Code.

[56] The prerequisites for an order pursuant to s. 161 are not made out since the victim was not under the age of 17 years at the time. I therefore decline to impose the order of prohibition contemplated under that section.

[57] I am imposing a victim surcharge in the amount of 200 dollars. Mr. Dillon will have to pay that amount or work it off within six months of today's date. If he is to work it off that can be done with the permission of his conditional sentence supervisor subject to any conditions which they deem appropriate.

[58] Finally, I order that the telephone seized by the police be forfeited to the Crown.

[59] Mr. Dillon, as I know you know, what you did to your victim was a terrible betrayal of her trust as well as a very profound breach of her physical integrity. As I have said, you committed a serious crime. However, your youth and lack of any criminal background are factors in your favour that have caused me to believe that a term of conventional imprisonment would have more of a negative impact on you than positive in comparison with a conditional sentence. I hope that after you are done serving the conditional sentence and probation order that I have imposed, you are ultimately able to put this behind you. You are still very young and your crime definitely does not need to define you in the future.

[60] In closing, I would like to thank both counsel for the benefit of their excellent work in this matter, particularly their submissions, both written and oral. They have been of great assistance in what I have found to be a difficult case.

Robert D. Gorin
Judge of the Territorial Court

Dated at Yellowknife, Northwest Territories
this 14th day of February, 2025

Counsel for the Crown: Morgan Fane
Counsel for the Accused: Jessi Casebeer

**IN THE TERRITORIAL COURT OF THE
NORTHWEST TERRITORIES**

BETWEEN:

**REASONS FOR JUDGMENT
of the
HONOURABLE JUDGE ROBERT GORIN**

[Ss. 12 & 1 *Canadian Charter of Rights and Freedoms*; s. 52
Constitution Act, 1982; s. 163.1(2) *Criminal Code*]

Restriction on Publication

This decision is subject to a ban on publication pursuant to s. 486.4 CC with respect to the name of the victim as well as information that may identify this person. Some details may have been edited to ensure that the victim may not be identified.