PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R v. Klayme*, 2024 NSPC 4

Date: 20240105
Docket: 8428472,8428473, 8428474
Registry: Dartmouth

Between:

His Majesty the King

v.

Brandon Klayme

Restriction on Publication: Sections 486.4 &486.5 Criminal Code

Judge:	The Honourable Judge Theodore Tax,
Heard:	December 18, 2023, in Dartmouth, Nova Scotia
Decision:	January 5, 2024
Charge:	Sections 163.1(4), 172.1(1)(a), 171.1(1)(a) of the **Criminal Code of Canada**
Counsel:	Melanie Perry, for the Nova Scotia Public Prosecution Service Michelle James, for the Defence Counsel

A Ban on Publication of the contents of this file has been placed subject to the following conditions:

Section 486.4 & 486.5: Bans ordered under these Sections direct that any information that will identify the complainant, victim or witness shall not be published in any document or broadcast or transmitted in any way. No end date for the Ban is stipulated in these Sections.

Order restricting publication — sexual offences

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

By the Court:

Introduction

[1] Mr. Brandon Klayme had been charged with three offences which involved allegations of Child Luring contrary to section 172.1(1)(a) of the **Criminal Code**, Making Sexually Explicit Material Available to a Child, contrary to section 171.1(1)(a) of the **Criminal Code** and Possession of Child Pornography contrary to section 163.1(4) of the **Criminal Code**. The offences were alleged to have occurred between August 29, 2018 and December 14, 2018, at or near Dartmouth, Nova Scotia. The Information alleging those three charges had been sworn on February 6, 2020, and the Crown proceeded by indictment on all three charges before the Court.

[2] After hearing three days of evidence introduced by the Crown, on November 9 and 10, 2021, as well as May 31, 2022, the Crown Attorney closed her case and tendered the Exhibits. At that point, the Defence Counsel for Mr. Klayme made a motion for a directed verdict in relation to all charges before the Court. The submissions on the directed verdict motion were made by counsel on May 31, 2022. The Court reserved its decision and dismissed the directed verdict motion on July 20, 2022.

[3] On December 19, 2022, which was the next scheduled court date for the trial or possibly the closing submissions, Defence Counsel advised the Court that they did not intend to call any evidence. At that point, the parties made their closing submissions. The Court reserved its decision and found Mr. Klayme guilty of all three charges before the Court on April 17, 2023.

[4] The issue before the Court is to determine a just and appropriate sentence.

Positions of the Crown and Defence:

[5] Defence Counsel had indicated at the time when a date was set for the sentencing submissions that they would be filing a **Charter** challenge to the mandatory minimum sentences of one year imprisonment in relation to the section 163.1 and the section 172.1 **Criminal Code** offences, and the six-month mandatory minimum sentence for the section 171.1 **Code** offence, in view of the

fact that the Crown had proceeded by indictment on all three of the charges before the Court.

[6] The parties initially filed their briefs in early June 2023, largely in relation to the section 12 **Charter** issue that the mandatory minimum sentences for those offences constituted "cruel and unusual punishment." The parties recognized that Provincial Court could not declare the legislation invalid, however, the Court could decline to apply the mandatory minimum sentences in finding that they could constitute "cruel and unusual punishment" in the circumstances of Mr. Klayme or in the circumstances of another reasonable hypothetical offender.

[7] The Parties agreed to postpone the original date for their sentencing submissions, which had been scheduled for July 27, 2023, as they had advised the Court that the Supreme Court of Canada had heard submissions and had reserved their decision in relation to the mandatory minimum sentences for the child luring offence [section 172.1 **Criminal Code**].

[8] The Supreme Court of Canada's decisions in ***R. v. Marchand*** and ***R. v. H.V.*** were released at the same time on November 3, 2023, under the citation ***R. v. Bertrand Marchand***, 2023 SCC 26 (CanLII). The ***Marchand*** case involved a **Charter** challenge to the mandatory minimum sentence of one-year imprisonment for the child luring offence contrary to section 172.1(2)(a) of the **Code** where the Crown had proceeded by indictment. The ***H.V.*** case involved a **Charter** challenge to the child luring offence contrary to section 172.1(2)(b) of the **Code,** where the Crown had proceeded by way of summary conviction and the offender was subject to the mandatory minimum sentence of six months imprisonment.

[9] In the ***Marchand*** decision, the Supreme Court of Canada concluded that the mandatory minimum punishments of one year in the case of an indictable offence and six months imprisonment in the case of a summary conviction offence for the child luring offence contrary to section 172.1(2)(a) and (b) of the **Criminal Code** were unconstitutional and contravened section 12 of the **Charter** as being cruel and unusual punishment. The Parties had also reminded the Court that in ***R. v. Hood***, 2018 NSCA 18, our Court of Appeal had rendered the mandatory minimum sentence for the section 172.1 **Code** offence invalid on the basis of a reasonable hypothetical.

[10] During their sentencing submissions on December 18, 2023, the Crown Attorney and Defence Counsel advised the Court that there had been recent unreported and non-binding decisions by my colleagues, Judge Murphy in ***R. v.***

Jeffrey Fullmore case where she had found the mandatory minimum sentence for possession and distribution of child pornography invalid and declined to apply the mandatory minimum sentence based on the reasonable hypotheticals that were set out in ***R. v. John*****,** 2018 ONCA 702.

[11] Counsel also indicated that my colleague, Judge Tufts had recently concluded in ***R. v. Troy McLean*** that the mandatory minimum sentence was "grossly disproportionate" in relation to the offence of possession and distribution of child pornography contrary to section 163.1(4) of the **Code** where the Crown had proceeded summarily and on the basis of reasonable hypotheticals outlined in ***R. v. John***, and ***R. v. Swaby***, 2018 BCCA 416 and a few other cases. Judge Tufts concluded that the mandatory minimum sentence for those reasonable hypotheticals would be contrary to section 12 of the **Charter** as being grossly disproportionate to a just and appropriate sentence and declined to apply the mandatory minimum sentence in the case.

[12] In her brief and in her oral submissions, the Crown Attorney advised the Court that, if the Court was to conclude that the sentence might be grossly disproportionate to either Mr. Klayme or on the basis of some reasonable hypotheticals, she did not intend to make any submissions with respect to section 1 of the **Charter** that the provisions were reasonable limits prescribed by law and could be demonstrably justified in a free and democratic society.

[13] In her written brief, the Crown Attorney submitted that the just and appropriate sentence in this case should be a prison sentence longer than the mandatory minimum sentence in any event, and in those circumstances, engaging in a section 12 **Charter** analysis would be a "moot" exercise in relation to a "reasonable hypothetical offender." Furthermore, in her opinion, even if the Court declined to apply the mandatory minimum sentence, the longer sentence proposed by the Crown would be the fit and appropriate sentence in any event.

[14] Prior to concluding their submissions, the Crown Attorney and Defence Counsel had some discussions with respect to the section 12 **Charter** issue in relation to the mandatory minimum punishments for the offences before the Court. Based upon the recent ***Marchand*** decision of the Supreme Court of Canada which declared that the mandatory minimum punishments for the child luring offence [section 172.1(1)(a) of the **Code**] were unconstitutional and that the minimum sentences were no longer of force and effect, the parties advised the Court that they have agreed that the Court should decline to apply the mandatory minimum

sentences for the other offences before the Court on the basis of a reasonable hypothetical.

[15] As a result, both counsel have submitted that, in light of the recent Supreme Court of Canada decision in ***Marchand*** and recent decisions by colleagues on the Nova Scotia Provincial Court, the Court should decline to apply the mandatory minimum sentences in this similar situation, not necessarily on the basis of the offender before the Court, but rather, on the basis of another possible reasonable hypothetical offender as in ***R. v. John***, *supra*, and ***R. v. Swaby***, *supra*. In my opinion, the joint recommendation made by counsel, **for the purposes of this case,** is appropriate based upon my review of the transcript of Judge Tuft's decision and review of the persuasive Court of Appeal decisions in ***John*** and ***Swaby***.

[16] After having considered the joint recommendation made by counsel, and having considered the recent SCC decision in ***Marchand*** and other cases provided by counsel, where reasonable hypotheticals in similar situations have been utilized to declare a mandatory minimum sentence unconstitutional, **for the purposes of this case,** I find that it is appropriate to decline to apply the mandatory minimum sentences for the remaining offences before the court as they likely violate section 12 of the **Charter** on the basis of a reasonable hypothetical.

[17] In the final analysis, it is the position of the Crown that the just and appropriate disposition is to impose a sentence of 18 months imprisonment for the child luring offence contrary to section 172.1(1)(a) of the **Criminal Code** and to impose an 18-month concurrent sentence for the possession of child pornography contrary to section 163.1(4) of the **Code** and 12 months concurrent for the making of sexually explicit material available to a child contrary to section 171.1(1)(a) of the **Code**. The Crown Attorney acknowledges that, in light of a decision to decline to apply the mandatory minimum sentences in this case and her recommendation that the just and appropriate sentence is 18 months imprisonment, a Conditional Sentence Order (CSO) of imprisonment in the community would be an "available" sentencing option.

[18] However, the Crown Attorney submits that the Court's decision should emphasize deterrence and denunciation of the unlawful conduct and apply the clear directions of the Supreme Court of Canada from the ***Friesen*** and ***Marchand*** decisions with respect to the seriousness of sexual offences committed against children. As a result, it is the position of the Crown that a CSO of imprisonment in

the community would not be a just and appropriate sentence, in all of the circumstances of this case.

[19] The Crown Attorney also submits that, following his sentence of imprisonment, Mr. Klayme should be subject to the terms of a probation order for 18 months and agrees with Defence Counsel that it is reasonable to include certain exceptions to some of the conditions in the order.

[20] In addition, the Crown Attorney seeks a DNA order pursuant to section 487.051 of the **Criminal Code**. The Crown Attorney also seeks a **five-year** order pursuant to section 161(1) of the **Criminal Code** to prohibit Mr. Klayme from attending at certain locations, work or volunteer positions, contact by any means with a person under the age of 16 years or use of the Internet or other digital network, subject to the statutory exceptions and two additional exceptions as proposed by Defence Counsel. The Crown Attorney also seeks a **20-year** order pursuant to section 490.012 and section 490.013(2)(b) of the **Criminal Code** that would require Mr. Klayme to comply with the provisions of the **Sex Offender Information Registration Act (SOIRA).**

[21] In her written brief, it was the position of the Defence that the Court ought to decline to apply the mandatory minimum sentences as being cruel and unusual punishment contrary to section 12 of the **Charter**. The Defence Counsel's position was certainly supported by the Supreme Court of Canada's decision in ***Marchand*** and other recent Nova Scotia decisions, which involved the same or similar offences, primarily on the basis of reasonable hypotheticals. Defence Counsel had also noted that the Crown Attorney had stated that she would not attempt to justify the mandatory minimum sentence under section 1 of the **Charter**, and if the Court found that there was a section 12 **Charter** violation, then a CSO of imprisonment in the community would be an "available" option for the Court to impose in this case.

[22] Following their joint recommendation with respect to the remaining mandatory minimum sentences being contrary to section 12 of the **Charter** and as such being unconstitutional, **for the purposes of this case**, and as indicated above, the Court accepts that joint recommendation, and as a result, the Court declines to apply the mandatory minimum sentences for the remaining offences. In those circumstances, Defence Counsel submits that, as long as the sentence to be ordered by the Court is less than two years, a conditional sentence order of imprisonment in

the community would remain an "available" option and she further submits that a lengthy CSO is the "just and appropriate" option in this case.

[23] Defence Counsel recommends that an 18-month CSO of imprisonment in the community is a just and appropriate sanction and that based on ***R. v. Proulx***, a CSO with strict conditions may equally address specific and general deterrence as well as denunciation of the unlawful conduct. She acknowledges that, for the purposes of the parity principle, there are not a lot of reported cases after the Supreme Court of Canada's decision in ***Friesen*** which involve the offences before the Court. However, Defence Counsel points out that, in the ***Marchand*** decision, the Supreme Court of Canada observed that there may be a wide range of sentences for these type of offences in certain circumstances.

[24] Defence Counsel does not take issue with an 18-month probation order to follow her recommended 18-month CSO, and as previously mentioned, with a couple of the conditions to be modified by agreement with the Crown. In addition, Defence Counsel does not take issue with the other ancillary orders sought by the Crown or the section 161 **Criminal Code** order with the additional exceptions that the counsel have agreed to be inserted in that order.

The Circumstances of the Offences:

[25] The offences before the Court began in 2018 when the victim, CH who was only 12 years old and resided in Wisconsin USA, met a male who identified himself as "Jay" through a chat group in Google+ entitled "DDLG" which is an acronym for "Daddy Dom Little Girl." About a week after meeting in that initial chat room, they continued to meet over the Internet and chat through a "kik.chat" internet account. Over the next two to three months, many messages of a very clear and very suggestive sexual nature were sent by "Jay" to CH, which were recovered from the iPhone that CH had been using to communicate with "Jay."

[26] The messages sent by "Jay" to CH involved, as mentioned, sexually explicit conversations, as "Jay" had provided CH with "Jay's Rulebook" that she had to follow in their "relationship" with him being the "dominant" and CH, as a 12-year-old girl, being his "submissive." In addition to the sexually explicit text messages and conversations over video between "Jay" and CH, "Jay" essentially demanded in that dominant/submissive "relationship" that CH take sexually explicit photos and videos of herself and forward them to him. CH provided those images to "Jay."

[27] On a few occasions, CH stated that she had seen "Jay's" face when his video camera was focused in that direction, but on most occasions where CH and "Jay" had a video conversation, he had the camera focused on his exposed penis. In addition, CH described the room in which "Jay" communicated with her by video and provided some general information with respect to his appearance, that his face was round, he had dark skin, dark eyes and dark hair. CH had also stated that, during the video calls, the room where "Jay" was located looked like it was his bedroom and on other occasions, it sometimes looked like the video call was from an office. She had described the bedroom and that she had also seen some windows and described the colour of the bedding.

[28] Although no images or chats were found on any of the devices seized from the bedroom in his parent's house which the police believed to have been utilized by Brandon Klayme, police officers in the United States were ultimately able to extract and recover 125 text messages from CH's iPhone of a sexual nature, relating to him being the "dominant" and CH being the "submissive" in their "relationship."

[29] Those messages, which also contained sexually explicit photos and videos between CH and "Jay" were sent between December 12, 2018, and December 15, 2018. Police officers were not able to extract any additional messages, photos, or any videos, as CH had advised them and ultimately the Court, that she did not delete messages but left them on her phone, but she did not save any of the video chats with "Jay" using the "Kik" messenger app. The police also retrieved one voicemail message from CH's iPhone that was sent to her by "Jay," with a timestamp of December 13, 2018, at 7:40:54 PM (UTC-6), which was played in court.

[30] In addition, the police in Wisconsin had obtained CH's iPhone and they were able to extract 80 photographs of her in various stages of undress, which exposed her genitals and, in some cases, her face. The Crown Attorney and Mr. Klayme's Defence Counsel, at that time, agreed, based upon their review of those 80 photographs, that it would not be necessary to have those photographs filed as Exhibits in the trial. They further agreed that 76 of the 80 images did constitute what the **Criminal Code** defines as "child pornography."

[31] In the final analysis, the key issue in the trial was whether the Crown had established, beyond a reasonable doubt, that Mr. Brandon Klayme was, in fact, "Jay" and that he was the person who had sent her the sexually explicit text

messages and had demanded and received sexually explicit photos and videos of CH, who was at the time that those images were exchanged, only 12 years old.

[32] The Court ultimately concluded on the basis of the totality of direct and circumstantial evidence accepted by the Court that the Crown had established, beyond a reasonable doubt, that Mr. Brandon Klayme was, at all material times, the person who identified himself as "Jay" and furthermore that, he was the person with whom CH had been communicating over several weeks in sexually explicit messaging and that he had demanded that CH send sexually explicit photos and videos of her, being a 12-year-old girl, to him. The Crown's direct and circumstantial evidence included numerous references to the IP addresses and other information for accounts such as Google+, Google, Kik which referred to different usernames, like ""Jay" with their subscriber contact being listed as Mr. Brandon Klayme.

[33] The sexually explicit conversations through text messaging and video conversations ended when CH's mother, LS, did a "random check" of her daughter's iPhone in mid-December 2018. LS confirmed that she had seen what she referred to as an "inappropriate" picture of an adult male's penis and after confronting her daughter about the image, she contacted the local police, and they immediately came to her residence. At that time, CH used her tablet to advise "Jay" that her mother had taken her iPhone and had given it to the police and that she would not be able to contact him after that date.

[34] LS advised the Court that, although the police had been provided with CH's cell phone, during their initial meeting with CH, they were not able to conduct a detailed interview with her. LS had stated that, in late December 2018 and for some time, CH had gone into a "deep depression" and she received inpatient treatment for 10 days during Christmas 2018. After that, she participated in intensive outpatient treatment for two hours per day, five days a week for the next six months. LS had advised the Court that, until the summer of 2018, CH was not "stable enough" to be able to provide information about this matter to the police.

[35] The information obtained by the Wisconsin police from Google, Kik and other Internet Service Providers took some time to obtain, and after the police were able to speak with CH, their information was forwarded to the Halifax Regional Police. Shortly thereafter, the Halifax Regional Police obtained a warrant based on the information provided by the Wisconsin police and conducted a search and seized some computers and other devices at the Klayme residence, in Dartmouth,

Nova Scotia on February 6, 2020. The Information, which alleged the charges before the Court, was sworn on February 6, 2020.

Victim Impact Statements:

[36] In CH's victim impact statement, which she read during her appearance by videoconference from Wisconsin, CH stated that she was 12 years old when these crimes were committed through manipulation, and she has never learned about having healthy boundaries and balanced relationships. After the police became involved, she spent two weeks in a psychiatric hospital because of being a "flight risk" and a risk of taking her own life, and after that, numerous appointments with detectives and victim services,

[37] Over the past five years, CH has suffered from depression, anxiety, attachment, trust and boundary issues coupled with flashbacks, paranoia, trouble sleeping and unbearable amounts of guilt as a direct result of this crime. She began to hate her body at age 12, was anorexic for over a year and continues to struggle with body image, self-esteem and eating disorders. She has tried to take her life on numerous occasions since this incident because of the lasting aftereffects of the trauma that it has caused.

[38] In concluding her statement, CH noted that her family and friends have provided astonishing support to assist her in trying to get some closure to move on with her life into adulthood.

[39] LS who is CH's mother also appeared by videoconference and stated that she has seen how her daughter has been robbed of her childhood, of innocence and likely, the ability to have healthy relationships for the rest of her life. Since she first found the images and a video on CH's phone, she has been haunted by them and often thinks that she is an inadequate parent who failed her child. The images continued to haunt her, and she has had thoughts of ending her life many times over the last several years.

[40] LS noted that after reporting the incident to the police, CH stopped eating for a time and she fears that CH will relapse into destructive and dangerous patterns of behaviour like cutting, or suicidal tendencies and she constantly fears that CH will never be able to experience healthy relationships. Immediately after the incident was reported and her phone was taken away, CH initially acted out harshly towards her parents and her mental health was so bad around Christmas 2018, that they had to admit CH in an inpatient psychiatric hospital to stabilize her.

[41] After CH was released from the inpatient treatment program, she came home and then attended intensive outpatient five-hour therapy sessions for seven months. LS concluded by stating that CH still struggles with trust and healthy boundaries in relationships and, in many ways, CH continues to struggle with being “normal.”

[42] Speaking for herself, LS stated that, after many years of therapy, she is just starting to feel like she is getting better, but from time to time, something will remind her of the harm that was done to her daughter, and she is overwhelmed with a deep, debilitating sadness. She concluded by stating that she has also benefited from the tremendous support of her husband, family, and friends.

[43] The Crown Attorney read a third victim impact statement which was filed by a very close friend of LS, for the last 14 years. NS stated that she had seen CH grow into a beautiful, bright, smart, and creative girl, but shortly before this incident came to light, she saw that CH was changing into a different person - she had lost her spirit and saw CH “slowly shut down” until the day that the first evidence of the abuse CH was suffering, was discovered.

[44] More recently, NS stated that CH has done a lot of “hard work” and she is starting to “see the light in her eyes again.” NS stated that LS has struggled with trauma and she is also doing “hard work” to deal with the issues from this incident.

Circumstances of the Offender:

[45] The Court received a Pre-Sentence Report (PSR) prepared by the Probation Officer on July 21, 2023, which indicated that Mr. Klayme, is now 28 years old, single and continues to live at home at his parent’s house. The PSR notes that Mr. Brandon Klayme has a very close relationship with his parents and siblings, is not currently involved in a relationship and also reported that he has never been in one.

[46] The PSR notes that Mr. Klayme completed grade 12 in 2013, but he advised the Probation Officer that he did not care about school and often was in trouble for not paying attention in class. He has not continued his education, but in terms of future education goals, Mr. Klayme indicated that, in the future, he would like to take a program in sound engineering. Mr. Klayme is presently unemployed, and his employment experience was with the family business and working with his father after graduating from grade 12. He has been unemployed since the family business was sold over one year ago. As a result, he is financially dependent on his parents.

[47] Mr. Klayme reported that he has good health and that he had been diagnosed with ADHD as a child but took prescription medication to address those issues. He does not use any intoxicating substances but may have a drink on a few special occasions each year. He described himself as being a "very calm person" and has never attended any form of counselling.

[48] The Probation Officer noted that, during her interview with Mr. Klayme, he presented as being polite, respectful, and cooperative, but took no responsibility and maintained that he was innocent and repeatedly cited that his "email account had been hacked."

[49] With respect to those comments in the PSR, at the conclusion of the sentencing submissions, the Court offered Mr. Klayme the opportunity to make any comments directly to the Court or for that matter, any comments directed towards CH or LS, who had remained on the videoconference throughout the hearing on December 18, 2023. Mr. Klayme stated that he was sorry to hear what had happened to CH and her family, but maintained, as he had stated to the Probation Officer, that they were occasioned by another person and not by him.

[50] In concluding her report with respect to an Assessment of Community Alternatives/Resources, the Probation Officer first noted that Mr. Klayme has no prior convictions and is now before the Court as a 28-year-old first-time offender. The Probation Officer noted, that given the nature of the offences, Mr. Klayme is not a suitable subject for Community Service Work. However, the Probation Officer concluded the PSR by stating "the subject is considered a suitable candidate for Community Supervision should the Court be considering such a disposition."

Purposes and Principles of Sentencing:

[51] Pursuant to section 718 of the **Code**, the fundamental purpose of sentencing is to protect society and to contribute to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions which have one or more of the following objectives: denunciation, deterrence, separation of offenders from society where necessary, rehabilitation, reparation, and the promotion of a sense of responsibility and acknowledgement of harm done in the offender.

[52] The determination of a just and appropriate sentence is highly contextual and is necessarily an individualized process which depends upon the circumstances of the offence and the offender: see ***R. v. Lacasse***, 2015 SCC 64 para.1. On this

point, the Supreme Court of Canada had also stated, in ***R. v. M. (C.A.),*** [1996] 1 SCR 500 at paras. 91 and 92, that the determination of a just and appropriate sentence requires the trial judge to do a careful balancing of the societal goals of sentencing against the moral blameworthiness of the offender and the gravity of the offence while, at the same time, considering the victim or victims and the needs of and current conditions in the community.

[53] Under section 718.1 of the **Code,** it is a **fundamental principle of sentencing** that the sentence be proportionate to the gravity of the offence(s) and the degree of responsibility of the offender.

[54] In ***R. v. Lacasse***, 2015 SCC 64 (CanLII), the Supreme Court of Canada provided clear guidance with respect to the application of the Principle of Proportionality, in the specific context of where the Court of Appeal had intervened on the basis that the trial judge had deviated from the "proper sentencing range." The SCC stated, in ***Lacasse***, *supra,* at para. 11 that, except where a sentencing judge makes an error of law or an error in principle that has an impact on the sentence, an appellate court may not vary the sentence unless it is demonstrably unfit. Then, with respect to the Proportionality Principle, the SCC stated in ***Lacasse***, *supra*, at para. 12:

> "[12] In such cases, proportionality is the cardinal principle that must guide appellate courts in considering the fitness of a sentence imposed on an offender. The more serious the crime and its consequences, or the greater the offender's degree of responsibility, the heavier the sentence will be. In other words, the severity of a sentence depends not only on the seriousness of the crime's consequences, but also on the moral blameworthiness of the offender."

[55] Parliament has assessed the objective gravity of the offences for which Mr. Klayme has been found guilty, with respect to section 172.1(2)(a) of the **Code** child luring by telecommunication offence, Parliament has legislated that it is subject to a maximum term of 14 years imprisonment when prosecuted by indictment. The offence had carried a minimum term of imprisonment of one year but, as mentioned, was struck down by the SCC's ***Marchand*** decision, *supra*, on November 3, 2023.

[56] As for the section 171.1(2)(a) of the **Code** offence of making sexually explicit material available to a child, Parliament has assessed the objective gravity of that offence by legislating that it is subject to a maximum term of imprisonment

of 14 years and a minimum punishment of imprisonment of six months when prosecuted by indictment.

[57] Finally, with respect to section 163.1(4)(a) of the **Code** offence of possession of child pornography, Parliament has assessed the objective gravity of that offence by legislating that it is subject to a maximum term of imprisonment of not more than 10 years and when prosecuted by indictment, it is subject to a minimum punishment of imprisonment for a term of one year.

[58] I find that Mr. Klayme committed a series of very serious sexual offences which involved his "grooming" and manipulation of a vulnerable 12-year-old girl in a "dominant/submissive relationship" to virtually demand, from another country that CH expose her body and do certain things while they were communicating by video or to send sexually explicit photos to him through her iPhone for his own sexual gratification.

[59] The impact of these sexual offences committed on a vulnerable 12-year-old child in or about December 2018, has been devastating and CH continues to experience several traumatic effects to this day. In this case, the Crown elected to proceed by indictment on all offences before the Court, and in terms of these offences, I find that the gravity or seriousness of these offences is certainly very high.

[60] In assessing Mr. Klayme's moral blameworthiness for these offences, I find that he also bears a very high degree of responsibility for the sexual offences which are before the Court on this sentencing hearing. There can be no doubt, in my opinion, that the high degree of Mr. Klayme's moral blameworthiness is evident from the fact that the offences were committed through his obvious "grooming" and subsequent manipulation of a vulnerable 12-year-old girl.

[61] I also find that his moral blameworthiness is also very high, given the fact that these offences were perpetrated virtually and essentially, in the Court's opinion, anonymously as "Jay" over the Internet or by video chats and text messaging on cell phones, over a three-month period. The only reason that the sexual abuse of CH by "Jay" ended in mid-December 2018 was due to the fact that CH's mother happened to do a "random check" of her daughter's iPhone and immediately reported the matter to the police.

[62] In my opinion, there can be no doubt whatsoever that this offender bears a very high degree of responsibility or moral blameworthiness for these sexual

offences committed against a vulnerable 12-year-old young girl and the devastating and likely long-term impact that those sexual offences have had on CH as well as her mother.

[63] Given the circumstances of the offences, I find that denunciation of the unlawful conduct and specific and general deterrence are the important purposes of sentencing in section 718 of the **Code** which must be emphasized in the context of these sexual offences which were perpetrated virtually over the Internet and by video and text messaging on cell phones, over a period of time, on a vulnerable 12-year-old girl.

[64] However, given the fact that Mr. Klayme has no prior record of any convictions, this sentencing decision should also consider his rehabilitation, promoting a sense of responsibility in him and at the same time, acknowledging the harm done to the victim, in determining the just and appropriate sentence.

[65] In the circumstances of this case, it is also important to consider that Parliament has enacted section 718.01 of the **Criminal Code** as a sentencing objective related exclusively to sentences imposed for offences involving the abuse of persons under the age of 18 years by stating that the Court "*shall give primary consideration to the objectives of denunciation and deterrence of such conduct."*

[66] In addition, I also note, given the circumstances of this case that Parliament has enacted a provision with respect to cumulative punishments for sexual offences committed against children in section 718.3(7)(a) of the **Criminal Code**. Section 718.3(7)(a) provides that a sentence of imprisonment imposed for an offence under section 163.1 of the **Code** must be served consecutively to any sentence of imprisonment imposed for any other sexual offences against a child.

[67] In the Supreme Court of Canada's decision in ***Marchand***, *supra*, at paras. 95 and 98, Justice Martin addresses the impact of section 718.3(7) of the **Code** whereby Parliament has removed judicial discretion and has dictated that sentences must run consecutively for certain offences, like child pornography where the offender also commits another sexual offence against a child, or where there are sexual offences other than child pornography committed by the same offender against several children.

[68] In discussing the impact of section 718.3(7) of the **Code**, in ***Marchand***, *supra*, at para. 95, Justice Martin points out that:

> "[95] Generally speaking, "offences that are so closely linked to each other as to constitute a single criminal adventure may, but are not required to, receive concurrent sentences, while all other offences are to receive consecutive sentences" [**Friesen**, at para 155; see also **Criminal Code**, s. 718.3(4)(b)(i)]. Determining whether sentences should be consecutive or concurrent is a fact specific inquiry to be undertaken in the context of each case (C.C. Ruby, *Sentencing* (10th ed. 2020) at 14.13)."

[69] Justice Martin also provides some further comments with respect to section 718.3(7) of the **Criminal Code** in ***Marchand***, *supra*, at para. 98:

> "[98] This is not to say that luring must always be sentenced consecutively. Unless so mandated by section 718.3(7), sentencing judges retain discretion on this point. However, in exercising their discretion, judges must remain cognizant of the fact that the offence of luring constitutes an invasion of a different legally protected interest. The judge is obliged to explain why the sentence is to be served concurrently with the penalties imposed for other infractions. The reason for imposing a concurrent sentence must be provided. I also note that judges must be mindful not to double count; where a judge orders that a sentence for luring be served consecutively to any sentence for a secondary offence, the secondary offence cannot act as an aggravating factor in determining the luring offence."

[70] In terms of other sentencing principles which are to be considered by the court in imposing a sentence, section 718.2(a) of the **Criminal Code** mandates that a sentencing court must take into consideration any relevant aggravating or mitigating circumstances relating to the offence(s) or to the offender in considering whether the sentence should be increased or reduced.

[71] Section 718.2(b) of the **Criminal Code** stipulates that the judge imposing a sentence considers the so-called "parity" principle which reminds judges that the sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.

[72] On this point, I note that it is often difficult to find those similar cases, as the sentencing process is highly individualized, and it is based upon the circumstances of the offence and on the circumstances of the offender. It is important to remember that the fundamental principle of sentencing is proportionality and given the individualized nature of sentencing, there may be considerable disparity between offenders so long as the sentence ordered is proportionate to the gravity of the offence and the moral blameworthiness or culpability of the offender: see ***R. v. Lacasse***, *supra*, at para. 92.

[73] The Totality Principle which is stated in section 718.2(c) of the **Criminal Code** provides that:

> "Where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh."

[74] In ***R. v. Friesen***, 2020 SCC 9 (CanLII) at para. 157, the SCC noted that several provincial courts of appeal have stated slightly different approaches for trial judges to determine whether the combined sentences, which were determined to be imposed consecutively, should be adjusted. However, as a starting point, the SCC outlined the Principle of Totality in the following manner:

> "[157] The principle of totality requires any court that sentences an offender to consecutive sentences to ensure that the total sentence does not exceed the offender's overall culpability (see **Criminal Code**, section 718.2(c); **M.(C.A)** at para. 42.)"

[75] The Totality Principle is a principle in sentencing which is closely connected to the Principle of Proportionality. Where an accused is to be sentenced on multiple counts, the totality principle requires the Court to first determine whether sentences should be served consecutively or concurrently and then determine the appropriate sentence for each offence.

[76] After the Court has made those initial determinations, the Nova Scotia Court of Appeal has stated in ***R. v. Adams,*** 2010 NSCA 42 (CanLII) at para. 23, that the Court is required to consider the Totality Principle and take a so-called "final look" in relation to the total consecutive sentence to ensure that it is proportionate and not excessive to the gravity of the offences and the offender's degree of responsibility for those offences. If the Court determines after that "final look" that the total sentence appears to be excessive by being unduly long or harsh, then the Totality Principle requires the Court to adjust the total sentence accordingly.

[77] In addition, in sections 718.2(d) and (e) of the **Criminal Code**, Parliament has reminded sentencing judges that an offender should not be deprived of liberty if a less restrictive sanction may be appropriate in the circumstances. Furthermore, the sentencing judge is required to consider all available sanctions other than imprisonment that are reasonable in the circumstance, with particular attention to the circumstances of Aboriginal offenders.

Recent SCC Statements re-Sexual Offences Involving Children:

[78] In ***R. v. Friesen***, *supra*, at para.1, the unanimous judgement of the SCC highlighted the fact that this "case is about how to impose sentences that fully reflect and give effect to the profound wrongfulness and harmfulness of sexual offences against children." After reiterating that the SCC affirmed the standard of review for sentencing by appellate courts that they had set out in ***R. v. Lacasse***, 2015 SCC 64, the third "overarching point" of the Supreme Court of Canada's reasons in the ***Friesen*** were stated at para. 5 as follows:

> "[5] Third, we send a strong message that sexual offences against children are violent crimes that wrongfully exploit children's vulnerability and cause profound harm to children, families and communities. Sentences for these crimes must increase. Courts must impose sentences that are proportional to the gravity of the sexual offences against children and the degree of responsibility of the offender, as informed by Parliament's sentencing initiatives and by society's deepened understanding of the wrongfulness and harmfulness of sexual violence against children. Sentences must accurately reflect the wrongfulness of sexual violence against children and the far-reaching and ongoing harm that it causes to children, families, and society at large."

[79] While the ***Friesen*** decision involved a charge of sexual interference, the SCC stated in para. 44, that the guidance provided was focused on that offence and closely related offences, such as sexual assault. However, the Court added that the principles outlined in the decision also have relevance to sentencing for other sexual offences against children, such as child luring (**Criminal Code**, (s.172.1). Courts should thus draw upon the principles set out in the case when imposing sentences for such other sexual offences against children.

[80] The Court directed, in ***Friesen*** at para. 50, that in determining a fit sentence, sentencing judges must "properly understand the wrongfulness of sexual offences against children and the profound harm that they cause."

[81] Furthermore, the SCC emphasized in ***Friesen*** at para. 90, that the fact that the victim is a child increases the offender's degree of responsibility. They added that the intentional sexual exploitation and objectification of children is highly morally blameworthy because children are so vulnerable, in referring to their decision of ***R. v. Morrison***, 2019 SCC 15 at para. 153.

[82] Then, in dealing with Parliament's decision to prioritize denunciation and deterrence for offences that involved the abuse of children by enacting section 718.01 of the **Criminal Code**, the Supreme Court of Canada noted, in ***Friesen***, at paras. 101-104 that the wording used by Parliament that a court "shall give primary

consideration to the objectives of denunciation and deterrence" for offences which involved the abuse of the children, does not limit other sentencing objectives from being considered.

[83] However, in ***Friesen*** at para. 104, the SCC stated that Parliament's direction that deterrence and denunciation have priority, while limiting the sentencing judge's discretion to elevate other sentencing objectives to an equal or higher priority, a judge may still accord significant weight to other factors.

[84] In support of the Supreme Court of Canada's statement at the outset in ***Friesen*** that sentences for sexual crimes committed against children must increase while being proportional to the gravity of the offence and the degree of responsibility of the offender. The Court also noted at para. 96-99 that maximum sentences help determine the gravity of the offence and thus the proportionate sentence and the fact that Parliament has made successive increases in the maximum sentences for sexual offences committed against children, is a clear indication of Parliament's determination that sexual offences against children are to be treated as more grave than they had been in the past.

[85] After providing those general comments with respect to sentencing of offenders who have committed crimes against children, the Supreme Court also provided, in ***Friesen***, at paragraphs 121-154, a few "significant factors to determine a fit sentence" for sexual offences against children. Their comments were not designed to be an exhaustive list, but included: (a) likelihood to reoffend, (b) abuse of a position of trust or authority, (c) duration and frequency, (d) age of the victim, (e) degree of physical interference and (f) victim participation.

[86] For the purposes of this sentencing decision, it is important to keep in mind what the SCC has stated with respect to "victim participation" in ***Friesen***, at paras. 148-154. There, the SCC clearly stated that a victim's participation should not distract the court from the harm that the victim suffers as a result of the sexual violence. In addition, at para. 153, the SCC stated: "in some cases, a victim's participation is the result of a campaign of grooming by an offender or of a breach of an existing relationship of trust. In no case should the victim's participation be considered a mitigating factor. Where a breach of trust or grooming led to the participation, that should properly be seen as an aggravating factor."

[87] More recently, the Supreme Court of Canada released its decision in ***R. v. Marchand,*** 2023 SCC 26, which primarily dealt with the section 12 **Charter** issue of whether the mandatory minimum offences for child luring [section 172.1(2)(a)

and (b) of the **Code**] were unconstitutional, but the SCC also commented on the relevant sentencing principles in a child luring case, after the ***Friesen*** decision.

[88] In ***Marchand***, at para. 5, Martin J. made it clear that invalidating the mandatory minimums does not mean that child luring is a less serious offence. Based upon "the distinct and insidious psychological damage luring generates, in some cases the appropriate penalty for child luring will be imprisonment for a period equal to or longer than that set out in the unconstitutional mandatory minimum sentences."

[89] Justice Martin added, in ***Marchand*** at para. 5, that: "in these appeals, the reasonably foreseeable scenarios proffered produce fewer harms, and are presented in circumstances where the moral culpability of the offender is reduced. The broad reach and range of the offence means that a defined minimum period of imprisonment in all cases will sometimes produce results so excessive as to outrage standards of decency."

[90] Then, in ***Marchand***, at paras. 26-28, Justice Martin commented on the fact that Mr. Marchand's sentence did not reflect the Supreme Court of Canada's direction in ***Friesen***. A fit and proportionate sentence must be crafted based upon the particular facts of the case in light of the existing legislation and case law and that section 718.1 of the **Code** is a fundamental principle that the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. She added that the sentencing court must also take into consideration the sentencing principles enumerated in section 718.2 of the **Code**.

[91] However, Justice Martin reiterated, in ***Marchand*** at para. 28, what had been stated in ***Friesen*** (at para. 101) that Parliament has specifically indicated that, in sentencing offences involving abuse of children, including child luring, the objectives of denunciation and deterrence must be given primary consideration. Primary consideration does not exclude consideration of other sentencing objectives, including rehabilitation, but the judge cannot give those other factors precedence or equivalency (***Friesen*** at para. 104).

[92] Justice Martin added, at para. 34 in ***Marchand***, in applying the ***Friesen*** principles to the offence of child luring, that sexual offences against children are crimes that wrongfully exploit children's vulnerability (***Friesen*** at para. 5) and in committing the offence of luring, the adult takes advantage of the child's weaker position and lack of experience and by doing so repudiates the fundamental value of protecting children. Martin J. stated, at para. 34 that "children are particularly

exposed and helpless on-line: the Internet allows offenders direct, and sometimes anonymous, and often secret or unsupervised access to children, frequently in the privacy and safety of their own homes."

[93] Justice Martin, after referring to those principles from ***Friesen***, then went on to state that child luring is a "highly blameworthy" conduct. She stated in ***Marchand***, at para. 35 that:

> "[35] The sexualization of children is itself morally blameworthy conduct. Luring invades a child's personal autonomy, sexual integrity and gravely wounds their dignity (**Friesen**, at para 51). Using any person as a means to an end is unethical, but an adult's manipulation of a child to satisfy their sexual urges is highly blameworthy conduct. It is for those reasons that luring is recognized as "manifestly harmful and wrongful." *References omitted*- Even when the only interactions with the child occur online, the offender's conduct is inherently wrong because it still constitutes a form of sexual abuse. - *References omitted* - While the degree of exploitation may vary from case to case, the wrongfulness of the exploitation of children is always relevant to the gravity of the offence (**Friesen** at para 78*)"* [*The References are cited in the SCC Decision]*

[94] In terms of the emotional and psychological harms caused by child luring, Justice Martin reiterated at, para. 37 in ***Marchand***, what the SCC had stated in ***Friesen*** (at para. 82) that "even in child luring cases where all interactions occur on-line, the offender's conduct can constitute a form of psychological sexual violence that has the potential to cause serious harm."

[95] In ***Marchand,*** at paras. 38-39, the SCC noted that child luring can also cause distinct psychological and developmental harms to young victims that differ in two main ways from harms arising from sexual contact initiated in person. First, online communication allows "for abusers to get into the victim's head and abuse remotely" and for "manipulation and control over time" which can lead to serious and lasting psychological consequences. Because the communications in luring often intentionally emulate positive relationships, it can be difficult for victims to trust anyone intimately following this experience.

[96] Secondly, Justice Martin stated in ***Marchand***, at para. 39, that since offenders cannot physically touch their victims when communicating with them online, their power and the effectiveness of their strategies often lies in the degree to which they can control the victim and manipulate them into engaging with the abuse. Victims of luring often feel that they actively participated in their own

abuse, which may increase self-blame, internalization, and shame. This worsens the psychological harm.

[97] In the final analysis with respect to the ***Marchand*** decision, at para. 70, the SCC agreed with the Crown that, "given the particular circumstances of the luring in that case, there was no justification for departing from the existing sentencing range of 12 to 24 months for luring cases proceeding by indictment (referring to ***Morrison***, at para. 177, citing ***Jarvis*** at para. 31 and ***AF*** at para. 75.)"

[98] Then, the Supreme Court of Canada in ***Marchand***, at paras. 71-87 provided a non-exhaustive list of "Significant Factors to Determine a Fit Sentence," which would be relevant to a sentencing decision in the context of child luring, after the Court had determined the gravity of the offence and the moral blameworthiness of the offender.

[99] The ***Mitigating Factors*** were listed in paras. 72-73 [*numerous citations in support have been omitted]:*

- Whether the offender has pled guilty,
- Whether the offender has expressed genuine remorse or gained insight into the offence,
- Whether the offender has undertaken rehabilitative steps such as counselling or treatment,
- A lack of prior convictions,
- Honesty and cooperation throughout the sentencing process,
- Personal circumstances of the offender may also have a mitigating effect on blameworthiness:
    - The age of the offender at the time of the events,
    - A stable family life,
    - Ability to have and maintain stable employment,

- Whether the offender might have or have had a mental disability or substance abuse disorder which imposes serious cognitive limitations, such that their moral culpability is reduced.

[100] The ***Aggravating Factors*** were listed in paras. 74-87 [*numerous citations in support have been omitted]:*

- **Grooming** - Justice Martin noted that the sentencing judge had erred in principle in failing to account for the fact that the offender's actions had caused the victim distinct psychological harm. The offender's manipulation and grooming were both aggravating factors that increased his moral blameworthiness, Martin J. stated at para. 75 in ***Marchand***, that although no formal Victim Impact Statement was adduced at the sentencing, even where actual harm to the victim is not admitted, harm can still be inferred. Even when there is no direct evidence, sentencing judges can infer the likelihood of actual harm where there are aggravating factors such as grooming.

- **Character of the Communication** - The duration and frequency of the communications are important to the extent that they may generate cumulative or more severe harms and increase the gravity of the offence and the moral blameworthiness of the offender. Because repeated and prolonged acts of sexual violence increase long-term harm suffered by the victim [***Friesen*** at para. 131], sending a large volume of messages, or sending messages in a persistent and unrelenting way is aggravating.

- **The Substance of the Communication** - The offender had often sent sexually explicit and objectifying messages to the victim. Graphic sexual content is clearly aggravating, but so is communication where the offender manipulates through language about love and affection. It is also aggravating for the offender to rely on trickery, lies or manipulation to lure the victim.

- **Encouraging the Child to Share Explicit images or Sending Explicit Images to the child** – This, according to Justice Martin, at para. 79, heightens blameworthiness and may serve as an aggravating factor on sentencing with respect to the luring offence. In ***Marchand***, the offender had encouraged the victim on numerous occasions to send explicit photos of herself through "Snapchat" which were saved on his phone. The duration and frequency of the communications, along with the sexually explicit nature of the messages and

the repeated requests for explicit photos, are all aggravating factors in the ***Marchand*** case.

- **Deceit** - Deceit can present itself in many forms and is aggravating. Where an offender relies on anonymity, for example, by using a false name, identity, or age, then the conduct is more blameworthy: ***Marchand*** at paras. 80-81 [*numerous citations in support have been omitted]*. Justice Martin noted that not every offender operates under the shield of anonymity and in ***Marchand***, the offender had met with the victim in person and had used his real name.

- **The communication itself as a deceitful tactic** - The offender may instruct the victim to erase the communication to conceal the luring or to refrain from sharing any messages with parents or family members. It is also a further *aggravating factor* if an offender intentionally chooses a platform that erases records of communication in order to avoid detection or to use a more secure platform after learning of the child's age.

- **Abuse of a Position or Relationship of Trust** - In ***Marchand*** at paras. 82-84, the SCC notes that jurisprudence provides several examples of traditional positions of authority which may be exploited, including a parent or a family friend, and that the positions of trust are on a spectrum where prior relationships can be used to build trust and confidence to manipulate the victim and facilitate the commission of the offence.

- **Age of the Victim -** The age of the child may also be an aggravating factor as pursuant to s.718.2(a)(ii.1) of the **Criminal Code**, abuse of a person under 18 years is a statutorily aggravating circumstance. Since luring will always involve a child, practically speaking the child would be of an age to access and use telecommunications and, as a result, luring will often involve adolescent victims.

- **A wide gap in age between the offender and the victim -** In ***Marchand***, the offender was nine years older (22) than the victim, who was in her early teenage years (13) at the start of the incident. The significant age gap and the victim's severe vulnerability are both aggravating factors.

[101] Finally in ***Marchand***, Justice Martin concluded that the five-month sentence ordered by the trial judge for the child luring offence resulted from several errors in principle and after considering the legislative initiatives regarding sexual offences against children, the aggravating and mitigating factors which she

articulated in the preceding paragraphs, held at para. 88 that the distinct harm caused by the on-line communication justified a sentence of 12 months imprisonment for Mr. Marchand.

[102] In finally determining the overall just and fit sentence, however, Justice Martin also considered the issues of concurrent versus consecutive sentences as there was no appeal with respect to Mr. Marchand's sentence of 10 months for the sexual interference offence.

[103] Martin J. concluded, at para. 100, that the sentencing judge had failed to consider the distinct legal interest that the luring offence protects and was present in the case and then, she conflated the sentence for luring with the secondary offence. As such, Justice Martin concluded that the twelve-month luring sentence ought to be served consecutively to the 10-month sentence for sexual interference. Following that, Justice Martin stated at para. 101: "Applying the totality principle, I find that the 22-month sentence is just in light of the circumstances of the case, Mr. Bertrand Marchand's personal circumstances and his moral blameworthiness."

[104] The balance of the ***Marchand*** decision from paras.103-174 dealt with the [6:1] majority decision as to whether mandatory minimum sentences in section 172.1(2) of the **Criminal Code** violated section 12 of the **Charter**. The Supreme Court of Canada concluded, in ***Marchand***, *supra* at para. 174 that the mandatory minimum sentences for the child luring offence, whether proceeded by indictment with a one-year minimum term of imprisonment or by way of summary conviction with a six-month term of imprisonment were inconsistent with section 12 of the **Charter**, are not saved by section 1 and were declared to be of no force and effect under section 52 of the **Constitution Act**, 1982.

Aggravating and Mitigating Circumstances:

[105] As I previously mentioned, section 718.2(a) of the **Criminal Code** requires the Court to consider any relevant aggravating and mitigating circumstances which relate to the offences or to the offender in considering whether the sentence imposed by the Court should be increased or reduced.

[106] I find that the **Aggravating Circumstances** are as follows:

- The evidence that the offender, in committing the offence, abused a person under the age of 18 years - section 718.2(a)(ii.1) of the **Code;**

- The evidence that the offence has had a significant and ongoing traumatic impact on the victim (C.H), considering her age (12 years old) and other personal circumstances, including her health and the financial implications on her family - section 718.2(a)(iii.1) of the **Code**;

- The victim in this case was a 12-year-old girl who had been "groomed" and manipulated by the offender with him as the "dominant" and CH as his "submissive" to demand that she provide him with sexually explicit photos and videos which constituted "child pornography;"

- The evidence that this was not a "one-off" situation, but rather the sexual abuse of the victim (C.H.) went on for two or three months and only ended when CH's mother (L.S.) discovered the sexually explicit photos on her daughter's cell phone and contacted the police;

- The evidence that the offender sent numerous sexually explicit and objectifying text messages to CH, and when conversations were on video, the offender generally focused his video camera on his exposed penis;

- As stated in ***Marchan*d**, the offender used deceit by using a false name or names to conceal his identity and maintain anonymity;

- The wide gap of about nine (9) years in age between the offender and the victim which coincidentally happened to be about the same gap as the offender and the victim in the ***Marchand*** case, which heightened the victim's vulnerability.

[107] I find that the **Mitigating Circumstances** are as follows:

- Mr. Klayme is a youthful first-time offender, who was 23 years old at the time of the offences and is now 28 years old;

- He has no prior criminal record and there were no violations of his terms and conditions of his interim release over about 3 years;

- He has positive community support from his parents and siblings and continues to reside with them in their house;

- Mr. Klayme presented as polite, respectful and cooperative in his dealings with the Probation Officer.

Precedents to Establish a Range of Sentence - Parity Principle [s.718, 2(b)]

[108] As I indicated previously, the parity principle found in section 718.2(b) of the **Code** requires the Court to consider that a sentence imposed should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. A review of the sentencing precedents provided by counsel or reviewed by the Court may be considered to establish a range of sentence, as a guideline for the trial judge. It does not, however, create any hard and fast rules, nor does the consideration of an appropriate range preclude a greater sentence where the emphasis is upon denunciation and, deterrence and the gravity of the offence or a lesser sentence based upon special or significant mitigating circumstances.

[109] In support of the Crown Attorney's sentencing position, she cited several cases where the offender had committed a very serious offence and that his actions represented a very high degree of moral blameworthiness for which a CSO would be inconsistent with the key sentencing principles applicable in this case. She also stated that, pursuant to section 718.01 of the **Code** and the comments in ***Marchand***, *supra*, when a Court imposes a sentence for an offence which involves the abuse of a person under the age of 18 years, the Court shall give "primary consideration" to the objectives of denunciation and deterrence of such conduct. In those circumstances, the Court may still consider and give some weight to other sentencing factors, but as stated in ***Friesen***, *supra*, at para. 104, the Court cannot give those other sentencing factors precedence or equivalency to the objectives of denunciation and deterrence.

[110] In terms of the sentencing precedents provided by the Crown Attorney, the majority were cited in relation to the section 12 **Charter** issue, but there were others submitted for the purpose of the parity principle to develop an appropriate range of sentence. In addition, I find that the most applicable, similar offenders who have committed similar offences in similar circumstances would be those sentencing decisions, which have been issued after the Supreme Court of Canada's decision in ***R. v. Friesen*** in 2020.

[111] In terms of the sentencing precedents provided by the Crown Attorney which focused on establishing a sentencing range for one of the offences before the Court, versus a primary focus on the **Charter** issue, I have considered the following cases:

[112] ***R. v. Bartley***, 2021 ONCJ 360 - Mr. Bartley had entered guilty pleas to two offences, namely making available child pornography, contrary to section 163.1(3) and possession of child pornography, contrary to section 163.1(4) of the **Code**. The Crown had proceeded by indictment. Mr. Bartley had uploaded images on his computer via Kik with his email address. After obtaining a warrant, police officers seized two cell phones, a tablet and discs. The images before the Court were located on one of his cell phones - there was one image in relation to the charge of making available child pornography and the other count relating to possession of child pornography, there were 39 images and 55 videos.

[113] The Court noted that the parties had agreed to sentencing range of 12 months by the defence and 16 months by the Crown, and as a result, no PSR was ordered by the Court. The offender was 36 years old, had a nine-year-old son that he had not seen since his arrest, supportive parents, grade 12 education and was steadily employed. Mr. Bartley had been diagnosed with ADHD but was not prescribed medication and had no prior criminal record. He had pled guilty to the charges and expressed his remorse to the Court.

[114] The Court discussed the evolution of sentencing for child pornography and sexual offences since ***Friesen*** and ordered 15 months of incarceration, which was reduced by one month, to a sentence of 14 months incarceration due to presentence custody credit and the ongoing Covid 19 pandemic, to be followed by a period of 18 months probation.

[115] ***R. v. R.L.W.,*** 2013 BCCA 50 - The accused appealed a sentence of five years imprisonment for a sexual assault causing bodily harm and 18 months consecutive for possession of child pornography. The appeals were dismissed.

[116] With respect to the appeal of the 18 months consecutive for the possession of child pornography. the accused had downloaded and filed over 200 videos depicting children engaged in all sorts of sexual activities with adults. He was a 28-year-old aboriginal offender who had suffered physical abuse as a young child and bullied at school. He had been molested as a child, was exposed to a sexualized environment at a young age and had a history of substance abuse and addictions. The issue on appeal was whether the sentencing judge had failed to properly consider the accused's personal circumstances and aboriginal background in sentencing.

[117] The Court of Appeal concluded that that the trial judge did not error in his application of the ***Gladue*** factors and that, with respect to the possession of child

pornography sentence, the trial judge had identified the appropriate range. The trial judge had also considered the nature and quantity of the pornography as well as how that factored into the accused's moral culpability. The trial judge had assessed the range for the child pornography as being four months to two years and given the collection, the Court of Appeal agreed that the sentence was towards the high end of the range but was not demonstrably unfit.

[118] ***R. v. Inksetter***, 2018 ONCA 474 - The accused was a first-time offender who was 51 years old and had pled guilty at an early date to possession of child pornography and making child pornography available. The Court noted that his collection was one of the largest and worst that the police service had ever encountered - being over 28,000 unique images and 1140 unique videos of child pornography on the accused's computer and various devices. About 95% of the material depicted explicit sexual activity, with some of the images of explicit sexual activity involving children as young as one-year-old.

[119] There was psychiatric evidence which indicated that the accused was a very low risk to reoffend for child pornography offences and unlikely to be a pedophile. The trial judge also noted that the accused had shown real remorse and insight and had accepted full responsibility for what he had done. The trial judge stated that the paramount sentencing objectives for offences involving child pornography are denunciation and deterrence and that they had already been largely accomplished. The trial judge imposed a sentence of two years less a day to be followed by three years probation to ensure that the Court could include a period of probation to assist the accused and ensure that he received counselling.

[120] The Crown stated that the applicable range of sentence would be three to five years and they recommended a sentence at the higher end of the range. The accused's counsel submitted that the range for possession of child pornography was nine months to four years and recommended one-year terms of imprisonment on each count to run concurrently, followed by probation of between 18 to 24 months.

[121] The Court of Appeal noted that child pornography is a pervasive social problem involving child sexual abuse and that in amassing, viewing and making it available, the accused had participated in the abuse of thousands of children. The Court of Appeal stated that over the past decade Parliament had increased the legislative range of sentence for child pornography related offences and there was a minimum sentence of one year and a maximum of 14 years, where the charge

proceeded by indictment. The Court allowed the appeal and substituted a sentence of 3 years imprisonment for the possession of child pornography and 3 ½ years imprisonment for the "make available" child pornography charge, to be served concurrently.

[122] ***R. v. Reid***, 2022 ONSC 2987 - the accused was found guilty of possession of child pornography and accessing child pornography and sentenced to 25 months imprisonment. He was acquitted of making child pornography available to others. Police found 2500 videos and 4000 images of child pornography on the hard drives of his computers that they seized from his home office. He had obtained the child pornography through peer-to-peer client software sharing networks.

[123] The Crown sought a custodial sentence of three years together with ancillary orders based upon the substantial collection of child sexual abuse material that was organized and curated. Defence Counsel took the position that a jail sentence was not required, as the accused's moral blameworthiness was mitigated by number of factors including that he had no prior criminal convictions, the offence was committed through recklessness in that he had not taken sufficient care to only target adult pornography and finally, he acknowledged that he had a problem with sex addiction and had taken steps to address that addiction.

[124] The Court took all of those aggravating and mitigating factors into account, including a positive history of social contribution and full support of his wife and other members of the community, but the collection of the child pornography had been going on for years, the material possessed by the accused was repugnant and there was a variety of violence and intrusive acts committed against children. The court ordered a sentence of imprisonment of 25 months.

[125] ***R. v. Clarke***, [2016] N.J. no. 78 (NLPC) - The accused had been found guilty of two offences involving the distribution and possession of child pornography. He had made available through a file-sharing program on the Internet child pornography to others. A police officer in Toronto was able to download the child pornography from the accused and a short time later police executed a search and found two computer towers and DVDs containing child pornography. The offences were prosecuted by indictment and section 163.1(4)(a) of the **Code** stated that the maximum term of imprisonment was not more than 10 years and there was a minimum punishment of imprisonment for term of one-year.

[126] The accused had been convicted of the two offences, hundreds of images were found in his possession and the offender, who had been in custody for 49

days did not feel that he had done anything wrong. The Court ordered 18 months for the possession of child pornography and determined that the appropriate sentence for the distribution of child pornography was two years, with the sentences to be served concurrently, so that a three-year term of probation could be ordered.

[127] ***R. v. Razon,*** 2021 ONCJ 616 - Mr. Razon had pleaded guilty to child luring [section 172.1(1)(b)] and possession of child pornography [section 163.1(4)]. The Crown had proceeded by indictment. An undercover police officer was operating in an Internet chat room, posing as a 14-year-old female ("Abby") when she initiated a conversation with the accused. She told him that she was 14 years old, and he quickly turned the conversation into sexual topics. He then provided her with his Skype account where they continued conversations and chats over the next two weeks that were of a sexual nature. The accused offered to share pornography with the undercover officer and sent her a photo of his penis. He repeatedly asked her to send him photos of her body and he also discussed sexual acts that he would like to perform on her. No concrete plans were ever made for meeting, and it appeared that the accused's main interest was in using the young female to manufacture child pornography for him.

[128] The Court noted that each offence carried a mandatory minimum sentence of one year of imprisonment. The accused had filed a section 12 **Charter** challenge to the mandatory minimum punishments, as his counsel was recommending a CSO of two years less a day, to be followed by three years on probation. The Crown took the position that the appropriate global sentence in the case was three years imprisonment and therefore, the constitutional issue was moot.

[129] The Court took account of the recent Supreme Court of Canada comments in ***Friesen*** with respect to the seriousness of child sexual offences generally and the seriousness of child luring offence in the case. There was little chance that the accused would meet with "Abby" as he was a 21-year-old, isolated young man, with significant social limitations who lived with strict and protective parents. Although he continually turned down efforts to formulate a plan to meet with "Abby" in person, he had repeatedly tried to entice "Abby" to send him intimate photos of herself and to engage in sexual acts with other children and to send him those images. The accused also possessed thousands of images and videos of child sexual abuse which he had amassed over the years. The Court determined that this was a serious case of child pornography.

[130] The accused had no prior record and based upon a psychiatric assessment, the doctor indicated that the accused suffered from both pedophilia and an autism spectrum disorder. The Court stated that none of those factors would excuse his behaviour but found that the level of moral responsibility for his conduct was significantly reduced owing to his psychological deficits.

[131] The Court found that there were many aggravating factors present - this was not a momentary error of judgement, the size and nature of the child pornography was seriously aggravating, the steps taken to lure "Abby" to commit sexual offences with a younger child were highly aggravating, the fact that the accused had distributed, in the course of the luring offence, both adult and child pornography to a person he believed was 14 years old was aggravating.

[132] On the other hand, the mitigating factors were that the accused had pled guilty and accepted responsibility thereby saving the court resources that would otherwise have been spent trying the case. The decision to plead guilty was made during a global pandemic when the Court's were resources were particularly strained and he had complied with his conditions of release for an extended period of time without incident.

[133] Despite the accused's sympathetic circumstances and all the rehabilitative efforts that he had undertaken, the Court noted that denunciation and deterrence were the predominant objectives of the sentence to be imposed. It was necessary to impose a harsh sentence that adequately denounced the accused's serious unlawful conduct and send an appropriate deterrent message to him and others. Although the accused did not pose an undue risk to the community, the Court was of the view that a CSO would "simply be inadequate" to reflect the denunciation of the unlawful conduct of the offences committed against children or properly reflect the harm done to many victims of child pornography.

[134] In the final analysis, despite the accused's significantly reduced level of responsibility for committing these offences, his personal circumstances, and the application of the principle of restraint, the Court ordered a total sentence of 18 months in prison, with 18 months being ordered for the child luring offence and 18 months for the child pornography to run concurrently, followed by three years probation. The Court declined to decide whether the mandatory minimums would infringe section 12 of the **Charter** in the case of a reasonable hypothetical, given the sentence ordered exceeded the mandatory minimum.

[135] ***R. v. A.H.,*** 2016 ONSC 6364 - The accused was convicted of Internet Child Luring with a minor over three-month period in 2013, when AH had sent offensive material over the Internet to a 15-year-old [SK], who was a friend of his daughter. The offensive material forwarded to SK included pictures of his penis and that he had told the victim in graphic terms what he wished to do to her. AH was 52 years old at the time of sentencing and was originally from Guyana. He had no prior criminal record. The victim did not provide a Victim Impact statement.

[136] The mandatory minimum sentence for section 172.1(2) of the **Code** for the child luring offence when prosecuted by indictment was one year of imprisonment. The Crown had sought a sentence of 15 months imprisonment to be followed by one year probation ancillary orders. Defence Counsel had submitted that a shorter sentence, and a period of probation would be appropriate. Defence Counsel also stated that AH continued to maintain his innocence.

[137] AH was sentenced to 15 months imprisonment to be followed by one year of probation. The Court noted that the only mitigating factor was his lack of a prior criminal record. The lack of remorse was not an aggravating factor. The offence was very serious and involved the abuse of a child and pursuant to section 718.01 of the **Code**, denunciation and deterrence were the primary considerations. In addition, there was evidence that the child luring had a significant impact on the young victim. The ancillary orders of a DNA sample, 20-year **SOIRA** order and 10-year section 161 **Code** order were granted.

[138] ***R. v. Rafiq***, 2015 ONCA 768 - The accused had pled guilty to one count of child luring contrary to section 172.1 of the **Code** and had received a CSO of two years less a day. The Crown appealed and the Court of Appeal allowed the appeal and ordered the appellant incarcerated for the time remaining on the CSO.

[139] The offence had occurred between April and December 2009 when the accused engaged in sexually explicit Internet chats with a 12-year-old girl who lived in the USA. They met through an Internet game and they each lied about their age. Within a short time, the accused learned the victim's true age and throughout their correspondence, the accused instructed her on sexual activities, sent her several photographs of his penis and induced her to send him nude photographs of herself. They also had lengthy chats with him requesting that she engage in masturbation at the same time as he did. Eventually the girl's parents discovered the chats and reported them to the police. The chats were traced to the accused's home and on his computer, the police found four (4) child pornography

videos and several pictures of the complainant. The victim did not give a victim impact statement, but her mother did.

[140] The sentencing judge had recognized that this was a serious case of child luring and considered that this would normally require a sentence of incarceration. The aggravating factors were the presence of an actual victim, her suffering, the victim's age, the prolonged nature of the conduct and that the accused was a healthy 24-year-old, who had manipulated a 12-year-old girl. However, the trial Court also acknowledged that there were several mitigating factors of a guilty plea, absence of a criminal record, a supportive family, his lengthy period on bail without incident, submitting to a psychiatric assessment and the accused's low risk of reoffending as well as his genuine remorse. Taking into account all of those mitigating factors, the trial judge ordered a CSO of two years less a day with 12 months of house arrest.

[141] The Court of Appeal allowed the appeal and ordered a sentence of imprisonment of two years less a day but reduced the sentence by giving the accused credit on a one-to-one basis for the time that he had served on his CSO. A Conditional Sentence Order sentence was not appropriate. While no minimum sentence was in place when the accused was sentenced, subsequently Parliament had legislated a mandatory minimum sentence of one year for those cases where the Crown had proceeded by indictment. If the minimum sentence was in place at the time a sentencing, a CSO would not have been an "available" sanction.

[142] The Court of Appeal stated that the CSO did not give adequate expression to denunciation, deterrence or the impact of the offence on the victim. The trial Judge had also ignored several aggravating factors, including that the accused repeatedly and successfully urged the victim to make and distribute child pornography, he had groomed the victim and there was a significant impact of the offence on the victim.

[143] The Defence Counsel's initial brief on sentencing, like the sentencing brief initially filed by the Crown Attorney, was entirely related to the section 12 **Charter** challenge to the mandatory minimum penalties in relation to the child luring charge [section 172.1] and the child pornography charge [section 163.1]. However, after the ***Marchand*** decision was released, the Court asked both sides whether they had any other cases that they wished to provide, which might be relevant to the parity principle and establishing the range of sentence for the offences, especially if they had any relevant precedents issued after the ***Friesen*** decision.

[144] Defence Counsel forwarded the case of ***R. v. Jeremie Roy***, 2023 ABCJ 262. The ***Roy*** case was decided on November 30, 2023, and considered not only the ***Friesen*** decision, but also the ***Marchand*** decision which had been released in early November. In the ***Roy*** case, the accused pled guilty to one count of making child pornography contrary to section 163.1(2) of the **Code** and one count of child luring contrary to section 172.1(1) of the **Code.** The Crown had proceeded by indictment.

[145] The agreed facts of the case were that the Regina police had received a report from a 13-year-old girl [TP] that she had been on "Snapchat" messaging with an unknown person using her friend's [MK] cell phone. The unknown person, who was subsequently identified as Mr. Roy had, during the messages, identified himself as a 23-year-old male named Jeremie. As "Jeremie," he had sent TP an image of his erect penis and two head shots of himself, he had counseled TP to touch her vagina and asked her to send him sexually explicit images, which she did. He also suggested that TP engage in sexual activity. All of the messaging or their conversations happened over the course of one day.

[146] MK's mother gave the Regina police the cell phone for forensic analysis. The analysis of the cell phone showed that the unknown person's "Snapchat" username was "Jeremie_legac19." The United States' Department of Homeland Security gave the Regina police information connecting that account to an IP address and a cell phone number. The Regina police obtained the general production order results from Bell and Shaw which confirmed that the cell phone number belonged to Mr. Roy and the IP address belonged to Mr. Roy's mother in Red Deer, Alberta, where she and Mr. Roy lived. The RCMP obtained and executed a search warrant and seized five electronic devices.

[147] Forensic analysis of the seized devices located the "Snapchat" conversation between Mr. Roy and TP, including three images that he had sent to her. The police also located a total of 102 "chats" in which the recipient disclosed that they were underage, and Mr. Roy continued to have a sexually related conversation with them. Mr. Roy had also told TP that he wanted to or did have sexual encounters with underaged persons.

[148] Mr. Roy was 32 years old at the time of the offence and was 36 years old at the time of the sentencing hearing. He had no criminal record, had not been in a intimate relationship or ever married, he had no children and lived with his mother. Mr. Roy had been steadily employed and was working about 40 hours a week in a farming and resource cooperative. In the PSR, Mr. Roy stated that he did not

remember the conversation with TP as he was speaking with the number of individuals on that chat program at that time. His parents had separated, and his mother was divorced from his stepfather, but he kept a positive and close relationship with his mother and was living with her. Mr. Roy had struggled in school because of his dad's transient employment, later finding out that he was diagnosed with ADHD and only completed grade 10.

[149] When discussing the offences with the Probation Officer, Mr. Roy stated that he "screwed up" and said that you meet a lot of people on "Snapchat" and that he had met a girl, asked her how old she was, and she said that she was underage. Mr. Roy stated that the girl asked for picture, so he sent her a picture of his penis and he asked her to send him a picture of her, which she did and then he said, "and now I am in trouble." He added that he did not specifically remember the victim saying that she was 13 years old before asking for a picture of her and him sending her sexually explicit material. The forensic report indicated that he was a low risk to reoffend.

[150] The Court acknowledged all the relevant provisions in ***Friesen*** with respect to the sentencing of sexual offences against children and noted that in ***Marchand*** the SCC had also stated that it is well-established that sexual offences against children cause significant harm. The Court also considered the comments in ***Friesen*** and ***Marchand*** with respect to the aggravating and mitigating factors in cases of this nature.

[151] The Court also observed that Mr. Roy had demonstrated his remorse through his guilty plea, his likelihood of reoffending was low based upon the assessment, and he was willing to attend treatment and counselling. Mr. Roy had significant family support and a relatively strong employment history. He was a first-time offender with no prior criminal record and the text message communication underlying the child luring offence occurred over one day.

[152] By comparison, the Court noted that in ***Marchand***, the Supreme Court of Canada had increased the sentence for the Child Luring offence to 12 months, where the luring had taken place over nearly seven months, with extensive grooming, the communications being manipulative and demeaning and the youth being particularly vulnerable as well as the offender exploiting a pre-existing relationship of trust. The Court determined that, by comparison, the gravity of the offence and moral blameworthiness of the offender in ***Marchand*** were considerably higher than in the ***Roy*** case.

[153] In the final analysis, the Court determined that a lengthy CSO was a "just and appropriate" order. After considering the provisions of section 742.1 of the **Code** and the decision in ***R. v. Proulx*** 2000 SCC 5, the Court held that a CSO with restrictive conditions can be a punitive sanction capable of achieving the objectives of denunciation and deterrence. The Court also noted in ***Roy***, *supra*, at para. 102, that some of the case law dealing with the child sexual offences after ***Friesen*** seems to suggest that "exceptional circumstances" must be present to order a non-custodial sentence**.** The Court acknowledged that, for many or most offences involving the sexual abuse of children, a non-custodial sentence will not be a proportionate disposition. However, the Court concluded that, while a CSO may be a rare disposition in child sexual offences, it did not mean that a sentencing judge must find an "exceptional circumstance" for a CSO to be a proportionate disposition.

[154] In the final analysis, the Court imposed a CSO of two years less one day followed by two years probation. During the first 18 months of the CSO, Mr. Roy was to be subject to house arrest, followed by curfew and other restrictive conditions for the balance of the CSO. The Court stated that the lengthy term of the CSO and the 18-month period of house arrest were both intended to give effect to the primacy of the sentencing objectives of denunciation and deterrence.

The Just and Appropriate Sentence:

[155] As I have previously determined, the fundamental principle in sentencing is proportionality which is codified in section 718.1 of the **Code**. A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. I have found that the gravity or seriousness of the three offences before the court, which were prosecuted by indictment, were all very serious in the circumstances of this case.

[156] In addition, in terms of Mr. Klayme's degree of responsibility or moral blameworthiness for those offences, given the significant number of aggravating circumstances, and the relatively few mitigating circumstances, I have found that his moral blameworthiness for the grooming and manipulation of a vulnerable 12-year-old girl for his own sexual gratification over a significant period of time represents an equally very high moral blameworthiness for the sexual abuse of a 12-year-old girl. .

[157] During their sentencing submissions, the Crown Attorney recommended that Mr. Klayme be sentenced to a period of 18 months in prison for the Child Luring offence contrary to section 172.1 of the **Code** and a concurrent sentence of 18 months for the section 163.1(4) of the **Code** charge as well as a 12-month concurrent sentence for the section 171.1 of the **Code** charge, Given the Crown Attorney's sentencing position, she is not recommending a sentence of federal incarceration of two years or more which, if accepted, would be a bar to the imposition of a CSO for Mr. Klayme.

[158] In view of the recent SCC decision in ***Marchand*** to strike down the mandatory minimum of one year of imprisonment for the section 172.1 of the **Code** offence, the legislated mandatory minimum for that offence is no longer a bar to the imposition of a CSO. Furthermore, as mentioned, the parties have jointly recommended that the mandatory minimums for the other two offences before the Court would likely violate section 12 of the **Charter** on the basis of a reasonable hypothetical. which the Court has accepted and thus, **for the purposes of this case**, the Court declines to apply the mandatory minimum sentences for the remaining offences before the Court. As a result, a CSO remains an "available" option and the Court is required determine if a CSO of imprisonment in the community is the "just and appropriate" sentencing option in all the circumstances of this case.

[159] In ***R v. Proulx,*** 2000 SCC 5 and in ***R. v. Wells***, 2000 SCC 10, the Supreme Court of Canada determined that section 742.1 of the **Code** required the judge to determine, at a preliminary stage, whether there were any provisions that exclude a CSO from being considered as an available sentencing option and to also to exclude two sentencing possibilities, probationary measures and a penitentiary term of more than two years.

[160] At the preliminary stage, the duration and venue of the sentence is not determined, the Court is required to consider the fundamental purpose and principles of sentencing set out in section 718 to 718.2 of the **Code** only to the extent necessary to narrow the range of sentence for the offender. In this case, neither the Crown nor Defence Counsel is recommending a suspended sentence and probation and notwithstanding the fact that the Crown proceeded by indictment, as mentioned, the Court is proceeding on the basis that the legislated one-year mandatory minimum term of imprisonment, is not a statutory bar to the imposition of a CSO for Mr. Klayme.

[161] Moreover, the fact that the Crown recommends a total sentence of 18 months, the recommended sentence of imprisonment is not more than two years, and, in those circumstances, the proposed sentence is less than the two-year limit for the imposition of a CSO of imprisonment in the community, as the Crown Attorney is not recommending a penitentiary term.

[162] Furthermore, pursuant to section 742.1 of the **Code**, before determining whether a CSO is the appropriate sanction to order, the Court is required to confirm that there is no minimum term of imprisonment, and that the safety of the community would not be endangered by the offender serving the sentence in the community. I have already dealt with the issue of the minimum sentence, and as for the other criterion, I find that the gravity of damage that could ensue from the offender committing a similar offence is serious. However, there is no information in the PSR or any forensic assessment before the Court, from which I could make an assessment, one way or the other, as to whether there is a low risk of the offender reoffending.

[163] In ***Proulx***, *supra*, at paras. 99-100, which was reiterated with approval in ***Wells***, *supra*, at para. 31, the Supreme Court of Canada noted that a conditional sentence can incorporate traditionally punitive goals of sentencing while also providing an opportunity to further the goals of restorative justice. It affords the sentencing judge the opportunity to craft a sentence with appropriate conditions that can lead to the rehabilitation of the offender, reparations to the community and the promotion of a sense of responsibility in ways that jail cannot. However, it is also a punitive sanction, and it is that punitive aspect of strict conditions that distinguishes it from probation.

[164] In ***Wells***, *supra*, at para. 33, the Supreme Court of Canada stated:

> "[33] The amount of denunciation and deterrence provided by a conditional sentence varies depending on the nature of the conditions imposed and the duration of the sentence. Since the imposition of any sentence is determined on an individual basis, each conditional sentence needs to be crafted with attention to the particular circumstances of the offence, offender and the community in which the offence took place. Consequently, conditions will vary according to these factors with it being generally true that "the more serious the offence and the greater the need for denunciation, the longer and more onerous the conditional sentence should be [**Proulx**, at para. 106]."

[165] While counsel have provided several precedents to determine a range of sentence for the child luring offence contrary to section 172.1 of the **Code**, I also

note that the SCC in ***Marchand*** found that**,** with several aggravating factors and also several mitigating factor, the just and appropriate sentence in that case, which proceeded by indictment, was 12 months imprisonment, after striking down the mandatory minimum sentence of one year imprisonment on the basis of reasonable hypotheticals.

[166] Based upon cases provided by counsel with respect to the parity principle, I found that the ***Razon*** case, which was **post-*Friesen***, was very similar in many respects to the instant case in terms of the serious nature of the offence, similar images, the age gap, but with the conversations and exchanges of photos occurring over a much shorter period of time than the instant case. In ***Razon***, there were also a more mitigating circumstances, which are not present in this case. In the final analysis, the Court ordered 18 months imprisonment and three years probation.

[167] The ***AH*** case, which was **prior** to the ***Friesen*** decision, was also quite similar to the instant case and, in that case, the Court ordered 15 months to be followed by one year on the terms of probation. Finally, I found that the ***Rafiq*** decision was almost identical to the instant case in terms of the nature of the child luring offence. Although it was **prior** to the ***Friesen*** decision, I find that the Ontario Court of Appeal in ordering incarceration of two years less a day had essentially taken into account most of the factors that the Supreme Court of Canada subsequently noted in ***Friesen***.

[168] I have also considered the ***Roy*** case provided by Defence Counsel, which was **post-*Friesen*** and also took into account the ***Marchand*** decision. In my opinion, there are several key distinguishing features of the ***Roy*** case as opposed to the instant case. In particular, in this case, there is the absence of several significant mitigating circumstances for the section 172.1 of the **Code** offence, which proceeded by indictment, that were present in the ***Roy*** case.

[169] In addition, in ***Roy***, the facts involved a brief conversation that happened over the course of one day, not over the course of several months, Mr. Roy did not utilize deceit to conceal his identity, and apparently only sent one sexually explicit image to the young girl, but he did ask for and did receive some sexually explicit images from the 13-year-old girl. In ordering the two-year less a day CSO, the judge in ***Roy*** acknowledged that is probably a “rare disposition” in child sexual offences. For those reasons, I do not believe that the ***Roy*** situation is that of a similar offender who has committed similar offences in similar circumstances.

[170] Based upon the cases provided to the Court, however, I am satisfied that in the circumstances of this case, that the range of sentence for the child luring offence and for that matter the other offences, would be between 12 months to 24 months of imprisonment. As a result, in my opinion, that range of sentence would still leave a CSO in the community as an "available" option.

[171] However, I find that this case really brings home the clear direction from ***Friesen*** and ***Marchand*** that sexual offences against children are violent crimes that wrongfully exploit children's vulnerability and cause profound harm to the children, families and communities, and that sentences for those sexual offences against children must increase.

[172] In my opinion, given what I have found to be the very serious gravity of the offences of which the Court has found Mr. Klayme guilty and that his moral blameworthiness for those offences was also very high, I also find that there are several very significant aggravating factors to consider. In particular, there was extensive grooming and the manipulation of CH through the frequency of the sexually explicit conversations, repeated requests for sexually explicit images and him sending sexually explicit images to a 12-year-old girl combined with the aspect of deceit where he could hide his identity by a false name, over the Internet and the traumatic and long-term impact on CH and for that matter her mother. In my opinion, all of those significant aggravating factors militate in favour of a strong message of specific and general deterrence as well as the denunciation of the unlawful conduct.

[173] When those specific aggravating factors are taken into account to increase the sentence and while there are certainly some mitigating factors for the Court to also take into account, Parliament has set a clear direction to trial judges, which has been endorsed by the Supreme Court of Canada. Pursuant to section 718.01 of the **Criminal Code,** when a court imposes a sentence for an offence that involves the abuse of a person under the age of 18 years, it shall give "primary consideration" to the objectives of denunciation and deterrence of such conduct.

[174] In this decision, I have certainly considered those mitigating factors that militate in favour of sentencing objectives such as rehabilitation and promoting a sense of responsibility in the offender and acknowledgement of the harm done to the victims. However, I also find that giving denunciation and deterrence the "primary consideration" in all the circumstances of this case is a clear direction

that those mitigating circumstances cannot take precedence over or equality to the objectives of a very clear denunciation and deterrence of the unlawful conduct.

[175] As a result, in my opinion, taking into account all of the aggravating and mitigating circumstances of this case, I find that a CSO of imprisonment in the community would not carry sufficient denunciation or specific or general deterrence to satisfy the objectives of sentencing which are paramount in the circumstances of the three offences before the Court.

[176] In the final analysis, I find that the just and appropriate sentence for the section 172.1 of the **Code** offence of child luring, taking into account that there are some mitigating circumstances, and that Mr. Klayme has apparently abided by the conditions of his release without incident for about three years, I hereby order a period of imprisonment of 15 months in relation to that offence. With respect to the section 171.1 offence of making sexually explicit material available to a child, I agree with the sentencing recommendation of the Crown Attorney that the just and appropriate sentence for that offence is to order a period of imprisonment of 12 months to be served concurrently with the other offences.

[177] With respect to the offence of child pornography contrary to section 163.1(4) of the **Code,** I hereby order a sentence of imprisonment of 10 months. Based upon section 718.3(7)(a) of the **Code,** Parliament has stipulated that where a court sentences an accused at the same time for more than one sexual offence committed against a child, the Court shall direct that a sentence of imprisonment it imposes for an offence under section 163.1 be served consecutively to the sentence of imprisonment it imposes for a sexual offence under another section of the **Code** committed against a child.

[178] In those circumstances, I find that Parliament has directed and in ***Marchand***, Justice Martin concluded, at para. 94 that the sentencing judge had erred in imposing a concurrent sentence in that case and to properly account for the distinct legal interests that the child luring offence protects from the sexual interference offence. In ***Marchand*** at para. 95, the SCC noted that Parliament has removed judicial discretion and has dictated that sentences must run consecutively for certain offences, like child pornography where the offender also commits another sexual offence against a child or where there are sexual offences other than child pornography committed by the same offender against several children.

Principle of Totality

[179] As the Supreme Court of Canada noted in ***Marchand*** at para. 99, the effect of the totality principle is to require a judge to ensure that the series of sentences are, in aggregate, "just and appropriate." This involves taking "one last look at the combined sentence" to assess whether it is "unduly long and harsh, in the sense that it is disproportionate to the gravity of the offence and the degree of responsibility of the offender." If the principle of totality is offended, in the Court's opinion, the sentences can be adjusted by making some concurrent, or if this does not achieve a just and appropriate sentence, by reducing the length of one or more of the sentences.

[180] In this regard, taking into account the mitigating factors that are present in this case and the fact that Mr. Klayme is a relatively youthful, first-time adult offender, and I am also taking into account the fact that the parties were both recommending a total of 18 months imprisonment, as the just and appropriate sentence. Of course, the difference between the sentencing positions was that the Crown Attorney recommended that the sentence be served in a provincial correctional centre, while Defence Counsel was submitting that it be served in the community under the terms of a CSO.

[181] When I consider those aspects and the very strong message of specific deterrence of Mr. Klayme and the equally strong message of general deterrence and denunciation of the unlawful conduct of a 25-month sentence, in taking that "one last look at the combined sentence," I find that, in all the circumstances of this case, a sentence in a federal penitentiary may well be "unduly long or harsh" for this offender. In my opinion, a total sentence of 25 months may be slightly "disproportionate to the gravity of the offences and the degree of responsibility of the offender."

[182] Having considered the totality principle, I am prepared to adjust the combined sentence and reduce it by seven (7) months, which would result in a combined sentence of 18 months imprisonment in a provincial correctional centre.

[183] Furthermore, upon the expiration of his sentence of imprisonment, I hereby order Mr. Klayme to be subject to the terms and conditions of a probation order for 18 months. The terms and conditions of the probation order are as follows:

- Keep the peace and be of good behaviour,

- Appear before the Court when required to do so by the Court.

- Notify the Court, probation Officer supervisor, in advance of any change of name, address, employment or occupation,

[184] And in addition:

- Report to a probation officer at 277 Pleasant St., Dartmouth, NS within two days after the date of expiration of your sentence of imprisonment and thereafter as directed by your probation officer,

- Participate in the following treatment program-Provincial Sex Offender Assessment and Treatment Program,

- Have no direct or indirect contact or communication with anyone under the age of 16 years except: while under the direct supervision of another adult who knows about your convictions,

- Do not be in any premises known as any public park, public swimming area, community centre, daycare, schoolground or playground except while under the direct supervision of another adult who knows about your convictions,

- Attend for assessment, counselling or program as directed by your probation officer,

- Do not use the Internet except for the purposes of employment or while enrolled in an educational program for the purpose of education.

Ancillary Orders:

[185] In addition, I hereby make the following ancillary orders which were sought by the Crown Attorney:

1. A section 487.051 **Criminal Code** order as the s.163.1(4) offence, the s.171.1(1)(a) offence and the s.172.1(1)(a) offences are all primary designated offences for the purpose of securing a DNA sample;

2. There will be a **SOIRA** order pursuant to section 490.013 of the **Criminal Code** for a period of twenty (20) years;

3. A section 161(1) **Code** prohibition for a period of five (5) years with respect to (a) non-attendance at certain locations where a person under the age of 16 might be present, except while under the direct supervision of another adult who

knows about your convictions; (b) not seeking, obtaining or continuing certain types of employment or a volunteer capacity that may involve a position of trust or authority over persons under the age of 16 years; (c) not to have any contact including communication by any means with any person under the age of 16 years unless done so under the direct supervision of another adult who knows about your convictions; (d) you shall not use the Internet or other digital network unless the offender does so for the purpose of employment or while enrolled in an educational program for the purpose of education der that you not attend at any public Park,

4. I find that ordering a victim fine surcharge pursuant to section 737 of the **Criminal Code** would represent an undue hardship and I hereby order that Mr. Klayme does not have to pay a victim surcharge.

[186] Judgment, accordingly,

Thedore Tax, JPC