SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Mathiesen*, 2023 NSSC 314

Date: 20230822
Docket: CRP No. 522649
Registry: Pictou

Between:

His Majesty the King

v.

John Phillip Mathiesen

SENTENCING DECISION

Restriction on Publication: s.486.4 & 485.5 of the *Criminal Code*

Judge:	The Honourable Justice Frank P. Hoskins
Heard:	August 22, 2023, in Pictou, Nova Scotia
Final written decision:	September 25, 2023
Counsel:	Robert Kennedy, for the Crown Robert Jeffcock, for the Accused

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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 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).

Mandatory order on application
(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and

(b) on application made by the victim, the prosecutor or any such witness, make the order.

Victim under 18 — other offences
(2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

Mandatory order on application
(2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall

(a) as soon as feasible, inform the victim of their right to make an application for the order; and
(b) on application of the victim or the prosecutor, make the order.

Child pornography
(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that

constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

Limitation
(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community.

Order restricting publication — victims and witnesses
486.5 (1) Unless an order is made under section 486.4, on application of the prosecutor in respect of a victim or a witness, or on application of a victim or a witness, a judge or justice may make an order directing that any information that could identify the victim or witness shall not be published in any document or broadcast or transmitted in any way if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice.

Justice system participants
(2) On application of the prosecutor in respect of a justice system participant who is involved in proceedings in respect of an offence referred to in subsection (2.1), or on application of such a justice system participant, a judge or justice may make an order directing that any information that could identify the justice system participant shall not be published in any document or broadcast or transmitted in any way if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice.

Offences
(2.1) The offences for the purposes of subsection (2) are

(a) an offence under section 423.1, 467.11, 467.111, 467.12 or 467.13, or a serious offence committed for the benefit of, at the direction of, or in association with, a criminal organization;

(b) a terrorism offence;

(c) an offence under subsection 16(1) or (2), 17(1), 19(1), 20(1) or 22(1) of the *Security of Information Act*; or

(d) an offence under subsection 21(1) or section 23 of the *Security of Information Act* that is committed in relation to an offence referred to in paragraph (c).

Limitation
(3) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice if it is not the purpose of the disclosure to make the information known in the community.

Application and notice
(4) An applicant for an order shall

(a) apply in writing to the presiding judge or justice or, if the judge or justice has not been determined, to a judge of a superior court of criminal jurisdiction in the judicial district where the proceedings will take place; and

(b) provide notice of the application to the prosecutor, the accused and any other person affected by the order that the judge or justice specifies.

Grounds
(5) An applicant for an order shall set out the grounds on which the applicant relies to establish that the order is necessary for the proper administration of justice.

Hearing may be held
(6) The judge or justice may hold a hearing to determine whether an order should be made, and the hearing may be in private.

Factors to be considered
(7) In determining whether to make an order, the judge or justice shall consider

(a) the right to a fair and public hearing;

(b) whether there is a real and substantial risk that the victim, witness or justice system participant would suffer harm if their identity were disclosed;

(c) whether the victim, witness or justice system participant needs the order for their security or to protect them from intimidation or retaliation;

(d) society's interest in encouraging the reporting of offences and the participation of victims, witnesses and justice system participants in the criminal justice process;

(e) whether effective alternatives are available to protect the identity of the victim, witness or justice system participant;

(f) the salutary and deleterious effects of the proposed order;

(g) the impact of the proposed order on the freedom of expression of those affected by it; and

(h) any other factor that the judge or justice considers relevant.

Conditions
(8) An order may be subject to any conditions that the judge or justice thinks fit.

Publication prohibited
(9) Unless the judge or justice refuses to make an order, no person shall publish in any document or broadcast or transmit in any way

(a) the contents of an application;

(b) any evidence taken, information given or submissions made at a hearing under subsection (6); or

(c) any other information that could identify the person to whom the application relates as a victim, witness or justice system participant in the proceedings.

By the Court:

Introduction

[1] This is the sentencing decision of John Philip Mathieson, who pled guilty to the offences of accessing child pornography, contrary to s. 163.1(4.1) of the *Criminal Code*, and the offence of possession of child pornography, contrary to s. 163.1(4) of the *Criminal Code*. The Crown proceeded by indictment. Therefore, the minimum penalties for these offences are both one-year imprisonment. The maximum penalty for both offences is ten years' imprisonment.

[2] Before embarking upon my analysis, I want to express my gratitude to counsel for their comprehensive briefs and their very able oral submissions, as they were very helpful.

Circumstances of the Offences

[3] There are no factual disputes in relation to the circumstances surrounding the commission of the offences.

[4] On December 8th, 2022, Constable Roberts was notified by Constable Williams of the Pictou County RCMP detachment of a complaint involving Mr. John Philip Mathiesen.

[5] At approximately 11:43 AM. on Thursday December 8th, 2022, Constable Chisholm of the Pictou County RCMP Detachment attended Day & Ross Limited located at 543 McLellans Brook Road, New Glasgow, Nova Scotia, and asked to speak with Mr. Mathiesen. Constable Chisholm was advised that Mr. Mathiesen was on the telephone and that he would meet with the officer after he had finished.

[6] Approximately 15 minutes later, Mr. Mathiesen came out of the building and was immediately arrested for possession of child pornography and voyeurism. Mr. Mathiesen was searched incidental to arrest by Constable Murnaghan and two cell phones were located on his person and were subsequently seized.

[7] Shortly after Mr. Mathiesen's arrest, Constable Downey observed located in Mr. Mathiesen's office, one HP Laptop (Work Laptop) hardwired to the internet connection.

[8] At approximately 9:00 P.M., Constable Edwards and Constable Downey received an issued search warrant authorizing the search of Mr. Mathiesen's home. Investigators arrived on scene and were met by Mr. Mathiesen's wife and three children. The investigating officers provided Ms. Mathiesen with a copy of the search warrant and entered the family's home.

[9] The following items were located and seized from the home: Sony Video Camera, Nikon Digital Camera, Black Apple Cell Phone, Silver HP Laptop, Cell Phone with Mickey Mouse Case; Red Cell Phone, iPad; Samsung Tablet, two Kobo Reader, Black Tablet, 32 GB USB, and a Silver Mac Laptop.

[10] On December 9th, 2022, a Production Order was granted ordering Day & Ross to provide investigators with the encryption key for Mr. Mathiesen's work laptop. The key was subsequently provided to the investigating officers allowing the investigators access to the device for the purpose of conducting an electronic search.

[11] During the forensic search of the laptop, Corporal Mercer learned that multiple USB drives had been associated with the HP Work Laptop. These USBs were showing as being previously connected devices with the computer and were showing an association with file names that, in the opinion of Cpl. Mercer were indicative of child pornography. Two of the USBs were identified as a Lexar USB and a HP USB. As the investigation to date had not recovered USBs associated with the work laptop, Constable Roberts sought judicial authorization to search Mr. Mathiesen's office at Day and Ross. The warrant was granted by Justice of the Peace Kelly Shannon.

[12] On December 13th, 2022, Constable Roberts arrived at Day & Ross and along with Constable Edwards began searching Mr. Mathiesen's office. During the search of Mr. Mathiesen's office, Constable Edwards found three USBs (32 GB Lexar USB; 4 GB HP USB; and a 16 GB Emtec USB), located in Mr. Mathiesen's work boots under his office desk.

[13] The devices were subjected to a forensic analysis and upon review, Cst. Roberts determined the following:

- Found on the Lexar 32 GB USB located in Mr. Mathiesen's office, were a total of 5,909 accessible images (4,899 of those images being unique images) that met the definition for child pornography provided for in the *Criminal Code*. In addition to those images a total of 17,625 images (15,133 unique images) were located on the device and classified as "inaccessible". Also found on the Lexar USB were a total of 23 accessible videos (all unique) containing content that met the definition for child pornography and a total of 38 inaccessible videos (11 of which were unique).

- Found on the 4 GB - HDl USB located in Mr. Mathiesen's office, were a total of 141 accessible unique images and 1 accessible video that met the criminal definition for child pornography. Also found on the USB were 3,314 inaccessible images, (1,482 unique), and 2 inaccessible videos which was a duplicate of the same video.

- Found on the 16 GB - EMTEC USB located in Mr. Mathiesen's office were a total of 245 unique accessible images and a total of 9 accessible videos (8 unique videos), all meeting the definition of child pornography. Also found on the EMTEC USB were 1,230, inaccessible images (1,171 unique) and 2 unique inaccessible videos).

- Found on Mr. Mathiesen's Work Laptop were a total of 20 accessible images (all unique) and 1 accessible video. Also found on the Work Laptop were 13,077 (12,950 unique) inaccessible images. There were no inaccessible videos on this device. All meeting the definition of child pornography.

- Found on Mr. Mathiesen's personal iPhone 11 was a single accessible image which met the definition of child pornography.

[14] In summary, the thumb drives contained the vast majority (99%) of the child pornography that was in Mr. Mathiesen’s possession. Child pornography was also found on Mr. Mathiesen’s Work Laptop and his iPhone 11. Mr. Mathiesen was in possession of 4,899 accessible and 15,133 inaccessible images (total: 20,032). He was also in possession of 32 accessible videos (total run time: 9 hours 10 minutes) and 13 inaccessible (total run time: 1 hour 48 minutes). The defence does not dispute the amount of child pornography that Mr. Mathiesen accessed and possessed during the dates in question, as stated above. In its written submission the defence described the amount of child pornography in Mr. Mathiesen’s possession during the dates in question as 5,909 images (4,899 unique) and 35 videos (32 unique). He accessed 17,625 images (15,133

unique) and 42 videos (13 unique).

Categorized Levels of Child Pornography

[15] As previously stated, in total Mr. Mathieson was in possession of 4, 899 *accessible* and 15, 133 *inaccessible* images of child pornography. He was also in possession of 32 *accessible* videos (total run time: 9 hours 10 minutes) and 13 *inaccessible* videos (total run time: 1 hour 48 minutes) of child pornography. The term *accessible* means that the content can be manipulated by the user using the device's interface. The term *inaccessible* means the user deleted the content, that they were in possession of in the past, and that the content is stored on the device's cache.

[16] In this case, it was necessary for me to view the child pornography involved in this case because there was no agreement as to how the materials should be categorized, using the categorization of levels of child pornography as set out in *R. v. Missions*, 2005 NSCA 82, at para. 14. Moreover, in my view, it was necessary to view the material in order to have a full appreciation of the nature and gravity of Mr. Mathiesen's admitted conduct, and to provide a description of that material: *R. v. J.S.*, 2018 ONCA 675, at para. 4. It should be parenthetically noted that in future cases, to avoid countless hours of viewing thousands of images and hours of videos of disturbing material, which is time-consuming work, where possible the court should be provided a "representative sample" that both parties agree fairly and accurately represent the entire collection.

[17] In *Missions*, the Court adopted the categorized levels of child pornography established by the English Court of Appeal in *R. v. Oliver*, [2002] E.W.J. No. 5441, where the court categorized the levels of child pornography into one of five categories, from least serious to most serious. The categories are as follows:

(1) images depicting erotic posing with no sexual activity;
(2) sexual activity between children, or solo masturbation by a child;
(3) non-penetrative sexual activity between adults and children;
(4) penetrative sexual activity between children and adults; and,
(5) sadism or bestiality.

[18] In this case, some of the photographic images are classified as erotic posing which includes exposure and close-ups of the child's genitalia. The girls depicted in these images are all pre-pubescent. The balance of the content of images depicts predominantly pre-pubescent young girls being the victim of penetrative sexual

> acts. They are being penetrated in their vaginas or mouths by adult penises or sex toys. There is also a significant amount of content classified as bondage: young nude boys or girls with their hands and feet tied up and/or their mouths covered in sexually vulnerable positions. There are also hundreds of images depicting young girls being sexually assaulted while they were asleep. These images include scenes where adult penises are penetrating their vagina or mouth. Others depict ejaculation on their genitalia, and bodies while they appear to be asleep. Similarly, in exhibit 2, and exhibit 3, the videos, are extremely graphic and disturbing and depict content that is similar to the images in Exhibit 1. The videos show young children ages 4 to 14 engaged in sexual activity with other children and adults, including acts of fellatio, cunnilingus, vaginal and anal sex, masturbation, and ejaculation on the children.

[19] Clearly, denunciation and general deterrence are the paramount consideration in cases of access and possession of this type of material. The mitigating objectives, such as rehabilitation, occupy a secondary place in the sentencing decision.

[20] In my view, using the categorized levels of child pornography as applied in *Missions,* the child pornography that Mr. Mathiesen accessed and possessed includes all categories 1 to 5, specifically:

(1) images depicting erotic posing with no sexual activity;
(2) sexual activity between children, or solo masturbation by a child;
(3) non-penetrative sexual activity between adults and children;
(4) penetrative sexual activity between children and adults; and
(5) Sadism.

[21] To be clear, there are a few images which fall into the fifth category, sadism. As defined in the *Oxford English Dictionary*, "sadism" means – the tendency to derive pleasure, especially sexual gratification from inflicting pain, suffering or humiliation on others. In Mr. Mathiesen's collection there are several images where it appears that a young pre-pubescent child sustained redness on her buttocks as she lays nude on an adult lap. In other images it appears that an adult ejaculated on their faces, and body. And there are images which depict children in bondage.

[22] While the categorization set out in *Missions* is very instructive, I am mindful that the *very existence* of child pornography is inherently harmful to children and society. The material exploits and dehumanizes children. Indeed, the children are re-victimized with each viewing of the material. Online distribution of films or images depicting sexual violence against a child repeats the original sexual violence since

the child must live with the knowledge that others may be accessing the films or images, which may resurface in the child's life at any time. This harm exists independently of dissemination or any risk of dissemination, which on their own violates the dignity and equality rights of children. The harm of child pornography is inherent because degrading, dehumanizing, and objectifying depictions of children, by their existence, undermine the *Charter* rights of children and other members of society: *R. v. Sharpe*, 2001 SCC 2, at para. 158.

[23] The degree of depravity involved in the content of the child pornography that Mr. Mathiesen accessed and possessed during the dates in question is obscene and repugnant. I am mindful that each category is extremely serious given that it causes ongoing profound harm to children, families, and communities.

[24] There are, undoubtedly, a plethora of adjectives that could be used to describe the child pornography in this case. The most obvious adjectives that immediately come to mind are obscene, vile, and repugnant.

The Impact of Offences on Victims

[25] Section 718.2 (a) (iii.1) of the *Criminal Code* requires the Court to consider the impact on victims. Over 20,000 images and approximately eleven hours of video content of degrading images depicting the sexual abuse and exploitation of young children were downloaded and accessed by Mr. Mathiesen. None of the victims have been identified. It should be acknowledged that there are far-reaching harms associated with these offences, including the permanence and persistence of the content, the circumstances of the content creation, and victimization associated with the ongoing distribution and acquisition of this material. Mr. Mathieson's actions were not victimless but have added to the cycle of victimization and exploitation these children, some now perhaps adults, continue to endure. As emphasized in *R. v. Friesen*, 2020 SCC 9, it is important not lose sight of the ongoing harm suffered by these victims who are often unidentified. As Justice Boswell aptly stated in *R. v. Reid*, 2022 ONSC 2987:

> 15 I appreciate that Mr. Reid did not directly abuse children and did not manufacture child pornography. But it is wrong to think that possessing child pornography is a victimless crime. As the Supreme Court noted in *R. v. Friesen*, 2020 SCC 9, at para. 48,
>
> > ...[O]nline distribution of films or images depicting sexual violence against a child repeats the original sexual violence since the child has to

> live with the knowledge that others may be accessing the films or images, which may resurface in the child's life at any time.

[26] The Court in *Friesen* noted several forms of long-term harm that manifest themselves during a victim's life. The Court noted:

> 81 Sexual violence against children also causes several forms of long-term harm that manifest themselves during the victim's adult years. First, children who are victims of sexual violence may have difficulty forming a loving, caring relationship with another adult as a result of the sexual violence. Second, children may be more prone to engage in sexual violence against children themselves when they reach adulthood ….Third, children are more likely to struggle with substance abuse, mental illness, post-traumatic stress disorder, eating disorders, suicidal ideation, self-harming behaviour, anxiety, depression, sleep disturbances, anger, hostility, and poor self-esteem as adults….

[27] The Court further commented:

> 82 We would emphasize that courts should reject the belief that there is no serious harm to children in the absence of additional physical violence …. As we have explained, any manner of physical sexual contact between an adult and a child is inherently violent and has the potential to cause harm. Even in child luring cases where all interactions occur online, the offender's conduct can constitute a form of psychological sexual violence that has the potential to cause serious harm….

[28] It should be noted that notwithstanding the size and nature of the collection possessed by Mr. Mathiesen, I am mindful that the sentence that this court imposes must derive from the application of the purpose and principles of sentencing, rather than from a reactive, emotional, impulse. In other words, a just and appropriate sentence for an offence and offender derives from an objective, measured, and reasoned determination of an appropriate punishment which properly reflects the moral culpability of the offender.

Pre-Sentence Report

[29] Section 721(1) of the *Criminal Code* authorizes the preparation of a Pre-Sentence Report ("PSR") by a probation officer. Thus, the court may order filing of "a report in writing relating to the accused for the purpose of assisting the court in imposing a sentence. In this case, a PSR was ordered. Unless otherwise specified by the court, the report must contain information about the accused: their age, maturity,

character, behaviour, attitude, and willingness to make amends": s. 721(3)(a). Section 723 requires the court to give the prosecutor and the defence an opportunity to make submissions with respect to any facts relevant to the sentence to be imposed and to hear evidence they see fit to submit. Section 726.1 clearly states that all information must be considered in determining the sentence: *R. v. Angelillo*, 2006 SCC 55, at para. 28.

[30] If an offender objects to any aspect of a PSR, then the judge is entitled to consider all the contents of the PSR: *R. v. Phinn*, 2015 NSCA 27, at paras. 53-54.

[31] In this case, the offender, Mr. Mathiesen, objected to specific comments contained in the PSR that are not in accordance with s. 721, and the principles outlined by Justice Arnold in *R. v. McCormick* 2022 NSSC 61. The objection related to unsubstantiated allegations and inaccurate representations contained in the third paragraph of page 4 of the report. The Crown did not take issue with Mr. Mathiesen's objection. After hearing the submissions of the Crown and defence ("parties") the Court redacted the impugned paragraph in the report, and it was not considered.

Circumstances of Offender, Mr. Mathiesen

[32] Mr. Mathieson is 54 years old. He is married and has three minor children. He was born in Richmond, British Columbia. As noted in his Pre-Sentence Report ("PSR"), dated June 14, 2023, Mr. Mathieson enjoyed a normal upbringing with supportive and loving parents that provided a positive home environment. He never experienced any form of abuse or neglect with the family home. He stated to the author of the PSR that "he was always provided for and never went without." Following the passing of his father, Mr. Mathieson's mother and brother relocated to Amherst, Nova Scotia, in 2018. Mr. Mathieson relocated his family to Westville, Nova Scotia, in 2021.

[33] As noted in the PSR, Mr. Mathieson has always shared positive relationships with his parents and his siblings. He continues to maintain a relationship with his brother. Mr. Mathieson is currently separated from his wife, who resides in the family home in Westville with their three children. Mr. Mathieson and his wife have been in a relationship for 27 years and have been married for 26 years. He described his relationship to the author of the PSR as "on and off for the last nine years. At the time of the interview for the report, Mr. Mathieson indicated that he currently has no contact with his children due to Child Welfare involvement because of the current charges. He advised the author of the report that he had not spoken with his children since December. However, he continues to talk with his wife daily, and she visits

him. He also advised that his wife is not opposed to reconciliation and would like to "get our family back together." The author noted that Mr. Mathieson stated that "Child Welfare wants me to take programs, counseling and therapy, however I cannot do any of that while I am in jail."

[34] The author of the report spoke to Mr. Mathiesen's wife. She confirmed that she and Mr. Mathiesen had been in a relationship for 27 years. She stated, "our marriage isn't perfect, but I stand by him. He always had the mindset of happy wife, happy life. I feel like he is obsessed with me, but not in a bad way. I consume the majority of his life and he tells me every day that he loves me. We have both changed over the years, both for good and bad. He is a good person." The author of the report also noted that Mrs. Mathiesen expressed to her that Mr. Mathiesen, her husband, needed the consequence of being in jail in order for him to open his eyes and want to change his actions. The author noted that Mrs. Mathiesen stated, "I honestly believe he wants to change and straighten out his life. He is on the right track but he can't do anything until he attends the services and programs that have been recommended. He is frustrated that he cannot start working on these things until he gets out of jail. He is focused on me and our children and wants to get himself better so we can all have a healthier life together."

[35] Ms. Mathieson advised the author of the report that she will support her husband upon his release from custody, noting that she is not sure what that would look like, as she will always put her children first, and their needs, even if that means not being in a relationship with him. She stated, "I don't hate him, but I hate what he has done. It has been a very emotional time for the family, and I think we all could benefit from counselling. The kids are close to their father, and everyone will need to heal from this in order to move ahead as a strong family unit." Ms. Mathieson added that she is hopeful that this experience has opened her husband's eyes and that he does the things he says he will do, further stating, "it is going to be a long road ahead of us. If he is willing to work on himself, I am willing to help him. Right now, we are both committed to making it work but I am not going to go through this kind of situation again, so something needs to change."

[36] Mr. Mathiesen's brother, Ralf Mathiesen, was interviewed by the author of the PSR. He confirmed his brother's comments about their normal upbringing, with supportive parents. He is 11 years older than his brother. He stated that, despite the age difference, he has always shared a positive relationship with his brother and maintained frequent contact over the years.

[37] The author of the PSR reported that she contacted Carol-Ann Parsons, a Social Worker with the Department of Community Services, for the purposes of the report. Ms. Parsons advised the author of the report that the Child Welfare file for the Mathiesen family was opened on April 5, 2023, after an investigation was conducted based on referrals. The author quoted Ms. Parsons as saying, "our major presenting problems that were found to be substantiated by the Agency were sexual abuse and risk of sexual abuse - exposure to a sexual perpetrator". …. The author of the report noted that Ms. Parsons also informed her that Justice Murray of the Supreme Court (Family Division) ordered the following conditions: Mrs. Mathiesen can only have phone calls with Mr. Mathiesen when the children are not in the home. Ms. Mathiesen cannot remove the children from Nova Scotia unless authorized by the Agency. No contact between the children and Mr. Mathiesen unless authorized by the Agency Forensic Assessment for Mr. Mathiesen and counselling for all three children. In terms of a long-term plan, the author quoted Ms. Parsons as saying, "we would be looking for a way in which Mr. Mathiesen can have safe and supervised access with his children facilitated by a third party. The agency does not support Ms. Mathiesen supervising access as it does not appear this would adequately protect the children."

[38] Mr. Mathiesen reported to the author of the report that he completed the Certified General Accountant Program in 1988. He obtained his grade 12 education in 1986 from Richmond Senior High School in Richmond, British Columbia.

[39] Mr. Mathiesen advised the author of the report that he is currently unemployed. He was employed with Day & Ross Freight as the Operations Manager. He was the Operations Manager for 16 months. He was dismissed from that position upon being charged and remanded on the present offences in December 2022. Prior to his employment with Day & Ross, Mr. Mathiesen held different positions with several companies British Columbia, including the following: as a general manager at Canuck Towing and Transport for 11 years; as a warehouse manager at Bedard Resources for 15 months; Coordinator at Livingstone International for 9 months; a driver for Waste Not Recycling for 8 months; and an instructor at Young Drivers Canada for 8 months. He was also employed at Poco Auto Rescue, Tri City Bong, Rusty's Towing, Key Engineering, Arby's, Custom Ornamental Iron Works, and as a paper deliverer.

[40] Mr. Mathiesen advised the author of the report that he always maintained employment throughout his adulthood, except for the time when he was on Employment Benefits for several months between jobs.

[41] Mr. Mathiesen reported that currently he has no source of income. His assets include his home, and a 2015 Chevy Cruze. He is currently separated from his wife and does not contribute to any household bills.

[42] Mr. Mathiesen advised the author of the report that he had a heart attack in 2018, and as a result he is prescribed six different medications. He reported that he had lost weight, fifty pounds, while remanded in custody. With respect to his mental health, Mr. Mathiesen advised that he has no diagnosis and has never attended for assessment.

[43] Mr. Mathiesen reported that he had no issues and/or concerns with alcohol and/or drugs.

[44] Mr. Mathieson has no previous criminal convictions.

[45] The author of the PSR contacted Lisa Hanke, Correctional Case Worker at the Northeast Nova Scotia Correctional Facility ("NNSCF"), for the purposes of the report. Ms. Hanke advised that Mr. Mathiesen has been remanded to NNSCF on December 9, 2022. She also reported that Mr. Mathiesen is not involved in any programing, nor has he received any behavior reports while on remand.

[46] The author of the PSR, concluded her remarks by stating that Mr. Mathiesen denied having concerns with substance abuse or mental health, however, feels he could benefit from anger management counselling.

[47] In written submissions, Mr. Jeffcock, counsel for Mr. Mathiesen, outlined the circumstances of Mr. Mathieson. He submitted that Mr. Mathieson was arrested on December 8th, 2022, and has remained in custody at the NNSCF since December 9th, 2022, having been denied bail by the Honourable Judge Atwood.

[48] Mr. Jeffcock pointed out that Mr. Mathiesen has endured harsh conditions while on remand at the NNSCF, including having been the victim of two assaults. He also has experienced a significant reduction in his residual liberty because of the institutional issues with staffing. Mr. Mathiesen has not been offered any programming or services that could assist with his rehabilitation.

[49] Mr. Jeffcock also submitted that:

> A Child Protection Proceeding involving Mr. Mathiesen, Mrs. Mathiesen and the Department of Community Services was initiated in the Supreme Court of Nova Scotia (Family Division) on April 21st, 2023. The Minister of

Community Services is represented by Department of Justice Lawyer, Sarah Lennerton in that matter and in email has confirmed the following:

> There is a current CFSA proceeding, and Mr. Mathiesen is represented by Shawn McLaughlin on that matter. I am copying Shawn here.
>
> The Agency is not asking Mr. Mathiesen to participate in any services while hie is incarcerated, as the Agency is not able to offer services to him while he is in the correctional facility. If Mr. Mathiesen returns to the community while the protection proceeding is ongoing, the Agency will revisit the plan for services. It is likely services will include parenting programming (e.g. family support) and counselling.
>
> The Agency is asking that Mr. Mathiesen participate in the Forensic Sexual Behaviour Program.
>
> It is important to note that the Agency does not support Mr. Mathiesen having contact with his children while incarcerated and will not support him living with his children upon his release.

[50] Mr. Jeffcock added that:

> It is the current practice at the Northeast Correctional Facility not to provide services to those remanded to the facility. As such, Mr. Mathiesen has not been able to participate in any programming to assist with rehabilitating himself not only back into the community, but back into his family's lives. Sexual Behaviour Program, as noted in Ms. Lennerton's email, the Agency is not able to offer services to Mr. Mathiesen while in custody, however, should Mr. Mathiesen be released while the protection proceeding is ongoing the Agency will revisit its plan for implementing services. A review of the CFSA will establish that a Protection Proceeding must be concluded within a certain time line. The timeline typically associated with a protection proceeding is 18 months after a finding of protection is made. It is submitted that the existence of a Child Protection Proceeding is relevant to this sentencing for at least two reasons. First, should Your Lordship agree that a mandatory minimum sentence is unconstitutional, the result would be that a conditional sentence order would become an available form of sentence. The fact that the Department of Community Services is involved in the Mathiesen's family lives and have sought a Supervision Order by the Supreme Court (Family Division) would add another level of supervision by another division of the Courts.

[51] In Oral submissions, Mr. Jeffcock confirmed that Mr. Mathieson was subjected to a court order pursuant to s. 810.1 of the *Criminal Code.* Under this section, a person, who causes a reasonably-grounded fear of a listed sexual offence in respect to one or more persons under 16 years of age, may be required to enter into a recognizance (sometimes known as a "peace bond"). In this case, on April 6, 2021, Mr. Mathiesen entered into a recognizance for 12 months, in relation to the offence of making child pornography. The peace bond expired on April 5, 2022. During that order, Mr. Jeffcock submitted that Mr. Mathieson was subject to a condition to participate in a treatment program, which he did. He attended 15 sessions of counselling for sexual behaviour related to children during the term of the recognizance. Mr. Jeffcock argues that this demonstrates Mr. Mathiesen willingness to participate in treatment in pursuit of his rehabilitation. On the other hand, the Crown pointed out that following the expiration of the recognizance, Mr. Mathiesen possessed child pornography between April 12, 2022, and December 22, 2022. Given that he committed this offence shortly after the expiration of the recognizance, after completing 15 sessions of counselling, the Crown argues that Mr. Mathiesen is at a high risk to re-offend.

Positions of the Parties

Crown's Position

[52] The Crown submits that a fit and appropriate sentence is in the range of 30 months imprisonment less remand credit at a ratio of 1.5 to 1 pursuant to Section 719(3.1) of the *Criminal Code*. The offender has been in pre-trial custody since December 8, 2022, as he was denied bail in Pictou Provincial Court. As the remaining sentence will be served in a provincial jail, the Crown also seeks a period of 24 months' probation with conditions focused on rehabilitation. Additionally, the Crown seeks the following ancillary orders: DNA Order (s. 487.051), SOIRA Order for 20 years (s. 490.011), Section 161 Order for 5 years, and Forfeiture Order of devices containing child pornography (s. 490.1).

[53] The Crown contends that after assessing such factors as the size and nature of the collection possessed by Mr. Mathiesen, his personal circumstances, the impact of these offences on victims and the community, the statutory and common law evolution of sentencing for child pornography offences, and parity, it is evident that the range of sentence is in the 30-month range. Mr. Mathiesen was in possession of

and accessed an enormous number of images and videos depicting child pornography. He interacted with this content for at least 9 months (April to December 2022). Further, the Crown argues that the content is particularly disturbing. It is vile and depraved, depicting penetrative acts against pre-pubescent children as well as bondage and sleeping children. Mr. Mathiesen was in possession of 4,899 accessible and 15,133 inaccessible images (total: 20,032). He was also in possession of 32 accessible videos (total run time: 9 hours 10 minutes) and 13 inaccessible videos (total run time: 1 hour 48 minutes).

[54] The Crown submits that in *Friesen*, the Supreme Court of Canada re-emphasized the gravity of all forms of child sexual exploitation, including child pornography offences, and the need for higher sentences for these offences. It has been said to have "pressed the reset button" in relation to sentencing child sexual offenders: *R v McNutt,* 2020 NSSC 219, at para. 79.

[55] The Crown submits that this Court plays a key role in sending a message to the greater community that individuals who choose to download and consume materials depicting the sexual abuse of vulnerable children will receive sentences that adequately reflect the principles of deterrence, denunciation, and the far-reaching harm caused by their conduct.

[56] The Crown concedes, that the one-year mandatory minimum penalty for these offences constitutes cruel and unusual punishment. Applying the framework in *R v Nur*, 2015 SCC 15, the Crown concedes that the mandatory minimum penalty for possession and/or accessing child pornography, violates s. 12 of the *Charter* and is not saved under Section 1, based on the application of a reasonable hypothetical, specifically the example discussed in *R v John,* 2018 ONCA 702.

[57] However, the Crown argues that the imposition of a fit and appropriate sentence in this case requires a sentence that exceeds the mandatory minimum penalty. Additionally, the Crown argues that the imposition of a conditional sentence of imprisonment in the community is not appropriate in the circumstances because there is a clear trend in the case law that conditional sentences for these offences are reserved for *exceptional circumstances*, such as intellectual disability or other circumstances serving to diminish the offender's moral blameworthiness.

[58] The Crown agrees with the defence that Mr. Mathiesen should receive *Duncan* credit, following the reasoning in *R v Duncan,* 2016 ONCA 754. The Crown concedes this issue after considering the four recent *Habeas Corpus* decisions of this court, wherein the current conditions at the Central Nova Scotia

Correctional Facility ("CNSCF") are described and commented on. The Crown also discussed the current conditions at the NNSCF with an official from that facility and concluded that the conditions are similar to the conditions at CNSCF. Lastly, the Crown acknowledged that Mr. Mathiesen has endured harsh conditions while on remand at the NNSCF, including having been the victim of two assaults.

The Defence's Position

[59] The defence submits that a fit and appropriate sentence for the offences and the offender, Mr. Mathiesen, is a sentence in the range of 18 months imprisonment less remand credit at a ratio of 1.5 to 1 pursuant to s. 719(3.1) of the *Criminal Code* and less *Duncan* credit. The defence conceded that the size of Mr. Mathiesen's collection is aggravating. While large, the defence argues that it cannot be characterized as amongst the largest collections ever seen by the Canadian Courts. The defence point out that the following *post-Friesen* cases represent collections greater than that found to be in Mr. Mathiesen's possession: in *R. v. McCrimmon* 2021 YKTC 28, the offender possessed 33,605 unique images and 4,696 videos and was sentenced to 20 months' custody; in *R. v. Dutchession,*[2021] O.J. No. 4740, the offender possessed 7,537 (5605 unique) images and received a sentence of 2 years less a day to be served conditionally; in *R. v. Jerret,*[2021] A.J. No. 154, the offender possessed 17,657 images and 108 videos and received a sentence of 24 months; and in *R. v. Rule,*[2023] O.J. No. 168, the offender possessed at least 22,429 images and 204 videos and received a sentence of 22 months custody.

[60] The defence submits that Mr. Mathiesen had in his possession 5,909 images (4,899 unique) and 35 videos (32 unique), which is a sizeable collection. However, the vast majority of the material came in the form of photo "sets" and therefore the number of images is not an accurate reflection of the number of children that were actually involved in the creating of the material in the collection.

[61] The defence argues that while the material contained in the collection included material that would be classified at the higher end of the *Missions* scale, the Court must recognize that the vast majority of the collection, and the primary interest of Mr. Mathiesen was on material at the low end of the *Missions* scale.

[62] The defence submits that there are several mitigating factors that must be considered in this case, including that Mr. Mathiesen does not have a criminal record and is before the Court being sentenced for his first criminal offence.

Therefore, the principle of restraint must be considered in imposing a first sentence of imprisonment, as stated by Rosenberg in *R. v. Priest*, (1996), 110 C.C.C. (3d) 289 (Ont. C.A.).

[63] The defence also submits that there are collateral consequences that should be considered by the court. Mr. Jeffcock writes:

> On December 12th, 2022, while Mr. Mathiesen was awaiting his show cause hearing, members of the RCMP notified his employer that material meeting the definition of child pornography was found on the work laptop assigned to Mr. Mathiesen. It was at this moment that Day & Ross advised RCMP that Mr. Mathiesen would be losing his job. As the Operational Manager for Day & Ross, Mr. Mathiesen received the benefits of a health plan that provided benefits for him and his entire family, including covering up to 90% of prescriptions. These benefits were terminated approximately 30-days after he lost his job. Mr. Mathiesen has a son who is diagnosed with ADHD and his wife suffers from cardiomyopathy. Mr. Mathiesen has been told by his wife that between the two of them, without his medical coverage the monthly costs on medication alone has been approximately $600.

[64] He further writes that:

> It is submitted that Mr. Mathiesen has suffered a number of collateral consequences as a result of this offence. Unlike, nearly all the cases presented to Your Lordship, Mr. Mathiesen was not granted judicial interim release. The impact of this should not be lost on the Court. Mr. Mathiesen woke one morning, went to work, leaving his children behind as he always does, and has not returned or spoken to them since. In addition to not seeing his children since his arrest. He has not been permitted any contact in any form with his children. Mr. Mathiesen was arrested on December 8th, meaning he was not able to speak with his children on Christmas day.

[65] Mr. Jeffcock states:

> As a result of these charges when Mr. Mathiesen is inevitably released from custody the Department of Community Services will not be supportive of Mr. Mathiesen residing with his children. He will be required to work with the Department of Community Services in accessing services and crafting an appropriate parenting plan moving forward. The fact that Mr. Mathiesen has been bailed denied has meant that the Department of Community Services have been unwilling to provide Mr. Mathiesen with services, services that he has expressed a willingness and desire to participate in, and most importantly services that are required for rehabilitation. Given the Legislative timelines associated with the Minster's involvement in a family's lives, Mr. Mathiesen

> has a limited period of time to benefit from the fact the Department of Community Services would be willing to provide services to him with the goal of reintegrating him back into his children's lives if released. Delaying his release will delay his ability to work with the Agency towards bettering himself.

[66] Mr. Jeffcock submitted that in the Protection Proceeding, it has been Mr. Mathiesen's position that he is willing to participate in all services, including participating in the Forensic Sexual Behaviour Program. As noted in Ms. Lennerton's email, the Agency is not able to offer services to Mr. Mathiesen while in custody. However, should Mr. Mathiesen be released while the protection proceeding is ongoing the Agency will revisit its plan for implementing services. A review of the and *Children and Family Services Act* (CFSA) will establish that a Protection Proceeding must be concluded within a certain timeline, typically 18 months after a finding of protection is made. Mr. Jeffcock, therefore, submits that the existence of a Child Protection Proceeding is relevant to this sentencing for at least two reasons. First, should the court agree that a mandatory minimum sentence is unconstitutional, the result would be that a conditional sentence order would become an available form of sentence. The fact that the Department of Community Services is involved in the Mathiesen family's lives and have sought a Supervision Order from the Supreme Court (Family Division) would add another level of supervision by another division of the Courts.

[67] The defence conceded that a term of imprisonment is warranted in the circumstances of this case, and argues the period of imprisonment that is appropriate and consistent with the caselaw is 18 months. The defence contends that the common thread running through the cases discussed below is that the accused had not accumulated any remand time, having been released following the laying of the charge. The same cannot be said about Mr. Mathiesen, who had never spent a day in custody in his life, went to work on December 8th, 2022, and has remained in custody ever since. The defence submitted that the fact that Mr. Mathiesen has been incarcerated for a significant period warrants the imposition of a conditional sentence order for the remaining portion of his sentence.

[68] The defence does not oppose the imposition of the ancillary orders sought by the Crown. With respect to the Forfeiture Order, and the s. 161 order, the parties have agreed to the terms of the orders. They have provided

the Court with the orders in advance to ensure that the wording of the orders are accurate.

The Purpose and Principles of Sentencing

[69] The Supreme Court of Canada has enunciated the correct approach to sentencing in *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, and Parliament has enacted legislation which specifically sets out the purpose and principles of sentencing. Thus, it is to these sources, and the common law jurisprudence that courts must turn in determining the proper sentence to impose.

[70] Parliament has articulated the fundamental purpose and principles of sentencing in s. 718 of the *Criminal Code*, which provides:

> Section 718 provides that the fundamental *purpose* of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following *objectives*:
>
> (a) to denounce unlawful conduct;
>
> (b) to deter the offender and other persons from committing offences;
>
> (c) to separate offenders from society, where necessary;
>
> (d) to assist in rehabilitating offenders;
>
> (e) to provide reparations for harm done to victims or to the community; and
>
> (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.
>
> [Emphasis added]

[71] The purpose of sentencing is achieved by blending the various objectives identified in s. 718(a) to (f). The proper blending of those objectives depends upon the nature of the offence and the circumstances of the offender. Thus, the judge is often faced with the difficult challenge of determining which objective, or combined deserves priority. Indeed, s. 718.1 directs that the sentence imposed must fit the offence and offender. Section 718.1 is the codification of the fundamental principle of sentencing which is the principle of proportionality. This principle is deeply rooted in notions of fairness and justice.

[72] Section 718.1 provides that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. As stated in *R. v. Parranto*, 2021 SCC 46:

> 10 The goal in every case is a fair, fit and principled sanction. Proportionality is the organizing principle in reaching this goal. Unlike other principles of sentencing set out in the *Criminal Code*, proportionality stands alone following the heading "Fundamental principle" (s. 718.1). Accordingly, "[a]ll sentencing starts with the principle that sentences must be proportionate to the gravity of the offence and the degree of responsibility of the offender" (*R. v. Friesen*, 2020 SCC 9, at para. 30). The principles of parity and individualization, while important, are secondary principles.

[73] Section 718.2 sets out the other sentencing principles that the court is mandated to take into consideration, which for the purposes of this case are:

> (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender
> (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
> (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
> (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders ...

[74] It is trite to say that the imposition of a just and appropriate sentence can be difficult a task for a judge. However, as difficult as the determination of a fit sentence can be, that process has a narrow focus. It aims at imposing a sentence that reflects the circumstances of the specific offence and the attributes of the individual offender. Sentencing is not based on group characteristics, but on the facts relating to the specific offence and offender as revealed by the evidence adduced in the proceedings.

[75] Generally, it is recognized that a fit sentence is the product of the combined effects of the circumstances of the specific offence with the unique attributes of the specific offender.

[76] Although the sentencing process is necessarily an individualized process, the judge must also take into account the nature of the offence, the victims and community. As Lamer C.J. (as he then was), noted in *M. (C.A.)*, sentencing requires

an individualized focus, not only on the offender, but also on the victim and community.

[77] The fundamental purpose of sentencing is to contribute to respect for the law and the maintenance of a just, peaceful and safe society, taking into account the rehabilitation and, where appropriate, the treatment of offenders, and acknowledging the harm done to victims and the community.

[78] Given that sentencing is highly contextual and necessarily an individualized process, the Court must impose a sentence that addresses the two elements of proportionality, that is the circumstances of the offence and the circumstances of Mr. Mathieson, and thereby reach a sentence that fits not only the offence but also the offender. The Court must fashion a disposition from among the limited options available which take both sides of the proportionality inquiry into account.

[79] As stated, the purpose of sentencing is to impose "just sanctions." A "just sanction" is one that is deserved. A fit sentence in that context is one that is commensurate with the gravity of the offence and the moral blameworthiness of the offender. In *R. v. Proulx*, [2000] S.C. J. No. 6, Chief Justice Lamer reaffirmed that principle:

> 82. Proportionality requires an examination of the specific circumstances of both the offender and the offence so that the punishment fits the crime. Disparity in sentencing for similar offences is a natural consequence of the fact the sentence must fit not only the offence but also the offender.

[80] The Ontario Court of Appeal in *R. v. Priest*, [1996] O.J. No. 3369, expressed the view that proportionality ensures that an individual is not sacrificed "for sake of the common good": at para. 26.

[81] Section 718.2 requires me to consider that an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances, and that all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders. This is particularly so, in the case of a first offender: see: *Priest*.

[82] It is of significance that Mr. Mathiesen is a first offender, as the *Stein* principle must be considered, which expresses the notion of restraint which underlies the purpose and principles of sentencing. The first offender principle requires the sentencing judge to exhaust all other dispositions before imposing a

custodial disposition on a first-time offender. The authority for this proposition is found in the seminal case of *R. v. Stein*, [1974] O.J. No. 93, wherein Martin, J.A., on behalf of the Ontario Court of Appeal, stated:

> [4] … In our view before imposing a custodial sentence upon a first offender the sentencing Court should explore the other dispositions which are open to him and only impose a custodial sentence where the circumstances are such, or the offence is of such gravity that no other sentence is appropriate. …

[83] The primary objectives in sentencing a first offender are individual deterrence and rehabilitation *unless* the offence is of *such gravity* that no other disposition aside from a period of custody is appropriate, like in the case at bar. In other words, there are certain very serious offences including child pornography offences that require a custodial sentence notwithstanding that the offender has an unblemished past, is of good character, and accepts responsibility for the commission of the offence.

[84] The first offender principle has been codified ss. 718 and 718.2 of the *Criminal Code*. Section 718(c) instructs that the separation of offenders from society is an objective of sentencing "*where necessary"*. Section 718.2(d) directs that "*an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances"*. Further, s.718.2(e) is remedial in nature, not simply a re-affirmation of existing sentencing principles. It applies to all offenders and requires that "*all available sanctions other than imprisonment, that are reasonable in the circumstances*" should be considered for all offenders.

[85] In *Priest*, Rosenberg, J.A.'s, comments are apposite:

> [20] The duty to explore other dispositions for a first offender before imposing a custodial sentence is not an empty formalism which can be avoided merely by invoking the objective of general deterrence. It should be clear from the record of the proceedings, preferably in the trial judge's reasons, why the circumstances of this particular case require that this first offender must receive a sentence of imprisonment. …

[86] The so-called first offender principle is a good illustration of the application of the principle of restraint in the sentencing process. However, as emphasized, its application is restricted where the offence is of such gravity that no other sentence is fit, such as in serious offences of child pornography, that require the sentencing judge to place emphasis upon the principles of denunciation and deterrence.

[87] An appropriate or reasonable disposition will depend on the circumstances of the case in the context of all relevant considerations, including not only the

personal circumstances of the offender and the degree of responsibility of the offender for the offence, but also the gravity of the offence itself.

[88] As stated, given that sentencing is highly contextual and necessarily an individualized process, the Court must fashion a disposition from among the limited options available which take both sides of the proportionality inquiry into account.

Sentencing Principles in relation to Child Pornography

[89] As the Supreme Court of Canada emphasized in *Friesen*, “Children are the future of our country and our communities. They are also some of the most vulnerable members of our society. They deserve to enjoy a childhood free of sexual violence”: at para.1.

[90] In this case, the Court must impose a sentence that fully reflects and gives effect to the profound wrongfulness and harmfulness of the offences of accessing and possessing child pornography, which are serious offences as reflected in the maximum sentence of ten years imprisonment.

[91] The seriousness of child pornography has been emphasized by the Supreme Court of Canada in *Sharpe*:

> 28 This brings us to the countervailing interest at stake in this appeal: society's interest in protecting children from the evils associated with the possession of child pornography. Just as no one denies the importance of free expression, so no one denies that child pornography involves the exploitation of children. The links between possession of child pornography and harm to children are arguably more attenuated than are the links between the manufacture and distribution of child pornography and harm to children. However, possession of child pornography contributes to the market for child pornography, a market which in turn drives production involving the exploitation of children. Possession of child pornography may facilitate the seduction and grooming of victims and may break down inhibitions or incite potential offences. Some of these links are disputed and must be considered in greater detail in the course of the s. 1 justification analysis. The point at this stage is simply to describe the concerns that, according to the government, justify limiting free expression by banning the possession of child pornography.

[92] As stated in *Sharpe*, child pornography involves the exploitation of children and, accordingly, it is in society's interest to protect children. While possessing or

accessing child pornography may not be as serious as the making or distributing of it, in terms of the link with the direct abuse of children, nevertheless, the market for child pornography drives the production of it, which, in turn, results in the abuse of children. The Court observed:

> 93. It is argued that even if possession of child pornography is linked to harm to children, that harm is fully addressed by laws against the production and distribution of child pornography. Criminalizing mere possession, according to this argument, adds greatly to the limitation on free expression but adds little benefit in terms of harm prevention. The key consideration is what the impugned section seeks to achieve beyond what is already accomplished by other legislation: R. v. Martineau, [1990] 2 S.C.R. 633. If other laws already achieve the goals, new laws limiting constitutional rights are unjustifiable. However, an effective measure should not be discounted simply because Parliament already has other measures in place. It may provide additional protection or reinforce existing protections. Parliament may combat an evil by enacting a number of different and complementary measures directed to different aspects of the targeted problem: see, e.g., R. v. Whyte, [1988] 2 S.C.R. 3. Here the evidence amply establishes that criminalizing the possession of child pornography not only provides additional protection against child exploitation -- exploitation associated with the production of child pornography for the market generated by possession and the availability of material for arousal, attitudinal change and grooming -- but also reinforces the laws criminalizing the production and distribution of child pornography.
>
> 94. … Possession of child pornography increases the risk of child abuse. It introduces risk, moreover, that cannot be entirely targeted by laws prohibiting the manufacture, publication and distribution of child pornography. Laws against publication and distribution of child pornography cannot catch the private viewing of child pornography, yet private viewing may induce attitudes and arousals that increase the risk of offence. Nor do such laws catch the use of pornography to groom and seduce children. Only by extending the law to private possession can these harms be squarely attacked.

[93] Given the serious nature and the prevalence of the offences of possession and accessing child pornography, the principles of deterrence and denunciation predominate the sentencing matrix, as evident in a trilogy of cases from the Ontario Court of Appeal: *R. v. Folino*, [2005] O.J. No. 4737; *R. v. Jarvis* (2006), 211 C.C.C. (3d) 20; and, *R. v. El-Jamel*, [2010] O.J. No. 3737.

[94] The following comments by Moldaver J.A. (as he then was) in *R. v. Woodward*, 2011 ONCA 610, are apposite:

> [76] In so concluding, I wish to emphasize that when trial judges are sentencing adult sexual predators who have exploited innocent children, the focus of the

> sentencing hearing should be on the harm caused to the child by the offender's conduct and the life-altering consequences that can and often do flow from it. While the effects of a conviction on the offender and the offender's prospects for rehabilitation will always warrant consideration, the objectives of denunciation, deterrence and the need to separate sexual predators from society for society's well-being and the well-being of our children must take precedence.

[95] More recently, the Supreme Court of Canada in *Friesen*, clearly, and in very explicit language, emphatically stated that sentences for sexual offences against children must increase. The Court stated:

> 5 [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 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.

[96] The Court reaffirmed that all sentences start with the principle that sentences must be proportionate to the gravity of the offence and the degree of responsibility of the offender, and that parity and proportionality do not exist in tension; rather, parity is an expression of proportionality: *Friesen*, at para. 32. The Court continued:

> 33 In practice, parity gives meaning to proportionality. A proportionate sentence for a given offender and offence cannot be deduced from first principles; instead, judges calibrate the demands of proportionality by reference to the sentences imposed in other cases. Sentencing precedents reflect the range of factual situations in the world and the plurality of judicial perspectives. Precedents embody the collective experience and wisdom of the judiciary. They are the practical expression of both parity and proportionality.

[97] In *Friesen*, the Court commented on the prevalence and role of technology in the context of new forms of sexual violence against children, including child pornography offences. Technology, can make sexual offences against children qualitatively different, in that, online distribution of films or images depicting sexual violence against a child repeats the original sexual violence since the child has to live with the knowledge that others may be accessing the films or images, which may resurface in the child's life at any time. The Court wrote:

> 46 Because protecting children is so important, we are very concerned by the prevalence of sexual violence against children. This "pervasive tragedy that has damaged the lives of tens of thousands of Canadian children and youths" continues to harm thousands more children and youth each year (Canada, Committee on Sexual Offences Against Children and Youths, *Sexual Offences Against Children: Report of the Committee on Sexual Offences Against Children and Youths* (1984), vol. 1, at p. 29 ("Badgley Committee")). In Canada, both the overall number of police-reported sexual violations against children and police-reported child luring incidents more than doubled between 2010 and 2017, and police-reported child pornography incidents more than tripled… Courts are seeing more of these cases…Whatever the reason for the increase in police-reported incidents, it is clear that such reports understate the occurrence of these offences…
>
> 47 New technologies have enabled new forms of sexual violence against children and provided sexual offenders with new ways to access children. Social media provides sexual offenders "unprecedented access" to potential child victims (*R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906, at para. 102). The Internet both directly connects sexual offenders with child victims and allows for indirect connections through the child's caregiver. Online child luring can be both a prelude to sexual assault and a way to induce or threaten children to perform sexual acts on camera … The Internet has also "accelerated the proliferation of child pornography" (*R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253, at para. 114, per Deschamps J.).
>
> 48 Technology can make sexual offences against children qualitatively different too. For instance, online distribution of films or images depicting sexual violence against a child repeats the original sexual violence since the child has to live with the knowledge that others may be accessing the films or images, which may resurface in the child's life at any time…
>
> 49 Both Parliament and the courts have begun to respond to the prevalence of, new forms of, and qualitative changes in sexual violence against children. Parliament has attempted to keep pace with these developments by amending sentencing provisions for sexual offences against children…Courts too have been on a "learning curve" to understand both the extent and the effects of sexual violence against children and sentencing has evolved to respond to the prevalence of these crimes (*R. v. F. (D.G.)*, 2010 ONCA 27, 98 O.R. (3d) 241at para. 21).

[98] As stressed in *Friesen*, to effectively respond to sexual violence against children, which includes child pornography offences, sentencing judges need to properly understand the wrongfulness of sexual offences against children and the profound harm that they cause. “Getting the wrongfulness and harmfulness right is important”: (para. 50).

[99] In recognizing the prime interest that the legislative scheme of sexual offences against children protect are the personal autonomy, bodily integrity, sexual integrity, dignity, and equality of children, the unanimous Court commented on the importance of these interest in the context of child pornography, wherein it stated:

> 51 This Court recognized the importance of these interests in *Sharpe* in the context of the production of child pornography. As this Court reasoned, the production of child pornography traumatizes children and violates their autonomy and dignity by treating them as sexual objects, causing harm that may stay with them for their entire lifetime… Sexual violence against children is thus wrongful because it invades their personal autonomy, violates their bodily and sexual integrity, and gravely wounds their dignity…
>
> 52 We would note that the personal autonomy interest carries a somewhat different meaning for children than it does for adults. Children under the age of 16 of course lack the capacity to consent to sexual contact with an adult. As we will explain in detail later in these reasons, a child's participation in such contact is not a mitigating factor and should never be equated to consent. Instead, personal autonomy refers to a child's right to develop to adulthood free from sexual interference and exploitation by adults (see *Sharpe*, at para. 185).

[100] The Court reaffirmed that there is an innate power imbalance between children and adults that enables adults to violently victimize them: at para. 65; *Sharpe* at para. 170. The Court also recognized that "because children are a vulnerable population, they are disproportionately the victims of sexual crimes": at para. 65.

[101] As the Court emphasized, it is critical that sentencing reflects the contemporary understanding of sexual violence against children.

[102] In the context of child pornography cases, taking the harmfulness of child pornography into account will ensure that the proportionality principle serves its function of "ensuring that offenders are held responsible for their actions and that the sentence properly reflects and condemns their role in the offence and the harm they caused": *R. v. Nasogaluak*, [2010] 1 S.C.R., at para. 42.

[103] In *Friesen*, the Court emphasized that the sentence imposed must that commensurate with the gravity of sexual offences against children. In doing so, the Court provided some guidance:

> 75. [i]t is not sufficient for courts to simply state that sexual offences against children are serious. The sentence imposed must reflect the normative character

> of the offender's actions and the consequential harm to children and their families, caregivers, and communities… We thus offer some guidance on how courts should give effect to the gravity of sexual offences against children. Specifically, courts must recognize and give effect to (1) the inherent wrongfulness of these offences; (2) the potential harm to children that flows from these offences; and, (3) the actual harm that children suffer as a result of these offences. We emphasize that sexual offences against children are inherently wrongful and always put children at risk of serious harm, even as the degree of wrongfulness, the extent to which potential harm materializes, and actual harm vary from case to case.

[104] The Court stressed the importance of courts, in taking the "modern recognition of the wrongfulness and harmfulness of sexual offences against children" into account when determining the offender's degree of responsibility: *Friesen*, at para. 87. The Court acknowledged that, given that sexual offences against children can cover a wide spectrum of conduct, the offender's conduct will be less morally blameworthy in some cases than in others. The Court observed:

> 91 [t]he proportionality principle requires that the punishment imposed be "just and appropriate ... and nothing more" (*M. (C.A.)*, at para. 80… First, as sexual assault and sexual interference are broadly-defined offences that embrace a wide spectrum of conduct, the offender's conduct will be less morally blameworthy in some cases than in others. Second, the personal circumstances of offenders can have a mitigating effect. For instance, offenders who suffer from mental disabilities that impose serious cognitive limitations will likely have reduced moral culpability…
>
> 92 Likewise, where the person before the court is Indigenous, courts must apply the principles from *R. v. Gladue*, [1999] 1 S.C.R. 688, and *Ipeelee*. The sentencing judge must apply these principles even in extremely grave cases of sexual violence against children…The systemic and background factors that have played a role in bringing the Indigenous person before the court may have a mitigating effect on moral blameworthiness… Similarly, a different or alternative sanction might be more effective in achieving sentencing objectives in a particular Indigenous community…

[105] Since 1987, Parliament has repeatedly increased sentences for sexual offences against children. In *Friesen*, the Court commented on this:

> 95 Parliament has recognized the profound harm that sexual offences against children cause and has determined that sentences for such offences should increase to match Parliament's view of their gravity. Parliament has expressed its will by increasing maximum sentences and by prioritizing denunciation and deterrence in sentencing for sexual offences against children. …

> 96 Maximum sentences help determine the gravity of the offence and thus the proportionate sentence. The gravity of the offence includes both subjective gravity, namely the circumstances that surround the commission of the offence, and objective gravity…The maximum sentence the *Criminal Code* provides for offences determines [page480] objective gravity by indicating the "relative severity of each crime" (*M. (C.A.)*, at para. 36… Maximum penalties are one of Parliament's principal tools to determine the gravity of the offence…

[106] The Supreme Court recognized that the decision to increase the maximum sentences for certain offences, including child pornography offences, demonstrates that Parliament wanted such offences to be punished more harshly. As the Court stated, "An increase in the maximum sentence should thus be understood as shifting the distribution of proportionate sentences for an offence": *Frieson*, at para. 97. The Court stated:

> 99 These successive increases in maximum sentences indicate Parliament's determination that sexual offences against children are to be treated as more grave than they had been in the past. As Kasirer J.A. (as he then was) reasoned in *Rayo*, the legislative choice to increase the maximum sentence for child luring [TRANSLATION] "must be understood as a sign of the gravity of this crime in the eyes of Parliament" (para. 125). We agree with Pepall J.A.'s conclusion in *Stuckless (2019)* that Parliament's legislative initiatives thus give effect to society's increased understanding of the gravity of sexual offences and their impact on children (paras. 90, 103 and 112). …
>
> 100 To respect Parliament's decision to increase maximum sentences, courts should generally impose higher sentences than the sentences imposed in cases that preceded the increases in maximum sentences. As Kasirer J.A. recognized in *Rayo* in the context of the offence of child luring, Parliament's view of the increased gravity of the offence as reflected in the increase in maximum sentences should be reflected in [TRANSLATION] "toughened sanctions" (para. 175; see also *Woodward*, at para. 58). Sentencing judges and appellate courts need to give effect to Parliament's clear and repeated signals to increase sentences imposed for these offences.

[107] The Court further acknowledged Parliament's decision to prioritize denunciation and deterrence for offences that involve the abuse of children by the enactment of s. 718. 01 of the *Criminal Code.* Section 718.01 provides:

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

[108] As pointed out in *Friesen,* s. 718.01 indicates that Parliament intended to focus the attention of sentencing judges on the relative importance of the objectives of denunciation and deterrence involving the abuse of children. As Saunders J.A. recognized in *R. v. D.R.W.* 2012 BCCA 454, Parliament thus attempted to "re-set the approach to the criminal justice system to offences against children" by enacting s. 718. 01: as quoted in *Friesen*, at para. 102.

[109] Importantly, in *Friesen* the Court emphasized that by the enactment of s. 718.01, "the sentencing judge's discretion is thereby limited, such that it no longer open to the judge to *elevate* other sentencing objectives to an equal or higher priority." This simply means that paramount consideration must be given to denunciation and deterrence. Notwithstanding that, the sentencing judge does retain the discretion to consider other factors such as rehabilitation and *Gladue* factors, in arriving at a fit sentence, in accordance with the overall principle of proportionality: at para. 104.

[110] The Court in *Friesen* also clearly stated that sentences for sexual offences against children must be increased to correspond to legislative initiatives:

> 107 We are determined to ensure that sentences for sexual offences against children correspond to Parliament's legislative initiatives and the contemporary understanding of the profound harm that sexual violence against children causes. To do so, we wish to provide guidance to courts on three specific points:
>
> > (1) Upward departure from prior precedents and sentencing ranges may well be required to impose a proportionate sentence;
> > (2) Sexual offences against children should generally be punished more severely than sexual offences against adults; and,
> > (3) Sexual interference with a child should not be treated as less serious than sexual assault of a child.

[111] The Court explained that there are two primary reasons why courts should depart from prior precedents and sentencing ranges in order to impose a proportionate sentence. First, sentences should increase as a result of the legislative initiative such as enactment of s. 718. 01 of the *Criminal Code.* The Supreme Court endorsed the reasoning in *R. v. Regnier*, 2018 QCCA 306, wherein the Quebec Court of Appeal reasoned that courts must give "the legislative intent its full effect" and should not feel bound to adhere to a range that no longer reflects Parliament's view of the gravity of the offence. The second reason why upward departure from the precedents may be required is that courts' "understanding of the gravity and

harmfulness of sexual offences against children has deepened": *Friesen*, at para.110. The Court confirmed:

> 110 Courts should accordingly be cautious about relying on precedents that may be "dated" and fail to reflect "society's current awareness of the impact of sexual abuse on children" (*R. v. Vautour*, 2016 BCCA 497, at para. 52. Even more recent precedents may be treated with caution if they simply follow more dated precedents that inadequately recognize the gravity of sexual violence against children… Courts are thus justified in departing from precedents in imposing a fit sentence; such precedents should not be seen as imposing a cap on sentences…

[112] The Court further observed:

> "… imposing proportionate sentences that respond to the gravity of sexual offences against children and the degree of responsibility of offenders will frequently require substantial sentences. Parliament's statutory amendments have strengthened that message. It is not the role of this Court to establish a range or to outline in which circumstances such substantial sentences should be imposed. Nor would it be appropriate for any court to set out binding or inflexible quantitative guidance - as Moldaver J.A. wrote in *D. (D.)*, "judges must retain the flexibility needed to do justice in individual cases" and to individualize the sentence to the offender who is before them (at para. 33). Nonetheless, it is incumbent on us to provide an overall message that is clear… That message is that mid-single digit penitentiary terms for sexual offences against children are normal and that upper-single digit and double-digit penitentiary terms should be neither unusual nor reserved for rare or exceptional circumstances. We would add that substantial sentences can be imposed where there was only a single instance of sexual violence and/or a single victim, as in this case, *Woodward*, and *L.M.* In addition, as this Court recognized in *L.M.*, maximum sentences should not be reserved for the "abstract case of the worst crime committed in the worst circumstances" (para. 22). Instead, a maximum sentence should be imposed whenever the circumstances warrant it…

[113] In concluding that Parliament has determined that sexual violence against children should be punished more severely, the Supreme Court in *Friesen* noted that four legislative signals reflect Parliament's recognition of the inherent vulnerability of children and the wrongfulness of exploiting that vulnerability. First, Parliament has prioritized deterrence and denunciation for offences that involve the abuse of children by enacting s. 718. 01. Second, Parliament has identified the abuse of persons under the age of 18 as a statutory aggravating factor pursuant to s. 718.2(a)(ii.1). Third, Parliament has identified the abuse of position of trust or authority as an aggravating factor pursuant to s. 718.2 (a)(iii). Fourth, Parliament has used

maximum sentences to signal that sexual violence against persons under the age of 16 should be punished more severely than sexual violence against adults.

[114] Finally, in *Friesen*, the Court identified significant factors to provide guidance to determine a fit sentence for sexual offences against children. Noting that their comments are neither a checklist nor an exhaustive set of factors, the Court stressed that their aim is to provide guidance on specific factors that require the articulation of governing and intelligible principles to promote the uniform application of the law of sentencing: at paragraph 121. These significant factors are:

(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.

[115] In the specific context of child pornography cases, Justice Molloy in *R. v. Kwok*, [2007] O.J. No. 457, summarized relevant factors that should be considered in sentencing. She wrote:

> 7. Not surprisingly, each case turns on its own particular facts. However, an analysis of the case law does reveal an emerging consensus on the relevant factors to be taken into account… Generally speaking, any of the following are considered to be aggravating factors: (i) a criminal record for similar or related offences; (ii) whether there was also production or distribution of the pornography; (iii) the size of the pornography collection; (iv) the nature of the collection (including the age of the children involved and the relative depravity and violence depicted); (v) the extent to which the offender is seen as a danger to children (including whether he is a diagnosed pedophile who has acted on his impulses in the past by assaulting children); and (vi) whether the offender has purchased child pornography thereby contributing to the sexual victimization of children for profit as opposed to merely collecting it by free downloads from the Internet. Generally recognized mitigating factors include: (i) the youthful age of the offender; (ii) the otherwise good character of the offender; (iii) the extent to which the offender has shown insight into his problem; (iv) whether he has demonstrated genuine remorse; (v) whether the offender is willing to submit to treatment and counseling or has already undertaken such treatment; (vi) the existence of a guilty plea; and (vii) the extent to which the offender has already suffered for his crime (for example, in his family, career or community).

Aggravating and Mitigating Factors

[116] In this case, there are several aggravating and mitigating factors that must be considered, which include the following:

Aggravating Factors

(i) The size of the pornography collection in this case is extremely aggravating. Mr. Mathiesen was in possession of 4,899 accessible and 15,133 inaccessible images (total: 20,032). He was also in possession of 32 accessible videos (total run time: 9 hours10 minutes) and 13 inaccessible ones (total run time: 1hour 48 minutes).

(ii) The immeasurable harm caused to a very large number of victims is a serious aggravating factor.

(iii) The nature of the collection is also seriously aggravating. The images and videos depict pre-pubescent children, in the 4 to14 year-old age range. The degree of depravity and violence involved in the content of the child pornography is obscene and repugnant. Mr. Mathiesen's collection of child pornography includes all categories 1 to 5 as described in *Missions.*

Mitigating Factors

(i) Mr. Mathiesen has pled guilty at the earliest opportunity and in doing so has accepted responsibility for having committed the offences.

(ii) Mr. Mathiesen's guilty pleas avoided the necessity of a trial which saved the resources and time that would have been required had the matter gone to trial.

(iii) Mr. Mathiesen is a first offender, having never been convicted of a previous offence.

(iv) He has expressed remorse and a willingness to submit to counseling and/or receive treatment.

(v) Mr. Mathiesen has the support of his spouse and others.

(vi) He lost his job after he was arrested and taken into custody.

(vii) Mr. Mathiesen has endured harsh conditions while in pre-sentence custody, which will be discussed below.

[117] The Crown stressed in its submissions that Mr. Mathiesen interacted with the content of the materials in this collection for at least nine months, April to December 22. This is concerning, particularly considering the age and maturity of Mr. Mathieson. In other words, this is not a situation where Mr. Mathiesen impulsively accessed or possessed child pornography on the spur of moment, out of curiosity. He is a mature and reasonably intelligent father of three children, aged 15, 11, and 5, at the time of the writing of the PSR. He knew what he was doing was wrong. What is more concerning, however, is the nature and size of his collection of child pornography, which includes photographs and videos. He *knowingly* accessed and/or possessed a substantial amount of child pornography before he was arrested. Thus, what can be reasonably inferred from the size and nature of Mr. Mathiesen's collection is that he possessed a keen interest in accessing this obscene material, which is both concerning and disturbing.

[118] Mr. Mathiesen was subject to a s. 810.1 order for twelve months. This is not an aggravating or mitigating factor, but it is relevant as another piece of information about Mr. Mathiesen's personal circumstances that should be considered in assessing his potential for rehabilitation. In this regard, it is a mitigating factor that Mr. Mathiesen has expressed a willingness to seek and obtain treatment and therapy.

[119] According to Mr. Mathiesen's PSR, he has indicated a desire to change his behaviour and is prepared to attend counseling and/or treatment. The author noted that Mr. Mathiesen said he wanted to fix his marriage and get his family back together. He also stated that Child Welfare wants him to take programs, counseling and therapy but he cannot do any of that while he is in jail. Mr. Mathiesen's wife remains supportive of him. Ms. Mathiesen commented in the PSR that her husband is a good person, but she expressed the view that he needed the consequences of being in jail to open his eyes and make him want to change his actions. She stated, "I honestly believe he wants to change and straighten out his life. He is on the right track but he can't do anything until he attends the services and programs that have been recommended. He is frustrated that he cannot start working on these until he gets out of jail. He is focused on me and our children and wants to get himself better so we can all have a healthier life together." Ms. Mathiesen further commented that

she is hopeful that this experience has opened her husband's eyes and that he will do the things he says he will do. She expressed her support for her husband.

[120] According to the author of the PSR, Mr. Mathiesen reported that he has no diagnosis and has never attended for assessment, but he admitted that he has concerns with anger, "but that "I am not physically violent."

[121] Following submissions of counsel, Mr. Mathieson was informed of his right to address the Court pursuant s. 726 of the *Criminal Code*. He stated:

> My Lord, just want to say that, I've taken responsibility for what I have done, I know what I've done and I'm admitting to it and I regret ever getting involved in it. I know I need help and I wish to take advantage of that help. I've had a lot of people offer me help through the years, I've always been too stubborn to accept it, but currently I do have people offering me help now, I've family and friends that are offering to help me. I have ministry, social workers that are offering to help me. They are offering this help based on the fact if I can get out of jail. I do have one more person I need to ask for help My Lord, and that is yourself. I am asking for your help to give me the chance to get better so I can reunite my family with myself once I am a better man and a better father. That's all I have to ask My Lord

[122] I accept that Mr. Mathiesen is frustrated and wants to get out of jail so he can attend counselling and treatment. The reality is, however, until he does get the necessary treatment and/or counselling, he remains at a high risk of re-offending. Given his recent history, where he was subject to an s. 810.1 recognizance for twelve months, received counselling during that time, and then shortly thereafter, committed these offences, there is reason to be concerned about Mr. Mathiesen's ability to control his behaviour. Undoubtedly, Mr. Mathieson needs curative treatment. He says that he needs counseling and/or treatment, and is willing to get it, which is a good thing.

[123] However, having considered all of the evidence, I am not persuaded that Mr. Mathiesen recognizes the wrongfulness and harmfulness of his behaviour, the gravity of the offences, and the profound impact that his behaviour has had on the victims and society. He seems to have limited insight into the seriousness of the harm that he has caused. Hopefully, with the support of his wife, friends, and others he will gain more by way of treatment or counselling. However, until he receives it, he will remain a high-risk to re-offend. His likelihood to reoffend is clearly relevant to the objective of rehabilitation in s. 718(d) of the *Criminal Code.*

[124] I hope that Mr. Mathiesen engages in meaningful treatment and counselling in his effort to rehabilitate because it offers long-term protection.

Relevant Case Authorities

[125] In their comprehensive briefs, the parties cited the numerous cases. The Crown submitted: *R. v. Friesen,* 2020 SCC 9; *R. v. McNutt,* 2020 NSSC 219; *R. v. Nur*, 2015 SCC 15; *R. v. John*, 2018 ONCA 702; *R. v. Duncan,* 2016 ONCA 754; *R. v. Vitale,* 2021 NSSC 109; *R. v. Lloyd,* 2016 SCC 13; *R. v. Missions,* 2005 NSCA 82; *R. v. Rodrigues,* 2022 CarswellNfld 203; *R. v. Reid,* 222 ONSC 2987; *R. v. Bartley*, 2021 ONCJ 360; *R. v. Sharpe,* 2001 SCC 2; *R. v. Morelli*, 2010 SCC 8; *R. v. G.P.W.*, 2021 NSSC 192; *R. v. Inksetter,* 2018 ONCA 474; *R. v. Wood*, 2021 NSSC 253; *R. v. Williams,* 2020 BCCA 286; *R. v. SJM*, 2021 NSSC 235; *R. v. M.M.*, 2022 ONCA 441; *R.* v. *Hagen,* 2021 BCCA 208; *R. v. Alexander,* 2019 BCCA 100; *R. v. Simpson,* 2021 ONSC 6032; *R. v. Jenkins,* 2021 PESC 6; *R. v. Swaby,* 2018 BCCA 416; *R. v. Sequin,* 2015 NSPC 95; *R. v. Clark,* 2018 NSPC 58; *R. v. Rule,* [2023] O.J. No. 168; *R. v. Brown,* 2022 ONCA 516; *R. v. Walker,* 2021 ONCA 863; *R. v. Laplante,* 2022 NWTSC 9; *R. v. Gerbrandt,* 2021 ABCA 346; *R. v. Dawson*, 2021 NSCA 29.

[126] The defence submitted: *R. v. Nur*, 2015 SCC 15; *R. v. Lloyd*, 2016 SCC 13; *R. v. Hood* 2018 NSCA 18; *R. v. Friesen,* 2020 SCC 9; *R. v. Clarke,* [2022] N.J. No. 128; *R. v. Kwok,* [2007] 0.J. No. 457; *R. v. Missions,* 2005 NSCA 82; *R. v. Hagen,* 2021 BCCA 208; *R. v. Adams,* [2022] B.C.J. No. 2532; *R. v. McCrimmon*, 2021 YKTC 28; *R. v. McCrimmon,* [2022] Y.J. No. 2; *R. v. King,* 2020 ABPC 219; *R. v. Dutchession,* [2021] O.J. No. 4740; *R. v. Jerrett,* [2021] A.J. No. 154; *R. v. Rule,* [2023] O.J. No. 168; *R. v. Alexander,* 2019 BCCA 100; *R. v. Branco,* 2019 ONSC 3591; *R. v. Priest,* 1996 CanLi 1381 (Ont C.A.); *R. v. Suter,* [2018] 2 S.C.R. 496; *R. v. Duncan,* 2016 ONCA 754; *R. v. Marshall,* [2021] O.J. No. 2757; *R. v. Steed,* 2021 NSSC 71; *R. v. Robinson,* 2021 NSPC 20; *R. v. Suter,* 2018 SCC 34; *R. v. Clarke,* [2022] N.J. No. 128; *R. v. Walker,* [2021] O.J. No. 461; *R. v. Hamlin,* [2019] B.c.J. No. 2541; *R. v.John,* 2018 ONCA 702; and *R. v. Swaby,* [2018] B.C.J. No. 3603.

[127] There is a dearth of reported sentencing decisions in Nova Scotia for the offences of possession and accessing child pornography, particularly post- *Friesen.* Thus, it is difficult to discern a sentencing range for the offences of possession and accessing child pornography in this province. However, there are numerous sentencing decisions in other jurisdictions that have considered and applied the instructional guidance of the Supreme Cout of Canada's reasons in *Friesen.*

[128] While the post-*Friesen* sentencing decisions are most helpful, there are several pre-*Friesen* cases that recognized that the focus of the sentencing hearing should be on the harm caused to the child by the offender's conduct and the life-altering consequences that can and often do flow from it. These decisions emphasized that while the effects of a conviction on the offender and the offender's prospects for rehabilitation will always warrant consideration, the objectives of denunciation, deterrence, and the need to separate sexual predators from society for society's well-being and the well-being of our children must take precedence: *Woodward*, at para. 76.

[129] As previously discussed, the range of sentences applicable to sexual offences against children has been profoundly impacted by *Friesen*. I am mindful that there is an evolution in the range of sentencing for child pornography cases, and that while each case appears to turn very much on its own unique set of circumstances and thus no case can be an exact guide for another, it is important to carefully review the cases in an effort to apply the principle of parity under s. 718.2 (b) of the *Criminal Code*, which provides that "a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances."

[130] While I recognize the importance of considering the parity principle in sentencing, I am mindful that sentencing is highly contextual and necessarily an individualized process, and often cases are distinguished by the circumstances surrounding the offence or the offender. Nonetheless, previous cases are helpful, in the sense that they provide some guidance in applying the relevant principles of sentencing.

[131] In *R. v. Pearce*, 2021 ONCA 239, the Ontario Court of Court of Appeal’s comments are apposite:

> 17 The principle of parity is provided for in s. 718.2(b) of the *Criminal Code*, R.S.C. 1985, c. C-46. It provides that "a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances". This guiding principle preserves fairness in sentencing by promoting the equal treatment of offenders according to law. It applies as between co-accused charged with the same crime, and between the offender and others who have committed similar crimes, where those others are similar to the offender in terms of degree of responsibility. Given the principle of individual sentencing, and that comparable circumstances are not apt to be identical, absolute parity is not required and, indeed, may not be appropriate. However, where there is a substantial and marked disparity in sentence between similar co-accused

offenders who have committed similar crimes, an appellate court should intervene: *R. v. Mann*, 2010 ONCA 342, 261 O.A.C. 379, at paras. 18-19.

[132] As stated by Lebel J, in *R v. Nasogaluak*, [2010] 1 S.C.R. 206:

> 44 The wide discretion granted to sentencing judges has limits. It is fettered in part by the case law that has set down, in some circumstances, general ranges of sentences for particular offences, to encourage greater consistency between sentencing decisions in accordance with the principle of parity enshrined in the *Code*. But it must be remembered that, while courts should pay heed to these ranges, they are guidelines rather than hard and fast rules. A judge can order a sentence outside that range as long as it is in accordance with the principles and objectives of sentencing. Thus, a sentence falling outside the regular range of appropriate sentences is not necessarily unfit. Regard must be had to all the circumstances of the offence and the offender, and to the needs of the community in which the offence occurred.

[133] Similarly, Justice Fichaud observed in *R. v. E.M.W.*, 2011 NSCA 87:

> 31 In assessing the similarity of precedents for the parity principle, it is useful to recall Chief Justice Lamer's statements in *R. v. M.(C.A.)*, para. 92 [above para. 7]. The Chief Justice said "[t]here is no such thing as a uniform sentence for a particular crime", and "[s]entencing is an inherently individualized process, and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction". From a similar perspective, in *R. v. A.N.* this Court recently said:
>
> > 30. An assessment of the gravity of Mr. N.'s offences with Mr. N.'s culpability for them is, as Chief Justice Lamer said, an inherently individualized process, not an exercise in academic abstraction. I say this here because Mr. N.'s parity submissions on this appeal appeared to assume that sentences in other cases established a binding matrix of precedent into which this case must be slotted.
>
> To the same effect *R. v. LeBlanc*, 2011 NSCA 60, para. 26. The sentencing judge is not expected to idealize a sentence that perfectly conforms to a hypothetical symmetry in the body of precedent. That would be a futile assignment because the actual precedents are not always consistent. It is not uncommon to find similar sentences in cases with significant factual differences. The overarching factor is the *Code*'s "Fundamental principle" of proportionality (s. 718.1) that the "sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender": *R. v. L.M.*, para. 36 (quoted above para. 8); *Nasogaluak*, para. 44.

[134] In view of these observations, it is arguable that case law is only helpful for the limited purpose of ascertaining the range of sentences imposed on similar offenders for similar offences committed in similar circumstances.

[135] In this case, the parties have discussed numerous cases in their written submissions that are somewhat similar to the case at bar. Additionally, they ably argued in their oral submissions the cases to which they view as being supportive of their respective positions as to what a just and appropriate sentence should be in this case.

[136] The Crown submits that a sentence in the range of 30 months imprisonment is well- supported by the case law. In support of that proposition, the Crown cites the following cases in its brief:

- In *Vitale,* a 76-year- old doctor with no criminal record was sentenced to 11 months' imprisonment as part of a joint recommendation for the summary offence of possession of child pornography. He was in possession of a large collection of child pornography, but "99.9%" of the files were illustrations and cartoon images.

- In *Clark,* after an unsuccessful constitutional challenge to the Mandatory Minimum Penalty, Judge Michie sentenced the offender to 6 months' imprisonment and 24 months' probation for the summary offence of possession of child pornography. The offender was in possession of 8 images and 110 videos of child pornography, a collection size significantly smaller than the case at bar. The offender had a host of mental illnesses and pedophilic disorder. He was a low to moderate risk to reoffend. After reviewing a vast range of sentencing decisions for possession of child pornography from across Canada, Judge Michie concluded that the range of sentence for Mr. Clark was between 6 months and 2 years less a day, when the accused pleads guilty to possession of child pornography (para. 57). It is noteworthy that this decision pre-dates *Friesen.*

- In *Inksetter,* a pre-*Friesen* decision, the 51-year-old first offender plead guilty at an early opportunity to possession and making available child pornography. On appeal, the sentence was increased from 2 years less a day imposed by the sentencing judge to 3 ½ years imprisonment (3 years for possession and 3 ½ years for making available, to run concurrently). The police identified 28,052 unique images and 1,144 unique videos of child pornography on the offender's computer and various devices. This collection was amassed over several years. The content included mostly penetrative sexual acts and other sexual activity involving children. The images included bondage and bestiality. The content was available to others via the Internet so long as it remained in the "shared" folder on his computer.

- In *Rule*, the accused was 70 years old, pled guilty to accessing and possessing child pornography and was sentenced to 22 months imprisonment and 3 years' probation. At the time of sentencing, the offender was under treatment for cancer and had to wear an ostomy bag that required regular medical care. Evidence was called that the correctional centre had the ability to provide adequate medical care. The police identified 22,429 images and 204 videos on the offender's computer as being child pornography.

- In *Brown*, the accused was convicted of accessing, possessing and making available child pornography. He was sentenced to 3 years imprisonment. The sentencing judge erroneously considered that there were 2,500 files, when there were in fact 500 files. The Court of Appeal nevertheless did not interfere with the sentence imposed, as 500 files was still a very large quantity warranting a significant sentence. The content was described as "severe".

- In *Walker*, the accused was found guilty of accessing, possessing and making available child pornography. He received 3 years custody for the make available offence and 2 years concurrent for possession offence. Notably, the Ontario Court of Appeal stated:

> The facts of this case are found in the sentencing decision at *R v Walker*, 2021 ONSC 837. The first-time offender was in possession of 43 videos and 17 images of child pornography. All of these videos and 3 of the images were accessible through a peer-to-peer sharing platform. The sentencing judge summarized the content at para. 6. He described the content as "abhorrent child abuse" at para. 7. The Crown sought a sentence of 2 ½ to 3 years and Defence argued for a conditional sentence of two years less one day. The offender had been gainfully employed throughout his adulthood and he had support from his family and friends. The offender had no insight into his offending.

- In *Laplante*, the accused pled guilty to possession and make available child pornography and received a sentence of 3 years, 8 months and 20 days. He was also given credit for time served of 1 year and 27 days, He was in possession of 2,900 accessible and 6,000 inaccessible images and 1,200 videos of child pornography. The age range of the male and female children in the images was infant to 11 years old. The full range of child pornography was in his possession. He had been married for more than two decades and his wife was supportive. He worked as a nurse and lost his employment after he was charged.

- In *Gerbrandt*, the offender pleaded guilty to possession and make available child pornography. The Alberta Court of Appeal allowed the Crown sentence appeal. The sentencing judge had imposed a suspended sentence, which was altered to be 2 years less a day imprisonment, concurrent on each charge. He was in possession of 4,075 unique images and 618 unique videos of child pornography. Some of this

content was also accessible by other users on a peer-to-peer platform.

[137] In its written submissions, the defence submits that a sentence in the range of 18 months imprisonment is a just and appropriate sentence for these offences and Mr. Mathiesen. In support of its submission, the defence argued that the appropriate range is 16 to 24 months as demonstrated by the following cases:

- In *Adams,* the accused was found with 357 images of child pornography, he was 31-years old, expressed a lack of remorse for his offence, indicated that he was not open to counselling and treatment and was sentenced to 16 months' imprisonment for two counts of possession of child pornography, followed by two years' probation, DNA order, 20 years' compliance order with sexual offender registry, forfeiture of electronic devices seized, five year's 161 order.

- In *King,* the accused possessed on several different electronic devices a collection of child pornography containing 1112 images and 79 videos. He also possessed over 500 written child pornography stories. Mr. King was 40 years of age, and without a criminal record. The Crown sought 30 months incarceration; the defence a CSO. The Court found that the appropriate sentence for Mr. King would be less than two years, and that a sentenced served in the community would not endanger the safety of the community; however, he ultimately determined that the principles of deterrence and denunciation would not be met by a CSO. At paragraph 36, Judge Fradsham wrote:

> [36] I wish to be clear: I am not saying that a CSO is never an appropriate sentence for possession of child pornography; such a statement would constitute an error in law. An example of a CSO being imposed for a charge of possession of child pornography, with the learned sentencing judge specifically considering the decision in *R. v. Friesen, supra,* is *R. v. Nepon,* 2020 MBPC (Man. Prov. Ct.). The sentencing principles remain constant; it is varying circumstances amongst the cases which cause differing sentencing outcomes.

Mr. King was sentenced to a period of incarceration of 18 months.

- In *McCrimmon,* Brooks J. at para. 55, considered the British Columbia Court of Appeals unchanged position on the appropriate sentencing range for possession offences from 2013 in *R.L.W,* 2013 BCCA 50, to the 2021 decision of *Hagan,* 2021 BCCA 208, and stated that although sentences for offences of this nature must increase *post-Friesen,* that increase must be seen to be incremental. In *McCrimmon,* the Court imposed a 20-month period of incarceration followed by two years' probation for s. 163.1(4)(a) offence. The offender possessed 33,605 unique images and 4,696 unique videos that met the definition of child pornography. The material depicted male and female children ranging in age from six months to 17 years. It showed "highly

exploitive and sexually invasive conduct, including young children in erotic poses with their genitals exposed, urination, anal intercourse, fellatio, vaginal intercourse, group sex, cunnilingus, use of sex toys, masturbation, ejaculation and digital penetration of the vagina and anus. There were images of children engaged in sexual activity with other children, as well as images of penetrative and non-penetrative sexual activity between children and adults. Some of the material showed bondage, sadism and bestiality" (*R. v. McCrimmon,* [2022] Y.J. No. 2, at paragraph 6). Mr. McCrimmon was sentenced to a 20- month period of incarceration followed by two years' probation. He had no criminal antecedents, a good work history, and support in the community. The Court found that he had taken successful steps to deal with the issues that led to his crime. A psychologist opined that the offender had developed empathy for the victims. This decision was appealed, and the Yukon Territory Court of Appeal did not interfere with the sentence of 20 months' imprisonment and two years' probation, however it did increase the s. 161(1) prohibition to 15 years.

- In *Rule,* the appellant argued that the trial judge erred in imposing a 22-month jail sentence for accessing and possession of child pornography and asked the Court of appeal to substitute a conditional sentence. The appellant was sentence on May 4, 2021, when he was 70 years old. He is a retired schoolteacher. It was determined that he was in possession of at least 22, 429 images and 204 videos determined to meet the definition of child pornography. Approximately two thirds of the material focused on the genital regions of the children depicted and the remaining one third showed children engaged in graphic sexual activity including vaginal and anal penetration by male's penises, objects and digits. There were pictures of babies in diapers and the children appeared to range from one to 15 years of age. The trial judge described the images as "disgusting and heartbreaking", and that the "utter defilement and destruction of these innocent lives cannot be overstated." For the appeal, the Crown conceded that "under the current state of the law, the Crown has no reasonable argument to support the constitutionality of a one-year minimum sentence for accessing child pornography".

The Court of Appeal concluded that a 22-month sentence was fit and appropriate and saw no basis to alter the sentence.

- In *Jerrett,* the accused was found guilty of possessing child pornography and accessing child pornography after being found to have in his possession of 17,657 images and 108 videos meeting the definition of child pornography. The majority of the images were photo collections of pre-teen girls. Each collection usually progressed from fully dressed girls to naked girls with a focus on the genital areas. The remaining images were of children ranging in age from infants to teenagers involved in sexual acts. The ages of the participants involved in the sexual acts in the videos ranged from infants to persons under the age of 18. The videos generally lasted less than a few minutes in duration. Judge Gill of the Alberta Court of Queen's Bench, after considering three decisions from the Alberta Court of Appeal, and *Friesen* found that a sentence of two years on each count to be served concurrently to be a fit and proper sentence, along with a mandatory DNA Order and a lifetime SOIRA.

> • In *Dutchession,* the accused was a first-time offender, aged 51. He lived alone, had two children, a 15-year-old son, and an 11- year-old daughter and was on bail conditions. He pled guilty to one count of possession of child pornography. On his laptop which was seized there was a total of 7537 images classified as child pornography; of which, 5605 were unique computer images. The majority of the images were of prepubescent female children, between 3 and 14 years of age. He received a sentence of 2 years less one day to be served conditionally in the community, followed by 24 months of probation. Judicial notice was taken of the fact that were Mr. Dutchession to be incarcerated, he would not receive any treatment of counselling in a provincial institution, but if he remained in the community, he would continue with his mental health treatment which "serves to address the safety of the community in the long run": at para. 41.

[138] The defence also submitted *R. v. Alexander,* 2019 BCCA 100, and *R. v. Branco,* 2019 ONSC 3591, in support of its position. In *Alexander,* the British Columbia Court of Appeal followed its earlier decision in *R. v. R.L.W,* 2013 BCCA 50, and stated that except in exceptional circumstances, those who possess child pornography will be imprisoned for anywhere from four months to two years. This range of sentence was recently reiterated in *R. v. Hagen,* 2021 BCCA 208, at para. 69.

[139] In *Branco,* a pre-*Friesen* decision, Justice Stribopoulos conducted an extensive review of sentences for possession of child pornography and observed:

> 101 This review of the case law demonstrates that the range of sentences varies widely, from intermittent sentences at the low end, to penitentiary sentences as long as 3 1/2 years at the upper end. Ultimately, with the exception of some outliers, where a particular case falls within the overall range of sentences is a function of its specific aggravating and mitigating factors.

Brief Comment on the Cases

[140] What can be seen by comparing all these cases is that no two cases are exactly alike, and it is often difficult to compare cases because of the multitude of varying factors or considerations that are considered and weighed cumulatively. All the cases cited above can be distinguished from the case at bar. The following cases, however, appear to be closer or more comparable to the case at bar. For ease of reference, I will briefly provide the circumstances surrounding each case.

[141] In *Laplante,* the accused pled guilty to possession and making available child pornography. He was in possession of 2, 900 accessible and 6,000 inaccessible

images, and 1,200 videos of child pornography. He had been married for two decades and his wife was supportive. He was employed as a nurse and lost his employment after he was charged. He was sentenced to three years, 8 months. This case can be distinguished from the case at bar because it involves the offence of making available child pornography which is a more serious offence carrying a 14 - year maximum sentence. Charbonneau C.J.S.C., in writing for the court, commented on the unique feature of the offence of making available child pornography:

> 11. What is important to state that in addition to accessing the materials, Mr. Laplante was also making it available to others. This was not sharing material in a dedicated chartroom, for example. By downloading the material, it was being made available to anyone else who was seeking it out.

[142] Charbonneau C.J.S.C. further stated:

> 69. Another unique feature of this offence, in particular the making available charge, is that it contributes to creating these communities of offenders and thereby the normalization of the conduct. It is not unreasonable to think that in turn encourages further offending.

[143] This case also involved the images of children engaged in sexual activities with animals. The age range of the of male and female children in the videos were predominantly infant to 13 years old. Mr. Laplante was very remorseful and told the author of his pre-sentence report that he had not considered the impact of his behaviour and had since developed an awareness of the damage that the offences caused. He also joined a Sexual Behaviors Clinic. The experts concluded that Mr. Laplante was a low risk to commit further offences involving accessing or sharing child sexual abuse material.

[144] In *McCrimmon*, the accused pled guilty to possession of 33,605 unique images and 4,696 unique videos of child pornography, a very large number of images and videos which had been accumulated over many years. He was charged only with possession, not with the offence of "making available." The material in that case depicted grave sexual abuse of children, as described above. In that case, the Crown sought a custodial sentence in the range of three and four years, which was in the range of other cases, such as *R. v. Inkestter,* 2018 ONCA 474. Mr. McCrimmon, however, was sentenced to a custodial sentence of 20 months which was upheld on appeal. In upholding the appeal, Justice DeWitt-Van Oosten stated:

> 40. … accept that the judge could have imposed a penitentiary jail term as requested by the Crown and it likely would have withstood appellate scrutiny. However, applying a deferential standard of review, I cannot say that the combined effect of imprisonment and probation imposed here unreasonably departs from the principle of proportionality: *Code*, s. 718.1; *Friesen* at paras. 30-33; *Parranto* at para. 10. That is the test this Court is bound to apply in deciding whether the sentence is demonstrably unfit.

[145] In *Inksletter,* a pre-*Friesen* decision, the accused's sentence was increased on appeal from two years less a day to 3 ½ years, for possession and making available child pornography. He was in possession of 28, 052 unique images and 1, 144 unique videos of child pornography. The collection was amassed over several years. The content included bondage and bestiality. This case also involved making available child pornography, which, again as discussed above, is an additional aggravating feature which is not present in the case at bar.

[146] In *Jerritt,* the accused received a sentenced of two years for possession and accessing child pornography. He was in possession of 17,657 images and 108 videos on three computers. Most of the images were of pre-teen girls with a focus on the genital areas. The remaining images were of children ranging in age from infants to teenagers involved in sexual acts. The court found that the pornographic material fell within the middle of the depravity continuum. The accused had a serious but unrelated criminal record. There were no mitigating circumstances and the accused had shown no remorse. The court imposed a sentence of two years on each count of possessing and accessing child pornography, to be served concurrently. This case is comparable to the case at bar because it only involves possession and accessing child pornography, and the size of the collection is similar. However, it is difficult to compare the degree of depravity in this case with Mr. Mathiesen's case without knowing more what is meant by "the pornographic material fell within the middle of the depravity continuum." In Mr. Mathieson's case there is no question that there is a significant degree of depravity in the content in his collection, as discussed above. Thus, this case is of limited assistance in that regard.

[147] In *Rule* the accused pled guilty to accessing and possession of child pornography and was sentenced to 22 months and three years of probation. The police identified 22, 429 images and 204 videos on the accused's computer as being child pornography. The age and health of the accused was a factor, unlike in the case at bar. However, the size of the collection was similar, and the offences were the same. In that case, Mr. Rule was 70 years old and suffered from significant health problems. He had advanced rectal cancer and required an ostomy bag. The trial judge

nevertheless sentenced him to 22 months in prison, followed by three years' probation. On appeal, the Crown argued that the sentence imposed was lenient because of the appellant's health problems and that the court should not alter the sentence imposed, which the Crown contended was entirely fit. The Court of Appeal held:

> 8 We are satisfied that the sentencing judge appropriately considered the appellant's health challenges. Some of the issues that afflicted him at the time of sentencing have since been resolved. We are satisfied that having regard to the nature of the offence, the size of the collection, the duration of possession and frequency of examination of the images, it was appropriate for the sentencing judge to rule out a conditional sentence which would have been inconsistent with the fundamental purposes and principles of sentencing, despite the appellant's health problems: see *R. v. McCaw*, 2023 ONCA 8, at paras. 28-29; *R. v. M.M.*, 2022 ONCA 441, at para. 15. The evidence does not establish that his medical conditions could not be treated in a custodial institution.
>
> 9 The sentencing judge was correct to conclude that denunciation and deterrence were of primary importance. There were real victims here; these were not imaginary representations such as cartoons, or paintings. As this court observed in *R. v. Inksetter*, 2018 ONCA 474, 141 O.R. (3d) 161, at para. 22, those who view and amass large amounts of child pornography participate in the abuse of the children portrayed.
>
> 10 In our view, a 22-month sentence is fit and appropriate and we see no basis to alter that sentence.

[148] In this case it appears that the accused received the additional mitigating effect of being 70 years old and suffering from significant health problems.

[149] In *King*, the accused possessed on several electronic devices a collection of child pornography containing 1112 unique images and 79 unique videos. He also possessed over 500 written child pornography stories. The images were generally of preteen and young teen girls. Many were images of nude poses such that they met the definition of child pornography. Some were of the children engaged in various sexual acts. This collection of child pornography was created between 2004 and 2018, with the majority being accumulated roughly between 2013 to 2018. He was 40 years old, and a first offender. The Crown sought a sentence of 30 months imprisonment for the possession of child pornography offence and 60 days consecutive for the breach of recognizance. The defence sought a global sentence of two years less one day, to be served in the community under a conditional sentence order pursuant s. 742.1. The Court rejected a conditional sentence order and imposed

a custodial sentence of 18 months. In that case, the sentencing judge considered and accepted the expert opinions in a report prepared by Dr. Lemieux, a clinical and forensic psychologist employed by Alberta Health Services at Forensic Assessment and Outpatient Services in Calgary. Judge Fradsham noted that:

> 16 As to risk assessment, Dr. Lemieux said: "... it is my clinical opinion that Mr. King poses a *low-moderate risk* for future online sexual offending. His risk of escalating to physical (contact) sexual offending is *low* ... Mr. King's prognosis, with appropriate treatment, impressed as favourable."

[150] It should be noted that the size of the collection in *King* is smaller than in the case at bar, where Mr. Mathiesen was in possession of 4, 899 accessible and 15, 133 inaccessible images, and in possession of 32 accessible videos, and 13 inaccessible videos. Although Mr. King had some issues with insight and remorse, he was considered a low-moderate risk to re-offend. His prognosis with treatment was favourable.

[151] In *Brown*, the accused was convicted of accessing, possessing and making available child pornography. He was sentenced to three years imprisonment. Unlike in the case at bar, Mr. Brown was convicted of the offence of “making available” child pornography, which in my view is an additional aggravating feature. Also, there was no mitigating effect of a guilty plea, as there is in the case at bar.

[152] In *Walker*, the accused was found guilty of accessing child pornography, possessing child pornography, and making child pornography available. He was sentenced to three years' custody for making child pornography available and two years concurrent on the possession count. In upholding the appeal, the Ontario Court of Appeal stated:

> 7 Regarding the third ground of appeal, we do not find that the sentence imposed was unfit. The trial judge was mindful of the admonition in *R. v. Friesen*, 2020 SCC 9, 444 D.L.R. (4^{the}) 1 that sentencing judges must impose sentences commensurate with the gravity of sexual offences against children and that reflect the consequential harm to children. The trial judge carefully assessed the *Friesen* factors and noted that the appellant's case fell on the high end of the "frequency" factor because he placed the material on a peer-to-peer file sharing platform for anyone to obtain, review, and redistribute. In addition, the trial judge found that the victims' ages were a particularly aggravating factor in this case because the children were prepubescent, with some appearing to be toddlers. Finally, the trial judge also found the degree of physical interference to be great because the material depicted digital and penile penetration, penetration by objects, fellatio, and aggression.

[153] Unlike in the case at bar, Mr. Walker was convicted of the additional offence of making available child pornography, for which the sentencing judge imposed a sentence of three years. He received a concurrent sentence of two years for the possession of child pornography offence. Mr. Walker was convicted and thus there was no mitigating effect of a guilty plea.

[154] In *Gerbrandt*, the accused pled guilty to possession and making available child pornography. The Alberta Court of Appeal allowed the Crown sentence appeal. The sentencing judge had imposed a suspended sentence, which was altered to be two years less a day imprisonment, concurrent on each charge. He was in possession of 4,075 unique images and 618 unique videos of child pornography. Some of this content was also accessible by other users on a peer-to-peer platform. Again, in that case it is noteworthy that the accused was sentenced for the offence of available child pornography, which is an additional aggravating factor in considering the gravity of the offence and the moral culpability of the offender.

[155] In *Dutchession*, the accused pleaded guilty to one count of possession of child pornography. On Feb 3, 2019, an image of a naked female with legs splayed, who had slight breast development, along with a second girl who had no breast development and no pubic hair, was uploaded to an IP address. The police believed the girls to be under 13 years of age. The IP address was registered to Mr. Dutchession. A search warrant was executed at his address and a laptop was seized. There was a total of 7537 images classified as child pornography; of which 5605 were unique computer images. The majority of the images were of prepubescent female children, between three and 14 years of age. Mr. Dutchession was a Warrant Officer in the military and served in combat zones on three occasions. He was considered an exemplary member of the military. He was dismissed as a result of this conviction but was now employed with a local plumbing company. Mr. Dutchession was diagnosed with Major Depressive Disorder and Post Traumatic Stress Disorder after he returned from Afghanistan in 2008. The Crown sought a sentence of 12 months' imprisonment and 24 months' probation. The Defence sought a 12-month conditional sentence order.

[156] The court imposed a 729- day conditional sentence order followed by 24 months’ probation. In reaching that decision, Justice McLeod noted that Mr. Dutchession pleaded guilty and was a 51-year-old first-time offender. His otherwise good character and service to his country were mitigating factors, as were his mental health issues and ongoing treatment for the same. Mr. Dutchession expressed

genuine remorse and also expressed insight into the damage caused by child pornography. The very young age of some of the depicted children was an aggravating factor. The court held that if Mr. Dutchession were to be incarcerated, he would not receive any treatment or counselling in a provincial institution. If he remained in the community, he would continue with his mental health treatment. That served to address the safety of the community in the long run. The pandemic, the extensive rehabilitative steps taken by Mr. Dutchession, his service to the country, and the resultant mental health issues led the Court to conclude that this was an extremely rare case where a conditional sentence was appropriate and could meet the sentencing principles. Clearly, this case is distinguishable from the case at bar. In that case, the Crown proceeded by way of summary conviction, and asked for a 12-month term of custody followed by 24 months' probation. Further, in that case, a significant mitigating factor was the accused's extensive rehabilitative efforts prior to sentencing and his ability to continue with the programming in the community under a conditional sentence order. Indeed, the circumstances surrounding the accused in that case were considered by the court to be extremely rare.

[157] All these decisions are helpful. I also found Justice Boswell's decision in *Reid* to be of assistance. In that case, Mr. Reid was convicted of possession of child pornography and accessing child pornography. He was acquitted of making child pornography available. Mr. Reid possessed videos and images constituting child pornography on a number of hard drives seized by the police from his home office. His preferred means of acquiring child sexual abuse material was by way of searches conducted on peer-to-peer file sharing networks. Using a law-enforcement version of widely available peer-to-peer client software known as ShareazaLE, the OPP child exploitation unit was able to communicate with one of Mr. Reid's computers, which was running another type of widely available peer-to-peer client software named CruxP2P. Through further investigation, the police were able to identify the location of Mr. Reid's IP address. They obtained and executed a search warrant at his residence. During the search they seized fourteen digital devices. On the devices they located roughly 2,500 unique videos and over 4,000 unique images of child pornography. Mr. Reid testified that he had a sex addiction. More specifically, he had an insatiable appetite for pornography, though he maintained that his interests were confined to adult pornography. He testified that he had been attending Sexaholics Anonymous meetings regularly in an effort to manage his addiction.

[158] With respect to the convictions for possessing child pornography, Crown counsel urged the court to impose a custodial sentence of three years, together with

ancillary orders. The Crown submitted that Mr. Reid had a substantial collection of child sexual abuse material that was organized and curated. Mr. Reid's counsel took the position that a penitentiary sentence was not called for or necessary in the circumstances of this case. He sought 10 to 18 months conditional sentence. He submitted that Mr. Reid's moral blameworthiness was mitigated by a number of factors including: (a) he had no prior involvement in the criminal justice system; (b) the offence was committed through recklessness, in that he lacked sufficient care as he targeted adult pornography for download; and (c) he had admitted to a problem with sex addiction and had taken steps to address that addiction.

[159] In sentencing Mr. Reid, Justice Boswell noted that while Mr. Reid did not directly abuse children and did not manufacture child pornography, he was wrong to think that possessing child pornography was a victimless crime. Justice Boswell noted that the aggravating factors were that: (a) Mr. Reid had a very substantial collection of child pornography; (b) the collection was carefully collected and curated, reflecting a disturbing level of dedication to the undertaking, which, increased Mr. Reid's moral culpability; (c) based on the file creation dates reflected in the forensic analysis of Mr. Reid's devices, the collection of child pornography had been going on for a number of years; and, (d) the content of the material possessed by Mr. Reid was repugnant. Justice Boswell noted that it was not at the very worst end of the spectrum. None of it, appeared to include bestiality. But it was not far from the worst. It included a variety of violent and intrusive acts against children ranging in age from toddlers to pre-pubescents. The mitigating factors were: (a) Mr. Reid had a history of positive social contribution and was supported by his wife and other members of the community; and, (b) Mr. Mr. Reid had no criminal record or other involvement in the criminal justice system. Mr. Reid's counsel argued that a further mitigating factor was that Mr. Reid's possession of child pornography was a result of recklessness or misadventure. In light of the aggravating and mitigating circumstances, Mr. Reid was sentenced to 26 months' imprisonment. He received a credit of one month against his sentence on account of the principles in *Downes*. Justice Boswell refused to impose a conditional sentence. The court further imposed a DNA order, Sex Offender Information Registration Act (SOIRA) order for life and a forfeiture order in the form provided by counsel.

[160] Like Mr. Mathiesen, Mr. Reid was in possession of a significant amount of child pornography. It consisted of roughly 2,500 unique videos and over 4,000 unique images of child pornography discovered on his devices. Mr. Reid, however, did not have the mitigating effect of a guilty plea. He received a global sentence of 26 months.

The Appropriate Disposition

[161] As stated, imposing a just and appropriate sentence can be a difficult a task for a judge. However, as difficult as the determination of a fit sentence can be, the process has a narrow focus. It aims at imposing a sentence that reflects the circumstances of the specific offence and the attributes of the individual offender. Sentencing is not based on group characteristics, but on the facts relating to the specific offence and offender as revealed by the evidence adduced in the proceedings.

[162] As Doherty J.A., in delivering the judgment of the Ontario Court of Appeal, in *R. v. Hamilton* (2004), 186 C.C.C. (3d) 129, aptly stated:

> [2] … A sentencing proceeding is also not the forum in which to right perceived societal wrongs, allocate responsibility for criminal conduct as between the offender and society, or "make up" for perceived social injustices by the imposition of sentences that do not reflect the seriousness of the crime.

[163] Generally, it is recognized that a fit sentence is the product of the combined effects of the circumstances of the specific offence with the unique attributes of the specific offender. The judge must also take into account the nature of the offence, the victims, and the community. As Lamer, C.J. (as he then was) noted in *M. (C.A.),* sentencing should not only focus on the individual, but also on the victim and the community. He stated:

> [92] … It has been repeatedly stressed that there is no such thing as a uniform sentence for a particular crime ... Sentencing is an inherently individualized process, and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction. As well, sentences for a particular offence should be expected to vary to some degree across various communities and regions in this country, as the "just and appropriate" mix of accepted sentencing goals will depend on the needs and current conditions of and in the particular community where the crime occurred. …

[164] As repeatedly stated in the cases, accessing and possessing child pornography are grave and serious offences that cause significant harm to children. For that reason, the principles of denunciation and general deterrence must be the paramount consideration. As stated in *R. v. Letkeman,* 2021 MBQB 143:

> 51 It is well established that when the principles of denunciation and general deterrence are paramount, the focus of the sentencing judge is to be more on the

> offence committed, rather than on the offender, so as to better reflect the gravity of the conduct; although factors personal to the offender are always relevant, they necessarily take on a lesser role.

[165] While the paramount sentencing objectives in the present case are denunciation and deterrence, I must not lose sight of the prospect of rehabilitation.

[166] As discussed above, the Supreme Court of Canada has repeatedly commented upon the blight of child pornography offences and their direct harm to individual victims and society at large. Penalties for these offences should reflect the seriousness of these offences.

[167] *Friesen* confirms the need for courts to impose more severe sanctions for sexual offences against children.

[168] The Court must impose a sentence that addresses the two elements of proportionality. That is, the Court must consider the circumstances of the offence and of the offender, Mr. Mathiesen. The Court must fashion a disposition from among the limited options available that takes both sides of the proportionality inquiry into account.

[169] In assessing the issue of what is the appropriate and just sentencing disposition for these offences and for Mr. Mathiesen, I have considered all of the mitigating and aggravating circumstances of this case, including Mr. Mathiesen's personal circumstances, the impact of these offences on victims and the community, the statutory and common law evolution of sentencing for child pornography offences and parity, all of which have been discussed above.

[170] The cases submitted by counsel, clearly illustrate that for the offences of accessing and possession of child pornography significant periods of incarceration are usually imposed, except in *rare* or *exceptional* circumstances. It appears from the cases submitted by counsel that the range for these offences is anywhere from 6 to 24 months, involving possession and/or accessing child pornography. The cases submitted by Crown counsel involving possession, accessing and "making available child pornography" appear to be in the 36 to 44 month range, usually with the presence of the additional offence of "making available": for example, *Laplant*e (44 months); *Inksetter* (42 months); *Brown* (36 months); and *Walker* (36 months). In these cases, the offenders were not only possessing and accessing child pornography, but were also "making it available", which is an additional aggravating feature. The offence of "making available" under s.163.1(2) is a more serious offence than the

offences accessing and/or possessing child pornography. The seriousness of the offence of making child pornography, contrary to s.163.1(2) of the *Criminal Code*, is reflected in its maximum punishment of 14 years. The maximum sentence for the offences of possession and accessing child pornography are both ten years: Sections 163.1 (4) and 163.1 (4.1), respectively.

[171] It also appears from the cases submitted that in circumstances where there is a significant collection of child pornography, the sentence range is around two years (24 months). For example, *Jerrett* (24 months:17,657 images and 108 videos); *Rule* (22,429 images and 204 videos: 22 months); and *Reid*, 26 months: 2,500 videos and 4,000 images).

[172] It is necessary to express, in no uncertain terms, society's abhorrence of the conduct engaged in by Mr. Mathiesen, and the court's denunciation of that conduct. It is necessary to send a message to Mr. Mathiesen and others like him, that knowingly accessing and possessing child pornography will attract significant jail sentences.

[173] Where, as here, the primary purpose of sentencing is to deter and denounce, the Court must ensure that its sentences are perceived by the public as strong condemnations of this type of behaviour.

[174] Having considered the totality of the circumstances surrounding the offences, and the offender, Mr. Mathesen, I conclude that a significant custodial sentence followed by a significant period of probation is warranted to emphasize the principles of denunciation and deterrence. The courts have very few options other than a significant period of imprisonment to achieve the objectives of denunciation and general deterrence. The courts have very few options other than a significant period of imprisonment to achieve the objectives of denunciation and general deterrence in cases like this, where the gravity of the offence is serious, and the moral blameworthiness of the offender is very high.

[175] In my view, an appropriate sentence in this case, in light of the aggravating and mitigating circumstances, (including the *Duncan* credit as a mitigating factor), and on consideration of the decision in *Friesen* and the cases that have applied it, would be a sentence in the range of 24-months imprisonment followed by a significant period of probation.

[176] In this case, the parties have proffered a joint recommendation in respect to the *Duncan* credit of 48 days. In considering that recommendation, I am mindful that

the *Duncan* credit is not a deduction from the otherwise appropriate sentence but is one of the mitigating factors to be considered in determining the appropriate sentence. As will be discussed later in these reasons, particularly punitive pretrial incarceration conditions can be a mitigating factor to be taken into account with the other mitigating and aggravating factors in arriving at the appropriate sentence from which the *Summers* credit will be deducted. Because the *Duncan* credit is one of the mitigating factors to be considered, it cannot justify the imposition of a sentence which is inappropriate, having regard to all of the relevant mitigating or aggravating factors.

[177] Having considered all of the mitigating and aggravating factors in this case, including the *Duncan* credit, a sentence of 682 days, followed by a three-year period of probation is a fit and appropriate sentence for the offences and the offender, Mr. Mathiesen. A substantial period of custody is warranted in this case because denunciation and general deterrence must be primary considerations for offences involving child pornography.

[178] I am of the view that a significant period of probation is necessary for both Mr. Mathiesen's rehabilitation and society's protection. He will be subject to stringent terms of probation, including attending court for status updates.

[179] To be clear, but for all of the mitigating factors in this case, Mr. Mathiesen's sentence would have been higher: see i.e. *Reid* 26 months

[180] Based on the cases submitted by counsel in this case, a sentence would have been higher. Based on the caselaw submitted by counsel in this case, the sentence would have been much higher, in the range of 36 to 44 months, had Mr. Mathiesen been sentenced for possession, accessing, and making available child pornography.

Constitutionality of Mandatory Minimum Penalties

[181] As stated, the Crown has proceeded by way of indictment and as such pursuant to sections 163.1(4)(a) and 163.1(4.l)(a) of the *Criminal Code* each offence has a mandatory minimum punishment of imprisonment of one year.

[182] Mr. Mathiesen alleges that the mandatory minimum provisions under each these sections violate his rights as guaranteed by section 12 of the *Charter* and seeks relief pursuant to section 24(1) of the *Charter* for a declaration that the mandatory minimum provisions are of no force and effect.

[183] While a conditional sentence order is not restricted to any particular kind of offence, given that the court imposed a two-year penitentiary sentence, Mr. Mathiesen is not eligible to apply for one pursuant to s. 742.1 of the *Criminal Code*. Notwithstanding that Mr. Mathiesen will actually receive a sentence less than two years after he receives enhanced credit under s. 719(3.1) and *Duncan* credit (*R. v. Duncan,* 2016, ONCA 754), the Supreme Court of Canada in *R. v. Fice,* [2005] 1 S.C.R. 742, held that under s. 742.1, a conditional sentence of imprisonment cannot become available to the accused, who otherwise warrants a penitentiary sentence solely because of the time the accused has spent in pre-disposition custody.

[184] In any event, after applying the well-known framework in the Supreme Court of Canada's decision in *R. v. Nur,* 2015 SCC 15, the Crown, in this case, Mr. Kennedy, concedes that the mandatory minimum penalties violate s. 12 of the *Charter* and are not saved under Section 1, based on the application of a reasonable hypothetical, specifically the example discussed in *R v John*, 2018 ONCA 702.

[185] Given the sentence that the court has imposed, the constitutional challenge to the mandatory minimum penalties under s.163.1(4) and s.163.1(4.1) of the *Criminal Code* seems moot. Therefore, it will not be fully addressed here, as I agree with the parties that in this case, the reasonable hypothetical (or "reasonably foreseeable application": per *Nur* at para. 57) inevitably leads to the conclusion that the 12-month mandatory minimum penalties of the aforementioned sections violate s. 12 of the *Charter.* The reasonably foreseeable situation in *John* was as follows:

> [29] ... An 18-year-old whose friend forwards him a "sext" from the friend's 17-year-old girlfriend without her knowledge. The 18-year-old doesn't forward the "sext" but keeps it on his phone.

[186] Thus, applying this reasonable hypothetical to the case at bar would lead to the conclusion that the mandatory minimum penalties under s.163.1(4) and s.163.1(4.1) of these sections violates s. 12 of the *Charter,* and would not be saved under s. 1 of the *Charter.*

[187] In *John* the Ontario Court of Appeal held:

> [41] The mandatory minimum is entirely unnecessary. This court has recently emphasized the importance of denunciation and deterrence for any offence involving abuse of a child, and that those principles are the primary principles of sentencing applicable for such offences involving child pornography: *R. v. Inksetter*, 2018 ONCA 474, at para. 16. In another recent decision, *R. v. J.S.*, 2018 ONCA 675, this court upheld a sentence of 18 years for sexual abuse of young

> children, making child pornography depicting that abuse, and distribution of that material.

[188] In *R. v. Hagen*, 2021 BCCA 208, Justice DeWitt-Van Oosten, in delivering the judgment for the British Columbia Court of Appeal noted that the mandatory minimum of one year of imprisonment when the Crown proceeds by indictment has been declared inoperative in British Columbia. She stated:

> 24 A conditional sentence is available for an offence under s. 163.1(4). The *Code's* mandatory minimum of one year of imprisonment when the Crown proceeds by indictment has been declared inoperative in this province on constitutional grounds. See *R. v. Cole*, 2021 BCSC 293; *R. v. Alexander*, 2019 BCCA 100; *R. v. Hamlin*, 2019 BCSC 2266; *R. v. Swaby*, 2018 BCCA 416, leave ref'd, [2019] S.C.C.A. No. 17.

The Request for a Conditional Sentence Order

[189] To be clear, even if Mr. Mathiesen was eligible to apply for a conditional sentence order in this case, I have no hesitation in saying that one would not have been imposed, given the seriousness of the offences, as discussed above. The aggravating factors are significant. The fundamental principle of proportionality is paramount. Indeed, there appears to a clear trend in the jurisprudence that conditional sentences for child pornography offences be reserved for *exceptional circumstances*. The most common examples include cognitive deficits, severe mental health issues, other severe health conditions, and significant self-motivated rehabilitative efforts. As previously stated, courts have responded to the signal from the Supreme Court of Canada in *Friesen* to re-calibrate the range of sentences for sexual offences against children, including child pornography offences. As stated by Justice Doherty, in *R. v. M.M.* 2022 ONCA 441*:*

> 16. Conditional sentences for sexual offences against children will only rarely be appropriate. Their availability must be limited to exceptional circumstances that render incarceration inappropriate — for example, where it gives rise to a medical hardship that could not adequately be addressed within the correctional facility. It would not be appropriate to enumerate exceptional circumstances here and we make no attempt to do so. Suffice it to say that no exceptional circumstances are present in this case. A sentence of imprisonment should have been imposed.

[190] Similarly, in *Hagan*, Justice DeWitt-Van Oosten wrote:

> 41 With this emphasis, incarceration will *generally* be necessary to achieve a proportionate sentence in a case involving a child sexual offence: *Alexander* at para. 39. Of course, there will be situations in which the particular factual matrix, including the offender's personal circumstances, justifies a community-based disposition. Sentencing is an inherently individualized process and no two cases are ever exactly alike. However, because of the gravity of child sexual offences and the paramountcy of denunciation and deterrence, a non-carceral sentence for an offence under s. 163.1(4) tends to be the exception, rather than the rule: *Alexander* at para. 39. See also *Hamlin* at para. 32; *Swaby* at paras. 66-67; *Inksetter* at paras. 22-25; *R.L.W.* at para. 49. [Emphasis in original]

[191] Two examples of cases where courts have imposed conditional sentences for child pornography offences where there were *exceptional circumstances* include the following:

> In *Dutchession*, as noted above, the accused pleaded guilty to possession of child pornography which included 7,537 images, the majority of which were prepubescent female children between three and 14 years old. He was 51 years old with no criminal record, and had served in three combat zones as a member of the military. He actively participated in treatment, expressed remorse, understood the gravity of the offence, and was considered a low risk. It was found that his military service resulted in mental health issues. There had been some delay associated with the case, and in that time Mr. Dutchession had undergone extensive, successful therapy. The Court was concerned he would not receive sufficient rehabilitation in a provincial facility. A CSO was imposed for two years less one day followed by 24 months of probation.

[192] In *R v Friesen*, 2022 ABCA 147, the Alberta Court of Appeal upheld the 24-month conditional sentence imposed by the sentencing judge for possession of child pornography. The sentencing judge acknowledged that conditional sentences are reserved for "exceptional circumstances": at para. 21. The Crown had sought a sentence of 13 months. The 21-year-old offender with no criminal record uploaded 6 images and 23 videos of child pornography to the Snapchat and Dropbox. Police further found 102 unique images and 6 videos of child pornography on the offender's phone. The offender was the victim of sexual abuse as a child. He was assessed at a low risk to reoffend, did not meet the criteria for pedophilic disorder, and scored a zero on the sexual deviancy scale. The offender successfully completed 24 sessions of sex offending therapy on his own volition and as a result, no other therapy was recommended. He further underwent 15 sessions with an addictions counsellor where he demonstrated "remarkable insight into his addictions history" and a "deep understanding regarding his internal and external triggers for alcohol". He further completed an in-depth relapse prevention plan. He acknowledged a relationship

between his alcohol abuse and offending. The Court of Appeal found that the offender's rehabilitation efforts were exceptional (para. 58). The sentencing judge found that the number of images and videos was not aggravating, as it was a relatively small number.

[193] In this case, I find a conditional sentence for Mr. Mathiesen would offend the proportionality principle given the current binding jurisprudence and the requirements of the *Criminal Code.* I am not satisfied that Mr. Mathieson's personal circumstances amount to extraordinary circumstances after reviewing the jurisprudence that addressed granting conditional sentences for these offences since the Supreme Court of Canada's decision in *Friesen.*

The Application of ss.719(3) and (3.1): *Summers* Credit

[194] Mr. Mathiesen was arrested on December 8, 2022, and has been in custody at the Northeast Correctional Facility since December 9, 2022, having been denied bail by Judge Atwood.

[195] In determining sentence, the court, under s. 719(3), may consider any time spent in custody by the offender as a result of the offence. The calculation of the credit awarded to an offender for time spent in pre-sentence custody is governed by s. 719 (3) and (3.1) of the *Criminal Code.* Credit for pre-sentence custody is discretionary. The general rule, expressed in s. 719(3) is that credit is limited to a maximum of one day for each day spent in pre-sentence custody. Section 719 (3.1) creates an exception to the general rule in s. 719(3). The exception may only be granted where the circumstances justify it, and the enhanced credit must not exceed one and one-half days credit for each day spent in pre-sentence custody. Section 719 (3.2) requires the court to give reasons for any credit granted and shall cause those reasons to be stated in the record.

[196] *R. v. Summers*, 2014 SCC 26, indicates that loss of early release is generally a sufficient basis on which to award enhanced credit even if the conditions of detention are not harsh and parole is unlikely.

Harsh Conditions of Remand as a Mitigating Factor: *Duncan* Framework

[197] In *Duncan,* the Ontario Court of Appeal recognized that additional credit, beyond the 1.5 credit referred to in 719 (3.1), is available where the offender serves their pre-sentence custody in particularly harsh circumstances. The Court stated:

> 6 … We agree with counsel that in the appropriate circumstances particularly harsh pre-sentence incarceration conditions can provide mitigation apart from and beyond the 1.5 credit referred to in s. 719(3.1). In considering whether any enhanced credit should be given the court will consider both the conditions of the presentence incarceration and the impact of those conditions on the accused.

[198] As stated in *Duncan*, harsh or punitive remand conditions can be a mitigating factor in determining sentence. In other words, it is not a deduction from an otherwise appropriate sentence. In *R. v. Marshall*, 2021 ONCA 344, the Ontario Court of Appeal explained:

> [52] The *"Duncan"* credit is not a deduction from the otherwise appropriate sentence, but is one of the factors to be taken into account in determining the appropriate sentence. Particularly punitive pretrial incarceration conditions can be a mitigating factor to be taken into account with the other mitigating and aggravating factors in arriving at the appropriate sentence from which the *"Summers"* credit will be deducted. Because the *"Duncan"* credit is one of the mitigating factors to be taken into account, it cannot justify the imposition of a sentence which is inappropriate, having regard to all of the relevant mitigating or aggravating factors.

[199] More recently, in *R. v. Smith*, 2023 ONCA 500, the Ontario Court of Appeal reaffirmed this approach. In delivering the judgment for the Court, Fairburn A.C.J.O wrote:

> 52 … I reiterate this court's comments in *Marshall* that the preferable approach going forward is to address any *Duncan* concerns as a factor in the course of determining the fit and proportionate sentence.

[200] In Nova Scotia, courts have recognized that harsh or punitive remand conditions can be a mitigating factor in determining sentence. In *R. v. Steed*, 2021 NSSC 71, Justice Rosinski credited a remand enhancement of 2:1 for the relevant time frame of harsh conditions at the CNSCF. He held:

> [193] Mr. Steed has argued that he should have an even greater or enhanced credit for that time he spent in custody under "harsh conditions", largely occasioned by the presence of Covid 19 in Nova Scotia since mid-March 2020 - namely, the reduction in programming available, liberty (within the correctional facility centres where he was housed - including less outdoor time; less mingling among inmates; less contact with family and friends etc.),

> and the occasions of "lockdowns" etc.: and a significant assault that caused serious injury to his eyes, some symptoms of which are ongoing.

[201] Similarly, in *R. v. Robinson*, 2021 NSPC 20, Judge Buckle acknowledged the existence of "harsh conditions" in Nova Scotia correctional facilities. She wrote:

> [44] ... In *Steed,* Justice Roskinski referred to evidence from an employee of NS Corrections and Mr. Steed apparently confirming that Covid restrictions had contributed to "harsh conditions". These included, "the reduction in programming available, liberty (within the correction centres where he was housed - including less outdoor time; less mingling among inmates; less contact with family and friends, etc.), and the occasions of "lockdowns". (at para. 193). I heard similar evidence from both the offender and a correctional employee in *Lambert.* Conditions in facilities have not been static over the past year but, in provincial court, counsel and persons in custody regularly report these same conditions and some, such as the absence of programming are regularly included in pre-sentence reports. In these circumstances, I do not believe that evidence is required to establish that inmate of provincial institutions have, at time, experiences harsher conditions due to Covid. These conditions would include reduced or no programming, less time out of one's cell and restrictions on visits. I accept that this has resulted in "harder time" for Mr. Robinson.

[202] More recently, in *Downey v. Nova Scotia (Attorney General)*, 2023 NSSC 204, Justice Brothers, in the context of a *habeas corpus* application, commented on the current conditions at the CNSCF. In a comprehensive and thoughtful decision, Justice Brothers expressed deep concern about the routine use of rotational lockdowns to respond to staffing challenges at the facility. She wrote:

> [93] Although Mr. Downey's application cannot succeed, it has given the court the opportunity to express its deep concern about the routine use of rotational lockdowns to respond to staffing challenges at CNSCF. I accept that these lockdowns are having a detrimental impact on the health and wellbeing of the people in custody. These individuals are being confined to their cells for reasons that are outside their control. They never know from one day to the next how much time they will get outside of their cells, as the decision is made each morning when the unit captains arrive for their shifts. There is nothing that a person in custody can do to earn more time outside of their cell. This situation adds an extra layer of stress and anxiety to the day-to-day experience of persons in custody and staff, and can increase tensions in the dayrooms, as reported by D/S Ross.
>
> [94] When courts sentence offenders to prison, they do so with the hope that those individuals can rehabilitate themselves and successfully reintegrate into the community. That is the premise of our criminal justice system. Confining persons

> in custody – many of whom may have pre-existing mental health issues – to their cells for exorbitant periods of time does nothing to assist and support their rehabilitation. Mr. Downey provided persuasive evidence of the toll this is taking on his mental and physical health. Even a person with robust mental health would find it challenging to be regularly confined to a cell, often for more than 20 hours per day, with little notice and no ability to earn more time out. This practice is dehumanizing, and it is setting these individuals up to fail. They deserve better.
>
> [95] Staffing issues at CNSCF have been ongoing for over three years. I was provided with very limited information on this application concerning concrete steps being taken to alleviate the staffing shortage. While I accept that administrators like D/S Ross are doing the best they can with the available staff, this is cold comfort to Mr. Downey and others who have recently filed *habeas corpus* applications in relation to the rotational lockdowns at CNSCF. Nor will they find comfort in the fact that their onerous conditions of confinement are no more restrictive than those faced by their peers in protective custody and general population.
>
> [96] The court has no power on this application to order the government to increase its efforts to hire and retain more staff. That said, there are striking similarities between the conditions of confinement at CNSCF during rotational lockdowns and those that were held to constitute cruel and unusual treatment in *Trang*, *supra*. If creative and effective measures to hire and retain staff are not pursued, there may come a day when, in a suitable procedural context, the court can provide some form of remedy.

[203] Similarly, in a recent trilogy of *habeas corpus* decisions rendered by Justice Arnold, he also expressed his concerns about the current conditions of confinement at CNSCF. In *Keenan v. Nova Scotia (Attorney General)*, 2023 NSSC 217, he fully adopted the reason of Brothers J. in *Downey*. He also commented on the adverse effects of rotational lockdowns because of chronic staff shortages. He stated:

> [1] There is a significant problem at the Central Nova Scotia Correctional Facility. It is seriously understaffed. As a result, the inmates have been subject, off and on, to rotational lockdowns for months. Whether on a general population range or on a protective custody range, because of the chronic staffing shortages, all inmates are subject to close confinement for significant periods of time. The rotational lockdowns create havoc with the daily schedule. Inmates do not know if or when they will be released from their cells. Programming has been impacted, but not cancelled completely. Calls to lawyers have been impacted. Visitation has been impacted. Meals have been impacted. Tensions are high. Inmate-on-inmate intimidation and violence, as well as inmate-on-staff intimidation, abuse and violence, is an issue, which leads to more lockdowns and more staffing shortages.

[204] Justice Arnold added that the circumstances are very similar to the facts in *Richards v. Nova Scotia (Attorney General)*,2023 NSSC 220, and *Sempie v. Nova Scotia (Attorney General)*, 2023 NSSC 218, as the events occurred either at the same time or very close in time in the CNSCF.

[205] In this case, Mr. Kennedy, Crown Counsel, fairly and properly conceded that Mr. Mathiesen should receive *Duncan* credit. Before making this concession, Mr. Kennedy stressed that he considered all of the above noted decisions, particularly the four *hapeas corpus* decisions, and importantly discussed the conditions with correctional officials, including an official at the Northeast Nova Scotia Correctional Facility, where Mr. Mathieson is on remand, and concluded that the conditions at that facility are similar to those at CNSCF. Based on all of that, the Crown agrees with the defence that *Duncan* credit is called for. They have agreed on the amount of *Duncan* credit that Mr. Mathiesen should receive.

[206] It should also be noted that the defence alleges that Mr. Mathiesen was the victim of two assaults while in custody.

Disposition

[207] The global sentence is 682 days imprisonment followed by 36 months probation, with the sentence for each offence to run currently. Enhanced credit under *Summers* is 261 days multiplied by 1.5 days for each day served is 391 days. Therefore, 391 days will be reduced from the global sentence of 682 days. The actual sentence going forward is 290 days imprisonment followed by three years of probation, coupled with the ancillary orders.

Victim Fine Surcharge

[208] Pursuant to s. 737(2.1) of the *Criminal Code*, I will waive the payment of the victim fine surcharge as I am satisfied after hearing from counsel that it would cause undue hardship to Mr. Mathiesen.

Ancillary Orders

[209] Counsel agree that the following ancillary orders are appropriate. Therefore, I impose the following orders:

- A DNA order;
- A SOIRA order for 20 years;
- A s. 161 Order for 5 years; and

- A Forfeiture Order in the form provided by counsel.

Hoskins, J.