SUPREME COURT OF YUKON

Citation: *R v Smeeton,* 2025 YKSC 3

Date: 20250108
S.C. No. 22-01519
Registry: Whitehorse

BETWEEN:

HIS MAJESTY THE KING

AND:

KOLE ALEXANDER SMEETON

Publication of information that could identify the complainant or a witness is prohibited pursuant to s. 486.4 of the *Criminal Code.*

Before Justice K. Wenckebach

Counsel for the Crown — Adrienne Switzer

Counsel for the Defence — David C. Tarnow

This decision was delivered in the form of Oral Reasons on January 8, 2025. The Reasons have since been edited for publication without changing the substance.

REASONS FOR SENTENCE

Introduction

[1] WENCKEBACH J. (Oral): The accused, Kole Alexander Smeeton, has pleaded guilty to one count of possession of child pornography, contrary to s. 163.1(4) of the *Criminal Code*, RSC 1985, c C-46 ("*Criminal Code*"). Mr. Smeeton is now before me for sentencing.

[2] The facts are that, on October 21, 2021, Dropbox, which is a file hosting service, provided a report to the National Center for Missing and Exploited Children, an

organization that gathers information about missing and sexually exploited children. Dropbox informed NCMEC that on October 16, 2021, an individual with the username "Kole Smeeton" had uploaded a video of a pubescent minor involved in a sex act. The report also provided the IP address used in the upload. Ultimately, the police learned that the IP address was associated with the house in which Mr. Smeeton was living.

[3] On February 8, 2022, the police went to Mr. Smeeton's house, and pursuant to a search warrant, seized a number of electronic devices from him. They then found numerous child pornography images and videos on Mr. Smeeton's mobile phone and computer.

[4] The lead investigator categorized the images and videos according to the degree of severity of the child pornography. There were 101 photos or videos depicting erotic posing with no sexual activity; 95 images or videos of sexual activity between children, or solo masturbation by a child; 11 images or videos of non-penetrative sexual activity between children and adults; 139 images or videos of penetrative activity between children and adults; and 4 images of sadism or bestiality. The images included females and males ranging in age from approximately 1 to 17 years old. There were a total of 350 pictures and videos of child pornography.

[5] Thirty-six of the images and six videos were of a youth engaged in sexual activity with Mr. Smeeton. Forty-eight of the videos were unique and appeared to have been downloaded from the internet.

[6] The Crown submits that an 18-month jail term, followed by two years' probation, is an appropriate sentence. Defence counsel seeks a two-year conditional sentence. The *Criminal Code,* however, sets a minimum sentence of one year's imprisonment for

this offence. Because there is a minimum jail sentence, I cannot make a conditional sentence order. Defence counsel seeks that I declare the minimum sentence provision unconstitutional, pursuant to s. 12 of the *Charter*, thus making a two-year conditional sentence possible.

Issues

[7] The issues are as follows:

A. Is a conditional sentence appropriate?

B. If not, what is the appropriate sentence for Mr. Smeeton?

C. Does the minimum sentence of 1 year for a conviction under s. 163.1(4) violate s. 12 of the *Charter*?

Evidence

[8] Three reports were filed; and two of the writers of the reports also testified. A Pre-Sentence Report was prepared by a probation officer, Christine Gebremichael; a Gladue Report was prepared, and the author, Stuart Cadwallader testified; and a psychologist, Martin Weir, prepared a risk assessment and also testified.

[9] On first reading the reports, it appears that Mr. Smeeton presented differently and provided different information for the PSR than he did for the Gladue Report and the risk assessment. There are, however, commonalities between the reports.

[10] The commonalities include that, in all three reports, Mr. Smeeton describes the offence and his culpability in a similar fashion. He essentially stated that the child pornography ended up on his devices through inadvertence, although there are variations in the details of how the child pornography came to be on his devices.

[11] The reports also describe the impact colonialism and residential school has had on multiple generations in his family and on him.

[12] Additionally, the reports also note that Mr. Smeeton abused substances. In particular, he used them heavily, especially cocaine, at the time of the offence. The Gladue Report and the risk assessment state that Mr. Smeeton recognizes that his substance use is linked to the commission of the offence. Mr. Smeeton also told the writers that he stopped taking cocaine. Now he uses marijuana and occasionally drinks. The evidence is inconsistent on the extent of his marijuana use. The PSR and Gladue Report state that he reports using marijuana a couple of times a week, while he told Mr. Weir that he uses marijuana daily.

[13] The reports also discuss the strengths in Mr. Smeeton's life. Mr. Smeeton has a job working on an oil rig. It was also clear that he has a strong work ethic; and work is very motivating for him. As well, his family is very supportive of him.

[14] What differed between the PSR, and the Gladue Report and the risk assessment are Mr. Smeeton's explanations about the harms of child pornography. He told Ms. Gebremichael that he could not identify the victims of child pornography. He also stated that he himself was harmed, having lost friends and job opportunities because the government had not provided safeguards from accessing sensitive content. He told Mr. Cadwallader and Mr. Weir, however, that the children who were in the images were victims.

[15] Counsel also noted the difference in Mr. Smeeton's attitude towards the report writers, but I do not find this difference meaningful for the purposes of sentencing.

[16] In addition, letters of support, and an autobiographical document written by Mr. Smeeton's paternal grandmother were filed. One of the letters of support was from a psychologist who stated that Mr. Smeeton had attended therapy with her. Mr. Smeeton's mother, Kyla Smeeton, and his aunt, Francine Chase, also testified. They discussed his early life, as well as recent positive changes they have noted in him.

Analysis

A. Is a conditional sentence appropriate?

[17] Mr. Smeeton seeks a two-year conditional sentence.

Law

[18] An offender may only receive a conditional sentence if two conditions are met. First, the appropriate range of the offender's sentence must be more than probation but less than two years imprisonment. Second, the court must be satisfied that the community would not be endangered by the offender serving their sentence in the community. Once those preconditions are met, the court will consider whether a conditional sentence order is appropriate given the objectives of sentencing, including those of denunciation, deterrence, and rehabilitation

[19] In sex offences involving minors, however, because of the gravity of the offence, conditional sentence orders will not be the norm (*R v DAD*, 2024 YKCA at para. 60). Rather, judges should generally order incarceration. In rare cases, however, conditional sentences orders may be appropriate (*R v Bertrand Marchand*, 2023 SCC 26 at para. 130), for instance, where the offender's moral responsibility is diminished because of mental health or cognitive issues, or where Gladue factors are present (*R v TJH*, 2023 YKCA 2 at para. 27).

Analysis

[20] Both counsel agree that the sentence range here is less than two years and more than probation. Thus, the first pre-condition is easily met.

[21] The other two questions are: whether the community would be endangered if Mr. Smeeton were to serve his sentence in the community and whether a conditional sentence meets the sentencing objectives in the *Criminal Code*. In my opinion, the assessment is similar for both those issues. I will therefore address them together. I will proceed by examining the risk assessment, Mr. Smeeton's circumstances, and whether there is an adequate plan for the conditional sentence.

[22] The risk assessment puts Mr. Smeeton at a low risk to re-offend. However, I have concerns about the accuracy of the risk assessment. Mr. Smeeton is not forthright about the circumstances of his commission of the offence and minimizes his responsibility. It seems this was not accounted for in the risk analysis, thus throwing the results of the assessment into question.

[23] Mr. Smeeton's failure to be candid about the offence is apparent upon reading the three reports. In particular, while he consistently stated that the images ended up on his devices inadvertently, he provided a different explanation to the report writers about how they ended up there. For the Gladue Report, Mr. Smeeton said that he had become involved in various online sexual fantasy boards. People from the online boards sent him attachments. He opened them and saw images of children doing awful things. He found it "gross" and closed the files, but inadvertently downloaded some of them as well.

[24] He also told Mr. Weir that he was on online fantasy boards; however, he also said that he downloaded a cache of images through a Dropbox link and was not sure what he would be receiving.

[25] This is also inconsistent with the Agreed Statement of Facts, which states that Mr. Smeeton uploaded a file containing an image of child pornography to Dropbox. Mr. Weir testified, however, that Mr. Smeeton did not tell him he had uploaded child pornography.

[26] Moreover, an element of the offence of possession of child pornography is that the offender has knowledge that they have the child pornography in their possession. At the beginning of the sentencing hearing, Mr. Smeeton confirmed that he knew he had the child pornography on his devices. There was child pornography in his possession on October 16, 2021, and as well on February 8, 2022. I conclude that Mr. Smeeton had child pornography in his possession for almost four months before the police seized his devices. At the time they were seized, there were 350 pictures and videos of child pornography on them. In stating to the report writers that the images were inadvertently transferred to his devices, Mr. Smeeton at best failed to take full responsibility for his actions and at worst implied that he did not know the images were on his computer.

[27] The risk assessment tool Mr. Weir administered to Mr. Smeeton, called the STABLE-2007, is based on an interview with the individual and available file information. The determination about the individual’s sexual interests, such as pedophilia, is based on questioning the individual about their interests and fantasies.

[28] Mr. Weir did not consider that Mr. Smeeton might provide misleading answers to the STABLE-2007 test. Given that the Gladue Report had not been completed when

Mr. Weir interviewed Mr. Smeeton, arguably there was not a sufficient basis for Mr. Weir to be concerned that Mr. Smeeton was not being forthright. Regardless, this was not factored into the administration of the test. It seems to me that, as Mr. Smeeton was not candid about the circumstances through which he obtained the child pornography, then there must be a concern that he would not be candid during the interview for the STABLE-2007 test as well. The results of STABLE-2007, in turn, would be suspect.

[29] Defence counsel submitted that the tests Mr. Weir used to assess Mr. Smeeton should not be dismissed simply because they are based on self-reporting. He argues that, as Mr. Weir emphasized in his testimony, the tests contain validity scales. It is therefore possible to determine when an individual is not being forthright.

[30] Mr. Weir did testify that some of the tests he administered, such as the Personality Assessment Inventory, contain validity checks. However, he did not provide information, either in the report or during testimony, about the validity scales for STABLE-2007. I am also not convinced simply because Mr. Smeeton was honest in completing the PAI, that he was also honest in providing information for the STABLE-2007. Mr. Weir wrote in his report that Mr. Smeeton "produced a valid profile [for the PAI test] that did not suggest any motivation to portray himself as being relatively free from common shortcomings or minor faults." It does not necessarily follow that, because Mr. Smeeton did not seek to hide "common shortcomings or minor faults", he was equally willing to discuss the circumstances of his possession of child pornography or any issues that may have prompted him to seek to possess child pornography. Mr. Weir also did not testify that the scientific literature supports using the validity of the PAI test

to support the validity of a STABLE-2007 test. I will therefore put no weight on the risk assessment.

[31] I now turn to the other factors used for determining Mr. Smeeton's risk. There are a number of factors that support the finding that Mr. Smeeton is at lower risk to re-offend. He has been on conditions for at least two years without incident. Mr. Smeeton has also linked his use of cocaine with the commission of the offence, showing some insight. He has stopped using cocaine and has voluntarily engaged in some counselling. I also accept that he now recognizes that child pornography harms the children who take part in it. His understanding thus progressed: at the time of the PSR interview, he was not able to identify that the children used for child pornography are victims; by the time of his interview for the Gladue Report and the risk assessment, he did.

[32] There are also factors, however, that suggest that Mr. Smeeton is at a higher risk of re-offending. While Mr. Smeeton has gained some insight into both the offence and the changes he himself must make, those insights are limited. He still minimizes his own responsibility in the offence. He has taken counselling, but it was not to address why he committed the offence. In terms of how this affects Mr. Smeeton's likelihood of recidivism, Mr. Weir testified that even if Mr. Smeeton is in denial about his problems, it will not have a negative impact on his ultimate chance of recidivism. He testified that therapists can work through denial to get an individual like Mr. Smeeton to reduce his risk. While accepting that therapy could eventually be successful, it seems to me that being honest about his responsibility and motivations would have an impact on his treatment. Because he is still unclear about what he did and why he did it, I conclude

that he is at a higher risk to re-offend, at least in the short term, than if he were prepared to be honest about the offence.

[33] Mr. Smeeton's use of substances also raises his risk level. His ability to stop using cocaine is an impressive feat. However, Mr. Smeeton continues to use marijuana, leading me to conclude that Mr. Smeeton's issues with substance abuse are on-going. I come to this conclusion despite Mr. Weir's statement in his report that Mr. Smeeton's substance use disorder might be viewed as being in remission. Mr. Smeeton smokes marijuana daily as a form of self-medication and to calm himself down. In discussing Mr. Smeeton's abuse of substances, Mr. Weir describes how taking substances in this manner has a negative effect on Mr. Smeeton. He states: "Whether legal or illicit in origin, these substances are likely employed to moderate the anxieties and personal inadequacies he feels in his social relationships. Equally useful is their ability to conceal his loneliness and to replace it with fantasies that are comforting and agreeable." It is difficult to see how marijuana, which Mr. Smeeton uses in a way that Mr. Weir highlights as being problematic, is not an issue.

[34] Moreover, Mr. Weir, who provides an otherwise positive report "strongly suggests" that Mr. Smeeton seek a consultation from an addictions counsellor to help prevent relapse and as a component for reducing his risk of recidivism.

[35] Mr. Smeeton's release conditions did not require Mr. Smeeton to abstain from drinking alcohol or taking non-prescription drugs. However, given the links Mr. Weir, Ms. Gebremichael, and Mr. Smeeton himself have drawn between Mr. Smeeton's substance use and the offence, a conditional sentence order would include a term requiring Mr. Smeeton to abstain absolutely from alcohol, marijuana, and any other non-

prescription drugs. Treatment for substance abuse would therefore be important in assuring that Mr. Smeeton would be successful on a conditional sentence. Mr. Smeeton has indicated he is willing to attend treatment but has not taken steps to get it. While he could be required by his probation officer to take substance abuse treatment, there is no evidence about what kind of treatment is open to Mr. Smeeton nor when it would be available. In my opinion, putting this term in the order, given his present use of marijuana and without knowing if treatment would be available soon, would put Mr. Smeeton not only at risk of violating the order, but would also increase the chances that he will re-offend in a manner that puts the safety of the community at risk.

[36] Similarly, Mr. Weir and Ms. Gebremichael recommended that if a conditional sentence were ordered, then Mr. Smeeton should take part in sex offender programming. There was not sufficient evidence that sexual offender programming would be available to Mr. Smeeton, however. Again, this increases Mr. Smeeton's risk. I conclude that the plan needed to mitigate Mr. Smeeton's risk is not sufficiently detailed. Overall, the risk of re-offending is too high to order a conditional sentence.

[37] For the same reasons, and despite the Gladue factors that may otherwise warrant a conditional sentence, I also find that the objectives of denunciation, deterrence and rehabilitation would not be met through a conditional sentence.

[38] Mr. Smeeton, I have concluded that a conditional sentence, or, house arrest, is not a good option. You are not being honest about how you ended up with child pornography on your devices. Because of that, I have concluded the risk assessment Mr. Weir performed is flawed. I also have concerns about how this lack of honesty impacts your chance of committing another crime in the short term.

[39] I recognize that you have made steps towards dealing with your issues. It takes strength to progress as you have. You have been able to stop using cocaine on your own. But you continue to use marijuana; and on the evidence I have I believe it is a problem for you. If I were to order house arrest, I would require you to stop using all non-prescription drugs, including alcohol and marijuana. I believe it would be challenging for you to comply with the order without treatment or counselling; and you have not lined up treatment or counselling to help you. We also do not know if sex offender treatment would be available to you. I believe your risk of committing another offence is too high to order house arrest.

B. What is the appropriate sentence for Mr. Smeeton?

[40] The Crown submits that an appropriate sentence for Mr. Smeeton would be 18-months jail.

[41] The *Criminal Code* directs me to take specific sentencing objectives into account when imposing a sentence (s. 718). The objectives most applicable here are denunciation, deterrence, and rehabilitation. The *Criminal Code* also sets out that, in crimes involving the abuse of a minor, the court must give primary consideration to denunciation and deterrence (s. 718.01).

[42] At the same time, particularly in sentencing Indigenous offenders, the court must also consider whether there are sanctions, other than imprisonment, that are reasonable (s. 718.2(d)). The impact of colonialism and racism may have an effect on an Indigenous offender such that their moral culpability is diminished (*R v Ipeelee* 2012 SCC 13 at para. 72).

[43] The court must apply these principles to impose a sentence that is proportionate. Proportionality encompasses the gravity of the offence and the degree of responsibility of the offender. The court thus addresses how serious the crime was and the offender's circumstances that may make them more or less blameworthy. The court also examines sentences that have been ordered in other cases, as sentencing judges seek to impose similar sentences for similar offences. This is called parity.

[44] I will therefore address the gravity of the offence Mr. Smeeton committed, his circumstances, and sentences other judges have ordered in similar offences.

Gravity of the Offence

[45] In *R v Friesen,* 2020 SCC 9 ("*Friesen*"), the Supreme Court of Canada outlined the principles to be used in sentencing for sexual offences against children. It explained that sexual offences against children are inherently harmful (at para. 77). Offenders who commit these offences are highly morally blameworthy (at para. 88).

[46] Child pornography offences are sexual offences and are therefore also inherently harmful. Child pornography degrades, dehumanizes, and objectifies children (*R v Sharpe*, 2001 SCC 2 at para. 158). Possession of child pornography is harmful, in part, because acquisition of child pornography is a part of what it drives the production of child pornography (para. 61).

[47] To understand the gravity of the offence, it is also helpful to hear the victims themselves describe the harms they suffer. The Crown filed a community impact statement. It includes materials from the Canadian Centre for Child Protection. One victim whose sexual abuse was recorded and shared states:

> It is hard to describe what it feels like to know that at any moment, anywhere, someone will be looking at my pictures

> of me as a child being sexually abused and getting sick gratification from it. It's like I am abused over and over and over again.

[48] Another states:

> The fact that there are pictures out there make it so that I can't help but remember the things that I desperately want to erase. I feel hopeless and I get embarrassed about it. I feel self-conscious and exposed.

[49] Moving from the general to the specific, the factors I will consider in determining the gravity of the offence in this case are: the number of pictures and videos Mr. Smeeton had in his possession; the length of time he had them; and the nature of the images. My analysis will also consider the ways in which *Friesen* applies, because in *Friesen* the Supreme Court of Canada provided guidance on how different factors should be used to assess the gravity of sexual offences against children.

[50] Mr. Smeeton had 350 images - a significant number. In *Friesen*, the Supreme Court of Canada states that, in cases where numerous instances of sexual violence are captured by one charge, the sentencing judge should not equate the gravity of the offence with cases in which there was one instance of sexual violence. Rather, the judge should give weight to the fact that an offender committed multiple assaults and that the victim was traumatized multiple times (at para. 133). This principle from *Friesen* is not directly analogous but it is instructive. The different images an offender possesses may depict a different victim or the same victim assaulted over and over again. One count of possession can, therefore, encompass hundreds or even thousands of victims.

[51] Mr. Smeeton has pleaded guilty to one count of possession of child pornography, but embedded in that count are numerous victims and at least one who was photographed more than one time. The number of images on Mr. Smeeton's devices is,

therefore, an aggravating factor. At the same time, the number is not as extreme as other cases.

[52] The length of time an offender has the child pornography in their possession may indicate whether the choice to possess the child pornography was impulsive or was made out of curiosity. Mr. Smeeton had the child pornography for approximately 4 months. It is less than other cases but suggests that Mr. Smeeton did not act impulsively in having child pornography in his possession.

[53] In assessing the nature of the images, courts have adopted a scale that ranks, in increasing order of seriousness, the content of the images and videos, which is known as the *Missions* categories (*R v Missions*, 2005 NSCA 82). The scale is as follows (at para. 14, quoting *R v Oliver*, [2002] EWJ No 5441):

> (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;
> (5) sadism and bestiality

[54] *Friesen* also provides guidance that can applied to the *Missions* categories. The Supreme Court of Canada, in speaking of contact sexual offences, states that the sentencing judge should not place too much emphasis on the extent of the physical interference inflicted on the victim, as that is not determinative of the degree of harm the victim has suffered. Furthermore, while the amount of physical interference is something the court can consider, it is a mistake to place different physical acts on a hierarchy, with touching at the bottom, fellatio and cunnilingus in the mid-range, and penile penetration at the most wrongful part of the scale (at paras. 142-146).

[55] Based on *Friesen*, it seems to me that the way the courts apply the *Missions* categories may need to be modified. Otherwise, the court is simply applying a scale based on the degree of physical interference the victim experiences to determine the gravity of the images. There will be challenges in using the *Missions* categories in a more nuanced fashion, however. The number of images involved in a case of child pornography can make it unrealistic to provide an individualized analysis, for instance.

[56] In the case at bar, the agreed statement of facts used the *Missions* categories and counsel did not provide submissions on the impact of *Friesen*. For the purposes here, then, I will adopt the *Missions* categories to assess the nature of the images. A more detailed examination of the use of *Missions* categories post-*Friesen* will wait for another day.

[57] Mr. Smeeton's pictures and videos cover all the different categories, including a few images in the fifth category.

[58] Taken together, the offence is at a medium level of gravity.

Mr. Smeeton's Circumstances

[59] There are a number of factors that are mitigating, meaning that they work in Mr. Smeeton's favour. These factors are: Mr. Smeeton is a first-time, youthful offender; he has stopped using cocaine, which was linked to the commission of the offence; and he has also taken some counselling.

[60] Colonialism has affected him and his family. I will not go into detail about how it has affected him, but the Gladue Report described well how residential school, substance abuse, sexual abuse, and other aspects of colonialism have affected

Mr. Smeeton's family for generations. Mr. Smeeton is also alienated from his First Nation, which is another impact of colonialism.

[61] The Crown noted Mr. Smeeton is inconsistent in the information he provided for the PSR, Gladue Report and risk assessment. While there are inconsistencies, there is still ample evidence upon which to conclude that Mr. Smeeton has lived a difficult and challenging life.

[62] Mr. Smeeton also has work and the support of his family. The Crown submitted that these factors should not be taken as mitigating. She argued that offenders who commit this kind of offence often have jobs or a supportive family. Generally, I agree with her. In the case at bar, however, I conclude that additional considerations impact my analysis. Mr. Smeeton's mother testified that, historically, he did not accept support from his family. He has, however, recently begun to do so. It seems to me that the intergenerational trauma he experienced because of colonialism contributed to him distancing himself from his family. That he is now able to accept their help speaks to the positive changes he has made in life. It is therefore, in this case, a positive factor I take into account.

[63] The most significant aggravating fact that works against Mr. Smeeton is his failure to take full responsibility for his actions. I accept that, as of late, he has come to recognize the harm that child pornography causes to children. On the other hand, he still is not forthright about what led him to have child pornography on his devices for four months and minimizes his responsibility. He has quit cocaine but has not sought treatment for his substance abuse or to explore why he committed the offence. This has

a negative impact on my assessment of specific deterrence and the possibility of rehabilitation.

[64] Before going a little bit deeper, Mr. Smeeton, I would like to say a few words to you. Your ability to stop using cocaine on your own speaks to a strong willpower. Your work ethic is a credit to you. I was also impressed that you were able to ask for help from your family and attended counselling. That you have managed all this in the face of a difficult life suggests that you are on the right path. Even though I am not giving you a conditional sentence, I hope that you continue this and continue to get assistance with the challenges you face. It is a mark of strength to get where you are. It is also a mark of strength to ask for help when you need it.

Case Law

[65] In reviewing the case law on the sentences imposed for similar offences, I must be aware of which sentencing decisions were before *Friesen* and which were after. This is because *Friesen* stated that sentences for sexual offences involving children must increase. It is therefore necessary to be cautious in using dated sentencing cases, or even more recent cases that rely on older cases (at para. 110).

[66] Turning to the case law, in *R v Hagen*, 2021 BCCA 208 ("*Hagen*") at para. 69, the Court of Appeal of British Columbia stated that four months to two years' imprisonment is the generally accepted range of sentences for possession of child pornography. This decision was post-*Friesen*; however, the Court of Appeal noted in *R v McCrimmon,* 2022 YKCA 1 ("*McCrimmon*") that *Hagen* does not stand for a generally accepted range for the offence following *Friesen*.

[67] In *R v Nowazek,* 2009 YKTC 51, which was decided before *Friesen*, the court determined that sentences for child pornography for offenders with no related record falls within a range of six to 18 months but the majority of offenders were sentenced to 10 to 12 months.

[68] In *McCrimmon*, which was decided after *Friesen*, the Court of Appeal of Yukon upheld a 20-month sentence but noted that a penitentiary term (which is a sentence of two years or more) would have been available. Mr. McCrimmon was a first-time offender. However, the gravity of the offence was great: the offender had in his possession thousands of pictures and videos, of which at least some of them were described as showing bondage, bestiality and sexual activity with children who were two to three years old. Mr. McCrimmon had been viewing the images for approximately a decade. Because of these factors, a penitentiary term was an option. However, the judge imposed a 20-month sentence, in large part because Mr. McCrimmon had sought out psychological help to deal with the impulses that led him to seek out child pornography. A psychologist who was treating Mr. McCrimmon provided a letter to the court. From that letter, the court was able to conclude that Mr. McCrimmon was on the path to rehabilitation.

[69] *McCrimmon's* facts were more serious than here. However, the case shows that a penitentiary term is within the range of possible outcomes. Noting that, and noting that in light of *Friesen*, sentences must increase, it seems to me that sentences need to increase from the range previously set.

[70] The gravity of the offence here is middling and there are both important mitigating and aggravating circumstances. I conclude that the Gladue factors lessen Mr.

Smeeton's moral responsibility. But for the Gladue factors I would find that a sentence of about 14 months would be appropriate. In the circumstances, I sentence Mr. Smeeton to 12 months' jail and two years probation. I will read out the terms for probation, and additional terms, at the end of the decision.

C. Does the minimum sentence of one year for s. 163.1(4) offences violate s. 12 of the *Charter*?

[71] Because I have sentenced Mr. Smeeton to 12 months imprisonment, which is the minimum sentence for this offence, I have the discretion as to whether to consider the question. The Crown seeks that I decline to consider the constitutionality of s. 163.1(4).

Law

[72] Oftentimes, a court that has the ability to make declarations about the constitutional validity of legislation will consider such an application even if the outcome will not affect the individual before the court. This is because unconstitutional provisions should not be allowed to remain in force indefinitely. As well, the court's decision communicates to the legislature that a law is not constitutional (*R v EO*, 2019 YKCA 9 at para. 38).

[73] However, there are circumstances in which the court will decline to consider a constitutional question. In a recent case, *R v Trimm*, 2024 NLCA 18, the Court of Appeal of Newfoundland and Labrador was asked to decide whether the mandatory minimum for distributing child pornography violated the *Charter of Rights and Freedoms*. It had not previously decided the issue and there had been mixed results before other courts. It declined to decide the question, however. It did so because the Supreme Court of Canada had agreed to hear an appeal on the constitutionality of

possession of child pornography. The Supreme Court's decision would thus provide the necessary clarity on the issue.

[74] The case the Court of Appeal of Newfoundland and Labrador was referring to, and which is now before the Supreme Court of Canada, will be heard on January 20, 2025. Given that the Supreme Court of Canada will soon resolve the very issue that is before me, I decline to consider the constitutionality of the provision.

[75] I order, under s. 164.2 of the *Criminal Code*, that the devices upon which pornographic material is located be forfeited.

[76] [Discussion on probation and other orders]

[77] The Crown also seeks a firearms prohibition. I presume that Crown seeks this pursuant to s. 110(a) of the *Criminal Code*. Crown made no submissions about the applicability of s. 110(a) to the offence of possession of child pornography. Section 110(a) applies to an offence "…in the commission of which violence against a person was used". While child pornography itself always involves violence, I am not convinced that committing the offence of possession of child pornography involves violence. I will not make the firearm prohibition.

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WENCKEBACH J.