Citation: *R. v. Callahan-Smith,* 2015 YKTC 3 Date: 20150116
Docket: 14-00057B
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Cozens

REGINA

v.

BILLY DEAN HANK CALLAHAN-SMITH

Publication of Information that could disclose the identity of the complainant or witness has been prohibited by court order pursuant to sections 486.4 of the *Criminal Code*.

Appearances:
Bonnie Macdonald Counsel for the Crown
Kim Hawkins Counsel for the Defence

REASONS FOR SENTENCING

[1] Billy Callahan-Smith has entered guilty pleas to having committed offences contrary to ss. 172.1(1)(b) and 171.1(1)(b) of the *Criminal Code* ("*Code*") and s. 137 of the *Youth Criminal Justice Act,* S.C. 2002, c. 1 ("*YCJA*"). I refer to these charges throughout this decision in accordance with the *Code* and *YCJA* sections the charges were amended to read and those on which Mr. Callahan-Smith is being sentenced.

[2] The facts of these offences are set out in an Agreed Statement of Facts.

> 1. On 4 April 2013, Billy Callahan-Smith, the Accused was sentenced to a two year youth probation order, after being convicted of three counts of sexual assault. The Accused has no other criminal convictions on his record. The Accused's youth probation order required that he "be of good behaviour".

2. On 26 April 2014, RCMP received a report from J.G. that her daughter, S.F. had been contacted on Facebook by the Accused and that he had been having a sexual conversation with her.

3. Ms. G. [name removed] gave Cst Leggett permission to access S.F.'s Facebook account.

4. Cst Leggett copied and pasted the Facebook conversation between the Accused and S.F. He also saved a picture of the Accused's face that the Accused had forwarded to S.F. in the course of this Facebook conversation, which was later matched to a photograph on CABS at the detachment.

5. The Facebook "conversation" between the Accused and S.F. occurred between the dates of 24 March 2014 and 24 April 2014. In the course of this conversation, the Accused asked S.F. how old she was, to which she responded "Im 12". The Accused subsequently asked S.F. if she wanted to see his genitals, to which she responded she did not.

6. On 27 April 2014, S.F. asked the Accused if he would give her an ipod, as she had heard he had some. The Accused asked what he would get it he did give her an ipod, and eventually offered to give S.F. "two iPods for sex". The Accused also requested that S.F. not tell anyone about his request.

7. Just after midnight on 27 April 2014, Cst Leggett logged into S.F.'s Facebook account and noted that the Accused had just posted a new message to S.F. and that the Accused was currently online.

8. At 0041 hrs on 27 April 2014, RCMP officers attended the Accused's residence, where they were met by his mother. Cst Leggett asked to speak to the Accused. The Accused quickly and without prompting walked out onto the steps. Cst Leggett advised the Accused that he was under arrest for Child Luring and advised him of his right to counsel and police caution. The Accused began to cry and said "this is cause of Facebook", without prompting.

9. Cst Leggett seized a black ipod from the Accused which was cracked and powered down; however, this

ipod was used for music and no further information was obtained from it.

10. At 0112 hrs on 27 April 2014, the Accused spoke to duty counsel and at 0157 hours, the Accused gave a warned statement to Cst Leggett in which he admitted to the Facebook conversation with S.F. During the course of this warned statement the Accused indicated that he owned two ipods and that a second ipod, which was not in the possession of the RCMP, was the one he used to access the internet.

11. On 27 April 2014, the RCMP obtained a search warrant and attended at the Accused's home to obtain the second ipod. RCMP seized an ipod and iphone. Shortly afterwards, the Accused's mother voluntarily provided RCMP with the Accused's second ipod, which she had on her person, and the items seized during the search of the home were returned.

12. On 28 April 2014, the Accused was released from custody on a recognizance with a surety.

13. On 30 April 2014, Cst Leggett spoke with R.R., J.G.'s sister. It was determined that R.R.'s daughter K.H., had Facebook contact with the Accused, which K.H. had terminated without the conversation becoming sexual. K.H. advised the RCMP that her 12-year-old friend K.M. had also been contacted by the Accused.

14. Cst Leggett spoke with K.M. who advised as follows. K.M. had been contacted by the Accused who asked if she wanted to be 'friends with benefits'. K.M. blocked the Accused from her Facebook account. The Accused then created a new account and started talking to her again. The Accused sent her a photograph of himself in which his penis was visible. The Accused also asked for pictures of K.M. The Accused told K.M. not to tell anyone about this or he would get in trouble. K.M. did not know if the Accused knew how old she was, but she did tell him "I am young and he shouldn't be doing this'. K.M. stated that her Facebook profile picture was a picture of herself and that she did not look like a teenager or adult. The written electronic conversation between the Accused and K.M. has never been captured.

15. On 30 April 2014, RCMP re-arrested the Accused on charges relating to K.M.

16. There was no evidence that the Accused had breached his recognizance or committed new substantive offences while on release. The Accused was detained at his second bail hearing.

17. On 1 May 2014, Cst Leggett conducted a warned statement with the Accused. During this warned statement, the Accused agreed that he had contact with K.M. on Facebook.

18. The contents of the Accused's ipod were downloaded. The majority of images and other items on the Accused's ipod were innocuous and unrelated to the charges before the court. A very small portion of the materials that were of a sexual but legal nature. Approximately six or fewer images were of females appearing to be clearly younger than 18 years of age engaging in sexual activity.

[3] I note that whereas the Agreed Statement of Facts refers to "S.F.", counsel agreed that the reference should, in fact, be "S.R.". As such, I will use S.R. throughout the remainder of these Reasons for Sentencing.

[4] Counsel for Mr. Callahan-Smith admitted that, based upon additional information not before the Court, that the comment "friends with benefits" was an invitation for sexual contact.

[5] As noted, Mr. Callahan-Smith has three prior convictions for sexual assault committed when he was a youth. He was sentenced to two years of probation for these offences. An Agreed Statement of Facts was filed in respect of these prior offences.

[6] The facts of these offences, in brief, are as follows:

[7] In 2011, Mr. Callahan-Smith convinced a 7-year-old girl to accompany him into the woods where he pulled down her pants and underwear and touched her between her legs. He invited her to touch his penis, which she did not do. She had to struggle to get away, having her shirt come off in the process.

[8] In 2009, Mr. Callahan-Smith pulled a young girl onto his lap while they were watching television in a home. He told her to take her shirt off, which she refused to do. He started to take his shirt off when the girl's father came downstairs, ending the incident.

[9] In 2011, Mr. Callahan-Smith invited two young girls to his home. There, he locked one girl outside and pulled the other girl onto his couch. He tried to pull down her pants. He put his arm over her mouth to quiet her while she struggled. She began to cry and he let her leave.

Positions of Counsel

[10] Crown counsel submits that an appropriate sentence for these offences is one of 23 months, less time served in custody on remand, plus a period of probation of three years.

[11] She submits that the sentences should be as follows:

- 15 months for the s. 172.1(1)(b) luring offence;
- 8 months consecutive for the s. 171.1(1)(b) offence distributing sexually explicit material offence; and

- probation for the s. 137 offence, as jail is not a sentence that is available. Had jail been available as a sentencing option, the Crown position was that the sentence should be one month consecutive.

[12] Counsel submits that any credit for Mr. Callahan-Smith's time in custody on remand can only be credited to the s. 171.1(1)(b) offence as Mr. Callahan-Smith was not detained and was in fact "at large" on the ss. 172.1(1)(b) and 137 offences. Her reasoning in taking this position is that for the duration of his remand time, Mr. Callahan-Smith was only formally detained on the s. 171.1(1)(b) offence and the recognizance releasing him on the s. 172.1(1)(b) and s. 137 offences was not revoked and was still in place. As such, he was "at large" on this recognizance, notwithstanding that he was otherwise in fact remanded in custody.

[13] While Crown counsel submits that Mr. Callahan-Smith is not entitled to credit at a rate of 1.5:1 for his time in custody on remand at Whitehorse Correctional Centre ("WCC"), based upon his conduct, she is prepared, in the circumstances, to concede this point insofar as the remand credit at 1.5:1 can only be applied to the s. 171.1(1)(b) offence.

[14] She also seeks ancillary orders under ss. 110, 161, 487.051 and 490.012.

[15] Crown counsel submits that the principles of denunciation, deterrence and separation from society are the paramount considerations in the circumstances of this offence and this offender. Mr. Callahan-Smith needs to receive his "just desserts". Rehabilitation, while a factor, is eclipsed by these considerations.

[16] Aggravating factors are the ages of the victims, his prior sexual assault convictions, the fact that he was on probation for sexual assaults at the time he committed these offences, the assessment that he is at a high risk to re-offend and his deviant sexual proclivities.

[17] She points to Mr. Callahan-Smith's persistent efforts, in particular with respect to K.M., his half-hearted efforts to pursue treatment opportunities, his lack of self-control and his awareness of the fact that what he was doing was wrong.

[18] Counsel acknowledges that his guilty plea is a mitigating circumstance.

[19] Counsel for Mr. Callahan-Smith submits that the mandatory minimum sentence of one year should be imposed on the s. 172.1(1)(b) offence, and the mandatory minimum of 90 days on the s. 171.1(1)(b) offence, with these sentences to run concurrently.

[20] I do not understand counsel to have stated any position with respect to the s. 137 offence.

[21] Counsel is not opposed to Mr. Callahan-Smith being placed on probation for the suggested three-year period.

[22] She submits that Mr. Callahan-Smith's time in custody on remand is available to be applied to both the ss. 172.1(1)(b) and 171.1(1)(b) offences, and that Mr. Callahan-Smith should be credited at a rate of 1.5:1.

[23] She notes that Mr. Callahan-Smith had just turned 18 at the time he committed these offences. He was not sophisticated in the commission of these offences, pointing out that he made no attempt to be anonymous. There was no subtlety in his actions. He did not want the victims to have to testify so he pled guilty.

[24] She notes Mr. Callahan-Smith's broad range of disabilities and frustration. While he is not suffering from Fetal Alcohol Spectrum Disorder ("FASD"), he lacks a full set of skills, and this impacts his moral culpability.

[25] She submits that he has a supportive family. She points to those aspects of the reports provided indicating that Mr. Callahan-Smith has the capacity to improve. She submits that his family is now more aware of Mr. Callahan-Smith's issues and he is also more aware of need for residential treatment. She points to this recognition being a turn-around for him.

Pre-sentence Report ("PSR")

[26] I note that the PSR relied fairly heavily on information previously provided by psychiatrists, psychologists and other professionals. Rather than try to paraphrase what these individuals stated, I will at times simply quote from their findings.

[27] Mr. Callahan-Smith turned 18 on February 6, 2014.

[28] He is a member of the Kwanlin Dün First Nation ("KDFN"). His mother is a member of the Tr'ondëk Hwëch'in First Nation. She works as an administrator for KDFN. His father is a member of the KDFN and works for a construction company owned by the First Nation. Mr. Callahan-Smith is an only child.

[29] Both Mr. Callahan-Smith's grandmothers attended residential school.

[30] The author of the PSR notes that:

> ….there is no history of addictions problems, spousal violence, criminal history or other indication of serious domestic conflict within the nuclear family unit.

[31] There are noted, however, to have been a number of alcohol-related deaths in his mother's extended family, more so than on his father's side.

[32] Mr. Callahan-Smith's paternal grandmother, Shirley Smith, informed the writer that Mr. Callahan-Smith's mother did not provide him the attention he needed; "he did not get hugs; he did not get affection". Ms. Smith stated that the parenting difficulties stemmed from being a residential school survivor and not having learned parental skills.

[33] As referred to in the PSR, Dr. Karl Williams notes in his psychological assessment that:

> [I]t was reported that Billy [Mr Callahan-Smith] behaves in an intimidating fashion toward his mother, whereas in turn his mother acts towards him in a subservient manner. The perception was communicated that Billy has been spoiled, that he controls his mother, and that he requires increased structure in order to enhance his functioning.

[34] As also noted in the PSR, Dr. Norman Brodie wrote that both the mother and grandmother described::

> ...a history of temper problems and defiant attitudes, both at home and at school, including physical acting out episodes such as throwing rocks, slamming things…

and sometimes:

> … during fits of anger he has been known to throw rocks at his parents' vehicle.

[35] There was a noted negative change in Mr. Callahan-Smith's behaviour around Grade 2. He would not stay in class, he would not work and he would get angry.

[36] He attended kindergarten through Grade 7 at Elijah Smith Elementary School. He had an educational assistant/tutor to assist him with reading and writing. He attended secondary school and was noted to have chronic behavioural problems.

[37] Subsequent to his sexual assault convictions, he attended Wood's Homes, a children's mental health centre in Calgary, where he did much better.

[38] As noted in the PSR, Jeremy Barham wrote in the discharge summary for Wood's Homes on February 20, 2014, that:

> Billy demonstrated a working understanding of common thinking errors and how to correct them and he was not exhibiting any problematic thinking errors at the time of his discharge. Billy displayed considerable improvement in his ability to regulate his emotions, able to [take] short breaks to calm down and return to the conversations that were upsetting him. Billy's family maintained consistent contact with him. Billy's parents and Jackie in particular showed an increased ability to maintain firm boundaries and reinforce rules with Billy … Billy worked on identifying the possible impacts of sexual abuse on his direct and indirect victims. His understanding seemed general in nature, and he would benefit from continued focus on understanding the specific impacts on his victims …

[39] Upon his discharge from Wood's Homes, Mr. Callahan-Smith was assessed using The Estimate of Risk of Adolescent Sexual Offence Recidivism – Version 2.0 (ERASOR – 2). Based upon his scores, he was considered to be a moderate risk for sexually re-offending.

[40] Cathy Deacon of the Youth High Risk Treatment Program provided information from a progress report for the Youth Sexual Offence Treatment Program in which she stated that:

> Billy made some gains at Woods – managing his frustration a little better – and finding success in the Woods school program. His progress in community based out-patient counselling is slow and he has a long way to go. He lacks insight about his thoughts, feelings and behaviours and has no idea how his actions affect others. When he gets triggered he wants to leave the situation and afterwards he can't/won't debrief. It was disheartening, but not surprising for everyone involved in Billy's care and treatment when he was charged with internet offenses. Since his new charges Billy's mother has consistently given him the message that he will be going to residential treatment. Residential treatment programs for Billy have to be vetted to ensure they are sexual offense specific and target deviant sexual arousal…

[41] Dr. Brodie commented that Mr. Callahan-Smith:

> [O]btained a Full Scale I.Q. of 71, which falls near the bottom of the borderline deficient or mildly impaired range at the 3rd [97 per cent of his peers would have better scores] percentile rank for this age group … This reinforces the impression of a consistently low level of mental development in all major cognitive areas tapped by the battery and this implies that his functioning is very likely stable and unlikely to change significantly in the foreseeable future. Most individuals with such generalized weakness across all major cognitive areas … are found to have significant limitations in both academic learning potential as well as future

> employment options … pursuing training in a skilled trade such as automotive mechanics is highly impracticable and likely to result in severe frustration … He may … [work] with his hands in doing basic prep work for an autobody shop … even if he is unlikely to be able to pursue a full journeyman status in a skilled trade…

[42] In 2011, Mr. Sigmond concluded that Mr. Callahan-Smith's history is consistent with a diagnosis of Attention Deficit Hyperactivity Disorder and potentially Oppositional Defiant Disorder and Conduct Disorder, which results in "an increased potential for [him] to develop more firmly entrenched delinquent attitudes and behavioural patterns".

[43] Dr. Brodie stated that:

> Billy's [Mr Callahan-Smith] potential for future repeat offending (both generic and sexual offending in particular) given the multiple risk factors present and as well in consideration of his 'expectation that his needs and demands will not be met expeditiously by his mother', his 'feelings of entitlement, which apparently are associated with Billy's immaturity and dependency needs' and his 'chronic patterns of troublesome and oppositional behaviour' which Dr. Williams opined 'are in the process of metamorphosing into adult forms of antisocial activity.' It was noted that Billy was not an insightful teenager … was inclined to think in concrete terms and … 'he has yet learned to be accountable for those actions.' .

[44] Cathy Deacon wrote, after consulting with Dr. Williams, that Mr. Callahan-Smith:

> … has no idea about the effects that sexual abuse has on victims and [he] expresses no remorse for his actions …

while positing that:

> Billy is focussed on Billy's wants and needs and lacks an understanding of what others might be thinking or [feeling]". "Billy's Woods Home therapist stated, '… his biggest risk is wanting sexual contact and not having a way of getting a girl to like him …" and "[t]his is a risk for Billy, however, a

> bigger concern is that it appears as if Billy has a deviant sexual interest to very young female children …"

[45] The author of the PSR notes that, on direct inquiry, Mr. Callahan-Smith acknowledged a sexual interest in prepubescent female children.

[46] As noted in pp. 21 – 26 of the PSR, Mr. Callahan-Smith's risk assessment shows him as requiring a high or very high level of supervision, with difficulties in many areas of assessment.

[47] He has a high level of stable dynamic needs.

[48] He presents as a high risk for sexually re-offending. He is noted to have an attraction to "prepubescent girls about 12 or 13 years of age", perhaps even younger.

[49] He is resistant to authority. His youth worker also noted him to function at times at a level much younger than his chronological age.

Gladue Report

[50] Mark Stevens prepared a *Gladue* Report. Mr. Stevens has considerable experience in the Yukon in preparing such reports. Some of what is contained in the *Gladue* Report has already been referred to in the PSR summary above and will not be repeated here.

[51] Due to Mr. Callahan-Smith's brevity and succinctness, Mr. Stevens relied more heavily than usual on collateral sources for information.

[52] He notes that Mr. Callahan-Smith's mother's grandfather and mother attended residential school. Mr. Callahan-Smith's grandmother struggled with alcohol issues for as long as Mr. Callahan-Smith's mother could remember. His mother ended up living with her maternal grandparents (his great-grandparents).

[53] Mr. Stevens confirms that Mr. Callahan-Smith's paternal grandmother spent a lot of time with him and that she told the parents that they needed to spend more time with him.

[54] There is some information that appears to link the noted negative change in Mr. Callahan-Smith's behaviour in Grade 2 to some inappropriate sexual touching of him by a family member. Dr. Williams considered this to be a "significant event", although noting that this incident had not been confirmed as having occurred. The suspected offender has since committed suicide.

[55] Mr. Callahan-Smith was noted to be a bit of a bully who did not have many friends as a result of his bullying.

[56] He acquired the name "Billy Bumguts" in Kwanlin Dun Village because he gained a lot of weight from eating junk food.

[57] He struggled at school. His attendance at the Youth Achievement Centre ("YAC") in February 2012 resulted in a mixed review. Mr. Stevens wrote:

> … While his attendance record was described as "exceptional" and staff noted that Billy possessed many positive attributes, including a strong work-ethic, generosity, an eagerness to learn, and athletic ability, there were also some concerns about his behaviour. …

[58] Mr. Stevens also wrote that:

> In a report dated 31 January 2013, forensic psychologist Dr. Karl Williams summarized some of the concerns YAC staff had regarding Billy's behaviour:
>
> > However, Billy has been noted to become quite volatile when his wishes are thwarted or when he is otherwise frustrated and not in a position of control. Although he is not known to have aggressed physically towards others at the YAC, he has exhibited a distinct tendency to kick and throw items and to strike inanimate objects… [and] at the time of my visit to the YAC a number of holes that he had punched in the walls of the facility were in the process of being repaired.
> >
> > In reference to such behaviour, YAC staff commented that despite their having noted some improvement in Billy's manners, during the first six months of his attendance at the centre he exhibited several instances of inappropriate and aggressive behaviour… Nevertheless, it was the apparent consensus of the YAC staff that Billy gets along well with other youths and the staff would like Billy to continue to attend there. At the same time, it was noted that on account of Billy's behaviour, the number of other adolescents attending at the YAC has dropped off since he began to frequent the centre.

[59] Mr. Callahan-Smith's time at Wood's Homes in Calgary resulted in him making friends that he remains connected to. Upon his return to Whitehorse after "aging out" at 18, Mr. Callahan-Smith did not get not involved in programming or any positive social activities. He had just been accepted into and started at Challenge-Disability Resources Group ("Challenge") in the Vocational Alternatives Program when he was arrested for these offences. Challenge is prepared to accept him back into the program when he is released, dependent on a start date for the program.

[60] While in custody at WCC, Mr. Callahan-Smith has accrued a few negative entries for lower level incidents.

[61] He has done some programming. He was working in the laundry until he lost this job for failing to follow directions.

[62] With respect to future treatment, Mr. Stevens notes that Mr. Callahan-Smith's counsellor from Kwanlin Dun has expressed concerns about seeing him outside of a highly supervised environment, due to risk factors for him and others if he is unable to deal with past traumatic experiences (should the door to these experiences be opened), without supports in place to assist him. Other clinicians and Mr. Callahan-Smith's youth worker expressed similar concerns.

[63] The consensus of some who work with Mr. Callahan-Smith is:

> … that Billy should be placed in an adult residential sex offender treatment program. Mike De Koning, Billy's youth probation officer, strongly believes that to be the only responsible course of action. He feels that Billy desperately needs "offence-specific" treatment and supervision in a residential setting. Unfortunately, there is very little available for adult men in terms of residential sex offender treatment, and what little there is seems tied to the federal corrections system.

[64] Mr. Callahan-Smith's mother feels like he would benefit from any residential programming that would provide a level of supervision, including programming not primarily targeting sexual offending.

[65] Noted to be a significant hurdle is the difficulty with respect to addressing the possible sexual victimization Mr. Callahan-Smith encountered from a family member which may be a root cause for his behaviours.

[66] With respect to the impact of further incarceration, Mr. Stevens states:

> That said, jail cannot provide the therapeutic environment Billy needs – even if appropriate offence-specific programming could be made available. Comments from his mother suggest that he is becoming more withdrawn and uncommunicative, which in turn will make it even harder to make any progress on his substantive clinical issues. Further, his unsubstantiated concerns about bullying – common among inmates charged with sexual offences against children – must be making a bad situation worse. His continued incarceration will only address public safety concerns in the very short-term; it will not provide for any longer-term therapeutic solutions that will ultimately be of greater value to Billy and to the public in general.

Victim Impact

[67] One of the victims, K.M. filed a Victim Impact Statement. Due to Mr. Callahan-Smith's actions she states that she has been negatively impacted in a number of ways. She is scared to walk alone or be approached by males she doesn't know. She has lost trust in people. She is scared that he told her he knows where she lives. It has negatively impacted her family. She fears not only for herself but for others when he is released from custody.

[68] Clearly, Mr. Callahan-Smith's crime has consequences, not only for him but for his victims. K.M., a young person, has to deal with the negative impacts of his crime against her. She should not have had to do so and Mr. Callahan-Smith bears the

responsibility for this. Although S.R. has not filed a Victim Impact Statement, I would not be surprised if she has been impacted similarly to K.M.

Applicable Principles in Case Law

[69] The offences Mr. Callahan-Smith has committed are indeed, serious ones.

[70] As stated by Doherty J.A. in *R. v. Alicandro,* 2009 ONCA 133, as quoted in *R. v. Legare*, 2009 SCC 56 at para 26:

> The language of s. 172.1 leaves no doubt that it was enacted to protect children against the very specific danger posed by certain kinds of communications via computer systems. The Internet is a medium in which adults can engage in anonymous, low visibility and repeated contact with potentially vulnerable children. The Internet can be a fertile breeding ground for the grooming and preparation associated with the sexual exploitation of children by adults. One author has described the danger in these terms:
>
> > For those inclined to use computers as a tool for the achievement of criminal ends, the Internet provides a vast, rapid and inexpensive way to commit, attempt to commit, counsel or facilitate the commission of unlawful acts. The Internet's one-[to]-many broadcast capability allows offenders to cast their nets widely. It also allows these nets to be cast anonymously or through misrepresentation as to the communicator's true identity. Too often, these nets ensnare, as they're designed to, the most vulnerable members of our community -- children and youth.
> >
> > Cyberspace also provides abuse-intent adults with unprecedented opportunities for interacting with children that would almost certainly be blocked in the physical world. The rapid development and convergence of new

> technologies will only serve to compound the problem. Children are the frontrunners in the use of new technologies and in the exploration of social life within virtual settings.
>
> (Gregory J. Fitch, Q.C., "Child Luring" (Paper presented to the National Criminal Law Program: Substantive Criminal Law, Advocacy and the Administration of Justice, Edmonton, Alberta, July 2007), Federation of Law Societies of Canada, 2007, at s. 10.1, pp. 1 & 3)

> 27 What s. 172.1(1) prohibits is thus apparent both from its remedial purpose and from the express terms adopted by Parliament to achieve that objective.
>
> 28 Section 172.1(1) makes it a crime to communicate by computer with underage children or adolescents for the purpose of *facilitating* the commission of the offences mentioned in its constituent paragraphs. In this context, "facilitating" includes *helping to bring about* and *making easier or more probable* -- for example, by "luring" or "grooming" young persons to commit or participate in the prohibited conduct; by reducing their inhibitions; or by prurient discourse that exploits a young person's curiosity, immaturity or precocious sexuality.
>
> 29 I hasten to add that sexually explicit language is not an essential element of the offences created by s. 172.1. Its focus is on the intention of the accused at the time of the communication by computer. Sexually explicit comments may suffice to establish the criminal purpose of the accused. But those who use their computers to lure children for sexual purposes often groom them online by first gaining their trust through conversations about their home life, their personal interests or other innocuous topics.

[71] The Alberta Court of Appeal stated in *R. v. Paradee*, 2013 ABCA 41:

> 12 Luring is dangerous and, as the Crown points out, serious. It involves pre-meditated conduct specifically designed to engage an underage person in a relationship with the offender, with the goal of reducing the inhibitions of the young person so that he or she will be prepared to

> engage in further conduct that is not only criminal but extremely harmful. Parliament has recognized that the internet has infinitely expanded the opportunity of predators to attract or ensnare children. The anonymity of the internet allows the predator to hide his or her true identity, to mask predatory behaviours through seemingly innocuous but persistent communication, and to count on the victims letting their guard down because the communication occurs in the privacy and supposed safety of their own homes. A proportionate sentence for internet luring must recognize the serious nature of this offence.

[72] As further stated in *R. v. Mills*, 2013 ABPC 181:

> 44 It is also clear from the case law and the Parliamentary background materials filed with this Court that offences such as those committed by Mr. Mills are being regarded as ever more serious, prevalent and deserving of stern punishment with increasing numbers of offenders and their victims coming before the courts.
>
> 45 This heightened attention to sexual crimes against minors has been reflected in Parliament's creation of new offences, such as sexual exploitation in s.153 and the using of a computer system to lure children in s.172.1. It is also being reflected in the mandating of minimum sentences for certain offences of corrupting morals and by the imposition of ever more denunciatory and deterrent sentences by the courts.
>
> 46 The context of this growing judicial and legislative opprobrium, clearly, is the desire to better protect innocent, vulnerable and naive children from the selfish, cruel and damaging criminality of adult predators. The case law and the Parliamentary commentary filed with this Court emphasize the legislative and judicial efforts to dissuade and punish individuals who would leverage their physical, emotional and intellectual advantage over their young victims to indulge their own selfish desires, with no regard for the pain they inflict in doing so.

Application to Mr. Callahan-Smith

[73] Mr. Callahan-Smith must be differentiated from many of those who predate on children through the internet and luring. His actions lack the sophistication and predatory anonymity of many offenders. He was fairly transparent and simplistic in his approach.

[74] He is limited by his youth and his broad range of disorders.

[75] While he comes from a supportive family, it is clear that he has been negatively affected by circumstances connected to his Aboriginal heritage.

[76] I am concerned about the risk Mr. Callahan-Smith poses to youth. His attraction to pre-pubescent females is extremely disconcerting. His high-risk rating for re-offending is warranted on the information before me. If he does not receive and actively engage in treatment and alter his behaviour through this treatment, there is every reason to believe he will re-offend, and that this re-offending will cause harm.

[77] I agree with the Crown that denunciation and deterrence are the paramount considerations in this case.

[78] However, due to Mr. Callahan-Smith's youth and other limitations, I am less willing to find that he needs to be separated from society for a lengthy period of time. If he does not receive and respond positively to treatment in the future, this may turn out to be the case. We are not yet at that point. What Mr. Callahan-Smith needs now is treatment in hopes that his issues, of what I consider to be sexual deviancy, can be addressed and his risk reduced.

[79] I am not prepared to find that he has crossed the threshold where the principle of rehabilitation should be entirely subrogated to the principle of separation from society.

[80] I am mindful of the purposes, objectives and principles of sentencing set out in ss. 718 - 718.2 of the *Code*. Proportionality is the fundamental principle of sentencing, including for the offences for which Mr. Callahan-Smith is being sentenced.

[81] As stated in *Mills:*

> 25 Since 1996, this Court has been guided by the objectives of sentencing enacted by Parliament in s. 718 of the *Criminal Code*, namely denunciation; deterrence (both individual and general); separation of the offender from society where necessary; rehabilitation; reparation; and, promotion of responsibility in the offender and acknowledgement of harm done.
>
> 26 Parliament also enacted principles of sentencing including requiring that:
>
> > a) sentences be proportional to the seriousness of the offence and the blameworthiness of the offender; (s.718.1)
> >
> > b) sentences be increased or decreased to account for aggravating or mitigating factors; (s.718.2)
> >
> > c) similar offenders receive similar sentences for similar offences;(s.718.2(b)) and
> >
> > d) gaol be used as a last resort. (S.718.2(d) & (e))
>
> 27 As noted above, s.718.1 of the *Criminal Code* provides that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. In other words, the punishment must fit both the crime and the criminal. The Alberta Court of Appeal decision in ***R. v. Arcand*** (2010), 264 C.C.C. (3d) 134, 49 Alta. L. R. (5th) 199, 499 A.R. 1, [2010] A.J. No. 1383 (Alta. C.A.) included in the Crown materials filed with this Court, reviews the overarching principle

of proportionality in the context of the sentencing framework at para. 52:

> [52] Why did Parliament choose proportionality as the governing principle? One answer is that it accords with principles of fundamental justice and with the purpose of sentencing - to maintain respect for the law and a safe society by imposing *just sanctions.* Further, just sanctions being the goal of sentencing, proportionality must be the overarching principle since a disproportionate sanction can never be a just sanction.

28 In its analysis, the Court makes it clear that the mandatory sentencing principle of proportionality is intended not only to constrain disproportionately high sentences but also to proscribe the imposition of disproportionately light penalties.

29 The Court provides further guidance on the sentencing process at para. 63 as it describes the relationship between the primary principle of proportionality in s.718.2 and the secondary principles of sentencing of sentencing in s.718:

> [63] Interpreting the secondary principles as complementary to, and consistent with, the proportionality principle gives weight and meaning to the secondary principles while maintaining, as Parliament clearly intended, the integrity and primacy of the proportionality principle. Thus, sentencing judges are not free to pick and choose one principle out of s.718.2 to the exclusion of the others, much less ignore the proportionality principle. The object of the sentencing exercise is to draw on all sentencing principles in determining a just and appropriate sentence with reflects the gravity of the offence and the degree or moral blameworthiness of the offender.

[82] I am aware of Mr. Callahan-Smith’s prior convictions for sexual assault. He does not come before the Court as the least egregious offender possible. I consider these

prior convictions to be aggravating factors. I also consider it to be aggravating that he was on probation for s. 271 offences when he committed these further sexual offences.

[83] However, a minimum sentence is not a “starting point” available only for the offender who has no aggravating factors and only mitigating ones, from which the sentencing judge must increase a sentence for every aggravating factor and the absence of every mitigating one. While, in many circumstances and for some offences, a sentence will be increased from the minimum in order to account for aggravating circumstances, in every case the particular circumstances of the offense and the offender must be considered.

[84] Sentencing offenders in Canada is not an exercise of punching various factors into a computer and having a “fit sentence” mark plotted on a grid.

[85] A sentence must be take into account all of the relevant purposes, objectives and principles of sentencing, weighting them in accord with the circumstances of the offence and the offender, in order to arrive at a sentence that is fit.

[86] Mr. Callahan-Smith is a young person, barely an adult for the purposes of the *Code*, not yet even of the age of majority in the Yukon. He suffers from a broad range of limitations. He is in many ways younger than his chronological age. He is Aboriginal and suffers from negative impacts resulting from his Aboriginal heritage. His actions in committing these offenses reflect some of his immaturity, in the lack of sophistication and lack of protective anonymity involved.

[87] Crown counsel filed the case of *R. v. Murphy*, 2014 ABCA 409. In that case the offender was a 37-year-old married father of three living in Edmonton, Alberta. He had a high school education. He communicated with whom he believed to be 13 and 15 year old girls living in Florida and Virginia through internet and texting. He engaged in graphic sexual conversations, encouraging them to engage in self-gratification, and sent them images of his genitals and masturbation acts. This took place over a prolonged period of 18 months. He never travelled to Florida or Virginia to pursue a relationship.

[88] In fact the "youth" were undercover police officers.

[89] Mr. Murphy pled guilty to three counts of luring a child contrary to s. 172.1(1)(b), two of which occurred prior to the one year minimum sentence being enacted. His one year sentence on each charge concurrent was overturned and he was sentenced to two years imprisonment, which was less than the range of 25 to 34 months that the Court considered to be appropriate, in order to allow for him to be placed on probation for three years.

[90] The sentencing judge noted as mitigating factors Mr. Murphy's guilty plea, his not re-offending while on judicial interim release, his cooperation with the police, his remorse and his status as a good father. He noted as aggravating factors the prolonged period of time over which the offences occurred, the graphic sexual nature of the communication, which included webcam images, and Mr. Murphy's claim that he wanted to establish a long-term relationship with the victims.

[91] Wakeling J.A., in a concurring judgment that was not entirely adopted by the other two members of the panel, set out five levels of inquiry into what is involved in

determining what constitutes a fit sentence in a particular case. I consider Wakeling J.A.s framework to be of some assistance in this case. Wakeling J.A. set out these levels of inquiry as follows:

1. What, if any, are the start and end points for the sanction for the offence:
    a. This requires a study of the Criminal Code provisions. It does not involve a focus on the offender or the offence;
2. What is the level of gravity and egregiousness of the offence, based upon the physical and mental elements of the offence:
    a. What is the foreseeable physical and mental harm to the victim of the conduct;
    b. What is the moral blameworthiness of the offender;
    c. The principles of proportionality and similarity in ss. 718.1 and 718.2 are intrinsic here;
3. What are the aggravating factors;
4. What are the mitigating factors;
    a. Those that relate to the offence;
    b. Those that relate to the offender prior to the commission of the offence;
    c. Those that occurred after the offence.
5. Do the objectives in s. 718 or principles in s. 718.2 warrant further adjustments to the tentatively reached sanction

[92] In para. 55, Wakeling J.A. cites the Supreme Court of Canada in *R. v. C.A.M.,* [1996] 1 S.C.R. 500 at p. 559 where the Court states:

> "[T]he overarching duty of a sentencing judge is to draw upon all the legitimate principles of sentencing to determine a 'just and appropriate' sentence.

[93] Wakeling J.A. continues in para. 56 to state that:

> A just sanction will ensure that an offenders' liberty interest is compromised no more than is necessary to validate the achievement of defensible state interests… Paragraphs 718.2(d) and (e) of the *Criminal Code* are statutory validation of this principle.

[94] Wakeling J.A. found that an appropriate sentence for Mr. Murphy was a global sentence of between 25 and 34 months. In the end, the panel increased the sentence to 24 months, thus allowing a period of probation to follow.

[95] Crown counsel submits that the circumstances in *Murphy* are less aggravating in that there was no actual victim in the *Murphy* case, whereas here there are two victims. I note that the Court in *Murphy* did not make any comment that the circumstances were mitigated by the absence of any actual victim. As well, the majority, in sentencing the offender to consecutive one year terms of imprisonment, specifically referred to there being two "victims" (para. 4).

[96] While I recognize the importance to the administration of justice of including information from victims regarding the harm that the offender's crimes have caused them, and would encourage victims to provide this information to sentencing judges, I am reluctant to consider this information to be an aggravating circumstance in and of itself. Certainly I would think that there is generally going to be an actual victim or victims in most crimes, who have suffered harm, and that the sentencing purposes,

objectives and principles are presumed to operate with this knowledge. In any event, that fact that in *Murphy* there were no actual victims does not in any way impact upon the moral blameworthiness of him as an offender. Certainly, I consider the moral blameworthiness of Mr. Murphy to be greater than that of Mr. Callahan-Smith, due not only to the nature of the offences but to those of the offender as well.

[97] I therefore sentence Mr. Callahan-Smith as follows:

[98] For the s. 172.1(1)(b) offence I sentence him to a period of custody of one year. For the s. 171.1(1)(b) offence he will be sentenced to a period of custody of 90 days.

[99] Crown counsel submits that these sentences must be consecutive to each other, otherwise I effectively am giving Mr. Callahan-Smith a free pass for the s. 171.1(1)(b) offence, citing *Murphy* at para. 4:

> By imposing concurrent sentences for these three offences, which included only the minimum period of imprisonment required for only one of them, the trial judge treated the first two offences as if they had not occurred. Additionally, his sentence did not reflect the fact that these offences involved two “victims”….

[100] While I understand the logic behind what the Court in *Murphy* is saying, it does not automatically follow that if there are different victims the sentences for offences against each victim must be served consecutively. There will be times when the purposes, objectives and principles of sentencing, including the totality of the period of incarceration to be imposed, will require that sentences, which could otherwise in law be served consecutively, be served concurrently. I consider that a dogmatic approach to sentencing, within which there is no flexibility or appreciation of all the factors in ss. 718

– 718.2, will often result in sentences which are unfit and contrary to the fair administration of justice.

[101] This said, in the circumstances of this case, I find it appropriate to order that the sentences of one year for the ss. 172.1(1)(b) and 90 days for the s. 171.1(1)(b) offences be served consecutive to each other.

Credit for Time in Custody on Remand

[102] With respect to his time in custody, Mr. Callahan-Smith was brought before the court on April 27, 2014 on Information 14-00057, which alleged offences contrary to s. 172.1(1)(b) and s. 137. The dates of the alleged offences were between March 26 and April 27, 2014. He was released after show cause on April 28, 2014.

[103] Mr. Callahan-Smith was subsequently re-arrested on April 30, 2014 and brought back before the court on May 1 on Information 14-00069 which alleged two offences contrary to ss. 172.1(1)(a), one offence contrary to s. 171.1(a) and two offences contrary to s. 137 of the *YCJA*. The dates of the alleged offences were between March 26 and April 30, 2014.

[104] The matter proceeded to show cause on May 2, 2014. Mr. Callahan-Smith was detained on the secondary and tertiary grounds. He has been in custody on remand continuously since his arrest on April 30, 2014; a total of 261 days.

[105] The Crown did not bring a s. 524 application to revoke prior process, stating that the Crown could not do so in the circumstances.

[106] Information 14-00069 was ultimately replaced by Information 14-00057B, which also replaced Information 14-00057.

[107] On November 14, 2014 a stay of proceedings was entered on Information 14-00069 and Information 14-00057, with the Crown proceeding on Information 14-00057B.

[108] Crown counsel submits that Mr. Callahan-Smith is entitled to receive credit for his time on remand only in respect of any sentence that is imposed for the s. 171.1(1)(b) offence. As stated earlier, Crown counsel submits that Mr. Callahan-Smith never had his prior process revoked in respect of Information 14-00057 and was thus "at large" for these offences. Given that he was "at large", he never accrued any time on remand in respect of the s. 172.1(1)(b) offence and cannot, therefore, borrow from the time he spent on remand for the s. 171.1(1)(b) offence.

[109] I note that the submission of Crown counsel was made on November 14, 2014. Given that the only file Mr. Callahan-Smith was in custody on since that date included all the offences, I will presume that the submission of Crown counsel does not extend to the 64 days that Mr. Callahan-Smith has been in custody since November 14. For this period of time, I will presume further that Crown counsel's submission that Mr. Callahan-Smith should receive something less than 1.5:1 credit, based upon the same concerns she raised with respect to his conduct for the period of time prior to November 14, would remain the same.

[110] As noted earlier, Crown counsel, while submitting that Mr. Callahan-Smith should not receive credit for time in remand custody at a rate of 1.5:1 due to his conduct while

in remand, is prepared to concede this point so long as the credit is applied only to the s. 171.1(1)(b) offence.

[111] A report, completed October 24, 2014, was filed detailing Mr. Callahan-Smith's activities while in custody in WCC on remand. He had worked continuously in the laundry since being incarcerated, other than being suspended for one day for not showing up. I note that in the *Gladue* Report, Mr. Stevens indicated that Mr. Callahan-Smith lost this job due to an incident on October 28 after being written up for failing to follow directions. I have no information as to what has transpired with respect to employment since that date.

[112] He has attended the Blood Ties information session, has been involved with a painting program and has done some academic upgrading.

[113] There have been concerns noted about Mr. Callahan-Smith's behaviour, although I note that for the most part these concerns are in respect of what I would categorize as being more in the "nuisance" category of behaviour. I must also consider Mr. Callahan-Smith's behaviour in custody while remaining cognizant of his age and other personal characteristics.

[114] In *R. v. Summers*, 2014 SCC 26, in considering how to calculate credit for time in custody on remand, the Court stated as follows:

> 77 The Crown says it is not appropriate for the sentencing court to inquire into the likelihood that a particular offender will receive parole because considerations relating to the administration of the sentence are irrelevant to sentencing. Further, it is improper to reduce a sentence by granting enhanced credit based on speculation about when the offender may be released.

78 However, judges are often called upon to make assessments about an offender's future, for example by considering prospects for rehabilitation. I see no reason why judges cannot draw similar inferences with respect to the offender's future conduct in prison and the likelihood of parole or early release.

79 The process need not be elaborate. The onus is on the offender to demonstrate that he should be awarded enhanced credit as a result of his pre-sentence detention. Generally speaking, the fact that pre-sentence detention has occurred will usually be sufficient to give rise to an inference that the offender has lost eligibility for parole or early release, justifying enhanced credit. Of course, the Crown may respond by challenging such an inference. There will be particularly dangerous offenders who have committed certain serious offences for whom early release and parole are simply not available.[7] [7 For example, a person who is convicted of first degree murder and sentenced to imprisonment for life shall not be eligible for parole until they have served 25 years of the sentence (s. 745).] Similarly, if the accused's conduct in jail suggests that he is unlikely to be granted early release or parole, the judge may be justified in withholding enhanced credit. Extensive evidence will rarely be necessary. A practical approach is required that does not complicate or prolong the sentencing process. (emphasis mine)

80 As well, when evaluating the qualitative rationale for granting enhanced credit, the onus is on the offender, but it will generally not be necessary to lead extensive evidence. Judges have dealt with claims for enhanced credit for many years. The conditions and overcrowding in remand centres are generally well known and often subject to agreement between the parties; there is no reason this helpful practice should not continue. There is no need for a new and elaborate process -- the TISA introduced a cap on the amount of enhanced credit that may be awarded, but did not alter the process for determining the amount of credit to apply.

[115] Clearly, Mr. Callahan-Smith was not able to obtain early release while in custody on remand. As such, he has met his onus to show that he should be entitled to seek credit for his time in remand at a rate of 1.5:1. Further, I find that his conduct in custody on remand has not been such that it would be unlikely he would be granted early release. I have evidence of his behaviours, which I have characterized as being more in the “nuisance” category. I have no evidence or information otherwise from WCC

officials that these behaviours would make it unlikely that, upon internal review, he would be granted early release.

[116] As such I find that Mr. Callahan-Smith is entitled to receive credit at a rate of 1.5:1 for the entirety of his time in custody.

[117] I have decided that a sentence of 90 days is appropriate for the s. 171.1(1)(b) offence. Therefore, I will assign 60 days from the 198 that Mr. Callahan Smith spent in custody between his arrest on April 30 and November 13, 2014. This leaves 138 days that Mr. Callahan-Smith spent in remand custody in that time period.

[118] I have determined that Mr. Callahan-Smith should receive the mandatory minimum sentence of one year for the s. 172.1(1)(b) offence. For this offence, I am able to assign credit for Mr. Callahan-Smith's additional 64 days in remand since November 14, given that he was in custody on this charge as well as the others. At 1.5:1 credit, this allows for 96 days to be credited towards the one year.

[119] In addition, I will credit Mr. Callahan-Smith three days for his time on remand on April 27 and 28, 2014.

[120] Therefore, from the one year (or 365 day sentence), for these two periods of time I credit Mr. Callahan-Smith 99 days credit. Thus he has 266 days remaining to serve.

[121] Were I to accede to Crown counsel's submission, then I would not credit Mr. Callahan-Smith for any of the remaining 138 days that he has spent in custody on remand between May 1 and November 13, 2014. This would be what is referred to as

"dead time". At 1.5:1 credit, this would be a total of 207 days in custody for which the Crown urges he cannot receive credit, because he was "at large" on this offence.

[122] In *R. v. Keepness,* 2014 SKCA 110, the Court considered whether it was appropriate to grant credit for time in remand. Section 719(3) of the *Code* as it then read stated as follows:

> (3) In determining the sentence to be imposed on a person convicted of an offence, a court may take into account any time spent in custody by the person as a result of the offence.

[123] The Court in *Keepness* stated:

> 72 The grammatical and ordinary sense of the words "an offence" and "the offence" found in s. 719(3) is that both refer to the same offence, i.e., the offence for which the accused has been convicted and is being sentenced. As well, the time spent in custody for which credit is being considered must be as a result of the same offence. The incarceration must therefore be caused by an offence for which the accused is being sentenced. This makes sense because as alluded to in *R v Rezaie* (1996), 31. O.R (3d) 713 (CA) at p 721, pre-trial custody causally connected to an offence is unfair without some credit or compensation.
>
> 73 The words "convicted of an offence" and "as a result of the offence" have been interpreted as referring to the same offence in R v. Wilson, 2008 ONCA 510, 236 CCC (3d) 285 [Wilson]….
>
> …
>
> 75 In summary, the Court concluded in *Wilson* that a judge is not, when sentencing an accused, entitled under s. 719(3) to credit an accused for time spent serving a sentence previously imposed on another unrelated offence which happens to be the same time the accused is in pre-trial custody for the offence for which the accused is being sentenced.
>
> …
>
> 78 …As Donald J.A. observed in *Mills supra*, the salient consideration is whether the custody being considered was on account of the offence (or

> offences) charged. If an accused is in custody on unrelated matters, the factual foundation for crediting pre-sentence custody does not exist.

[124] In *R. v. Knife*, 2006 ABPC 205, LeGrandeur J. dealt with a submission from defence counsel that it is sufficient for the purposes of assigning credit for time in custody on remand to establish a causal connection between the offence for which the offender is being sentenced and the offender's time in pre-sentence custody, on the basis that the detention of the accused on the bail hearing was in part premised on the reverse onus that resulted from his having been released on the first offence.

[125] LeGrandeur J. reviews a number of cases and concludes in para. 17 that:

> …Section 719 is not so specific in limiting as to clearly and absolutely lead to the conclusion that pre-trial custody with respect to one offence cannot be seen as pre-trial custody with respect to another. Certainly one must concede that there has to be some connection between the custody and the offence whether it be an overlapping of custody for two separate offences, or as is the case in this circumstance where there is a rational connection between the custody and the offence for which the accused is being sentenced, even though the imposition of custody is with respect to two other offences. This accused is in custody as a consequence of an accumulation of factors, including the offence for which he is before this Court. It is that offence which was a factor for consideration by the Justice of the Peace on the subsequent bail application and indeed it was that offence that provided the foundation for the s. 145 offence, which in turn placed the reversed onus on the accused with respect to the subsequent offence and which ultimately contributed to his remaining in custody. It seems to me that given the principle that the provision should be interpreted in a manner favourable to the accused and given the level of ambiguity presented by s. 719(3), having regard to principles of sentencing, in particular proportionality and the fairness prescribed by the Charter that to interpret the section as prohibiting a judge from exercising his or her discretion to give credit for time served in detention would be as in the Supreme Court's words, "offensive both to rationality and to justice"…..

[126] I have reviewed the Transcript of the proceedings at the judicial interim release hearing conducted on May 2, 2014 (the "Transcript"). Ms. Macdonald, who was Crown counsel at the hearing, in seeking Mr. Callahan-Smith's detention, made specific reference to the details of the allegations for the s. 172.1(1)(b) offence. These references can be found in the Transcript on p. 4, ll. 2 – 47 and p. 5, ll. 1 – 5. Ms. Macdonald made further reference, either directly or implicitly, regarding the s. 172.1(1)(b) offence in her submissions to Luther J. as part of her argument as to why Mr. Callahan-Smith should be detained in custody. These references can be found in the Transcript on p. 6, ll. 24 – 45, p. 7, ll. 3 – 9, and p. 13, ll. 16 – 22.

[127] In his reasons for detaining Mr. Callahan-Smith, Luther J. included the circumstances of the s. 172.1(1)(b) offence. (Transcript, p. 15, ll. 1 – 34.).

[128] I find that it is quite clear that Mr. Callahan-Smith was detained, at least in part, because of the s. 172.1(1)(b) offence. The fact that his recognizance had not been revoked pursuant to s. 524 does not alter the fact that he was detained and not "at large" in the community. It is not reasonable to conclude that Mr. Callahan-Smith's detention was unrelated to the s. 172.1(1)(b) offence. The commission of this offence clearly played a role in Mr. Callahan-Smith's detention and his time in custody on remand.

[129] I am in agreement with the comments of LeGrandeur J. in *Knife*. The ability of a sentencing judge to consider an offender's pre-trial time in custody on remand should be based upon a consideration of all the factors that, together, resulted in the offender

being detained in custody. This is the manner in which s. 719(3) should be interpreted and applied.

[130] The technical argument advanced by the Crown in this case that Mr. Callahan-Smith was “at large” on the s. 172.1(1)(b) offence and thus prohibited from receiving credit for his time in custody on remand, is not in accord with s. 719(3) and to interpret this section in the manner urged by the Crown would be “offensive both to rationality and to justice”.

[131] Had all the offences been placed on the same Information and Mr. Callahan-Smith been brought before the Court and detained after show cause on this Information, there would be no dispute that he was entitled to receive credit for his custody on remand.

[132] However, because the RCMP laid two separate Informations and arrested and brought Mr. Callahan-Smith into court on each Information four days apart without alleging a breach of the recognizance that he was released on on April 28, I have a submission before me from Crown that Mr. Callahan-Smith’s 138 days in custody can now only be counted as dead time. To accede to this submission would, in my mind, be not only wrong in law but, frankly, unconscionable.

[133] Therefore I credit Mr. Callahan-Smith a further 207 days for his time in pre-trial custody. In total he has 306 days of time served in custody on remand that is to be credited towards the 365 days I have determined is the appropriate sentence.

[134] As such, Mr. Callahan-Smith has a remanet of 59 days custody on the s. 172.1(1)(b) offence remaining to be served.

[135] I also sentencing Mr. Callahan-Smith to three years of probation for both the s. 172.1(1)(b) and 171.1(1)(b) offences.

[136] Without commenting on the merits of the Crown's position that a jail sentence is not available for Mr. Callahan-Smith for the s. 137 offence, I am satisfied that a period of probation is an appropriate disposition. For simplicity's sake only, I will impose a period of probation of three years. This is not to reflect in any way that I consider the circumstances of the s. 137 offence so aggravated that I have chosen to impose such a lengthy period of probation.

[137] The terms of the probation order are as follows:

1. Keep the peace and be of good behaviour;

2. Appear before the court when required to do so by the court;

3. Notify the Probation Officer, in advance, of any change of name or address, and, promptly, of any change in employment or occupation.

4. Have no contact directly or indirectly or communication in any way with S.R. and K.M.

5. Do not go to any known place of residence, education or employment of S.R. and K.M.

6. Remain within the Yukon unless you obtain written permission from your Probation Officer or the court.

7. Report to a Probation Officer immediately upon your release from custody, and thereafter, when and in the manner directed by the Probation Officer.

8. Reside as directed by your Probation Officer, abide by the rules of that residence, and not change that residence without the prior written permission of your Probation Officer.

9. You will abide by a curfew by being within your place of residence between the hours of 11:00 p.m. and 6:00 a.m. daily, except with the prior written permission of your probation officer or except in the actual presence of a responsible adult approved in advance by your Probation Officer.

10. Attend and actively participate in all assessment and counseling programs as directed by your Probation Officer and complete them to the satisfaction of your Probation Officer, for the following issues:

    a. sexual issues;
    b. psychological issues; and
    c. any other issues identified by your Probation Officer

    and provide consents to release information to your Probation Officer regarding your participation in any programming you have been directed to do pursuant to this Order.

11. Participate in such educational or life skills programming as directed by your Probation Officer and provide your Probation Officer with consents to release information in relation to your participation in any programs you have been directed to do pursuant to this Order.

12. Make reasonable efforts to find and maintain suitable employment and provide your Probation Officer with all necessary details concerning your efforts.

13. Not possess or use any computer or other device that accesses the internet, except with the prior written permission of the Probation Officer. If you have obtained the written permission of the Probation Officer to possess or use a computer or such a device, you shall provide the Probation Officer, and/or any responsible adult that the Probation Officer directs, with your password for the computer or device and you shall allow the Probation Officer or responsible adult to take possession of and access the computer or device to monitor what you have been doing on the computer or device.

14. Not attend any public park, school ground, daycare centre, public swimming pool, playground, skating rink, community centre, or recreational centre where persons under the age of 16 years are present or might reasonably be expected to be present except with the prior written permission of the Probation Officer or except in the actual

presence of a responsible adult approved in writing in advance by your Probation Officer.

15. Have no contact, directly or indirectly, or communication in any way, with any person you know to be, or who reasonably appears to be, under the age of 16 years except with the prior written permission of your Probation Officer or except in the actual presence of a responsible adult approved in writing in advance by your Probation Officer.

16. Not seek, obtain or continue in any employment, whether or not the employment is remunerated, or becoming or being a volunteer in a capacity, that involves being in a position of trust or authority towards persons under the age of 16 years except as approved in writing in advance by your Probation Officer.

17. Not be alone in the presence of any person you know to be, or who reasonably appears to be, under the age of 16 years.

[138] As I have included in terms 13 through 17 of this probation order conditions addressing what would be considered in a s. 161 prohibition order, I decline to make an order under s. 161.

[139] Pursuant to s. 487.051, you will provide a sample of your DNA for analysis.

[140] Pursuant to s. 490.012 you will comply with the provisions of the *Sex Offender Information Registration Act*, S.C. 2004, c. 10. Pursuant to s. 490.013(2.1) this order shall be for life.

[141] Pursuant to the Crown election in this matter, the s. 172.1(1)(b) offence is indictable with a maximum punishment of 10 years imprisonment. As such I am required to impose a s. 109(1) order prohibiting Mr. Callahan-Smith from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or an explosive substance. Pursuant to s. 109(2)(a)(ii), this order shall be for 10 years.

[142] There is a mandatory victim surcharge of $100.00 for the s. 137 offence and $200.00 for each of the s. 172.1(1)(b) and s. 171.1(1)(b) offences, for a total of $500.00. I impose these surcharges and make them payable forthwith. I further note Mr. Callahan-Smith to be in default and order that a default warrant be issued and that he serve his default time concurrent to the 59 days remaining to be served on the s. 172.1(1)(b) offence.

_____

COZENS T.C.J.