

CANADA / JUDGMENT

R. v. Tellier

2023 BCSC 1853

COURT

Supreme Court of British Columbia

DECIDED

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2023 BCSC 1853 R. v. Tellier

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Tellier,

2023 BCSC 1853

Date: 20230516

Docket: 180973-1

Registry: Victoria

Rex

v.

Michael Ryan Erik Tellier

Corrected Judgment: The text of the judgment was corrected on the front page on November 7, 2023

Before: The Honourable Mr. Justice G.R.J. Gaul

On appeal from: Provincial Court of British Columbia, March 11, 2022

(R. v. Tellier, Victoria File No. 180973-1)

Oral Reasons for Judgment

(Re Crown Sentence Appeal)

Counsel for the Appellant:

S.M. Simpson

Counsel for the Respondent:

C. Tollefson

Place and Date of Trial/Hearing:

Victoria, B.C.

April 5, 25, 2023

Place and Date of Judgment:

Victoria, B.C.

May 16, 2023

- [1] THE COURT: On 3 July 2021, the respondent, Michael Tellier, pleaded guilty in Provincial Court to one count of possessing child pornography, contrary to s. 163.14 of the Criminal Code.
- [2] In preparation for the sentencing hearing, a psychological assessment of Mr. Tellier was prepared by Dr. Shauna Darcangelo, a registered psychologist with the Victoria Regional Clinic of the Forensic Psychiatric Services Commission. This report was filed with the Provincial Court on 14 September 2021. Additionally, a pre-sentence report was prepared by Tara Walden, a probation officer with Saanich Community Corrections. That report was filed with the Provincial Court on 17 September 2021. In addition to these reports, Mr. Tellier filed a number of letters of reference authored by members of his family and some of his friends.
- [3] The matter returned to the Provincial Court on 11 March 2022 for a sentencing hearing. The Crown submitted that the appropriate sentence was a conventional custodial sentence of eight to 10 months followed by a three-year probation order. Counsel for Mr. Tellier, not counsel before me, submitted that a conditional sentence followed by a probation order would be sufficient in this case and would address all the applicable principles of sentencing. Counsel for Mr. Tellier did not identify or suggest a length of the proposed conditional sentence order or of the probation order, though he did acknowledge that the conditional sentence could be longer than the custodial sentence being proposed by the Crown.
- [4] The sentencing judge imposed a 15-month conditional sentence with a provision that the first six months be served under house arrest with the remainder being served under a seven-day-a-week, 10:00 p.m. to 6:00 a.m., curfew. The conditional sentence would be followed by two years' probation.
- [5] The Crown appeals the sentence imposed on Mr. Tellier and seeks to have Mr. Tellier's sentence varied to eight to 10-months of conventional imprisonment, followed by three years of probation.

Circumstances of the Offence

- [6] In November 2019, the Central Saanich Police Services began investigating an internet protocol address ("IP address") located in Victoria that was accessing and downloading child pornography from the internet. The police were able to identify Mr. Tellier as the user associated with the IP address in question. Using an internet-based police investigative resource known as the Child Protection System ("CPS"), the police were able to determine that a significant number of child pornography and child abuse files were being downloaded to Mr. Tellier's IP address.
- [7] In February 2020, the police again used the CPS to observe Mr. Tellier's IP address accessing child pornography images and downloading four child pornography videos. The videos in question varied in length between three minutes to 40 minutes. Three of the videos depicted adult males engaging in various sexual acts including anal penetration with prepubescent boys. The fourth video depicted a male rubbing his penis on the vagina of a prepubescent female and then ejaculating on or into her vagina.
- [8] The police obtained a warrant to search Mr. Tellier's residence and that search occurred on 1 October 2020. During the search, the police seized computer hardware belonging to Mr. Tellier as well as two dozen sex toys. A forensic examination of Mr. Tellier's computers disclosed what the police described as "hundreds, if not thousands" of child pornography images and videos. The images and videos were generally consistent with the materials the police had observed in February 2020 and, in some cases, they depicted the sexual abuse of male and female children between the ages of eight and 13 years. Some of the images involved incest and at least one involved bestiality.

Circumstances of the Offender

- [9] Mr. Tellier is 37 years old. He was 36 when he pleaded guilty and was sentenced for the present offence.
- [10] Mr. Tellier graduated from high school with honours. In his early 20s, he completed a four-year machinist program at the British Columbia Institute of Technology.
- [11] At the time of his arrest in October 2020, Mr. Tellier was employed as a machinist at Canadian Forces Base Esquimalt in Esquimalt, British Columbia. He was also the commanding officer of the Pacific Air Cadet Squadron in Victoria, B.C.
- [12] As a result of his arrest, Mr. Tellier was suspended from work. He was also relieved of his position with the Air Cadets.
- [13] Prior to this offence, Mr. Tellier had no criminal record.

[14] Mr. Tellier acknowledged to the author of the pre-sentence report that he started accessing child pornography approximately three years prior to his arrest in early October 2020. Mr. Tellier explained that he began viewing sexually explicit materials involving children out of curiosity. With regard to Mr. Tellier's attitude and understanding of the offence to which he pleaded guilty, Ms. Walden notes in her pre-sentence report:

When queried about the impact on the victims, Subject stated "[he] would not know none victimized directly by me" and appeared to correlate victimization exclusively to perpetrators who commit physical sexual violence against children. He further stated feeling "horrible" for the victims as potentially incurring "lasting, emotional and psychological damage, and mental health and self-worth issues".

[15] During the course of the psychological assessment, Mr. Tellier completed the Personality Assessment Inventory, which is a self-report objective inventory of adult personality that provides information relevant for clinical diagnosis, treatment planning, and screening for psychopathology. With respect to the results of this test, Dr. Darcangelo remarks:

Mr. Tellier's responses indicated that he attended appropriately to item content and responded in a consistent fashion to similar items. However, his responses suggested that he may not have answered in a completely forthright manner. Specifically, Mr. Tellier appears to have a tendency to present himself in a favourable light, relatively free of common shortcomings or problems that most individuals would admit to experiencing. He appears reluctant to acknowledge minor faults in himself. Although there is no indication that Mr. Tellier intentionally attempted to distort the profile, the results may underrepresent the extent and degree of any significant findings in certain areas due to his tendency to avoid negative or unpleasant aspects of himself.

[16] Under the heading, "Offender's Version of Current Offence," Dr. Darcangelo observes:

Mr. Tellier reported that he began to view child pornography "a few years ago". He could not recall what led to his initial interest in child pornography, "It was probably a pop up." Mr. Tellier acknowledged that at his peak, he was masturbating to sexual images / videos of children approximately three to four times per week. Despite his regular masturbation to child pornography, Mr. Tellier denied that he was sexually attracted to children. He attributed his use of pornography to "the extra thrill of knowing it was wrong." Mr. Tellier disclosed regular use of adult pornography, as well as child pornography. He denied that his child pornography use was associated with desensitization to adult pornography or to any other specific circumstances in his life.

[17] Under the heading, "Diagnostic Impressions," Dr. Darcangelo explained:

Based on available information, including Mr. Tellier's self-report, current presentation and psychological test results, there is no indication that he currently meets criteria for a major mood, psychotic or anxiety disorder. Although Mr. Tellier denied any sexual interest / arousal to prepubescent children, given his admission that he masturbated regularly to child pornography prior to his arrest (i.e., up to four times a week for approximately two to three years) and he

denied that he had become desensitized to adult pornography, a provisional diagnosis of Pedophilic Disorder, Nonexclusive type (i.e., attracted to both children and adults) seems appropriate. This diagnosis should be explored further in a treatment setting.

[18] Finally, under the heading "Risk Assessment," Dr. Darcangelo concludes:

Overall, based on a consideration of available information and given the overall pattern of risk factors Mr. Tellier's level of risk for sexual reoffending in the community (i.e., possession of child pornography) is estimated in the low to moderate range. The factors most relevant to his risk of sexual violence include sexual deviance (i.e., sexual attraction to children) and problems with self-awareness. Problems with stress and coping is also a likely risk factor. If Mr. Tellier was to engage in contact sexual offending, both male and female children between the ages of eight and 13 would likely be at risk. He would most likely choose victims that he had a prior relationship with (i.e., a stranger victim would be less likely). In terms of protective factors, Mr. Tellier presents as a pro-social individual with a stable employment history and a good support from his parents. He expresses a willingness to participate in sex offender treatment.

Reasons of the Sentencing Judge

[19] The sentencing judge delivered his oral reasons for sentence once counsel had concluded their submissions. He began his reasons by noting that the offence committed by Mr. Tellier was a very serious one. The sentencing judge then observed:

[1] it has become clear to this court the child pornography industry is one that is as despicable as it is broad. It is industrial sized and it is terrible, leaving in its wake the destruction of young lives in a terrible, terrible way.

[20] The sentencing judge further identified deterrence and denunciation as the primary goals of sentencing in Mr. Tellier's case. He then framed the central question as follows:

[4] The issue in this sentencing is whether the general principles which I have outlined along with their rationale are such that an actual jail sentence as opposed to a conditional sentence of imprisonment is appropriate. There are many considerations that go into it. The central consideration relates to whether there are any circumstances which are described as exceptional such that he should not go to actual jail. Otherwise, the range of sentence is six to 15 months of actual jail.

[21] The sentencing judge found that "exceptional circumstances" for the purposes of determining an appropriate sentence included:

- a) Mr. Tellier not having a prior criminal record;
- b) Mr. Tellier being a person of good standing in the community and for whom the prospect of reoffending is highly unlikely; and

- c) Mr. Tellier having acknowledged his wrongdoing and exhibited remorse since the time of his arrest.
- [22] In rejecting the Crown's submission that a conventional jail sentence was warranted in Mr. Tellier's case, and finding that a conditional sentence would address all of the applicable principles of sentencing, the sentencing judge concluded:
- [6] Mr. Tellier is an individual with no record. He is an individual who has the good fortune of strong support from his family. He has in his character shown himself over the years to be an individual who has worked hard and has contributed to his community in a volunteer capacity as well as achieving certain things in his employment. As a result of this offence, I understand him to have been relieved of his duties and placed on unpaid leave. I do not know if that leave is going to be permanent, although defence counsel's submissions suggested that that was certainly a likelihood. He has organized himself to build up his financial future and it is clear that the financial future has been placed in serious jeopardy. I do not give these latter factors of his financial situation great importance because they are, although very real and very practical consequences, they are ones that should not be exaggerated in the circumstances of an offence such as this, but they should not be ignored and I do not ignore them.
- [7] At the end of the day, it comes down to very much a sense of the character of the person before me, of his understanding of the harm that he has done to other persons, other humans he shares this earth with, and his understanding that he must never ever come before the court again.
- [10] I confess that this case is very close to the line. It is one that causes me some concern, but at the end of the day, I come to the conclusion that public safety is not jeopardized by a conditional sentence order, that the considerations in Proulx are ones which are satisfied in this case, and that there can be a sentence given by me which does emphasize deterrence and denunciation in such a way that any person having knowledge of this sentence would quickly understand that this is an offence to steer away from for the penalties have a significant and long-term impact on the individual involved
- [23] Ultimately, the sentencing judge determined that a 15-month conditional sentence followed by two years' probation was a fit and appropriate sentence in the circumstances of Mr. Tellier's case. In reaching this conclusion, the sentencing judge explained:
- [11] I also take into account that any sentence of any actual jail would result in a period of parole which would mean that the person might serve as little as a third, probably as much as two-thirds, maybe even as little as a half, of their actual time in custody, but on a conditional sentence order, they would serve every day of it. So that the consequences of their behaviour would impact their lives in a very real way for a much longer period of time.

Issues on Appeal

- [24] The Crown submits that the sentencing judge erred in principle by failing to properly weigh the aggravating factors against the mitigating factors; and by finding exceptional circumstances where there were none.
- [25] The Crown also contends that the 15-month conditional sentence that was imposed on Mr. Tellier is demonstrably unfit given the circumstances of the case. In my opinion, it is appropriate to consider the question of whether there were exceptional circumstances that warranted a conditional sentence in this case when addressing whether the sentence imposed is demonstrably unfit.

Discussion

Standard of Review

- [26] The applicable standard of review on this appeal is a highly deferential one. In *R. v. Friesen*, 2020 SCC 9, Chief Justice Wagner and Mr. Justice Rowe writing for a unanimous court explained:
- [25] Appellate courts must generally defer to sentencing judges' decisions. The sentencing judge sees and hears all the evidence and the submissions in person (*Lacasse*, at para 48; *R. v. Shropshire*, [1995] 4 S.C.R. 227, at para. 46). The sentencing judge has regular front-line experience and usually has experience with the particular circumstances and needs of the community where the crime was committed (*Lacasse*, at para. 48; *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 91.) Finally, to avoid delay and the misuse of judicial resources, an appellate court should only substitute its own decision for a sentencing judge's for good reason (*Lacasse*, at para. 48; *R. v. Ramage*, 2010 ONCA 488, 257 C.C.C. (3d) 261, at para. 70).
- [26] As this Court confirmed in *Lacasse*, an appellate court can only intervene to vary a sentence if (1) the sentence is demonstrably unfit (para. 41), or (2) the sentencing judge made an error in principle that had an impact on the sentence (para. 44). Errors in principle include an error of law, a failure to consider a relevant factor, or erroneous consideration of an aggravating or mitigating factor. The weighing or balancing of factors can form an error in principle "[o]nly if by emphasizing one factor or by not giving enough weight to another, the trial judge exercises his or her discretion unreasonably" (*R. v. McKnight* (1999), 135 C.C.C. (3d) 41 (Ont. C.A.), at para. 35, cited in *Lacasse*, at para. 49). Not every error in principle is material: an appellate court can only intervene if it is apparent from the trial judge's reasons that the error had an impact on the sentence (*Lacasse*, at para. 44). If an error in principle had no impact on the sentence, that is the end of the error in principle analysis and appellate intervention is justified only if the sentence is demonstrably unfit.
- [27] Where the standard of review has been met, the appeal court will be entitled to perform its own sentencing analysis, deferring in the process to any factual findings made by the sentencing judge that are not tainted by legal error: *R. v. P.R.J.*, 2023 BCCA 169.

Did the sentencing judge fail to properly weigh the aggravating and mitigating factors?

[28] The Crown argues that, although the learned sentencing judge indicated in his reasons that deterrence and denunciation were the primary principles of sentencing in this case, he failed to properly assess and weigh the aggravating factors that exist in this case, including the harm child pornography causes to its child victims and, instead, focused chiefly, if not exclusively, on the mitigating factors, including Mr. Tellier's prospects for rehabilitation.

[29] Mr. Tellier disputes the Crown's characterization of the sentencing judge's analysis. In doing so, Mr. Tellier maintains that the judge's reasons for sentence disclose that he was well aware of all of the aggravating factors present in this case, including:

- a) the overall seriousness of the child pornography offences;
- b) the general prevalence of the industry and its destructive impact on the lives of its young victims;
- c) the fact that those who possess child pornography support the industry's existence and allow its abuse of children to continue; and
- d) the fact that Mr. Tellier had been accessing child pornography for a significant period of time and had hundreds, if not thousands, of files on his computer.

[30] Having considered the submissions of counsel on this appeal, including their helpful written submissions, and the jurisprudence they have brought to my attention, I find the Crown's position on this issue is the correct one. When the principles of denunciation and deterrence are paramount, as in the present case, the sentencing court must focus first and foremost on the circumstances of the offence, including its impact on the victims, rather than the personal circumstances of the offender. In saying this, I have taken note of the following passage from *R. v. Johnson*, 2020 MBCA 10 where Chartier, C.J.M. explained:

[13] The objective of denunciation and general deterrence is that the sentence should communicate society's condemnation of that conduct and generally deter others who might consider engaging in such conduct (see *M (CA)* at para 81; and *R v BWP*; *R v BVN*, 2006 SCC 27 at para 2). When the principles of denunciation and general deterrence are paramount, the focus of the sentencing judge is more on the offence committed (the conduct), than on the offender (the personal circumstances of the accused). Put another way, while factors personal to the accused remain relevant, they necessarily take on a lesser role. See *R v McMillan (BW)*, 2016 MBCA 12; and Clayton C Ruby et al, *Sentencing*, 9th ed (Toronto: LexisNexis, 2017) at para 1.18.

[31] The evidence before the sentencing judge relating to the nature of Mr. Tellier's offence indicated that Mr. Tellier had assembled a vast collection of child pornography, including still images and videos, and had been using the materials to masturbate three to four times per week for a few years. According to Dr. Darcangelo's report, Mr. Tellier had explained that he possessed these materials for the thrill of it and for his own gratification, which, in my

view, is inconsistent with his claim that he has no sexual attraction to children. In my opinion, this is the proper context in which Mr. Tellier's offence needed to be examined for the purpose of determining an appropriate sentence.

- [32] In *R. v. Alexander*, 2019 BCCA 100, our court of appeal considered the constitutional validity of the six-month mandatory minimum sentence for possession of child pornography. Like Mr. Tellier, the accused in *Alexander* had pleaded guilty to one count of possessing child pornography. The Crown had submitted that a nine to 12-month custodial sentence followed by probation of two to three years was the appropriate sentence. Mr. Alexander sought to have the six-month mandatory minimum sentence that was in force at the time, declared unconstitutional and submitted that an 18-month conditional sentence followed by a period of probation was the fit sentence. Although the Court of Appeal found that the impugned mandatory minimum sentence did indeed fail to pass constitutional muster, it also concluded that the eight-month conventional jail sentence as opposed to a conditional sentence was the fit sentence in the case. In rejecting the submission for a conditional sentence, Madam Justice MacKenzie observed:
- [34] The appellant submits he clearly qualified under s. 742.1 of the Criminal Code for a CSO based on the following factors: there was no mandatory minimum punishment (assuming it is unconstitutional), the appropriate sentence is less than two years, the appellant was assessed as being of low to moderate risk of reoffending and there was no evidence he was an immediate risk to the community. The only remaining consideration was whether a CSO would adequately address the paramount sentencing principles of denunciation and deterrence for this offence. The appellant contends the judge failed to appropriately address these principles.
- [35] I consider the judge fully set out the purpose and objectives of sentencing in s. 718 of the Criminal Code. He also referred to ss. 718.1 and 718.2, and specifically referred to s. 718.01, which requires a court to give primary consideration to the objectives of denunciation and deterrence when imposing a sentence for offences involving the abuse of children.
- [36] After reviewing a number of sentencing authorities and considering the circumstances of the offender in detail, the judge determined the principles of denunciation and deterrence would not be given "adequate voice" by a CSO. In summary, the judge comprehensively addressed the necessary sentencing principles and factors. He made no error in principle.
- [37] I agree with the Crown that the judge's review of recent and relevant sentencing authorities, including *Swaby BCSC*, was extensive. It properly reflected society's evolving understanding of the harmfulness of child pornography. The judge carefully considered all relevant mitigating and aggravating factors on sentence. He concluded the appropriate range for a first-time offender would be a jail sentence of six to 15 months. The appellant has not provided any submissions or authorities challenging this range, nor has he established, in my view, that the sentence imposed was demonstrably unfit.

- [39] At sentencing, the appellant asserted a CSO was a fit sentence for him as the facts of this case are analogous to those in *Swaby BCSC*. However, the judge accurately distinguished Mr. Swaby's circumstances from those of the appellant. Moreover, recent authorities say incarceration will be necessary in all cases of possession of child pornography, except in exceptional cases, to appropriately emphasize the principles of denunciation and deterrence. I do not consider the present case to be exceptional.
- [40] In *R.L.W.*, this Court explained that over the years, courts have developed a greater appreciation of the harm caused to children by the manufacturing, distribution and possession of child pornography. The courts have thus placed greater emphasis on denunciation and deterrence, causing sentences to increase: at para. 49.
- [41] *R. v. Inksetter*, 2018 ONCA 474 held a custodial sentence was necessary to emphasize denunciation and deterrence in cases of child pornography:
- [22] Child pornography is a pervasive social problem that affects the global community and its children. In *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45, the Supreme Court described how possession of child pornography harms children. As Fraser C.J.A. wrote in *R. v. Andrukonis*, 2012 ABCA 148, at para. 29, "possession of child pornography is itself child sexual abuse." The children depicted in pornographic images are re-victimized each time the images are viewed. In amassing, viewing, and making available his vast and terrible collection to others, the respondent participated in the abuse of thousands of children.
- [23] Over the past decade, Parliament has increased the legislated range of sentence for child pornography related offences. Most recently, in 2015, it amended the Criminal Code to increase the minimum sentence for possession of child pornography to 1 year and the maximum sentence to 10 years, in all cases where the Crown proceeds by indictment. At the same time, the maximum sentence for [making] child pornography available was increased to 14 years. (The minimum sentence remains at one year.)
- ...
- [25] As Feldman J.A. wrote in [*R. v. D.G.F.*, 2010 ONCA 27], at para. 21, "[o]ver the last two decades, courts have been on a learning curve to understand both the extent and the effects of the creation and dissemination of child pornography over the internet and to address the problem appropriately". Even before these amendments, this court signalled that more significant sentences for child pornography-related offences were appropriate: *R. v. H. (R.)*, 2012 ONCA 593, [2012] O.J. No. 4230; *R. v. Saliba*, 2013 ONCA 660, [2013] O.J. No. 6002.
- [42] *Swaby* expressed the same principles, stating, "[e]xcept in exceptional cases, those who possess child pornography will be incarcerated", even in cases where the Crown proceeds summarily: at paras. 66--67.
- [43] In the result, I conclude the sentence of eight-months' imprisonment followed by 18-months' probation was within the appropriate range and is a fit sentence.

- [33] In my opinion, these observations of Justice MacKenzie are apposite to the appeal before me and provide helpful guidance in reaching a result.
- [34] I also find P.R.J. to be instructive. The accused in that case had been found guilty at trial of sexual interference, invitation to sexual touching, and sexual assault. Given the rule against multiple convictions for the same criminal act, articulated in *Kienapple v. The Queen*, [1975] 1 S.C.R. 729, the trial judge entered convictions on the first two charges and ordered that the sexual assault charge be conditionally stayed: *R. v. P.R.J.*, 2021 BCSC 2420. The trial judge sentenced P.R.J. to a 23-month conditional sentence, followed by two years of probation: *R. v. P.R.J.*, 2021 BCSC 2537.
- [35] P.R.J.'s appeal from his conviction for invitation to sexual touching was allowed in part in that the court of appeal found what had occurred constituted a single act of child abuse that should result in a single conviction. Applying the *Kienapple* rule, the court conditionally stayed the invitation to sexual touching charge, leaving only the conviction for sexual interference: *R. v. P.R.J.*, 2023 BCCA 13.
- [36] Although the offences for which the accused in P.R.J. was found guilty and the offence for which she was sentenced are different from the one committed by Mr. Tellier, they all have the common element of child sexual abuse.
- [37] Similar to the situation on the present appeal, the Crown in P.R.J. appealed from the conditional sentence that had been imposed, arguing that the trial judge erred in principle by failing to give meaningful effect to the harms arising from the offender's actions.
- [38] In her reasons allowing the Crown's appeal indexed at 2023 BCCA 169, Madam Justice DeWitt-Van Oosten reviewed P.R.J.'s personal circumstances and the trial judge's reasons for sentence:
- [17] The pre-sentence report stated that since being removed from PRJ's care, P has shown herself to be "resilient" and has made "incredible progress". However, she initially presented as a "scared lost puppy that was unsure". She was "often found hiding in a closet crying". She had suffered an "emotional toll". She now lives with PRJ's sister. Arrangements were made for therapeutic intervention. It took "time for her to settle and feel secure", but she "eventually became comfortable". The last therapist involved with her said she "presented as happy and [was] doing very well". Should P require supportive intervention in the future, it will be made available to her, recognizing that "in her teen or adult years, she will encounter events, relationships, or circumstances that trigger her".
- [18] PRJ was 44 years old when sentenced. The pre-sentence report described her as isolated, struggling with depression and/or anxiety, and not being connected to any services. A court liaison worker confirmed that between the trial and sentencing, PRJ had various interactions with police. Most of them related to her mental health. The Court has no information about the nature of those incidents, PRJ's current mental health status, or the extent of any assessment or programming that has occurred since the imposition of

sentence. At trial, PRJ testified that she was receiving disability benefits "related to her mental health". However, she did not provide greater detail.

- [21] The judge began his reasons for sentence by noting that sentences for child sexual offending must recognize and give meaningful effect to the fact that "any and all such offending violates the integrity of children, both sexually and physically": 2021 BCSC 2537 at para. 4, citing *R. v. Friesen*, 2020 SCC 9 [Friesen]. He instructed himself that the "primary purposes and objectives" of sentencing are denunciation and deterrence: at para. 5.
- [22] The judge noted that PRJ was in a position of trust when she committed the offence and that the offence occurred in P's home: at paras. 5, 22. He accepted these factors as aggravating: at paras. 5, 22. The judge recognized that although P was said to be doing well at the time of sentencing, it is unknown whether the sexual offence may have long-term, adverse effects on her well-being: at paras. 7-10. The judge acknowledged that it is because of the harms arising from child sexual offences that these offences must be treated as very serious (at para. 11):
- ... judges must approach sentencing in cases of sexual offending against children as very serious cases by considering not only the inherent wrongfulness of such offences but also by considering and assessing the harm that is done not only to a particular child victim but also the harm done to communities and society as a whole when children are violated especially by those relied upon to protect them from harm.
- [23] The judge recognized that sentencing is an individualized process and the personal circumstances of the offender will inform the search for a just sanction. He was satisfied it was not necessary to sentence PRJ to a penitentiary term or a lesser term of conventional imprisonment. From his perspective, a conditional sentence would best serve to promote PRJ's rehabilitation by allowing her to address her substance use and "psychiatric issues" in the community: at para. 23.
- [24] In reaching this conclusion, the judge noted that: (1) PRJ has no criminal record; (2) the sexual offending occurred once; (3) PRJ was "extremely intoxicated" at the time of the offence and "likely further uninhibited" by the "misuse of prescription medication"; (4) her conduct was "an aberration in the relationship between mother and daughter"; and (5) she was experiencing anxiety and depression at the material time: at paras. 14-18.
- [25] The judge also noted that PRJ and her daughter lived together for at least five months after the offence and there was no suggestion of similar behaviour; PRJ performed well on bail for three years prior to sentencing; there is no evidence she "poses a risk to the community" if not incarcerated; and, because of the offence, PRJ has experienced the loss of her child, who has been removed from her care: at para. 23.
- [39] In setting aside the 23-month conditional sentence and replacing it with a conventional custodial sentence of 36 months, Justice DeWitt-Van Oosten concluded:

- [52] The Crown has persuaded me that the judge did not consider the harms associated with child sexual offending "in a manner that reflects society's deepening and evolving understanding of their severity": Friesen at para. 74, emphasis added. He did not give meaningful effect to those harms. Doing so was required to properly assess the gravity of PRJ's offending and her moral blameworthiness.
- [53] As explained in Friesen, the "wrongfulness and the harmfulness [of sexual offences against children] impact both the gravity of the offence and the degree of responsibility of the offender": at para. 75, emphasis added. These offences are treated as grave (or very serious) because of the harms. However, a judge's assessment of an offender's moral blameworthiness must also account for the harms arising from child sexual offending because they are reasonably foreseeable. The failure to do so can result in a skewed proportionality analysis that risks the offender's personal circumstances overwhelming the determination of a fit sentence.
- [54] Here, the judge considered PRJ's personal circumstances at the time of the offence, including that she was "extremely intoxicated" and "uninhibited" (at para. 16), and likely experiencing anxiety and depression: at para. 18. It is clear from the reasons that these factors impacted the sentence, both its length and its form: at para. 23. It is implicit that they were found to have attenuated PRJ's moral blameworthiness.
- [55] To properly assess PRJ's personal responsibility, the judge was obliged to consider her moral blameworthiness in the context of the harms flowing from her conduct. Or, as aptly articulated by the Crown in its factum, the judge had to assess PRJ's personal responsibility "through the lens of the harms" associated with child sexual offending.
- [56] As explained in Friesen:
- [88] Intentionally applying force of a sexual nature to a child is highly morally blameworthy because the offender is or ought to be aware that this action can profoundly harm the child. In assessing the degree of responsibility of the offender, courts must take into account the harm the offender intended or was reckless or wilfully blind to ... For sexual offences against children, ... save for possibly certain rare cases, offenders will usually have at least some awareness of the profound physical, psychological, and emotional harm that their actions may cause the child ...
- ...
- [90] The fact that the victim is a child increases the offender's degree of responsibility. Put simply, the intentional sexual exploitation and objectification of children is highly morally blameworthy because children are so vulnerable ... Offenders recognize children's particular vulnerability and intentionally exploit it to achieve their selfish desires ...
- [40] Like the remarks of Justice MacKenzie in *Alexander*, these observations of Justice DeWitt-Van Oosten provide helpful guidance in addressing the issues in the present appeal.

[41] In my view, the sentencing judge erred in principle by focusing too much on Mr. Tellier's personal circumstances and the mitigating factors in his case at the expense of the aggravating factors that were present. In doing so, I find the sentencing judge placed too much weight and value on those personal circumstances and mitigating factors and too little on the aggravating factors. Those aggravating factors include the gravity of the offence committed; the size and nature of the child pornography that Mr. Tellier had collected over a significant period of time; Mr. Tellier's motive for assembling such a large collection of child pornography, that is, his personal gratification; the horrific abuse of children that results from the child pornography industry's production of such materials; and the simple fact that the industry would not exist if it were not for those like Mr. Tellier who seek it out and collect it.

Did the sentencing judge err by imposing a demonstrably unfit sentence?

[42] While counsel for Mr. Tellier is correct to point out that there was evidence before the sentencing judge to support a rehabilitative sentence, that does not change the fact that rehabilitation plays a secondary role to deterrence, denunciation and protection of the public, when the offence in question involves the sexual abuse of a child.

[43] In my opinion, by focusing upon Mr. Tellier's personal circumstances and the mitigating circumstances in the case, including the fact that prior to the present offence, Mr. Tellier had no criminal record and the fact that he continued to have the support of his family, the sentencing judge failed to adequately consider Mr. Tellier's degree of moral culpability. I accept the Crown's submission that Mr. Tellier's reasons for assembling his collection of child pornography, his lack of insight into the reasons for possessing this material, and his very limited understanding of the dreadful consequences of his actions on the child victims, all point to a very high degree of moral culpability. I also agree with the Crown that to give effect to the principles of sentencing that must be paramount in this case, meaning deterrence and denunciation, a conventional custodial sentence is required in Mr. Tellier's case. In my view, deviating from this approach will only be justified when exceptional circumstances are present.

[44] In my respectful view, the circumstances that the sentencing judge identified as exceptional, constituted nothing more than mitigating circumstances. They did not, in my opinion, meet the threshold of "exceptional circumstances" or circumstances that made the case an "exceptional one". Based upon my review of the jurisprudence, I am satisfied that exceptional cases or exceptional circumstances that make a case exceptional are circumstances that demonstrate that the offender's life, both before and after the offence in question, show a marked and material improvement or a significantly reduced degree of moral blameworthiness. Let me note that the jurisprudence that I am referring to includes:

- R. v. Voong, 2015 BCCA 285;
- R. v. Swaby, 2017 BCSC 2020, aff'd 2018 BCCA 416;

- R. v. Alexander, 2019 BCCA 100;
- R. v. Kodimayala, 2020 BCCA 275; and
- R. v. Capewell, 2021 BCSC 904

[45] Although counsel for Mr. Tellier maintains that exceptional circumstances exist in the present case, she also submits that they are not a prerequisite for a conditional sentence. In advancing this submission, counsel has drawn my attention to R. v. Burnett, 2017 MBCA 122. In particular, counsel for Mr. Tellier underscores the following portion of Chief Justice Mainella reasons where he observes:

[25] The law does not require a sentencing judge to find "exceptional circumstances" to justify imposing a sentence that merely departs downward from a judicially created starting point or sentencing range (see R v Scott, 2013 NSCA 28 at paras 26, 53; and R v Howell, 2013 NSCA 67 at para 9). The comments of Twaddle JA in R v Dew, 1998 CarswellMan 467 (CA), leave to appeal to SCC refused [1998] SCCA No 591, a case where the offender was involved in a conspiracy to traffic cocaine, are instructive (at paras 5, 9):

This Court has held on occasions prior to the introduction in 1996 of the conditional sentence that a prison term should be imposed in all but exceptional circumstances for the offence of trafficking in cocaine or conspiring to do so. That ruling is still valid, but does not prevent the imposition of a term of imprisonment to be served conditionally in the community.

In our view, exceptional circumstances need not exist in order to justify an order permitting a sentence of imprisonment to be served conditionally in the community. All that need be established is that a fit sentence for the offence is one of less than two years' imprisonment; that service of the sentence in the community will not endanger the community's safety; and that service of it in the community is consistent with the fundamental purpose and principles of sentencing.

[46] I do not take issue with that statement of law. However, I do not find that it assists in Mr. Tellier's case. While exceptional circumstances are not a prerequisite for the imposition of a conditional sentence order, our Court of Appeal in Alexander has made it patently clear, in my view, that in all cases of child pornography, a conventional custodial sentence will be called for, except where there are exceptional circumstances.

[47] In my view, there is nothing in the nature of the present offence or in Mr. Tellier's circumstances, including after his arrest, that justifies a departure from the normal sentencing practices for child pornography cases. By over-emphasizing the mitigating circumstances and finding that there were exceptional circumstances, I find that the learned sentencing judge fell into error when he concluded that a conditional sentence order was an appropriate result in Mr. Tellier's case.

What is a fit sentence?

- [48] The ordinary range of sentence in a case like Mr. Tellier's is a custodial sentence of between four months and two years. I repeat, such a sentence is to be served in a custodial sentence and not in the community on a conditional sentence order unless it is an exceptional case; that is, there exist exceptional circumstances that justify departing from the normal range of sentence. By translating or converting what are more properly mitigating circumstances into exceptional circumstances and then using them as justification for a conditional sentence, I say with respect, that the sentencing judge erred in principle and imposed a sentence that was demonstrably unfit.
- [49] At the outset of their reasons in Friesen, Chief Justice Wagner and Mr. Justice Rowe explained:
- [1] Children are the future of our country and our communities. They are also some of the most vulnerable members of our society. They deserve to enjoy a childhood free of sexual violence. Offenders who commit sexual violence against children deny thousands of Canadian children such a childhood every year. This case is about how to impose sentences that fully reflect and give effect to the profound wrongfulness and harmfulness of sexual offences against children.
- [5] we send a strong message that sexual offences against children are violent crimes that wrongfully exploit children's vulnerability and cause profound harm to children, families, and communities. Sentences for these crimes must increase. Courts must impose sentences that are proportional to the gravity of sexual offences against children and the degree of responsibility of the offender, as informed by Parliament's sentencing initiatives and by society's deepened understanding of the wrongfulness and harmfulness of sexual violence against children. Sentences must accurately reflect the wrongfulness of sexual violence against children and the far-reaching and ongoing harm that it causes to children, families, and society at large.
- [42] Protecting children from wrongful exploitation and harm is the overarching objective of the legislative scheme of sexual offences against children in the Criminal Code. Our society is committed to protecting children and ensuring their rights and interests are respected (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 67). As Otis J.A. stated in *R. v. L. (J.-J.)* (1998), 126 C.C.C. (3d) 235 (Que. C.A.), [TRANSLATION] "the protection of children constitute[s] one of the essential and perennial values" of Canadian society (p. 250). Protecting children from becoming victims of sexual offences is thus vital in a free and democratic society (*R. v. Mills*, 2019 SCC 22, [2019] 2 S.C.R. 320, at para. 23).
- [50] It is clear, in my respectful view, that courts must send a loud and unmistakable message to those who would engage in any conduct that involves child pornography. That message is: if you are found guilty of engaging in such conduct, then barring exceptional circumstances that make the case an exceptional one, you will be imprisoned. In my opinion, there is also a heightened need to ensure that such offenders are supervised in the community once they are released from prison so as to ensure, as much as possible, that the public is protected

and the offender has resources available to them to assist with their rehabilitation and safe reintegration into the community.

- [51] In my opinion, the imposition of a conditional sentence in this case failed to reflect the fundamental and primary purposes of sentencing, namely, denunciation, deterrence, and protection of the public. This is especially so given the high degree of Mr. Tellier's moral culpability, the significantly aggravating circumstances, and the lack of any exceptional circumstances.
- [52] Given all of the circumstances and the jurisprudence that relates to sentencing offenders who have committed crimes relating to child pornography, I accept that the sentencing judge erred in principle by failing to properly weigh the mitigating and aggravating factors in this case and by imposing a sentence that was demonstrably unfit.
- [53] Considering all of the circumstances surrounding Mr. Tellier and the offence he committed, and applying the legal principles of sentencing that must be applied in cases involving child abuse, I find the appropriate sentence in this case is 10 months' incarceration, followed by three years' probation.
- [54] I am extending the duration of the probation order because I accept there is a need for ongoing supervision of Mr. Tellier's behaviour in the community and because with the reduction of the length of the custodial sentence from 15 months to 10 months, the probation order will be starting sooner than it would have had the original sentence remained in place. In my opinion, the few extra months of community supervision are justified because of the need to further examine and assess Mr. Tellier's apparent pedophilic tendencies, assist him in his rehabilitative efforts, and to ensure there is an appropriate ongoing supervision in the community to ensure the public is as safe as it can be.
- [55] The terms of probation will be the same as those imposed by the sentencing judge. There will be no changes to the ancillary orders that were made in the first instance.

Conclusion

- [56] For all these reasons, I am allowing the Crown appeal, setting aside the 15-month conditional sentence order and replacing it with a conventional jail sentence of 10 months in a provincial correctional facility. I am also replacing the two-year probation order with one that will last three years.
- [57] Mr. Tellier was sentenced on 11 March 2022. He has, as of today's date, served a little over 14 months of his conditional sentence. When an appeal court replaces a conditional sentence with a conventional custodial sentence, the offender is entitled to receive 15 days' credit for every month or portion of month they have spent on a conditional sentence: *R. v. Ali*, 2022 BCCA 83.

- [58] As I have just said, Mr. Tellier has spent 14 months of his conditional sentence and therefore, subject to counsel indicating that my arithmetic needs to be corrected, I find he is entitled to a credit of 210 days or seven months. The new custodial sentence of 10 months that would have commenced on 11 March 2022, the date of the original sentencing, is therefore reduced to three months' imprisonment.
- [59] The practical effect of all of this is that Mr. Tellier has served and completed the custodial portion of his sentence. He will now be subject to a three-year probation order. The terms of that order will be the same as those in the order made by the sentencing judge. There will also be no changes to the ancillary orders that have been made.
- [60] The start of Mr. Tellier's period of probation will be retroactive to the date when his custodial sentence would have expired. The Corrections Branch of the Provincial Ministry of Public Safety and Solicitor General will calculate the actual start date for Mr. Tellier's probation.
- [61] I am, therefore, ordering Mr. Tellier to report to a probation officer at the B.C. Corrections Branch office at 836 Courtney Street, Victoria, B.C., by 4:00 p.m. tomorrow, Wednesday, 17 May 2023, so that the start date of the probation order can be confirmed and any other issues relating to his probation addressed.
- [62] Ms. Tollefson, let me address you before concluding these reasons. Will that timeframe of reporting to the Corrections so that the probation order start date can be assessed and determined and explained to Mr. Tellier, is that timeframe realistic for your client?
- [63] CNSL C. TOLLEFSON: I'm sure it is. Yes, he will be able to attend there today, in fact, I'm sure.
- [64] THE COURT: All right, very good. Thank you, Ms. Tollefson. Since you have the mic, is there anything arising?
- [65] CNSL C. TOLLEFSON: No, thank you very much.
- [66] THE COURT: Ms. Simpson?
- [67] CNSL S. SIMPSON: No, thank you, Justice.
- [68] THE COURT: All right. I thank you both for your work on this case. Your submissions were helpful, including your supplemental submissions relating to the P.R.J. case. I also thank you for your additional submissions relating to the calculation of the sentencing credit to be applied in this case.
- [69] So, let me conclude by saying Ms. Tollefson, you represented your client well, and Ms. Simpson, you represented the Crown well.
- [70] The court will stand down.

"G. R. J. Gaul J."

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