Citation: *R. v. Welsh*, 2021 YKTC 44

Date: 20211006
Docket: 19-10056A
Registry: Watson Lake

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Chisholm

REGINA

v.

JOSHUA ISAAC WELSH

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

Appearances:
Sarah Bailey — Counsel for the Crown
Norah E. Mooney — Counsel for the Defence

REASONS FOR SENTENCE

[1] CHISHOLM T.C.J. (Oral): Mr. Joshua Welsh has pleaded guilty to the offence of possessing child pornography in Watson Lake, Yukon between September 28, 2018 and December 17, 2019.

[2] The Crown proceeded summarily in this matter. As such, pursuant to s. 163.1(4)(b) of the *Criminal Code* (the "*Code*"), the minimum punishment is a six-month term of imprisonment.

[3] The defence challenges the constitutionality of this provision, alleging that it amounts to cruel and unusual punishment, and therefore violates s. 12 of the *Charter*.

Facts

[4] Counsel submitted an Agreed Statement of Facts which became Exhibit 1 on the sentencing hearing. The following is a summary of that exhibit.

[5] On October 30, 2019, police received a report of two images of child pornography located on Facebook Messenger linked to Josh Welsh of Watson Lake, Yukon. After further investigation, police applied for and obtained a search warrant on December 13, 2019. Police officers executed the search warrant at which time they seized electronic devices and USB keys from Mr. Welsh's residence.

[6] A search of the devices revealed 423 unique images, and 269 duplicates, for a total of 692 child pornography images. It is believed that the images were downloaded from the internet. The images consisted of both females and males ranging in age from approximately two to 17 years. The majority of the images were young females exposing their genitals or involved in sexual activity. The images depict children engaged in sexual activity with other children, adults and/or engaged in solo masturbation. There are images of both penetrative and non-penetrative sexual activity between adults and children. The images of children engaged in sexual acts with other children and adults, include digital penetration, vaginal and anal intercourse, fellatio, and the insertion of sex toys.

[7] Additionally, the police located, on Mr. Welsh's devices, 2011 unique images described as "child collateral". These images are of children under the age of 18 in which there is visible exposure of the genitals, however the genitals are not the main focus of the images.

[8] A total of 116 child pornography videos (of which 106 are unique) were located. It is believed that these videos were downloaded from the internet. The videos depict children ranging in age from approximately two to 17 years, mostly young females. The videos are of children involved in sexual activity with other children and adults, including masturbation, vaginal intercourse, fellatio, the use of sex toys, and ejaculation. All videos contained exposure of the vaginal, penal, and/or anal areas of the children. A further 25 videos described as “child collateral” were also seized.

[9] Of all the images located, 282 child pornography items were cartoon (anime) depictions.

[10] Upon arrest, Mr. Welsh provided an inculpatory warned statement to police, after speaking to counsel. He admitted feeling addicted to extreme pornography, including child pornography, and to accessing and viewing child pornography.

Positions of the Parties

[11] The Crown contends that a nine-month term of imprisonment, two years of probation, plus other ancillary orders is the appropriate sentence.

[12] The defence submits that a conditional sentence in the range of six months, plus probation and ancillary orders is the appropriate response in this case.

[13] In terms of the Notice of Application challenging the constitutionality of the mandatory minimum sentence in s. 163.1(4), defence counsel argues that the mandatory minimum sentence is grossly disproportionate to Mr. Welsh and to other

offenders in reasonable hypothetical situations. As a result, the defence maintains that I should find the mandatory minimum sentence to be invalid in this case.

A Fit Sentence

Victim impact

[14] Although no victim impact statements were filed, I acknowledge the likely psychological effects on the children portrayed in these images and videos. As the Supreme Court of Canada stated in ***R.*** *v.* ***Friesen***, 2020 SCC 9, at para. 48:

> Technology can make sexual offences against children qualitatively different too. For instance, online distribution of films or images depicting sexual violence against a child repeats the original sexual violence since the child has to live with the knowledge that others may be accessing the films or images, which may resurface in the child's life at any time. …

Circumstances of the Offender

[15] Mr. Welsh is 25 years of age. As indicated, he pleaded guilty to this offence. I have the benefit of two reports: a ***Gladue*** Report and a Pre-Sentence Report ("PSR"). He is a member of the Whitesand First Nation, but has lived in Watson Lake with his family for many years.

[16] Mr. Welsh's mother is a member of the Whitesand First Nation, an Ojibwa First Nation near Armstrong, Ontario. Ms. Welsh's parents both attended residential school, and it is clear that they both became addicted to alcohol. Her parents' addiction resulted in Ms. Welsh experiencing a difficult upbringing, including spending time in foster care. She struggled between the ages of 10 and 14, experimenting with drugs and alcohol.

[17] As a teenager, and to her credit, Ms. Welsh was able to extricate herself from a dysfunctional relationship with family members. She met Mr. Welsh's father when she was 15 years old, and by all accounts has been able to live in a pro-social and productive manner. As a result, Mr. Welsh grew up in a stable household. He and his partner reside with Mr. Welsh's parents.

[18] This is not to say that there have been no negative consequences to Mr. Welsh's maternal grandparents attending residential school. For example, neither Mr. Welsh nor his mother have had any real exposure to their own First Nation's culture and heritage. Even though Mr. Welsh did not have the benefit of learning and experiencing his own First Nation's culture, he has taken it upon himself to speak occasionally to a Liard First Nation Elder he has befriended. He indicates that he has always had an interest in learning about First Nation culture generally.

[19] Mr. Welsh described feeling depressed and without purpose between the ages of 16 and 20. He felt that, unlike his siblings, he did not receive adequate attention from his parents. However, subsequent to being charged with the matter before the Court, he has come to realize that his family cares deeply about him. He enjoys a good relationship with his siblings, parents, and paternal grandmother. He has been attending counselling with a Mental Wellness and Substance Use counsellor for close to two years, which he has found to be beneficial.

[20] Mr. Welsh reported being abused sexually by a member of the community as a pre-teen. This occurred in the abuser's business when it was empty. His family reported this to the local police, however charges were never laid. His family also

arranged for him to attend counselling after this disclosure. He explained to the author of the PSR that he still holds resentment towards the police as a result of the outcome of that investigation.

[21] Mr. Welsh received home schooling until grade 9. He did well in grades 10 and 11, but when the school shifted to online learning, Mr. Welsh did not pursue his studies. He has a good work history. In addition to the support of his family, he has a supportive spouse. His mother advised that she relies on his help around the house.

[22] Mr. Welsh and his family practice Judaism. His mother indicated that the family does not engage in First Nation activities.

[23] Mr. Welsh has experienced much guilt with respect to his actions, and is remorseful for the crime that he has committed.

[24] Although Mr. Welsh sought out, and has been attending counselling with a Mental Wellness counsellor, and is described as a full participant in this process, detailed information about this counselling is lacking.

Principles of Sentencing

[25] The fundamental principles of sentencing are found in ss. 718 to 718.2 of the *Code*. The important objectives in this case are denunciation, deterrence, and rehabilitation. Section 718.01 requires a sentencing judge to give primary consideration to the objectives of denunciation and deterrence for a crime that involves the abuse of a person under the age of 18 years. Section 718.2(a)(ii.1) also stipulates that abuse of a victim under the age of 18 is aggravating.

[26] The principle of proportionality is central to the sentencing process (***R.** v. **Nasogaluak***, 2010 SCC 6, at paras. 40 and 41). Section 718.1 of the *Code* mandates that a sentence be "proportionate to the gravity of the offence and the degree of responsibility of the offender". The Court in ***R.** v. **Swaby***, 2018 BCCA 416, at para. 69, found that a "…sentence should be proportionate to the circumstances of the offence, including its gravity, and the circumstances of the offender."

[27] It is also important to consider the principle of parity, that offenders in similar circumstances who commit similar offences should receive similar sentences.

[28] Nonetheless, sentencing is a highly individualized process that takes into account the nature of the offence and the offender, as well as the principles of sentencing (see ***R.*** v. ***Lacasse***, 2015 SCC 64, at para. 54; ***R.** v. **Proulx***, 2000 SCC 5, at para. 82; ***Nasogaluak***, at para. 43; and ***R.** v. **Suter***, 2018 SCC 34, at para. 4).

[29] In the case at bar, I am particularly mindful of s. 718.2(e) of the *Code*, which directs me to consider “all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders”.

[30] When dealing with Aboriginal offenders, I must also be cognizant of the principles enunciated by the Supreme Court of Canada in ***R.** v. **Ipeelee***, 2012 SCC 13, and ***R.** v. **Gladue***, [1999] 1 S.C.R. 688. The presence of ***Gladue*** factors may diminish the offender's moral blameworthiness. As stated in ***R.** v. **Sellars***, 2018 BCCA 195, at para. 33:

> ...However, the unique circumstances of Aboriginal offenders can diminish their degree of moral blameworthiness for an offence and therefore the weight to be given to those principles of sentencing.

[31] In ***R. v. Bosco***, 2016 BCCA 55, at para. 32, the Court of Appeal while considering the process of determining a fit sentence stated:

> The process of determining a sentence requires full consideration of the offence's gravity, including the harm caused, and the offender's degree of responsibility, including his or her moral blameworthiness. Moral blameworthiness is determined, in part, by considering the intentional risks undertaken by the offender. The degree of harm caused by the offence is also considered, as is the degree to which the conduct deviates from acceptable standards of behaviour… The offender's age, mental capacity or motive for offending may also bear upon his or her moral blameworthiness. The gravity of the offence concerns its circumstances, including the harm or likely harm caused to the victim, society and societal values...

Gravity of the Offence

[32] It has long been recognized that child pornography is a serious and destructive crime. In ***R. v. Inksetter***, 2018 ONCA 474, at para. 22, the Court of Appeal stated: "Child pornography is a pervasive social problem that affects the global community and its children…". In ***R. v. Sharpe***, 2001 SCC 2, the Supreme Court spoke of child pornography degrading and dehumanizing children.

[33] In ***R. v. R.L.W.,*** 2013 BCCA 50, the Court noted that courts have gained a greater appreciation of the harm caused by child pornography offences. In ***Friesen***, the Supreme Court of Canada reiterated that the Internet has "accelerated the proliferation of child pornography" (para. 47). Courts must consider the harm caused by sexual offences against children and the wrongfulness of sexual violence. Accordingly, when

applying the proportionality principle, courts must "…take into account the wrongfulness and harmfulness of sexual offences against children…" (***Friesen***, at para. 75).

[34] In the matter before me, the number of images and videos possessed by Mr. Welsh is numerous. Additionally, the images that he possessed fell into the first four of the five categories of child pornography adopted in ***R. v. Missions***, 2005 NSCA 82, at para. 14:

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

[35] In other words, certain images are highly invasive, and violate the dignity of the child victims. In my view, this is an important consideration in sentencing.

Degree of Responsibility

[36] Mr. Welsh is a young man with no prior criminal history. He was cooperative with police and entered a guilty plea. As indicated, he has a supportive family and spouse. He has been a productive member of society. He appears to be genuinely remorseful for what he has done.

[37] I also consider his background, as set out above, including his statement that he suffered abuse of a sexual nature as a child. Additionally, even though he grew up in a stable family environment, I cannot discount the fact that the residential school system had an impact on his upbringing to some degree, since it deprived him of a connection to his First Nation heritage.

[38] On the other hand, his offending behaviour is not an isolated incident, but encompasses a period of approximately 14 months during which he accumulated a significant collection of child pornography.

[39] Although Mr. Welsh's moral blameworthiness is somewhat attenuated because of his personal circumstances, it nonetheless remains high. In ***Friesen***, the Court held that "[c]ourts must take the modern recognition of the wrongfulness and harmfulness of sexual violence against children into account when determining the offender's degree of responsibility…" (para. 87).

Sentencing Case Law

[40] Courts have consistently held that possession of child pornography offences will generally result in sentences of imprisonment.

[41] In ***Swaby***, at para. 66, the Court held that, even absent a mandatory minimum sentence, a period of incarceration in possession of child pornography cases is usually warranted. The ***R.L.W.*** decision cited a range of four months to two years' imprisonment. This range of sentence was recently reiterated in ***R.*** *v.* ***Hagen***, 2021 BCCA 208, at para. 69.

[42] In a recent case in this jurisdiction, ***R.** v. **McCrimmon***, 2021 YKTC 28, at para. 55, Brooks J. considered the unchanged sentencing range from ***R.L.W.*** to ***Hagen***, and stated that although sentences for offences of this nature must increase post-***Friesen***, that increase must be seen to be incremental. In ***McCrimmon***, the Court imposed a 20-month period of incarceration followed by two years' probation for a s. 163.1(4)(a) offence. The offender possessed a very significant number of unique images and videos which were of the "…most serious kind" (para. 11). He had no criminal antecedents, a good work history, and support in the community. The Court found that he had taken successful steps to deal with the issues that led to his crime. A psychologist opined that the offender had developed empathy for his victims.

[43] In ***R.** v. **Alexander***, 2019 BCCA 100, the Court found the mandatory six-month minimum term of imprisonment in force at the time for indictable child pornography offences (s. 163.1(4)(a)) to be of no force and effect. Nonetheless, the Court upheld an eight-month jail sentence for the 25-year-old first time offender who possessed a large collection of child pornography. The images ranged from erotic posing of children to penetrative activity between children and adults. There were also some images that included bestiality and bondage. The Court had the benefit of a pre-sentence report and a psychological risk assessment, and took into account the offender's "…significant thinking and concentration problems. …" (para. 15).

[44] In ***R.** v. **John***, 2018 ONCA 702, the Court declared the mandatory six-month minimum term of imprisonment in force at the time under s. 163.1(4)(a) to be unconstitutional. The 31-year-old offender (29 at the time of the offence) suffered from serious mental health issues for which, initially, he was inadequately treated.

Subsequently, he was treated by way of psychotherapy for these issues, was employed, and was continuing counselling. His collection of 89 videos and 50 unique images of child pornography was considered to be aggravating, as it included images of very young children suffering "terrible abuse". The Court of Appeal upheld a 10-month jail sentence.

[45] The ***Hagen*** case involved a 36-year-old Indigenous offender convicted of possession of child pornography under s. 163.1(4)(a)**.** He had not learned about his Indigenous culture or practices, aside from sustenance fishing. He had experienced trauma as a child and as an adult, and reported being sexually abused by neighbours as a young boy. He expressed remorse for his crime. His counsellor indicated that Mr. Hagen was coming to understand, through treatment, the harmful effects of his offending conduct. The offender did not participate in a psychological assessment prepared for sentencing. As a result, it was difficult to assess his risk. He was diagnosed with an adjustment disorder and a possible learning disability. Despite the presence of ***Gladue*** factors, the British Columbia Court of Appeal upheld a 10-month jail sentence. The three-year probationary period was not challenged.

[46] In ***R.*** *v.* ***Capewell***, 2021 BCSC 904, the offender possessed a substantial amount of child pornography. He had no prior criminal record and had pleaded guilty. He was the primary caregiver of his disabled wife, who had mental health issues. Although he displayed insight into his offending, mental health, and treatment needs, a pre-sentence psychological assessment found that he required treatment and management. A forensic psychological expert, retained by the defence, found that the offender was at low risk to reoffend. The expert also opined that incarceration could

have a harmful effect on his rehabilitation. The sentencing judge rejected a submission for a conditional sentence, and instead imposed an eight-month term of imprisonment, followed by 18 months of probation.

[47] A recent sentencing decision involving a s. 163.1(4)(b) offence is ***R.*** *v.* ***Martin***, 2021 BCPC 195. The offender possessed 372 images and 59 videos that met the definition of child pornography as defined in s. 163.1 of the *Code*. The sentencing judge considered the volume and nature of the pornographic material as aggravating factors. The offender pleaded guilty and expressed remorse. He had taken rehabilitative steps and had community support. He did not have a prior criminal history. His offence had attracted media attention in a small community. The Court sentenced him to 10 months' incarceration followed by 12 months' probation.

[48] Courts have imposed conditional sentences for offences involving child pornography. I have already referred to the ***Swaby*** decision where the Court of Appeal held that Mr. Swaby was not a "typical" offender (para. 72). He suffered from mental health issues and significant cognitive and intellectual impairment. As a result, his moral culpability was low. Two psychologists were of the view that incarceration would negatively affect him. The Appellate Court upheld the imposition of a conditional sentence, finding that it was a proportionate sentence. The Court stated that unless a case is exceptional, offenders possessing child pornography will be incarcerated.

[49] In ***R.*** *v.* ***Doucette***, 2021 ONSC 371, the Summary Conviction Appeal Court noted that conditional sentences are rare in cases of child pornography. Although the Court acknowledged that at the time of the actual sentencing of the offender, a conditional

sentence would not have been appropriate, the matter had become an exceptional situation. The Court took into account the offender's completion of his three-year probationary term, his ongoing rehabilitative efforts, and his poor health. In this regard, the Court considered the potential negative effects of incarceration for an offender in poor health during an ongoing pandemic. The Court ordered that the remainder of the offender's sentence be served in the community.

[50] In ***R.*** *v.* ***Hawes***, 2021 ONCJ 40, the 59-year-old first time offender possessed 107 images, 92 of which were unique. The images were of children between 10 and 17 years of age. The Court indicated that the images had been described as "…minimal and moderate intrusiveness, with a primary focus on vaginal or anal images…" (para. 7). The Court considered a number of factors, including the offender's early guilty plea, his lack of a criminal record, the low number of images; his otherwise good character; his mental health issues and on-going treatment; his remorse; his expression of insight into the damage caused by his crime; and, the nature of the images. The sentencing judge imposed an eight-month conditional sentence followed by two years' probation.

Appropriate Sentence

[51] I turn now to the defence submission that a conditional sentence would be appropriate, but for the mandatory minimum penalty. The requirements for a conditional sentence are found in s. 742.1 of the *Code*. It must be a sentence of less than two years' imprisonment, which is clearly the case in this matter. I also find, on balance,

and despite the lack of a psychological assessment, that a conditional sentence would not endanger the community.

[52] I take into account the fact that Mr. Welsh is a young adult of otherwise good character, that he is genuinely remorseful, that he has engaged in general counselling, that he has been victimized, and that there are certain ***Gladue*** factors present.

[53] On the other hand, as already outlined, the offence is grave, and it perpetuates the serious harm suffered by the victims. Additionally, over a period of time, for the purpose of self-gratification, Mr. Welsh collected numerous images and videos, including those of a very serious nature. I have concluded that his moral blameworthiness is high.

[54] In the result, I do not find that a conditional sentence in this case would be consistent with the principles of sentencing, including the predominate weight which must be given to denunciation and deterrence. A conditional sentence would not satisfy the principle of proportionality.

[55] That being said, in my view, it is important to comment on the constitutionality of the mandatory minimum sentence. Despite Appellate Court jurisprudence that the mandatory minimum sentence in s. 163.1(4)(b) is unconstitutional, the Crown takes the position that as that jurisprudence pre-dates ***Friesen***, any reasonable hypotheticals previously found to be grossly disproportionate are now simply disproportionate. As such, the Crown contends that there is no violation of s. 12 of the *Charter*.

[56] In considering the reasonably foreseeable hypothetical of an offender with severe cognitive impairment who possesses a small quantity of child pornography on the low end of the *Missions* scale (i.e. images depicting erotic posing with no sexual activity), a six-month period of imprisonment would clearly be grossly disproportionate, and therefore in violation of s. 12 of the *Charter*.

[57] The Court in ***R. v. Nur***, 2015 SCC 15, commented on the vulnerability of mandatory minimum sentences because of the wide range of potential conduct captured by those provisions. Additionally, of course, there is a broad range of moral culpability of offenders.

[58] Following the reasoning of Appellate Courts, such as in ***Swaby***, in analyzing the constitutionality of s. 163.1(4), the recent decision in ***Friesen*** does not make provisions such as subsection (b) less constitutionally vulnerable.

[59] In the case at bar, in all the circumstances, I find that a jail sentence of eight months is appropriate, to be followed by a probationary period of two years. 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. Report in person to a Probation Officer within two business days of his release from custody, and, after that, he must report as and when directed by the Probation Officer;

5. Reside at a residence approved by his Probation Officer, abide by the rules of the residence, and do not change that residence without the prior written permission of his Probation Officer;

6. Attend and actively participate in all assessment and counselling programs as directed by his Probation Officer, and complete them to the satisfaction of his Probation Officer, for any issues, including but not limited to, psychological issues, and provide consents to release information to his Probation Officer regarding his participation in any program he has been directed to do pursuant to this condition.

[60] There will be an ancillary order pursuant to s. 161 of the *Code*. As submitted by counsel, this order will be for a period of five years.

[61] It shall include the terms that:

1. Mr. Welsh not seek, obtain, or continue any employment, whether or not the employment is remunerated, or become, or be a volunteer in a capacity that involves being in a position of trust or authority towards persons under the age of 16 years;

2. Additionally, he is not to have any contact, including communicating by any means, with a person who is under the age of 16 years except under the supervision of another adult; and

3. Finally, he is not to use the Internet or other digital network, unless he does so in accordance with conditions set out below.

[62] The conditions of the s. 161(d) Internet term will be as stipulated by the Court in ***R.*** *v.* ***Brar***, 2016 ONCA 724, specifically, that Mr. Welsh not use the Internet or similar communication service to access any content that violates the law; that he not access, directly or indirectly, any social media sites, social network, internet discussion forum, chat room, or maintain a personal profile on any such devices, including, but not limited to, Facebook, Twitter, Tinder, Instagram, or any equivalent or similar service.

[63] In order to ensure his compliance with this s. 161(d) order, Mr. Welsh shall, while possessing or using any such device pursuant to that order:

1. Not delete his browsing history;

2. Having consented, sign any release of information forms as will enable his Probation Officer or a peace officer to monitor his compliance with the s. 161(1)(d) order, knowing that any information obtained by the Probation Officer can be given to a peace officer; and

3. Provide the device and any password used to lock the device to his Probation Officer or a peace officer upon their request in order for him or her to monitor compliance with s. 161(1)(d).

[64] I make the following ancillary orders:

1. Pursuant to section 164.2 (4) of the *Code*, I order forfeiture of the devices on which the pornographic material was found;

2. Pursuant to s. 487.051 of the *Code*, I order Mr. Welsh to provide samples of DNA for analysis and recording. As sexual exploitation is a primary designated offence, the order is mandatory;

3. Pursuant to s. 490.012, I order that Mr. Welsh comply with the provisions of the *Sex Offender Information Registration Act*, S.C. 2004, c. 10, for a period of 10 years.

[65] Since Mr. Welsh will be in custody, I find that the victim surcharge would present a hardship and it is waived.

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CHISHOLM, T.C.J.