



**IN THE COURT OF APPEAL  
OF NEWFOUNDLAND AND LABRADOR**

**Citation:** *R. v. Trimm*, 2024 NLCA 18

**Date:** May 29, 2024

**Docket Number:** 202201H0050

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**BETWEEN:**

STEPHEN TRIMM

APPLICANT/APPELLANT

**AND:**

HIS MAJESTY THE KING

RESPONDENT

**Coram:** L.R. Hoegg, F.J. Knickle and K.J. O'Brien JJ.A.

**Court Appealed From:** Provincial Court of Newfoundland and Labrador,  
St. John's 0121A00283, 0121A01000 and  
0122PA00471

**Appeal Heard:** February 26, 2024

**Judgment Rendered:** May 29, 2024

**Reasons for Judgment by:** K.J. O'Brien J.A.

**Concurred in by:** L.R. Hoegg and F.J. Knickle JJ.A.

**Counsel for the Applicant/Appellant:** Iain R.W. Hollett

**Counsel for the Respondent:** Kathleen M. O'Reilly

**Authorities Cited:**

**CASES CITED:** *R. v. Trimm*, 2023 NLCA 13; *R. v. Bertrand Marchand*, 2023 SCC 26; *R. v. Clarke*, 2021 NLCA 8; *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089; *R. v. Friesen*, 2020 SCC 9, [2020] 1 S.C.R. 424; *R. v. Parranto*, 2021 SCC 46; *R. v. Hoben*, 2016 NLPC 0815A00164; *R. v. Barrett*, 2022 NLSC 43; *R. v. Mollon*, 2019 BCSC 423; *R. v. Lundrigan*, 2012 NLCA 43; *R. v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130; *R. v. Basso*, 2024 ONCA 168; *R. v. Alexander*, 2019 BCCA 100; *R. v. J.E.D.*, 2018 MBCA 123; *R. v. E.O.*, 2019 YKCA 9, leave to appeal to SCC refused, 38743 (28 November 2019); *Caron Barrette v. R.*, 2018 QCCA 516; *Ibrahim v. R.*, 2018 QCCA 1205; *Y.P. v. R.*, 2019 QCCA 1506; *R. v. Dyck*, 2019 MBCA 81; *R. v. Watson*, 2018 BCCA 329; *R. v. Stephenson*, 2019 ABCA 453; *R. v. Hewitt*, 2018 ONCA 561; *R. v. Barry (Charter & Sentencing)*, 2021 NLPC 0820A0060; *R. v. Boodhoo, and others*, 2018 ONSC 7207, var'd on other grounds 2022 ONCA 895; *R. v. R.J.H.*, 2020 BCSC 1070, var'd on other grounds 2021 BCCA 54, leave to appeal to SCC refused, 39626 (22 July 2021); *R. v. Milne*, 2020 BCSC 2101, rev'd on other grounds 2021 BCCA 166; *R. v. Walker*, 2021 ONSC 837, var'd on other grounds 2021 ONCA 863; *R. v. J.G.*, 2021 ONSC 1095; *R. v. Simpson*, 2021 ONSC 6032; *R. v. Mootoo*, 2022 ONSC 384; *R. v. Nassr*, 2023 ONSC 6040; *R. v. Scott*, 2023 ONSC 3023; *R. v. Shokouh*, 2023 ONSC 220; *R. v. Hughes*, 2023 ONSC 5927; *R. v. Harroff*, 2024 BCSC 318; *R. v. Gerbrandt*, 2021 ABCA 346, rev'g 2020 ABPC 261; *R. v. Schultz*, 2008 ABQB 679; *R. v. Ibrahim*, 2017 QCCQ 11203, aff'd on other grounds 2018 QCCA 1205; *Procureur général du Québec v. Terroux*, 2023 QCCA 731; *R. v. Morrison*, 2019 SCC 15, [2019] 2 S.C.R. 3; *R. v. Hutchings*, 2012 NLCA 2.

**STATUTES CONSIDERED:** *Criminal Code*, RSC, 1985, c. C-46, sections 163.1(3), 172.1(1)(b), 172.1(1)(a), 172.1(2)(a), 172.1(2)(b), 675(1)(b), 718, 724(3), 742.1, 163.1(4)(a), 163.1(4.1)(a), 163.1(2); *Canadian Charter of Rights and Freedoms*, sections 12, 1; *Constitution Act, 1982*, section 52.

**K.J. O'Brien J.A.:**

**OVERVIEW**

[1] This is a sentence appeal. Stephen Trimm was convicted of distribution of child pornography (*Criminal Code*, RSC, 1985, c. C-46, at s. 163.1(3)) and child luring (*Code*, at s. 172.1(1)(b)) following trial (*R. v. Trimm* (23 February 2022), St. John's 0121A01000 (NLPC) ("Conviction Decision")). A second charge of child

luring was judicially stayed (*Code*, at s. 172.1(1)(a)). The complainant for the offences was E.

[2] The sentencing judge sentenced Mr. Trimm to 34 months of incarceration: 12 months for distribution of child pornography and 24 months, consecutive, for child luring, reduced to 22 months based on the principle of totality. She also imposed various ancillary orders (*R. v. Trimm* (18 July 2022), St. John's 0121A01000; 0122PA00471 (NLPC) ("Sentencing Decision")).

[3] Mr. Trimm challenged the constitutionality of the mandatory minimum sentences for both offences pursuant to section 12 of the *Canadian Charter of Rights and Freedoms*. Section 12 of the *Charter* protects individuals from cruel and unusual punishment. The judge did not rule on Mr. Trimm's constitutional challenge because she found that the appropriate sentence for Mr. Trimm for each offence was not below the mandatory minimum prescribed by the *Code*.

[4] Mr. Trimm appealed his conviction and sought leave to appeal his sentence. This Court dismissed the conviction appeal in *R. v. Trimm*, 2023 NLCA 13 ("Conviction Appeal").

[5] At Mr. Trimm's request, the Court postponed hearing the sentence appeal pending the release of the Supreme Court of Canada's decision in *R. v. Bertrand Marchand*, 2023 SCC 26, which concerned two companion appeals involving convictions for child luring. In the decision, which was released on November 3, 2023, the Supreme Court determined fit and proportionate sentences for the two offenders involved. The Court also held that the mandatory minimum sentences for child luring in sections 172.1(2)(a) and (b) of the *Code* are of no force or effect under section 52 of the *Constitution Act, 1982*, because they are inconsistent with section 12 of the *Charter* and not saved by section 1.

### **Overview of the facts**

[6] Mr. Trimm met E when he joined a friend, E's aunt, babysitting at E's house. At the time, Mr. Trimm was 37 years old and E was 15 years old. Despite the 22-year age difference, Mr. Trimm and E shared interests, such as gaming and music. Additionally, both were experiencing mental health issues. They began

communicating consistently and frequently using texts, phone calls, gaming platforms and social media. They had occasional in-person meetings.

[7] The frequent electronic contact continued for approximately five months. Mr. Trimm developed feelings toward E, which he described to E's aunt as akin to those of a "jealous boyfriend". At some point, Mr. Trimm asked for, and received, pictures of E's genitals, one of which he forwarded to an adult friend.

[8] E talked to Mr. Trimm about suicide. Mr. Trimm disclosed E's suicidal ideation to his own counsellor who contacted the Department of Children, Seniors and Social Development (CSSD). CSSD contacted E's parents. As a result of this intervention, E's mother became aware of E's communication with Mr. Trimm. She contacted Mr. Trimm and asked him to stop communicating with E because she felt it was inappropriate. Mr. Trimm said he would stop. E's aunt also warned Mr. Trimm to stop contact with E. Despite saying that he would stop, Mr. Trimm continued contacting E. When E's mother learned that communication was continuing, she contacted the police. A police officer called Mr. Trimm and Mr. Trimm told the police officer that he would stop contact.

[9] Mr. Trimm persisted, however. Contact did not stop until E's mother found a text from Mr. Trimm to E that said, "When we have our hotel night some day, I can cuddle into you. I want to see if you can feel how much I care about you. I will play with your hair and rub your back for you too." (Conviction Decision, at para. 24). E's mother confronted Mr. Trimm and reported the matter to the police again. The charges were subsequently laid.

## **Issues**

[10] Mr. Trimm raises two grounds of appeal in relation to his sentence:

- a. The judge erred in law by failing to find that the mandatory minimum sentences for child luring and distribution of child pornography were grossly disproportionate and therefore a violation of section 12 of the *Charter*.
- b. The judge imposed a sentence that was demonstrably unfit.

## Summary of decision on sentence appeal

[11] For the reasons that follow, I would grant leave to appeal sentence and I would allow the appeal. I conclude:

- a. The sentence imposed by the judge for distribution of child pornography was not demonstrably unfit and she made no error in her assessment. As such, I would not interfere with the sentence of 12 months' imprisonment for distribution of child pornography.
- b. The sentence imposed by the judge for child luring was demonstrably unfit. A fit and proportionate sentence for child luring for Mr. Trimm is 12 months' imprisonment.
- c. These sentences should be served consecutively. A total sentence of 24 months' imprisonment is proportionate to the gravity of the offences and Mr. Trimm's degree of responsibility. Although Mr. Trimm asked for a conditional sentence, a conditional sentence is not consistent with the fundamental purpose and principles of sentencing in these circumstances.

[12] Additionally, I would decline to decide Mr. Trimm's *Charter* challenge of the mandatory minimum sentence of 12 months' imprisonment for distribution of child pornography. The outcome of the challenge would not impact Mr. Trimm's sentence. As well, the Supreme Court of Canada has recently granted leave to hear an appeal related to the constitutionality of the mandatory minimum sentences for two other child pornography offences, which is likely to clarify the law in this area.

## LEAVE TO APPEAL SENTENCE

[13] Mr. Trimm requires leave of the Court to appeal his sentence (*Code*, at s. 675(1)(b)). Leave will be granted unless the appeal is frivolous. An appeal is frivolous if it without arguable basis or sufficient merit (*R. v. Clarke*, 2021 NLCA 8, at para. 4).

[14] I am satisfied that the elimination of the mandatory minimum sentence for child luring and the sentences pronounced by the Supreme Court of Canada as fit and proportionate for that offence in *Bertrand Marchand* are developments in the law sufficient to render this appeal not frivolous. As such, I would grant leave.

## STANDARD OF REVIEW AND RELATED LAW ON SENTENCING

[15] Sentencing decisions attract a high level of deference. An appellate court may not intervene to vary a sentence unless the sentence is demonstrably unfit or the judge made an error of law or principle that had an impact on the sentence (*R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at paras. 11, 44; and *Clarke*, at para. 22).

[16] If a sentence is demonstrably unfit or if a judge made an error in principle that had an impact on the sentence, the appellate court must perform its own sentencing analysis to determine a fit sentence by applying the principles of sentencing afresh to the facts. In such a case, there is no deference to the existing sentence, even if that sentence falls within the applicable range (*R. v. Friesen*, 2020 SCC 9, [2020] 1 S.C.R. 424, at para. 27; and *Lacasse*, at para. 42).

[17] Demonstrably unfit is a high threshold denoting a decision that is “clearly unreasonable”, “clearly or manifestly excessive”, “clearly excessive or inadequate”, or representing a “substantial and marked departure” (*Lacasse*, at para. 52). A sentence is “demonstrably unfit” if it constitutes an “unreasonable departure” from the fundamental principle of proportionality (*Lacasse*, at paras. 52-53). The principle of proportionality requires that a sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender (*Friesen*, at para. 30; and *R. v. Parranto*, 2021 SCC 46, at para. 10).

[18] While each case and each offender is unique, a fit sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. This is known as the principle of parity. To arrive at a sentence that is in parity with other sentences, courts look at comparable sentencing decisions. The principle of parity is secondary to the principle of proportionality, but the two are not at odds with each other. This is because parity assists courts in fixing a proportionate sentence (*Parranto*, at paras. 10-11; and *Friesen*, at para. 31).

[19] In *Friesen*, the Supreme Court of Canada gave new direction on sentencing for sexual offences against children. The court made clear that sentences for sexual offences against children have been too low in Canada and need to increase to reflect the damage that sexual exploitation by adults causes to vulnerable, young victims (*Friesen*, at paras. 110-114).

## **POSITIONS OF THE PARTIES**

[20] Mr. Trimm submits that the sentences the judge imposed are demonstrably unfit.

[21] He submits that a fit and proportionate sentence for him for distributing child pornography is three to six months. He alleges that the judge erred by failing to assess the constitutionality of the mandatory minimum sentence for distribution of child pornography and that, if she had, she would have found that the minimum one-year sentence is unconstitutional for being grossly disproportionate in this case. If he is incorrect in this assertion, Mr. Trimm submits in the alternative that the one-year minimum is unconstitutional because it infringes the section 12 *Charter* rights of reasonably foreseeable hypothetical offenders.

[22] Mr. Trimm submits that a fit and proportionate sentence for him for child luring is six to nine months, consecutive to the sentence for distribution of child pornography. Because the one-year mandatory minimum sentence for child luring has now been found unconstitutional by the Supreme Court of Canada in *Bertrand Marchand*, he does not ask this Court to address the judge's failure to address his *Charter* challenge with respect to that offence.

[23] Mr. Trimm submits that the sentences imposed by the judge are demonstrably unfit primarily because they are not in parity with comparable sentencing decisions, including those considered in *Bertrand Marchand*. He also submits that the judge failed to give due consideration to mitigating circumstances, in particular, the role his mental health played in the offences and that there was no proof that E was identifiable in the photograph he distributed.

[24] The Crown submits that there is no cause for the Court to intervene because the sentences are fit and the judge made no errors. The Crown submits that the judge considered the appropriate sentencing principles and factors, and that the sentences she imposed were within the range of comparable sentences. The Crown argues that the judge adhered to the Supreme Court of Canada's guidance in *Freisen* that sentences for sexual crimes against children should attract significant sentences.

## **THE SENTENCE FOR DISTRIBUTING CHILD PORNOGRAPHY**

[25] In arriving at the sentence for distributing child pornography, the judge considered the principles of sentencing found in section 718 of the *Code* (Sentencing

Decision, at para. 11). She identified denunciation and deterrence as the primary principles in cases involving children (Sentencing Decision, at paras. 14, 18). She relied on the Supreme Court of Canada's direction in *Friesen* for increased sentences for sexual offences against children (Sentencing Decision, at para. 20).

[26] The judge also considered the circumstances of the offence and Mr. Trimm's personal circumstances, including his mental health problems (Sentencing Decision, at para. 28). The judge gave particular attention to the fact that Mr. Trimm had used his relationship with E to obtain the photograph of E's genitals. She noted the effect that Mr. Trimm's request for "hot pics" had on E. The requests (there were multiple) made E uncomfortable (Sentencing Decision, at para. 25). The judge considered that E was vulnerable and that during the five months of contact, E was admitted to hospital for mental health concerns. E's discomfort was such that he falsely told Mr. Trimm that he was hospitalized with a serious medical condition in order to distance himself from the relationship (Sentencing Decision, at para. 30).

[27] The judge considered comparable cases. She cited two cases from this jurisdiction which considered sentence ranges for distribution of child pornography: *R. v. Hoben*, 2016 NLPC 0815A00164 and *R. v. Barrett*, 2022 NLSC 43. In *Hoben*, which was decided pre-*Friesen*, the sentencing judge reviewed several precedents and concluded that sentences for distributing child pornography (or making it available to others) ranged from 18 to 24 months (para. 52). In *Barrett*, the sentencing judge reviewed cases showing a range of sentence from 15 months for possession of child pornography to 5 years for distribution of child pornography (para. 53).

[28] Ultimately, the judge found that a 12-month sentence for distribution of child pornography was appropriate for Mr. Trimm (para. 52).

### **Analysis of the judge's sentence**

[29] I agree with the Crown that the sentence of 12 months for distribution of child pornography is not demonstrably unfit, and the judge did not make any errors in principle in imposing it. I will explain why.

[30] Because Mr. Trimm alleges that the judge did not give proper attention to the parity principle, I will begin my analysis by making two points relevant to *Hoben* and *Barrett*, and the cases considered in those decisions. The first is that, notwithstanding that the lower end of the range may be affected by mandatory minimum sentences, the cases show that child pornography offences generally attract

significant imprisonment sentences (even those decided pre-*Friesen*) and that distributing child pornography is considered a more serious offence than possessing child pornography. The second point is that the sentence imposed by the judge was lower than the bottom end of the ranges considered in *Hoben* and *Barrett*.

[31] The ranges considered in *Hoben* and *Barrett* were established from offences that involved more images, and often more depraved images, than in Mr. Trimm's case. The judge recognized that Mr. Trimm distributed a single photograph that depicted E's genitals, and this explains why she decided upon a lower sentence (Sentencing Decision, at para. 42). This was reasonable and appropriate.

[32] There are few reported sentencing decisions involving the distribution of a small number of child pornography images. Before this Court, Mr. Trimm cited only one, *R. v. Mollon*, 2019 BCSC 423. In *Mollon*, two images were distributed on one occasion and the sentencing judge concluded that, absent the mandatory minimum sentence, the appropriate sentence for distribution would be six months.

[33] In sentencing Mr. Trimm, the judge did not consider *Mollon*, perhaps because the case was not cited to her. Regardless, having considered it, I would not conclude that Mr. Trimm's sentence is not in parity with Mr. Mollon's and thus demonstrably unfit. Although there are similarities between the cases (one time transmission, low number of images, no prior record), the factor that the judge considered the most aggravating for Mr. Trimm, his use of his relationship with E to get the photograph, was not present in *Mollon*.

[34] There was no suggestion in the *Mollon* decision that Mr. Mollon knew his victims. Mr. Trimm, on the other hand, fostered a relationship with a vulnerable child, emotionally manipulated him, and repeatedly asked him for "hot pics". The judge did not err by considering this as an aggravating factor in sentencing Mr. Trimm, particularly given the evidence before her about the effects on E. E testified that he sent the pictures because he was aware of Mr. Trimm's mental health problems and afraid of the consequences for Mr. Trimm if he did not send the pictures as asked (Transcript, Vol. 1, at 106, lines 11-19).

[35] Mr. Trimm submits that the judge failed to sufficiently consider the role his mental health played in the offences and the fact that he was seeking professional help to address his feelings toward E. With respect to his mental health, the judge wrote (Sentencing Decision, at para. 28):

There was also evidence that Mr. Trimm was undergoing counseling at the time of these offences and he continues with counseling at the time of sentencing. He had suffered mental health issues which required a stay at the Waterford Hospital prior to these offences. However, no medical evidence nor a pre-sentence report were made available to the court to determine the extent or nature of these issues.

[36] An offender may have a mental disability that imposes serious cognitive limitations, such that their moral culpability is reduced (*Bertrand Marchand*, at para. 73; and *Friesen*, at para. 91). Additionally, where a mental illness existed at the time of the offence and contributed to the offender's behavior, sentencing judges should consider prioritizing rehabilitation and treatment through community intervention (*Bertrand Marchand*, at para. 128; and *R. v. Lundrigan*, 2012 NLCA 43, at paras. 20-22). However, this does not mean that mental health issues are always a mitigating factor – the mental health issue must in some way contribute to the committing of the offence. Mental health issues do not give a person licence to commit crimes.

[37] Given that there was insufficient information before the judge to enable her to assess the extent or nature of Mr. Trimm's mental issues or how they may have lessened his moral culpability, I cannot find that she erred in failing to consider as mitigating Mr. Trimm's poor mental health.

[38] Finally, Mr. Trimm submits that the judge failed to sufficiently consider that there was no proof that E was identifiable in the photograph he distributed. Unquestionably, the evidence did not establish that E was identifiable in the photograph. However, the evidence did not establish conclusively that E was *not* identifiable either. Although the Crown must prove any aggravating factor beyond a reasonable doubt (*Code*, at s. 724(3)(e)), the absence of an aggravating factor is not a mitigating factor.

[39] Mitigating factors must be proven on a balance of probabilities (*Code*, at s. 724(3)). Here the judge made no finding with respect to whether E could be identified in the distributed photograph. The photograph was not in evidence. E testified that he had sent three to four "hot pics" to Mr. Trimm. The judge did not make a finding as to the exact number (Conviction Decision, at paras. 60, 63, 86). It follows that she could not make a finding as to whether E could be identified in the distributed photograph.

[40] Even if it had been established on a balance of probabilities that E was not identifiable in the photograph, this would not necessarily be a mitigating factor.

Victims of child pornography must live with unknowns. They will often never know who has seen the images, how many copies have been made, or whether they are still circulating. This may be a source of shame, fear, anger, or any number of emotions that may cause them harm for a lifetime. That they may not be identifiable in the images, either because of the nature of the image or because their appearance has changed over time, may be of little comfort to them. This is one of the reasons why the offence is so serious.

[41] In short, I would not find that the judge erred in principle in any way that impacted her assessment of Mr. Trimm's sentence for distribution of child pornography. Nor would I find that the sentence she imposed is demonstrably unfit. The judge applied the appropriate sentencing principles and considered appropriate aggravating and mitigating factors. She recognized that Mr. Trimm had distributed a single photograph, one time. She reasonably considered Mr. Trimm's moral culpability and the effects on E. The sentence is within the range of sentences for this offence and does not offend the principle of parity. Twelve months may be on the higher end of an appropriate sentence for Mr. Trimm for this offence, but it is not clearly unreasonable or manifestly excessive.

[42] As such, I would not intervene on this aspect of Mr. Trimm's sentence.

### **The *Charter* challenge**

[43] Given that she found the proper sentences for Mr. Trimm meet or exceed the mandatory minimum sentences, the judge declined to consider Mr. Trimm's section 12 *Charter* application. She was not in error. Provincial court judges are not obligated to consider the constitutionality of a mandatory minimum sentence where it can have no impact on the sentence in the case at issue. Provincial court judges are not empowered to make formal declarations that a law is of no force or effect under section 52(1) of the *Constitution Act, 1982*; only superior court judges of inherent jurisdiction and courts with statutory authority possess this power (*R. v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130, at para. 15). Judicial economy dictates that judges should not squander time and resources on matters they need not decide (*Lloyd*, at para. 18).

[44] Mr. Trimm submitted that even if there was no error by the judge in assessing his sentence, his constitutional challenge remained relevant because if the mandatory minimum sentence for distribution of child pornography was declared unconstitutional, and the Court imposed a sentence of imprisonment of less than two

years, he would be eligible for a conditional sentence pursuant to section 742.1 of the *Code*. Although this is technically true, I would not find a conditional sentence is appropriate for Mr. Trimm.

[45] A court cannot order a conditional sentence unless it is satisfied that serving the sentence in the community would be consistent with the fundamental purpose and principles of sentencing. Given the gravity of the offences, the victim's vulnerability and the effect the crimes had on the victim, and Mr. Trimm's level of moral blameworthiness, I am not satisfied that a community-based sentence would be consistent with the purposes and principles of sentencing.

[46] As a result, I do not need to decide Mr. Trimm's section 12 *Charter* challenge to decide this appeal. Nevertheless, this Court, having the jurisdiction to declare laws unconstitutional, is in a different position than the provincial court judge. Appellate courts in similar situations have sometimes exercised their discretion and considered the constitutional challenge (see e.g., *R. v. Basso*, 2024 ONCA 168; *R. v. Alexander*, 2019 BCCA 100; *R. v. J.E.D.*, 2018 MBCA 123; *R. v. E.O.*, 2019 YKCA 9, leave to appeal to SCC refused, 38743 (28 November 2019); and *Caron Barrette v. R.*, 2018 QCCA 516) and have sometimes declined to do so (see e.g., *Ibrahim v. R.*, 2018 QCCA 1205; *Y.P. v. R.*, 2019 QCCA 1506; *R. v. Dyck*, 2019 MBCA 81; *R. v. Watson*, 2018 BCCA 329; *R. v. Stephenson*, 2019 ABCA 453; and *R. v. Hewitt*, 2018 ONCA 561).

[47] Factors that appellate courts consider in exercising their discretion include: whether the issue had been fully argued on the basis of an adequate factual record, whether the court had the benefit of the lower court's reasons, the likelihood of the issue to reoccur, the need for clarity in the law, and the appropriate use of judicial resources. This is not a closed list.

[48] In this case, there is need for clarity in the law. The constitutionality of the mandatory minimum sentence for distributing child pornography has not been addressed by this Court or by the Supreme Court of Newfoundland and Labrador. A judge of the provincial court found section 163.1(3) unconstitutional in respect of the offender in *R. v. Barry (Charter & Sentencing)*, 2021 NLPC 0820A0060. In other provinces, there have been mixed results. Although most courts have found the mandatory minimum sentence unconstitutional (see e.g., *R. v. Boodhoo, and others*, 2018 ONSC 7207, var'd on other grounds 2022 ONCA 895; *Mollon*; *R. v. R.J.H.*, 2020 BCSC 1070, var'd on other grounds 2021 BCCA 54, leave to appeal to SCC refused, 39626 (22 July 2021); *R. v. Milne*, 2020 BCSC 2101, rev'd on other grounds 2021 BCCA 166; *R. v. Walker*, 2021 ONSC 837, var'd on other grounds 2021 ONCA

863; *R. v. J.G.*, 2021 ONSC 1095; *R. v. Simpson*, 2021 ONSC 6032; *R. v. Mootoo*, 2022 ONSC 384; *R. v. Nassr*, 2023 ONSC 6040; *R. v. Scott*, 2023 ONSC 3023; *R. v. Shokouh*, 2023 ONSC 220; *R. v. Hughes*, 2023 ONSC 5927; and *R. v. Harroff*, 2024 BCSC 318), some courts have upheld it (see e.g., *R. v Gerbrandt*, 2021 ABCA 346, rev'g 2020 ABPC 261; *R. v. Schultz*, 2008 ABQB 679; *R. v. Ibrahim*, 2017 QCCQ 11203, aff'd on other grounds 2018 QCCA 1205).

[49] To date, the Supreme Court of Canada has not ruled on the constitutionality of the mandatory minimum sentence for any of the child pornography offences. However, it appears that this is about to change. On April 25, 2024, the Supreme Court granted the Attorney General of Quebec leave to appeal from *Procureur général du Québec v. Terroux*, 2023 QCCA 731. In *Terroux*, a majority of the Quebec Court of Appeal held the mandatory minimum sentences in section 163.1(4)(a) (possessing child pornography) and in section 163.1(4.1)(a) (accessing child pornography) to be unconstitutional. Although possessing and accessing child pornography are at issue, not distributing it, in its leave application the Attorney General of Quebec argued that the decision could influence future cases with respect to the constitutionality of the mandatory minimum sentences for section 163.1(2) (making child pornography) and section 163.1(3) (distributing child pornography).

[50] Certainly, if the Supreme Court of Canada were to uphold the 12-month mandatory minimum sentences for possessing and accessing child pornography, it would follow that the 12-month mandatory minimum sentence for distributing child pornography would be constitutionally sound. Although if the Supreme Court were to find the sections unconstitutional it would not necessarily follow that the 12-month mandatory minimum sentence for a more serious child pornography offence would be affected, the Supreme Court's decision regarding *Terroux* will likely provide guidance for a constitutional assessment of section 163.1(3).

[51] In these circumstances, I would exercise my discretion not to consider Mr. Trimm's *Charter* challenge. This decision has no bearing on this Court's determination of a fit and proportionate sentence for Mr. Trimm. The need for clarity in the law would be better addressed, if necessary, after the Supreme Court of Canada decides the *Terroux* appeal.

## **THE SENTENCE FOR CHILD LURING**

[52] In determining the sentence for child luring, the judge relied on the same sentencing principles and circumstances of the offence and offender as she had for

distribution of child pornography, which I have reviewed at paragraphs 25 and 26 above.

[53] The judge cited this Court's decision in *Clarke* as establishing the range of sentence for child luring by way of indictment as 12 to 24 months. She continued by noting "The Court of Appeal in *Clarke* noted certain mitigating factors that are not present here – namely, a guilty plea, remorse and a positive pre-sentence report" (Sentence Decision, at para. 40). She did not otherwise explain why she considered a sentence at the top end of the cited range as appropriate for Mr. Trimm.

### **Analysis of the judge's sentence**

[54] *Clarke* was decided by this Court post-*Freisen*. So, although the Court in *Clarke* referred to an earlier Supreme Court of Canada case as determining the range, *R. v. Morrison*, 2019 SCC 15, [2019] 2 S.C.R. 3, *Clarke* affirmed that range for this province with the benefit of *Freisen's* direction. Further, although the judge did not have the benefit of *Bertrand Marchand*, the Supreme Court has affirmed the range of 12 to 24 months from *Morrison* in that decision (para. 70).

[55] In *Clarke*, this Court determined fit and appropriate sentences for a 66-year-old offender who had lured four different children, ages 12 to 15, over a period that ranged from two days to eight months. The Court determined that the appropriate sentences were 12 months for two of the charges, 14 months for the third, and 18 months for the fourth.

[56] Although the judge was correct in noting that there were mitigating factors in *Clarke* that were not before her for Mr. Trimm (guilty plea, positive pre-sentence report, and "some remorse"), there were also aggravating factors in *Clarke* that were not present for Mr. Trimm (*Clarke*, at para. 53). Notably, Mr. Clarke had encouraged one child to perform an indecent sexual act on herself and another to perform an indecent act on her sister (*Clarke*, at para. 53). Additionally, Mr. Clarke pretended to be a 16-year-old boy online and his communications with his victims were highly sexualized.

### *Fit sentences in Bertrand Marchand*

[57] In *Bertrand Marchand*, the Supreme Court of Canada determined the appropriate sentence for Mr. Bertrand Marchand to be 12 months' imprisonment. The mitigating factors were identified as a guilty plea, no prior convictions, honesty

and cooperation through the sentencing process, his age at the time of events, his stable family life, and his stable employment (paras. 72-73). The fact that Mr. Bertrand Marchand had overcome a substance use disorder was not “as mitigating” in Mr. Bertrand Marchand’s circumstances because his substance use did not overlap with the offence period (para. 73).

[58] As for aggravating factors, Mr. Bertrand Marchand’s manipulation and grooming of his victim, a 13-year-old child under the Director of Youth Protection’s care, were considered to increase his moral blameworthiness (paras. 49, 74). Also considered as aggravating were the period of luring (nearly seven months), the hundreds of messages exchanged during that time, the sexually explicit and objectifying content of the messages, and the encouragement of the victim to send explicit photos of herself (paras. 77-79).

[59] Mr. Bertrand Marchand had illegal sexual intercourse with the victim three times prior to engaging in the online communications that lead to the luring charge. Notwithstanding that the underlying offence of sexual interference had occurred three times before the start of the luring, the Supreme Court found it aggravating that Mr. Bertrand Marchand exploited the pre-existing trust he had established with the victim in his luring conduct (para. 84).

[60] Finally, the Supreme Court considered the significant age gap of nine years and the victim’s “severe vulnerability” as aggravating factors (para. 87).

[61] In the companion appeal in *Bertand Marchand*, the Supreme Court of Canada determined the appropriate sentence for H.V., who was 52 years old when he lured his 16-year-old niece and godchild using text messages over a period of 10 days. In the texts, H.V. repeatedly asked the victim to delete his communications (which were sexual in nature) and keep them to herself. H.V. suggested to the victim’s mother that the victim come work for him at the school where he was principal. On the second day of work, H.V. touched the girl’s breasts. He was prosecuted by summary conviction and ultimately pleaded guilty to and was sentenced for the child luring count, not for the secondary offence related to the sexual touching (para. 111).

[62] The Supreme Court determined that the fit and appropriate sentence for H.V. was four months’ imprisonment (para. 112).

*The judge's sentence for child luring is demonstrably unfit*

[63] A sentence at the top end of the established range for child luring is demonstrably unfit for Mr. Trimm. The sentences imposed by this Court in *Clarke* and by the Supreme Court of Canada in *Bertrand Marchand*, are at the low or lower end of the established range. For H.V., the fit sentence was less than the low end of the established range. These cases involved circumstances with similarities to Mr. Trimm's case.

[64] Of course, all of the cases reviewed above are influenced by their individual mitigating and aggravating factors. However, the gravity of Mr. Trimm's offence and the degree of his responsibility is not significantly higher than those reviewed such that a 22-month or 24-month sentence would be appropriate.

[65] Being satisfied that the sentence for child luring is demonstrably unfit, I must now perform the sentencing analysis afresh to determine a fit sentence for Mr. Trimm.

**A fit sentence for Mr. Trimm for child luring**

[66] In *Bertrand Marchand*, the Supreme Court of Canada provided a non-exhaustive list of aggravating and mitigating factors that are particularly relevant in the context of luring (paras. 72-87). I will conduct my analysis by reference to these factors, to the extent that they apply to Mr. Trimm.

*Mitigating factors*

[67] A post-sentence report was provided to the Court. The post-sentence report gives this Court information that was not available to the judge at Mr. Trimm's initial sentencing. The report discloses several mitigating circumstances: Mr. Trimm's awareness of his mental health issues, the steps he has taken to reintegrate himself into the workforce, his present awareness of his wrongful behavior, his status as a first-time offender, and his assessed low risk to reoffend.

*Post-sentence report*

[68] In 2004 when he was a university student, Mr. Trimm was the victim of a hate crime. Because of his sexual orientation, he was randomly attacked and suffered a head injury. This was a life-changing event for Mr. Trimm, severely affecting his

emotional and mental health. His assailant was prosecuted. Mr. Trimm received counselling through the Victim Services program but the financial support for his counselling was eventually exhausted and he could not afford to continue.

[69] Mr. Trimm has lived with and had the support of his parents throughout these proceedings. Unfortunately, since the post-sentence report was written, his mother has passed away. He continues to live with his father. He has a close bond with his only sibling, a half-sister, and his niece.

[70] Since he was attacked, Mr. Trimm has continued to struggle with his mental health, suffering from suicidal behavior and depression. Although he is educated and has worked as a teacher, his mental health has interfered with his ability to sustain long-term employment. He was admitted to the Waterford Hospital in 2006, 2016, and 2019. The latter admission is relevant to the present offences.

[71] Mr. Trimm met E in 2019. He developed a strong interest in having an emotionally intimate relationship with E, for which he felt guilty. The situation significantly impacted his ability to manage his mental health, and he again suffered from suicidal behavior. This led to the 2019 hospital admission. At least at that time, Mr. Trimm felt that E was unaware of his interest.

[72] Mr. Trimm was referred to the community mental health clinic of Eastern Health for counselling in the Fall of 2019. His counsellor referred him to a sexologist because he had expressed significant concern regarding his thoughts and feelings towards E. He was troubled by his growing obsession with E and knew it to be harmful for his own mental wellness and potentially harmful to E and others.

[73] Mr. Trimm disclosed to the sexologist that E had sent him a picture of his genitals and that he (Mr. Trimm) had sent the picture to a friend. The sexologist ultimately reported this information to authorities. Mr. Trimm felt very betrayed by this reporting and lost confidence in the mental health system as result. As of the time of the post-sentence report, he had not returned to any treatment or counselling.

[74] Mr. Trimm has a physical medical condition that makes sexual activity painful and challenging. He realizes that he justified the relationship he forged with E as being “safe”, because “he knew there would be no physical interaction due to his sexual/physical dysfunction” (Post-Sentence Report, at 11).

[75] At the time of the initial proceeding, Mr. Trimm was working in a government office job. Although he enjoyed the work, after he was convicted he could not continue with that job. To enhance his career opportunities in a way which he believes will be available to him despite his criminal record, he has started an online software development course.

[76] The Level of Service/Case Management Inventory (LS/CMI) tool was administered to Mr. Trimm and the results determined that his risk to reoffend was low.

*Aggravating factors*

[77] Mr. Trimm's emotional manipulation of E is aggravating.

[78] The character of the communication is also aggravating in terms of the long duration (five months), the high volume of messages sent, and the fact that some of those messages were sexual in nature, including requests for sexually explicit images. Mr. Trimm's persistence in communicating with E after receiving multiple warnings and promising to stop, is also aggravating.

[79] It is also aggravating that Mr. Trimm encouraged E to keep private a social media account in another name that he used for their communications. As noted in *Bertrand Marchand*, deceit can present itself in many forms in the luring context and is aggravating (paras. 80-81).

[80] Finally, although Mr. Trimm was not in the same position of trust as a teacher, parent, or relative, positions of trust fall on a spectrum and a relationship of trust of any kind may facilitate the commission of the luring offence (*Friesen*, at para. 125; and *Bertrand Marchand*, at para. 82). As noted in *Bertrand Marchand* at paragraph 82:

...Prior relationships can be leveraged to provide an entry, form a basis of trust, build confidence, and can make it easier to manipulate the victim — often because the offender knows more about the victim including any additional vulnerabilities, like the victim's family situation....

[81] Mr. Trimm met E through E's aunt, with whom he was a close friend. Mr. Trimm knew that E was suffering from mental health problems and vulnerable. He used this information to build trust and manipulate E. This is an aggravating factor.

[82] Finally, the significant age gap (22 years) is also aggravating.

*A fit sentence*

[83] I am satisfied that a fit and proportionate sentence for child luring for Mr. Trimm is 12 months' imprisonment.

[84] In coming to that decision, I have considered the mitigating and aggravating factors discussed above, and the parity principle, particularly with respect to the sentences enunciated in *Clarke* and *Bertrand Marchand*.

[85] Although Mr. Trimm's mental health condition does not excuse or justify what he did, I have considered that Mr. Trimm has shown some awareness of the harmfulness of his actions and insight into his behavior and has previously sought professional help. This suggests that Mr. Trimm has good prospects for rehabilitation.

[86] I have also considered that Mr. Trimm appears to inappropriately assign some blame for his present circumstances on the sexologist's reporting to authorities. According to the post-sentence report, his anger over the reporting has prevented him from getting help. To be clear, there was nothing inappropriate about the sexologist's reporting (Conviction Appeal Decision, at paras. 18-26). Mr. Trimm was charged and convicted because of his actions. Mr. Trimm's prospects for rehabilitation will improve if he gets help to deal with his anger and mental health problems (Post-Sentence Report, at 12-14).

[87] Both counsel suggested appropriate sentences for luring that were higher than the sentences they submitted as appropriate for distributing child pornography. Consequently, it may seem incongruous that I have found that a fit sentence for luring is the same as was imposed for distributing child pornography. However, two circumstances explain this result. First, this Court had information in the post-sentence report that the judge did not have at the initial sentencing. Second, having found that the sentence she imposed for distributing child pornography was not a result of error or demonstrably unfit, this Court has not revisited that sentence.

*Totality*

[88] When sentencing someone for multiple offences, the totality principle requires a judge to ensure that the sentences are, in aggregate, just and appropriate. This

involves taking “one last look at the combined sentence” to assess whether it is “unduly long or harsh, in the sense that it is disproportionate to the gravity of the offence and the degree of responsibility of the offender” (*R. v. Hutchings*, 2012 NLCA 2, at para. 84; and *Bertrand Marchand*, at para. 99).

[89] Applying the totality principle, a 24-month imprisonment sentence is just considering the circumstances of the offences, Mr. Trimm’s personal circumstances, and his moral blameworthiness.

**DISPOSITION**

[90] For these reasons, I would grant leave to appeal the sentence and allow the appeal. I would sentence Mr. Trimm to 24 months of imprisonment broken down as follows:

- a. 12 months for distribution of child pornography (*Code*, at s. 163.1(3));  
and
- b. 12 months, consecutive, for child luring (*Code*, at s. 172.1(1)(b)).

[91] I would not interfere with the ancillary orders made by the judge (Sentencing Decision, at para. 53).

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K.J. O’Brien J.A.

**I concur :** \_\_\_\_\_  
L.R. Hoegg J.A.

**I concur :** \_\_\_\_\_  
F.J. Knickle J.A.