

In the Alberta Court of Justice

Citation: R v Hijazi, 2025 ABCJ 41

Date: 20250304
Docket: 230267304P1
Registry: Calgary

Between:

His Majesty the King

- and -

Abdul-Rahman Mohamed Hijazi

Restriction on Publication

Identification Ban – See the *Criminal Code*, section 486.4.

By Court Order, information that could identify THE VICTIM must not be published, broadcast, or transmitted in any way.

NOTE: Identifying information has been removed from this judgment to comply with the ban so that it may be published.

Decision of the Honourable Justice G.D.M. Stirling

[1] Abdul-Rahman Hijazi pleaded guilty to one count of possession of child pornography contrary to section 163.1(4) of the *Criminal Code*.

[2] The issue before me is to determine a fit sentence.

[3] The mandatory minimum sentence of one year incarceration, under section 163.1(4) has been found to be unconstitutional and is of no effect (*R v Brittain*, December 4, 2018; ABQB, unreported).

[4] The Crown seeks a sentence of 18 months imprisonment followed by two years of probation. The Crown argues only a period of actual incarceration can give effect to the primary sentencing objectives of denunciation and deterrence.

[5] The Defence submits that a two year less a day Conditional Sentence Order followed by three years probation with conditions to address deterrence, while also allowing for rehabilitation and support in the community, is a fit disposition.

[6] For the reasons that follow, I impose a conditional sentence of two years less one day with very restrictive conditions, followed by three years of probation and a mandatory DNA order.

Agreed Statement of Facts

[7] An Agreed Statement of Facts, (“*ASF*”), was marked as an exhibit at the sentencing. The facts can be summarized as follows:

[8] The online search company, Google, advised the National Center for Missing and Exploited Children that one of its users had downloaded 54 images of child sexual abuse material (CSAM). The images were forwarded to the Southern Alberta Internet Child Exploitation Unit (SAICE). After further investigation, it was determined that the images had been downloaded to an internet protocol address associated with the residence of the accused where he lived with his two siblings and his mother. A search warrant was executed at the accused’s residence. The accused was in the residence when the search warrant was executed. Several electronic devices were seized.

[9] A search of the devices found 4088 images and 4 videos of child pornography across 10 devices including mobile phones, desktop computers, a laptop, and a tablet. The images and videos were written to each device on various dates between October 2018 and March 2023. The images depict all types of penetrative and non-penetrative explicit sexual activity involving children, predominantly girls between three and sixteen years old; including bondage and bestiality. A letter from the Crown later clarified that where there were images of bestiality, they were computer generated, and largely, where sex acts were being perpetrated in the images, they were either drawings or computed generated. The images of actual children were ones with children largely posing showing the vaginal or anal regions and did not depict a “great deal” of sexual acts. The other images that contained sex acts were anime or drawings. Of two videos, one was anime depicting solo masturbation, and the other was of a male masturbating to a picture of a female. The electronic devices also revealed a collection of 7281 images of fully clothed girls dancing, and 16 videos of fully clothed girls dancing.

[10] The accused admits he downloaded and possessed the images.

Circumstances of the Accused

Pre-Sentence Report

[11] A Pre-Sentence Report (“*PSR*”) was marked as an exhibit.

[12] Mr. Hijazi is 26 years old. He is not married, has no children, and is not currently in a relationship. He has no prior record. Mr. Hijazi expressed regret for his actions and feelings of shame and embarrassment. The report writer said the accused seemed to have little insight on how the offence affected the victims.

[13] The accused was born in Calgary and has two younger siblings. His father worked as manager for a grocery chain, and his mother as an immigration consultant. He described his upbringing as strict and religious. His father described the accused as a happy and obedient child, and the family as “very close”. His brother says the accused gets along with all members of the family, and he shares a close relationship with his brother and is supportive of him. The report writer says the accused appears to have been raised in a loving and supportive family, and they continue to support him, although the writer says the accused has not disclosed the details of the offence to his family. The accused described himself as empathetic, polite, and responsible. The family continues to support him, although at the time of the report, the accused had not disclosed the details of the offence to his family.

[14] The accused reported that between the age of 13 - 14, he was sexually molested daily by a second cousin who resided with his family. He and his cousin shared a room. Mr. Hijazi says he was manipulated by his cousin to make him feel as if he was consenting to the sexual abuse. He did not report the matter to the police and only as an adult did he disclose the abuse to his mother. His mother told the report writer she recalls that after the cousin stopped living with them, Mr. Hijazi began to display bouts of anger, and he became more solitary.

[15] Mr. Hijazi says he was diagnosed with ADHD in 2019.

[16] In 2022, he began having feelings that he wanted to transition his gender to female. He said he slowly became depressed about his gender. He did not want to disclose his feelings as it would lead to separation from his religious and cultural identity. Recently, he has started transitioning to a female and is taking various hormonal medications to change how he looks. He has disclosed his gender change to his mother and was confronted with mixed feelings. He has not disclosed his gender change to other members of his family as the male members of his family are very traditional, and they would most likely not accept his transition.

[17] The accused graduated from high school with average grades and then attended SAIT where he obtained several certificates in various computer programs. He is employed full time by an IT company and works from home. He spends much of his free time doing computer programming and playing video games.

[18] The accused said his goals were to complete his transition so he could become a woman. He would like to move out of the family home so that he can live freely to act and dress like a woman.

[19] The report says Mr. Hijazi has numerous strengths such as full-time employment, stability, a cooperative and respectful attitude, and support from his family. The report writer says Mr. Hijazi would benefit from counselling for his mental health as well as decision making and counselling related to sexual offending.

FAOS Report

[20] A forensic psychiatrist conducted a risk and mental health assessment, and a FAOS report was marked as an exhibit in the sentencing. Mr. Hijazi is taking medication for depression and anxiety, ADHD, and feminine hormone medications for gender transition.

[21] The report writer says that Mr. Hijazi wanted to emphasize that he was disturbed by the finding that there were Japanese anime images of bestiality and bondage in his possession. He told the writer he never sought out those images, and he wants to be clear that he found no pleasure in the images, and he would never want to see children hurt in that way. Mr. Hijazi told the report writer he feels beyond embarrassed and ashamed that those images were found on his electronic devices.

[22] Several psychometric testing tools were used in part to assess Mr. Hijazi's risk of sexual re-offending. Mr. Hijaz was assessed at a low risk to re-offend.

[23] The report writer considered whether there was a connection between Mr. Hijazi's possession of child pornography and his reported sexual abuse when he was 13 and 14. The writing in the FAOS report is unusual, and it is difficult to clearly summarize some of the findings. The report writer said as follows:

he admits guilt, remorse, repentance but never truly explains what was the drive and motivation in accessing these images and videos, ranging age wise from age 3 to age 16 of female bodies; there could be a connection with a sexual abuse he would have been victim of by an older cousin of his father when he was around 15; that could have played a role in the attraction and fixation having exerted its powerful attraction then and never left him

[24] In terms of a diagnosis of pedophilia, the report writer stated:

it is not however sufficient to make us have a clear diagnosis of pedophilia or hebephilia, but nevertheless, we could conservatively concur that he presents at least with some features of or traits of pedophilic disorder, suggested and compounded by sexual abuse on his own body when a pubescent boy...

[25] The report writer diagnosed Mr. Hijazi with gender dysphoria, ADHD, likely adjustment disorder with mixed anxiety, and depressive features.

Character References

[26] There were seven character references marked as an exhibit. Three letters were from members of his family, and the remaining four were from family friends. One of his aunts described Mr. Hijazi as having admirable character traits, a compassionate heart, and a caring nature. She says he has shown "genuine remorse" and has actively sought treatment. Mr. Hijazi's sister says that her brother has always been caring, respectful, loyal, and thoughtful of those around him. She says he has taken responsibility for the offence and has acknowledged to her that he is guilty of possessing child pornography. She says the crime is out of character and is the opposite of what her brother has always been for her. Mr. Hijazi's brother also describes the accused as a "very caring" person, and someone who is trustworthy and reliable.

[27] The letters from friends of Mr. Hijazi or friends of his family describe Mr. Hijazi as someone who is sensitive and caring. He is described as gentle, polite, and always helping other people or his family. Most of the references referred to him as reliable, kind, helpful, trustworthy, and devoted to his family.

Letter from Calgary Correctional Centre

[28] There was marked as an exhibit a letter from the Director of the Calgary Correctional Centre. The Director indicated the institution has multiple placement options available to accommodate transgender inmates, and transgender inmates have successfully integrated into both protective custody and general population living units.

Letter from Therapist

[29] A letter from a therapist who specializes in sexual offender treatment and who has been employed by FAOS in the Sex Offender Maintenance group was marked as an exhibit. The letter indicated Mr. Hijazi has attended 5 sessions with the therapist. His attendance was described as problematic, but when he attended, Mr. Hijazi was described as “active and engaged in the therapeutic process”

Position of the Crown

[30] The Crown refers to *R v Friesen*, 2020 SCC 9, (“*Friesen SCC*”) that sentencing courts must take into account the wrongfulness and harmfulness of sexual offences against children when applying the proportionality principle. The Crown says Mr. Hijazi’s moral culpability is high and argues that there is nothing in his background of ADHD, sexual abuse. or gender dysphoria to indicate he was incapable of understanding the profound wrongfulness of his criminal behaviour. The Crown refers to *R v Gerbrandt*, 2021 ABCA 346, which affirmed that issues related to mental disorder or the cognitive function to be considered in mitigation must be relevant to the commission of the offence and show an incapacity of the accused to appreciate the wrongfulness of their conduct. There is no evidence that Mr. Hijazi suffered from any disorder that affected his ability to appreciate the wrongfulness of his conduct.

[31] The Crown cites *R v McDowell*, 2023 ABPC 59, that society’s understanding of the profound harm caused to children who are victims of sexual abuse has evolved. *Friesen* and section 718.01 of the *Criminal Code* direct that when sentencing for child sexual offences, the court shall give primary consideration to the objectives of denunciation and deterrence. The Crown refers to the aggravating factors identified in *R v Kwok*, 2007 ONSC 2942. The aggravating features are the high moral blameworthiness of the accused, the duration of the offending, the amount of material possessed, the nature of the material, and the age of the children depicted. The mitigating feature is the guilty plea. The absence of a prior criminal record should be given little weight in mitigation as the offending behaviour occurred over a three-year period before the accused was charged. While other sentencing principles are to be considered and applied, they are to be given less weight when imposing sentences for sexual offences involving children.

[32] The Crown argues a Conditional Sentence Order is only available in exceptional circumstances in cases involving the possession of child pornography. The Crown cites *R v M.M.*, 2022 ONCA 441, that those who commit sexual offences against children must understand that carceral sentences will ordinarily follow, and that conditional sentences for sexual offences against children will only rarely be appropriate (paras 15-16). Absent “truly exceptional circumstances”, the sentencing goals of denunciation and deterrence demand a sentence of imprisonment. The Crown argues there is nothing exceptional about Mr. Hijazi’s circumstances that warrants the imposition of a Conditional Sentence Order.

[33] The Crown submits that a fit sentence that takes into account the aggravating and mitigating factors and the accused's circumstances is 18 months imprisonment followed by 24 months probation.

Position of the Defence

[34] The Defence accepts that in sentencing for child sexual offences, the court must give primacy to denunciation and deterrence. The Defence says that a 24-month Conditional Sentence Order with 24 hours-a-day house arrest followed by three years of probation, where the accused is subject to a curfew for one year, gives appropriate weight to denunciation and deterrence, and gives effect to other fundamental sentencing principles including restraint and rehabilitation. The Defence cites *R v McCormick*, 2006 ABCA 410, that restrictions on an accused's liberty in either a Conditional Sentence Order or Probation Order is a continuing form of punishment.

[35] The Defence argues that the accused's moral culpability is reduced by the fact he was the victim of sexual abuse while he was a child. The Defence refers to the FAOS report where Dr. Morrison states that the sexual abuse he experienced in his teens may have played a role in the attraction he has to child pornography. The Defence refers to the comments in *R v S. (W.B.)*, 1992 CanLII 2761 (AB CA), at paragraph 8, that one of the consequences of child sexual abuse is that the victim as an adult may abuse a child sexually. The Defence refers also to the statement in *Friesen SCC*, at paragraph 81, that the children who are subjected to sexual abuse may be more prone to engage in sexual violence against children themselves when they reach adulthood (para. 81). In subsequent written argument on this issue, the Defence referred to several other authorities that support its argument that the fact an accused was subject to sexual abuse as child can be a mitigating factor, or a factor that reduces the moral blameworthiness in offences involving child sexual abuse. Some of those authorities are discussed in more detail below.

[36] The Defence argues that there is no list of exceptional circumstances that must exist for a Conditional Sentence Order to be a fit disposition for possession of child pornography. Sentencing is highly individualized, and the offence and the nature of the offender exists on a nuanced continuum of conduct and moral culpability. Here, the circumstances are exceptional enough to warrant a conditional sentence. The accused was sexually abused for an extended period by his father's cousin. The accused has gender dysphoria and is on medication to transition to a female. While the accused's medications can be continued in custody, the accused will face difficult circumstances for someone transitioning to female to be housed with male inmates. The accused is 26 and was 21 to 24 at the time of his offending behaviour. He is youthful, and the court should exercise restraint for a youthful first-time offender. The court should consider the least restrictive sanction, short of jail, that still gives effect to denunciation and deterrence.

[37] In terms of aggravating and mitigating factors, the accused possessed 4088 images, and 2 discrete videos. Given the ease and speed at which images can be downloaded, the size of a collection may not necessarily be a useful "yardstick" for weighing the culpability of the accused. The images were not catalogued or organized. Except for one image, all of the images involving portrayals of bestiality, bondage, or penetrative sex involved anime or other computer-generated images. Except for two images, real children were not abused to produce the pornographic images. The accused has expressed remorse, he has undertaken counselling, he has pleaded guilty, he has no prior record, and he has the support of his family and community who

are aware of his offending conduct. The accused has been assessed at a low risk to re-offend. In considering all these factors, a conditional sentence is a fit and proportionate disposition.

Legal Framework

Fundamental Purpose of Sentencing

[38] As set out in section 718 of the *Criminal Code*, the fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect of the law and maintenance of a just, peaceful, and safe society by imposing just sanctions that have one or more of the objectives of denouncing unlawful conduct and harm done to victims, deterring the offender and others from committing offences, separating offenders from society where necessary, assisting in rehabilitating offenders, providing reparations for harm done to victims or the community, and promoting a sense of responsibility in offenders and acknowledgement of the harm done to victims or the community.

[39] Under section 718.1, it is a fundamental principle of sentencing that the sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[40] As stated in *R v Lacasse*, 2015 SCC 64 (CanLII), [2015] 3 S.C.R. 1089, (“*Lacasse*”):

...proportionality is the cardinal principle that must guide appellate courts in considering the fitness of a sentence imposed on an offender. The more serious the crime and its consequences, or the greater the offender’s degree of responsibility, the heavier the sentence will be. In other words, the severity of a sentence depends not only on the seriousness of the crime’s consequences, but also on the moral blameworthiness of the offender. (para 12).

[41] As in every sentencing, the sentencing judge must take into account all of the principles of sentencing articulated in section 718 of the *Criminal Code* including the principles set out in section 718.2, that is, a sentence should consider any aggravating or mitigating circumstances.

[42] Section 718.01 provides that when a Court imposes a sentence for an offence that involves the abuse of a person under the age of 18 years, it shall give primary consideration to the objectives of denunciation and deterrence.

[43] Under section 718.2(a)(ii.1), it is statutorily aggravating that the offender in committing the offence, abused a person under the age of 18 years.

Sexual Offences Involving Children

[44] In *Friesen SCC*, the Supreme Court provided guidance to trial judges in sentencing for sexual offences involving children:

...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. (para 9)

[45] *Friesen SCC* involved a charge of sexual interference, but the principles outlined in *Friesen* are relevant in sentencing for other sexual offences against children (para 44).

[46] The Court directed that in determining a fit sentence, sentencing judges must “properly understand the wrongfulness of sexual offences against children and the profound harm that they cause.” (para 50)

[47] *Friesen SCC* emphasized that 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.” (para 90)

[48] The primacy of the sentencing objective under section 718.01 prescribes a relative ordering of sentencing objectives with denunciation and deterrence being of primary importance. The sentencing judge’s discretion is limited such that “it is no longer open to the judge to elevate other sentencing objectives to an equal or higher priority”. (para 104)

[49] In brief, *Friesen SCC* directs sentencing judges that there should be an upward departure from previous sentences for sexual offences involving children. “To respect Parliament’s decision to increase maximum sentences, courts should generally impose higher sentences than those sentences imposed in cases that preceded the increases in maximum sentences.” (para 100)

[50] Having said this, the Court also noted that its comments on the seriousness of sexual offences against children, and the primacy of denunciation and deterrence, is not a direction to sentencing judges that all other sentencing principles are to be ignored.

[51] The Court stated at para 104:

However, while s. 718.01 requires that deterrence and denunciation have priority, nonetheless, the sentencing judge retains discretion to accord significant weight to other factors (including rehabilitation and *Gladue* factors) in exercising discretion in arriving at a fit sentence, in accordance with the overall principle of proportionality (see *R v Bergeron*, 2013 QCCA 7, at para. 37 (CanLII)). [See also para 91]

Parity

[52] Section 718.2(b) of the *Criminal Code* provides that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.

[53] Again, *Friesen SCC* provides direction to trial judges on giving effect to the principle of parity. “Parity and proportionality do not exist in tension; rather, parity is an expression of proportionality. A consistent application of proportionality will lead to parity. (para 32)

[54] In giving effect to parity, the Court is guided by prior decisions. At the same time, sentencing is an individualized process and as stated in *R v Parranto*, 2021 SCC 46, (“*Parranto*”) “parity is secondary to proportionality”.

Other Sentencing factors

Sexual abuse of the accused

[55] The accused reported that when he was 13-14, he was sexually assaulted daily by his father's cousin who shared a room with him. He said he was made to feel as if he co-operated in the abuse. His mother was only advised of the abuse when Mr. Hijazi became an adult. His mother reports that after the cousin stopped living with them, she noted a change in the accused's behaviour and he displayed bouts of anger and became solitary.

[56] The Supreme Court and Courts of Appeal have recognized that sexual abuse of an accused while a child can be an important mitigating factor. In *Friesen SCC*, at paragraph 174, the Court commented on factors considered by the sentencing Judge:

We share the Court of Appeal's view that Judge Stewart properly weighed the mitigating factors. Friesen is a relatively youthful first offender and he experienced a traumatic and painful childhood involving physical, emotional and sexual abuse. Judge Stewart was right to recognize these as "important" mitigating factors and to identify how Friesen's traumatic and abusive upbringing could "shed some light" on his actions (A.R., at p. 2). However, Judge Stewart had to weigh these against the aggravating factors and the need to prioritize denunciation and deterrence as well as separation of Friesen from society because of the high risk he posed to children. This all supported a reasoned and principled basis to impose a substantial custodial term.

[57] In *R v Jongsma*, 2021 ONSC 796, the accused pleaded guilty to one count of possession of child pornography. He had been sexually abused as a child. The court considered this as a relevant factor in imposing a conditional sentence instead of a period of jail. At paragraphs 40-42 the court stated:

[40] Most importantly for this argument, the Court recognized that victims of sexual abuse might become abusers themselves. At para. 64, the Court said:

In particular, children who are victims of sexual violence may be more likely to engage in sexual violence against children themselves when they reach adulthood ... Sexual violence against children can thus fuel a cycle of sexual violence that results in the proliferation and normalization of the violence in a given community. [Emphasis added; citations omitted.]

[41] This raises the delicate and difficult issue of determining how to factor in a history of sexual abuse as a child on the part of an accused when sentencing them for sexual offences involving children. In *Friesen*, the appellant had been physically and sexually abused as a child and later worked in the sex trade. The judge in the first instance said these were important mitigating factors that could shed some light on his actions. But the aggravating factors, the need for denunciation and deterrence and the need to separate Friesen from society because of the high risk he posed to children all required a substantial custodial sentence. The Supreme Court of Canada approved this approach.

[42] Clearly, in sentencing a sexual offender their own history of sexual victimization and abuse is relevant and must be considered. Such a history

directly impacts on their degree of responsibility for their offences. Relevant considerations here would include: (a) the nature and duration of the sexual abuse suffered by an accused; and (b) the nature and duration of the sexual abuse he committed and (c) any causal connection that might be drawn to the abuse he has suffered.

[58] See also *R v R.M.D.*, 2014 BCCA 56, and *R v T.F.*, 2019 SKCA 82, where the fact that the accused was subjected to sexual abuse as a child was treated as a mitigating factor.

[59] In short, courts have recognized that one of the harms of child sexual abuse is that the child victim may, as an adult, be more prone to engage in sexual violence against children (*Friesen SCC* para 81). Having recognized that child sexual abuse may in turn beget child sexual abuse, the sexual abuse of the accused as a child is a factor to be weighed in mitigation of sentence.

Anime and Computer-generated Images

[60] Most of the images possessed by Mr. Hijazi were computer generated. All but one of the images depicting penetrative sexual acts was anime or otherwise computer generated. There is some limited case law in Alberta that suggests possession of computer-generated child pornography may warrant a sentence that is lower than those imposed for possessing images of actual children.

[61] In *R v Chin*, [2005] A.J. No. 1712 (unreported), an oral decision by Justice Tilley, the accused pleaded guilty to importing child pornography. The accused had imported 15 anime-style magazines from Japan, and no real images were contained therein. In response to the joint submission by counsel for a 12-month Conditional Sentence Order, Justice Tilley commented:

Well, were it not for the fact that these are cartoon-like drawings that do not involve the actual exploitation of children, I would have a great deal of difficulty with the joint submission not involving actual gaol time. But given the nature of the material and the fact that it does not involve the actual exploitation of children, I am prepared to go along with the joint submission and accordingly order that Mr. Chin be sentenced to a term of imprisonment of 12 months but I will allow that sentence to be served in the community in accordance with the following terms and conditions (at para 75).

[62] Similar comments were made in *R v Ellis*, [2024] O.J. No. 1161 and *R v Mahannah*, [2013] O.J. No. 6330. In *Ellis*, in commenting on the effect of possessing anime child pornography, the Court stated at paragraph 17 in part:

Where real photographs and videos are created, the production of the material itself entails the sexual abuse of children. That element is missing in the anime context, however, the production, dissemination, and consumption of this material is harmful in that, as noted earlier, it seeks to promote and normalize sexual relations between adults and children.

[63] The harm inflicted by the anime pornography is that it can be seen as normalizing sexual behaviour in the images' depictions. However, while not a mitigating factor, the possession of primarily anime child pornography may place an accused at the lower end of the sentencing

range than those who are guilty of possessing images and videos of real children, as those cases involve harm to actual children.

Comparator Cases

[64] In *R v Moller*, 2012 ABCA 381, (“*Moller*”), the Alberta Court of Appeal commented on the “limited utility of attempting to identify a fit sentence through reviewing a number of cases for the same offence, but with an otherwise wide range of facts and mitigating and aggravating factors.” See also *R v Kollie*, 2021 ABCA 389, (“*Kollie*”) where the court states “there is no perfect comparator” (para 30).

[65] I have considered the following sentencing decisions referred to me by the Crown and Defence:

[66] *R v Friesen*, 2020 SCC 9; *R v McDowell*, 2023 ABPC 59; *R v Jonat*, 2019 ONSC 1633; *R v Harvey-Pike*, 2018 ABPC 266; *R v Kwok*, 2007 ONSC 2942; *R v Gerbrandt*, 2021 ABCA 346; *R v San Gabriel*, 2022 ABCA 238; *R v Nalla Naidu*, November 30, 2023, ABKB (unreported); *R v M.M.*, 2022 ONCA 441; *R v C.T.*, 2024 ABKB 155; *R v Rathwell*, 2021 ABPC 254; *R v Borchert*, 2023 ABKB 647; *R v Stumpf Allen*, April 24, 2023, ABKB (unreported); *R v Rozell*, 2023 ABKB 527; *R v Biovin*, June 30, 2023, ABCJ (unreported); *R v Cook*, 2023 ABCJ 258; *R v Tarleton*, 2023 ABCJ 274; *R v Friesen, Daniel*, 2022 ABPC 129; *R v Friesen, Derek*, 2022 ABPC 130; *R v Friesen, Keone*, 2021 ABPC 223; *R v Friesen, Keone*, 2022 ABCA 147; *R v King*, 2020 ABPC 219; *R v Courtepatte*, November 22, 2021, ABPC (unreported); *R v Bultmann*, 2022 ABPC 106; *R v S.B.*, 2022 ONCJ 536; *R v C.W.C.L.*, 2022 BCPC 54; *R v Mitchell*, 2021 BCPC 246; *R v Doucette*, 2021 ONSC 371; *R v Jenkins*, 2021 PESC 6; *R v Bisson*, 2020 BCSC 1778; *R v HF*, 2021 ABPC 68.

[67] The sentencing range for possession of child pornography, where there is a guilty plea, and the accused has no prior criminal record, typically involves a period of incarceration of 6 to 18 months. There are sentences imposed that are outside of this range where the circumstances are either more mitigating or aggravating. Courts have imposed a Conditional Sentencing Order or intermittent sentence where there are notable mitigating factors or reduced moral culpability or where “exceptional” circumstances exist.

Availability of Conditional Sentence Order

[68] Under section 742.1, if the offence is one in which a conditional sentence is permitted, a Court may impose a Conditional Sentence Order if it is satisfied that service of the sentence in the community would not endanger the safety of the community, and the Conditional Sentence Order would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2.

[69] In *Proulx*, the Court held that the focus at the first stage of the analysis is “on the risk posed by the individual offender while serving his sentence in the community”.

Risk to the Community

[70] Mr. Hijazi was subject to several psychometric tests and was assessed by Dr. Morrison as at low risk to re-offend. Mr. Hijazi has extensive family and community support. His parents

attended the sentencing and are aware of his offending behaviour. He continues to reside with his parents, and they continue to support him as does his siblings.

[71] I am satisfied that if Mr. Hijazi was to serve his sentence in the community under extended house arrest and other restrictive conditions, and there were conditions associated with assessment treatment and counselling, such a sentence would not endanger the safety of the community.

Conditional Sentence Order and Fundamental Purposes of Sentencing

[72] The primary issue is whether a Conditional Sentence Order would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 - 718.2.

[73] In *Proulx*, the Court held that where a combination of both punitive and restorative objectives may be achieved, a conditional sentence will likely be more appropriate than incarceration (see para 113).

“Where punitive objectives such as denunciation and deterrence are particularly pressing, such as cases in which there are aggravating circumstances, incarceration will generally be the preferable sanction. This may be so notwithstanding the fact that restorative goals might be achieved by a conditional sentence.” (see *Proulx* para 114).

[74] In most sentencing cases involving possession of child pornography decided after *Friesen SCC*, courts have held that to give effect to the primacy of denunciation and deterrence, a period of actual incarceration is required.

[75] Two cases cited by the Crown from the Alberta Court of Appeal provide additional guidance on the availability of a Conditional Sentence Order for child pornography offences.

[76] *R v Gerbrandt*, 2021 ABCA 346, (“*Gerbrandt*”), involved an appeal of a Provincial Court decision where a suspended sentence was imposed after guilty pleas to one count of possession of child pornography and one count of making available child pornography. The accused possessed 4,321 images, and 679 videos of child pornography and was involved in extensive sharing of the pornographic material. The accused suffered from reduced cognitive capacity, but the Court found no significant relationship between the lack of cognitive capacity and the offender’s degree of responsibility. In imposing a two-year concurrent jail sentence on each count, the Court noted the gravity of the offences (possession and making available child pornography), has been “reinforced time and again” citing *R v Sharpe*, 2001 SCC 2, (“*Sharpe*”), and that the considerations in *Sharpe* were carried forward in *Friesen*.

[77] At para 96 the Court stated:

As for the role of the courts, *Friesen* was equally unambiguous. It is “not sufficient for courts to simply state that sexual offences against children are serious. The sentence imposed must reflect the normative character of the offender’s actions and the consequential harm to children and their families, caregivers and communities. (Citing *Friesen* at paragraph 76).

[78] In *R v Friesen*, 2022 ABCA 147 (“*Friesen ABCA*”), the Court upheld a Conditional Sentence Order of 24 months less a day followed by two years probation on one count of possession of child pornography. The accused was youthful at 21 years old. He grew up in a

dysfunctional family and was sexually abused during his childhood. His mother became addicted to opioids and died of a drug overdose. The offence was widely reported, and the accused suffered public humiliation and the loss of a promising music career. The accused had undertaken extensive treatment and counselling and had developed insight into his offending behaviour and was found to be at a low risk to reoffend. In light of the numerous mitigating factors, and the fact that denunciation and deterrence had been partially served by the public humiliation and loss of career suffered by the accused, a Conditional Sentence Order was a fit disposition.

[79] In *Friesen (ABCA)*, the Court found *Friesen (SCC)* does not categorically rule out a Conditional Sentence Order in every case of possessing child pornography. Rather, the question is whether a Conditional Sentence Order in the circumstances of a particular case, is disproportionately lenient and fails to adequately promote the objectives of denunciation and deterrence. (para 51)

Aggravating and Mitigating Factors

[80] *Kwok* sets out a useful framework of factors to consider in sentencing for possession of child pornography. The *Kwok* framework has been applied by courts in Alberta (see for example *R v Downing*, 2018 ABPC 257).

Criminal Record for Similar or Related Offences

[81] Mr. Hijazi has no prior criminal record.

Involvement in production, the distribution of child pornography.

[82] Mr. Hijazi has not been involved in making or distributing child pornography.

The Size of the Collection

[83] Mr. Hijazi had 4,088 images and 4 videos (2 discrete videos and 2 duplicates). The size of the collection is significant.

The Nature of the Collection

[84] The English Court of Appeal in *R v Oliver*, [2002] EWCA Crim 2766 (“*Oliver*”), adopted a five-step categorization of child pornography. Canadian courts have applied this scheme to categorize the severity of child pornography. See for example: *R v Jonat*, 2019 ONSC 1633, (“*Jonat*”).

[85] The *Oliver* scale is as follows:

- (i) Images depicting erotic posing with no sexual activity;
- (ii) Sexual activity between children, or solo masturbation by a child;
- (iii) Non-penetrative sexual activity between adults and children;
- (iv) Penetrative sexual activity between children and adults;
- (v) Sadism or bestiality.

[86] Mr. Hijazi’s collection consisted primarily of images in category (i). There were some computer-generated images in category (iv) and (v) of the *Oliver* scale.

The Extent to which the Offender is Seen as a Danger to Children.

[87] Mr. Hijazi is assessed at a low risk to re-offend.

Whether the Offender Purchased the Material

[88] There is no evidence Mr. Hijazi purchased child pornography.

Mitigating Factors

The Youthful Age of the Offender

[89] Mr. Hijazi was 21 - 24 years old at the time of the offence. He is relatively youthful.

Otherwise Good Character

[90] Mr. Hijazi has no prior criminal record. Although *Kwok* identifies previous good character as a factor to be considered, the Alberta Court of Appeal in *R v Arcand*, 2010 ABCA 363, (“*Arcand*”), found that “good character evidence has limited application as a mitigating factor in sexual offences”. However, in *R v Bertrand Marchand*, 2023 SCC 26, a case that involved a charge of prolonged and abusive child luring and a charge of sexual interference, the Supreme Court held that the absence of a criminal record was a “significant” mitigating factor.

The Extent to which the Offender has shown insight into his problem

[91] The Pre-Sentence report states that Mr. Hijazi expressed shame and embarrassment for the offence, but appeared to have little insight into how his conduct affected the victims. The FAOS report indicates Mr. Hijazi expressed deep regret for his conduct. He also indicated to Dr. Morrison that he was really bothered by the fact he possessed anime that depicted bondage and bestiality. He said he had never sought out those images, and he felt ashamed and disgusted that he possessed the images. He stated he found no pleasure or satisfaction in this, and he would never want to see any humans harmed, and “children are the last people I would want to see harmed”.

Whether the Offender has demonstrated genuine remorse

[92] See comments in paragraph 94.

Whether the offender is amenable to, or has taken counselling or treatment

[93] Mr. Hijazi has attended counselling and is amenable to ongoing counselling.

The existence of a guilty plea

[94] Mr. Hijazi pleaded guilty at an early stage.

Conclusion

[95] Possession of child pornography is a grave offence. The primary sentencing objective is denunciation and deterrence. It is not open to a sentencing judge to elevate other sentencing objectives to an equal or higher priority. Denunciation and deterrence are most effectively achieved by actual incarceration.

[96] There are several aggravating features here. The offending conduct occurred over a nearly three-year period. The size of the collection of over 4000 images is significant. Some of the images depicted anime images of bestiality and bondage.

[97] The mitigating facts include that Mr. Hijazi is relatively young. He is a first-time offender. He has been diagnosed as a low risk to re-offend. He pleaded guilty at an early stage. He has expressed remorse for his conduct. He has undertaken counselling on his own volition.

[98] There are some features here, each of which on their own may not be atypical, but in totality are unusual.

[99] Mr. Hijazi was sexually abused by a family member almost daily for about a year when he was 13-14. The abuse included penetrative sex. Dr. Morrison in the FAOS report states the abuse “could have played a role” in his attraction to child pornography. Canadian courts have recognized there can be a causal link to sexual abuse as a child and perpetrating child sexual abuse as an adult.

[100] Almost all of the images were computer generated, and all but one of the images involving sexual activity and the images of bondage and bestiality were anime or computer generated. As noted earlier, the possession and dissemination of computer-generated images of child sexual activity is grave conduct as it contributes to normalizing the sexual abuse of children. However, the act of creating such images does not involve the same harm caused in the creation of child pornography involving the abuse and depiction of actual children. I find in the specific circumstances of this case that the sentence to be imposed for the possession of computer-generated images should be lower than the sentence that would be imposed for possession of similar images involving actual children.

[101] Mr. Hijazi is transitioning to a female. The director of the Calgary Correction Centre confirms that the incarceration of transgender accused can be successfully accommodated in the penal system. Having noted this, it likely will be challenging and create greater hardship for Mr. Hijazi, who is transitioning to a female, to be housed in a male prison.

[102] Mr. Hijazi continues to have the support of his parents, members of his extended family and family friends. He has been on release for nearly two years and complied with all of his release conditions. He has expressed remorse for his conduct. He has taken and is willing to continue to take counselling to address his criminal conduct. He is continuing to take medication to transition to a female and is under the care of a doctor for this aspect of his health.

[103] The Crown is seeking a period of 18 months incarceration. In considering all of the sentencing principles discussed above I find in the specific circumstances of this case a conditional sentence of two years less a day with house arrest for the entire period would give effect to the primary sentencing objectives of denunciation and deterrence. The conditional sentence would be six months longer than the jail sentence sought by the Crown. A conditional sentence would also give effect to secondary sentencing principles of restraint and rehabilitation

[104] The accused will also be required to perform 240 hours of community service within the first 18 months of the Conditional Sentence Order. The conditional sentence will be followed by three years of probation. The accused will be subject to a curfew for the first 12 months of the probation order and other terms set out at the sentencing hearing.

[105] Mr. Hijazi will be required to provide his DNA pursuant to section 487.051 (1) of the *Criminal Code*.

SOIRA Order

[106] The Crown seeks a 20-year Sex Offender Information Registration Act (SOIRA) order under section 490.013(2)(b). The defence opposes the imposition of a SOIRA order.

[107] Under section 490.012 (3), there is presumption that a SOIRA order will be issued unless the accused can show that:

- (a) there would be no connection between making the order and the purpose of helping police services prevent or investigate crimes of a sexual nature by requiring the registration of information relating to sex offenders under that Act, or
- (b) the impact of the order on the person, including on their privacy or liberty, would be grossly disproportionate to the public interest in protecting society through the effective prevention or investigation of crimes of a sexual nature to be achieved by the registration of information relating to sex offenders under that Act.

[108] Section 490.012(4) of the Criminal Code sets out a list of factors that must be considered in determining whether to impose an order under subsection (3):

- (a) the nature and seriousness of the designated offence;
- (b) the victim's age and other personal characteristics;
- (c) the nature and circumstances of the relationship between the person and the victim;
- (d) the personal characteristics and circumstances of the person;
- (e) the person's criminal history, including the age at which they previously committed any offence and the length of time for which they have been at liberty without committing an offence;
- (f) the opinions of experts who have examined the person; and
- (g) any other factors that the court considers relevant.

[109] In considering the foregoing factors, the offence is serious, but for the reasons stated earlier, the possession of computer-generated images is in the particular circumstance of this case less serious than the possession of images of actual children. Mr. Hijazi has no criminal record. He has complied with all of the terms of his release. He is assessed by an expert at a low risk to re-offend. He is a person of otherwise good character. In considering all of these factors, I find there would be no connection between making a SOIRA order and the purpose of helping police services to prevent or investigate crimes of a sexual nature. As a consequence, Mr. Hijazi is not required to register under SOIRA.

Dated at the City of Calgary, Alberta this 4th day of March, 2025.

G.D.M. Stirling
A Justice of the Alberta Court of Justice

Appearances:

Jennifer Rees, KC
Carolyn Ayre
for the Crown

James F. McLeod
for the Accused