PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. d'Eon*, 2017 NSPC 22

Date: 2017-04-07
Docket: Yarmouth No. 2964964, 2964965, 2964966, 3015466, 3015467
Registry: Yarmouth

Between:

Her Majesty the Queen

v.

Jacque Alain d'Eon

LIBRARY HEADING

Restriction on Publication:
PUBLISHERS OF THIS CASE PLEASE TAKE NOTE
that section 486.4(1) of the **Criminal Code** applies and may require editing of this Judgment or its heading before publication.

Editorial Notice:	**The electronic version of this decision has been modified to remove identifying information**
Judge:	The Honourable Judge James H. Burrill, JPC
Heard:	March 7, 2017 and April 4 & 7, 2017 in Yarmouth, Nova Scotia
Written Decision:	June 1, 2017
Subject:	Sentencing, Joint Recommendation
Summary:	**Accused pled guilty to Making Child Pornography, Possession of Child Pornography, and Breach of Probation. Counsel presented a joint recommendation to the court for a total sentence of two years less a day plus probation. Counsel agreed that the accused should be given credit for time served on a 1.5:1 basis.**
Issue:	(1) Whether Joint Recommendation should be imposed.

applying the principles set out by the SCC in R v Cook.

Result: Joint Recommendation rejected and the accused sentenced to 42 months for the Offence of Making Child Pornography, 6 months concurrent for Possession of Child Pornography and 2 months concurrent for Breach of Probation. Credit for remand time given as recommended by counsel.

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Judge:	The Honourable Judge James H. Burrill, JPC,
Heard:	March 7, 2017 & April 4 & 7, 2017, in Yarmouth, Nova Scotia
Decision	April 7, 2017 (orally) June 1, 2017 (written)
Charge:	Section 163.1(2) CC, Section 163.1(4) CC, Section 733.1(1) CC, Section 733.1(1) CC, Section 733.1(1) CC
Counsel:	Richard W.P Murphy, QC, Colleen Hepburn, Dell C. Wickens, QC, for the Prosecution David Curry, for the Defendant

PUBLISHERS OF THIS CASE PLEASE TAKE NOTE that section **486.4(1)** of the **Criminal Code** applies and may require editing of this Judgment or its heading before publication. Section **486.4(1)** provides:

> 486.4(1) Subject to subsection (2), the presiding Judge or Justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of;
>
> (a) any of the following offences:
>
> (i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 172, 172.1, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.02, 279.03, 346 or 347,
>
> (ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male), or 245 (common assault) or subsection 246(1) (assault with intent) of the **Criminal Code**, chapter c-34 of the Revised Statues of Canada, 1970, as it read immediately before January 4, 1983, or
>
> (iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16 and 18), 153 (sexual intercourse with stepdaughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the **Criminal Code**, chapter C-34 of the Revised Status of Canada, 1970, as it read immediately before January 1, 1988; or
>
> (b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in any of subparagraphs (a)(i) to (iii).

The Court: (orally)

[1] This is the sentencing of Jacque d'Eon on five charges that are now before the Court. The charges include three charges of breach of probation for failure to keep the peace and be of good behaviour because he was on three separate probation orders at the time of the pornography offences.

[2] He is also being sentenced for making child pornography and possession of child pornography. Those charges attract minimum sentences and have been proceeded with by way of Indictment. The minimum sentence for the making of child pornography under Section 163.1(2) of the **Criminal Code** is one year in prison. Possession of child pornography proceeded with by way of Indictment under Section 163.1(4) attracts a minimum of a six months in custody .

[3] The circumstances of this offence are that on March 5th, 2016, twelve photographs depicting child pornography were found in the accused's home by his mother. The RMCP were notified of this. They entered the home with a warrant and the photographs were retrieved. The photographs were found in a backpack along with photographs that could be described as adult pornography. The pictures of adult pornography were found loosely in the backpack while the photographs of

child pornography were found in an album that had been prepared. The photographs of child pornography were of […] five year old [A.].

[4] The twelve photographs have been presented to the Court. […] [Mr. d'Eon] was identified in some of the child pornographic photos and his fingerprints were located on all twelve of the photographs.

[5] It is relevant to this sentencing hearing that in January of 2015 he had been tried and had been found not guilty in the Supreme Court of sexual interference and sexual assault in relation to […] the child [A.]. Those charges alleged offences between February 28th, 2014 and August 29th, 2014. This is essentially the same period during which these photographs were made and then later possessed.

[6] It is important, however, that there were no prior accusations in that trial of him making or possessing child pornography and, therefore, this was not a matter resolved in the trial and the Crown is not estopped, nor is there any suggestion that charging him with the offences before the Court today could result in a plea of *autrefois acquis* because clearly this is another legal matter.

[7] As I sentence him, I must be mindful that I cannot sentence him for the sexual interference with the child, however, in my view, it would be wrong for me to ignore that his body is used as a prop in some of these pornographic photos.

[8] The photographs appear to be well focused. It appears that some could be described as high quality photographs and I must say that in 32 years in the criminal justice system they are among the most disturbing photographs I've ever seen and I've had to caution myself that I should not be unduly influenced by the horrific visceral reaction that those photographs generate when viewed.

[9] Mr. d'Eon's personal circumstances are detailed in both a pre-sentence report and a forensic sexual behaviour pre-sentence assessment and I'm grateful to the authors of both those documents for their preparation of the same. They provide significant insight into Mr. d'Eon's background, his character and his acceptance/denial/rationalization of these offences.

[10] At times in the forensic sexual behaviour pre-sentence assessment he denied responsibility for creating the child pornographic images. He expressed resentment toward his mother for having called the police when she found them and seemed to an extent, at least, focus on the negative consequences that have

resulted to him. To a marked degree he has failed to express significant remorse or acknowledge the harm done to the community, in particular, the child.

[11] Mr. d'Eon's background is that he comes from a home that provided him with a pro-social upbringing. His parents have been supportive of him, especially his mother, and continue to be supportive of him to a degree. They have certainly been supportive of him through his significant battles with substance abuse. They are financially supportive of him by paying his mortgage payments at this time while he has been on remand. During his adult life, he has spiraled into substance abuse. He has clearly hit the bottle hard. With regard to alcohol abuse, he has been admitted to detox on three occasions, has relapsed, has even resorted to attempting to brew his own alcohol during a period of custody. He has been involved in many relationships throughout his life.

[12] Significantly, in his sexual history in the forensic sexual behaviour pre-sentence assessment he denied that he had ever used child pornography or had fantasized about children, however, he also denied ever viewing pornography without also masturbating and said that he would view only so long as it took him to reach orgasm, although it's clearly a case where he was talking about the viewing of adult pornography.

[13] He indicated later in the various reports that if, in fact, he did make the child pornography it must have been at a time when he was so under the influence of alcohol that he didn't know what he was doing, although that seems to stretch the facts of the matter and it is difficult to believe, especially when one looks at how focused those photographs were.

[14] He has been on remand since May 8, 2016 and has not been drinking since that time because he has been locked up. He clearly has issues with anxiety, depression, substance abuse that have, to a degree, remained untreated and certainly need to be the focus of any rehabilitation, at least the start of any rehabilitation.

[15] The accused's sexual arousal profile was tested while he was in custody undergoing the voluntary assessment and it is noted in the report that when presented with visual stimuli only, Mr. d'Eon's strongest sexual response was to images of adult females but he also produced moderate to strong sexual responses to pubescent girls. Moreover, when presented with a combination of visual and auditory stimuli, Mr. d'Eon's strongest sexual response was to female children. He produced strong sexual responses to females across the age span from infant to adult and also to stimuli depicting males. Although his relative preference overall was heterosexual, his arousal was not inhibited by inclusion of coercion versus

assaults being persuasive in nature and further he produced a much stronger sexual arousal to coercive adult heterosexual sexual interactions than he did to stimuli describing consenting adults.

[16] Overall, the assessor indicated that his assessment results indicated both deviant and non-deviant sexual arousal.

[17] The deviant nature of his responses was discussed with him and he claimed to the assessor that he did feel angry with himself when he noticed that he was sexually responding to the deviant stimuli and asserted that the overall experience was very unpleasant.

[18] It's clear that the assessor has labeled him a pedophile. He has a pedophilic disorder of the non-exclusive type which is in the DSM 5 described as a major mental disorder.

[19] He is described as having a personality disorder which is a mix of avoidant and depressive traits with anti-social and borderline features which are described in the report.

[20] He has an alcohol use disorder which is self-reported to be in early remission through his incarceration on remand and a stimulant use disorder for cocaine which he reports is in full remission and I accept that as a fact.

[21] To the assessor of that report he insisted he did not take the photographs or sexually assault the child to his knowledge and although he had claimed to the police that he had not seen the photographs, he did not maintain that position with the assessor. Instead he said, while packing up junk belonging to a previous girlfriend he found the pictures, brought them downstairs and put them in his backpack intending to bring them to the shore to burn them, however, he passed out, his parents arrived, woke him up and that led to him being taken to detox and to custody.

[22] He insisted that he did not remember doing anything sexual to [A.] or to taking or printing the photographs found in his duffle bag, although his guilty pleas to the charges indicate that he accepts responsibility now for the fact that he did take those photographs, that he did make the child pornography, and that he did place those photographs in an album. With his fingerprints all over them, it's clear that he handled each and every one of those photographs that he took.

[23] His risk to re-offend has been assessed through various psychological testing tools and the summary of that risk is found at page 33 of the report and it says "overall his baseline actuarial risk for recidivism is in the moderate range for general violence but in the moderate high range for sexual recidivism compared to other offenders not in the general population."

[24] If he were to reoffend sexually his history and current assessment results suggest that it would most likely be with a contact offence against a female child whom he has repeated access and may, therefore, groom or manipulate to engage in sexual contact, however, the report does not rule out a risk to male children as well.

[25] The assessor points out the obvious, that since he is incarcerated and has been since May the 8th, his risk for sexual recidivism is contained at present. As they look forward to release and life in the community, they look at various variables; the need to find a job, the living alone, having financial debts. Dynamic variables currently in evidence suggest that although Mr. d'Eon would still not have ready access to opportunity to offend, his risk management overall may be poor. The situation would become more optimistic if he could commit to abstaining from alcohol, establish stable employment and/or educational activities, activities engaged in a treatment to improve coping and social skills and confidence. Establishing an age appropriate marital relationship with a pro-social partner might also help, however, they do emphasize that a marital relationship is not necessarily a protective factor with regard to risk.

[26] What they essentially say is that a more stable lifestyle, sense of positive meaning and purpose might ameliorate the risk to a degree. They point to the need

for rehabilitative treatment and they have suggested in the report that he participate in and successfully complete a specialized treatment program for sexual offenders delivered at least at a moderate level of intensity offered by professionals specifically trained in this field followed by maintenance sessions. They point out that sexual offender treatment is not currently offered in provincial jails and that treatment resources are contained within the federal correctional system and currently devoted to high risk offenders.

[27] Mr. d'Eon's moderate to moderate-high actuarial risk is somewhat higher than the community based programs are designed to target, however, given that he has had some prior counseling on which to draw and provided that he is actively pursuing abstinence from alcohol following release, they indicate he might be an appropriate candidate for a community based program that is offered currently only in Dartmouth or Kentville.

[28] Mr. d'Eon has had an attachment to the workforce that has often been interrupted by alcohol use and abuse. It has resulted in him having bounced from job to job. His preferred job is that of being a fisher which allows him to work apart from most individuals. He likes to work alone to the extent possible. He has had some work in fish plants as well. He has been fired from a few positions because of alcohol use, including alcohol use aboard his vessel.

[29] Mr. d'Eon is not a stranger to the criminal justice system. While this is a first conviction for anything akin to the charges that he faces today, except for the breach of probation, he has been given the benefit of many community based supervision orders in the past. He had eleven prior convictions for breach of probation which means eleven times he did not follow orders that had been placed upon him by the Court and that is of significance as I consider the appropriateness of a three year period of probation that has been recommended as part of the joint submission before me.

[30] It appears as well that in the last several years there has not been a significant period of abstinence from substances except for the period of time he has been in custody.

[31] As to his criminal record, it is attached to the pre-sentence report. I will not review it in its totality although it would be listed and summarized in any written transcript of this decision.

Offender Summary

Charge	Offence Date(s)	Sentence
CC 145(3)	29-MAR-2016	**Sentence Date: 30-MAR-2016** COURT CUSTODY SEQUENCE: 2 SECURE CUSTODY DURATION: 15 DAYS CONSECUTIVE CONTINUOUS CUSTODY AT A PROVINCIAL FACILITY
FAIL TO COMPLY WITH RECOGNIZANCE OR UNDERTAKING		

Offender Summary

Charge	Offence Date(s)	Sentence
CC 145(3)	28-MAR-2016	**Sentence Date: 30-MAR-2016** COURT CUSTODY SEQUENCE: 1 SECURE CUSTODY DURATION: 45 DAYS CONCURRENT CONTINUOUS CUSTODY AT A PROVINCIAL FACILITY
FAIL TO COMPLY WITH RECOGNIZANCE OR UNDERTAKING		

Charge	Offence Date(s)	Sentence
CC 733.1(1)	09-JUN-2015	**Sentence Date: 25-AUG-2015** SUSPENDED SENTENCED VICTIM SURCHARGE: $100.00 DUE: 26-JAN-2016 DEFAULT DURATION: 1 DAY CONCURRENT PROBATION DURATION: 1 YEAR
BREACH OF PROBATION		

Charge	Offence Date(s)	Sentence
CC 348(1)(b)	11-JUL-2014	**Sentence Date: 03-FEB-2015** VICTIM SURCHARGE: $100.00 DUE: 02-AUG-2016 DEFAULT DURATION: 1 DAY CONSECUTIVE COURT CUSTODY SEQUENCE: 1 SECURE CUSTODY DURATION: 3 MONTHS CONCURRENT CONTINUOUS CUSTODY AT A PROVINCIAL FACILITY PROBATION DURATION: 12 MONTHS RESTITUTION AMOUNT: $1386.87 DNA (SECONDARY)
BREAK AND ENTER AND COMMIT		

Charge	Offence Date(s)	Sentence
CC 259(2)	11-JUL-2014	**Sentence Date: 03-FEB-2015** VICTIM SURCHARGE: $100.00 DUE: 02-AUG-2016 DEFAULT DURATION: 1 DAY CONSECUTIVE COURT CUSTODY SEQUENCE: 2 SECURE CUSTODY DURATION: 1 MONTH CONCURRENT CONTINUOUS CUSTODY AT A PROVINCIAL FACILITY PROBATION DURATION: 12 MONTHS, CONCURRENT CASE NO. 2799090
MANDATORY ORDER OF PROHIBITION		

Charge	Offence Date(s)	Sentence
CC 733.1(1)	11-JUL-2014	**Sentence Date: 03-FEB-2015** VICTIM SURCHARGE: $100.00 DUE: 02-AUG-2016 DEFAULT DURATION: 1 DAY CONSECUTIVE COURT CUSTODY: SEQUENCE 3 SECURE CUSTODY DURATION: 1 MONTH CONCURRNET CONTINUOUS CUSTODY AT A PROVINCIAL FACILITY PROBATION DURATION: 12 MONTHS, CONCURRENT CASE NO. 2799090
BREACH OF PROBATION		

Offender Summary

Charge	Offence Date(s)	Sentence
CC 733.1(1)	11-JUL-2014	**Sentence Date: 03-FEB-2015** VICTIM SURCHARGE: $100.00 DUE: 02-AUG-2016 DEFAULT DURATION: 1 DAY CONSECUTIVE COURT CUSTODY SEQUENCE: 4 SECURE CUSTODY DURATION: 1 MONTH CONCURRENT CONTINUOUS CUSTODY AT A PROVINCIAL FACILITY PROBATION DURATION: 12 MONTHS, CONCURRENT CASE NO. 2799090
BREACH OF PROBATION		

Charge	Offence Date(s)	Sentence
CC 733.1(1)	29-AUG-2014 to 30-AUG-2014	**Sentence Date: 22-JAN-2015** COURT CUSTODY SEQUENCE: 1 SECURE CUSTODY DURATION: 2 MONTHS CONCURRENT CONTINUOUS CUSTODY AT A PROVINCIAL FACILITY, DEEMED TIME SERVED ON REMAND, CONSECUTIVE TO ANY OTHER SENTENCE PRESENTLY BEING SERVED
BREACH OF PROBATION		

Charge	Offence Date(s)	Sentence
CC 733.1(1)	14-AUG-2014	**Sentence Date: 22-JAN-2015** COURT CUSTODY SEQUENCE: 2 SECURE CUSTODY DURATION: 2 MONTHS CONCURRENT CONTINUOUS CUSTODY AT A PROVINCIAL FACILITY, DEEMED TIME SERVED ON REMAND.
BREACH OF PROBATION		

Charge	Offence Date(s)	Sentence
CC 733.1(1)	04-JUL-2014	**Sentence Date: 22-JAN-2015** COURT CUSTODY SEQUENCE: 3 SECURE CUSTODY DURATION: 2 MONTHS CONCURRENT CONTINUOUS CUSTODY AT A PROVINCIAL FACILITY, DEEMED TIME SERVED ON REMAND
BREACH OF PROBATION		

Charge	Offence Date(s)	Sentence
CC 249.1(1)	16-FEB-2013	**Sentence Date: 14-AUG-2013** COURT CUSTODY SEQUENCE: 2 SECURE CUSTODY DURATION: 40 DAYS CONSECUTIVE TO CASE 2564312 CONTINUOUS CUSTODY AT A PROVINCIAL FACILITY PROBATION DURATION: 2 YEARS
FLIGHT – OPERATE MOTOR VEHICLE IN EVADING PEACE OFFICER		

Offender Summary

Charge	Offence Date(s)	Sentence
CC 253(1)(B)	16-FEB-2013	**Sentence Date: 14-AUG-2013** COURT CUSTODY SEQUENCE: 1 SECURE CUSTODY DURATION: 30 DAYS CONCURRENT TO CASE 2554294 CONTINUOUS CUSTODY AT A PROVINCIAL FACILITY PROBATION DURATION: 2 YEARS LICENSE SUSPENSION PERIOD: 14-AUG-2013 TO 14-AUG-2016, VEHICLE PROHIBITION ORDER
OVER .08		

Charge	Offence Date(s)	Sentence
CC 733.1(1)	16-FEB-2013	**Sentence Date: 14-AUG-2013** COURT CUSTODY SEQUENCE: 3 SECURE CUSTODY DURATION: 1 DAY CONCURRENT CONTINUOUS CUSTODY AT A PROVINCIAL FACILITY, DEEMED TIME SERVED ON REMAND PROBATION DURATION: 2 YEARS
BREACH OF PROBATION		

Charge	Offence Date(s)	Sentence
CC 733.1(1)	16-FEB-2013	**Sentence Date: 14-AUG-2013** COURT CUSTODY SEQUENCE: 4 SECURE CUSTODY DURATION: 30 DAYS CONCURRENT CONTINUOUS CUSTODY AT A PROVINCIAL FACILITY PROBATION DURATION: 2 YEARS
BREACH OF PROBATION:		

Charge	Offence Date(s)	Sentence
CC 253(1)(B)	28-DEC-2012	**Sentence Date: 21-MAY-2013** COURT CUSTODY SEQUENCE: 1 SECURE CUSTODY DURATION: 60 DAYS CONSECUTIVE CONTINUOUS CUSTODY AT A PROVINCIAL FACILITY LICENCE SUSPENSION PERIOD: 21-MAY-2013 TO 21-MAY-2015, VEHICLE PROHIBTION ORDER
OVER .08		

Charge	Offence Date(s)	Sentence
CC 733.1(1)(A)	28-DEC-2012	**Sentence Date: 21-MAY-2013** COURT CUSTODY SEQUENCE: 2 SECURE CUSTODY DURATION: 30 DAYS CONCURRENT CONTINUOUS CUSTODY AT A PROVINCIAL FACILITY
BREACH OF PROBATION		

Charge	Offence Date(s)	Sentence
CDSA 4(1)	28-DEC-2012	**Sentence Date: 21-MAY-2013** FINE: $500.00 DUE: 29-NOV-2013 DEFAULT DURATION: 6 DAYS CONSECUTIVE
POSSESSION OF SUBSTANCE		

Offender Summary

Charge	Offence Date(s)	Sentence
CC 145(3)	06-MAR-2013	**Sentence Date: 14-MAR-2013** COURT CUSTODY SEQUENCE: 3 SECURE CUSTODY DURATION: 15 DAYS CONCURRENT CONTINUOUS CUSTODY AT A PROVINCIAL FACILITY
FAIL TO COMPLY WITH CONDITION ON RECOGNIZANCE OR UNDERTAKING		

Charge	Offence Date(s)	Sentence
CC 733.1(1)	06-MAR-2013	**Sentence Date: 14-MAR-2013** COURT CUSTODY SEQUENCE: 4 SECURE CUSTODY DURATION: 15 DAYS CONSECUTIVE CONTINUOUS CUSTODY AT A PROVINCIAL FACILITY
BREACH OF PROBATION		

Charge	Offence Date(s)	Sentence
CC 253(1)(B)	08-JAN-2013	**Sentence Date: 14-MAR-2013** COURT CUSTODY SEQUENCE: 1 SECURE CUSTODY DURATION: 30 DAYS CONCURRENT CONTINUOUS CUSTODY AT A PROVINCIAL FACILITY LICENSE SUSPENSION PERIOD: 14-MAR-2013 TO 14-MAR-2015, VEHICLE PROHIBITION ORDER
OVER .08		

Charge	Offence Date(s)	Sentence
CC 733.1(1)	08-JAN-2013	**Sentence Date: 14-MAR-2013** COURT CUSTODY SEQUENCE: 2 SECURE CUSTODY DURATION: 15 DAYS CONCURRENT CONTINUOUS CUSTODY AT A PROVINCIAL FACILITY
BREACH OF PROBATION		

Charge	Offence Date(s)	Sentence
CC 348(1)(B)	08-MAR-2010	**Sentence Date: 08-FEB-2011** COURT CUSTODY SEQUENCE: 1 CONDITIONAL SENTENCE DURATION: 18 MONTHS CONCURRENT, CONTINUOUS CUSTODY AT A PROVINCIAL FACILITY PROBATION DURATION: 1 YEAR RESTITUTION AMOUNT: $1000.00
BREAK AND ENTER AND COMMIT		

Charge	Offence Date(s)	Sentence
CC 253(1)(B)	08-MAR-2010	**Sentence Date: 08-FEB-2011** FINE: $1000.00 VICTIM SURCHARGE: $150.00 DUE: 03-JAN-2012 DEFAULT DURATION: 16 DAYS CONSECUTIVE LICENSE SUSPENSION PERIOD: 08-FEB-2011 TO 08-FEB-2012, VEHICLE PROHIBITION ORDER
OVER .08		

Offender Summary

Charge	Offence Date(s)	Sentence
CDSA 4(1)	08-MAR-2010	**Sentence Date: 08-FEB-2011** COURT CUSTODY SEQUENCE: 2 CONDITIONAL SENTENCE DURATION: 1 MONTH CONCURRENT, CONTINUOUS CUSTODY AT A PROVINCIAL FACILITY
POSSESSION OF SUBSTANCE		

[32] There are two convictions that are detailed in the report that I should comment on because they are sentences that were imposed on March the 30th of 2016 for offences that occurred on the 28th and the 29th of March 2016. Those were two counts of failure to comply with an undertaking. Those two convictions are for post-offence conduct and in no way can be treated as aggravating at this sentencing. They are only relevant to any suggestion that since the time of the offences he has been of good behaviour.

[33] I have victim impact statements that have been prepared. One by [A.] (the child but submitted by the grandmother on her behalf). The comments contained in both that statement and the statement of [B.], the mother of the child, inform the court greatly. To the extent that they refer to sexual assaults committed, I must ignore that part of the reports because I must respect the fact and do acknowledge that he was found not guilty of those offences. I am only sentencing him today for the child pornography, the possession and the making of that child pornography, as well as the breach of probations.

[34] Something the mother says I find to be a poignant reminder of the harm created by the creation of child pornography, when individuals create child pornography that is then distributed or seen by others, and in this case I hasten to add that there is no suggestion that this child pornography has been distributed in any way, she says after the police had seized the photographs, “I went to the police station to look at these photos. I will (and she capitalizes the word “NEVER.”), “I will NEVER get them out of my head. [A.] was five years old in these photographs. As a parent, I should have never had to worry about seeing anything like this and I cannot forget them. Those images are burned into my memory for the rest of my life. The only part that I can think about to make myself feel better is that I was the only member in my family to have to see them and [A.] does not remember him taking them.”

[35] “[A.]. had her innocence taken away from her. Jacque took photos of her, printed them off and carried them around in a photo album in his backpack and he took them everywhere with him. I was disgusted and horrified. For the rest of our lives we will have to deal with the outcomes of his crimes. [A.] will never have the typical childhood. She will always remember the things that he has done to her and will have to live her life with those thoughts…” That part of the Victim Impact Statement I must expunge from my consideration and I accept thankfully

that the child does not remember these offences that have been committed for which I am sentencing him today.

[36] A mother, in fact no one, should ever have to view the photos that Mr. d'Eon took, printed, carried around and placed in an album.

[37] As I sentence him today, I must be mindful that I have a joint recommendation before me that was arrived at after negotiation by two experienced criminal lawyers. Mr. Murphy, who in the criminal justice system has more experience than do I, and Mr. Curry who has clearly represented his client's interests according to the highest traditions of the Nova Scotia bar, As well, Mr. Wickens has given effect to and stands by the joint recommendation that was negotiated between Mr. Curry and Mr. Murphy. The Crown does not back away from that and Mr. Wickens has made submissions that he views the sentence as appropriate in the circumstances and urges the court to accept the joint recommendation, noting that the guilty pleas have served to obviate the need for [A.] or her mother to ever have to come before the Court to testify further concerning the matters.

[38] I have already alluded to the minimum penalty provided for this offence by the **Criminal Code**. There is a maximum, however, of a ten year period of

custody that can be imposed for the making of child pornography and I must also consider the principles and purpose of sentencing in determining whether the joint recommendation is appropriate in all the circumstances.

[39] I must be mindful that the purpose of sentence is set out in 718 of the **Criminal Code** and reads as follows:

> The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
>
> (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
>
> (b) to deter the offender and other persons from committing offences;
>
> (c) to separate offenders from society, where necessary;
>
> (d) to assist in rehabilitating offenders;
>
> (e) to provide reparations for harm done to victims or to the community; and
>
> (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

[40] 718.01 indicates that;

> When a court imposes a sentence for an offence that involved the abuse of a person under the age of eighteen years, it shall give primary consideration to the objectives of denunciation and deterrence of such conduct.

[41] Primary consideration in this case must be given to the fact that his crimes need to be denounced and deterred. He needs to know and likeminded individuals need to know, that if you commit offences such as he has pled guilty to that there will be stern but fair sanctions imposed by the criminal justice system.

[42] While we as judges are powerless to prevent the abuse of young children, we have the duty when offenders appear before us convicted of such offences to impose just and appropriate sanctions that meet both the purpose and principles of sentencing set out in the **Criminal Code** thus attempting to protect society and make society safe for the most vulnerable members of our society, our young children.

[43] A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. Section 718.1 sets that principle out. In this case no one can doubt that by using this child as a prop to prepare and make his pornography that his offence is indeed grave and is viewed so by society and

that he is wholly 100% responsible for this offence. From the facts that I've read and his waffling on the point of the making of the pornography, I do not accept for a moment that he was so under the influence of alcohol that he did not know what he was doing and even if he was drunk out of his mind, it can in no way excuse his or mitigate his behavior.

[44] I must take into account the mitigating and aggravating features. Those principles are set out in 718.2 of the **Criminal Code** and says that,

> A court that imposes a sentence shall also take into consideration the following principles:
>
> - a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
>
> **(ii.1)** evidence that the offender, in committing the offence, abused a person under the age of eighteen …
>
> **(iii)** evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,
>
> **(iii.1)** evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation,
>
> …shall be deemed to be aggravating circumstances;

[45] In this case those paragraphs that I have reviewed have some significance although I do temper the impact on the particular victim by the acknowledgement by her mother that the child does not remember the child pornographic photos being taken of her and thankfully so.

[46] The **Criminal Code** also in that section tells me that a sentence should be similar to offences imposed on similar offenders for similar offences committed in similar circumstances and that the offender should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances and all available sanctions other than imprisonment that are reasonable in the circumstances and consistent with the harm done to the victims or to the community should be considered for all offenders, including Mr. d'Eon.

[47] It is with those principles in mind that I must assess the joint recommendation that has been presented in respect of consideration of similar cases in similar circumstances. I must say that while I have been referred to other cases regarding the making of child pornographic materials, I have not been able to consider that those referred to have been similar in circumstances to this case, although they do offer some guidance. Specifically the cases to which I have been referred are:

The Queen v. Elmir (2016), 128 W.C.B. (2d) 427. 2016 QCCA 243, (C.A. Que.)

R. v. Pitts, [2016] N.S.J. No. 425 (N.S.C.A.)

R. v. A.S.G., [2004] N.S.J. No. 10 N.S.C.A.)

[48] In the first case of *Elmir*, the accused was sentenced to twelve months' imprisonment for making child pornography. The offender engaged in three photo shoots with a 15 year old victim in which the victim touched and fellated him. There was a guilty plea; a pre-sentence report found also that he was moderate to high risk to reoffend.

[49] A conditional sentence had been available at the time of that sentencing for this offence but the Court imposed a twelve month period of custody.

[50] Different from that offence, the offender here took advantage of a much younger child […].

[51] *R. v. Pitts* there was an appeal from a five year sentence imposed for eight counts of conspiracy to commit sexual assault on children. That appeal was dismissed. That could be described as a different type, more serious offence and a number of offences were committed.

[52] It involved the accused convincing parents of children in the Philippines to perform sex acts on children on video for Mr. Pitts' sexual gratification.

[53] There had been a two year concurrent period of custody for making child pornography in that case but there was an overall sentence of seven years that was imposed there.

[54] In the *A.S.G.* case the Court of Appeal dismissed a sentence appeal where the accused had received a total of four years in custody for a sexual assault, sexual touching and two years consecutive in the totality of the situation, making it a total sentence of four years, two years for the making of child pornography and in dismissing the appeal the Court said that the judge's sentence was fit, the length was justified as the judge correctly emphasized the aggravating factors and the need for denunciation and deterrence. There were multiple helpless victims in that particular case.

[55] The Court has been urged by counsel in this case to accept the joint recommendation of two years' custody less one day which would mean that he would serve the sentence in a provincial institution.

[56] Counsel have asked me to grant him credit for time served on a 1.5 multiplier basis. They acknowledge that in this circumstances there is some conflict in the caselaw between the case of *R. v. Vinepal* [2015] B.C.J. No. 1674 British Columbia Court of Appeal and *R. v. Akintunde* [2015] O.J. No. 4614

Ontario Court of Appeal as to whether or not he is eligible for 1.5 credit or whether credit must be given on a 1 to 1 basis.

[57] Counsel have jointly submitted, despite that conflict in the appeal courts of those two provinces, that I sentence him and give him credit for remand time on a 1:1.5 basis, thus giving him enhanced credit for time already served.

[58] I do afford him that credit at this sentencing hearing. He has been in custody 334 days as of today, giving then a multiplier of 1.5, he will be given credit for having served 501 days in custody and that will be reduced from any sentence that I impose here today.

[59] Counsel have also asked me to make a non-communication order while he is in custody under Section 743.21 with respect to the complainant [A.] and her mother [B.] and I will do that.

[60] And on the charge of making the child pornography which is inherently a crime of violence, he will be prohibited upon his release from custody under Section 109 of the **Criminal Code** from the possession of firearms for a period of 10 years but with respect to prohibited firearms, restricted firearms, prohibited weapons, prohibited devices and prohibited ammunition, the period of prohibition will be for his lifetime. On that same offence he will submit to a DNA order. It is a

primary designated offence and he will provide a sample of bodily substance suitable for forensic DNA analysis such that his DNA profile can be obtained and maintained at the National Databank in accordance with federal legislation.

[61] He will be the subject of a 161 Prohibition Order prohibiting him attending a public park or public swimming area where persons under the age of sixteen are present or can reasonably be expected to be present or a daycare centre, school ground, playground or community centre, from being within two kilometers of any dwelling house where the victim identified in the order (and the victim will be identified as [A.] in the order by her full name) resides.

[62] He will be prohibited from seeking, obtaining or continuing any employment whether or not the employment is remunerated or becoming or being a volunteer in a capacity that involves being in a position of trust or authority toward a person under the age of sixteen years or having any contact, including communication by any means, with a person who is under the age of sixteen years unless the offender does so under the supervision of a person that is an adult who is aware of his criminal record.

[63] He will be prohibited from using the internet or other digital network for the purpose of communicating with any child under the age of eighteen except he may

communicate with his son through that means provided that the other parent is made aware of such communication. That prohibition will be for his lifetime, although the joint recommendation does contemplate if he attends for sex offender assessment and treatment, the Crown may be amenable to a further application under 161(3) for the variation of that order.

[64] Also, under Section 490.012 in accordance with Section 490.013 (2.1) because there are two offences here, there will be a Sex Offender Information Registry Act order for a period of the accused's lifetime.

[65] Three years' probation is also recommended as part of the joint recommendation to this Court with conditions.

[66] I endorse the ancillary orders that I have referred to, they will be part of the sentence.

[67] The question now becomes whether or not I accept the recommendation of counsel for two years less a day minus the 501 days in custody already served plus the three year period of probation.

[68] In assessing that joint recommendation, I must be mindful that there is no dispute now that the leading case governing joint submissions at a sentencing hearing is the case of *The Queen v. Anthony Cook*, a decision released by the

Supreme Court of Canada on October the 21st of last year and that case details the importance to the public, and our criminal justice system, joint recommendations.

[69] In fact, speaking for the court Moldaver J. says at paragraph 25,

> "It is an accepted and entirely desirable practice for Crown and defence counsel to agree to a joint submission on sentence in exchange for a plea of guilty. Agreements of this nature are commonplace and vitally important to the well-being of our criminal justice system, as well as our justice system at large. Generally, such agreements are unexceptional and they are readily approved by trial judges without any difficulty. Occasionally, however, a joint submission may appear to be unduly lenient, or perhaps unduly harsh, and trial judges are not obliged to go along with them (*Criminal Code*, R.S.C. 1985, c. C-46, s. 606(1.1)(b)(iii)). In such cases, trial judges need a test against which to measure the acceptability of the joint submission. The question is: What test?

[70] And he answered that question in paragraphs 32 to 33 of his reasons and, in fact, headed that paragraph as "The Proper Test" and it is the public interest test;

> "[32] Under the public interest test, a trial judge should not depart from a joint submission on sentence unless the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest."

[71] He then queries, What does that Threshold Mean? He indicates that there were two decisions from the Newfoundland and Labrador Court of Appeal that were helpful in that regard. He refers to *R. v. Druken*, 2006 NLCA 67 , and at paragraph 33, and says:

> "In Druken, at para. 29 the court held that a joint submission will bring the administration of justice into disrepute or be contrary to the public interest if, despite the public interest considerations that support imposing it, it is so "markedly out of line with the expectations of reasonable persons aware of the circumstances of the case that they would view it as a break down in the proper functioning of the criminal justice system". And, as stated by the same court in *R. v. B.O.2*, 2010 NLCA 19, at para. 56 (CanLII), when assessing a joint submission, trial judges should "avoid rendering a decision that causes an informed and reasonable public to lose confidence in the institution of the courts".

[72] He went on to identify the benefits of the acceptance of joint submissions and what that brings. It brings to a degree certainty of outcomes for both parties. Leniency for an accused giving up his right to a trial. It saves the expense and inconvenience to victims and witnesses and makes for the efficient use of court resources. Clearly here the inconvenience to victim and witnesses has been a factor that has been urged upon me as important.

[73] Justice Moldaver then says at paragraph 42 ,

> "Hence, the importance of trial judges exhibiting restraint, rejecting joint submissions only where the proposed sentence would be viewed by reasonable and informed persons as a breakdown in the proper functioning of the justice system. A lower threshold than this would cast the efficacy of resolution agreements into too great a degree of uncertainty. The public interest test ensures that these resolution agreements are afforded a high degree of certainty.
>
> At the same time, this test also recognizes that certainty of outcome is not "the ultimate goal of the sentencing process. Certainty must yield where the harm caused by accepting the joint submission is beyond the value gained by promoting certainty of result"

[74] And in that regard then refers to (*R. v. DeSousa*, 2012 ONCA 254 (CanLII), 109 O.R. (3d) 792, per Doherty J.A., at para. 22).

[75] And he continues at paragraph 44 and says,

> "Finally, I note that a high threshold for departing from joint submissions is not only necessary to obtain all the benefits of joint submissions, it is appropriate. Crown and defence counsel are well placed to arrive at a joint submission that reflects the interests of both the public and the accused. As a rule, they will be highly knowledgeable about the circumstances of the offender and the offence and the strengths and weaknesses of their respective positions. The Crown is charged with representing the community's interest in seeing that justice is done… Defence counsel is required to act in the accused's best interests, which includes ensuring that the accused's plea is voluntary and informed… And both counsel are bound professionally and ethically not to mislead the court…

[76] And clearly there's no suggestion that that has been at play here.

> In short, they are entirely capable of arriving at resolutions that are fair and consistent with the public interest …"

[77] Under a heading Moldaver J. entitles "Guidance for Trial Judges" sets out specific considerations a sentencing judge hearing a joint submission should bear in mind.

[78] He says an omission should be regarded as something considered but rejected by counsel. The same public interest test applies to "jumping" or

"undercutting" a joint submission. Trial judges should be informed on the circumstances leading to the joint submission with counsel required to amply justify their position on the facts of the cases presented in Court to allow the judge a proper basis upon which to determine whether the joint submission should be accepted and the judge, as I've done here, the trial judge should notify counsel of his or her concern and give the opportunity to have the accused at least apply to withdraw the guilty plea and finally a trial judge departing from a joint submission should explain why the proposed sentence was unacceptable and provide reasons that facilitate appellate review.

[79] That case speaks to the importance of resolution discussions between counsel and the proper functioning of our justice system and I do provide the joint submission that I have received here today and over the last few days that we have been in court, do receive it with a high degree of respect to both counsel. Both are capable learned counsel with a great deal of experience. They have amplified their positions to the Court and they have suggested that the sentence is not an insignificant sentence. It is almost, in fact, almost two times the mandatory minimum for the offence but, of course, far lower than the maximum provided.

[80] It is a sentence that would give some effect to the issue of the need for rehabilitative counseling by proposing a three year period of probation in the

community and a requirement that he attend for forensic sexual behaviour programming offered by the Nova Scotia Health Authority as well as other counseling.

[81] Reviewing all the facts and factors, however, I have concluded that to impose the joint recommendation would bring the administration of justice into disrepute and would be contrary to the public interest in this particular case.

[82] I believe that a reasonable and informed person viewing the circumstances of this offence and this offender would view the joint recommendation as a breakdown in the proper functioning of the justice system. I don't say that lightly.

[83] I have been on the bench about thirteen and a half years now and I think this is probably no more than the third or fourth joint recommendation that I have varied and I know in one of those cases I varied the joint recommendation by lowering it. I say this simply as an indication that I have given this case a great deal of thought. I have considered and reconsidered the appropriate test that I must apply. I have considered and reconsidered the facts of the case and the principles and purpose of sentencing and the following are my reasons for departing from the joint submission:

[84] Mr. d'Eon has been, as I've said before, no stranger to the criminal justice system. He has eleven prior convictions for breaching probation orders. He has consistently shown an inability to curb his abuse of alcohol. He has relapsed after having been in treatment three times. He was on probation at the time of the offences that have been committed such that he is being sentenced for three additional breaches of probation here today. He was on three separate probation orders when he possessed and made that child pornographic material.

[85] Also, he has been identified in the report as a moderate to high risk to reoffend in regard to sexual offences. He, when exposed to both visual and auditory stimuli, responds most strongly to female children. He has been untreated and the report indicates that at best, I say "at best" because he needs to get other things in his life under control before he's a good candidate for treatment, the programs offered in the community "might" be appropriate for him to take and afford him the rehabilitative opportunities that are clearly required in order to reduce his risk in the community and ultimately protect society.

[86] The sentence that is suggested by counsel through their joint recommendation is a sentence that would keep him in the provincial institution where I am told there are no treatment options for sex offenders. He would serve his additional time just like he has served his time on remand without any

counselling, without any programming to address the risk that he poses upon release.

[87] If he were sentenced to a federal institution, there are programs that are designed to treat individuals that are a high risk to reoffend and with all the criminogenic factors that have been identified in the reports, I find it hard to accept that he is anything other than a high risk to commit further offences if he gets the chance in the future. There is programming that is available if he were sent to a federal institution that could be targeted to him to give him the best opportunity to reduce the risk to others and get control of himself and to best protect society.

[88] The bottom line is I feel that the sentence jointly submitted in this case simply does not afford the level of protection to society that society deserves, therefore, it fails to address in a significant enough way the principles and purpose of sentencing such that I conclude that to impose the joint recommendation would indeed bring the administration of justice into disrepute and be contrary to the public interest.

[89] I don’t say that by simply looking at the number that has been suggested to me as an appropriate length of sentence. I have considered the length. I have considered the programs to which he could be or would be exposed, the needs of

both he and society to have a level of treatment which, in my view, should be offered and attempted before his release in the community. I have considered those things together with the requirement that I give primary emphasis to denunciation and deterrence.

[90] Before I announce the sentence I will say that there must be a victim fine surcharge of $200.00 in regard to each of the offences before the Court and grant him until December 31st, 2020 as time to pay those amounts.

[91] With regard to the offences I am prepared to announce the custody at this time, would you stand up, please, Mr. d'Eon?

[92] On the charge of making child pornography, I sentence you to 42 months in a federal institution. That will be reduced by 501 days as credit for remand time.

[93] On the charge of possessing child pornography, there will be a sentence of 6 months. I am satisfied, however, that the possession and the making of this was all part and parcel of the same continuing victimization of this child's photographic image and that 6 months will be concurrent.

[94] On the charges of breach of probation, there will be a 2 month concurrent period of custody on each of those.

[95] So, the overall sentence is a sentence of 42 months to be reduced by 501 days credit that he has already served.

[96] As to whether or not the issue of the 1 to 1.5 credit is legally appropriate, I've deferred to counsel's joint recommendation in that regard, I note that I have been unable to find any binding authority in this jurisdiction to deal with that particular issue.

James H. Burrill, JPC