WARNING

The President of the panel hearing this appeal directs that the following should be attached to the file:

An order restricting publication in this proceeding under ss. 486.4(1), (2), (2.1), (2.2), (3) or (4) or 486.6(1) or (2) of the *Criminal Code* shall continue. These sections of the *Criminal Code* provide:

> 486.4(1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of
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> (a) any of the following offences;
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> (i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or
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> (ii) any offence under this Act, as it read at any time before the day on which this subparagraph comes into force, if the conduct alleged involves a violation of the complainant's sexual integrity and that conduct would be an offence referred to in subparagraph (i) if it occurred on or after that day; or
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> (iii) REPEALED: S.C. 2014, c. 25, s. 22(2), effective December 6, 2014 (Act, s. 49).
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> (b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).
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> (2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall
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> (a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and
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> (b) on application made by the victim, the prosecutor or any such witness, make the order.

(2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

(2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall

(a) as soon as feasible, inform the victim of their right to make an application for the order; and

(b) on application of the victim or the prosecutor, make the order.

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community. 2005, c. 32, s. 15; 2005, c. 43, s. 8(3)(b); 2010, c. 3, s. 5; 2012, c. 1, s. 29; 2014, c. 25, ss. 22, 48; 2015, c. 13, s. 18.

486.6(1) Every person who fails to comply with an order made under subsection 486.4(1), (2) or (3) or 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

(2) For greater certainty, an order referred to in subsection (1) applies to prohibit, in relation to proceedings taken against any person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any way of information that could identify a victim, witness or justice system participant whose identity is protected by the order. 2005, c. 32, s. 15.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Snowden, 2023 ONCA 768
DATE: 20231117
DOCKET: C70130

Trotter, Thorburn and Coroza JJ.A.

BETWEEN

His Majesty the King

Appellant

and

Thomas Snowden

Respondent

Stacey D. Young and Alysa Holmes, for the appellant

Amy J. Ohler and Arash Ghiassi, for the respondent

Heard: April 12, 2023

On appeal from the sentence imposed by Justice Apple Newton-Smith of the Ontario Court of Justice on November 22, 2021, with reasons reported at 2021 ONCJ 597.

Trotter J.A.:

A. OVERVIEW

[1] The respondent pled guilty to a number of child pornography offences. The Crown appeals from the sentencing judge's decision not to sentence them[1] as a

[1] On appeal, respondent's counsel indicated the respondent's preference for gender-neutral pronouns.

dangerous offender or, alternatively, as a long-term offender, under Part XXIV of the *Criminal Code*, R.S.C. 1985, c. C-46.

[2] The sentencing judge recognized that denunciation and deterrence are the paramount sentencing principles when it comes to child pornography offences, particularly in this case, where the collection was very large and contained materials that were vile. She also considered the respondent's troubling psychiatric diagnoses, unfavourable risk assessment, and lack of treatment. The sentencing judge found, however, that the criteria to designate the respondent as either a dangerous offender or long-term offender were not met. She imposed a five-year sentence along with several ancillary orders.

[3] The Crown submits that in deciding not to designate the respondent as either a dangerous offender or a long-term offender, the sentencing judge made two legal errors. First, she failed to find that the offences of possessing, accessing, and making available child pornography are capable of constituting serious personal injury offences ("SPIOs"), as defined in s. 752 of the *Criminal Code*. Second, the sentencing judge erred in her interpretation of s. 753.1 of the *Criminal Code* by reading in the requirement that the Crown must prove that the respondent poses a risk of future violent offending, rather than the mere risk of future offending, as a prerequisite to finding the respondent to be a long-term offender.

[4] I would allow the appeal, set aside the sentence imposed, and order a new hearing under Part XXIV of the *Criminal Code*. The sentencing judge erred in finding that the child pornography offences in this case were not capable of satisfying the definition of an SPIO because the respondent was not the direct cause of the harm to the victimized children. Further, the sentencing judge erred in her consideration of whether she should find the respondent to be a long-term offender by repeating the same error in her interpretation of the similarly-worded s. 753.1(2)(b)(i). The sentencing judge's approach impacted her decision not to declare the respondent to be a dangerous offender, as well as her decision not to find the respondent to be a long-term offender.

B. THE FACTUAL BACKGROUND

(1) The Offences

[5] On August 19, 2020, the respondent entered guilty pleas to 10 offences: possession of child pornography (s. 163.1(4)); accessing child pornography (s. 163.1(4.1)) (x 4); making available child pornography (s. 163.1(3)) (x 2); and failing to comply with a recognizance (s. 145(3)) (x 3).

[6] A police investigation revealed that the respondent was sharing child pornography on a peer-to-peer network. On September 12, 2018, the police arrested the respondent and seized devices that contained 148 images and

92 videos of child pornography. A few days later, the respondent was released on bail, with conditions that restricted their access to the internet.

[7] Two months later, on November 12, 2018, a police investigation revealed that the respondent was again accessing child pornography on the internet. On May 29, 2019, the police executed a search warrant at the respondent's home and seized more devices. There were 2,582 images and 7 videos on these devices.

[8] On June 7, 2019, the respondent was released on bail again. Within just a couple of months, they returned to the world of online child pornography. On December 2, 2019, the police arrested the respondent and seized another device containing child pornography.

[9] In total, 2,730 images and 99 videos seized from the respondent met the definition of child pornography.

[10] At the time of the dangerous offender proceedings, the respondent already had a record for committing child pornography offences. I will have more to say about the respondent's criminal history below.

(2) The Nature of the Child Pornography

[11] The materials discovered through the police seizures are extensive, graphic, and vile. Only a representative sample of this material was filed at the dangerous offender hearing. This sample includes images and videos of young children,

sometimes babies, being sexually abused by adults, including being penetrated in various ways. There are images of children having sex with other children. In most of these images, the faces of the children are visible; indeed, sometimes they appear to be looking right at the camera. In terms of their explicit, graphic, demeaning, and depraved content, the respondent's collection is at the most serious end of the spectrum of child pornography.

[12] Significantly, the respondent's collection included the images of four children whom the police have previously identified. Victim impact statements concerning three of these children are discussed below.

(3) The Internet Chats

[13] The police investigation led to the discovery of the respondent's participation in some disturbing internet chats with others in the child pornography world. As the sentencing judge noted, some of these chats were "fantasy chats", including one where the respondent portrayed themself as a young girl being raped.

[14] In another chat, the respondent communicated with someone a person whom the police believed to be the mother of several young children. She sent the respondent family photographs of her children. The respondent gave direction to this person to sexually abuse a baby and spoke about meeting up so that the respondent could have access to the children. There was no evidence that a meeting ever occurred.

[15] In another chat, the respondent communicated with someone named “Bensy”. This correspondence was conducted via “Kik” social media on February 26, and March 17 and 18, 2019. The respondent asked “Bensy”, “let’s see the daughter”. “Bensy” sent an image of the bottom half of a female child, taken from behind. The respondent then asked, “OK, if I tell u what to do will u do it”. “Bensy” said he would when he was next alone with “her”. In a subsequent exchange, “Bensy” sent a video of a man slapping the young girl’s buttocks. The respondent asked, “Any vid of u fucking her”. There was no reply.

[16] The police investigated this chat, which led them to an address in another country. The police arrested and interviewed the adult brother of this child, who was living in the same home. The police learned that the images sent to the respondent were created before the Kik chats.

C. THE DANGEROUS OFFENDER PROCEEDINGS

(1) The Victim Impact Evidence

[17] Victim impact evidence was adduced at the dangerous offender hearing concerning three victims whom the police had previously identified. The respondent had one image of a known child, but it did not meet the definition of child pornography (it was a cropped image of a known larger photo that does meet the definition of child pornography). This child’s mother described the devastation of knowing that images of her child being sexually abused are viewed by strangers

on the internet: “Learning that this defendant had an image of my child that is not technically ‘illegal’ does not make me any less upset … The fact that [they] had a so-called ‘legal’ image of my child is really creepy, and scary.” This child was psychologically assessed for the purpose of proceedings in another jurisdiction. That doctor wrote that the child “will more probably than not suffer psychologically and emotionally as a result of being a victim of the crimes related to the distribution of his images and videos.”

[18] The image of another identified child, a 6- to 8-year-old, was found in the respondent’s collection. The image is vile. The angle of the image suggests the child would have been aware of the camera. This image appears in a series known to the police, accessible on the internet. In their victim impact statement, this child’s parents speak about the impact of the distribution of the pornographic images:

> Knowing that people all over the world can continue to exploit her is the deepest concern. We dread the day we must tell her the abuse was videotaped and distributed all over the Internet … While out shopping or eating at a restaurant, we’re constantly worried and afraid one of these online monsters would recognise her from videos … Once she herself realizes the impact of her abuse there is no telling how she would react.

[19] The photo of another 10- to 12-year-old child found in the respondent’s collection is part of a different child pornography series identified by the police. Again, this child is looking directly at the camera. In their victim impact statement, this child said:

> I know there are like hundreds of pictures and videos on several websites ... It just makes me freaked out and I know it is never going to stop ... Knowing people are watching what happened gives me a mix of anxiety, sadness, anger and it disgusts me ... if it wasn't out there, I wouldn't be as fearful as I am now. It scares me. I'm definitely afraid of running into somebody who has seen them and recognises me ... Even the thought of it makes me want to stay inside and not come out and see the outside world ... when I first went to school I thought about kids going on the Internet and knowing who I am.

[20] In addition to the statements summarized above, and without objection, the Crown filed two community impact statements, pursuant to s. 722.2 of the *Criminal Code*. The sentencing judge referred to these statements in her reasons, but she appeared to place no reliance on them. For the purposes of this appeal, it is only necessary to rely on the victim impact evidence of the individual children and parents detailed above.

(2) The Respondent's Background and Criminal Record

[21] The respondent, who was 37 years old at the time of sentencing, had a terrible childhood and upbringing. Their mother has developmental challenges and severe physical disabilities. She was unable to properly care for the respondent. The Children's Aid Society ("CAS") became involved. The respondent was placed in foster care several times and was made a Crown ward at 13.

[22] The respondent reported being sexually abused as a child by a family "friend". They displayed behavioural difficulties while in the care of the CAS,

including setting fires and sexual incidents with other children. The sentencing judge noted that the respondent has a youth court record for conduct that occurred while living in a group home; it is unrelated to this case.

[23] The respondent's adult criminal record is not extensive, but it is related. In 2003, the respondent was convicted of mischief. The respondent was caught masturbating in a children's change room at a department store while wearing a girl's dress. They received a suspended sentence and probation. As a result of this incident, the respondent was referred to the Centre for Addiction and Mental Health ("CAMH"). They were diagnosed with a disorder their psychiatrist referred to as "fetishistic transvestitism"[2]. Phallometric testing indicated pedophilia/hebephilia. However, their family did not support the diagnosis. Consequently, the respondent discontinued attending CAMH after one course of treatment. The respondent also refused to receive Lupron, a sex drive reducing medication.

[24] In 2013, the respondent was convicted of possessing and making available child pornography. This was a result of their participation in an online chat. The respondent purported to be babysitting an eight-year-old girl. The respondent wrote that they wanted to undress her, that she was crying, and then said, "I'm

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[2] This term is taken from the psychiatric report prepared at the time, and may seem outdated today. In a later psychiatric assessment, Dr. Woodside commented on this diagnosis, describing "transvestic disorder" as "characterized by fantasies and sexual urges by heterosexual men to dress in female clothes for the purpose of arousal and as an adjunct [to] masturbation or sexual intercourse."

going to fuck her", and "she's scared. I'm raping her." The person with whom the respondent was communicating called the police. It turned out that the respondent was in an internet café. The subsequent search of their computer resulted in the discovery of 34 child pornography images and one video. The images were predominantly of 5- to 10-year-old girls, but there was one image of a baby.

[25] The respondent received a 90-day intermittent sentence and two years' probation. In 2014, they were convicted of three counts of failing to comply with the probation order by possessing electronic devices. The respondent received a suspended sentence and two years' probation. They began using child pornography again after they completed this period of probation.

(3) The Respondent's Testimony

[26] The respondent testified at the dangerous offender hearing. They spoke about a desire to secure housing, upgrade their education, and receive treatment. They said they would be amenable to intense supervision in the community.

[27] The respondent also testified that they would agree to take Lupron, knowing the risk of undesirable side-effects, even though they had refused this medication in the past. As the respondent explained, at the time when they previously refused the medication, they did not believe that they needed it. Also, their family had not been supportive of this approach. The respondent's knowledge of the side effects had dissuaded them from consenting to this treatment.

[28] At the hearing, the Crown challenged the sincerity of the respondent's willingness to take Lupron, especially since they had become aware of more risks associated with the drug. The respondent still had concerns, but said, "I feel the potential benefits still … outweigh those risks."

[29] During their testimony, the respondent expressed some insight into their offending behaviour. The respondent claimed to realize that using child pornography is not a victimless crime: "The person that was abused still has to relive it every day and like they re-suffer by constantly thinking, is my image still out there and stuff." They said their understanding was gained through programs they accessed while in jail; but as the sentencing judge noted with doubt, these were mostly general life-skills, vocational, and parenting programs.

[30] The respondent was questioned about the "Bensy chat", and on numerous occasions, but insisted that they did not believe that "Bensy" was interacting with a real child. Under questioning during cross-examination, the respondent once admitted to believing that Bensy was sexually abusing a child. However, considering the respondent's evidence on this issue as a whole, the sentencing judge did not rely on the respondent's single admission. She could not say with any degree of certainty that the respondent directed "Bensy" to abuse a child, or actually believed that "Bensy" was in a position to abuse a child.

[31] The respondent admitted to having an attraction to young people, but denied having physically engaged with children in a sexual manner. They acknowledged that they are addicted to child pornography; however, they believed that they could learn to control it, with medication and counselling.

(4) The Psychiatric Assessment

[32] Dr. Scott Woodside assessed the respondent under s. 752.1 of the *Criminal Code.* He prepared a report and testified at the dangerous offender hearing.

[33] Dr. Woodside was familiar with the respondent from the 2003 convictions, and the resultant phallometric testing. Dr. Woodside stated that the respondent functions at the below-average range intellectually, with specific learning disorders. He diagnosed the respondent with the following disorders: pedophilia, hebephilia, "transvestic disorder, with fetishism," exhibitionistic disorder (in remission), sadomasochistic interests, conduct disorder, anti-social personality disorder, and alcohol and cannabis use disorder.

[34] Dr. Woodside opined that the respondent's scores on actuarial risk assessments indicated an above average risk of reoffence, and an above average risk of sexual recidivism when compared with other convicted sex offenders.

[35] Dr. Woodside testified that it is rare for individuals who commit child pornography offences alone to progress to "hands-on offending". The sentencing judge quoted liberally from Dr. Woodside's report, including the following passage:

> In my opinion, he is most likely to reoffend through repeated use of child pornography; his risk of committing a hands-on sexual offense is likely much lower.
>
> Overall, when combining/considering both clinical/ dynamic and actuarial assessments of risk, I view Mr. Snowden as being at above average risk for further sexual offending in the form of repeated use of child pornography.

[36] Dr. Woodside said that there may be reason for "limited optimism that Mr. Snowden's risk could be managed in the community pursuant to some form of long-term supervision". This opinion was predicated on a number of factors, including the respondent's willingness to take "all forms of treatment", including "chemical castration", and to obtain supportive housing for people with intellectual deficits and a history of sexual offences.

D. THE SENTENCE IMPOSED

[37] The sentencing judge did not sentence the respondent as a dangerous offender, or as a long-term offender. These conclusions turned on her interpretation of the definition of an SPIO, and the threshold requirements for a long-term offender designation in s. 753.1 of the *Criminal Code*.

[38] The sentencing judge imposed five years' imprisonment (less credit for three years of pre-sentence custody). She held that the principles of denunciation and deterrence were paramount for offences involving the possession of child pornography. As she observed, at para. 155:

> Here Mr. Snowden's repeat offending, including while on bail for these offences, and the size and nature of his collection are extremely aggravating factors. His psychiatric diagnoses and risk assessment are similarly aggravating. As is his historical failure to accept and follow through with treatment.

No period of probation was imposed.

E. DANGEROUS AND LONG-TERM OFFENDERS

(1) The Statutory Framework

[39] Part XXIV (Dangerous Offenders and Long-Term Offenders) of the *Criminal Code* establishes a detailed procedure and threshold criteria for determining whether a sentencing judge may impose the exceptional preventive measures of indeterminate detention or a long-term supervision order. In *R. v. Sipos*, 2014 SCC 47, [2014] 2 S.C.R. 423, Cromwell J. described the former as "preventive detention in its clearest and most extreme form": para. 19.

[40] Section 753(1) lists the statutory criteria required to be met before an offender may be designated as a dangerous offender. As discussed in detail below, this includes the Crown proving that the accused person has committed an SPIO. Described as the "designation stage", s. 753(1) sets out the types of behaviour that will qualify for the purposes of this designation:

> **753 (1)** On application made under this Part after an assessment report is filed under subsection 752.1(2), the court shall find the offender to be a dangerous offender if it is satisfied

> **(a)** that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (a) of the definition of that expression in section 752 and the offender constitutes a threat to the life, safety or physical or mental well-being of other persons on the basis of evidence establishing
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> > **(i)** a pattern of repetitive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a failure to restrain his or her behaviour and a likelihood of causing death or injury to other persons, or inflicting severe psychological damage on other persons, through failure in the future to restrain his or her behaviour,
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> > **(ii)** a pattern of persistent aggressive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a substantial degree of indifference on the part of the offender respecting the reasonably foreseeable consequences to other persons of his or her behaviour, or
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> > **(iii)** any behaviour by the offender, associated with the offence for which he or she has been convicted, that is of such a brutal nature as to compel the conclusion that the offender's behaviour in the future is unlikely to be inhibited by normal standards of behavioural restraint; or
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> **(b)** that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (b) of the definition of that expression in section 752 and the offender, by his or her conduct in any sexual matter including that involved in the commission of the offence for which he or she has been convicted, has shown a failure to control his or her sexual impulses and a likelihood of causing injury, pain or other evil to other persons through failure in the future to control his or her sexual impulses. [Emphasis added.]

[41] As the Supreme Court of Canada held in *R. v. Boutilier*, 2017 SCC 64, [2017] 2 S.C.R. 936, subparas. (a)(i) to (iii) are disjunctive: "[T]hey provide three standalone grounds for finding that the offender is a 'threat' under s. 753(1)": at

para. 18, *per* Coté J. If any one of the criteria is met, there is no discretion in the sentencing judge; “the designation must follow”: at para. 20.

[42] However, once a dangerous offender designation is made, the sentencing judge regains discretion to impose the appropriate sentence, subject to s. 753(4.1). The options are set out in s. 753(4), and the analysis is guided by s. 753(4.1):

> **(4)** If the court finds an offender to be a dangerous offender, it shall
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> > **(a)** impose a sentence of detention in a penitentiary for an indeterminate period;
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> > **(b)** impose a sentence for the offence for which the offender has been convicted — which must be a minimum punishment of imprisonment for a term of two years — and order that the offender be subject to long-term supervision for a period that does not exceed 10 years; or
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> > **(c)** impose a sentence for the offence for which the offender has been convicted.
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> **(4.1)** The court shall impose a sentence of detention in a penitentiary for an indeterminate period unless it is satisfied by the evidence adduced during the hearing of the application that there is a reasonable expectation that a lesser measure under paragraph (4)(b) or (c) will adequately protect the public against the commission by the offender of murder or a serious personal injury offence.

[43] There is an alternative route to a long-term offender designation. Even if the court does not find the offender to be a dangerous offender, it may treat the application as a long-term offender application: s. 753(5)(a). In this case, having dismissed the dangerous offender application, the sentencing judge considered

whether the respondent should be sentenced as a long-term offender, but decided against it.

[44] Part XXIV creates rights of appeal similar to appeals under Part XXI (Appeals – Indictable Offences). An offender found to be a dangerous offender may appeal on any ground of law or fact, or mixed law and fact (s. 759(1)), whereas the Attorney General may only appeal "on any ground of law" (s. 759(2)).

(2) SPIO: Definition and Methodology

[45] At the heart of this appeal is a foundational concept of Part XXIV of the *Criminal Code*: the concept of the SPIO. The resolution of this appeal requires clarification of the approach to be taken to determine when possessing, accessing, and making available child pornography will be SPIOs. Following the approach in the leading case of *R. v. Steele*, 2014 SCC 61, [2014] 3 S.C.R. 138, a case-by-case consideration of the factual circumstances of these offences will be required to determine whether they meet the criteria for an SPIO. However, as I will discuss below, in my view the sentencing judge interpreted the definition of an SPIO in a manner that precluded the consideration of some relevant facts.

[46] The commission of an SPIO plays an important role at two junctures in Part XXIV. First, it serves as a "gatekeeper" for entry into the dangerous offender or long-term offender regime at the assessment stage, under s. 752.1 of the *Criminal Code*: *Steele*, at para. 35. The section provides:

> 752.1 (1) On application by the prosecutor, if the court is of the opinion that there are reasonable grounds to believe that an offender who is convicted of a serious personal injury offence or an offence referred to in paragraph 753.1(2)(a) might be found to be a dangerous offender under section 753 or a long-term offender under section 753.1, the court shall, by order in writing, before sentence is imposed, remand the offender, for a period not exceeding 60 days, to the custody of a person designated by the court who can perform an assessment or have an assessment performed by experts for use as evidence in an application under section 753 or 753.1. [Emphasis added.]

[47] Second, s. 753 provides that a conviction for an SPIO is a requirement, among others, before a court may find an offender to be a dangerous offender.

[48] An SPIO is defined in s. 752 as follows:

> **serious personal injury offence** means
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> **(a)** an indictable offence, other than high treason, treason, first degree murder or second degree murder, involving
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> > **(i)** the use or attempted use of violence against another person, or
> >
> > **(ii)** conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage on another person,
>
> and for which the offender may be sentenced to imprisonment for ten years or more, or
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> **(b)** an offence or attempt to commit an offence mentioned in section 271 (sexual assault), 272 (sexual assault with a weapon, threats to a third party or causing bodily harm) or 273 (aggravated sexual assault)

[49] First, an SPIO under para. (a) of the definition in s. 752 must be punishable by a sentence of 10 years or more. Most of the offences in this appeal meet this threshold. Possession of child pornography (s. 163.1(4)) and accessing child

pornography (s. 163.1(4.1)) are both punishable by a maximum of 10 years' imprisonment when prosecuted by indictment.[3] Making child pornography available (s. 163.1(3)) is an indictable offence, punishable by a maximum punishment of 14 years' imprisonment. Breach of probation (s. 733.1(1)) does not qualify because it is punishable by a maximum sentence of four years' imprisonment, when prosecuted by indictment.

[50] The next part of the definition of an SPIO may take two forms. One is categorical, in that para. (b) of the definition states that offences under ss. 271, 272, and 273 will always be SPIOs.[4] The other, under para. (a), is interpretive. The Crown must establish that the offence in question either involves (i) the use or attempted use of violence against another person, or (ii) conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage on another person. This appeal turns on the application of subpara. (a)(ii) to the child pornography offences in question.

[51] In *Steele*, the Supreme Court of Canada discussed the methodology for classifying offences as SPIOs. That case involved a robbery committed by using threats of violence (*Criminal Code*, s. 343(a)). It required the interpretation of the

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[3] Until 2015, both offences were punishable by a maximum of five years' imprisonment. They were increased to 10 years with the passage of *Tougher Penalties for Child Predators Act*, S.C. 2015, c. 23.
[4] Parliament could have chosen to include offences under ss. 163.1(3), 163.1(4), and 163.1(4.1) in this category of offences, but it did not do so, even though it had enumerated them in the long-term offender provisions (s. 753.1(2)(a)), discussed below.

subpara. (a)(i) definition of an SPIO, but it is also instructive in the approach to subpara. (a)(ii) in this case.

[52] The Court held that some offences, while not included in para. (b) of the definition, will always amount to an SPIO, "where personal violence or endangerment forms part of the definition of the offence": at para. 22, citing *R. v. Cepic*, 2010 ONSC 561 (a case involving dangerous driving causing bodily harm). However, other offences may not, by definition, meet the criteria of an SPIO. In such cases, *Steele* requires an examination of the manner and circumstances in which the offence was committed in order to determine whether the definition of an SPIO in subpara. (a)(i) is satisfied. The same approach is employed with subpara. (a)(ii): see *R. v. Cook*, 2020 ONCA 809, at para. 20 (a criminal harassment case).

[53] This interpretive exercise must be undertaken in a manner consistent with the purposes of Part XXIV of the *Criminal Code*. The primary rationale of this Part is the protection of the public; but there is more to it than that. As Wagner J. (now C.J.) explained in *Steele*, at paras. 35-36:

> These sentences are also punitive, however, and in this regard, the function of the SPIO requirement is twofold: first, it serves as a "gatekeeper" for entry into the dangerous or long-term offender system (s. 752.1(1)); second, if the Crown applies for a finding that the offender is a dangerous offender, it serves as a requirement for the making of such a finding (s. 753(1)).

> If the punitive purpose of these sentencing options were outweighed entirely by their preventive purpose, they might violate the fundamental principle of sentencing, that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. The SPIO requirement helps safeguard the constitutionality of the scheme: *Lyons*, at p. 338. As Lamer C.J. put it in *Currie*, "[t]he [SPIO] requirement acts as a gatekeeper to ensure that the sentence is not disproportionate to the offence" (para. 31; see also *Goforth*, at para. 44).
>
> These two purposes, one of them general and the other specific, are in conflict. In interpreting the definition of an SPIO, I must give effect to the overall protective purpose of Part XXIV, while also furthering the specific purpose of the SPIO requirement by tying the punishment to the predicate offence and safeguarding the objective of proportionality. Whereas an unduly narrow interpretation of the words "use or attempted use of violence" could preclude courts from remanding potentially dangerous offenders for assessment and thereby undermine the goal of public protection, an unduly broad interpretation of those words would dilute the gatekeeper function of the SPIO requirement and jeopardize the scheme's objective of proportionality.

[54] Importantly, Wagner J. held that subpara. (a)(ii) does not include a requirement of objective seriousness; that is, an SPIO does not require a minimum level of violence: at paras. 38-41. This was also the holding of this court in *R. v. Lebar*, 2010 ONCA 220, 101 O.R. (3d) 263, at para. 67, cited in *Steele*.

[55] The same approach is indicated under the companion definition in subpara. (a)(ii) – "conduct endangering or likely to endanger the life or safety of

another person or inflicting or likely to inflict severe psychological damage on another person" (emphasis added).

[56] Whereas subpara. (a)(i) requires the use or attempted use of violence, subpara. (a)(ii) is cast in broader terms. In *R. v. Morgan* (2005), 195 C.C.C. (3d) 408 (Ont. C.A.), leave to appeal refused, [2005] S.C.C.A. No. 247, MacFarland J.A. held, at para. 13: "The section requires that the conduct have actually inflicted severe psychological damage on a complainant or be such that it is likely to cause severe psychological damage. It is in this sense that the offence can be said to be a serious personal injury offence" (emphasis added). Moreover, it need not be an offence against the person. MacFarland J.A. said, at para. 11: "Had Parliament intended that only offences against the person were capable of meeting the definition of 'serious personal injury offence', it would have said so as it did in respect of sexual offences in s. 752(b)." In *Morgan*, attempting to obstruct justice was found to be an SPIO.

F. CHILD PORNOGRAPHY

(1) Child Pornography and Harm

[57] As a precursor to this analysis, it is helpful to explore how the courts have considered the harms caused by child pornography offences, and the psychological impact of this pernicious criminal conduct on the victims.

[58] Little needs to be said about the obvious harm of producing child pornography. In any scenario involving the making or production of child pornography involving a real child, whether coming into physical contact with the child or not, the offender is involved in the direct sexual abuse of a child. This conduct carries a maximum sentence of 14 years' imprisonment (s. 163.1(2)) and is likely to be accompanied by liability for other sexual offences against children.

[59] The production of child pornography is the first step in a succession of serious harms. In the leading case of *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45, the Supreme Court was unanimous in upholding the constitutional validity of s. 163.1(4) of the *Criminal Code* (possession of child pornography). The Court recognized the serious harms associated with possession of child pornography. As McLachlin C.J. wrote, at para. 28:

> This brings us to the countervailing interest at stake in this appeal: society's interest in protecting children from the evils associated with the possession of child pornography. Just as no one denies the importance of free expression, so no one denies that child pornography involves the exploitation of children. The links between possession of child pornography and harm to children are arguably more attenuated than are the links between the manufacture and distribution of child pornography and harm to children. However, possession of child pornography contributes to the market for child pornography, a market which in turn drives production involving the exploitation of children. Possession of child pornography may facilitate the seduction and grooming of victims and may break down inhibitions or incite potential offences. [Emphasis added.]

[60] When addressing the harm experienced by a child whose sexual abuse is recorded, McLachlin C.J. said, at para. 92, “the child must live in the years that follow with the knowledge that the degrading photo or film may still exist, and may at any moment be being watched and enjoyed by someone”: see also *R. v. Jarvis*, 2019 SCC 10, [2019] 1 S.C.R. 488, at para. 62.

[61] In separate reasons, L’Heureux-Dubé J. (Gonthier and Bastarache JJ., concurring) made the following observations about the impact on the children whose sexual abuse is recorded (at paras. 164 and 169):

> In addition to the types of harm discussed above, child pornography creates a risk of harm that flows from the possibility of its dissemination. If disseminated, child pornography involving real people immediately violates the privacy rights of those depicted, causing them additional humiliation. While attitudinal harm is not dependent on dissemination, the risk that pornographic representations may be disseminated creates a heightened risk of attitudinal harm.
>
> …
>
> Pornography that depicts real children is particularly noxious because it creates a permanent record of abuse and exploitation. [Emphasis added.]

[62] In *R. v. L.M.*, 2008 SCC 31, [2008] 2 S.C.R. 163, the Court heard a sentence appeal of an offender who recorded the sexual abuse of his daughter and distributed the images on the internet. In restoring the sentence of the trial judge (that had been reduced by the Court of Appeal), LeBel J. said, at para. 28:

> Finally, I note that L.M. disseminated his pornography around the world over the Internet. The use of this medium can have serious consequences for a victim. Once a photograph has been posted on the Web, it can be accessed indefinitely, from anywhere in the world. R.M. will never know whether a pornographic photograph or video in which she appears might not resurface someday. [Emphasis added.]

[63] In *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253, at para. 114, Deschamps J. (dissenting, but not on this point) observed that the internet has "accelerated the proliferation of child pornography".

[64] The harms associated with the distribution and consumption of child pornography were also mentioned in *R. v. Friesen*, 2020 SCC 9, [2020] 1 S.C.R. 424, a sentencing case involving sexual interference with a young child (*Criminal Code*, s. 151), and the attempted extortion of the child's mother (s. 346(1)). Wagner C.J. and Rowe J. articulated the sentencing principles to be applied in cases involving the sexual abuse of children. They discussed how "new technologies have enabled new forms of sexual violence against children and provided sexual offenders with new ways to access children": at para. 47. Echoing the words of Deschamps J. in *Morelli*, Wagner C.J. and Rowe J. made the following observation, at para. 48:

> Technology can make sexual offences against children qualitatively different too. For instance, online distribution of films or images depicting sexual violence against a child repeats the original sexual violence since the child has to live with the knowledge that others may be

> accessing the films or images, which may resurface in the child's life at any time. [Citations omitted.]

[65] This court has often stated that the ascendant sentencing principles in child pornography cases are denunciation and deterrence. It has recognized the harm caused to children by offences that extend beyond the creation of child pornography – i.e., possessing, accessing, and making available. For instance, in *R. v. S. (J.),* 2018 ONCA 675, 142 O.R. (3d) 81, Strathy C.J.O. said, at para. 120:

> Sadistic sexual assault of twin babies and a very young child by a trusted caregiver is amongst the most grievous crimes imaginable. To record such abuse and trade it on the Internet compounds the injury to the victims. All the more so when the offender does so for the stated purpose of attaining notoriety and "respect" so that others will share their own sadistic abuse of children. And the more horrific the abuse, the more it is valued in that community. The appellant's violation of his victims is repeated every time the images are viewed on the Internet, where they cannot be erased and will likely reside in perpetuity. And, as the sentencing judge observed, the victims, particularly S, whose face is shown, may be further traumatized by the knowledge that these images and films could surface in their personal lives at any time. [Emphasis added.]

[66] Similarly, in *R. v. Inksetter*, 2018 ONCA 474, 141 O.R. (3d) 161, Hoy A.C.J.O. said, at para. 22:

> Child pornography is a pervasive social problem that affects the global community and its children. In *R. v. Sharpe*, [2001] 1 S.C.R. 45, [2001] S.C.J. No. 3, 2001 SCC 2, the Supreme Court described how possession of child pornography harms children. As Fraser C.J.A. wrote in *R. v. Andrukonis*, [2012] A.J. No. 481, 2012 ABCA 148,

> at para. 29, “possession of child pornography is itself child sexual abuse”. The children depicted in pornographic images are re-victimized each time the images are viewed. In amassing, viewing and making available his vast and terrible collection to others, the respondent participated in the abuse of thousands of children.

See also *R. v. D.G.F.*, 2010 ONCA 27, 98 O.R. (3d) 241, at paras. 21-22 and *R. v. McCaw*, 2023 ONCA 8, 165 O.R. (3d) 179, at para. 28.

[67] From this brief review of the jurisprudence, there can be no doubt of the myriad harms associated with child pornography – not just in its making, but also in its proliferation, especially on the internet, and by those who access or possess it. These cases harmonize with the experiences described in the victim impact statements discussed earlier in these reasons. The question is whether any or all of these related offences – making available, possessing and accessing child pornography – are capable of meeting the requirements of SPIOs.

(2) Child Pornography Offences as SPIOs: Previous Decisions

[68] Only a handful of cases have addressed the specific issue on appeal – whether the offences of possessing, accessing, and making available child pornography constitute SPIOs. It is accepted that they are not categorically SPIOs. On the other hand, these cases support the conclusion that, depending on the circumstances, they are capable of being SPIOs. It is helpful to review some of this jurisprudence.

[69] In *R. v. Patterson*, 2018 ONSC 5395, the Crown applied under s. 752.1 for an assessment order in relation to charges of possession and accessing child pornography. The Crown argued that, as a matter of law, any conviction for either offence would necessarily constitute an SPIO: "[E]very image represents violence towards children." Bawden J. rejected this sweeping submission, along with the Crown's further submission that everyone who possesses or accesses child pornography is a party to the making of that child pornography. The Crown does not make either submission on this appeal.

[70] Turning his attention to *Steele*, Bawden J. considered the manner in which Mr. Patterson committed his offences. Bawden J. summarized the evidence of the accused's offending and referred to the victim impact statement of the mother of a 12-year-old boy whose image figured prominently on a website frequented by Mr. Patterson, and whose image was in Mr. Patterson's collection. Bawden J. held, at para. 30: "[T]he statement establishe[d] a foundation for a finding that the maker of the images inflicted severe damage to [this child]." He ultimately concluded, however, that Mr. Patterson's offences were not SPIOs, at para. 32:

> Mr. Patterson was a low end consumer of child pornography. There is no evidence that he did anything to encourage the creation of child pornography apart from committing the essential elements of his own offences. The two images that he possessed did not depict a sexual assault on either of the subjects. One of the images that he accessed (the boy with ejaculate on his tongue) did depict evidence of a sexual assault but on

> the scale of such images, this was on the less serious end. The videos showing sexual activity between prepubescent boys are clearly the most disturbing images but they were few in number and of limited visual quality. There is no evidence that Mr. Patterson ever attempted to take possession of them.

[71] Bawden J. declined to make an assessment order for the purposes of a dangerous offender application.

[72] The approach in *Patterson* was followed in *R. v. Ewing*, 2021 ONCJ 273, a case also involving the offences of possessing and accessing child pornography. The SPIO issue arose at the s. 752.1 application stage. The sentencing judge, Libman J., described the collection amassed by Mr. Ewing, which included images of young children, some of whom have been identified by international police agencies. The Crown also tendered a victim impact statement of one of the individuals in Mr. Ewing's collection. She recounted the trauma she continues to experience 20 years after the abuse at the hands of her father, which was recorded and shared on the internet.

[73] Libman J. distinguished *Patterson*, holding that Mr. Ewing was not a "low end consumer": para. 80. He placed great reliance on the victim impact statement of the child whose image was in the collection. Libman J. also relied on the same community impact statements filed in this case and found that there were reasonable grounds to believe that Mr. Ewing had committed an SPIO. In relation to the identified victim, Libman J. said the following, at para. 89:

> In the mind of [the identified victim], and other survivors of child sexual abuse who live in constant dread of their images being viewed by others, and especially of being recognized, there is no meaningful distinction between the maker of child pornography, or the viewer of same. They each inflict severe psychological damage on such victims, albeit at different times and in different ways, every time the image is viewed. The publisher may play the role of principal offender; the audience's role as secondary offender. The performance may be "pay for view" or not. However, they remain offenders alike; they are all patrons of the same genre of harm.

[74] Libman J. ordered an assessment under s. 752.1.

[75] In *R. v. Brouillard*, 2020 QCCS 604, the accused was convicted of accessing, possessing, and making available child pornography. The sentencing judge, Ouellet J.S.C., focused on the accused's behaviour in sharing child pornography online, which included providing others with codes and/or passwords necessary to access file directories.

[76] Ouellet J.S.C. concluded that, "at a minimum", making available child pornography is conduct that is likely to inflict severe psychological damage on another person: at para. 31. A key factor was that the faces of the victims were visible, such that "they can recognize themselves, be recognized, and know that they will be recognized, for all time, as long as these images are circulating on the Internet": at para. 32. He rested this conclusion on statements of the Supreme Court about child pornography, discussed above, as well as other cases about the

indelible nature of images posted online. He found that making child pornography available qualified it as an SPIO.

[77] Lastly, I refer to *R. v. Millie*, 2021 SKQB 281, a case involving the offences of making available, accessing, and possessing child pornography.

[78] Applying *Steele*, Dawson J. accepted that the essential elements of the three offences do not automatically qualify as SPIOs: para. 76. Referencing *Sharpe*, Dawson J. accepted that there is a rational connection between accessing, possessing, and making available child pornography and the sexual exploitation of children, but held that "the SPIO definition requires something more than mere speculation or an abstracted rational connection": para. 79.

[79] Mr. Millie was in possession of and had access to 90,708 images of child pornography, of which 13,289 were unique. There were also 131 unique videos in his collection. The children's faces were visible in some of the images Mr. Millie uploaded to the internet.

[80] After reproducing the passages from *Friesen* and *S.(J.)* quoted above, Dawson J. held that "the court must be satisfied that the offender's conduct contributed in some non-zero measure to the severe psychological damage to a victim of the child pornography in question. In other words, the connection or link between the offender's conduct and a victim's identifiable severe psychological damage must be established": para. 92. She found that, although the identifiable

victims in Mr. Millie's collection did not directly attribute the harms they suffered to Mr. Millie's conduct, this did not bar a finding that he caused their severe psychological damage. The perpetual and acute emotional distress the victims described in their victim impact statements was not specific to Mr. Millie because the statements were prepared before the date of his offences. However, Dawson J. concluded:

> [114] All three victims identify significant, prolonged and continuing severe psychological damage from the knowledge that individuals download and possess the child pornographic images of them. Even though the victims did not relate their psychological damage to Mr. Millie specifically, or individually, I am satisfied that there is established from the Victim Impact Statements … a clear link between the knowledge of the victims that persons possess and view their images and each of their psychological damage.
>
> [115] Here, Mr. Millie's possession of the pornography, which contains the victims' images, has the effect of inflicting severe psychological harm, as the victims are aware that they have been victimized in this way and revictimized by the ongoing process of access and/or possession of the images.
>
> [116] I am satisfied on the evidence, that Mr. Millie's possession of the said pornography is inflicting or likely to inflict severe psychological damage on another person.
>
> [117] I find that the circumstances of this case mandate a finding that the possession of child pornography contrary to s. 163.1(4), committed by James Millie in the factual circumstances, of this case satisfies the definition of an SPIO for the purposes of s. 752 of the *Criminal Code*.

[81] Together, these cases apply *Steele* and demonstrate a common approach to the determination of whether possessing, accessing, and making available child pornography are SPIOs – a case-by-case consideration of the circumstances in which the offences were committed in light of s. 752(a)(ii). None of these cases categorically preclude these offences from being qualified as such.

G. ARE POSSESSING, ACCESSING, AND MAKING AVAILABLE CHILD PORNOGRAPHY CAPABLE OF CONSTITUTING SPIOs?

(1) The Sentencing Judge's Reasons

[82] In her detailed reasons, the sentencing judge reviewed the authorities discussed above. She recognized that an SPIO need not involve "extreme violence or that physical harm is caused"; following *Morgan*, she accepted that it need not be an offence against the person: para. 119.

[83] The sentencing judge focused on the word "inflict" in the definition of an SPIO: "[C]onduct … likely to inflict severe psychological damage on another person." Consulting the *Oxford English Dictionary* (online), she held, "The plain meaning of inflict suggests that direct action on the part of the accused is required" (emphasis added): at para. 122.

[84] The sentencing judge addressed the question of whether the respondent "inflicted" harm by looking at two bodies of evidence – the "Bensy" chat and the victim impact evidence. As noted above, she accepted the respondent's evidence

that they did not believe that “Bensy” was with the child during their exchanges. Moreover, there was evidence that the image and video existed prior to the “Bensy” chat. As she said, “I cannot say with any degree of certainty that [the respondent] intended to direct Bensy to abuse a child”: para. 128.

[85] Turning to the victim impact evidence, the sentencing judge found that children who are the knowing victims portrayed in child pornography are likely to suffer severe psychological damage: para. 133. She then posed the following question: “[W]hether the harm is a direct result of Mr. Snowden’s actions, or if the harm has multiple causes and if so, if Mr. Snowden’s contribution to the harm is enough to bring his conduct into the SPIO sphere”: para. 137.

[86] The sentencing judge’s conclusions on this issue are found in the following passage from her judgment:

> [140] The Crown has called victim impact evidence with respect to three real children who are captured in images in Mr. Snowden’s collection of child pornography. The harm suffered by those children, and described by their parents, is not specific to the actions of Mr. Snowden. Each child clearly suffered terrible, serious and direct harm as a result of the actions of the persons who abused them and created the child pornography. It is hard to see how they would not have been psychologically damaged. To varying degrees they will continue to suffer as a result of what happened to them at the hands of their perpetrators. And to the extent that they have knowledge of the presence and availability of their images on line they will suffer harm as a result. Their parents also

> experience psychological distress from knowing their children's images are being disseminated on line.
>
> [141] The difficulty here is not only that it is difficult to parcel out the role that Mr. Snowden's actions may have played in the terrible harms suffered, the root cause of which are unquestionably not the actions of [the respondent], but moreover that the harm exists irrespective of the actions of Mr. Snowden.
>
> [142] I find that extending the definition of harm required for a SPIO to harm that is suffered irrespective of the actions of the offender is overly broad. Without a direct causal connection between Mr. Snowden's actions and the harm suffered proportionality is jeopardized.
>
> [143] Mr. Snowden's actions may be a contributing factor to the perpetuation of the harm suffered by these victims of child pornography, but I cannot say that [the respondent] is a cause of the severe psychological damage that they suffer. [Emphasis added.]

(2) Discussion

[87] The Crown submits that the sentencing judge erred in law by concluding that it had to be proved that the respondent was the "direct" cause or "root cause" of the psychological harm of the victims of child pornography. In so doing, she essentially found that the offences of making available, accessing, and possessing child pornography could never qualify as SPIOs.

[88] The respondent submits that the sentencing judge's approach was not so categorical. Instead, based on the record before her, the sentencing judge made a largely factual determination that the respondent did not cause severe psychological damage to any victim.

[89] In my respectful view, the sentencing judge adopted an overly restrictive approach to the definition of an SPIO. This ultimately caused her to err in effectively finding that the respondent's offences were incapable of qualifying as SPIOs.

[90] The sentencing judge's approach to causation was unduly narrow in requiring that the respondent be the "root cause" of, or their actions in "direct causal connection" with, the severe psychological damage experienced by the victims. Moreover, the sentencing judge failed to consider not only whether the respondent's conduct did "inflict severe psychological damage", but also whether it was "likely to inflict severe psychological damage", in accordance with *Morgan* (discussed in para. 64, above).

[91] Canadian criminal law has long recognized the different ways in which a person may cause harm to another. An individual may be the sole cause of another person's harm, a co-perpetrator of that harm, or they may contribute to, or exacerbate, an existing harm.

[92] In *Smithers v. The Queen*, [1978] 1 S.C.R. 506, a homicide case, Dickson C.J. stated the test for causation as "a contributing cause of death, outside the *de minimis* range": p. 519. A more modern formulation speaks of being a "significant contributing cause": *R. v. Nette*, 2001 SCC 78, [2001] 3 S.C.R. 488, at para. 71 *per* Arbour J. and *R. v. Maybin*, 2012 SCC 24, [2012] 2 S.C.R. 30 at paras. 1, 5. Thus, for liability purposes, a person need not be the "root cause" or

"direct cause" of a person's harm. One may contribute to, or perpetuate, a harm that has already been caused by the actions of another. That harm may be different in nature.

[93] Applied to the context of child pornography, the initial harm lies in the sexual assault of the infant or child. Added to this is the related harm of recording this abuse. This harm is different in kind, but still an extension of the sexual abuse. Similarly, the sharing of recordings with others furthers or perpetuates the harm caused by the initial recording and underlying abuse. Accessing and possessing child pornography fulfills the objective of the person who shares it or makes it available. Indeed, this market for child pornography, whether for purchase, trade or otherwise, may motivate those who make it available, and in turn, those who create it. Accessing and possessing child pornography may further harm the children depicted in the child pornography where they become aware that their image has been accessed or possessed. Thus, cognizable harm has the potential to extend beyond the initial abuse involved in creating child pornography. It may not be the same type of harm at each stage, but it need not be to remain within the ambit of conduct that inflicts or is likely to inflict severe psychological damage.

[94] The sentencing judge alluded to this broader perspective. I repeat what she said in para. 143: "Mr. Snowden's actions may be a contributing factor to the perpetuation of the harm suffered by these victims of child pornography, but I

cannot say that Mr. Snowden is a cause of the severe psychological damage that they suffer" (emphasis added). This is the classic language of causation in the criminal context. But the sentencing judge failed to give effect to these reasons, preferring to rely only on "direct" or "root cause" harm. I believe that this may have occurred because of the significance she attributed to Parliament's use of the word "inflict" in the SPIO definition. In my view, the use of this term has no impact on the causation jurisprudence discussed in para. 100, above.

[95] The respondent submits that the sentencing judge did not find that these offences could never qualify as SPIOs; she merely made a fact-specific determination on the record before her. I do not accept this submission. The respondent's actions were paradigmatic examples of the offences with which they were charged. It is difficult, if not impossible, to imagine an example of such offending that would overcome the sentencing judge's narrow approach to causation. This is because those who participate in the creation of child pornography will always be the more direct or "root" cause of the harm, compared to those who only possess, access, or make it available. The sentencing judge's approach to causation therefore functionally excludes the offences for which the respondent was charged from ever qualifying as SPIOs.

[96] Applying the correct approach, the sentencing judge should have gone on to consider whether the manner in which the respondent committed their offences

inflicted or was likely to inflict severe psychological damage. This is a case-specific factual inquiry, as demonstrated in the SPIO cases discussed above.

[97] Drawing on some of these cases, the Crown proposes a number of considerations or circumstances that might inform the determination of whether a child pornography offence meets the requirements of an SPIO. These factors, individually or in combination, may be helpful in discerning whether severe psychological damage has been or is likely to be inflicted by the commission of the offences under consideration. However, I would not endorse these factors as a formal checklist in assessing whether an offender's conduct constitutes an SPIO. Nor is this list meant to be exhaustive. Rather, the proposed factors may guide a contextual inquiry.

[98] These factors are the following:

Does the child pornography depict a real child?

[99] I agree with the Crown's submission that child pornography that does not depict a real child (perhaps because it is in an animated format, or because it takes the form of a fictionalized, written story), while clearly disturbing, does not inflict severe psychological damage to a person. Although pornography that does not depict a real child may contribute to the attitudinal distortions discussed in *Sharpe*, standing alone, child pornography offences committed in this manner cannot meet the definition of an SPIO. However, offences involving this type of offensive

material may be instructive in the overall determination of whether a dangerous offender designation should be made when the offender is also guilty of child pornography offences involving real children.

Is a real child identifiable in the material?

[100] Where a child is identifiable because their face is visible, or where the child pornography includes other identifiers of the child (e.g., through other visual content or information contained in metadata), this will be a significant factor. As noted in the review of the individual victim impact statements above, a pervasive concern expressed by victims is the fear of recognition.

Does the child know they are being recorded?

[101] This factor is related to the previous one. In some cases, such as where the child is posed or is directed to do certain things, and depending on the age of the child, they may be aware that they are being recorded. But this factor must not be drawn too narrowly. For example, in the present case, some of the children depicted in the respondent's collection would have been too young to understand the grave wrongs that were perpetrated against them at the time; similarly, they would have no concept of the electronic recording or creation of images. However, this knowledge may be subsequently gained. Such revelations may have the same, if not greater, emotional impact. This factor must be applied with an awareness of that possibility.

What is depicted in the child pornography?

[102] The Crown submits that the more graphic the imagery or recording, the more likely it is to inflict severe psychological damage. There is some appeal in this submission. Again, this factor should not be drawn too narrowly. All images and recordings of child pornography are an affront to the dignity and sexual integrity of children, irrespective of their graphic nature, especially if some of the other factors discussed in this part are present.

How many unique images and victims are depicted?

[103] The Crown submits that the greater the number of unique victims and images (i.e., victims not already depicted in child pornography in circulation, or images not already in circulation), the more likely it is to inflict severe psychological damage to a person. I recognize that the size of an offender's collection of child pornography is often considered an aggravating factor on sentencing: see e.g., *R. v. John*, 2018 ONCA 702, 142 O.R. (3d) 670, at para. 45. The Crown's submission here is more subtle in its focus on unique images. This is an especially powerful factor when gauging the seriousness of making child pornography available. Sharing otherwise known or identified images and recordings is extremely serious in its own right; introducing new material, with new victims, into circulation marks an insidious expansion of the victim pool, thereby increasing the likelihood of inflicting severe psychological damage.

Did the offender encourage further sexual violence against children or other forms of further victimization?

[104] The Crown submits that an offender who encourages the creation of new child pornography content poses a greater risk of inflicting severe psychological damage. This was the point of the “Bensy” chat evidence discussed above. The Crown attempted to prove that the respondent encouraged the creation of new, or unique, child pornographic material. But this fact must be treated with care. It borders on secondary liability (*Criminal Code*, ss. 21 (aiding or abetting) and 22 (counselling)) for the offence of making child pornography. Nonetheless, short of such a charge, it may assist in the severe psychological damage inquiry. I would not preclude its consideration in this context.

Other considerations

[105] As I have already noted, there may be other considerations at play in determining whether an offender’s conduct amounts to an SPIO. In addition to the factors proposed by the Crown, I would add two more which may be particularly relevant where an offender is convicted of possessing and accessing child pornography, but not making it available. While all child pornography offences are morally repugnant, when it comes to assessing whether the offence constitutes an SPIO, there may be a significant difference between possessing or accessing child pornography on the one hand, and making it available on the other.

[106] If the child or the family of the child depicted in a pornographic image is aware that the offender has accessed or is in possession of that image, this may inflict or be likely to inflict severe psychological damage. Similarly, paying for access to child pornography, or otherwise compensating the creator or distributor of child pornography, may incentivize the creation or distribution of more child pornography. Again, whether or not any of the offending features discussed above amount to an SPIO finding, they may well be relevant to the application of the other criteria, in ss. 753(1)(a) and (b). Similarly, if the offender is to receive a determinate sentence, these offence features may be relevant to the crafting of a fit sentence.

[107] In conclusion, the sentencing judge's restrictive approach to causation prevented a full consideration of the likelihood that severe psychological damage would be inflicted by the respondent's offending conduct. This factual analysis must be undertaken at the new hearing.

H. ARE POSSESSING, ACCESSING, AND MAKING AVAILABLE CHILD PORNOGRAPHY CAPABLE OF GROUNDING A LONG-TERM OFFENDER FINDING?

(1) The Sentencing Judge's Reasons

[108] As noted above, s. 753(5)(a) of the *Criminal Code* allows a court, where a dangerous offender designation has not been made, to treat the application as an

application to designate the offender a long-term offender. The sentencing judge engaged in this process.

[109] The criteria for designating an offender as a long-term offender is set out in s. 753.1(1):

> **753.1 (1)** The court may, on application made under this Part following the filing of an assessment report under subsection 752.1(2), find an offender to be a long-term offender if it is satisfied that
>
> > **(a)** it would be appropriate to impose a sentence of imprisonment of two years or more for the offence for which the offender has been convicted;
> >
> > **(b)** there is a substantial risk that the offender will reoffend; and
> >
> > **(c)** there is a reasonable possibility of eventual control of the risk in the community.

[110] The sentencing judge found that the criteria in s. 753.1(1)(a) had been met – the appropriateness of a sentence for two years or more. She also found that s. 753.1(1)(c) was satisfied, relying on Dr. Woodside's cautious optimism that the respondent's risk could be managed in the community.

[111] The sticking point for the sentencing judge was s. 753.1(1)(b). She accepted Dr. Woodside's evidence that there was a substantial risk that the respondent would re-offend. However, relying on *R. v. Piapot*, 2017 SKCA 69, 355 C.C.C. (3d) 239, she held that the Crown must prove a risk of violent re-offending. As she said, at para. 149 of her reasons:

> Mr. Snowden has no history of violence. Dr. Woodside's opinion was that he was at above average risk to reoffend for child pornography possession offences and not for hands-on offences. It was not Dr. Woodside's opinion that there was a substantial risk that Mr. Snowden would re-offend violently, nor is there any evidence before me from which I can conclude that there is a substantial risk that he will re-offend with violence. [Emphasis added.]

[112] The sentencing judge then turned to s. 753.1(2), which creates a presumption that there is a substantial risk that the offender will re-offend in certain circumstances. The section provides:

> **(2)** The court shall be satisfied that there is a substantial risk that the offender will reoffend if
>
> > **(a)** the offender has been convicted of an offence under section 151 (sexual interference), 152 (invitation to sexual touching) or 153 (sexual exploitation), subsection 163.1(2) (making child pornography), 163.1(3) (distribution, etc., of child pornography), 163.1(4) (possession of child pornography) or 163.1(4.1) (accessing child pornography), section 170 (parent or guardian procuring sexual activity), 171 (householder permitting sexual activity), 171.1 (making sexually explicit material available to child), 172.1 (luring a child) or 172.2 (agreement or arrangement — sexual offence against child), subsection 173(2) (exposure) or section 271 (sexual assault), 272 (sexual assault with a weapon) 273 (aggravated sexual assault) or 279.011 (trafficking — person under 18 years) or subsection 279.02(2) (material benefit — trafficking of person under 18 years), 279.03(2) (withholding or destroying documents — trafficking of person under 18 years), 286.1(2) (obtaining sexual services for consideration from person under 18 years), 286.2(2) (material benefit from sexual services provided by person under 18 years) or 286.3(2) (procuring — person under 18 years), or has engaged in serious conduct of a sexual nature in the commission of another offence of which the offender has been convicted; and

> **(b)** the offender
>
> > **(i)** has shown a pattern of repetitive behaviour, of which the offence for which he or she has been convicted forms a part, that shows a likelihood of the offender's causing death or injury to other persons or inflicting severe psychological damage on other persons, or
> >
> > **(ii)** by conduct in any sexual matter including that involved in the commission of the offence for which the offender has been convicted, has shown a likelihood of causing injury, pain or other evil to other persons in the future through similar offences. [Emphasis added.][5]

The sentencing judge held that this presumption was inapplicable "for the same reasons that [she] found that the predicate offences do not satisfy the SPIO requirement": para. 151. In other words, because the predicate offences are not the direct or root cause of any severe psychological damage, they cannot be likely to inflict severe psychological damage as required by s. 753.1(2)(b).

(2) Discussion

[113] The Crown submits that the sentencing judge should not have embarked upon the long-term offender inquiry without hearing submissions from the parties. This led the sentencing judge into two errors. First, she erred in finding that s. 753.1(1)(b) requires a risk of violent re-offending. This is inconsistent with the plain language of the provision. Moreover, if correct, it would be inconsistent with

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[5] Note that the child pornography offences were added to this section by the *Criminal Law Amendment Act, 2001*, S.C. 2002, c. 13, s. 76.

the requirements for a dangerous offender designation which, as discussed, does not require the risk of “hands on” offending.

[114] Second, the Crown contends that the sentencing judge erred in failing to give effect to the presumption in s. 753.1(2). She did so by repeating the same error in her interpretation of the SPIO definition, discussed above. This interpretation of s. 753.1(2)(b) results in an irreconcilable tension with the inclusion of the make available, possession, and access offences in s. 753.1(2)(a).

[115] The respondent submits that this issue should not be addressed on appeal because it was not properly litigated at the dangerous offender hearing. Alternatively, the respondent submits that the sentencing judge did not err in relying on the decision in *Piapot*. The respondent also submits that the sentencing judge properly applied her conclusions concerning the definition of an SPIO to her interpretation of s. 753.1(2)(b) of the *Criminal Code*.

[116] I am unconvinced that the long-term offender issue was not a live issue at the hearing, especially in light of the statutory options available to a sentencing judge under Part XXIV, discussed above, and in view of the expert evidence of Dr. Woodside, particularly his opinion on managing the respondent’s risk in the community. The sentencing judge was no doubt attempting to be efficient in addressing all relevant issues.

[117] Nonetheless, it is not necessary to address the broader issue of whether s. 753.1(1)(b) requires violent re-offending where the presumption in s. 753.1(2) does not apply, an issue that this court has yet to rule on definitively: see *R. v. Lalumiere,* 2011 ONCA 826, 286 O.A.C. 254, leave to appeal refused, [2015] S.C.C.A. No. 476, and *R. v. Ryan*, 2017 ONCA 334, at para. 10.[6] It is only necessary to address the Crown's submissions concerning the application of s. 753.1(2) because this provision is specifically designed to address the child pornography offences of which the respondent was convicted.

[118] The sentencing judge's approach to the SPIO issue, with which I respectfully disagree, also resulted in her mistaken approach to the presumption in this section. As discussed, the offences of accessing, possessing and making available child pornography are capable of inflicting or being likely to inflict severe psychological damage on another person, depending on the facts underlying the offences. The sentencing judge erred in holding otherwise at para. 151, for the same reason she erred in finding that these offences were incapable of constituting SPIOs. Further, the inclusion of the offences of possessing, accessing and distributing child pornography in s. 753.1(2)(a) would make little sense if they were incapable of meeting the criteria in 753.1(2)(b).

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[6] Other appellate courts have differed in their interpretation of s. 753.1(1)(b): see *Piapot* (violent re-offending required); *R. v. S.W.P.*, 2020 BCCA 373 (no requirement of violent re-offending).

[119] I would give effect to this ground of appeal.

I. THE REMEDY

[120] The Crown submitted that, if successful on this appeal, a new hearing under Part XXIV should be ordered. This is due to the fact that, after determining the SPIO issue, the sentencing judge did not consider the further criteria in s. 753(1)(a) and (b).

[121] Typically, appellate courts have no power to remit a case back to the sentencing judge for a new hearing or further consideration: see *R. v. Abdelrazzaq*, 2023 ONCA 231, at para. 5. Section 687(1) of the *Criminal Code* empowers the court to either allow the appeal and "vary the sentence within the limits prescribed by law", or dismiss the appeal.

[122] Appeals taken under Part XXIV are different. Section 759(3) provides:

> **(3)** The court of appeal may
>
> > **(a)** allow the appeal and
> >
> > > **(i)** find that an offender is or is not a dangerous offender or a long-term offender or impose a sentence that may be imposed or an order that may be made by the trial court under this Part, or
> > >
> > > **(ii)** order a new hearing, with any directions that the court considers appropriate; or
> >
> > **(b)** dismiss the appeal. [Emphasis added.]

[123] This is an appropriate case in which to order a new hearing. I have identified the legal error in the sentencing judge's interpretation of an SPIO, turning on the causation issue. But this marks only the beginning of the required analysis. Sentencing judges must then engage in a qualitative analysis of the manner and circumstances in which the predicate offences were committed, as discussed above. This is a factual inquiry, best left to a judge of first instance for determination.

[124] Moreover, given her conclusion on the SPIO issue, the sentencing judge, understandably, did not address the other criteria in ss. 753(1)(a) and (b). These too must be addressed at the new hearing, not for the first time on appeal.

[125] Lastly, it was somewhat less than clear what items of child pornography in the representative sample applied to which offence committed by the respondent – in particular, which formed the making available offence. This may need to be qualified in order to permit the contextual analysis that is required.

[126] If it is feasible, the case should be remitted back to the same sentencing judge. She has already considered the voluminous evidence adduced at the hearing, and has made certain factual findings, including some relating to credibility. With the cooperation of the parties, significant efficiencies might be achieved before the same sentencing judge.

J. DISPOSITION

[127] I would allow the appeal, set aside the sentence imposed, and order a new hearing under Part XXIV of the *Criminal Code*.

Released: November 17, 2023 “G.T.T.”

“Gary Trotter J.A.”
“I agree. Thorburn J.A.”
“I agree. Coroza J.A.”