

CANADA / JUDGMENT

R. v. Downes

2020 BCSC 177

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2020 BCSC 177 R. v. Downes

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Downes,

2020 BCSC 177

Date: 20200210

Docket: X080191-A

Registry: New Westminster

Regina

v.

Randy William Downes

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Before: The Honourable Madam Justice MacNaughton

Oral Reasons for Sentence

Counsel for the Crown:

G.P. Barnes

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Counsel for the Accused:

G. Orris, Q.C.

F. Alamy

Place and Date of Hearing:

New Westminster, B.C.

January 10, 2020

Place and Date of Judgment:

New Westminster, B.C.

February 10, 2020

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INTRODUCTION

- [1] On June 14, 2019, I convicted Randy William Downes of two counts of voyeurism contrary to s. 162(1)(a) of the Criminal Code, R.S.C. 1985, c. C-46 [Code]: R. v. Downes, 2019 BCSC 992. These are my reasons on his sentencing.
- [2] As the Crown proceeded by indictment, the maximum punishment is five years: s. 162(5)(a). There is no mandatory minimum punishment.

THE OFFENCES

- [3] The offences involved Mr. Downes intentionally and surreptitiously taking photographs of two boys, T.R. and G.C., in arena dressing rooms, without their consent. In total, the Crown relied on 38 photographs of the boys that the RCMP found on electronic devices belonging to Mr. Downes and seized during a search of his residence.
- [4] The investigation of Mr. Downes commenced when Canadian Border Service Agents forwarded concerns to the RCMP after searching some of Mr. Downes' electronic devices on his return to Canada from the United States. The RCMP obtained a warrant to search Mr. Downes' home and electronic devices. They discovered the photographs on a number of different electronic devices, as set out in the reasons for conviction.
- [5] Mr. Downes took the photographs of T.R. over two days in June 2013, when he was between 13 and 14 years of age and was playing on a summer-league hockey team coached by Mr. Downes. Mr. Downes took the photographs of G.C. over two weeks in August 2015, when he was about 12 years of age and was playing on hockey and baseball teams coached by Mr. Downes.
- [6] As explained in my reasons for conviction, although some of the photographs were of the boys in various states of undress, none of the photographs showed the boys nude and none of them were pornographic.

THE EVIDENCE ON SENTENCING

The Pre-Sentence Reports and Preliminary Objection

- [7] At the request of the Crown, and not opposed by counsel for Mr. Downes, I ordered a pre-sentencing report involving a psychological component. Counsel for Mr. Downes wished to have some input into the specific questions addressed in the report, and I directed that Mr. Downes' counsel write to the Crown setting out the questions he sought to have addressed. Counsel advised me that he did so.
- [8] The pre-sentence report was delayed for much longer than anticipated and the date for sentencing submissions was adjourned.
- [9] Two reports were filed just prior to January 10, 2020, the date reset for sentencing submissions. On January 3, 2020, Forensic Psychiatric Services filed the pre-sentence report authored by Dr. Eugene Wang, a psychiatrist, addressing psychological or psychiatric issues. Dr. Wang had completed the report that day. I will refer to that report in these reasons as the psychological report.
- [10] On January 8, 2020, a probation officer with TriCity Community Corrections filed a pre-sentence report, prepared the day before. I will refer to that report in these reasons as the corrections report.
- [11] Mr. Downes' counsel objected to some of the content of both reports. With respect to the psychological report, his objections were to:
- a) the inclusion of what purported to be direct quotes from Mr. Downes, which counsel said were inaccurate;
 - b) the fact that Dr. Wang appeared to proceed on a misapprehension of the offence of voyeurism for which Mr. Downes was convicted. Dr. Wang presumed that the offence required that the photographs in question were taken for a sexual purpose. Mr. Downes was not charged with voyeurism for a sexual purpose under s. 162(1)(c). This misapprehension may have affected Dr. Wang's assessment of Mr. Downes and led him to opine that Mr. Downes' self-report should be "interpreted with caution" given Mr. Downes' adamant denial that the photographs were taken for a sexual purpose;
 - c) the fact that Dr. Wang's recommendations for treatment were significantly affected by his misunderstanding of the circumstances of the offence and Dr. Wang's cautionary approach to Mr. Downes' self-report; and
 - d) the sources of information provided to Dr. Wang, which included: an intake assessment by Samantha Broom, a psychiatric nurse and forensic liaison, which was not disclosed as a part of the psychological report and was not available at the sentencing hearing; and the report to Crown counsel, which may well have included information about the pornography charges originally filed against Mr. Downes.
- [12] In respect of the corrections report, counsel for Mr. Downes objected to:

- a) the inaccurate reporting of what Mr. Downes said to the author;
- b) a repeat of Dr. Wang's risk assessment which, as set out above, may have been unfairly affected by Dr. Wang's misconception about the offence for which Mr. Downes was convicted;
- c) the inaccurate information about an adult conviction which occurred 40 years before;
- d) an inaccurate recitation of Mr. Downes' purported contraventions of his bail conditions;
- e) a lack of clarity;
- f) the inclusion of a summary of Dr. Wang's report; and
- g) the author's recommendations regarding sentencing of a person convicted of a sexual offence and the proposed referral to the Forensic Sex Offender Program.

[13] Neither of the report writers was available to give evidence at the sentencing hearing on January 10, and Mr. Downes' counsel was unsuccessful in his efforts to contact them in advance of the sentencing hearing.

[14] With respect to the psychological report, the Crown acknowledged that Dr. Wang may have misunderstood the offence for which Mr. Downes was convicted. Dr. Wang was not provided with a copy of my reasons for judgment or the photographs that formed the basis for the charges. The Crown suggested that Mr. Downes could be referred for a second assessment.

[15] In light of the more than six-month delay in receiving the two pre-sentence reports, the fact that charges were first laid against Mr. Downes in October 2016 after an investigation in April of that year, and the fact that the Crown had requested the reports, I declined to adjourn the sentencing submissions.

[16] I have only considered those portions of the pre-sentence reports to which Mr. Downes did not object, as I agree with his counsel's submissions that they are unreliable because they are based on incorrect assumptions about what has been proven with respect to the nature of the offences--in particular, that they were committed for a sexual purpose.

Evidence of Victim Impact

[17] T.R. and G.C. did not file victim impact statements.

[18] T.R.'s mother spoke to the author of the corrections report. She told the author that when she told T.R. about the photographs, he was disappointed as he had considered Mr. Downes one of his more positive coaches. She said T.R.'s trust was broken and, as a result, T.R. is more cautious and less trusting of coaches and people in general.

Mr. Downes' Circumstances

- [19] Mr. Downes is 62 years of age. He is the only child of Lynne Downes, who was 21 years of age when he was born. He never met his biological father and has no information about him. He does not believe that his parents were married or ever lived together. He was raised in New Westminster, BC by his mother who worked two jobs to support them.
- [20] The Crown alleged that Mr. Downes was convicted of arson when he was 19 years of age, and the conviction was referred to in the corrections report. Mr. Downes denied that he had been convicted of arson and the Crown was unable to prove that Mr. Downes had a criminal record. Even if the Crown had been able to do so, it occurred 43 years ago and there was no evidence that, following it, Mr. Downes had any other involvement with the criminal justice system. Thus, for the purposes of this decision, I consider Mr. Downes to be a first-time offender.
- [21] Mr. Downes described himself as a "loner" to the author of the corrections report. As a child, he spent a lot of time at Queens Park arena in New Westminster, which he described as a "second home". He said he was a "stick boy" and was at the arena five or six days a week, taping hockey sticks, and assisting the trainer. He was permitted to skate with the icemen.
- [22] In the spring and summer months, Mr. Downes spent his time at Sapperton Park in New Westminster as a "bat boy".
- [23] As a teenager, Mr. Downes described himself as unpopular at school and said he was pushed around by other kids. He was heavily involved in sports and coaching.
- [24] Mr. Downes never married, has not lived in a common-law relationship, and has no children. He had a girlfriend in high school, and they dated on and off for about a year. He has had other relationships involving women, usually the mothers of boys he coached. His most significant relationship was with such a mother, but the relationship ended when she moved to Castlegar and he decided not to move with her.
- [25] Mr. Downes and his mother jointly own a detached home in Coquitlam. They live in defined areas of the home. He lives in a basement suite.
- [26] Mr. Downes completed high school but never enjoyed school. He focused on athletics rather than on academics. He never pursued post-secondary education, although he has taken courses in relation to coaching sports and refereeing.
- [27] For most of his working life, Mr. Downes has been a head coach for various winter hockey clubs in the Lower Mainland and, for 25 years until October 2016, he was president of the Coquitlam-Moody Minor Baseball Association. He started as a volunteer but, latterly, was paid to coach. In 2015, prior to the charges being laid, he earned an income of between \$2,500 and \$3,000 a month. His income declined sharply after he was charged, and his bail conditions did not allow him to coach or referee children under the age of 16.

- [28] Mr. Downes explains that he has lost almost all of his adult hockey refereeing and adult slow-pitch umpiring opportunities. He says that he is unemployable as all of his life and work experience involved amateur sports. Currently, he referees a few adult hockey games and umpires a few slow-pitch baseball games. He is collecting bottles and walking his mother's dog for payment.
- [29] Mr. Downes reported to Dr. Wang that he has never been under the care of a psychologist, counsellor, or psychiatrist and has never been prescribed psychiatric medication.
- [30] In the psychological report, Dr. Wang concluded that Mr. Downes does not meet the clinical criteria for major mental illness in the general categories of mood, psychotic and anxiety disorders. He also concluded that there was insufficient evidence to establish a definitive diagnosis of an impairment in social communication or emotional reciprocity.
- [31] Mr. Downes did not express remorse to either of the authors of the presentence reports. He was described in the corrections report as being "extremely guarded in most areas of his life except with his feelings towards his charges and the criminal justice system" with his bail supervisor. He was also described as unable to hide his anger, hostility, and resentment towards the Coquitlam RCMP and Crown counsel, the reasons for which I will outline below. In the psychological report, Mr. Downes was described as expressing "some distrust and frustration toward the legal system" regarding the accusations that he breached his pre-trial conditions of release.

Mr. Downes' Letter to the Court

- [32] In Mr. Downes' letter to the court, he offers his sincerest apologies to the two victims and their families for his actions and any pain and embarrassment they may have experienced as a result, and for betraying the trust they placed in him as a coach. He accepts full responsibility for the offences and does not try to make excuses for his behaviour. He adamantly denies that the offences were sexual in nature and says that, had he thought there was a chance of either of the boys being nude, he would never have taken the photos. He also says that he never shared or posted the photos anywhere. He recognizes that none of this is an excuse for his behaviour.
- [33] I accept that Mr. Downes is truly sorry for taking the photographs and understands the impact his doing so has had on T.R., G.C., and their families.
- [34] His letter also expresses his frustration about what he describes as harassment by the Coquitlam RCMP. To put that frustration in context, it is necessary to review the initial charges Mr. Downes faced, the steps taken by the RCMP with respect to publicly announcing those charges, the press coverage of the charges, and the terms of Mr. Downes' pretrial release. I do so below.

Letters of Community Support

- [35] A number of letters in support of Mr. Downes were filed with the court. Unfortunately, some of the letters comment on, and express disagreement with, the offence of voyeurism, the result of the trial, and the conduct of the police. To the extent that those views tainted the content of the letters of support, I have disregarded some of those letters entirely and some of them in part. Where I have considered parts of them, it is with respect to the supportive statements about Mr. Downes' character and volunteer community contributions.
- [36] His friend, Allen Hiebert, wrote about Mr. Downes' long history of community service in youth baseball. He described how Mr. Downes hosted an annual baseball tournament to memorialize Jevon Clarke, a player whom Mr. Downes had coached and who died in an accident shortly afterwards.
- [37] His friend, Dan Hare, wrote about the fundraisers Mr. Downes had been involved in to support a young player's family during that player's battle with cancer. The player was known to Mr. Downes but was not coached by him. Mr. Hare also wrote about the fundraising Mr. Downes organized to support a single parent in replacing a bike that had been stolen from a child. His friend, Doug Dray, also wrote about the fundraising for the bicycle. He explained that Mr. Downes did not know the family. He read about the theft in a local paper.
- [38] Derek Doucette, who also testified at trial, wrote about Mr. Downes' positive effect on the lives of many. Jim Dechka, who knew Mr. Downes from coaching and later became friends with him, wrote about the "countless hours" that Mr. Downes put in as President of Coquitlam-Moody Minor Baseball Association, which had 1,400 registered players.
- [39] John Macdonald, who coached with Mr. Downes and gave evidence at his trial, wrote that Mr. Downes regrets his actions in taking the photographs at issue in these criminal proceedings and has told Mr. Macdonald that it was a "terrible mistake". Mr. Macdonald describes Mr. Downes as someone who cares about people, children, and families. John Rennie, who has known Mr. Downes as a referee for more than ten years and has worked closely with him, describes Mr. Downes as "respectful of the people he interacts with", able to mediate confrontational situations during the course of hockey games, and as "trustworthy, conscientious, and honest".
- [40] Jordan Dray, a young man who is now attending UBC on an athletic scholarship, attributes the fact that he is a leader on his team to Mr. Downes' coaching and influence. He wrote, Mr. Downes "absolutely changed my life."
- [41] Mr. Downes' mother wrote about the support Mr. Downes provides to her, in and around their home, and his acts of kindness and generosity to others some of which are set out above. She also wrote about the public humiliation that she and Mr. Downes have suffered since he was charged.

Events Between Charges being Laid and Sentencing

[42] On October 12, 2016, Mr. Downes was arrested and charged with four counts of voyeurism contrary to s. 162(1)(a) of the Code, one count of possessing child pornography contrary to s. 163.1(4) of the Code, and four counts of making or publishing child pornography contrary to s. 163.1(2) of the Code. He appeared before Judge Alexander in Coquitlam Provincial Court and was released on bail of \$1,000 without surety and without deposit. He was subject to strict bail terms, which included:

- Condition 4 - not to be in a position of trust, including sports coaching of children under the age of 16;
- Condition 5 - not to use a camera except in the course of employment and then only in the presence of another adult;
- Condition 6 - to allow a Peace Officer or Bail Supervisor to examine his photographic equipment and electronic devices capable of storing images upon request;
- Condition 7 - not to be in any change room at a community centre or ice rink where there is a child under the age of 16 in that change room;
- Condition 8 - not to attend any public park or public swimming area where the persons under the age of 16 years are present or can reasonably be expected to be present, or a daycare center, school ground, playground, beaches or community center, except you may go to a community centre or ice rink if you are refereeing an adult hockey game and on such occasions you may not take with you or have on your person a cellphone or camera and you must go directly to the rink to which you are refereeing the game and you are to leave immediately after the game and you are not to enter a change room if any person under the age of 16 is in that change room; and
- Condition 11 - not to be alone with any child under the age of 16.

[43] Following Mr. Downes' arrest, the Coquitlam RCMP issued a press release and held a press conference at which Constable Jamie Phillipson, the Media Relations Officer for the Coquitlam RCMP, spoke. The press release and Constable Phillipson's comments said that the photographs were taken in a public setting that met the threshold for criminal charges of voyeurism and child pornography and suggested that the photographs had been taken for a sexual purpose. In fact, Mr. Downes had not been charged under s. 162(1)(c), the subsection of the voyeurism offence which addresses photographs taken for a sexual purpose.

[44] One of the stated purposes of the press release and conference was to ask parents of children coached by Mr. Downes to come forward with information about victims and witnesses.

- [45] Local, provincial, and national press organizations reported on the charges, and Mr. Downes' picture was prominently displayed in the coverage. Television cameras also came to the Downes house and filmed his 80-year-old mother while he was in custody. The focus of much of the press was the pornography charges.
- [46] At the preliminary hearing before Judge Janzen in Provincial Court, the Crown sought Mr. Downes' committal for the four voyeurism and the five pornography offences. As to the pornography charges, and the photographs relied on by the Crown to support those charges, Judge Janzen said at para. 9 of her April 9, 2018 reasons:

not a single photo is of a nude boy. Not a single photo is of a boy wearing wet clothing that is clinging to the boy's genitals or buttocks. Not a single shot is zoomed in on the crotch or buttocks. Not a single shot is cropped to remove the upper torso and head and/or the legs to focus on the crotch or the buttocks. The vast majority of the poses involve boys playing sports in uniforms, or playing in parks or on beaches in board shorts.

- [47] At para. 14, Judge Janzen said that the police had searched Mr. Downes' many electronic devices for commercially made and available child pornography and not a single image was found. She concluded that there was no evidence to support that the images Mr. Downes possessed were pornographic and he was not ordered to stand trial on the five pornography counts. He was ordered to stand trial on the four remaining voyeurism offences. As set out above, only two of those charges eventually went to trial.
- [48] On January 19, 2017, Justice Brown varied Mr. Downes' recognizance of bail to include a surety deposit in the amount of \$10,000 and to add a bail term. Bail Condition 8, set out above, was amended to read:

You are not to attend any park, swimming pool, daycare centre, school, playground, beach, amusement park, movie theatre, community centre, or ice rink, except you may attend at any ice rink for the sole purposes of working as an official for adult hockey games, provided that you:

- a) Advise your bail supervisor in advance of the time and location;
 - b) Arrive and depart within 30 minutes of the scheduled game time;
 - c) You are not to be in the same dressing room with any child under the age of 17;
 - d) You will not attend within 150 feet of any location, within a public building or otherwise, that has been set aside for children; and, should you come across one accidentally, you will not stop but walk through that location, without stopping, until such time as you are beyond the prohibited area.
- [49] After the discharge on the pornography counts, Mr. Downes applied for a review of his bail conditions. Justice Bernard heard the review, and he released oral reasons indexed as R. v. Downes, 2018 BCSC 1731.

[50] Justice Bernard described the bail conditions Mr. Downes was then under as "very restrictive" and "clearly intended to address concerns for the safety of children arising from the serious, but subsequently determined to be baseless, child pornography charges": para. 11.

[51] At para. 15, Justice Bernard wrote:

There is no evidence from which it may reasonably be inferred that Mr. Downes poses a threat to the safety of children at all, let alone in the litany of public places named in Condition 8. This condition and others currently in place are unwarranted restrictions on his freedom and his employment opportunities, given the nature of the charges he now faces. While it is not surprising that the charges and the alleged circumstances in which they were committed invite conjecture as to the motives of Mr. Downes and, thus, unspecified concerns as to the safety of children, something more than conjecture is required.

[52] Justice Bernard varied the terms of bail to a recognizance of bail in the amount of \$500, without deposit or surety, and set only the following restrictive conditions:

You are not to be in the presence of any boys under the age of 17 years in any circumstances where a boy would have a reasonable expectation of privacy, including but not limited to locker/dressing rooms, washrooms, and showers.

You are not to take photographs, or record the image of any boy under the age of 17 in any circumstances, except with the prior written consent of the boy's parent or guardian.

[53] It is in the context of these new terms that Mr. Downes complains about what he describes as the continued harassment by the RCMP following the amendment of his bail conditions.

[54] On one occasion, Mr. Downes was stopped by an officer when walking on a trail, because the officer thought he was walking with someone. Mr. Downes was alone. Even if he had been walking with a boy, doing so would not be in breach of his then bail conditions as it would not be in a circumstance in which the boy would have a reasonable expectation of privacy.

[55] On two occasions, the Coquitlam RCMP approached him when he was having coffee in a McDonalds restaurant because the restaurant had a children's play area. Mr. Downes was not in breach of his bail conditions and he described his public embarrassment as at least three police vehicles arrived.

[56] On one other occasion, in the summer of 2019, Mr. Downes was in an adult-only beer tent at the PNE. He was approached by two or three Vancouver Police officers. Mr. Downes was not in breach of his probation order, but the PNE security removed him from the premises and banned him from the property.

Time in Pre-Trial Custody

- [57] Mr. Downes has faced two trials on charges for breach of bail. He spent a total of 207 days in pre-trial custody. He was convicted of breaching his bail in December 2016 for attending an arena (under the initial more restrictive bail conditions), and was sentenced to time served of seven days. He was acquitted after the second trial in 2017.
- [58] While Mr. Downes was in pretrial custody, he was assaulted three times and suffered serious injuries. As a result, he was placed in protective custody, and remained in his cell for 22 hours a day.

POSITIONS OF THE PARTIES

The Crown's Position

- [59] The Crown submits that the 200 days remaining to be credited for time Mr. Downes spent in pre-trial custody should be given credit at a rate of 1.5:1, for a total of 300 days credit for time served. Taking into account this credit, the Crown seeks one additional day in custody, for a total of 301 days or roughly 10 months' incarceration, followed by a three-year probationary period on strict terms. It seeks terms similar to the ones under which Mr. Downes was originally released on bail. The Crown's proposed terms would:
- (a) prohibit him from having contact or communication directly or indirectly with, or be alone in the presence of anyone he knows to be or appears to be under 16 years of age;
 - (b) prohibit him from engaging in activities, volunteer work including sports coaching, or employment that could bring him into contact with persons under the age of 16 years without written permission of his probation officer and when so engaged, to carry the permission with him;
 - (c) prohibit him from going to any public park, public swimming area, community centre or ice rink where persons under the age of 16 years are present or can reasonably be expected to be present, or daycare centre, school ground, playground or library. Prohibit him from being in any change room in which there is a child who is or appears to be under the age of 16 years. He could attend an ice rink to referee adult hockey games so long as he arrived a maximum of 30 minutes prior to the start of the game and left no later than 30 minutes after the game;
 - (d) require him to attend, participate in and successfully complete any intake, assessment, counselling or program as directed by the probation officer. Without limiting the general nature of this condition, the intakes assessments, counselling or programs may relate to sexual offender treatment or sexual offence prevention;
 - (e) require him to attend, participate in and successfully complete any intake, assessment and treatment for psychiatric and/or psychological counselling as directed by the probation officer;

- (f) prohibit him from photographing any child under the age of 16 years unless the parent of that child is present and consents to the taking of the photograph; and
 - (g) on request, require him to allow his probation officer or a peace officer to examine his photographic equipment and electronic devices capable of storing images.
- [60] The Crown relies on *R. v. Russell*, 2019 BCCA 51, for the authority that voyeurism offences can attract significant periods of incarceration. It stresses the importance of denunciation and deterrence, given that the victims were under 18 years of age. It also submits that the age of the victims, the fact that Mr. Downes was in a position of trust towards them, and evidence that the offence has significant impact on the victims, and the fact that the offences involved some planning are aggravating factors.

Mr. Downes' Position

- [61] Mr. Downes' counsel submits that, absent the conduct of the RCMP, an appropriate sentence for his voyeurism offences would be a suspended sentence with six months to a year of probation, on terms much less onerous than those suggested by the Crown.
- [62] He concedes that in this kind of a case, denunciation and deterrence are key factors in sentencing, and a discharge would not normally be in the public interest. However, Mr. Downes' counsel submits that the circumstances of this case are unusual. He submits that I should take into account the following factors to impose a conditional discharge with a probationary term:
- a) the conduct of the RCMP;
 - b) the intense public scrutiny that Mr. Downes has been under since 2016;
 - c) the delay that has occurred;
 - d) the impact on him and his mother of the charges that were laid; and
 - e) the time he has already spent in custody and under strict bail conditions, including having been assaulted and seriously injured on three occasions and spending most of his time in isolation in protective custody.
- [63] Counsel for Mr. Downes acknowledges that in most voyeurism cases in which conditional discharges were granted, the offence usually involved only one occasion of voyeurism in relatively impulsive circumstances. Although he agrees that this case involved more planning, he submits that the consequences Mr. Downes has faced as a result of the unsubstantiated pornography charges and the police conduct make this case unique. He also distinguishes Mr. Downes' offence from similar offences where suspended sentences or conditional sentences of imprisonment were imposed because the images he took did not involve the exposure of genitals. Although he agrees that incarceration is possible in voyeurism cases, he submits that it is unusual and tends to be imposed in cases coupled with another serious offence.

- [64] Counsel for Mr. Downes submits that the absence of a criminal record would assist Mr. Downes in rebuilding his career, which he will already face considerable difficulty doing considering the publicity surrounding his initial charges for pornography offences.

ANALYSIS

The Principles and Purposes of Sentencing

- [65] Sentencing is a highly individualized process requiring the court to take into account the circumstances of the offence and the offender. Although my discretion is bound by the principles of sentencing set out in the Criminal Code, the importance of the various principles and purposes will vary according to the particular circumstances of the case.
- [66] As set out in s. 718 of the Code, the fundamental purpose of sentencing is to contribute to respect for the law and the maintenance of a just, peaceful and safe society by imposing sanctions that reflect the objectives enumerated in the section. As s. 718(f) codifies, one of these objectives is to impose a sentence that promotes a sense of responsibility in offenders and an acknowledgement of the harm done to victims and to the community. In the circumstances of Mr. Downes, denunciation and deterrence, both general and specific, and his rehabilitation, are important objectives.
- [67] Although the principle of parity--like offenders should receive like sentences for like offences--is recognized in s. 718.2(b), the sentence must also achieve the fundamental principle of being proportionate to the gravity of the offence and the degree of responsibility of the offender: s. 718.1. The circumstances of the offence and of the offender must be analyzed to identify the aggravating and the mitigating factors: s. 718.2(a).

The Range of Sentences Available

- [68] The Crown cites Russell as authority for the proposition that voyeurism offences can attract significant periods of incarceration. In Russell, the court described the range of sentences as "broad", spanning from a "conditional discharge, to a suspended sentence, to a conditional sentence order, to up to two years' imprisonment."
- [69] The court said that cases at the higher range generally involve more serious offences and that lengthy custodial sentences are reserved for egregious conduct, often where the offence is committed in conjunction with other serious offences: para. 39. The sentencing judge in R. v. Jarvis, 2019 ONSC 4938, the sentencing decision following R. v. Jarvis, 2019 SCC 10, the seminal case on the elements of the offence of voyeurism and the circumstances in which a reasonable expectation of privacy arises under the various subsections of s. 162(1) of the Code, made a similar observation:

- [51] It seems that the authorities provide for a wide range and variety of sentences, albeit principally non-custodial. It is not disputed that most, if not all, of the case law referred to by both counsel proffers the imposition of either a conditional or suspended sentence for this stand-alone offence. Where jail has been imposed, it was in conjunction with another serious offence, like sexual assault, extortion or possession of child pornography.

Aggravating and Mitigating Factors

- [70] In this case, the fact that Mr. Downes was in a position of trust towards the victims, and the fact that they were under 18 years of age, are aggravating: s. 718.2(a)(ii.1), (iii). I have also considered the fact that the offences involved some planning and the impact of the offence on T.R. as described by his mother. Although the offences took place over a relatively short period, as compared to some other voyeurism cases, and Mr. Downes stopped his behaviour before he was caught, he continued to store the images on his electronic devices for some time after taking them.
- [71] The mitigating factors include the fact that Mr. Downes is a first time offender and has shown genuine remorse, acceptance of responsibility, and an understanding of the impact of his actions on the victims and their families. Although he did not enter a guilty plea, he has been cooperative with the RCMP investigations and entered certain admissions at trial, which meant that the Crown called fewer witnesses and the length of the trial was reduced.
- [72] Mr. Downes relies on *R. v. Purchase*, 2012 BCSC 208 at paras. 164-167, for the proposition that delay that does not reach the level of a s. 11(b) Charter breach can nonetheless be considered as a mitigating factor in sentencing. This comment was made in obiter, but was based on the Supreme Court of Canada's decision in *R. v. Nasogaluak*, 2010 SCC 6. At para. 53 in *Nasogaluak*, the Court cited *R. v. Bosley* (1992), 59 O.A.C. 161, where Justice Doherty held that delay which is excessive, but not unconstitutional, may be taken into consideration as a mitigating factor in sentencing because it causes prolonged uncertainty for the offender. I accept that the delay between the time the charges against Mr. Downes were laid and his sentence can be considered as a mitigating factor.
- [73] Over his many years of coaching, Mr. Downes' voyeuristic behaviour only occurred with respect to two boys. Although this is not a mitigating factor, it suggests he was interested in surreptitiously photographing these two boys in particular, as opposed to taking such photographs generally. I have no explanation for his behaviour. Mr. Downes was not charged with taking the photographs for a sexual purpose, nor has the Crown sought to prove that the photos were taken for a sexual purpose in this sentencing hearing. I have no evidence as to why he took them and, in the circumstances, I am not prepared to draw an inference that the photos were taken for a sexual purpose. There is nothing in the portions of the Corrections and Psychological reports that I have considered indicating that there was an event in Mr. Downes' life, which triggered his behaviour.

- [74] I have also taken into consideration the time that Mr. Downes was subject to strict bail conditions: *R. v. Nghiem*, 2009 BCCA 170 at paras. 15-16.
- [75] As canvassed above, Mr. Downes suggests that the following additional circumstances should be taken into account in mitigation of his sentence: the intense public scrutiny he faced, which was based primarily on charges for sexual offences which were later found to be baseless; the RCMP's behaviour towards him in monitoring his bail conditions and in publishing incorrect information about his offences; the impact of the charges on him and his mother; and the assaults and isolation he endured in pre-trial custody. I will consider the time in pre-trial custody under a separate heading in my analysis.
- [76] Mr. Downes relies on *Nasogaluak* for authority that a sentence can be reduced in light of state misconduct relating to the circumstances of the offender or the offence, even when the incidents complained of do not rise to the level of a Charter breach: para. 53. He submits that the RCMP's behaviour in publishing information about his pornography charges, which were later determined to be baseless, and in making his offences seem sexual in nature, constitute misconduct. He further submits that the police continuing to surveil him on the terms of his original, highly restrictive bail conditions, even after they were modified by Justice Bernard, and the embarrassment this caused him, should be recognized in mitigation of his sentence.
- [77] In my view, the original press release that the police issued does not rise to the level of misconduct. At the time they made the release, the police genuinely believed that they had a basis on which to charge Mr. Downes with the pornography offences, and I am not prepared to find that this belief was so unreasonably held as to constitute bad faith, or even a lack of good faith. However, I accept that the consequences that Mr. Downes faced as a result of the initial charges and the widespread media coverage of them can be considered as a collateral consequence of the offence for sentencing purposes.
- [78] In *R. v. Suter*, 2018 SCC 34, Justice Moldaver for a majority of the Supreme Court of Canada considered when sentencing judges may look to collateral consequences when tailoring a sentence to the circumstances of the offence and the offender. *Suter* expanded the concept of collateral consequences to include consequences impacting the offender that flow from the act of committing the offence, in addition to those that flow from the length of the sentence or the conviction: para. 47.
- [79] Justice Moldaver explains that collateral consequences are not necessarily aggravating or mitigating, as they do not relate to the gravity of the offence or the offender's level of responsibility. Instead, they "speak to the 'personal circumstances of the offender'": para. 48. Their relevance flows in part from the concepts of individualization and parity, because the effect of the consequences means that a particular sentence would have a more significant impact on the offender because of his or her circumstances.

- [80] In Suter, the fact that the offender had been attacked by vigilantes was held to be a collateral consequence of the offence, and could be considered when determining an appropriate sentence: para. 57. However, Justice Moldaver emphasized that the primary principle on sentencing is always proportionality, and collateral consequences must not be used to reduce a sentence to the point where it becomes disproportionate to the gravity of the offence and the blameworthiness of the offender: para. 56.
- [81] I accept that the laying of the pornography charges, and the subsequent media coverage of them, are consequences that flow from the commission of Mr. Downes' offences, namely, the fact that he took the photos. He was ultimately charged and convicted of offences that were primarily about the invasion of privacy, which is not how the story appeared in the media. The effect of this public shaming and embarrassment to Mr. Downes, and to his mother, should be considered when crafting a fit sentence for him.
- [82] I further accept that the police acted improperly in their surveillance of Mr. Downes after the child pornography charges against him were dismissed and his bail conditions were amended to reflect the fact that there was no evidence that he was a threat to the safety of children in public places. It is particularly questionable that the police would have a concern over Mr. Downes' attendance at an adult-only beer garden. Before acting, police officers who are investigating circumstances in which they suspect an individual may be in breach of bail conditions should at least be aware of the conditions placed on that individual. There is nothing about the situations in which Mr. Downes was investigated--on a public walking trail, in a public restaurant, and at an adult-only area at a public fair--that could have given rise to a suspicion that Mr. Downes was acting in breach of his bail conditions.
- [83] Regardless of whether this is considered under the heading of police misconduct, per Nasogaluak, or as a collateral consequence of the offence, per Suter, I accept that this is a factor which should be taken into account in Mr. Downes' sentencing.

The Authorities Relied Upon

- [84] The Crown submits, and I accept, that this case is most analogous to the sentencing decision in Jarvis. Jarvis involved a high school teacher convicted of voyeurism. Over the course of a year, he surreptitiously used a pen camera to video and/or audio record female students, between the ages of 14 and 18, and a female teacher, at various locations in and around the school. The subjects were unaware that the videos were being taken without their permission. Most, if not all, of the images focused on the female students' cleavage, sometimes from close up: at paras. 6-7, 9, 41.
- [85] Mr. Jarvis was sentenced to six months' imprisonment followed by 12 months' probation. The similarities to Mr. Downes' case include: both offenders were in a position of trust, the victims were of a similar age, and none of the images involved nudity. However, Jarvis involved significantly more victims, his photographs focused mainly on the victims' cleavage, the offender did not stop his behaviour until he was caught, and the offence took

place over an 18-month period as compared to the few days in Mr. Downes' case. I am of the view that the circumstances of Mr. Jarvis' offences were more serious than those of Mr. Downes'.

[86] Mr. Downes relies on a number of provincial court decisions from this jurisdiction and others. Of course, each case is fact-specific. Those cases include:

- a) *R. v. Bosomworth*, 2015 BCPC 7: The offender, who was 39 years old with no criminal record, was convicted under s. 162(1)(a) after he placed a small camera with a USB memory stick in the paper towel dispenser of a unisex washroom used by staff and patrons of a small restaurant that he operated. His business and reputation were adversely affected by widespread publicity regarding the offence. He was given a suspended sentence with a 12-month probationary period on conditions, including that he not possess or use any device capable of making or capturing video or photographic recordings. The judge rejected the possibility of a conditional discharge on the basis that denunciation and deterrence are particularly important for privacy offences given erosion of privacy in the public sphere, leading to greater importance in protecting highly private places.
- b) *R. v. Dekker*, 2014 ABPC 61: The offender was convicted of surreptitiously videotaping at least 80 people, including children, using the toilet and exposing their private parts on five different occasions. The offence was not sexually motivated. The offender pleaded guilty, was remorseful, had no prior record, and had strong family and community support. His family suffered significant public humiliation as a result of the charges and conviction. The judge held that a suspended sentence would not adequately reflect the seriousness of the offence, the offender's culpability, or the need for denunciation and general deterrence. He was sentenced to a 9-month conditional sentence, comprised of four months' house arrest followed by five months on a strict curfew, and by two years' probation.
- c) *R. v. F.G.*, [2011] N.J. No. 95 (P.C.): The offender was sentenced to three months' imprisonment to be served conditionally in the community, followed by three years' probation, after video recording his 17-year-old step-daughter naked in her bedroom after she had taken a shower. The victim's statement described the profound effect on her and the gross violation of her trust, and said she wanted the offender out of her life. The judge found that the damage to the complainant's sense of personal security was high, her expectation of privacy was extremely high, and that denunciation and deterrence were the key factors, especially to protect the integrity of children. The offender had no criminal record, had sought counselling, and was hospitalized for a short time after his arrest.
- d) *R. v. M.S.A.*, 2013 ABPC 66: The offender twice surreptitiously videotaped his 15-year-old stepdaughter dressing in her bedroom using a hidden cell-phone camera. The judge declined to order a conditional sentence and imposed a sentence of five months' incarceration followed by two years' probation. The offence was described as "grave" and involved abuse of a position of trust and a victim under 18 years of age.

- e) R. v. R.C.H., 2010 BCPC 475: the 59-year-old offender videotaped his 13-year-old (non-biological) granddaughter while she was naked getting in and out of the shower. It was an isolated incident. He pleaded guilty and was found to have developed an unhealthy and sexually inappropriate orientation towards his granddaughter after having been sexually abused himself as a teenager. His risk of recidivism was found to be negligible and the incident destroyed his relationship with his son, the victim's father. The offender had a strong work ethic and was highly skilled; any sex offender registration would have a significantly negative implication on his work outside of Canada. The court was satisfied that it was not contrary to the public interest to impose a conditional discharge, followed by a period of three years' probation to ensure the offender received recommended counselling.
- [87] Although Mr. Downes submitted some additional cases, and I have read and considered all of them, I will not summarize them as I found them to be less helpful because of combinations of the following factors: the case was dated, it did not involve a victim under 18 years of age, it did not involve an offender in a position of trust towards the victims, and the offence was impulsive and did not involve planning.

Time Spent in Pre-Trial Custody

- [88] In R. v. Fice, 2005 SCC 32 at para. 17, Justice Bastarache for a majority of the Supreme Court of Canada confirmed that pre-sentence custody is taken into account in sentencing because it "is part of the total punishment imposed; it is not a mitigating factor that can affect the range of sentence". This is because "the appropriate range of sentence is related to the gravity of the offence or the moral blameworthiness of the offender, and these concepts do not change with the time spent in pre-sentence custody": para. 22.
- [89] The Crown submits that Mr. Downes should be credited on a 1.5:1 basis for his 200 days of time served, for a total of 300 days of credit. Counsel for Mr. Downes submitted that the conditions that Mr. Downes faced in pre-trial custody would warrant credit given at a 2:1 ratio, but that imposing a sentence of that kind would be inappropriate in the circumstances of this offence and this offender. When asked their position in reply to this submission, the Crown agreed that I could give credit at a ratio higher than 1.5:1 to account for particularly onerous pre-trial custody conditions.
- [90] Neither counsel made submissions on the legal pathway to doing so, given the restriction in s. 719(3.1) capping the credit that can be received for time spent in custody to 1.5:1. The Supreme Court of Canada's decision in Nasogaluak indicates that offenders who have suffered particularly harsh treatment who seek to avoid this cap "can often look to other remedies, including under s. 24(1) of the Charter": para. 73. In any event, it is not necessary for me to resolve this issue because neither counsel in fact seeks to have credit at a ratio over 1.5:1 granted in this case. The Crown seeks 1.5:1 credit, and the defence seeks a conditional discharge, which, as I understand their position, would not involve awarding any credit for the time Mr. Downes spent in custody.

The Fit Sentence

- [91] With respect to the defence's proposed sentence, a discharge is available for offences under s. 162(1)(a) as the offence does not contain a minimum sentence and has a maximum sentence of less than 14 years' imprisonment. Under s. 730 of the Criminal Code, for a discharge to be granted, I must also consider it to be in the best interests of the accused and not contrary to the public interest.
- [92] *R. v. Fallofield*, [1973] 6 W.W.R. 472 (B.C.C.A.) is the leading authority with respect to conditional discharges. It confirmed that discharges are not limited to technical or trivial violations; they can be considered in any case in which the statutory criteria are met. It also explained what it means for a discharge to be in the best interests of the accused. This criterion presupposes that the accused is a person of good character, without previous convictions, that it is not necessary to enter a conviction against him in order to deter him from future offences or to rehabilitate him, and that the entry of a conviction against him may have significant adverse repercussions.
- [93] *Fallofield* also confirmed that the public interest in the deterrence of others does not preclude the judicious use of the discharge provisions. In some of the cases relied on by Mr. Downes, sentencing judges have imposed conditional discharges for offences of voyeurism. It appears that those cases tended to involve circumstances where the offence was for a non-sexual purpose or was done impulsively. For example, in *R. v. Laskaris*, 2008 BCPC 130, a dentist pleaded guilty to unlawfully videotaping his female staff using the washroom. The surveillance was for the purpose of dealing with theft problems and there was no sexual motive. In that case, the court imposed a conditional discharge and probation for one year.
- [94] Cases of voyeurism in which a discharge was found to be unsuitable generally include greater moral blameworthiness, such as a planned or pre-meditated course of conduct, multiple surreptitious recordings or voyeuristic acts, those involving more than one victim, or those associated with other criminal activity.
- [95] It is clear that a discharge would be in Mr. Downes' best interests as it would allow him, to the extent it is possible, to start rebuilding his coaching career which, together with his sports photography business, is how he has earned his living. He has no other marketable skills. I accept, in part due to the onerous bail conditions he was under as a result of the charges against him, that it is not necessary to enter a conviction against him in order to deter him from future offences or to rehabilitate him.
- [96] However, in my view, a discharge would not be in the public interest in these circumstances. I have come to this conclusion in particular because the victims were under the age of 18 and Mr. Downes was in a position of trust towards them.

THE SENTENCE IMPOSED

- [97] Having considered the evidence before me on this sentencing and the principles in ss. 718-718.2 of the Code, I suspend the passing of sentence and place Mr. Downes on probation for six months. The probation orders are concurrent.
- [98] I remind Mr. Downes that if he is convicted of another offence during the term of his probation, s. 732.2(5) permits me to revoke the probation orders and impose any sentence that could have been imposed had I not suspended the passing of sentence.
- [99] The terms of the probation orders shall be as follows:
1. You shall keep the peace and be of good behaviour.
 2. You shall appear before the court when required to do so by the court.
 3. You shall report to a probation officer within two working days after the making of this probation order and thereafter when required to do so by the probation officer. Such reporting may be by telephone.
 4. You shall notify the court or the probation officer in advance of any change of name or address.
 5. You shall have no contact directly or indirectly with T.R. or G.C..
 6. You are not to be in the presence of any boys under the age of 17 years in any circumstances where a boy would have a reasonable expectation of privacy, including but not limited to locker/dressing rooms, washrooms, and showers.
 7. You are not to take photographs, or record the image of any boy under the age of 17 in any circumstances, except with the prior written consent of the boy's parent or guardian.

Ancillary Orders

- [100] The Crown sought a DNA sample, which Mr. Downes has already provided. It also seeks a victim fine surcharge and a forfeiture order with respect to certain police exhibits on which photographs taken by Mr. Downes were stored.
- [101] Counsel for Mr. Downes opposes most of the remaining ancillary orders sought by the Crown.

Victim Surcharge

- [102] Section 737(1) of the Code provides that an offender "shall pay a victim surcharge for each offence, in addition to any other punishment imposed on the offender." The amount of the surcharge is \$200 per offence in the case of offences punishable by indictment: s. 737(2).

- [103] Despite the mandatory wording in subsection (1), the Code provides for an exception in s. 737(2.1). This exception allows the court to order an offender pay no surcharge, or pay a reduced amount, if satisfied that the surcharge would cause undue hardship to the offender or would be disproportionate to the gravity of the offence or the degree of responsibility of the offender. "Undue hardship" is defined in s. 737(2.2) as meaning that "the offender is unable to pay a victim surcharge on account of the offender's precarious financial circumstances, including because of their unemployment, homelessness, lack of assets or significant financial obligations towards their dependants."
- [104] Counsel for Mr. Downes submits that Mr. Downes has not been working since charges were laid, except for refereeing a few adult games. He has minimal income and his mother is financially supporting him.
- [105] I am satisfied that imposing a victim surcharge on Mr. Downes would cause undue hardship due to his precarious financial circumstances and his unemployment. I therefore decline to grant the order for a victim surcharge sought by the Crown.

Forfeiture Order

- [106] The forfeiture order sought by the Crown is with respect to two USB storage devices (Police Exs. 11 and 66), an external hard drive (Police Exhibit 4), an Apple iPhone 4S (Police Ex. 82), an Apple iMac (Police Ex. 3), and an Apple MacBook Pro (Police Ex. 88). The order sought would wipe the devices of all data and return them to Mr. Downes, or, if it is not possible to wipe the exhibits clean, to have them forfeited.
- [107] Mr. Downes does not oppose forfeiting the external hard drive, the two USB storage devices, or the iPhone. He consents to having the images removed from the Apple iMac and the Apple MacBook Pro, but he seeks to have the computers returned to him as he cannot afford to purchase new ones.
- [108] Section 490.1 of the Code deals with the forfeiture of offence related property, which is defined in s. 2 of the Code. Section 490.1(1) requires forfeiture of the property when the court is satisfied on a balance of probabilities that the property is offence related and that the indictable offence of which the accused is convicted was committed in relation to that property.
- [109] I am satisfied that the items sought for forfeiture meet the definition of "offence related property" as property used in connection with the commission of the offences. I am also satisfied that the requirements of s. 490.1(1) are met.
- [110] The USB storage devices, the external hard drive, and the iPhone will be forfeited. The Apple iMac and the Apple MacBook Pro are to be scrubbed of all versions of the 38 images, which were included in the appendix to the admissions filed as Ex. 2 at the trial. The computers are then to be returned to Mr. Downes. In the event that the images cannot be scrubbed, counsel may return before me to speak to this issue further.

"MacNaughton J."

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