

CANADA / JUDGMENT

R. v. Hamlin

2019 BCSC 2266

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Supreme Court of British Columbia

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2019 BCSC 2266 R. v. Hamlin

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Hamlin,

2019 BCSC 2266

Date: 20191004

Docket: 106411-2

Registry: Kamloops

Regina

v.

Donald Eric Hamlin

Restriction on Publication: Pursuant to 486.4(1) C.C.C.

Section 16(4) Sex Offender Information and Registration Act ("SOIRA"): This section provides that no person shall disclose any information that is collected pursuant to an order under SOIRA or the fact that information relating to a person is collected under SOIRA

Before: The Honourable Justice Winteringham

(appearing by videoconference)

Oral Reasons for Sentence

Counsel for the Crown:

L.A. Ruzicka (appearing by teleconference)

J.A. Khan

Counsel for the Accused:

D.J. McNamee

Place and Date of Hearing:

Kamloops, B.C.

September 27, 2019

Place and Date of Judgment:

Kamloops, B.C.

October 4, 2019

Table of Contents

I. OVERVIEW.. 3

II. POSITION OF THE CROWN/DEFENCE. 3

III. CIRCUMSTANCES OF THE OFFENCE. 4

IV. Mr. Hamlin's CIRCUMSTANCES. 5

V. CONSTITUTIONAL CHALLENGE. 9

VI. DISPOSITION. 14

I. OVERVIEW

- [1] On March 11, 2019, Don Eric Hamlin pleaded guilty to possession of child pornography relating to events that occurred on December 7, 2016, contrary to s. 163.1(4) of the Criminal Code (the "Code") and accessing child pornography on November 28, 2016, contrary to s. 163.1(4.1) of the Code. Mr. Hamlin filed a Notice of Constitutional Question on March 27, 2019, challenging the constitutionality of the mandatory minimum sentence, one-year incarceration when the Crown proceeds by indictment, statutorily mandated under s. 163.1(4) and 163.1(4.1). Mr. Hamlin contends that the mandatory minimum jail sentence constitutes a violation of s. 12 of the Canadian Charter of Rights and Freedoms (the "Charter"). After his guilty pleas were recorded, he adjourned sentencing to September 27, 2019.
- [2] These offences had previously attracted lower mandatory minimum sentences than the one-year sentence at issue here. Even the lower mandatory minimum sentence did not survive Charter scrutiny.
- [3] Counsel requests that the court determine the constitutional question, even though there are court rulings striking similar provisions, and despite the fact that in Mr. Hamlin's case the Crown seeks a jail sentence in excess of one year.

- [4] In these reasons, I will first set out the positions of crown and defence counsel with respect to sentence. Second, I will set out the circumstances of the offence and the circumstances relating to Mr. Hamlin I will then turn to the constitutional issue. Lastly, I will provide my decision as to sentence for Mr. Hamlin.

II. POSITION OF THE CROWN/DEFENCE

- [5] The Crown asserts that a just and fit sentence in the circumstances presented here is a jail sentence in the range of 12-15 months, followed by three years of probation with the conditions that are set out at p. 7 of the presentence report dated August 7, 2019, with slight modifications. The Crown also seeks ancillary orders under s. 161 of the Code, DNA pursuant to s. 487.051(1), a lifetime SOIRA order (required for two convictions for designated offences) and a forfeiture order pursuant to s. 164.2(1). In support of its sentencing position, the Crown relies on the following: *R. v. D.N.G.*, 2007 BCSC 1999; *R. v. Hopps*, 2010 BCSC 1875; and, *R. v. C.W.F.*, 2009 BCPC 85.
- [6] Mr. Hamlin submits that a conditional sentence order in the range of 18-24 months would be a just and fit sentence. In the alternative, he submits that a sentence of 90 days, to be served intermittently, would satisfy the principles of sentencing in the circumstances of this case. In the further alternative, Mr. Hamlin submits that the court impose an intermittent sentence on one count and a conditional sentence order on the second count. He agrees that the three-year probation order would follow. With slight modifications, he does not oppose the ancillary orders sought by the Crown.
- [7] Mr. Hamlin relies on the following authorities: *R. v. Pommer*, 2008 BCSC 737; *R. v. R.Y.*, 2013 BCPC 421; *R. v. Gurr*, 2007 BCSC 1586; *R. v. Leask*, 2013 BCSC 926; and, *R. v. Qusted*, 2019 BCPC 95.

III. CIRCUMSTANCES OF THE OFFENCE

- [8] The Crown tendered an Admission of Facts which was filed as an exhibit at the sentencing hearing. The Admission of Facts will be attached to these reasons as Appendix "A." I provide but a brief summary of the facts here.
- [9] Mr. Hamlin is 56 years old, works as a carpenter, and is self-employed. The investigation into his conduct commenced on June 7, 2015, when a pornographic photograph of a child was transferred over Facebook to another Facebook user from a user account identified as "Don Ham". The photograph depicted a naked boy, approximately 8-12 years old, with an erect penis. The boy was looking down toward the camera while holding a ruler. The RCMP's Integrated Child Exploitation Unit conducted an investigation into this photograph. Their investigation culminated in the police obtaining a search warrant for Mr. Hamlin's residence. The search warrant was executed on December 7, 2016. At that time, the police seized Mr. Hamlin's cellphone and laptop. Mr. Hamlin gave the police his password for the laptop. Mr. Hamlin was cooperative with the investigators from the outset.

- [10] The police examined the cellphone and laptop. On the cellphone, the police located a text message dated November 18, 2016, which read: "I couldn't keep my eyes off those peoples daughter yesterday I hope to get the floor job for them. I'm open [to] any age as long as no [one gets] hurt."
- [11] The police examined the laptop and found a pornographic photograph of a female child approximately 1-3 years of age and five pornographic video compilations of children. The videos are described in Appendix A. For the purpose of these reasons now, I simply provide a brief summary of the video compilations. The videos range from 27 seconds to two minutes in length and depict various sexual acts by adults on children. For example, Video 2 is described as being 59 seconds in length, showing a young girl, approximately 3-7 years old, lying nude, face up on a bed, and an adult male having intercourse with this young child. Similarly, Video 3 is described as being 40 seconds in length, showing a male child approximately 6-10 years old, lying face down on a bed, with an adult male having anal intercourse with this child.
- [12] Also from the laptop, the police discovered Mr. Hamlin's conversation in a chat room with a user identified as "private tutor", engaged in a discussion about fondling a child. At the end of the conversation, Mr. Hamlin demonstrated restraint from actually performing the act discussed.
- [13] As noted, Mr. Hamlin cooperated with the police investigation. It was some time before he was formally charged but it appears that he indicated his intention to plead guilty at the earliest opportunity.

IV. Mr. Hamlin's CIRCUMSTANCES

- [14] For this sentencing hearing, two reports were prepared: a presentence report, dated August 7, 2019; and, a forensic psychological report of Dr. Joneja, a registered psychologist, dated August 29, 2019.
- [15] In addition, Mr. Hamlin provided the following information:
- (a) a personal letter that he wrote expressing his apology;
 - (b) a letter from Mr. Hamlin's partner, Satina Bruno;
 - (c) a letter from Sharanjeet Bubbar, a person Mr. Hamlin has done significant contracting work for; and
 - (d) an appointment notice from Interior Health regarding an ultrasound appointment for October 23, 2019.

- [16] The character references state that Mr. Hamlin is a reliable and good worker, and is someone who is of great assistance and support to Ms. Bruno and her elderly father. Both letters indicate that Mr. Hamlin provides needed support to Ms. Bruno, who suffers from seizures as a result of epilepsy. Their relationship is one that has lasted over ten years, and Ms. Bruno states that a prison sentence will cause considerable hardship to both her and her father if they were to lose the support of Mr. Hamlin
- [17] With respect to employment, Sharanjeet Bubbar describes Mr. Hamlin as a reliable contractor who has provided significant services to their company, Grace Contracting Inc., over the last four years.
- [18] Both in his personal letter and in his statement to the court, Mr. Hamlin expressed remorse for his conduct giving rise to the criminal convictions for which he is to be sentenced. I will turn in a moment to the reports filed, but note the following from Mr. Hamlin's letter where he said this:

I apologize for my actions and I am sorry for what I have done. I never previously considered that my viewing material was causing harm but I understand the implications. I know there wouldn't be anyone producing this kind of material if I wasn't viewing it. I never clued into it. I don't consider myself to be a stupid person but my actions were stupid.

I understand Kamloops Forensic Services considers me a high risk to re-offend and I totally disagree with that assessment. I consider myself to be a law abiding person and I will comply strictly with all conditions imposed by the court as part of my sentence. I've had an awful lot of time to think about my offending. There hasn't been a lot else on my mind aside from this. These charges were a wake-up call.

- [19] I turn then to Mr. Hamlin's criminal record, which is dated. In 1986, he was convicted of failing to provide a breath sample and dangerous operation of a motor vehicle. Related to the offences now before the court, Mr. Hamlin was convicted on September 27, 2004, for sexually assaulting a young girl when she was between 9-10 years old. In the presentence report, it was noted that the offence involved touching of her chest and vaginal area on more than one occasion while the victim was in his care. He was sentenced to a nine-month conditional sentence order with probation following. With respect to the 2004 conviction, he was stated to have completed community supervision with no reported breaches of his conditions. To the pre-sentence report writer and with respect to the child pornography offences now before the court, Mr. Hamlin acknowledges the harm caused by his use of child pornography stating "initially he felt removed from the individuals who actually create child pornography but stated he now understands how viewing the material is also causing harm." He also stated "he understands how his actions contribute to the production of this material and abuse of children and acknowledges that his actions hurt many people and this is not a victimless crime. He states that he would never want to cause anyone harm again."

- [20] In the presentence report, the author notes that if Mr. Hamlin is sentenced to a provincial term of incarceration, he would be referred to the Forensic Sex Offender Treatment Program offered at Ford Mountain Correctional Centre ("Ford Mountain"). This program commences on October 22, 2019 and completes on December 31, 2019.
- [21] With respect to his conviction for sexual assault, Mr. Hamlin reported that he does not connect this prior conviction to the current offence, although both do involve sexualizing a minor.
- [22] I turn then to the psychological assessment, and I start with Dr. Joneja's opinion that Mr. Hamlin has been assessed at a high risk of sexual reoffending, noting that his current risk is mitigated by external controls such as limited access to children and use of the internet.
- [23] The basis of Dr. Joneja's opinion is set out at paras. 42-45 of the report:

Factors that contribute to a high risk of sexual violence recidivism include but are not limited to: difficulties with stress or coping; possible difficulties originating in childhood; past suicidal ideation; substance use; chronicity and diversity of sexual offending behaviour; attitudes that condone sexual violence; potential problems with treatment; minimisation of sexual violence and sexual deviancy. The support of his partner and her family may be considered a protective factor; however, it should be noted that they may not be aware of the seriousness of Mr. Hamlin's sexual deviancy and as such, it is recommended that family members not be placed in a supervisory capacity unless otherwise notified.

The assumed anonymity of internet usage as well as its availability and affordability may have been critical components to Mr. Hamlin's recent offending behaviour. The behavioural reinforcement of internet use and the function of pornography itself may have served the purpose of obtaining reinforcing stimulation and avoiding negative emotional states. Possible feelings of isolation, intimacy and social skill deficits, and sexual deviancy may also predispose and perpetuate problematic use of pornography.

Additional factors that may contribute to a risk of sexual recidivism include extremely limited self-awareness and the aetiology of his sexual deviancy and paraphilias as well as his understanding of the factors and processes (cognitive, emotional, and behavioural) that precipitated his sexual offending behaviour and perpetuate a risk of sexual violence towards children. In 2004, Mr. Hamlin did not acknowledge a sexual attraction towards children (Kropp, 2004), thereby potentially limiting the effectiveness of treatment. Individual therapy may be useful to examine the extent of his psychopathology and identify priorities for intervention. The uncertainty associated with his ability to manage his compulsions independently may necessitate the maintenance of external controls to prevent future reoffending. An extended period of restricted and supervised use of the internet is recommended.

Mr. Hamlin has a positive history of non-violent offending as well as violent, contact sexual offending. According to research, child pornography offenders who had committed a prior or concurrent contact sexual offense were the most likely to offend again, either generally or

sexually (Seto & Eke, 2005). Moreover, dual offenders, those with a history of both child pornography and contact sexual offending demonstrated the highest rates of recidivism compared to contact sexual offenders and illegal pornography offenders (e.g. Eke et al., 2019; Goller et [al]., 2016; Eke & Seto, 2008). Mr. Hamlin's criminal history including prior contact sexual offenses, the preponderance of sexually explicit material and other images depicting prepubescent boys as opposed to prepubescent girls as well as Mr. Hamlin's declared sexual interest in children contribute to his risk of reoffending.

[24] Dr. Joneja recommends that Mr. Hamlin participate in group sex offender treatment programming, to be complemented with individual psychotherapy.

[25] As noted previously, Mr. Hamlin disagrees with this risk assessment. His counsel also cautions the court against re-sentencing Mr. Hamlin for the 2004 sexual offence.

V. CONSTITUTIONAL CHALLENGE

[26] In Mr. Hamlin's notice of constitutional question, he submits that the imposition of the one-year mandatory minimum sentence under ss. 163.1(4) and (4.1) will result in a punishment which is grossly disproportionate to his culpability, in that:

- (a) a proportionate sentence for knowingly possessing or accessing child pornography contrary to s. 163.1 could, absent a mandatory minimum sentence, include a sentence short of imprisonment, or a shorter sentence of imprisonment, while still giving effect to the fundamental principles of sentencing; and
- (b) the imposition of a one-year prison sentence in this case would represent a grossly disproportionate sentence for the offence, having regard to all the circumstances of this offence and this individual.

[27] In other words, Mr. Hamlin asserts that the one-year mandatory minimum sentence for possession of and accessing child pornography constitutes cruel and unusual punishment contrary to s. 12 of the Charter, either pursuant to the particularized or generalized inquiry.

[28] The procedure to follow when facing a challenge under s. 12 is to embark on a two-stage process consisting first of determining whether the sentencing provision in question provides for punishment that is grossly disproportionate as applied to the individual offender. This is referred to as the particularized inquiry. If the provision is not found to be grossly disproportionate in the circumstances of the particular offender, the inquiry then shifts to the second stage to consider whether the provision provides for a punishment that is grossly disproportionate in reasonable hypothetical scenarios.

[29] The Crown submits that the current one-year mandatory minimum sentence for possession of child pornography cannot be constitutionally defended. Simply put, much shorter mandatory minimum sentences have not withstood constitutional scrutiny. In its helpful submission, the Crown stated its position in the following way at paras. 4-6 of their written submissions:

The Crown acknowledges that, based on the binding authority of *R. v. Swaby* . . . the current one year [mandatory minimum sentence] for possession of child pornography (where the Crown proceeds by indictment) cannot be constitutionally defended. In *Swaby*, the Court of Appeal . . . declared the former 90 day [mandatory minimum sentence] where the Crown proceeded summarily to be of no force and effect. Shortly thereafter, in *Alexander*, the Court declared the former six month MMS for possession of child pornography where the Crown proceeded by indictment to be of no force and effect. [Justice] MacKenzie, writing for the Court, held that "the reasonable hypothetical adopted in *Swaby* inevitably leads to the conclusion that the six-month mandatory minimum punishment then in effect under s. 163.1(4)(a) also violates s. 12 of the Charter" . . . In this case, *Swaby* "inevitably leads" to the same conclusion with respect to the current one-year [mandatory minimum sentence] in s. 163.1(4)(a) where the Crown proceeds by indictment.

While there are arguably fine distinctions that may be made between accessing and possessing child pornography, the two offences are directed to conduct that is not materially different from a moral culpability perspective. In this respect, they stand in stark contrast, for example, to the offence of making and distributing child pornography.

Consequently, it is also open to this Court to consider the facts of *Swaby* or the reasonable hypothetical used in *Swaby* as conduct that amounts to "accessing", or can be reasonably modified or adapted to do so. If so, *Swaby* also compels the conclusion that the one year MMS . . . for accessing child pornography also infringes s. 12 on the basis of a reasonably foreseeable hypothetical.

[30] The somewhat more difficult question for this court is whether I should exercise my discretion to decline to consider the constitutionality of a mandatory minimum sentence if I determine that it does not have an impact on the determination of a fit sentence for this individual; see *R. v. Lloyd*, 2016 SCC 13 at paras. 4, 18 and 20; *R. v. Alexander*, 2019 BCCA 100 at paras. 50, 52, 56; and, *R. v. Boesel*, 2017 BCSC 970 at paras. 13, 14 and 153. Counsel for the Crown and defence invite the court to determine the issue, even if the proportionate sentence for Mr. Hamlin is at or in excess of one year. The Crown submits that determining the issue will provide jurisprudential certainty in British Columbia because s. 52 declaratory relief is available only to superior courts. In circumstances where an accused is charged with possession of or accessing child pornography and the Crown proceeds by indictment, the accused could elect to be tried in Provincial Court. A Provincial Court judge does not have the jurisdiction to make a general declaration that the law is of no force and effect if an accused were to challenge the one-year mandatory minimum in Provincial Court; see *Lloyd* at para. 19. Rather, if the Provincial Court judge concludes that the one year mandatory

minimum sentence violates s. 12, the Provincial Court judge must decline to apply the mandatory minimum and proceed to impose the fit sentence. The mandatory minimum, however, would remain, as the Crown states, "on the books". As Justice Bennett explained in *R. v. E.O.*, 2019 YKCA 9, this leads to uncertainty and the inefficient use of judicial resources. Justice Bennett stated it this way at paras. 37-40:

In *R. v. Lloyd*, the Court affirmed that a provincial court does not have the jurisdiction to strike down legislation as unconstitutional, but does have the power to find a law unconstitutional insofar as it affects the case before it (at para. 17). The Court also held that a provincial court does not have to engage in an analysis of the constitutionality of legislation if it would not affect the case, which is what the judge did here (at para. 18). Given the judge's conclusion on sentence, it cannot be said that he erred in concluding that he did not need to consider the issue of the mandatory minimum sentence.

However, that conclusion does not end the matter in this Court. When a court does have the ability to declare legislation unconstitutional, as long as the application is properly argued, it will not offend principles of judicial economy to engage in the analysis regardless of the effect on the individual before the court. Unlike a provincial court judge, a superior court of inherent jurisdiction or court with appropriate statutory authority can issue an order that invalidates the legislation. In *R. v. Ferguson* at para. 73, and in *R. v. Nur* at para. 51, the Court frowned on leaving unconstitutional provisions "on the books", as it violates the rule of law to allow unconstitutional laws to remain in force indefinitely and deprives the legislature of the important signal that a law does not pass constitutional muster. In short, it is an appropriate use of judicial resources to strike down unconstitutional mandatory minimum sentences even where the offender before the court will be unaffected by that ruling.

I pause to note that in *R. v. Morrison*, Justice Moldaver for the Court declined to rule on a mandatory minimum because the mens rea of the offence had been significantly clarified in that case, and therefore, exceptionally, the Court lacked proper submissions on the kind of conduct that would be caught by the mandatory minimum. In this case, by contrast, there is no significant confusion among the parties about the workings of the offence.

Therefore, in my view, it is appropriate for this Court to consider the constitutionality of the mandatory minimum contained in s. 153(1.1)(a).

[Citations omitted.]

[31] In light of the position taken by both the Crown and defence here, and following my consideration of *Alexander* and *R. v. Swaby*, 2018 BCCA 416, leave to appeal refused, [2019] S.C.C.A. No. 17, the sentence to be imposed in Mr. Hamlin's case, which I will set out momentarily, I agree that in the circumstances presented here, it is appropriate to determine the constitutional issue. To that end, I am particularly guided by the reasoning of Justice MacKenzie in *Alexander*, where the mandatory minimum sentence at issue was 90 days, when proceeding summarily, and six months, when proceeding by indictment. Although the trial judge there had declined to determine the constitutional issue, the Court

of Appeal concluded that it was not precluded from addressing the constitutional issue, determining it was bound to follow the legal conclusion in *Swaby*. In the result, the Court of Appeal declared the six-month mandatory minimum of no force and effect. In coming to that conclusion, MacKenzie J. explained in *Alexander* at paras. 51-55:

In declaring that s. 163.1(4)(b) of the Criminal Code violates s. 12 of the Charter and is of no force and effect, the Court in *Swaby* upheld the conclusions of the sentencing judge and the summary conviction appeal judge that a 90-day sentence of incarceration was grossly disproportionate to a CSO, which would otherwise be appropriate for the offender. In its analysis, the Court relied on a reasonable hypothetical derived from *R. v. John*, concluding there are reasonable hypotheticals in which a mandatory term of imprisonment would result in a grossly disproportionate sentence (*Swaby* at paras. 91, 96).

In my view, the reasonable hypothetical (or "reasonably foreseeable application": per Nur at para. 57) adopted in *Swaby* inevitably leads to the conclusion that the six-month mandatory minimum punishment then in effect under s. 163.1(4)(a) also violates s. 12 of the Charter. The reasonably foreseeable situation in *John* was as follows:

[29] An 18-year-old whose friend forwards him a "sext" from the friend's 17-year-old girlfriend without her knowledge. The 18-year-old doesn't forward the "sext" but keeps it on his phone.

If *Swaby* concluded this hypothetical rendered the 90-day mandatory minimum unconstitutional, then consideration of the same hypothetical would also render the six-month mandatory minimum punishment in this case unconstitutional. The essential elements are identical for both offences. The only difference lies in how Crown exercises its very broad discretion as to whether to proceed by indictment or summarily.

To conclude that where the Crown proceeds summarily, the 90-day mandatory minimum punishment is unconstitutional, but where the Crown proceeds by indictment instead, the six-month mandatory minimum withstands Charter scrutiny could give rise to unfairness. The Crown could simply avoid the effect of *Swaby* by electing to proceed by indictment in every case.

Furthermore, the Crown properly acknowledges that this Court "may consider itself bound to follow the legal conclusion that *Swaby* provides a hypothetical [scenario] that infringes s. 12 of the Charter". The Crown did not argue that the legislation was saved under s. 1 of the Charter.

As the Ontario Court of Appeal in *John* said recently with respect to the mandatory minimum punishment at issue in the present case:

[41] The mandatory minimum is entirely unnecessary. This court has recently emphasized the importance of denunciation and deterrence for any offence involving abuse of a child, and that those principles are the primary principles of sentencing applicable for such offences involving child pornography: *R. v. Inksetter*, at para. 16. In another recent decision, *R. v. J.S.*, this court upheld a sentence of 18 years for sexual abuse of young children, making child pornography depicting that abuse, and distribution of that material.

[Citations omitted.]

- [32] Regardless of the constitutionality of the mandatory minimum in this case, I agree with the Crown that when determining a proportionate sentence in cases involving child pornography, there are a number of factors that the court must nonetheless bear in mind:
- (a) the gravity of offences involving child pornography, as reflected by Parliament's choice to impose a mandatory minimum sentence, cannot be ignored. See, for example, the Ontario Court of Appeal's remarks about child pornography as a pervasive social problem in *R. v. Inksetter*, 2018 ONCA 474 at paras. 23-25;
 - (b) except in exceptional cases, the sentencing range for possession of child pornography starts with incarceration: see *Swaby*, at paras. 66-67; and, *Alexander*, at paras. 40-42; and
 - (c) BC courts have indicated a broad sentencing range of four months to two years for possession of child pornography: see *Alexander*, at paras. 37-39.
- [33] Should the court find a violation of s. 12 of the Charter, the Crown does not seek to justify that violation under s. 1 of the Charter.
- [34] Following that legal reasoning, I would declare, pursuant to s. 52(1) of the Constitution Act, 1982, that the one-year mandatory minimum punishment under s. 163.1(4) and (4.1) of the Code are unconstitutional and those provisions are of no force and effect.

VI. DISPOSITION

- [35] I must now consider what sentence is appropriate for Mr. Hamlin
- [36] I set out here the fundamental principles and objectives of sentencing. Section 718 of the Code sets out the principles of denunciation, general and specific deterrence, protection of the public, rehabilitation, providing reparations for the harm done to victims and the community, and promoting an offender's sense of responsibility, and acknowledgment of the harm done. Fundamental principles central to the sentencing process are proportionality and parity. Simply put, a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the individual. Parity is reflected in s. 718.2(b), which provides that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.
- [37] Sentences should also be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, as provided in s. 718.2(a).
- [38] With respect to child pornography offences, the court has consistently recognized it to be a pervasive social problem that affects the global community and its children. This was clearly stated by Associate Chief Judge Hoy in *Inksetter* where it was stated:
- [22] Child pornography is a pervasive social problem that affects the global community and its children. In *R. v. Sharpe*, 2001 SCC 2 (CanLII), [2001] 1 S.C.R. 45, the Supreme Court described how possession of child pornography harms children. As Fraser C.J.A. wrote in *R.*

v. Andrukonis, 2012 ABCA 148 (CanLII), 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

- [39] However, sentencing must be an individualized process. Each and every case must be determined by the unique circumstances of the individual and of the conduct presented. I have considered the authorities presented by Mr. Hamlin. I have found many of those cases to reveal circumstances that are less serious than those presented here. With respect to the Provincial Court decision of Judge Giardini in R.Y., I have considered her decision and her useful summary of sentences for child pornography cases. I have also considered her reference to Justice Molloy's decision in R. v. Kwok, [2007] O.J. No. 557, where Molloy J. identifies a number of factors which could be considered aggravating in child pornography possession cases which include:
- (a) whether the offender has a criminal record for similar or related offences;
 - (b) whether there was also production or distribution of the pornography;
 - (c) the size of the collection;
 - (d) the nature of the collection, including the age of the children involved and the relative depravity and violence depicted;
 - (e) the extent to which the offender is seen as a danger to children; and
 - (f) whether the offender has purchased child pornography.
- [40] In R.Y. and the cases summarized therein, many of the sentences imposed were 90 days, and thus amenable to a term of intermittent sentence. I have also considered Leask and Gurr.
- [41] When I weigh the mitigating factors in this case, which include Mr. Hamlin's early guilty plea and expressions of remorse, which I do accept, and the principles of sentencing, and the authorities cited, I am of the view that 90 days does not adequately reflect an appropriate sentence in the circumstances presented here.
- [42] On the other hand, I do agree with Mr. Hamlin that the cases cited by the Crown are more serious than the circumstances presented here. I also agree that the court cannot use his 2004 prior conviction for sexual assault to resentence Mr. Hamlin for that offence. However, I do consider the criminal record before me to play a role in determining a fit sentence. I accept that he has a related record and that is but one of the factors I am to consider. I have a report before me that is, in essence, unchallenged by an opposing forensic report, raising a clear concern about risk. Despite Mr. Hamlin's assurance that his risk is lower than that captured by Dr. Joneja's opinion, I am nonetheless satisfied that his circumstances render this case more serious than the circumstances presented in Leask, Gurr and R.Y. I am also of the view that the principles of sentence with respect to specific deterrence, rehabilitation, and protection of the public will best be addressed by a period of incarceration enabling Mr.

Hamlin to complete the Sex Offender Treatment Program at Ford Mountain.

- [43] As I have stated, I am of the view that some of the cases cited by the Crown are more serious than the circumstances presented here, albeit not significantly so, particularly though with respect to the size of the collections at issue in those cases. I am guided by MacKenzie J.'s conclusion in *Alexander* where she upheld a sentence of eight months for an individual following a guilty plea to a single count of possession of child pornography in circumstances where there was a much larger collection, but without a prior record and with evidence that the individual there, Mr. Alexander, was a low to moderate risk to reoffend.
- [44] I am also mindful of MacKenzie J.'s analysis regarding the role of denunciation and deterrence in sentencing cases involving child pornography. She refers to *R. v. R.L.W.*, 2013 BCCA 50, where the Court of Appeal explained that over the years, courts have developed a greater appreciation of the harm caused to children by the manufacturing, distribution and possession of child pornography. The courts have thus placed greater emphasis on denunciation and deterrence, causing sentences to increase: see *R.L.W.*, at para. 49.
- [45] Again, this sentiment is reflected in her reliance on the discussion in *Inksetter* at paras. 22, 23 and 25 about the harms associated with the offence of child pornography and possession of it.
- [46] Having considered the circumstances of the offences, including the size of the pornography collection discovered by the police, the nature of the videos found on Mr. Hamlin's laptop, including content involving adults engaged in intercourse with young children, the related record, albeit from 2004, and the risk of re-offending as expressed in the psychologist's report, I am satisfied that a jail sentence of eight months is required. That length of sentence will enable Mr. Hamlin to participate and complete the Sex Offender Treatment Program delivered at Ford Mountain. I also order that this period of incarceration be followed by probation for three years with the following conditions:
- (a) You must report, in person, to a Probation Officer at 102 - 455 Columbia Street, Kamloops, British Columbia, by 3:00 p.m. on the day of your release, and after that, you must report as and when directed by the Probation Officer;
 - (b) You must reside at a residence approved in advance by the Probation Officer. You must provide your Probation Officer with your phone number and address, and you must not change your residence or phone number without written permission from your Probation Officer;
 - (c) When first reporting to your Probation Officer, you must advise the officer the names of all permanent and temporary occupants of your residence and immediately tell him or her of any change;

- (d) You must 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, such intakes, assessments, counselling or other programs may relate to sexual abuse prevention;
- (e) You must not go to any public park, public swimming area, community or daycare centre, school ground or playground where persons under the age of 16 years are present or can reasonably be expected to be present;
- (f) You must have no contact or communication, directly or indirectly, with, nor be alone in the presence of, any person you know to be or who reasonably appears to be under the age of 16 years;
- (g) You must not own, possess, or use any device capable of accessing any computer network, including the internet, except as -- except with written permission of your Probation Officer;
- (h) You must not enter into any agreement or contract with any internet service provider providing any internet access or any form of data plan, mobile or otherwise, except with written permission from your Probation Officer; and
- (i) You must not possess any device capable of storing data, except with written permission from your Probation Officer.

[47] Regarding the submission from Mr. Hamlin's counsel permitting Ms. Bruno to supervise, I am not prepared to grant that modification at this stage. I have decided that because Ms. Bruno seems to have been unaware of what was occurring in her own home regarding these offences and, as such, her ability to provide adequate supervision seems limited.

[48] I will also make the following ancillary orders:

- (a) Pursuant to s. 161 of the Code, you are prohibited for eight years from:
 - i. attending a public park, public swimming area, community or daycare centre, school ground or playground where persons under the age of 16 years are present or can reasonably be expected to be present;
 - ii. seeking, obtaining, or continuing any employment, whether or not the employment is remunerated, or becoming or being a volunteer in a capacity that involves a position of trust or authority towards persons under the age of 16 years or who reasonably appears to be under the age of 16 years; and
 - iii. having contact or communication with a person who is under the age of 16 years or who reasonably appears to be under the age of 16 years.

[49] Pursuant to s. 487.051(1), I make an order in Form 5.03 authorizing the taking of samples of bodily substances from you for the purpose of registration in the DNA National Data Bank.

- [50] You have been found guilty of more than one designated offence and pursuant to s. 490.013(2.1) you are required to comply with the Sex Offender Information Registration Act for life.
- [51] Finally, with respect to the forfeiture, pursuant to s. 164.2(1) of the Code, following your conviction, I am satisfied on a balance of probabilities that a silver HP Laptop (serial no. 5CD42166H5, identified as Exhibit 4) and an HGST Internal HD (identified as Exhibit 4A) was: used in the commission of the offence; and, is your property. The HP Laptop and HGST Internal HD is to be forfeited to Her Majesty The Queen to be disposed of in accordance with the directions of the Attorney General, as defined in s. 2 of the Code.
- [52] As stated at the outset, I am directing that a copy of the transcript of these reasons for sentence be provided and sent to the appropriate correctional authority.
- [53] Those are my reasons for sentence.

"Winteringham J."

APPENDIX "A"

R. v. Donald Eric Hamlin

AGREED STATEMENT OF ACTS

In accordance with s. 655 of the Criminal Code and for the purpose of dispensing with proof thereof, the parties agree as follows:

1. The accused, Mr. Donald Eric Hamlin, is currently 56 years old, works as a carpenter and is self-employed;
2. On June 7, 2015, a pornographic photograph of a child was transferred over Facebook to another Facebook user from user account "Don Ham". The photograph depicted a naked boy with an erect penis. The boy was approximately 8-12 years old. The photograph was angled from the boy's scrotum area up towards his face. The boy was looking down towards the camera while holding a ruler;
3. On January 9, 2016, the Royal Canadian Mounted Police Integrated Child Exploitation unit in British Columbia assumed responsibility for an investigation into the June 7, 2015, incident;
4. On December 7, 2016, members of the Kamloops Royal Canadian Mounted Police (RCMP) searched Mr. Donald Hamlin's residence at 660 Douglas Street in Kamloops, British Columbia, pursuant to a search warrant. They seized Mr. Hamlin's cell phone and laptop. Mr. Hamlin provided RCMP with the password to his laptop and said that "what they were looking for" would be there;
5. Cst. Kevin McIntyre conducted a forensic examination of Mr. Hamlin's cell phone and located the following:

- a. A record of a text message that Mr. Hamlin had sent to contact "Rolli" on November 18, 2016. The message read: "I couldn't keep my eyes off those peoples daughter yesterday I hope I get the floor job for them. I'm open ro any age as long as no ine get hurt" (sic);
- 6. Cst. Kevin McIntyre conducted a forensic examination of Mr. Hamlin's laptop and found the following:
 - a. A pornographic photograph of a female child approximately 1-3 years old, lying face up on a beach wearing a floral dress. The dress was pulled up to her waist displaying her nude vagina. The dominant characteristic in the photo was the depiction of the child's vagina;
 - b. 5 pornographic video compilations of children:
 - i. Video 1 ("especial boys!!!!") was 27 seconds long. It began with a collage of 25 still images of a male child approximately 7-10 years old engaged in sexual acts with an adult male, including masturbation, fellatio and anal intercourse. The stills were followed by motion video of an adult male having anal intercourse with the same child. The motion video ended with a collage of 25 still images of a female child approximately 4-8 years old. In some of the stills the child was nude, and in some she was partially nude with her legs spread, displaying her vagina to the camera
- 1. Mr. Hamlin last accessed this video on his laptop on November 28, 2016.
- 2. [collectively removed by Crown and defence counsel]
- ii. Video 2 (WA0021) was 59 seconds long and in colour. It showed a female child approximately 3-7 years old, lying nude, face up on a bed. An adult male was having vaginal intercourse with the child;
- iii. Video 3 (WA0045) was 40 seconds long and in colour. It showed a male child approximately 6-10 years old, lying face down on a bed. The child was shirtless but wearing jeans. An adult male was having anal intercourse with the child. The video ended with footage of the adult ejaculating on the child's back;
- iv. Video 4 ("aliokara") was 1 minute and 13 seconds long and in colour. It showed a male child approximately 6-10 years old kneeling on a bed. The child was nude and an adult male was performing fellatio on him. The child's penis was exposed during the acts depicted;
- v. Video 5 ("mom and boy") was 2 minutes and 6 seconds long and in colour. It showed a male child approximately 6-10 years old standing fully clothed. An adult female opened the child's pants, fondled the child's penis and then performed fellatio on the child;
- c. Approximately 100 images of infants or children wearing diapers; as well as photographs of Mr. Hamlin wearing diapers and lingerie while exposing his penis

- i. The day police searched Mr. Hamlin's residence, Mr. Hamlin provided a non-custodial statement and told police that he had a "collection of kids that were still in diapers that interested him"
- ii. That same day, Mr. Hamlin's girlfriend, Satina Bruno, told police that Mr. Hamlin wore diapers for both medical reasons and for a sexual purpose;
- d. A record of a conversation that Mr. Hamlin had on January 3, 2016, in a chat room while speaking to a user called <PrivateTutor>:

PrivateTutor: good feeling to fondle isn't it?

Hamlin: hi yes it is

PrivateTutor: so fulfilling

how long have you fondled?

Hamlin: he is handicapped severly he was in home form age 2 to age 7 then came home due to cut back.

so I guess be feeling him since ihe was 7

now 17

PrivateTutor: did it become better when he could ejaculate?

Hamlin: he can squirt but its a lot to make it happen

he is on many meds

PrivateTutor: i like to feel the sudden wetness

yes it can be difficult to bring on an erection with the meds

Hamlin: but it doesn't me I sure a hell dont give him a go

PrivateTutor: he is the first you have fondled?

Hamlin: in all honesty nope

I have kid sat over the years

...

PrivateTutor: how do you fondle them? as they sit on your lap?

Hamlin: on the couch

hehehehe...

PrivateTutor: how do you fondle?

Hamlin: hand in diaper bath time and in shower

you have kids

PrivateTutor: 2 older dau

Hamlin: cool

you teaching her

PrivateTutor: yes

started bathtime and bedtime fun

How do you fondle the other kids?

Hamlin: I don't

its been a very long time (sic)

7. Mr. Hamlin was convicted in 2004 of sexual assault. He received a 9 month conditional sentence order and 2 years of probation. The sexual assault was against [a child], who was between 9 and 10 years old at the time of the offence.

"Daniel McNamee"

"Janelle Khan"

Agreed to by Daniel McNamee

Counsel and Agent for Accused, Donald Eric Hamlin

Agreed to by Janelle Khan

Crown Counsel

Date: March 11, 2019

Date: March 11, 2019

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