

CANADA / JUDGMENT

R. v. Isbister

2024 BCSC 1836

COURT

Supreme Court of British Columbia

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2024 BCSC 1836 R. v. Isbister

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Isbister,

2024 BCSC 1836

Date: 20240913

Docket: X083232

Registry: New Westminster

Rex

v.

Kelly Glen Isbister

Before: The Honourable Mr. Justice Blok

Oral Reasons for Sentence

Counsel for the Crown:

S. Domaradzki

S. Wan

Counsel for the Accused:

J. Sicotte

Place and Dates of Hearing:

New Westminster, B.C.

March 1, May 2 and

September 3, 2024

Place and Date of Judgment:

New Westminster, B.C.

September 13, 2024

- [1] THE COURT: On July 31, 2023, Kelly Isbister pleaded guilty to one count of possessing child pornography and one count of breaching a s. 810.1 recognizance. He is now before the court for sentencing.

I. Sentencing Delay

- [2] Sentencing in this matter has been delayed to a most unsatisfactory extent, and so I consider it necessary to review those circumstances briefly.
- [3] As already noted, Mr. Isbister entered guilty pleas on July 31, 2023, following a voir dire ruling in favour of admitting evidence obtained as a result of the execution of a search warrant.
- [4] A sentencing hearing was set for September 20, 2023, but that date was adjourned because an expected Gladue report had not yet been received. Sentencing was rescheduled to November 6, 2023. Sentencing did not proceed on that date, because defence counsel brought an application to withdraw. That application was granted. A further sentencing date of December 15, 2023, was then fixed, but sentencing did not proceed on that date because counsel who was lined up to represent Mr. Isbister declined the retainer at the last minute.
- [5] The matter was rescheduled to March 1, 2024 and proceeded that day, but only in part as defence counsel sought time to get an up-to-date psychiatric report. Additionally, there was a concern that counsel had been unable to agree on the amount of time Mr. Isbister should be credited with for pre-trial custody, and I directed counsel to exchange written submissions on that issue. I allowed the adjournment, as I was satisfied that potential unfairness outweighed the concerns over delay.
- [6] Sentencing submissions resumed on May 1, 2024, but these submissions were limited to the question of credit for pre-trial custody. The matter was then put over to September 3, 2024, but also with a case management conference set for July 18, 2024, which I had directed in order to enable the Court to check on the status of the matter at that time.

- [7] At the case management conference, counsel informed the Court that Mr. Isbister had missed a scheduled appointment for an assessment by the Forensic Psychiatric Commission, and so no psychiatric report was going to be available from that source. In substitution, defence counsel had obtained a private psychiatric report, but Crown expressed concerns over some alleged inadequacies of that report and was looking to have those concerns addressed.
- [8] As it turned out, those concerns evidently could not be addressed to the Crown's satisfaction, and defence counsel opted not to proffer the report in light of the Crown's objections. Counsel indicated that, instead, some of the factual matters referenced in the report would be mentioned in her submissions, a matter with which the Crown took no objection.

II. Circumstances of the Offences

- [9] The circumstances surrounding the investigation and discovery of the pornographic images are set out in a voir dire ruling given on May 23, 2023, and so I will not repeat that level of detail here.
- [10] By way of summary, images and video files depicting child pornography were detected by one of the popular social media platforms and then reported to the National Centre for Missing and Exploited Children ("NCMEC"), a U.S. non-profit organization that works to reduce the internet distribution of child sexual exploitation images and videos. NCMEC in turn forwarded those reports to the B.C. Integrated Child Exploitation Unit (BC ICE), a law enforcement unit specializing in the investigation of child exploitation offences.
- [11] The images and video files were found to be associated with accounts in the name of Kelly Isbister. On December 19, 2019, police executed a warrant at Mr. Isbister's address and seized his cell phone. The cell phone was subsequently examined pursuant to the authority granted in the warrant. Mr. Isbister was arrested at the scene, but he was released without conditions once the warrant execution was complete.
- [12] Mr. Isbister was arrested on these charges on August 27, 2020 and a second cell phone seized at that time was found to contain further images of child sexual abuse.
- [13] A voir dire was held over three days in January and April 2023, and a ruling in favour of admission of the evidence was given on May 23, 2023.
- [14] As already noted, on July 31, 2023, Mr. Isbister pleaded guilty to two offences on what would have been the first day of a nine-day trial. Prior to his guilty pleas, the indictment was amended to combine Counts 1 and 2, such that Count 1 reads:

Kelly Glen ISBISTER, between the dates of the 19th day of December, 2019 and the 26th day of August, 2020, at or near Langley and/or Vancouver, in the Province of British Columbia, did possess child pornography contrary to Section 163.1(4) of the Criminal Code.

- [15] The second count to which Mr. Isbister pleaded guilty is Count 3, which reads:

Kelly Glen ISBISTER, on or about the 19th day of December, 2019, at or near Langley, in the Province of British Columbia, being bound by a recognizance under section 810.1 of the Criminal Code, committed a breach of the recognizance by possessing child pornography, contrary to section 811 of the Criminal Code.

- [16] In all, police found a total of 150 images and 10 videos depicting child pornography on Mr. Isbister's cell phones. There were 103 images and six videos on the phone seized on December 19, 2019, and a further 47 images and four videos on the phone seized when Mr. Isbister was arrested on these charges in August 2020.
- [17] The Court was informed that the images and videos in question are of young males exposing themselves in various ways and engaging in oral and penetrating sex with adults as well as with other youths.

III. Victim Impact

- [18] Offences relating to the possession and distribution of child pornography are ones in which the victims are often not before the court to speak to the impact they have suffered. Yet these are not victimless crimes.
- [19] I digress for a moment to note that the phrase "child pornography" has come to be criticized as it is seen as an inappropriately neutralized term for images and videos of child sexual abuse: see *R. v. W.H.*, 2024 BCSC 336 at paras. 7 to 9; *R. v. LaPlante*, 2022 NWTSC 9 at para. 6; and *R. v. S.J.H.*, 2024 BCCA 134 at footnote 1.
- [20] So, although the offence at issue here in Count 1 is "child pornography" because that is the term used in the Criminal Code, what is at issue here are images of exploited children who are being sexually abused.
- [21] The offender who possesses and distributes child sexual abuse imagery may not have played a direct role in the crime depicted in the material. Nevertheless, the offender is an active participant in this exploitive industry which, in turn, "increases the risk of child abuse": *R. v. Sharpe*, 2001 SCC 2 at para. 94. Someone, somewhere, sexually abused an exploited child in order to create these images, and possession and distribution of this material is tantamount to complicity in, and the endorsement of, the abuse inflicted on the child.
- [22] As the court said in *R. v. Prince*, 2018 BCSC 987:
- [61] Those who wish to possess child pornography encourage the sexual abuse of children and encourage the recording of this abuse by providing an audience or a market for those who produce child pornography. Therefore, simple possession of child pornography must also be treated as a very serious offence. If the court can deter or reduce the market for child pornography, the court may, in turn, effectively reduce the sexual abuse of children.

- [23] The prevalence of child sexual abuse imagery has only escalated with developments in technology: R. v. Friesen, 2020 SCC 9 at paras. 46-47. A digital record of these crimes remains online in perpetuity, resulting in the continuous revictimization of the child, who "must live in the years that follow with the knowledge that the degrading photo or film may still exist, and may at any moment be being watched and enjoyed by someone": Sharpe at para. 92; Friesen at para. 48.
- [24] In this case, we have a community impact statement of the "Phoenix 11", a group of 11 survivors of child sexual abuse where, for most of those survivors, images and videos of their abuse were distributed on the internet. The Crown also filed an affidavit from a representative of the Canadian Centre for Child Protection Inc. ("C3P"), explaining how that community impact statement came about.
- [25] C3P is a charity that provides programs and services aimed at reducing all forms of child victimization, including victimization through the creation, distribution, and viewing of child sexual abuse material. In 2018, C3P held gatherings of child sexual abuse survivors and, together, they agreed to develop a community impact statement, both in writing and in an anonymized video, for use in court proceedings. Only the written impact statement was filed here.
- [26] The community impact statement is long, detailed and very compelling, so I will refer to excerpts only. Among other things, the Phoenix 11 said:

We want everyone to know that the "possession of child pornography" is not a victimless crime.

We want the court to understand that we have all worked very, very hard to put the sexual assaults we suffered as children behind us. But because the sexual assaults we endured were also recorded, and for most of us, shared with other people, we can never really be free.

Our childhood sexual abuse is a public fact. The existence of our child sexual abuse material - and for most of us, the sharing of it - keeps the succession of our torture going. We all believe that our imagery can be accessed by anyone, anywhere, anytime, which means we are forced to live our lives in a perpetual state of vigilance and fear.

We are outraged that someone could want to see this imagery, and each of us feel that we are violated and re-victimized every time imagery of any one of us is accessed or stored by another person.

The images and videos of our child sexual abuse are permanent markers of the most painful and traumatic experiences of our lives. It is a constant barrier to us healing and moving on with our life.

If there were not people wanting to look at and possess this kind of imagery, our abuse may not have ever been recorded, and it certainly would not be out there now for people to see.

- [27] The statement goes on to detail physical and economic impacts suffered by members of the group. For the former, these include various stress-related health conditions; for the latter, these include various struggles at work and school, avoiding employment in certain occupations, work time lost and counselling costs.
- [28] These profound effects amply illustrate why the courts view the possession of child pornography as a serious crime, a crime that will be punished by way of a jail sentence in all but exceptional cases: *R. v. Swaby*, 2018 BCCA 416 at para. 67; *R. v. Alexander*, 2019 BCCA 100 at para. 39.

IV. Circumstances of the Offender

- [29] The biographical information I summarize here is derived from both the submissions of defence counsel and a Gladue report.
- [30] Mr. Isbister is 52 years old. He was 47 at the beginning of the offence period. He was born in New Westminster and raised in Langley.
- [31] Mr. Isbister is Métis. Notably, he declined to include family and friends in the preparation of the Gladue report, telling the author "they have been through enough". I will discuss that report later.
- [32] The Court was informed that Mr. Isbister had a difficult upbringing. His father subjected Mr. Isbister and his siblings to both physical and psychological abuse. His parents divorced when he was 11 or so, and around that time he was also abused by a neighbouring couple. His mother attempted suicide by taking pills and he "mimicked" that behaviour by doing the same.
- [33] After his parents separated, he was left in the care of his mother. He had limited contact with his father, although he reconnected with him some time later.
- [34] His mother also remarried, and while he had a positive relationship with his mother and stepfather, by high school he realized he was gay and this proved incompatible with his mother's religious beliefs. Nonetheless, he reports that he has a positive relationship with his mother and her side of the family.
- [35] Mr. Isbister had low grades in high school and left school without graduating, although he completed high school equivalency, as well as some college courses, as a young adult.
- [36] Mr. Isbister began using cannabis around age 14, and at age 18 he was admitted into residential treatment for substance abuse at the instigation of his mother. He said he was sober between ages 18 and 24. It was during this time that he completed high school equivalency. He had employment for a couple of years, working with his birth father.

- [37] At age 24, he "began drinking again and has not stopped", according to the Gladue report. He did not have substantive employment and he received government assistance, a situation that has continued to the present. He said he has "never really worked". In 2020, Mr. Isbister was accepted for benefits payable under the Persons with Disabilities program, based on reported disorders relating to mood, anxiety, personality and substances.
- [38] Mr. Isbister recounted three traumas during his adult years. In 2011 he suffered significant injuries, including a serious head injury, as a result of a home invasion. He reports that this has affected him cognitively. In his 40s, he was incarcerated and lost all his belongings as a result, meaning he had to "start over again" on release from custody as he was effectively homeless. In 2022 he lost his SRO home and belongings in a fire.
- [39] I will return to the matter of Mr. Isbister's prior convictions later, but for the moment I will note Mr. Isbister says that during his time in federal custody, he was subjected to considerable harassment, though I note that corrections reports describe Mr. Isbister as being the source of much conflict within the institution, including through sexually aggressive behaviour towards other inmates.
- [40] On release from federal custody in 2017, he was immediately made subject to an 18-month recognizance under s. 810.1 of the Criminal Code. He breached that recognizance by having alcohol, and spent 56 days in pre-trial custody before being sentenced, in June 2018, to one year in jail. His sentence appeal was allowed in April 2019, with the sentence changed to one of time served. He spent 195 days in jail up to the time of the appeal decision.
- [41] He was again charged with a breach offence, this time a breach of his lifetime s. 161 prohibition that was ordered as part of his earlier federal sentence. That charge arose after he attended a flea market, a place the Crown alleged was a place frequented by children. He was acquitted of that charge on November 6, 2019, but by that time he had spent six months in pre-trial custody.
- [42] Defence counsel submits that these events show the level of instability in Mr. Isbister's life in the time leading up to the subject offences.
- [43] As already noted, Mr. Isbister was arrested on the subject charges in August 2020 and was detained in custody until December, when he was released to reside at a recovery facility. He breached within days and was thereafter held in custody until May 3, 2021. I will review this timeline in more detail later when I discuss credit for time in pre-trial custody.
- [44] Since May 2021, Mr. Isbister has been out of custody, but on strict conditions that have included 24-hour house arrest, which was modified to a 6:00 p.m. to 7:00 a.m. curfew, but with 24-hour house arrest remaining in effect on weekends, then the same curfew seven days a week, and finally, on August 13, 2024, to a curfew of 10:00 p.m. to 6:00 a.m. Throughout, he has been subject to electronic monitoring and a prohibition against internet access.

- [45] Since his release in May 2021, he has resided in SRO-type accommodation in the Downtown Eastside neighbourhood of Vancouver.
- [46] Mr. Isbister told the Gladue report author that he currently drinks five beers each night to help him sleep. He told the Gladue author that his goals are to become sober, gain employment and improve his living situation.

A. Counselling

- [47] Mr. Isbister has been subject to release conditions requiring assessment and counselling, specifically with psychologist Dr. Anton Schweighofer, going back to the release order of December 10, 2020.
- [48] There were pandemic-related challenges that delayed the start of counselling, but once started, Mr. Isbister did not attend reliably. In October 2022, his bail supervisor recorded that Mr. Isbister had not been attending regularly and had not attended a full session for the last three months.
- [49] Mr. Isbister said his spotty attendance was because he was reluctant to discuss the subject offences. His failure to engage in the counselling condition of his release order caused the matter to be brought before Justice Riley, who modified the counselling term to address Mr. Isbister's stated concern, such that counselling was to focus on managing Mr. Isbister's risk factors and without obliging him to discuss the outstanding charges.
- [50] In a letter dated February 28, 2024, the bail supervisor gave a more positive report, saying Mr. Isbister "has performed well during this period" in terms of reporting and attitude, and was attending monthly meetings with Dr. Schweighofer. The supervisor said:

Mr. Isbister self-reports that he has changed and desires a better, and more stable/normal life. However, Mr. Isbister has not engaged in employment, volunteer, or social activities and appears withdrawn. Mr. Isbister states it is due to the stress of being on bail, his court-matters, and living in a single-room occupancy hotel (SRO) in the Downtown Eastside. Mr. Isbister needs to work on healthy coping skills to better deal with stress.

- [51] The supervisor provided the following counselling update:

Dr. Schweighofer describes a mixed bag of results with Mr. Isbister's treatment stating that while he does not appear to be placing himself in high-risk situations (through self-report) and he has been attending, he is struggling with self-managing (identifying risk factors, and demonstrating active coping to manage them). Dr. Schweighofer has also recommended Mr. Isbister attempt volunteer work or similar activities to get him out and engaged with others but there has been no success so far.

B. Gladue report

- [52] The Gladue author notes Mr. Isbister is Métis through his father, whose own father was Métis. His mother and paternal grandmother are or were non-Métis. Mr. Isbister told the author he was "raised White and cut off from my Native heritage". He does not have any Métis cultural practices or knowledge, or any knowledge about attendance at residential school or day school by his ancestors, but he stated he would like to learn about his Indigenous heritage.
- [53] The author said some of the adverse factors that affect Indigenous people in general are present in Mr. Isbister's situation. The author referred to *R. v. Kehoe*, 2023 BCCA 5 at para. 55, noting that many Indigenous people have become disconnected from their ancestral communities, cultures, and social structures as a consequence of Canada's colonial history and assimilationist policies.

C. Criminal Record

- [54] I return to the matter of Mr. Isbister's criminal record, which is a related criminal record. In 2014, he pleaded guilty to three counts of sexual interference with persons under 16, and he was given an effective four-year sentence with one year credit for pre-trial custody.
- [55] He also received a lifetime order under s. 161 of the Criminal Code, prohibiting him from communicating with persons under age 16, attending public facilities or areas where persons under 16 are present, or seeking or having employment of any sort that involved being in a position of trust or authority over persons under 16.
- [56] The particulars of those offences are set out in the sentencing reasons dated December 18, 2014, found at 2014 BCPC 0324. Each of the victims was 14 years old at the time of the incident. Each was befriended by Mr. Isbister and provided with alcohol, drugs, and cash, "as he drew them into the sexual activity with him for his gratification" (at para. 11). The offending occurred over an extended time period; with one victim, it was 21 months, for another it was about a year, and for the third it was about three months. The offending conduct across all three counts extended over approximately three years and 10 months. The acts in question involved sexual touching, anal intercourse, mutual masturbation and oral sex. In the case of two of the victims, Mr. Isbister photographed them in a sexual or provocative way.
- [57] Police found Mr. Isbister had a large number of child sexual abuse images on his camera and determined he had photographed 11 male children.
- [58] In the words of the sentencing judge:

[14] Mr. Isbister provided what appeared to these victims to be a supportive relationship which allowed him to take regular sexual advantage of them, each in their own vulnerable circumstances and while they were intoxicated with alcohol and/or drugs. He manipulated these victims for his own sexual gratification.

[59] While on bail for those offences, he breached a no-contact order by contacting one of the victims, and he was re-arrested for that. In January 2015 police received information that Mr. Isbister had been involved in a sexual relationship with a 15-year-old male and he was again arrested for breaching bail conditions.

[60] I am very cognizant that Mr. Isbister is not to be re-sentenced for these earlier offences, and that is not my intention in any way. However, the circumstances of those offences provide important context in weighing the severity of the offences currently before the Court.

V. Parole Board and Related Records

[61] The Crown filed three decisions and one report which I will summarize.

Parole Board decision - November 12, 2015

[62] This decision was part of the Parole Board's review of Mr. Isbister for day and full parole. Among other things, the panel said:

Your contributing risk factors are in the areas of personal/emotional orientation, substance abuse, and attitude. You do not view your actions as criminal and indicate you believe that you were involved in caring, mutual relationships with the victims. You reportedly regularly used marijuana and alcohol and have said you will never refrain from such usage as you do not view them to be problematic in your life. You reportedly demonstrate no remorse for your actions or the effects on the victims.

Your CMT [Case Management Team] recommended day and full parole be denied as you have no effort or progress to address your risk factors and have a marked lack of insight into your offending.

[63] The panel also noted that although Mr. Isbister had been encouraged to work with Aboriginal elders while in custody, he had made only marginal efforts in that regard.

[64] The panel concluded:

the Board notes that you remain a moderate risk to reoffend, that you have taken no programming to reduce your risk and therefore remain an untreated sex offender, and that you do not have the support of your CMT for any form of release. Moreover, during the interview you repeatedly demonstrated your profound lack of insight into your criminal behaviour. You have no release plan to manage your risk. The Board concludes that your risk to reoffend is undue. The Board therefore denies both day and full parole.

Parole Board Appeal Division decision - May 26, 2016

[65] Mr. Isbister appealed the November 2015 decision, citing a number of grounds that essentially challenged the nature of the index offences. He also maintained that he did not agree with the claims that serious harm or significant trauma occurred because of his actions. The appeal panel dismissed the appeal.

Parole Board Decision - November 17, 2016

[66] This hearing was convened for the purpose of considering a direct referral for detention. The panel noted that to order continued detention through to warrant expiry, "the Board must be satisfied that you are likely, if released, to commit an offence causing serious harm to another person".

[67] The panel noted Mr. Isbister's history of alcohol and drug abuse as outlined in a review prepared by an Aboriginal elder. The panel said:

The document indicated that you did not see the value in substance abuse treatment.

The Elder reported that you appear to be confused between the difference of being in love and having sex. The Elder stated that you are far removed from your culture and spiritual practices and have been involved in the Christian faith but that you appear to be interested in your culture.

Specific to your disinterest in participating in substance abuse treatment the Board finds that you have minimized both the impact and seriousness of your drinking alcohol and taking illegal substances.

Notably the report stated that you have said that if Aboriginal programs would delay your release you would prefer the non-Aboriginal stream.

In your hearing you appeared to stress that, as there were no victim statements [at sentencing], it should be inferred that there was no victimization. The Board finds this attitude further exemplifies the indifference to the real harm you have caused and your lack of accountability and responsibility.

The Board is concerned with your demonstrated capacity to manipulate children into risky situations that have resulted in serious harm. The Board is also concerned that despite being found guilty you have continued to deny the seriousness of your crimes. The denial was present at your hearing today.

Your risk factors include: substance abuse, personal emotional and attitude. You are, at present, untreated. Having examined your file content, the Board has determined that your most significant risk domain assessments remain unchanged.

You are rated as having low accountability and low motivation. You are not engaged in your correctional plan. Your reintegration potential is low. These are concerning assessments to the Board as they indicate that you are not interested in change, you accept no responsibility for serious sexual offending, and you present as having a lack [of] potential to reintegrate into the community safely.

Psychological assessments were conducted in your case. Based on the results of a recent assessment, you are at a moderate level of risk for sexual reoffending. According to file information you adamantly deny committing any criminal offences as you believe the law is wrong. Apparently, you believe that having sexual relations with a child of fourteen years of age is appropriate as long as the minor is consenting. According to your file you believe your victims were not traumatized or harmed. You have exhibited no remorse towards your victims. The Board finds that your inability to obey the law is deeply concerning. Your attitude toward the law and legal determinants of sexual consent point to an unwillingness to accept and live by the rules of society.

Your CMT indicates that you have "absolutely no insight" toward your offence cycle, no remorse for your offences, and point to the fact that you re-offended in the community while on Court ordered sanctions. Your CMT has determined you have demonstrated a lack of control of your sexual urges and have poor impulse control. They suggest you have refused to participate in programs, and you apparently do not believe there is anything wrong with your criminal behaviour.

The Board concludes that you have been encouraged to participate in appropriate Aboriginal and non-Aboriginal correctional programming and that you had been referred to a motivation intervention which did not succeed in your case. The Board has put its mind toward your Indigenous social history but finds that you have not pursued this pathway with either effort or enthusiasm.

[68] The panel concluded that Mr. Isbister was an untreated sexual offender and an untreated user of intoxicants and, ultimately, was satisfied that he was likely, if released, to commit an offence causing serious harm to another person should he be released before the expiration of his sentence.

High Risk Recognizance Advisory Committee Case Review - November 30, 2017

[69] As his warrant expiry approached in late 2017, Mr. Isbister was assessed by the High Risk Recognizance Advisory Committee ("HRR Committee") which prepared a report dated November 30, 2017. This review was prepared by an analyst with B.C. Corrections following a s. 810.1 application by the RCMP.

[70] This report examined psychological risk assessments from December 2014 and February 2016, as well as correctional records concerning programming and institutional adjustment. The author noted that in February 2017, the Correctional Services of Canada had raised Mr. Isbister's "risk to public safety" rating from "moderate" to "high" on account of his continued

refusal to engage in any kind of intervention. The author concluded Mr. Isbister "is an untreated sex offender who has no self-management plans. He has no insight and continues to minimize his offending". Noting that Mr. Isbister was already subject to lifetime prohibitions under s. 161 of the Criminal Code, the HRR Committee recommended a number of conditions to be imposed with the s. 810.1 bond, should one be granted, including regular reporting, attendance for assessment, counselling or educational programming, alcohol and drug prohibitions, and electronic monitoring.

VI. Positions of Crown and Defence

A. Crown

- [71] The Crown submits that a global three-year jail sentence is appropriate in this case. The Crown also seeks ancillary orders: (1) a DNA order, which here is mandatory given that Count 1 is a primary designated offence; (2) a SOIRA order, which here would be mandatory with a 20-year duration; and (3) a 10-year order under all three subsections of s. 161.
- [72] In urging the imposition of a three-year sentence, the Crown emphasizes Mr. Isbister's prior criminal and institutional records, and in particular his past offences involving the abuse of male children, for which he was given an effective four-year sentence.
- [73] The Crown also emphasizes Mr. Isbister's record while in federal custody, noting that Mr. Isbister applied for both day and full parole, but was denied by the Parole Board through two decisions and one appeal. As a result, Mr. Isbister served the entirety of his sentence.
- [74] Crown says that the decisions of the Parole Board Appeal Division and HRR Committee reveal Mr. Isbister's lack of insight into his offending, his failure to participate in programming, and his lack of effort in addressing his significant risk factors.
- [75] As his warrant expiry date approached, the RCMP applied for a recognizance pursuant to s. 810.1 of the Criminal Code due to the risk he posed for offending against young persons. An 18-month recognizance was imposed by the court on June 20, 2018. It is that recognizance that forms the offence in Count 3 to which Mr. Isbister has pleaded guilty.
- [76] The Crown says that all Mr. Isbister's risk factors are still present and have not been addressed, emphasizing in particular the HRR Committee report, and the bail supervisor's reports of October 14, 2022 and February 2024.
- [77] Mr. Isbister was denied bail on these charges at a bail hearing held on October 16, 2020. The Crown later consented to a bail review and release of Mr. Isbister on condition that he would attend sessions with a forensic psychologist, but on his ultimate release in May 2021, Mr. Isbister attended only two sessions in six months. That indifferent attendance was the subject of the bail supervisor's report of October 14, 2022, referred to earlier.

- [78] The Crown notes that right up to the first day of this sentencing hearing, which was March 1, 2024, Mr. Isbister had done nothing to look for employment or to engage in his Indigenous culture, which is what he said he would do if released from custody. Moreover, in a report dated February 28, 2024, his bail supervisor noted Mr. Isbister "does not appear to have any social support or contacts outside of his bail supervisor and [psychologist]". The Crown notes this is a risk factor in terms of reoffending.
- [79] The Crown argues that three years' custody is the appropriate sentence here. The Crown emphasizes the risk factors that Mr. Isbister has still not addressed, and notes that Mr. Isbister was found with further child pornography on a second phone just eight months after his first phone was seized. The Crown submits this reoffending within a relatively short period of time shows the intractability of Mr. Isbister's criminal behaviour.
- [80] The Crown argues that three years jail would have been within the established sentencing range for the pornography offence prior to the Supreme Court of Canada's decision in Friesen. The Court in Friesen said that sentences for offences involving children must increase: Friesen at para. 5; R. v. Landon, 2022 BCPC 133 at para. 22. In this regard, the Crown also notes that in 2015, Parliament increased the maximum sentence for possession of child pornography from five to 10 years.
- [81] In this regard, the Crown referred to R. v. Pike, 2024 ONCA 608, a very recent case, where the Ontario Court of Appeal concluded those two events warranted an increase in the upper end of the range for possession of child pornography from its existing, that is, in Ontario, upper end of three and a half to four years, to five years.
- [82] The Crown says the aggravating and mitigating circumstances set out in Tyndall, 2021 ABPC 232 are similar to those here. In Tyndall, the offender received a three-year jail sentence for possession of child pornography, plus another six months in jail for breach of a s. 161 order.
- [83] The Crown referred to the following extracts from Friesen, arguing they are particularly relevant here:
- [70] Children who belong to groups that are marginalized are at a heightened risk of sexual violence that can perpetuate the disadvantage they already face.
- [71] Children who belong to other groups that face discrimination or marginalization in society are also especially vulnerable to sexual violence.
- [73] Similarly, LGBT2Q+ youth may be especially vulnerable because of the marginalization they continue to experience in society (Too Many Victims, at p. 9). Sentencing judges should be attentive to the ways in which LGBT2Q+ youth may "experience sexual assault differently than heterosexual victims". Sexual violence may cause young LGBT2Q+ victims to experience unique forms of isolation and may negatively affect how they feel about the process of coming out. A lack of specialized services may compound these problems.

[References omitted.]

- [84] The Crown also referred to some of the broader principles expressed in Friesen at paras. 74 to 76, including the need to recognize the harm to children caused by sexual offences against them, the need for Courts to weigh these harms in a manner that reflects society's deepening and evolving understanding of their severity, and that taking the wrongfulness and harmfulness into account will ensure that the proportionality principle serves its function of "ensur[ing] that offenders are held responsible for their actions and that the sentence properly reflects and condemns their role in the offence and the harm they caused.": para. 75.
- [85] The Crown emphasized the following quote from Friesen:
- [76] Courts must impose sentences that are commensurate with the gravity of sexual offences against children. It is not sufficient for courts to simply state that sexual offences against children are serious. The sentence imposed must reflect the normative character of the offender's actions and the consequential harm to children and their families, caregivers, and communities. We thus offer some guidance on how courts should give effect to the gravity of sexual offences against children. Specifically, courts must recognize and give effect to (1) the inherent wrongfulness of these offences; (2) the potential harm to children that flows from these offences; and, (3) the actual harm that children suffer as a result of these offences. We emphasize that sexual offences against children are inherently wrongful and always put children at risk of serious harm, even as the degree of wrongfulness, the extent to which potential harm materializes, and actual harm vary from case to case.
- [86] The Crown also addressed the Gladue report that was prepared in this matter, noting that Mr. Isbister has no connection to his Indigenous community or culture. Although Mr. Isbister had expressed to the Gladue report author an interest in learning about his Indigenous heritage, he had done nothing about it. That same expression of interest and subsequent inaction on Mr. Isbister's part had also characterized Mr. Isbister's time in federal custody.

B. Defence

- [87] The defence seeks a sentence of two and a half years' jail, one year of which has already been served, in terms of pre-trial custody, with the remaining 18 months to be served in the community followed by two years' probation. Counsel proposes that the terms of the CSO would be strict, with house arrest, a curfew, and strict conditions concerning access to the internet.
- [88] Counsel emphasizes that the sentence sought is not that of a standalone CSO, as the defence accepts that a standalone CSO is not appropriate here. The proposed sentence does involve one year of "real" jail, albeit as credited time, based on the defence view of the proper calculation of that credit.

- [89] The defence says there are some other considerations that ought to impact sentence, including the restrictive conditions to which all inmates were subject during the height of the pandemic, as well as the stringent conditions of Mr. Isbister's release when he was finally released on bail.
- [90] The defence cites the following authorities on the effect of stringent release conditions in terms of sentence: R. v. Tse, 2010 BCSC 1273 at paras. 19 to 20; and R. v. Plowman, 2015 BCCA 423 at para. 28. As for additional credit for harsh pre-trial conditions, the defence cites R. v. Clark, 2023 BCSC 853.
- [91] The defence agrees with the Crown's characterization of the size of the collections as being at the "lower end of the scale", but acknowledges that it is in the "moderate to high" range in terms of the severity of its content. Through his counsel, Mr. Isbister explained that social interaction led him to acquiring the materials in question, as he was trying to connect socially and was looking for acceptance of his sexuality.
- [92] The defence took some time to review Mr. Isbister's personal circumstances. I have referred to most of those matters in my earlier summary.
- [93] In answer to the Crown's submission that Mr. Isbister has not sought employment, defence counsel noted Mr. Isbister had two months of work through a temp agency in July and August 2020. More recently, he has been attending a six-month employment preparation program, which involves pre-employment training and six months of paid work as part of a civic clean-up team.
- [94] Counsel also had more accurate records of Mr. Isbister's counselling attendance, showing seven sessions with a clinical counsellor that were completed in June and July 2021, as well as the number of sessions with Dr. Schweighofer. There were five sessions with Dr. Schweighofer in 2021, four sessions in 2022, 10 sessions in 2023 and three sessions in 2024, for 22 sessions in all. From this, counsel submits Mr. Isbister is no longer an "untreated" sex offender.
- [95] More generally, the defence notes Mr. Isbister's history of incarceration, his release without supports, the imposition of restrictive conditions through an s. 810.1 recognizance, two breach charges that put him in custody for further periods, all left him without any social supports or ability to become steadily employed. It was at this point that the first of the offences took place.
- [96] Counsel argues that this case is similar to R. v. Hamlin, 2019 BCSC 2266. Like Mr. Isbister, the offender in Hamlin had a prior conviction for the direct physical abuse of a child. The offender in Hamlin was given an eight-month jail sentence plus three years' probation.

- [97] Counsel cites Friesen at para. 92, where the Court said Gladue principles must be applied even in extremely grave cases of sexual violence against children. While the sentencing objectives of denunciation and deterrence must have priority, sentencing judges retain the discretion to accord significant weight to other factors, including rehabilitation and Gladue factors: Friesen at para. 104.
- [98] Here, counsel submits the Gladue factors in Mr. Isbister's case mean that he has reduced moral culpability, given the "causal nexus" between Gladue factors and his offending.
- [99] Counsel also submits that Mr. Isbister has already taken steps towards rehabilitation, insofar as he has attended counselling from both a clinical counsellor and from Dr. Schweighofer. Counsel submits the risk to the public has been reduced.
- [100] Other cases cited by the defence include: R. v. Humphreys, 2020 BCPC 136; R. v. Neasloss, 2020 BCPC 161; R. v. Watson, 2018 BCCA 329; Alexander; R. v. Bisson, 2020 BCSC 1778; and R. v. Hagen, 2021 BCCA 208.

C. Crown Reply

- [101] In reply, the Crown notes the suggestion in Tse that stringent bail conditions can be dealt with by the granting of direct credit has not found appellate support. The Crown says the guiding authority on the point is R. v. Nghiem, 2009 BCCA 170 at para. 16, where the court said a sentencing court should instead concern itself with "the degree to which objectives of sentencing may have already been accomplished through the imposition of strict bail conditions".
- [102] The Crown notes that despite the counselling provided by Dr. Schweighofer, there is nothing before the Court to indicate the focus of the sessions, the extent to which they address the offending behaviour or the reasons for it, or whether Mr. Isbister achieved any level of insight into his offending. While acknowledging that Dr. Schweighofer has a practice in the general area, there is nothing to indicate whether the sessions would qualify as "sex offender treatment".
- [103] The Crown notes Mr. Isbister was described in Parole Board reports as an "untreated sex offender" and there is nothing in the materials or information provided by the defence that says he has actually had this treatment.
- [104] Finally, on the matter of the CSO urged by the defence, the Crown again refers to appellate authority that says that, save in cases having exceptional circumstances, incarceration is necessary for those convicted of child pornography offences. Here the Crown adds as an additional case, R. v. Harroff, 2024 BCSC 318, where the sentencing judge referred favourably to the following summary from R. v. Smith, 2023 BCPC 188:

[62] To meet this high threshold [of showing exceptional circumstances], the offender would have no criminal record, was otherwise of good character, whose degree of responsibility was reduced by reason of their limited cognitive functioning or mental illness, which was casually connected to their criminal behaviour.

[105] The Crown says Mr. Isbister does not meet any of these criteria.

(PROCEEDINGS ADJOURNED AND RECONVENED)

VII. Discussion

A. General Principles

[106] I will take a moment to set out some of the general principles of sentencing. Although these are well known to counsel and of course to the Court, nonetheless it is important that even those familiar with them be reminded of these fundamental and important principles.

[107] Section 718 of the Criminal Code sets out the fundamental purposes of sentencing, being:

to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

[108] Other sections of the Criminal Code declare some further fundamental principles, including:

- a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender;
- a sentence should be increased or reduced to account for any aggravating or mitigating circumstances of the offence or the offender;
- an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and, finally

· all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

[109] Section 718.01 of the Criminal Code requires sentencing courts to give primary consideration to the sentencing objectives of denunciation and deterrence in cases involving the abuse of persons under the age of 18 years: *Swaby*; see also *R. v. Athey*, 2017 BCCA 350 and *R. v. Allen*, 2012 BCCA 377.

[110] In *Allen*, the court quoted from *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, as follows:

[81] Retribution, as well, should be conceptually distinguished from its legitimate sibling, denunciation. Retribution requires that a judicial sentence properly reflect the moral blameworthiness of that particular offender. The objective of denunciation mandates that a sentence should also communicate society's condemnation of that particular offender's conduct. In short, a sentence with a denunciatory element represents a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law.

[Emphasis in original.]

B. Aggravating and Mitigating Factors

[111] In *R. v. R.J.H.*, 2020 BCSC 1070, Mr. Justice Baird referred to a summary of various aggravating and mitigating circumstances that courts have considered in child pornography cases, which summary derives from *R. v. Kwok*, 2007 CanLII 2942 (Ont. S.C.J.) at para. 7. The list of aggravating factors is as follows:

- a criminal record for similar or related offences;
- whether there was also production or distribution of child pornography;
- the size of the collection;
- the nature of the collection, including the age of the children and the relative depravity and violence depicted;
- whether the offender is a pedophile or otherwise seen as a danger to children; and
- whether the offender contributed to the sexual victimisation of children for profit by purchasing the pornography rather than merely downloading it from the internet.

[112] The list of mitigating factors is:

- the youthful age of the offender;
- the otherwise good character of the offender;
- the extent to which the offender has shown insight into his problem;

- genuine remorse;
- willingness to engage in counselling or treatment;
- the entry of a guilty plea; and
- the extent to which the offender has already suffered for his crime.

[113] In this case, there are a number of aggravating factors:

- a) Mr. Isbister has a criminal record for three related offences involving the abuse of young males;
- b) having already been arrested for possessing child pornography in December 2019, he assembled a further collection of child sexual abuse images by the time he was again arrested in August 2020;
- c) the content of the two collections included images and videos depicting penetrative sex with children by adults, as well as sexual activity between children, which puts it at the "moderate to high" level of seriousness; and
- d) as noted in the Parole Board documents, Mr. Isbister represents a danger to children.

[114] I do not consider that Mr. Isbister engaged in distribution of the images in the intended sense of that term, as suggested by the Crown, given that he was sending images from one of his social media accounts to another of his social media accounts.

[115] I agree with the Crown's characterization of the size of the two collections as being at the lower end of the scale seen in the cases. I also agree, as I have already said, that the content of the images puts them in the "moderate to high" range.

[116] There are few mitigating factors. The guilty pleas came very late, on the first day of the trial proper, and only after the evidence in question was ruled admissible. Mr. Isbister is entitled to some favourable consideration for that, but not much. He is neither youthful nor of otherwise good character. He has shown no insight into his offending or the harm caused by it, and he has shown no remorse. Finally, he has resisted programming relating to sex offending and substance misuse and, even now, it is not clear whether the limited counselling he received from Dr. Schweighofer involved any sex offender treatment of the type provided through correctional authorities. Given that these counselling sessions that he did have occurred at a frequency of less than once a month over three years, I do not accept that the counselling Mr. Isbister received was formal sex offender programming, which I understand is much more intensive.

- [117] I accept that Mr. Isbister's stringent release conditions, which also required him to take counselling, is a mitigating factor that is properly taken into account, as per Nghiem. Specifically, I conclude that the sentencing objective of rehabilitation has been advanced at least somewhat through these restrictive conditions insofar as Mr. Isbister has received some counselling and has demonstrated satisfactory compliance over a number of years.
- [118] To deal with a related point raised by the defence, I decline to consider additional credit due to harsh custodial conditions said to have been associated with the pandemic, which is so-called Duncan credit. Even if credit were available along those lines, and I say that because it is more of a feature in Ontario criminal litigation, such a submission would have to be supported by evidence and none was led here.

C. Gladue Factors

- [119] There is scant information on which to assess the role and strength of any Gladue factors in this case. Mr. Isbister has Métis heritage through his father and grandfather, and I accept that Mr. Isbister is disconnected from his Indigenous heritage. Kehoe instructs us that it is an error of law to conclude that Gladue factors have no part to play in the sentencing of an individual who is disconnected from their Indigenous heritage. This is so because:
- [56] Disconnection is one of the very harms associated with Canada's colonial history and assimilationist policies that Gladue and Ipeelee seek to address. Accordingly, the Crown's reasoning that Gladue principles should play a very limited role in this case because Mr. Kehoe was disconnected from his Indigenous culture, community and supports subverts the remedial purpose of s. 718.2(e) of the Code and penalizes Mr. Kehoe for the success of Canada's destructive policies.
- [120] However, what is missing from this case is information showing a nexus between Mr. Isbister's Indigenous disconnection, or any other consequences of Canada's historical mistreatment of Indigenous people, and his offending behaviour. As the Court of Appeal said in *R. v. Olson*, 2023 BCCA 430:
- [46] There is no doubt that Mr. Olson was a deeply troubled, unstable and dysfunctional youth, who exhibited many forms of behaviour common in some of the Indigenous youth whose lives have been blighted by intergenerational trauma arising out of Canada's colonial history. But, as Marchand J.A. explained in Kehoe at paras. 46-49, and as is reflected in Hamer at paras. 114-17, there needs to be a connection between that history and the circumstances of an Indigenous offender to ground an analysis to assess the offender's moral culpability. In my view, the Gladue report does not lay anything other than the most tenuous foundation to say that that nexus exists in this case.

- [121] In this case, the Court has no information from Mr. Isbister's family because he did not permit the Gladue author to contact them. As a result, we do not know whether or in what way colonialism and assimilationist policies affected Mr. Isbister's father and grandfather, or how any effects of colonialism gave rise to Mr. Isbister's sexual offending generally or his possession of images of child sexual abuse in particular.
- [122] Mr. Isbister's father appears to have been a difficult man who disciplined his children through corporal punishment, but there is nothing to indicate that this behaviour derived from colonial practices and policies.
- [123] In terms of possible causes of Mr. Isbister's sexual offending, there was mention made of Mr. Isbister having been abused by neighbours when he was around 11 years old, but there was no nexus shown or argued between that and Mr. Isbister's Métis heritage or any harms associated with Canada's mistreatment of Indigenous people.
- [124] Given the dearth of information here, which is an informational shortfall of Mr. Isbister's own making, I am unable to accord much weight to the Gladue factors in this case.
- [125] More generally, I note that the dearth of information relating to Gladue factors is one of several instances of information gaps in this case. The Court does not have a report from the Forensic Psychiatric Commission because Mr. Isbister did not attend the appointment. Mr. Isbister said this was due to an administrative error and not his fault, but nonetheless it is another situation where potentially important information is unavailable to the Court. Finally, there is no report from Dr. Schweighofer or even a letter from him explaining the nature of his counselling sessions or anything to do with Mr. Isbister's insight or attitude. The absence of information about these sessions has left it open to Mr. Isbister to say that these sessions involved the same kind of treatment that sex offenders get in structured programming, but it is an assertion I do not accept for the reasons I have explained.
- [126] Mr. Isbister was given plenty of time to obtain reports or other evidence demonstrating that the Parole Board assessments were no longer accurate, but ultimately nothing to this effect was submitted.

D. Sentencing Range

- [127] The Criminal Code provides that the maximum sentence for possession of child pornography is 10 years' imprisonment: s. 163.1(4). The maximum sentence for breach of a s. 810.1 recognizance is four years.
- [128] In *R. v. R.L.W.*, 2013 BCCA 50, a pre-Friesen case, the Court of Appeal endorsed a sentencing range for child pornography possession of four months to two years' imprisonment. *R.L.W.* is cited with approval in *R. v. Hagen* at para. 69, a post-Friesen case, although without any discussion of the Supreme Court of Canada's direction that sentences for sexual offences involving children must increase.

[129] Given the example set by the Ontario Court of Appeal in *Pike*, I conclude that the combined effect of the 2015 increase in the maximum sentence from five to 10 years where proceedings are by indictment, and the clear direction of the Supreme Court of Canada in *Friesen*, means that the upper end of the sentencing range must increase from that articulated back in 2013.

E. Analysis

[130] The defence concedes that a "standalone" CSO is not available given the circumstances of this case, but argues that Mr. Isbister's presentence custody can be considered the jail part of his sentence and, with that, a CSO is appropriate.

[131] This submission appears to run afoul of *R. v. Fice*, 2005 SCC 32, which held that presentence custody is not to be taken into account when determining the availability of a CSO. In other words, a CSO cannot become available to an offender who otherwise deserves a penitentiary term solely because of the time the offender has spent in custody.

[132] In my view, given the gravity of these offences, Mr. Isbister's reoffending with further child pornography just eight months after being arrested for possession of child pornography, the nature of his criminal antecedents, the various Parole Board assessments, and his moral blameworthiness in these offences, a penitentiary sentence is called for. A CSO is therefore not available here.

[133] Even if I am wrong in my conclusion on that point, on the authority of *Swaby* and *Alexander*, there must be a jail sentence imposed here, as Mr. Isbister's case does not have any exceptional circumstances of the type discussed in the authorities. Put another way, given all the circumstances concerning this offence and this offender, I conclude a CSO would not adequately address the sentencing objectives of denunciation and deterrence.

[134] Some of the authorities cited by counsel were of limited assistance as they are clearly distinguishable or they involve the imposition of a CSO in exceptional circumstances. Two cases, *Hamlin* and *Hagen*, have at least some similar circumstances.

[135] In *Hamlin*, a pre-*Friesen* case, the offender was given an eight-month sentence plus three years' probation. He had a sexual assault conviction from 15 years prior for touching a young girl. However, in the subject case, he had cooperated fully with the investigators, including by providing his laptop password, he entered an early guilty plea, and he demonstrated insight and remorse. These matters distinguish *Hamlin* from the present case.

- [136] In Hagen, a post-Friesen case, the offender was given a 10-month sentence plus three years' probation. He was Indigenous and had been sexually abused as a child. He had no related convictions and was not considered a danger to children, two important features that distinguish Hagen from the present. Also, as a result of the criminal proceedings the offender had been the subject of shaming in his small and, in the context, presumably Indigenous community.
- [137] Perhaps the most distinguishing feature between those cases and the present is that those offenders did not accumulate a further child pornography collection after arrest, as did Mr. Isbister.
- [138] Two further cases provide some further sentencing guidance. In R.L.W., the Court of Appeal upheld an 18-month consecutive term of imprisonment for a first-time Indigenous offender convicted of possessing child pornography, having specifically noted the offender had strong Gladue factors and sexual victimization when he was young. In Watson, a 72-year-old first-time offender with health issues, who did not pose a significant risk of reoffending, received a 12-month jail sentence and three years' probation.
- [139] From these authorities, I conclude that a fit global jail sentence in this case is 27 months. I arrive at that figure by taking what would otherwise be a fit sentence of 30 months and reducing it by three months to reflect the mitigating factor of Mr. Isbister's lengthy time on strict release conditions, as I discussed earlier.

F. Credit for Time Served

- [140] Crown and defence do not agree on the credit to be given for time served. The issue turns on whether certain time Mr. Isbister spent in custody is sufficiently connected to the subject charges that it meets the statutory definition of being "as a result of" the offences for which he is now being sentenced.
- [141] The facts are not in dispute. Mr. Isbister was arrested on these charges on August 27, 2020. He was ordered detained following a bail hearing. On December 10, 2020, Mr. Isbister was granted release on bail on the consent of the Crown, on conditions that included a requirement that he reside at the New Vision Recovery facility ("New Visions") in Surrey. He perfected bail and was released the next day. This time in custody totalled 107 days.
- [142] Mr. Isbister breached his release conditions within days, as he was evicted from New Visions by allegedly being confrontational with other residents, not abiding by staff directions, and attempting to gain internet access. Mr. Isbister then went to live with his mother, but because he was no longer residing at New Visions, on December 16, 2020 he was taken back into custody and remained there until May 3, 2021. The second part of Mr. Isbister's time in custody totals 139 days.

[143] The Crown submits this later period of custody relates to the breach only, as the release order relating to the substantive charge was never revoked, nor was there an application for bail. On May 3, 2021 the breach charges were stayed, and Mr. Isbister was then released and the prior release order then "kicked back in", as Crown put it. In fact, the Crown then applied to revoke the release order, but when the matter was heard, as it happens before me, the Court declined to revoke bail.

[144] Both Crown and defence agree that this matter is governed by s. 719(3) and 719(3.1) of the Criminal Code, which reads:

(3) In determining the sentence to be imposed on a person convicted of an offence, a court may take into account any time spent in custody by the person as a result of the offence but the court shall limit any credit for that time to a maximum of one day for each day spent in custody.

(3.1) Despite subsection (3), if the circumstances justify it, the maximum is one and one-half days for each day spent in custody.

[Emphasis added.]

[145] It is also common ground here that typically credit for time served is given at one and a half to one, on the authority of *R. v. Summers*, 2014 SCC 26.

Crown Submissions

[146] The Crown acknowledges that those sections of the Criminal Code do not limit consideration of presentence custody only with respect to the offence that was the immediate trigger of the detention, but says there must be "a causal connection of sufficient link or relation" between the offence for which the offender is being sentenced and the presentence custody: *R. v. Barnett*, 2017 ONCA 897 at para. 30, which was followed in *R. v. Haq*, 2024 BCCA 85.

[147] The Crown submits, however, that when considering the exercise of discretion, the Court ought to consider the fact that Mr. Isbister did not apply for bail after December 16, 2020 even though there was a reasonable prospect of release as evidenced by the fact that the Court did not revoke Mr. Isbister's bail when the Crown applied to do so on May 21, 2021.

[148] Given these circumstances, the Crown argues that the later period of pre-trial custody is properly attributable to the breach charges, and to those charges only, and not in any way to the offence for which Mr. Isbister is presently being sentenced.

Defence Submissions

[149] The defence confirms there is no real disagreement on the applicable law, though counsel cited *R. v. Pete*, 2019 BCCA 244, as being a more comprehensive and pertinent authority on the issue.

- [150] As per Pete, the substantive offence need not be the direct cause of the detention as the law requires only that there be "some causal connection"; "a sufficient link or relation"; "some meaningful causative collection"; "a logical connection"; or "a sufficient nexus": Pete at para. 72.
- [151] Here, Mr. Isbister was subject to the child pornography charges and then charged with breaching release conditions when he was evicted from the recovery facility. The defence submits that it was unlikely the subsequent breach charges alone would have resulted in detention in the absence of the substantive charges.
- [152] Counsel notes that there are no cases involving a denial of credit where there has not also been a subsequent substantive offence charged. Where the subsequent charge has been a breach offence only, credit is given.

Analysis

- [153] I am satisfied that credit for the later period of pre-trial custody ought to be granted because I accept there is a sufficient nexus between that period of custody and the substantive charges.
- [154] During the bail revocation hearing on May 21, 2021, there was evidence led of the difficulties Mr. Isbister had encountered in finding a suitable living situation that he could propose for his release. Of the many facilities canvassed, New Visions was the only one that would accept Mr. Isbister, all others having declined due to the nature of the charges he was facing, meaning the child pornography charges. Adding to the difficulty was the near-certainty that any acceptable release plan would have to involve a prohibition on internet use along with reliable oversight or control, to ensure that prohibition was complied with.
- [155] The Crown relies on Mr. Isbister's failure to apply for release during the second period of pre-trial custody, but I am satisfied that Mr. Isbister's ability to formulate an acceptable release plan was likely substantially hampered by the child pornography charges. Given these circumstances, I am satisfied there is a sufficient nexus between the child pornography charges, although now they are a single combined count, and the later period of pre-trial custody.
- [156] The time spent in pre-trial custody totals 246 days. That is 107 plus 139. Credit for pre-trial custody at one and a half to one is therefore 369 days.

VIII. Sentence

- [157] I will now proceed to impose sentence, beginning with the ancillary orders sought by the Crown which are not opposed.

- [158] First, there will be a so-called DNA order, which is mandatory given that Count 1 is a primary designated offence. To be more specific, pursuant to s. 487.051 of the Criminal Code, there will be an order in Form 5.03 authorizing the taking of samples of bodily substances for the purpose of forensic DNA analysis.
- [159] There will be a SOIRA order, which here is mandatory with a 20-year duration, as possession of child pornography is a primary designated offence. To be more specific, pursuant to s. 490.012(1)(a) of the Criminal Code, there will be an order in Form 52 requiring Mr. Isbister to comply with the Sex Offender Information Registration Act, S.C. 2004, c. 10, for a mandatory period of 20 years.
- [160] The Crown also sought a 10-year order under all three components of s. 161 of the Criminal Code, but I note Mr. Isbister is already subject to a lifetime order under that section. Given that this order is a discretionary one, I decline to make a further s. 161 order.
- [161] Finally, I waive the victim fine surcharge in light of Mr. Isbister's meagre financial circumstances.
- [162] Mr. Isbister, if you would please stand.
- [163] For the offences for which you have been convicted, I impose a global sentence of 27 months in jail.
- [164] Against that sentence, which equates to 810 days, you are entitled to credit for time served of 369 days, leaving you with a net remaining sentence of 441 days.
- [165] That sentence will be recorded against each count and those sentences will run concurrently.
- [166] You may be seated.
- [167] Pursuant to s. 743.2 of the Criminal Code, I direct that a transcript of these reasons be prepared and then sent to the Correctional Service of Canada together with the Gladue report which is found in Exhibit 1 at Tab 7.
- [168] Those conclude my sentencing reasons. Are there any issues that counsel wish to raise?
- [169] CNSL S. WAN: Yes, Justice, with respect to duration of the SOIRA order, I believe in the circumstances, Mr. Isbister is under a mandatory lifetime order.
- [170] THE COURT: Okay, take me through that.
- [SUBMISSIONS RE SOIRA ORDER]

- [171] THE COURT: After I had concluded giving reasons for sentence in this matter, Crown counsel, who is filling in for the assigned Crown in this matter, indicated that the SOIRA order that I have made, being an order that Mr. Isbister comply with the provisions of the Sex Offender Information Registration Act for a mandatory period of 20 years, ought to be changed to a lifetime requirement.
- [172] The Crown indicated that there had been a legislative change, I believe he said effective October 26, 2023, and, as a result of a related Supreme Court of Canada decision on the topic, the revised situation applied to Mr. Isbister retrospectively or retroactively.
- [173] This matter has been raised in a less than satisfactory manner. I was not favoured with a copy of the revised provision so that I could see it. I was not given a copy of the Supreme Court of Canada's decision that was mentioned. There were no submissions developed beyond the bare assertion, as I have outlined, and defence counsel is understandably not in a position to respond.
- [174] A key factor on this issue is that the Crown, when making its own sentencing submissions, made it clear that it was a 20-year SOIRA order that was being sought and no notice, other than today in court, was given to the defence of anything other than a 20-year term.
- [175] The other fact that is at the forefront of my assessment of this matter is the fact that Mr. Isbister is already subject to a lifetime SOIRA order as a result of convictions entered in December 2014, and so any further SOIRA order that is ordered is duplicative and the present debate is really quite an idle one.
- [176] I appreciate that the Crown has an interest in ensuring the Court makes orders that accord fully with the legal requirements set out in the Criminal Code, but again it is most unsatisfactory to raise it in this fashion and at this late date.
- [177] I agree with defence counsel that this is really the Crown's problem to solve and I conclude that the appropriate response is to maintain the order that I pronounced when reading my reasons for judgment, that is a 20-year SOIRA order, and should that prove to be an order that does not comply with the law, then Crown can do whatever it feels is necessary to fix it.
- [178] So to be clear, the earlier SOIRA order I made and briefly contemplated suspending is in fact the order that I am making.
- [179] All right, I have before me two forfeiture orders, one for two iPhones and another for an Apple MacBook. Do you take any position on the forfeiture orders?
- [180] CNSL J. SICOTTE: No position.
- [181] THE COURT: All right, I have signed the orders on the bench. They may be returned to counsel. That concludes this, thank you.
- [182] THE CLERK: Justice, there is one other thing.

[183] THE COURT: One other thing.

[184] THE CLERK: The two counts that have not been addressed, that he has not been sentenced on --

[185] THE COURT: Oh, I see. Sorry, yes, the Crown may want to address those. Madam Registrar, thank you as always.

[186] CNSL S. WAN: Yes, Justice, I believe it's Count 2 and Count 4, the Crown will direct a stay of proceedings on those two counts.

[187] THE COURT: Okay, just this is a little more complicated because there was an amendment combining Counts 1 and 2, and I do not think there is a Count 3 anymore.

[DISCUSSION RE INDICTMENT]

[188] THE COURT: Okay, the original indictment contained four counts. The first two had to do with possession of child pornography. Count 3 had to do with the 810.1 recognizance, and Count 4 had to do with transmitting or distributing child pornography. Counts 1 and 2 were combined. There was an ill-guided thought to renumbering these as a result of that combination, which was briefly contemplated but then reversed, such that there are, in fact, three counts on the indictment as amended, Count 1 being the combined count of 1 and 2, Count 3 being the breach of the 810.1 recognizance, there being no Count 2 any more, and Count 4 being the transmitting or distribution of child pornography which, as a result of the reversal of the brief attempt to renumber, remained and remains Count 4.

[189] CNSL S. WAN: So, Justice -- so I believe then Count 4 is the only outstanding count.

[190] THE COURT: Yes.

[191] CNSL S. WAN: And the Crown will be directing a stay of proceedings on Count 4.

[192] THE COURT: Okay.

"Blok J."

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