

CANADA / JUDGMENT

R. v. X

2022 BCSC 1594

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 1594 R. v. X

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. X,

2022 BCSC 1594

Date: 20220909

Docket: 47487

Registry: Penticton

Rex

v.

X

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Pursuant to s. 16(4) of the Sex Offender Information Registration Act [SOIRA],

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 Funt

Oral Reasons for Sentence

Counsel for the Crown:

A. Lerchs

Counsel for the Accused:

J. Pennington

Place and Dates of Hearing:

Penticton, B.C.

July 19-22, 2022

Place and Date of Judgment:

Penticton, B.C.

September 9, 2022

1. introduction

[1] These are my reasons for sentence. I have used the letter X to identify the offender. Penticton is a closely-knit community.

[2] X has pleaded guilty to transmitting, making available, or distributing child pornography.

[3] X's offence involved many victims, including his stepdaughter, S.D.

[4] The Crown asks that X be sent to jail. The Crown submits that the appropriate sentence is 36 to 42 months imprisonment, plus 10 years of probation and many common ancillary orders including some in relation to child pornography convictions.

[5] X's counsel submits that a two-year less a day conditional sentence, with a further period of 2 years of probation and ancillary orders, some crafted, would be appropriate.

2. the indictment

[6] X pleaded guilty to the following count:

[X], on or about the 10th day of January, 2020, at or near Penticton, in the Province of British Columbia, did transmit, make available, or distribute child pornography, contrary to Section 163.1(3) of the Criminal Code.

3. FBI Covert operation

[7] X is currently 48 years old. In January 2020, X was caught as a result of an FBI online covert operation. The FBI employee posted online messages on a social media forum apparently known for discussing and trading child pornography. The FBI employee presented online as a 33-year-old father of a daughter.

- [8] At the time of the offence, January 2020, X was married and living with his spouse (they had married in 2018), along with her daughter, S.D., and her son from a prior relationship. X had moved in with them in or around 2016. X has two children from a prior relationship. These children did not live with them.
- [9] In January 2020, S.D. was almost 15 years old and the stepson was 10 years old.
- [10] Starting January 7, 2020, X, using an internet name, had online contact with whom he believed was a father with a young daughter (the FBI covert employee).
- [11] In his online conversations with the FBI covert employee, X disclosed, among other matters:
- a) he had been recording S.D. "since she was like 12";
 - b) he had placed a camera in the bathroom noting that it is "hard to find cams that [don't] get discovered"; and
 - c) he had been able to get pictures "in and out of shower toilet".
- [12] X sent 13 images of S.D. to the FBI covert employee, each of which meets the definition of child pornography. One of the images showed S.D. when she was 12 years old. Another image showed S.D.'s breasts and vagina. One image was taken the day before X sent it to the FBI covert employee.
- [13] The Pre-Sentence Report reads (in part):
- [X] reports he shared the content displaying the victim because he "thought it was hot" to share the images with "likeminded" people. He states he "wanted to see if they found her as hot" as he did. [X] states he distributed the pornographic images of the victim to "win over the trust of the guys in the group". He recalls when distributing the images, he did not believe the victim would get hurt because he believed the victim would never know and it was not a hands-on offence. [X] states he has always been attracted to the victim.
- [14] The FBI covert online operation led to the involvement of the RCMP, the issuance of a search warrant for the search of X's residence, and the execution of the search warrant on January 11, 2020.
- [15] The January 11, 2020 search resulted in the seizure of various items, including cell phones, computers, USB cards, spy cameras, a shower curtain, and underwear of a young female.
- [16] The subsequent computer forensic analysis located 314 unique images and 20 unique videos meeting the definition of child pornography under s. 163.1(1) of the Criminal Code, R.S.C. 1985, c. C-46.
- [17] As noted, some of the images and videos were taken in the bathroom of the family residence and showed S.D.'s breasts and genital areas. Other of the images and videos were of children that X apparently did not know (these other images and videos were not taken in the family residence).

[18] X's purpose in distributing images and videos was to share images and videos with others who would have images and videos that they would share with him. There was no evidence that X distributed the images or videos for profit.

4. sentencing principles

a) Criminal Code

[19] Section 718 of the Criminal Code sets forth the fundamental purpose of sentencing and related objectives. Section 718 reads:

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

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

[20] Section 718.01 of the Criminal Code gives a specific instruction where the offence involves the abuse of a person under the age of 18 years. Section 718.01 reads:

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

[21] Section 718.1 of the Criminal Code provides a further general principle. Section 718.1 reads:

A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[22] Section 718.2 of the Criminal Code requires the Court to increase or reduce a sentence to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender.

b) R. v. Friesen, 2020 SCC 9

[23] In R. v. Friesen, 2020 SCC 9, the Supreme Court of Canada sets forth directions, guidance, and principles relating to sentencing for sexual offences against children (including child pornography).

[24] Some of the key portions of Friesen read:

[1] Children are the future of our country and our communities. They are also some of the most vulnerable members of our society. They deserve to enjoy a childhood free of sexual violence. Offenders who commit sexual violence against children deny thousands of Canadian children such a childhood every year. This case is about how to impose sentences that fully reflect and give effect to the profound wrongfulness and harmfulness of sexual offences against children.

[]

[5] [], we send a strong message that sexual offences against children are violent crimes that wrongfully exploit children's vulnerability and cause profound harm to children, families, and communities. Sentences for these crimes must increase. Courts must impose sentences that are proportional to the gravity of sexual offences against children and the degree of responsibility of the offender, as informed by Parliament's sentencing initiatives and by society's deepened understanding of the wrongfulness and harmfulness of sexual violence against children. Sentences must accurately reflect the wrongfulness of sexual violence against children and the far-reaching and ongoing harm that it causes to children, families, and society at large.

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[42] Protecting children from wrongful exploitation and harm is the overarching objective of the legislative scheme of sexual offences against children in the Criminal Code. Our society is committed to protecting children and ensuring their rights and interests are respected (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 67). As Otis J.A. stated in *R. v. L. (J.-J.)* (1998), 126 C.C.C. (3d) 235 (Que. C.A.), [translation] "the protection of children constitute[s] one of the essential and perennial values" of Canadian society (p. 250). Protecting children from becoming victims of sexual offences is thus vital in a free and democratic society (*R. v. Mills*, 2019 SCC 22, at para. 23).

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[47] New technologies have enabled new forms of sexual violence against children and provided sexual offenders with new ways to access children. Social media provides sexual offenders "unprecedented access" to potential child victims (*R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906, at para. 102). []. The Internet has also "accelerated the proliferation of child pornography" (*R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253, at para. 114, per Deschamps J.).

[48] Technology can make sexual offences against children qualitatively different too. For instance, online distribution of films or images depicting sexual violence against a child repeats the original sexual violence since the child has to live with the knowledge that others may be accessing the films or images, which may resurface in the child's life at any time (R. v. Sharpe, 2001 SCC 2, [2001] 1 S.C.R. 45, at para. 92; R. v. S. (J.), 2018 ONCA 675, 142 O.R. (3d) 81, at para. 120).

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[56] This emphasis on personal autonomy, bodily integrity, sexual integrity, dignity, and equality requires courts to focus their attention on emotional and psychological harm, not simply physical harm. Sexual violence against children can cause serious emotional and psychological harm that, as this Court held in R. v. McCraw, [1991] 3 S.C.R. 72, "may often be more pervasive and permanent in its effect than any physical harm" (p. 81).

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[79] In addition to the inherent wrongfulness of physical interference and exploitation, courts have recognized that sexual violence against children inherently has the potential to cause several recognized forms of harm. The likelihood that these forms of potential harm will materialize of course varies depending on the circumstances of each case. However, the potential that these forms of harm will materialize is always present whenever there is physical interference of a sexual nature with a child and can be present even in sexual offences against children that do not require or involve physical interference. These forms of potential harm illustrate the seriousness of the offence even absent proof that they have materialized into actual harm (see [R. v. McDonnell, [1997] 1 S.C.R. 948], at paras. 35-36).

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[82] We would emphasize that courts should reject the belief that there is no serious harm to children in the absence of additional physical violence (Benedet, [Janine. "Sentencing for Sexual Offences Against Children and Youth: Mandatory Minimums, Proportionality and Unintended Consequences" (2019) 44 Queen's L.J. 284] at p. 299. As we have explained, any manner of physical sexual contact between an adult and a child is inherently violent and has the potential to cause harm. []

[83] In many cases, it will be impossible to determine whether these forms of harm have occurred at the time of sentencing. If the victim is an adult at the time of sentencing, the court may be able to conclude that these forms of potential long-term harm have materialized into actual harm. However, as Moldaver J.A. (as he then was) recognized in [R. v. D. (D.) (2002), 58 O.R. (3d) 788 (C.A.)], if the victim remains a child at the time of sentencing, "[t]ime alone will tell" whether that child will experience particular forms of harm as an adult (para. 38). It may also be impossible to determine the nature and extent of the harm that the victim will experience during childhood, since particular forms of harm may materialize following the date of sentencing.

[84] As a result, courts must consider the reasonably foreseeable potential harm that flows from sexual violence against children when determining the gravity of the offence. Even if an offender commits a crime that fortunately results in no actual harm, courts must consider the potential for reasonably foreseeable harm when imposing sentence (A. Manson, *The Law of Sentencing* (2001), at p. 90). When they analyze the gravity of the offence, sentencing judges thus must always take into account forms of potential harm that have yet to materialize at the time of sentencing but that are a reasonably foreseeable consequence of the offence and may in fact materialize later in childhood or in adulthood. To do otherwise would falsely imply that a child simply outgrows the harm of sexual violence (see Wright, [Margaret M. *Judicial Decision Making in Child Sexual Abuse Cases*. Vancouver, UBC Press, 2007] at p. 88).

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[95] Parliament has recognized the profound harm that sexual offences against children cause and has determined that sentences for such offences should increase to match Parliament's view of their gravity. Parliament has expressed its will by increasing maximum sentences and by prioritizing denunciation and deterrence in sentencing for sexual offences against children.

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[101] Parliament's decision to prioritize denunciation and deterrence for offences that involve the abuse of children by enacting s. 718.01 of the Criminal Code confirms the need for courts to impose more severe sanctions for sexual offences against children. In 2005, Parliament added s. 718.01 to the Criminal Code by enacting Bill C-2. In cases that involve the abuse of a person under the age of 18, s. 718.01 requires the court to give "primary consideration to the objectives of denunciation and deterrence of such conduct" when imposing sentence.

5. reasonably foreseeable potential harm

[25] As may be seen above, in *Friesen*, the Court stated at para. 84 (in part):

[84] As a result, courts must consider the reasonably foreseeable potential harm that flows from sexual violence against children when determining the gravity of the offence. Even if an offender commits a crime that fortunately results in no actual harm, courts must consider the potential for reasonably foreseeable harm when imposing sentence. []

[26] Under the heading *Victim Information*, the Pre-Sentence Report reads:

The mother of the victim was contacted for the purpose of this report. She states the victim is doing "well", having gone to counselling. She states that the victim will not be submitting a victim impact statement. She is in support of protection order conditions for the safety of her children; however, she would like to have contact with [X].

- [27] Despite the fact that S.D. suffered no actual physical harm and is currently reported as doing "well", I find that S.D. suffered psychological harm and faces reasonably foreseeable potential psychological harm.
- [28] I am satisfied that the psychological harm may endure with S.D. wondering what images or videos of her are on the internet, when may they appear, and whether they may be used by some wicked person in the future in an attempt to embarrass her or extort her for money or some favour.
- [29] Young people dream. S.D. may wish to become, say, an actor. S.D. may wish to become, say, a Member of Parliament. S.D. may wish to enjoy a simple and quiet family life. Will the images (or videos) appear? S.D. knows there are images and videos of her that were surreptitiously taken over a two-year period of her possibly showering or toileting when she was between 12 and 15 years old. Regardless of the dream, S.D. must now live with the uncertain menace that the images and videos may reappear at any time.
- [30] S.D. may also reasonably suspect that there are more images and videos of her taken by X than those known to exist. Assurances otherwise, understandably, may have little effect.
- [31] I also find that the psychological counselling that S.D. may require may be very challenging because of the futurity involved. S.D.'s knowledge of her step-father's crime cannot be contained to the past. She will know that she will be victimized again if images or videos reappear. In short, X's crime leaves a floating, pervasive worry that S.D. must bear for the rest of her life.
- [32] The unique images and unique videos also show unknown victims who are apparently currently unaware that they are victims. That said, they may become aware that they were victims. With the rapid and further development of facial recognition technology, the images or videos may also be used by some wicked person in the future to embarrass or extort any one of these victims. I find that it is reasonably foreseeable that potential harm may flow from X's crime for one or more of these victims.
6. applicable factors
- a) Generally
- [33] In *R. v. R.J.H.*, 2020 BCSC 1070, appeal allowed in part 2021 BCCA 64, Justice Baird summarized general sentencing principles and the effect of relevant factors as follows:
- [30] A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender, it should be increased or reduced to account for any relevant aggravating or mitigating factors relating to the offence or the offender, and it should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.

- [31] When it comes to offences involving the creation, possession, or distribution of child pornography, and the abuse of children generally, the governing sentencing principles without any debate or question are those of denunciation and deterrence: see s. 718.01 of the Criminal Code; *R. v. Watson*, 2018 BCCA 329 at para. 23; *R. v. Inksetter*, 2018 ONCA 474 at para. 16. Rehabilitation, though important, is a secondary consideration, see *R. v. Prince*, 2018 BCSC 987 at para. 93.
- [32] It is well recognised that the creation, acquisition, and distribution of child pornography has grown into a significant criminal industry of international reach that has led to the enslavement and violent abuse of legions of defenceless victims. The suppression of this vile traffic and the punishment of persons involved in it are the main preoccupations of law enforcement in this domain. The overall objective is to protect this most vulnerable demographic of the world population, to prevent and deter child sexual abuse, and to punish offenders. A jail sentence is almost always imposed for offences such as those at bar.
- [34] The making and distribution of child pornography is a grave offence. In the case at bar, X was solely responsible for making many of the images and videos.
- [35] Although X did not make or distribute the images and videos for profit, by virtue of their distribution, the images and videos could readily fall into the commercial, criminal mainstream of child pornography.
- [36] The Court's primary consideration must be to the objectives of denunciation and deterrence of conduct such as X's surreptitious surveillance of S.D. for a period of approximately two years with the taking of images and making of videos which he then distributed (although not for profit).
- [37] A significant sentence is required in order to denounce and deter similar conduct.
- b) Mitigating factors
- i. No criminal record
- [38] X does not have a criminal record.
- ii. Guilty plea
- [39] X pleaded guilty to the offence. Although Crown counsel notes that a complex trial was avoided, Crown counsel says that it was not an early plea.
- [40] Mr. Pennington, counsel for X, says that any delay of a guilty plea was caused by him (Mr. Pennington). He wished to be thoroughly satisfied that X was guilty.
- [41] In my view, our system of criminal justice works best where there are driven, thorough, and learned defence counsel. Without thoroughness, especially in complex cases, there is the real risk that an innocent accused will plead guilty when he or she should not.

- [42] Through sentencing factors, courts should not pressure defence counsel to recommend to their client a guilty plea. A guilty plea should only be recommended where defence counsel is satisfied, without reservation, that a guilty plea is factually and legally the proper course.
- [43] I add that defence counsel have many burdens. If defence counsel believes that further thoroughness is required, such should be encouraged. Few burdens are greater than living with the regret of even partial responsibility for jailing an innocent person.
- [44] The Criminal Code does not provide for greater sentences depending on how late a guilty plea is entered in the criminal process. Other countries do. The fact that Parliament chose not to do so supports the Court giving no weight to the timing of the guilty plea in the case at bar.

iii. Some insight by X

- [45] Crown counsel notes that X has now developed, through counselling, some insight that despite not touching S.D., or other subjects, they were victims.
- [46] BC Mental Health & Substance Use Services ("BC Mental Health") prepared a pre-sentence psychological evaluation of X's risk to re-offend. With respect to X's insight, BC Mental Health, in its March 30, 2022 report, states:

X demonstrated good insight into his offence, and much of his emotional functioning. He spoke openly about his sexual interests and was reflective regarding the origin of this. He identified a number of cognitive distortions that contributed to his offending at the time, including minimizing the seriousness of it, feeling that "just fantasies" were not that harmful and feeling he had his sexual interests "in check." He reported he had been engaged in counselling for two years and his insight is likely reflective of the work he has done in his individual sessions.

- [47] According to a two-page letter dated July 11, 2022 from Ms. Jeanni Jones, a Registered Clinical Counsellor, submitted by X's counsel, X has been seeing her weekly since January 2020.

- [48] In her July 11, 2022 letter, Ms. Jones states:

[X] was able to recognize his own sexual behaviour and practices and how they progressed into his eventual offending and the impact on his step-daughter. Once he was able to realize the extent of his behaviour's possible effect on her, he began to take full responsibility for his actions and to see the risks he faces in the future if he does not attend to his own self-management. He is, in my opinion, unlikely to do the same again due to being horrified that he did this at all and feeling both remorseful and ashamed about his offence. While this is no guarantee that [X] will not offend again, I believe he will reach out for assistance now, knowing his own progression.

[49] I have given only limited weight to this factor of X's current insight. I am satisfied that X would have known the absolute wrongfulness of surreptitiously surveilling S.D., or anyone else, in a bathroom (with shower) for approximately two years. In short, X knew that his surveillance at the time of the crime was wrong. X's conduct must be denounced.

iv. X has undertaken counselling as his own expense

[50] Crown counsel notes that since being charged, X has undertaken counselling at his own expense. I have given some weight to this factor and further note that it may favourably portend successful rehabilitation.

v. X's willingness to engage in future treatment

[51] As Crown counsel notes as a mitigating factor, X has shown a willingness to engage in future treatment.

[52] The pre-sentence report filed April 8, 2022 states that X "is receptive to court-managed counselling, including the Forensic Sex Offender Program and the Sex Offender Maintenance Program".

[53] Ms. Jones notes:

[X] been very active in his treatment program and will, I believe, continue to take full responsibility for never again offending. I also believe that he will seek counseling in future because of his self-awareness and his desire to take full responsibility for his future.

[54] I have given some weight to this factor. Again, there is a greater chance of successful rehabilitation with X being willingly receptive to counselling.

c) Aggravating Factors

i. S.D. was a member of X's family

[55] The fact that S.D. is X's stepdaughter is a statutory aggravating factor: Criminal Code, s. 718.2(a)(ii).

ii. S.D. was under 18 years of age

[56] The fact that S.D. was under the age of 18 is a statutory aggravating factor: Criminal Code, s. 718.2(a)(ii.1).

iii. X abused a position of trust

[57] As S.D.'s stepfather, X abused a position of trust, which is a statutory aggravating factor: Criminal Code, s. 718.2(a)(iii). The breach of trust was very serious because it occurred over two years and it involved very personal privacy interests.

iv. Production and distribution of the images and videos

[58] X personally produced and distributed many of the images and videos. The distribution was not limited to the FBI covert employee.

v. Victims other than S.D.

[59] As noted, there were victims other than S.D. The computer forensic analysis located 314 unique images and 20 unique videos. Many of these images and videos did not involve S.D.

vi. Sophisticated Planning

[60] X surveilled S.D. using spy cameras. The use of spy cameras shows that X was deliberate in his planning of his wrongful conduct. The hiding of the spy cameras reflects a sophisticated effort.

7. Will X re-offend?

[61] Crown counsel says that the likelihood that X will re-offend is a neutral factor. She submits that although the March 30, 2022 B.C. Mental Health report considers X to be at average risk of re-offending, she recognizes X has had treatment and has shown a willingness to continue with counselling.

[62] As noted, Ms. Jones, in her July 11, 2022 letter, stated:

[X] is, in my opinion, unlikely to do the same again due to being horrified that he did this at all and feeling both remorseful and ashamed about his offence. While this is no guarantee that [X] will not offend again, I believe he will reach out for assistance now, knowing his own progression.

[63] The Court finds that X's wrongful conduct is deep-rooted. For example, he would have known that surveilling a person in a bathroom is wrong but, nevertheless, persisted for two years until caught. He certainly requires further specialized counselling to reduce the risk that he will re-offend.

[64] The Court is satisfied that at this time, there is a real and significant risk that X will re-offend. He must be separated from society as he is further assisted in his rehabilitation.

8. Collateral consequences

[65] Mr. Pennington submitted that the Court should consider the collateral consequences of imprisonment.

[66] In her July 11, 2022 letter, Ms. Jones summarizes well the collateral consequences:

My biggest concern for X's future is the care of his elderly father and his young children for whom he is the main caregiver financially. While he has not been able to interact with his children over the past two years, he has maintained financial support for their day to day care and for his father, who is elderly and partially dependent on him for daily physical and mental [well being]. X has not been able to find someone to take over his business in the case of jail time should it be ordered by the court which will have a huge impact on them. This will put a major

strain financially on both his children who are still minors and their mothers (with whom he maintains a good relationship[]) and on his father. If he has jail time, he can not manage his business from prison and then will need additional time once released to get his business up and running again.

[67] I have considered the foregoing collateral consequences. I find that the objectives of denunciation and deterrence with the need to separate X from society as he rehabilitates outweigh the collateral consequences.

[68] While I recognize that X has gained some insight as to his offence and the harm to others, as noted, X's behaviour is deep-rooted. There is the real and significant risk that he will re-offend. This further warrants his separation from society.

9. Parity

[69] In *R. v. K.M.*, 2022 BCSC 360, Justice Donegan sentenced the offender to 30 months imprisonment for making child pornography, contrary to s. 163.1(2) of the Criminal Code. The offender was not charged with distributing child pornography under s. 163.1(3) of the Criminal Code.

[70] In *K.M.*, the offender used a spy camera to record the 15-year-old daughter of his roommate in the bathroom. The offender had a criminal record, which in general terms, related to alcohol and drug use, dangerous driving, and assaulting a peace officer with a weapon. He did not express remorse as X has. The offender in *K.M.* blamed the victim. For example, he described the victim as "flaunting her stuff a lot".

[71] In *R.J.H.*, one of the two accused, R.J.H., was sentenced to 30 months imprisonment for making available and distributing child pornography contrary to s. 163.1(3) of the Criminal Code. R.J.H. had no or very little insight as to the harm involved. However, he did not surreptitiously surveil a family member as X did in the case at bar.

[72] In *R.J.H.*, Justice Baird stated (in part):

[6] [] [T]he search of R.J.H.'s iPad disclosed numerous electronic communications between R.J.H. and parties other than C.S. [the co-accused], during which child pornography was shared, received, and discussed. I have no intention of repeating any of these discussions. It is sufficient to say that they are alarming and sickening and clearly reveal that R.J.H. is a sexual deviant who requires decisive punishment, correction, and long-term treatment.

[73] Justice Baird's decision in *R.J.H.* was appealed but only with respect to certain aspects of ancillary orders made under s. 161(1) of the Criminal Code.

[74] Having regard, in particular, to the length of X's surreptitious surveillance of his stepdaughter and the profound breach of trust, I find that a sentence of greater than 30 months imprisonment is fit.

10. Proportionality

- [75] In arriving at a proportional and fit sentence, I have applied the sentencing principles of the Criminal Code, the direction, guidance, and principles set forth by the Supreme Court of Canada in Friesen, the existence of the "significant criminal industry of international reach" regarding the distribution of child pornography, and the various factors including the mitigating and aggravating factors set forth above.
- [76] I have also taken into account the risk that X may re-offend.
- [77] Parity of sentences serves as a rough guide and check for proportionality. Parity is a subordinate principle to proportionality. As Justice Wagner (as he then was) stated in R. v. Lacasse, 2015 SCC 64:
- [58] [] [A]lthough ensuring parity in sentencing is in itself a desirable objective, the fact that each crime is committed in unique circumstances by an offender with a unique profile cannot be disregarded. []
- [78] I find that the proportional and fit sentence for X in the case at bar is 36 months imprisonment.
- [79] In arriving at 36 months imprisonment, which is the lowest sentence the Crown recommends, I have given weight to the fact that X has sought counselling, is receptive to more counselling, and has developed some insight as to the harm he caused. Absent such, I would have sentenced X to 42 months imprisonment.
- [80] X, the Court sentences you on Indictment 47487-2 Penticton Registry to 36 months of imprisonment on Count #2.
11. Ancillary Orders
- a) Forfeiture of items seized
- [81] X agreed to the forfeiture of items seized. I have earlier signed the appropriate order.
- b) Firearms/weapons prohibition
- [82] Pursuant to s. 109 of the Criminal Code, you are prohibited from possessing:
- a) any firearm, other than a prohibited firearm or restricted firearm, and any cross-bow, restricted weapon, ammunition and explosive substance for a period of 10 years following your release from prison, and
- b) any prohibited firearm or restricted firearm, prohibited weapon, prohibited device and prohibited ammunition for life.
- c) Sex Offender Information Registration Act
- [83] Pursuant to ss. 490.012 and 490.013 of the Criminal Code, X is required to comply with the Sex Offender Information Registration Act, S.C. 2004, c. 10, for 20 years.

[84] I ask Crown counsel to prepare the formal order in Form 52 for my signature.

d) Taking of X's DNA

[85] Count #2 on Indictment 47487-2, Penticton Registry, is a primary designated offence.

Pursuant to s. 487.051(1) of the Criminal Code, I authorize the taking of DNA samples from X by a Peace Officer of British Columbia.

[86] I ask Crown counsel to prepare the formal order in Form 5.03 for my signature.

e) No communication with S.D.

[87] Pursuant to s. 743.21(1) of the Criminal Code, X must have no contact or communication directly or indirectly with S.D. while X is in custody except with the prior written approval of his parole officer.

f) Prohibitions on release

[88] Pursuant to s. 161 of the Criminal Code, X is prohibited, starting on the date of X's release from prison, from:

- a) attending a public park or public swimming area where persons under the age of 16 years are present or can reasonably be expected to be present, or a daycare centre, school ground, playground or public swimming pool;
- b) being within 500 meters of any residence, school or workplace, or place of worship of S.D. unless in a moving vehicle;
- c) seeking, obtaining or continuing any employment or self-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;
- d) having contact or communicating by any means with a person who is under the age of 16 years except incidental contact including contact in the course of their employment or your employment or self-employment or as approved of in writing by the Court, your probation officer, your parole officer, or the person to whom you are reporting under the Sex Offender Information Registration Act. You must carry a copy of the written permission with you which may be in an electronic format;
- e) accessing any computer network including the Internet to:
 - i. access any content that violates the law;
 - ii. access directly or indirectly or maintain a personal profile on any social media sites, social network, internet, discussion forums or chatrooms unless for purposes directly related to your employment;

iii. to communicate electronically or attempt to communicate electronically, directly or indirectly, with any person you know to be or who reasonably appears to be under the age of 16 years unless they are your own children.

[89] With respect to accessing the Internet, I note in particular Mr. Pennington's submissions that X, as part of his rehabilitation and reintroduction into society, should, if reasonably practical, be able to access say, a national newspaper on the Internet or to shop for a refrigerator on the Internet. The Internet is part of day-to-day normal life.

[90] Counsel agreed to the foregoing terms. They disagreed on the appropriate duration. The Crown seeks 10 years. Mr. Pennington seeks 5 years.

[91] For the s. 161 ancillary orders, I find that 10 years is the appropriate duration for these orders based on my finding that X's wrongful conduct is deep-rooted. Even with X's positive attitude towards counselling, in my view, significant time will be required to achieve full rehabilitation. In balancing matters, the Court must favour the protection of our youth.

[92] Those are my reasons.

"Funt J."

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Prepared on 30 October 2026 · Esheria