DATE: 2014·03·11
Citation: *R. v. Brunton*, 2014 ONCJ 120

ONTARIO COURT OF JUSTICE

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

JAMES BRUNTON

Before Justice Peter Harris
Reasons for Sentence released on March 11, 2014

Mr. Michael Callaghan ..... for the Crown
Ms. Alison Mackay..... for the Accused

Harris J.:

[1] James Brunton entered guilty pleas to a total of 3 charges of possessing, 3 charges of making and 1 charge of distributing child pornography. Two counts of possession and two counts of making child pornography involve short video clips of eight male youths who were underage at the time (May 1st, 2003 and February 27th, 2004). The videos were taken in a locker room/shower area while members of the Peterborough Bees Hockey team were in the process of undressing and showering. The players appear to be in their mid-to-late teens and were not aware

they were being filmed and did not consent to this activity.

[2] The three remaining charges (one count each of possessing, making and distributing child pornography) relate to a youth, B. D. who resides in the United States, and was between the ages of 15 and 17 during the period August, 10, 2009 and October 18, 2012. Mr. Brunton and the youth began communicating online through a profoundly bizarre and depraved website by the name of zambianmeat.com that specializes in postings, stories and private messages involving sexual and cannibalistic fantasies. When B.D. was 15 years of age Mr. Brunton encouraged the youth to send nude photographs and videos of himself in various poses. In total 87 photographs were sent, more than 30 of which represented child pornography. Most images involved nude poses but there were some very troubling and dangerous photos involving poses with knives at the youth's neck and scrotum. Most appalling was a ghastly "fantasy" contract that had been entered into online with the youth who had agreed to be used as a sex slave, then tortured, dismembered and eaten. In addition, 3 short video clips were made at Mr. Brunton's request, one involving a video of anal penetration with a blunt instrument. These video images all constituted child pornography as well. In total Mr. Brunton paid the youth $3528.62 for pornographic images over the course of three years. The distribution count pertains to the numerous nude photos of the youth that Mr. Brunton sent to at least 4 email addresses between the dates May 4th, 2010 and July 11, 2012. (See Agreed statement of Facts for more detail, Exhibit 1).

[3] The above facts were admitted by the defendant with the following amendments that the Crown did not challenge: (1) nothing inappropriate occurred between Mr. Brunton and the young hockey players other than the recording of nude images; (2) there was nothing else on Mr. Brunton's computer in the nature of child pornography that was not described in the Agreed Statement; (3) Mr. Brunton asserts that he had not accessed the "hockey team" materials "for a couple of years."

[4] The Crown has elected to proceed by indictment on all charges and the *mandatory minimum sentences under the Criminal Code* for the indictable offences of possession, making child pornography and distribution of child pornography dating from October 10, 2009 to October 18, 2012 are 6 months, 90 days and one year incarceration respectively. The charges stemming from the "hockey team" videos dating from May 1st, 2003 to February 27th, 2004 carry no mandatory minimum sentences. Crown counsel has requested a number of ancilliary orders:

1. An order pursuant to s. 161 of the *Criminal Code*, that he be prohibited from 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, schoolground, playground or community centre unless accompanied by his spouse or another adult person and in any event he is not to possess a device in any of those locations capable of recording still or moving images, for life; secondly, that he be prohibited from knowingly

placing himself in a position of trust with persons under the age of 16 years *and* prohibited him from using the internet to contact or communicate with persons under the age of 16 years, for life.

2. A "D.N.A." order.

3. An order requiring Mr. Brunton to comply with the applicable provisions of the *Sex Offender Information Registry Act* for life.

[5] The Crown seeks a sentence of two years less a day. He takes the position that while case law may support concurrent sentences for the "possess" and "make c. p." charges, the "distribution" charge should be consecutive to reflect the reprehensible conduct inherent in circulating character - damaging images of an underage youth on the internet from which there may be no possibility of retrieval. Crown counsel further submits that for various reasons specific to this case, he would not be opposed to a pre-trial custody credit of 15 months, being the 10 months actual pre-trial custody with statutory enhancement of 1.5 times the period of detention. He therefore seeks a further 9 months less one day imprisonment followed by probation with specific supervisory conditions for three years.

[6] Counsel for Mr. Brunton has submitted that time served of 10 months (with the appropriate credit enhancement) followed by a suspended sentence with probation for three years would address all of the applicable principles of sentencing. She is in agreement with the imposition of the ancillary orders the prosecutor seeks with the exception of parts of the s. 161 order.

DEFENCE SENTENCING MATERIALS

[7] James Brunton is a 65 year old retired man in relatively poor health. Mr. Brunton has no criminal record and a solid work history for many years. He has a college education and has worked as a medical laboratory technologist in hospitals in Campbellford, Peterborough and Toronto to age 55 after which he was employed in medical centres, labs and clinics until he retired in 2010. He had been working one day a week in a nephrology clinic until the date of his arrest ten months ago. He married in 1976 and has a daughter, [redacted] aged 36 years. According to the Report from Dr. [redacted] forensic psychiatrist, filed (exhibit 5) Mr. Brunton developed impotence about 20 years ago due to his obesity, hypertension, diabetes and the effects of the five different types of medication he is required to take for these conditions. Nevertheless, Dr. [redacted] reports that "He has always had a good relationship with his wife." He is described by his wife, [redacted] as having always been a loving, caring and sensitive husband and a good father to his daughter, [redacted] She states that he has never shown any sexual interest in other males of females and does not use illegal drugs or excessive amounts of alcohol. Dr. [redacted] has concluded that Mr. Brunton shows no evidence of thought disorder or mental

illness and was remorseful for his actions and "regretted causing his family and [B.D.] any distress." Mr. Brunton, according to Dr. [redacted] has acknowledged some sexual interest in young adult males and is willing to undergo treatment for this condition. According to the report, the defendant believes the sexual fantasy ideation is a compensatory mechanism for impotence and low self-esteem. He recognizes "that he has deviant sexual interests that while purely fantasy-based, are also socially repugnant and would require professional help to deal with." Dr. [redacted] has assessed Mr. Brunton as a "low risk to reoffend" and a "person who is likely to follow through with treatment." He is prepared to accommodate him in a sex offender treatment program within a week of his release.

[8] I have received a letter from [redacted] (exhibit 1) who has expressed shock at learning about these charges. She states, "I realize it will take time to rebuild trust, but I am willing to stand behind him and make sure that he gets the help that he needs." She further comments that, " I am worried about his health as he has several medical conditions and has not had the benefit of a C-PAP machine for many months." His counsel, Ms. Mackay has advised that Mr. Brunton suffers from severe sleep apnea and requires this device (which not available in detention) to keep his airways open while sleeping. [redacted] has also shared her thoughts (exhibit 2). She states that after the initial shock of the charges, she has now had time to process these developments. She comments that, "I support mom's decision to stay with my dad and work with him to get help. I am encouraged to hear that they have acknowledged the need for more open communication and are setting up resources to get him help to deal with his issues. My dad has a number of health concerns and while that does not excuse the mistakes that he has made, I believe he would be better off in the care of my mother." Counsel for the defendant advises that upon arrest, he was so filled with shame and sadness for what he had done and "what he had caused his family" that he decided to forego any application for interim release and stay in custody until the charges are dealt with. At present I am told Mr. Brunton's legs are swollen and he is having difficulty sleeping at night. It is safe to say that these charges have had a profoundly life-altering effect on the defendant. I believe he has a reasonable degree of insight into his activities and issues and is willing to undertake management of these.

[9] The youth B.D. who is now 19 years of age was asked to comment about the effect of these offences on him. He states, "The offence caused me to feel afraid for my life. I felt unsafe and also had slight paranoia. I felt ashamed of what was happening because I felt that I couldn't say anything about it. As of now I have moved on and I am feeling better about it all. So it takes some thinking to remember the feelings I had then."

THE LEGAL FRAMEWORK

[10] "Section 718 of the *Criminal Code provides that:* The fundamental purpose of sentencing is 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;
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> (b) to deter the offender and other persons from committing offences;
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> (c) to separate offenders from society, where necessary;
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> (d) to assist in rehabilitating offenders;
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> (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 and to the community.

[11] "Section 718.01 of the *Criminal Code:* 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."

[12] **"**Section 718.1 of the *Criminal Code:* A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender."

[13] **"**Section 718.2 of the *Criminal Code:* A court that imposes a sentence shall also take into consideration the following principles:

> (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
>
> > (i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor,
> >
> > (ii) evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner,
> >
> > (ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,
> >
> > (iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim shall be deemed to be aggravating circumstances,
> >
> > (iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization, or

(v) evidence that the offence was a terrorism offence;

(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;

(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders."

LEGAL PRINCIPLES OF SENTENCING IN CASES INVOLVING CHILD PORNOGRAPHY:

[14] The paramount sentencing principles in respect to the scourge of child pornography are deterrence and denunciation. The prevalence of the offences of possession, "making" and distribution of child pornography are of immense concern both to this court and to the community. Parliament has amended the punishment for such offences to require significant minimum jail terms and to remove the possibility of a conditional sentence for these crimes. Notwithstanding the requirement of minimum jail terms, the Court must balance the above-noted sentencing principles while maintaining a primary emphasis on deterrence and denunciation. In any event, the court will not lose sight of other sentencing objectives, principles, and factors such as proportionality, totality, rehabilitation and restraint.

[15] The reality at the heart of this case is that there is no way of knowing the extent of the psychological effects of this involvement on a vulnerable youth like B.D. who was having what were probably fairly typical adolescent emotional adjustment problems. The hockey playing youth (members of the Peterborough Bees) seemed to have been unaware of the fact their naked images were being recorded and all seem to be well-adjusted and generally untroubled by the news of these invasions of their privacy. Fortunately there does not appear to have been any distribution of these locker room images and for these youth there was never any real risk of harm. In B.D.'s case one can only hope that, as his victim impact statement indicates, he has "moved on" and is "feeling better about it all." "It takes some thinking to remember how I felt at that time." One hopes he will put this period of emotional confusion behind him and continue with his development in a healthier lifestyle. The effects on a vulnerable youth like B.D. who is put on naked display in these images is real but unquantifiable and the additional harm created by making these images available is completely indeterminable with any precision, and

accordingly the proportionately appropriate sentence for an individual who has distributed these loathsome images is relatively incalculable. It is possible these images have all been deleted from computers to which they were forwarded: it is equally possible that these scandalous images may reappear in the future in ways that could severely embarrass B.D. in business and future relationships. The fact is we don't really know what harm individuals like Mr. Brunton cause. In the final analysis, the sentencing jurist can only strive to identify the correct balance of sentencing principles while placing appropriate emphasis on deterrence and denunciation.

[16] These cases often provoke contradictory sentencing responses. This Court is faced with just such a problem. On the one hand, the circumstances of these offences and the minimum sentencing provisions of the Criminal Code demand relatively significant jail terms. On the other hand, the Mr. Brunton's personal circumstances strongly suggest that incarceration beyond the required minimums is unnecessary.

AGGRAVATING AND MITIGATING FACTORS

[17] The aggravating factors are few in number but relatively serious. In terms of the locker room videos, Mr. Brunton took advantage of a position of trust as an adult who was expected to assist with the management of the hockey team. As well, he entered into an exploitive relationship with an obviously troubled youth in which there were continuing overtones of manipulation and abuse including the encouragement of sado-masochistic roleplaying and fetishistic behavior. The nude images and videos are repulsive and require me to assign aggravating weight to the possession, the making of, and most importantly the sharing of these materials and allocate proportionate correctional values, in accordance with s. 718.1 of the Code. In terms of relative depravity and violence, the collection can be said to be less severe. Nonetheless, the potential for child endangerment in the form of desensitizing, destructive behavior is an additional aggravating factor.

[18] In terms of mitigation, Mr. Brunton is before the court on a serious matter as a first offender. Even with the necessary emphasis on denunciation and deterrence, I consider rehabilitation to be very much a factor given, his plea, the remorse he has expressed which I accept as sincere, and his motivation to undertake sexual therapy with Dr. [redacted] at his clinic in Toronto. He appears to have insight into his deviant sexual fantasy proclivities and is motivated to take treatment and is a low risk to reoffend. He is otherwise of good character. The charges have already had an extremely damaging effect on his health, relationships, his self-esteem and his enjoyment of life. On the basis of his solid family support, I am persuaded that he will have the inner resources and external reinforcement to pursue treatment and rebuild the trust he has violated in his family and the community.

ANALYSIS

[19] There is little doubt that the making available and distribution of child pornography gives rise to a greater need for denunciation and deterrence that does mere possession. Still the role possessors play is fuelling the market must be considered carefully as well. In *R. v. Stroempl*, 1995 105 C.C.C. (3d) 187 at page 191 the Ontario Court of Appeal held:

> "The possession of child pornography is a very important contributing element in the general problem of child pornography. In a very real sense possessors such as the appellant instigate the production and distribution of child pornography -- and the production of child pornography, in turn, frequently involves direct child abuse in one form or another. The trial judge was right in his observation that if the courts, through the imposition of appropriate sanctions, stifle the activities of prospective purchasers and collectors of child pornography, this may go some distance to smother the market for child pornography altogether. In turn, this would substantially reduce the motivation to produce child pornography in the first place."

[20] In *R. v. E.O.* [2003] O.J. No. 563 (Ont. C.A.) the court noted:

> "Possession of child pornography is a crime of enormous gravity both for the affected victims and for society as a whole. For that reason the courts have repeatedly recognized that the most important sentencing principles in cases involving child pornography are general deterrence and denunciation. Further, the offence of possession of child pornography requires the imposition of sentences which denounce the morally reprehensible nature of the crime, deter others from the commission of the offence and reflect the gravity of the offence."

[21] I have also reviewed other decisions of the Ontario Court of Appeal such as: *R. v. Lisk*, [1998] O.J. No. 1456; *R. v. Cohen*, [2001] O.J. No. 1606; *R. v. Schan*, [2002] O.J. No. 600); *R. v. Webber*, [2003] O.J. No.3306; *R. v. Kim*, [2004] O.J. No. 119; *R. v. D.G.F.* [2010] O.J. No. 127 and *R. v. Nisbet* [2011] O.J. No. 101 (Endorsement).

[22] Even though denunciation and deterrence are the paramount principles of sentencing in this case, Mr. Brunton's sentence "should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances" according to s. 718.2(b) of the Code. The latter principle inevitably requires a sentencing court to compare the circumstances of one case with the circumstances of others in which sentences for the same offence have been imposed.

[23] The issues involving the quantity of material, the making, distribution and how the "collection" of child pornography was obtained require some discussion. It could fairly be said that the size of the collection is relatively small, the distribution of nude photos of B.D. was to four email addresses and not websites and there were no images involving abuse of young children. As discussed above, the nude images and videos were essentially purchased and represent a repulsive exercise in sado-masochistic and fetishistic abuse and exploitation. On the other hand, Mr. Brunton meets all the criteria for sentence mitigation that have been helpfully enumerated by Justice Molloy in *R. v. Kwok*, 2007 CanLII 2942 (ONSC) ─ with the exception of youthful age:

> (i) the youthful age of the offender;
>
> (ii) the otherwise good character of the offender;
>
> (iii) the extent to which the offender has shown insight into his problem;
>
> (iv) whether he has demonstrated genuine remorse;
>
> (v) whether the offender is willing to submit to treatment and counselling or has already undertaken such treatment;
>
> (vi) the existence of a guilty plea; and
>
> (vii) the extent to which the offender has already suffered for his crime.

[24] There is no question that Mr. Brunton was otherwise of good character, has shown insight, remorse, has pleaded guilty and is willing to undertake treatment. He has suffered in terms of pre-trial detention and has felt the weight of the shock and betrayal experienced by family and friends.

[25] The next step in the analysis involves a comparison with the facts in other cases. In doing so there is no intention to minimize the serious harm that all child pornography represents. The following Ontario decisions appear to be most relevant to any decision as to the length of sentence:

> (i) In *R. v. Kim*, [2004] O.J. No. 119, the youthful first offender pleaded guilty to both possession and distribution of child pornography. He had exchanged material with other offenders on a two-for-one basis, he had over 12,000 images on his server, he had received between 5,600 and 6,400 images over an eight-day period, and he had sent out 2,800 to 3,200 images. In the opinion of the Court of Appeal, a substantial reformatory sentence was called for. However, in view of the fact that

the offender had already served seven and a half months of his conditional sentence, the Court was reluctant to interfere and impose a period of incarceration at this stage.

(ii) In *R. v. Ewing*, [2007] O.J. No. 1710 (Ont. C.J.), the offender aged 32, lived alone in his grandmother's basement. He was unemployed and had no friends or previous relationships and minimized the seriousness of his conduct. He possessed 6951 images of child pornography, 73 child pornography stories and 292 child pornographic videos. The collection included depictions of infants and children being forced into explicit and violent sexual bondage and bestiality activity. In addition to this "vast" collection, the offender had posted child pornographic images to a publicly available website. The offender stated he had no sexual fantasies about children but on arrest, he was found in possession of a "large quantity of girl's undergarments." The Court imposed a sentence of 24 months imprisonment less credit for time served.

(iii) In *R. v. Smith*, [2008] O.J. No. 4558 (Ont. S.C.), the offender was in possession of about 837 pictures and 147 videos of child pornography. He had used file-sharing software to share his collection on peer-to-peer networks. The possession and making available charges were proceeded with by indictment. The defendant was a 43 year old actor whose career was ruined by his conviction. The Court imposed a sentence of 21 months in prison.

(iv) In *R. v. Cuttell*, [2010] O.J. No. 1624 (Ont. C.J.), the offender had amassed a collection of over 1300 child pornography images and 10 child pornography videos. The nature of the materials was described as "horrendous." They included acts of oral sex, anal and vaginal penetration of children, ejaculation, bondage, group activities including children with children and children with adults. The age of the youngest child appeared to be about 3. On one date, police found 193 files of child pornography on the accused's file-sharing network and on another occasion there were 246 files in his shared folder available to anyone on the internet. The accused was 67 years of age with no record and had two prior hip replacements that caused him pain, stiffness and limited mobility. The Court was not able to assess the accused's potential to cause future harm to children and was unable to find he had any genuine insight into his crimes. In the result, the Court imposed a sentence of 18 months.

(v) In *R. v. Guillemette*, [2010] unreported, (Ont. S.C.), the offender was in possession of 545 videos and 1392 pictures of child pornography which depicted persons ranging in age from three to twelve years. He also entered a chat room and sent a child pornography video to an undercover officer. Both the possession and

make available charges were proceeded with by indictment. He was 21 years of age; he lived with his mother, and had attended for assessment and treatment for sexual behaviours. The Court imposed a sentence of 18 months (the mandatory minimum for the distribution offence was one year in prison).

(vi) In *R. v. Lynch-Staunton* [2012] O.J. No. 313 (Ont. S.C.) the offender pleaded guilty to possession and distribution over a four month period. The pornography was found on 21 computer hard drives and encompassed 2097 images, 1763 stories, and 574 child pornography movies. On the basis of a total accumulation of 12.1 gigabytes of data from all devices, a lack of remorse or insight and an unwillingness to undergo any type of assessment or treatment, the sentence imposed was five years imprisonment.

(vii) In *R. v. D.G.F.* [2012] O.J. No. 127 (Ont. C.A.) the offender pleaded guilty to seven sexual offences against children, including two counts of sexual assault of his four year old daughter, three counts of making child pornography using his four year old daughter, one count of possession of child pornography and one count of distributing child pornography. The accused had a massive collection of child pornography and the culminating event was a live sex assault of his daughter he transmitted by webcam to an internet chat room set up for pedophiles. The Court imposed a seven year sentence.

CONCLUSION

[26] Balancing the repugnancy of the material possessed, made and distributed by Mr. Brunton and the paramount need to deter, denounce and condemn his conduct — with all the factors that speak to the need to exercise restraint with a first offender with a good reputation and community supports, demonstrated remorse, insight and motivation to take treatment, and most importantly, with a diagnosis that suggests he presents a low risk to reoffend — a total sentence in the range of fifteen to eighteen months is called for on the basis of the sentencing precedents I have reviewed. The *Kim*, *Ewing*, *Smith*, *Cuttell* and *Guillemette* cases supra, appear to contain slightly more aggravating features and a careful extraction of the sentencing principles from those cases combined with some slight accommodation of proportionality, rehabilitation and restraint values would result in an appropriate sentence in the range of fifteen months in this case. The *Lynch-Staunton* and *D.G.F.* decisions are clearly distinguishable on the basis of far more reprehensible conduct.

[27] I come to this conclusion partly because the most significant aggravating factor, the extent to which the images were shared with others – appears to have been more of an irregular gesture than a lifestyle. In other words, it was not a peer-to-peer file-sharing system in which any

random browser could view every image he had on his computer at any time. In making this distinction, I do not intend to suggest there is not the potential for considerable harm should the 13 nude photos that were sent to four email addresses ever find their way into the swirling vortex of depravity that is the web-based child pornography industry. In the instant case the harm from internet circulation is much more speculative. A second major sentencing consideration is the extent he has suffered for this crime. The net effect of these charges has been to reduce his position in his family and community from that of a respected, caring, trusted husband and father to that of a burden and an embarrassment. As well, it is now apparent that the defendant's health is seriously at risk in custody. While it is incumbent upon all courts to give prominence to deterrence in sentencing child pornography offenders, it remains questionable whether there is any significant public interest in making any further sentencing example of a senior citizen in poor health. Clearly, on the facts of this case specific deterrence does not appear to be a major consideration.

[28] As serious as the distributing offence is, and it is considerably more serious than the possession and the making of child pornography because of the potential for opening the floodgates in this market for child abuse, I still find that Mr. Brunton, who sent approximately 13 nude photographs of B.D. to four email addresses, is not in the same category as the accused in the cases noted above who made child pornographic images directly available to any random internet user. Consequently, in my view, the minimum mandatory sentence for "distribution" will suffice in this case. As a result of a delicate balancing of sentencing factors and being mindful of the primacy of denunciation and deterrence in this area of law, and having regard to the two most serious charges, **I have concluded that Mr. Brunton should serve a period of twelve (12) months in prison on the "distribution" charge in relation to the youth B.D. and 90 days consecutive on the charge of "making child pornography" in relation to the youth B.D. The "possession" charge in relation to the youth B.D. will be stayed on the basis of the totality principle and the "same transaction" principle: *R. v. Kienapple*, [1975] 1 S.C.R. 729 (S.C.C.).** The two counts of possession and the two counts of making child pornography (the hockey team charges) will result in concurrent sentences of 45 days imprisonment. **The total sentence for all seven offences is therefore fifteen (15) months imprisonment.** On the basis of enhanced credit for time served, (R. v. Summers, 2013 ONCA 147 applied) Mr. Brunton will be attributed with having served 15 months as discussed above and the endorsement on the information will read **"time served, 10 months; the sentence will be suspended followed by concurrent periods of probation for three years."**

[29] I now invite counsel to address the Court on the s. 161 Order, the DNA Order, the SOIRA Order and the terms of the Probation Order.

Released: March 11th, 2014

Justice Peter Harris