

CANADA / JUDGMENT

# R. v. Bevan

2024 BCCA 414

## COURT

British Columbia Court of Appeal

## DECIDED

19 December 2024

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2024 BCCA 414 R. v. Bevan COURT OF APPEAL FOR BRITISH COLUMBIA Citation: R. v. Bevan, 2024 BCCA 414 Date: 20241219 Docket: CA49593 Between: Rex Respondent And Dayton William Earl Bevan Appellant Restriction on publication: A publication ban has been mandatorily imposed under

- s. 486.4(2) of the Criminal Code restricting the publication, broadcasting, or transmission in any way of evidence that could identify the complainant or witness under the age of 18. This publication ban applies indefinitely unless otherwise ordered. Corrected Judgment: The text of the judgment was corrected on the cover page on January 7, 2025. Before: The Honourable Madam Justice Fisher The Honourable Justice Griffin The Honourable Mr. Justice Butler On appeal from: An order of the Provincial Court of British Columbia, dated September 18, 2023 (sentence) (R. v. Bevan, Houston Docket 26173-2-C). Counsel for the Appellant: T. Rauch-Davis Counsel for the Respondent: L. Chu Place and Date of Hearing: Vancouver, British Columbia December 2, 2024 Place and Date of Judgment: Vancouver, British Columbia December 19, 2024 Written Reasons by: The Honourable Madam Justice Fisher Concurred in by: The Honourable Justice Griffin The Honourable Mr. Justice Butler Summary: The appellant challenges his sentence on one narrow ground pertaining to the proper interpretation of s. 161(1)(c) of the Criminal Code. The sentencing judge made an order prohibiting the appellant from "being in the presence" of a person under the age of 16. The appellant argues that this "no presence" condition impermissibly extends the scope of the prohibition contemplated by the Code. Held: Appeal allowed. While sentencing judges retain broad discretion to craft exceptions to prohibition orders to address the nature and degree of risk posed by an offender, an order under s. 161(1)(c) cannot prohibit a broader range of conduct than what is contemplated by the words used in this provision. A prohibition on "being in the presence of" an underage person is broader than the prohibition on having "any contact". The order is amended accordingly. Reasons for Judgment of the Honourable Madam Justice Fisher:

- [1] The issue raised in this appeal is a narrow one: whether s. 161(1)(c) of the Criminal Code, which authorizes orders prohibiting an offender from having "any contact" with a person under the age of 16 without appropriate supervision, permits such orders to include a prohibition from "being in the presence of" an underage person.
- [2] The appellant, Dayton Bevan, contends that including a "no presence" condition impermissibly broadens the scope of the prohibition on contact in s. 161(1)(c) by importing a "spatial ambiguity" that has the potential for overbroad and grossly disproportionate restrictions on his liberty. He seeks an order removing this condition for want of jurisdiction.
- [3] The respondent Crown disagrees and says the "no presence" condition is not fundamentally different from what is encompassed in the broad wording of s. 161(1)(c) and the sentencing judge did not exceed her jurisdiction by including this term.
- [4] Section 161(1)(c) of the Criminal Code provides: 161(1) When an offender is convicted, or is discharged on the conditions prescribed in a probation order under section 730, of an offence referred to in subsection (1.1) in respect of a person who is under the age of 16 years, the court that sentences the offender or directs that the accused be discharged, as the case may be, in addition to any other punishment that may be imposed for that offence or any other condition prescribed in the order of discharge, shall consider making and may make, subject to the conditions or exemptions that the court directs, an order prohibiting the offender from
- (c) having any contact -- including communicating by any means -- with a person who is under the age of 16 years, unless the offender does so under the supervision of a person whom the court considers appropriate; The order
- [5] The context is this. The appellant was convicted of sexual interference and sentenced to imprisonment for two years less a day, three years' probation, and various ancillary orders, including an order under s. 161(1)(c) prohibiting him for a period of 10 years from the date of his release from prison from: 5(b) Having any contact or communications, directly or indirectly, or being in the presence of any person under the age of 16. The exceptions are:
- i. It is your child, ii. You are in the immediate presence of the child's guardian(s), iii. You are in the immediate presence of another adult who is aware of this order, iv. The communication, contact or your presence is incidental to employment (or to your presence in a public place), or
- v. The communication, contact, or your presence is in the course of your employment with customers or co-workers, as long as you have given a copy of this order to your employer and your employer agrees to provide supervision by an employee. [The impugned provisions underlined.]

- [6] The judge included the same condition in the probation order (which is not challenged given the authority granted in s. 732.1 of the Criminal Code).
- [7] Before the sentencing judge, the Crown did not suggest the inclusion of a "no presence" condition and simply sought an order under s. 161(1) that included a prohibition as described in s. 161(1)(c). It appears that the judge modeled both orders on this no contact condition in the Provincial Court Picklist for probation and peace bonds: You must not have any contact or communication directly or indirectly with, or be in the presence of, any person under the age of [number] years of age, except when there is incidental communication, contact or presence in a public place where other adults are present. The scope of s. 161(1)(c)
- [8] The precise scope of s. 161(1)(c) has not been judicially considered. Consequently, there are cases in this Court where orders under s. 161(1)(c) have included similar "no presence" language: see, for example, *R. v. Thibodeau*, 2022 BCCA 386; *R. v. Adams*, 2023 BCCA 369. In those cases, as well as in this appeal, similar orders were made in both probation and s. 161(1)(c) orders. The "no presence" wording that is commonly included in probation orders seems to have crept into s. 161(1)(c) orders, perhaps in an effort to keep these orders consistent. However, s. 161(1)(c) authorizes orders prohibiting an offender from having "any contact" with a person under 16; it does not use the word "presence" at all.
- [9] The appellant submits that the "no presence" condition is outside the scope of available conditions authorized by s. 161(1). He relies on *R. v. Veringa*, 2024 BCCA 295, where this Court held that the preamble in s. 161(1) "should generally be interpreted as intended to limit, not enlarge the prohibitions provided for in (a) through (d)": at para. 55. Relying on the well-known principles of statutory interpretation, the appellant submits that s. 161 is exhaustive and the sentencing judge erred in law by imposing a condition that is not contained in the legislative text. He says further that "presence" is fundamentally different from "contact" and "communication", and a "no presence" condition is more restrictive because of its "inherent obscurity".
- [10] The Crown submits that s. 161(1)(c) aims to protect children by prohibiting sexual offenders from having unsupervised access and the "no presence" language is not fundamentally more restrictive than the "any contact" language. Although the Crown concedes that the "no presence" language without the exceptions included in the order is broader than the "no contact" language, it says the addition of the "no presence" language when considered with the exceptions ordered by the judge does not result in a prohibition of conduct not contemplated in s. 161(1)(c). The Crown further submits: Even without an express prohibition from being in the presence of underage children in a non-public setting, given the significant risk of breaching the offender's s. 161(1)(c) order, this is the type of conduct an offender ought not to and is unlikely to engage in as a matter of common sense.

- [11] While the appeal is framed by the appellant as a challenge to the jurisdiction of the sentencing judge, I consider the issue to be simply a question of statutory interpretation. To properly interpret the scope of s. 161(1)(c), the words must be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme and object of the statute and the intention of Parliament: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27.
- [12] The purpose of s. 161 is clear: it has an overarching protective function to shield children from sexual violence. It provides sentencing judges with a discretionary power to carry out this purpose and flexibility to tailor a prohibition to the circumstances of offenders and the risk they pose to children upon their release into the community: *R. v. K.R.J.*, 2016 SCC 31 at paras. 44, 47. At the same time, such orders constitute punishment, as they can have a significant impact on the liberty and security of offenders: *K.R.J.* at para. 57. Therefore, s. 161 orders are to be imposed "only when there is an evidentiary basis upon which to conclude that the particular offender poses a risk to children and the judge is satisfied that the specific terms of the order are a reasonable attempt to minimize the risk": *K.R.J.* at para. 48.
- [13] In *Veringa*, this Court was addressing s. 161(1)(a), which prohibits offenders from attending at specified public places where persons under 16 are present or can reasonably be expected to be present: a public park, public swimming area, daycare centre, schoolground, playground or community centre. In that context, the Court agreed with the parties (the Crown and defense took the same position) that the preamble did not confer authority to impose a prohibition from attending at a public place (in that case, theatres) not listed in s. 161(1)(a).
- [14] Section 161(1)(c) is drafted in broader language than s. 161(1)(a) but its focus is on prohibiting "any contact" with a person under 16. By definition, "contact" includes something more than "presence": Contact n. the state or condition of physical touching; the action of communicating or meeting (*Concise Oxford English Dictionary*, 11th Edition ) Contact v. to enter or be in contact with to get in communication with (*Merriam Webster* (online)) Presence n. the state of fact of being present (*Concise Oxford English Dictionary*, 11th Edition) Presence n. a place where a person is (*Oxford English Reference Dictionary*, 2nd ed. Revised)
- [15] Moreover, when the word "contact" is considered with the rest of the words in s. 161(1)(c), it is clear that it is intended to include some form of communication. And that form of communication is broad, as it includes communication "by any means". I agree with the appellant's submission that the "no contact" and "no communication" conditions suggest some form of engagement or interaction while "no presence" does not require the same active engagement.
- [16] Applying the modern rule of statutory interpretation, I would interpret s. 161(1)(c) to authorize only orders prohibiting offenders from having any unsupervised contact or communication with a person under 16. This is consistent with the protective purpose of s.

161 in the context of the sentencing regime in the Criminal Code. Contrary to the Crown's submission, without an express prohibition from being in the presence of underage children in a non-public setting, the significant risk of an offender breaching a s. 161(1)(c) order does not support a conclusion that this is the type of conduct contemplated by the "no contact" language in this provision.

- [17] That said, I would not go so far as to say that sentencing judges cannot include the word "presence" in whatever conditions or exemptions they consider appropriate. Judges have considerable latitude under s. 161 to craft prohibition orders tailored to address the nature and degree of risk posed by the offender in question and to provide clarity so that the offender may know what is or is not prohibited. For example, neither party in this case suggested that the use of the word "presence" in exceptions (ii), (iii) or the bracketed portion of (iv) of this s. 161 order was inappropriate, and I agree.
- [18] I would therefore allow the appeal and vary the s. 161 order to remove the words "being in the presence of" from para. 5(b) of the order and the words "or your presence" in the exceptions (iv) and (v). The new terms of the order will read: 5(b) Having any contact or communications, directly or indirectly, with any person under the age of 16. The exceptions are:
- i. It is your child, ii. You are in the immediate presence of the child's guardian(s), iii. You are in the immediate presence of another adult who is aware of this order, iv. The communication or contact is incidental to employment (or to your presence in a public place), or
  - v. The communication or contact is in the course of your employment with customers or co-workers, as long as you have given a copy of this order to your employer and your employer agrees to provide supervision by an employee. [Underline emphasis indicating new terms of the order.] "The Honourable Madam Justice Fisher" I AGREE: "The Honourable Justice Griffin" I AGREE: "The Honourable Mr. Justice Butler"

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