

CANADA / JUDGMENT

R. v. G.F.

2018 BCCA 339**COURT**

British Columbia Court of Appeal

DECIDED

11 September 2018

BEFORE

The Honourable Chief Justice Bauman

The Honourable Mr. Justice Goepel

The Honourable Madam Justice Griffin

On appeal from: An order of the Provincial Court,
dated May 25, 2016 (sentence) (R. v. G.F., 2016
BCPC 173, Vancouver Docket 229138).

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2018 BCCA 339 R. v. G.F.**COURT OF APPEAL FOR BRITISH COLUMBIA****Citation:**

R. v. G.F.,
2018 BCCA 339
Date: 20180911
Docket: CA44037

Between:

Regina
Respondent
And
G.F.
Appellant

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Before:

The Honourable Chief Justice Bauman
The Honourable Mr. Justice Goepel
The Honourable Madam Justice Griffin
On appeal from: An order of the Provincial Court, dated May 25, 2016 (sentence) (R. v. G.F., 2016 BCPC 173, Vancouver Docket 229138).

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Respondent:**

L.A. Ruzicka

Place and Date of Hearing:	Vancouver, British Columbia June 14, 2018
Place and Date of Judgment:	Vancouver, British Columbia September 11, 2018
Written Reasons by:	The Honourable Mr. Justice Goepel
Concurred in by:	The Honourable Chief Justice Bauman The Honourable Madam Justice Griffin
Summary:	The appellant was sentenced to a total of 12 years less time served for sexual interference, sexual exploitation, sexual assault and distribution of child pornography. The complainants were the appellant's great-nephew and the nephew's friend. The abuse took place frequently over several years, from the time the nephew was between six and nine until he was 15 and when the nephew's friend was 14. The appellant argues that the sentencing judge made errors in principle and the sentence imposed is demonstrably unfit. He also argues that s. 161(1) conditions imposed retrospectively should be removed from his sentence. HELD: Appeal allowed. The sentencing judge erred in principle by failing to apply the totality principle, and in her consideration of mitigating and aggravating circumstances. Taking into account all the circumstances and the totality principle, eight years less time served is a fit sentence. The s. 161(1)(c) condition is properly removed as conceded by the Crown. However, the appellant was required to provide notice in order to challenge the s. 161(1)(a.1) condition's constitutionality. No such notice was provided, and that aspect of the appeal must fail. Reasons for Judgment of the Honourable Mr. Justice Goepel: INTRODUCTION [1] The appellant was sentenced on May 25, 2016 as follows: a. Count 1 (sexual interference with J.C., between January 1, 1997 and July 21, 2006, contrary to s. 151) - five years, less two years and one month of credit for pre-sentence custody; b. Count 2 (sexual exploitation of J.C., between July 22, 2006 and December 31, 2008, contrary to s. 153) - two years concurrent with Count 1; c. Count 4 (distribution of child pornography on June 26, 27 and September 12, 2006, contrary to s. 163.1(3)) - two years consecutive to Counts 1 and 2; and d. Count 8 (sexual assault of D.G. causing bodily harm, between January 1, 2004 and June 9, 2006, contrary to s. 272(2)(b)) - five years consecutive to all other sentences. [2] The imposed sentence was 12 years. With credit for time served, the actual sentence was nine years and eleven months. In addition, the judge made certain ancillary orders including orders under s. 161 of the Criminal Code. As a result of the s. 161 orders, the appellant is prohibited for life from: · attending a public park, school ground, daycare centre, public swimming area, playground or community centre where persons under the age of 16 are present or can reasonably expected to be present (s. 161(1)(a)); · being within two kilometres of any dwelling house where J.C. or D.G. ordinarily reside (s. 161(1)(a.1)); · seeking, obtaining or continuing any employment, whether or not the employment is remunerated, or becoming a volunteer in a capacity, that involves being in a position of trust or authority towards persons under the age of 16 years (s. 161(1)(b)); · having any contact - including communicating by any means - with a person who is under the age of 18 years, unless the offender does so under the supervision of a person whom the court considers appropriate (s. 161(1)(c)); and

· using the Internet or other digital network, unless he does so in accordance with conditions set by the court (s. 161(1)(d)).

[3] The appellant now seeks leave to appeal his sentence. He submits that the sentencing judge erred in principle by failing to take the totality principle into account. He further submits additional errors in principle were made when the judge failed to properly consider the Gladue factors, his break in criminal offending and rehabilitation since the historical offences considered by the trial judge took place. In the alternative, the appellant argues that the sentence imposed was demonstrably unfit, after considering the sentences imposed on similar offenders for similar offences.

[4] In addition, the appellant challenges certain of the orders made under s. 161(1) of the Criminal Code on the basis that those restrictions were not in force at the time that the offences took place and cannot be applied retrospectively.

[5] The Crown acknowledges that the restrictions pursuant to s. 161(1)(c) cannot be given retrospective application and that condition should be deleted. Otherwise the Crown submits that the sentencing judge did not commit any of the alleged errors in principle and the sentence was not demonstrably unfit.

BACKGROUND

[6] The sentencing judge set out the background facts at paras. 3-9 of her reasons:

[3] As I said in my reasons for judgment delivered on April the 18, 2016, 2016 BCPC 157, I accepted the evidence of J.C. and D.G. about the accused's interaction with each of them. I found that the accused was the equivalent of a grandfather in relation to J.C. He is actually J.C.'s maternal great uncle. From a very early age, approximately six years old, J.C. would visit the accused and his spouse, staying over at their home sometimes for weeks at a time.

[4] J.C. described sexual interaction with the accused beginning when he was between the ages of six and nine. He described the accused regularly fondling his genitals and his bottom. He would regularly perform fellatio on J.C. He attempted to penetrate J.C. anally, but stopped when J.C. complained of pain. This last occurred when J.C. was between the ages of 10 and 14. The accused also asked J.C. to fellate him when J.C. was between the ages of 10 and 12. J.C. told me that he attempted this for a short period of time, but did not continue.

[5] J.C. met D.G. at school when he was 12 years old, almost 13. In the early summer of 2006, both J.C. and D.G. would have turned 14 years of age. During that summer, the two boys visited frequently at the [G.F.] residence. During that time, the accused engaged sexually with both boys, sometimes with one or the other, often with both boys together.

[6] J.C. described the events as beginning with watching pornography provided by the accused and smoking marihuana, again provided by the accused. The events would progress to masturbation, then oral sex, and then anal sex. The accused would frequently take photographs and videos of these interactions.

[7] D.G. described the events that involved the accused, J.C., and himself in similar fashion. I concluded on the basis of all of the evidence that it was most likely these events in respect to D.G. occurred in the summer of 2006. As D.G. said during his testimony, sexual interaction with the accused occurred so many times that the events "joined into each other."

[8] He described that the sexual contact would begin with touching and progress to oral and anal sex. D.G. suffered bodily harm, damage to his anus, on the first occasion that the accused penetrated him and the damage continued because the abuse continued.

[9] In summary, [G.F.] sexually abused J.C. in British Columbia from the time he was

about six years of age until he was 15 years old. The accused was in a position of trust or authority towards J.C. during all of this time. He sexually assaulted D.G. during the summer of 2006 when D.G. was just barely 14 years of age including causing him bodily harm while penetrating him anally. He sent to J.C. pornographic photographs of J.C. and D.G. that he took when they were children within the meaning of s. 163.1(1) of the Criminal Code. Specifically, J.C. was 13 years old when some of the photographs of him were taken and sent to him and D.G. was approximately 14 years of age when photographs of him were taken.

[7] It is not precisely clear when the abusive behavior commenced. J.C. who was born in 1992 says the abuse began when he was between the ages of six and nine which means the abuse started sometime between 1998 and 2001. The abuse appears to have ended in 2007. The victims reported the abuse in 2012.

TRIAL PROCEEDINGS

[8] The proceedings did not follow a normal path. An eight count information was sworn against the appellant on March 18, 2013. He entered pleas of not guilty on each of the eight counts and a trial was scheduled to begin on June 23, 2014. On that day, he entered pleas of guilty respecting Count 1, sexual touching of J.C, a person under the age of 14 years, and Count 8, sexual assault causing bodily harm in relation to D.G. After those pleas were accepted, the sentencing hearing was adjourned to allow for the preparation of a pre-sentence report and risk assessment. When the guilty pleas were entered, it was understood the Crown would eventually stay the other six counts.

[9] The appellant subsequently retained new counsel and brought an application to withdraw his guilty pleas. That application commenced on July 30, 2015 and was denied on October 16, 2015.

[10] After the application to withdraw the guilty pleas was dismissed, the appellant was no longer prepared to admit the facts the Crown intended to allege on Counts 1 and 8. As it was necessary to call both complainants to testify to prove the disputed facts, the Crown decided to proceed on Counts 2 through 7.

[11] A five day trial was then held in January and March 2016. During the course of the trial, the Crown stayed Count 7. On April 18, 2016 the judge delivered reasons for judgment. She convicted the appellant on Counts 2, 3 and 4, and found him not guilty on Counts 5 and 6. Count 3 was conditionally stayed at sentencing pursuant to the provisions of *R. v. Kienapple*, [1975] 1 S.C.R. 729.

[12] This Court in reasons indexed at 2018 BCCA 81 dismissed the appellant's conviction appeal save and except in regard to the pornography count, it amended the information by substituting "transmit" for "distribute". The reason for the amendment was that the evidence disclosed that the pornographic images had only been sent to one person.

CIRCUMSTANCES OF THE APPELLANT

[13] The appellant was born on March 17, 1953. He was 63 years old at the time of sentencing. He presently has a variety of health issues including Type 2 Diabetes, Hypertension, Osteoarthritis, Hypercholesterolemia and Ischemic Heart Disease.

[14] The evidence at the sentencing hearing disclosed that the appellant's parents both attended residential school; his biological father was said to have been an abusive alcoholic. His mother moved away from his father when the appellant was a baby and she took him to live with her parents. As a very young child, the appellant and his siblings were raised by his maternal grandparents. The family lived a traditional First Nations life in Saskatchewan. His grandfather trapped for furs and hunted. His grandparents owned a farm and effectively lived off the land in a traditional manner. His grandparents only spoke Cree.

[15] When the appellant was five years old, the Royal Canadian Mounted Police and an Indian agent came and loaded him and his siblings into the back of a truck and drove them 200 miles to an Indian Residential School. When he first arrived at the school he did not speak English and no interpreters were provided. By grade three, he had lost his ability to speak his Cree language and was forced to only speak English.

[16] The appellant was physically abused throughout his time at the school. Beginning at the age of 10 and for about two years thereafter, he was sexually abused by one man in particular at the school. The adjudicator who heard his claim respecting this abuse found that he suffered one or more incidents of anal intercourse, and repeated and persisted incidents of oral intercourse and masturbation during the time he was at the school. The appellant estimated the number of incidents as between 20 and 50.

[17] The appellant left the school at age 13 and went to live with his mother in Vancouver. He remained with her for a brief period of time, then lived on his own for a period of time before he was apprehended by the authorities. He was placed in a series of foster homes, which he persistently ran away from to live on the streets. To support himself, he and his brother would sell marihuana, and he also started to commit break and enters. It was at this time that he became addicted to drugs. He started with soft drugs, such as marihuana and hash. In his 20s he started to inject heroin. He also started drinking and that abuse escalated in his 20s.

[18] The appellant has a criminal record. He admitted the following criminal convictions at sentencing:

1. In 1969, in North Battleford, Saskatchewan, he was convicted of trafficking a substance held out to be a narcotic. The sentence was suspended for one year.
2. In 1972, in North Battleford, Saskatchewan, he was convicted of two charges of breaking and entering and committing an indictable offence. The sentence was suspended for one year.
3. In 1973, in Surrey, British Columbia, he was convicted of possession of a narcotic. The sentence was suspended and he was placed on probation for six months.
4. In June 1977, in Arizona he was convicted of lewd and lascivious acts for which he received a four to five year sentence and sodomy for which he received a five to twelve year sentence concurrent to the four to five years for lewd and lascivious acts. The circumstances of those offences are unclear. They apparently arose from sexual activity between the appellant and an adult female. In Arizona at the time of the offences, consent was not a defence to the charges: *State v. Bateman*, 113 Ariz. 107, 547 P. 2d. 6 (1976).
5. In 1980, in Penticton, British Columbia, he was convicted of two charges of indecent act. He received a sentence of 14 days on each charge concurrent. At the sentencing hearing, the judge was told through counsel that this conviction involved urinating in a police vehicle.
6. In June 1982, in California, he was convicted of oral copulation by force and sentenced to six years in jail. The circumstances of this offence were not disclosed other than it appears that the victim of the sexual assault was a prostitute.
7. In August 2012 in Saskatchewan he was convicted of possession of marihuana.

[19] In the mid-1980s, the appellant dramatically turned his life around. He went into counselling and stopped using alcohol and most drugs. In the early 1990s he entered into a long-time relationship which continues. He and his spouse have now been together for more than 25 years.

[20] Since returning to Canada in 1986, the appellant has been regularly employed. He has worked in the construction industry, in plumbing and electrical jobs. He

suffered a heart attack in 1996 and was off work for two years. In 1998, he obtained a position with B.C. Housing in the maintenance department and later as a live-in caretaker for social housing. He was employed in this capacity until 2004. He has for several years been self-employed as a photographer at Pow Wows. His primary source of income now is from the Canada Pension Plan.

[21] In 2008, the appellant was awarded \$122,000 as compensation for the abuse he suffered while at the residential school.

THE SENTENCING HEARING

[22] The exhibits at the sentencing hearing included a pre-sentence report, a psychiatric evaluation dated October 17, 2014, a Gladue report, an Indian Residential School Claim Adjudicator's report, a copy of the appellant's criminal record, victim impact statements of J.C. and D.G., and an earlier psychiatric assessment dated December 8, 1999 that had been prepared in connection with a civil claim that the appellant had brought against the Anglican Church and the Federal Government for the sexual abuse he endured while at the residential school.

[23] The Crown submitted that the appellant should be sentenced to serve seven years with respect to Count 1 and two years concurrent with respect to Count 2. These are the counts relating to his abuse of J.C. The Crown further submitted that the appellant should be sentenced to serve two years consecutive with respect to Count 4, the count relating to distribution of child pornography, and five years consecutive to all the other sentences in regards to Count 8, the charge of sexual assault causing bodily harm on D.G. The Crown further submitted that its proposed 14 year sentence ought to be reduced to 12 years when the totality principle is applied, with a further of two years and one month to be taken into account for time served.

[24] The defence submitted that a global sentence of between four and six years was appropriate.

REASONS FOR JUDGMENT

[25] The judge commenced her reasons by reviewing the background facts. She went on and discussed the position of the parties, the victim impact statements of J.C. and D.G., and the appellant's background, including his experiences at the residential school and his criminal record. She then discussed his attitude towards the offences as discussed in the various reports that were before her and his denial of almost all of the allegations made against him. She reviewed certain case law that had been brought to her attention, including *R. v. Ipeelee*, 2012 SCC 13, to which she said she took guidance as she must.

[26] The judge considered the aggravating factors which she said, in her view, were numerous and obvious. They were:

1. The abuse of J.C. lasted around a decade and has had a significant negative impact on his life;
2. The abuse of D.G. at the approximate age of 14 has caused him significant problems that involved bodily harm. This was also not an isolated incident -- G.F. abused D.G. on a regular basis; and

3. The accused has a criminal record which includes conviction for other sexual offences.

[27] Given the length of time that the appellant offended against J.C. and the abuse of D.G. over a more limited but still not brief period of time, the judge rejected the submission that the offences were "opportunistic, and unlikely to be repeated." She found, given his minimizing of the events, his lack of insight and empathy for his victims, and his other criminal convictions involving sexual acts, that recidivism was a real concern.

[28] The judge said that there were no real mitigating circumstances other than perhaps the age of the offender. She did note with respect to the pornography count that the quantity of pornography here was minimal and the photographs did not include violence.

[29] The judge stated that she was taking into account all of the relevant factors and in particular, the principles set out in *R. v. Gladue*, [1999] 1 S.C.R. 688 and *Ipeelee*. She sentenced the appellant as follows:

1. With respect to Count 1, five years' incarceration, from which would be subtracted two years and one month time served;
2. With respect to Count 2, two years concurrent with Count 1;
3. With respect to Count 4, two years consecutive to the sentence on Counts 1 and 2; and
4. With respect to Count 8, five years consecutive to all other sentences.

[30] The total sentence was 12 years, which taking into account time served, was reduced to nine years and eleven months. In addition, the judge imposed certain ancillary orders including those requested under s. 161 for his lifetime.

ON APPEAL

[31] On the appeal, the appellant submits that the trial judge erred in principle by failing to take into account the principle of totality. He further submits that the judge erred in the manner in which she dealt with mitigating factors. In particular, he submits that his age, his health issues, his break in criminal offending, his lack of offending since the date of these offences, and most importantly, his Gladue factors, were not given proper weight. He also submits that the judge gave too much weight to his prior sexual offences, given the very different circumstances of those offences and the time in which they took place. Finally, he submits that certain sanctions under s. 161(1) are not applicable in this case because those sections came into force after the date of the offences. He submits that in all the circumstances a proper global sentence is in the range of six years.

[32] The Crown acknowledges that the sanctions set out in s. 161(1)(c) should be deleted. Otherwise, they submit the sentence is fit and that the judge made no errors in principle.

DISCUSSION

A. Standard of Review

- [33] The Supreme Court of Canada has stated on numerous occasions that deference is to be accorded to sentencing judges: *R. v. Lacasse*, 2015 SCC 64 and *R. v. M.(C.A.)*, [1996] 1 S.C.R. 500. Where however, there is an error in principle, such as the failure to consider a relevant factor or the erroneous consideration of an aggravating or mitigating factor, appellate intervention will be warranted when it appears from the judge's decision that such an error had an impact on the sentence: *Lacasse* at para. 44.
- [34] In *R. v. Agin*, 2018 BCCA 133, this Court summarized the circumstances in which appellate intervention is justified:
- [56] Appellate intervention is justified when an appellate court identifies a material error that has impacted the sentence, in that the sentence would have been different absent the error. The court will then assess the fitness of the sentence by conducting its own sentencing analysis. If the sentence is unfit, the court may vary the sentence and impose a fit sentence.
- [57] Where there is no error, or the error had no impact on the sentence, appellate intervention can still be justified if the sentence is demonstrably unfit.

B. Did the Judge Err in Principle?

- [35] The appellant alleges the trial judge's failure to consider totality was an error in principle. He further alleges that the judge erroneously considered certain aggravating factors, and failed to consider relevant mitigating factors.
- [36] The totality principle recognizes that the quantum of sentence imposed should be broadly commensurate with the gravity of the offences committed and the moral blameworthiness of the offender: *R. v. C.A.M.*, [1996] 1 S.C.R. 500 at para. 40.
- [37] In *R. v. K.R.J.*, 2014 BCCA 382 (*K.R.J. BCCA*), reversed in part on other grounds, 2016 SCC 31 (*K.R.J. SCC*), Groberman J.A., speaking for the Court on this issue, described the operation of the totality principle:
- [27] Where an offender is convicted of more than one offence, the sentencing judge is required to consider the offender's overall culpability in fixing the global sentence. In *R. v. Li*, 2009 BCCA 85, this Court recommended a two-stage approach:
- [26] Whether sentences for multiple offences are made consecutive or concurrent, it is the task of the sentencing judge to fix an appropriate global sentence that reflects the specific circumstances of the offences and the unique circumstances of the offender. The importance of this balancing is reflected in the principle of proportionality, which has been codified in s. 718.1 of the Criminal Code under the heading "fundamental principle":

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

- [27] The principle of totality also factors into the imposition of an appropriate aggregate sentence for multiple offences. In *M.(C.A.)*, Lamer C.J.C. described the principle:
- [42] In the context of consecutive sentences, this general principle of proportionality expresses itself through the more particular form of the "totality principle". The totality principle, in short, requires a sentencing judge who orders an offender to serve consecutive sentences for multiple offences to ensure that the cumulative sentence rendered does not exceed the overall culpability of the offender. As D.A. Thomas describes the principle in *Principles of Sentencing* (2nd ed. 1979) at p. 56:

The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate sentence is "just and appropriate".

- [28] Thus, there is a two-stage approach to sentencing an offender convicted of multiple offences. The first stage is to determine the appropriate sentence for each offence, and decide whether the individual sentences should be made consecutive or concurrent. If consecutive sentences are imposed, then the second stage is to determine whether the sentences, in the aggregate, offend the totality principle. If the sentence, as a whole, is unduly harsh or disproportionate, then the length of the individual sentences should be adjusted in order to arrive at an appropriate global sentence. See *R. v. P.P.H.*, 2003 BCCA 591.
- [28] In *R. v. Joseph*, 2010 BCCA 525 at para. 17, the Court made it clear that the recommended two-stage approach is not an absolute requirement, but rather a means of ensuring that the sentencing judge has properly considered the totality principle:
- [17] While I do not suggest that sentencing judges are required to follow a rigid two-step approach in sentencing for multiple offences, there should be something in the reasons for sentence which reflects that the totality principle was taken into account, and the two-step approach makes that clear.
- [18] The question remains whether, even if the sentencing judge erred in failing to take into account the totality principle, the sentence was, nonetheless fit.
- [29] Where a sentencing judge fails to demonstrate that the totality principle has been taken into account, this Court must independently determine whether the sentence imposed is a fit one.
- [38] In this case, the judge's reasons failed to demonstrate that the totality principle was taken into account. While Crown counsel had suggested that his proposed individual sentences should be reduced to take into account the totality principle, the judge, having determined the appropriate individual sentence for each offence and that three of the sentences should be served consecutively, failed to consider whether the sentences in the aggregate offended the totality principle. Her failure was an error in principle.

[39] In her reasons, the judge stated that there were no real mitigating circumstances other than perhaps the age of the offender. While the trial judge made specific mention of Gladue and Ipeelee, she does not appear to have taken any of the factors discussed in those cases into consideration. In Ipeelee the Court explained that systemic and background factors are mitigating in nature:

73 First, systemic and background factors may bear on the culpability of the offender, to the extent that they shed light on his or her level of moral blameworthiness. This is perhaps more evident in Wells where Iacobucci J. described these circumstances as "the unique systemic or background factors that are mitigating in nature in that they may have played a part in the aboriginal offender's conduct" (Wells, at para. 38 (emphasis added)). Canadian criminal law is based on the premise that criminal liability only follows from voluntary conduct. Many Aboriginal offenders find themselves in situations of social and economic deprivation with a lack of opportunities and limited options for positive development. While this rarely -- if ever -- attains a level where one could properly say that their actions were not voluntary and therefore not deserving of criminal sanction, the reality is that their constrained circumstances may diminish their moral culpability. As Greckol J. of the Alberta Court of Queen's Bench stated, at para. 60 of *R. v. Skani*, 2002 ABQB 1097, 331 A.R. 50, after describing the background factors that lead to Mr. Skani coming before the court, "[f]ew mortals could withstand such a childhood and youth without becoming seriously troubled." Failing to take these circumstances into account would violate the fundamental principle of sentencing -- that the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. The existence of such circumstances may also indicate that a sanction that takes account of the underlying causes of the criminal conduct may be more appropriate than one only aimed at punishment per se. As Cory and Iacobucci JJ. state in *Gladue*, at para. 69:

In cases where such factors have played a significant role, it is incumbent upon the sentencing judge to consider these factors in evaluating whether imprisonment would actually serve to deter, or to denounce crime in a sense that would be meaningful to the community of which the offender is a member. In many instances, more restorative sentencing principles will gain primary relevance precisely because the prevention of crime as well as individual and social healing cannot occur through other means.

[40] The appellant was a victim of the residential school system. As a young child he was taken by force from his home. At school he was physically and sexually abused on a regular basis. When he left school he became addicted in his teens to drugs and alcohol, which in turn led to a criminal lifestyle that he lived for many years.

[41] The judge had an obligation to consider the mitigating impact of the appellant's experience of cultural dislocation and abuse in her assessment of his moral culpability. Her failure to consider this background or any of the individual circumstances of the appellant's upbringing as mitigating factors that shed light on his level of moral blameworthiness was an error in principle.

- [42] The judge's conclusion that recidivism was a real concern appears to have taken no account of a highly relevant consideration -- that the appellant was offence free for many years after he righted himself in the mid 1980s. Notwithstanding his traumatic upbringing, he stopped abusing drugs and alcohol and, for many years, lived a productive life that few would have predicted. She seemingly paid no regard to this highly relevant consideration factor in determining whether the appellant posed an ongoing risk to the community. To use the language of Lacasse, she failed to have regard to a highly relevant factor in her assessment of future risk, which, in turn, was one of the considerations that drove the imposition of the sentence.
- [43] While the judge did not appear to consider the appellant's time as a productive member of society a mitigating factor, she conversely appeared to place considerable emphasis on his dated criminal record and in particular, the sexual offences for which he had been convicted -- even though, as she noted in her reasons, the details of his criminal record were not completely clear.
- [44] There were three such offences. It is questionable whether the Arizona offences in 1977 would have constituted offences in Canada. As noted in Bateman, consent was not a defence. The circumstances of the indecent act offence are unknown. The sentence of 14 days, however, suggests the acts were not of a serious nature. The sexual assault of a prostitute is, of course, a serious offence but one that took place prior to the appellant turning his life around. None of the prior offences involved children or acts similar to those which were the subject matter of these offences, and all occurred during the time that the appellant was abusing drugs and alcohol.
- [45] While past criminal conduct can be an aggravating circumstance, the judge appears to have given these dated offences more weight than they properly deserve and given no consideration to the "gap" principle. The effect of a "gap" on the appropriate sentence is fact intensive. It depends on the context whether it will be viewed as a mitigating or at least neutral factor, when sentencing for a subsequent offence: *R. v. Georgiev*, 2014 BCCA 246 at para. 22. In the circumstances of this case I am of the view that the judge erred in principle in the emphasis she placed on the appellant's past sexual offences.
- [46] I find that the judge's failure to consider the totality principle and her erroneous consideration of aggravating and mitigating factors had an impact on the sentence. In these circumstances, appellate intervention is justified. The role of the court when intervention is justified was set out in *Agin*:
- [55] Where appellate intervention is justified, the role of the court is "to inquire into the fitness of the sentence and replace it with the sentence it considers appropriate": *Lacasse*, at para. 43. *Wagner J.* further outlined that meeting the standard allows an appellate court to "intervene without deference to substitute a sentence on appeal": at para 61. The appellate court reviews the fitness of the sentence "without the traditional deference to the sentencing judge's disposition blocking the way" (*Joe*, at para. 38) or "unshackled by the full force of the

deferential standard of review" (J.C.S., at para. 92). However, as conceded by the appellant, this does not imply that deference should not be accorded to findings of fact absent palpable or overriding error, or to determinations with respect to the relative weight to assign the various goals of sentencing that are found to be untainted by the error in issue.

C. What Is A Fit Sentence

- [47] As the result of the errors of the trial judge in the sentencing process, it is now for this Court to determine a fit sentence. The objectives and principles of sentencing are codified in ss. 718 to 718.2 of the Criminal Code. Section 718.1 mandates that a sentence be "proportionate to the gravity of the offence and the degree of responsibility of the offender". Section 718.2 provides a non-exhaustive list of secondary sentencing principles, including the consideration of aggravating and mitigating circumstances, the principles of parity and totality, and the instruction to consider "all available sanctions other than imprisonment that are reasonable in the circumstances", with particular attention paid to the circumstances of Aboriginal offenders.
- [48] In *R. v. Nasogaluak*, 2010 SCC 6, the Court explained the principles of sentencing:
- [43] The language in ss. 718 to 718.2 of the Code is sufficiently general to ensure that sentencing judges enjoy a broad discretion to craft a sentence that is tailored to the nature of the offence and the circumstances of the offender. The determination of a "fit" sentence is, subject to some specific statutory rules, an individualized process that requires the judge to weigh the objectives of sentencing in a manner that best reflects the circumstances of the case (*R. v. Lyons*, [1987] 2 S.C.R. 309; *M. (C.A.)*; *R. v. Hamilton* (2004), 72 O.R. (3d) 1 (C.A.)). No one sentencing objective trumps the others and it falls to the sentencing judge to determine which objective or objectives merit the greatest weight, given the particulars of the case. The relative importance of any mitigating or aggravating factors will then push the sentence up or down the scale of appropriate sentences for similar offences. The judge's discretion to decide on the particular blend of sentencing goals and the relevant aggravating or mitigating factors ensures that each case is decided on its facts, subject to the overarching guidelines and principles in the Code and in the case law.
- [44] The wide discretion granted to sentencing judges has limits. It is fettered in part by the case law that has set down, in some circumstances, general ranges of sentences for particular offences, to encourage greater consistency between sentencing decisions in accordance with the principle of parity enshrined in the Code. But it must be remembered that, while courts should pay heed to these ranges, they are guidelines rather than hard and fast rules. A judge can order a sentence outside that range as long as it is in accordance with the principles and objectives of sentencing. Thus, a sentence falling outside the regular range of appropriate sentences is not necessarily unfit. Regard must be had to all the circumstances of the offence and the offender, and to the needs of the community in which the offence occurred.

- [49] This case involves offences against vulnerable children. In such cases, denunciation and deterrence are the main considerations. This Court noted in *R. v. D.G.*, 2014 BCCA 84:
- [37] children are "priceless assets" and it is extremely important to denounce conduct that takes advantage of their vulnerability.
- [50] In the often cited case of *R. v. T.A.D.* (1995), 68 B.C.A.C. 236, a case involving repeated sexual offences against a young child, Chief Justice McEachern stated that in cases involving sexual offences against children over an extended period, while sentences of up to 12 years or more have been approved, the usual range is more like five to eight or nine years. In *T.A.D.* in which the accused was convicted after a difficult trial, this Court increased a sentence for continued sexual abuse of the appellant's daughter, from ages 10 to 19, from three to six years.
- [51] In *R. v. D.(D.)* (2002), 58 O.R. (3d) 788 (C.A.), Moldaver J.A. (as he then was) said:
- [44] To summarize, I am of the view that as a general rule, when adult offenders, in a position of trust, sexually abuse innocent young children on a regular and persistent basis over substantial periods of time, they can expect to receive mid to upper single digit penitentiary terms.
- [52] In *D.(D.)*, the accused was found guilty after trial of 11 sex-related offences against four young boys ranging in age from five to eight years and for periods of time ranging from two to seven years. The offences took place between 1990 and 1997. The accused was arrested in 1997. The abuse took many forms and two of the complainants were subjected to anal intercourse. The total sentence was nine years and one month, less one year time served.
- [53] The appellant referred to a number of cases to support his submission that the sentence was demonstrably unfit. He submits that in each of these cases the abuse was more serious but the sentence less than imposed in this case.
- [54] *R. v. Snow*, 2017 NLTD(G) 206, concerned historical sexual assaults. The offences took place between 1967 and 1975. The accused was tried in 2017 and found guilty at trial of eight counts of indecently assaulting each of his five half-siblings multiple times, sometimes weekly, in their bedrooms in the family home. These indecent assaults included fondling, anal intercourse, oral sex and simulated intercourse. He sometimes used physical force to ensure compliance. The victims ranged in age from six to fourteen when they were first indecently assaulted. The accused in the case came from a difficult upbringing which was considered by the sentencing judge. The accused was 68 at the time of sentencing. The judge determined fit sentences for the individual offences respectively, which together would result in a cumulative sentence of sixteen years. He then went on to hold that a total sentence of sixteen years was unduly harsh and long and, applying the totality principle, he imposed a sentence of ten years, less time served of 65 days.

- [55] In *R. v. C.S.*, 2016 ONSC 7681, the accused was found guilty by a jury for sexual offences committed against his two nieces. The offences occurred frequently over a 10-year period between 1976 and 1986. One incident involved forced sexual intercourse. The accused was 68 when sentenced. The accused received a total sentence of six years.
- [56] In *R. v. Challes*, [2008] O.J. No. 4334 (S.C.), the accused was convicted of sexual offences committed against three step-daughters and their two cousins. The offending was frequent, and took place over a period of almost 18 years between 1962 and 1980 when the complainants ranged in age from four to 23 years. The offences in respect to the various complainants include assaults, digital penetration, sexual assaults and six separate incidents of vaginal intercourse. When sentenced the accused was 65 years old. A global sentence of nine years was imposed.
- [57] In *R. v. Dedam*, [2016] N.B.J. No. 291 (Q.B.), the accused in 2016 was found guilty at trial of sexually abusing three sisters during the time that he was Chief of his Aboriginal community. The offences took place between 1977 and 1985. The three victims were orphans who eventually came to live in the home of the accused. The sexual abuse of the eldest sister continued over five years and included frequent intercourse. The accused gave alcohol to a second sister and had sexual intercourse with her when she was unconscious and did not stop in spite of her protests when she awoke. The third sister was subject to one incident of sexual touching. The accused was 60 years old when sentenced. The court considered his Gladue factors but they did not weigh heavily. The judge determined that the appropriate individual sentences should be eight years in regard to the first sister, five years consecutive for the second sister and six months consecutive for the third sister, for a total 13.5 years. The judge then concluded that a proper global sentence, which adequately addressed the circumstances while respecting the goals of deterrence and denunciation, was nine years.
- [58] Over the last decade this Court has on several occasions had to consider sentences imposed on those who have sexually abused children.
- [59] In *R. v. B.C.M.*, 2008 BCCA 365 the offender pleaded guilty on two counts of sexual touching of a person under the age of 14, one count of possession of child pornography and one count of making child pornography. The victims were the middle two of four daughters of the offender's common law spouse. The events leading to these charges began in December 2004 when the appellant's sexual activities with the two middle daughters, aged six and eight at the time, escalated. Over the next two years, at the appellant's direction, they engaged in fellatio, cunnilingus, digital penetration and masturbation by hand and with his penis against their labia. There had been 15 to 25 such incidents with the second daughter, and about 15 with the third daughter. The appellant also took sexually explicit photos of himself engaged in fondling, masturbation, and oral sex with the second daughter. As well, the police discovered an electronic child pornography collection consisting of 274 photographs, 175 photos of nude or provocatively posed children, and over 45,000 adult pornographic images. The appellant had also downloaded over 1,500 videos, many of which involved the sexualization of children. This Court upheld a global sentence of six years which included

three years concurrent on each of the charges of sexual touching, reduced by 13 months to reflect time spent in pre-sentence custody; one year on the charge of possession of child pornography, consecutive to the charges of sexual touching; and three years on the charge of making child pornography, consecutive to the charges of sexual touching but concurrent with the charge of possession of child pornography.

- [60] R. v. O.M., 2009 BCCA 287 concerned the sexual abuse of a daughter for about 13 years, from the time she was two or three years old until 15 years of age. The acts began with touching and progressed to sexual intercourse by the time she was about 6. The most frequent act was digital penetration. The daughter reported that between the ages of 11 and 14 the abuse occurred on an average of five days a week, three weeks out of the month. The accused pleaded guilty. He came from a chaotic home environment where he had been sexually abused. The Crown appealed a sentence of two years less a day. This Court, while noting that an offender who was himself a victim of abuse must be treated with compassion, found the sentence of two years less a day an unsatisfactory response to an egregious crime and imposed a five year sentence.
- [61] R. v. R.A.J., 2010 BCCA 304 concerned convictions for sexual assault, sexual touching and assault. RAJ committed the offences against his daughter over an eight-year period, which started when she was seven years old. The offences continued until she reported the incidents to authorities in 2007. This Court upheld an eight year global sentence for the various offences.
- [62] R. v. B.C.L., 2010 BCCA 183 concerned an appeal of a sentence of seven years' imprisonment following guilty pleas to two counts of touching for a sexual purpose and one count of making pornographic videos and photographs of children. The accused made his four-year-old daughter masturbate and fellate him. He touched her genitals with his penis. He made his daughter's four-year-old playmate masturbate him. He made short videos of the girls masturbating him and took photos of them naked. The appellant was sentenced to three years' imprisonment on each count of sexual interference, the sentences to run concurrently, and four years for making pornography, to run consecutively. The accused was 62 years old. He had previous convictions for indecent acts, exposure and sexual touching of a minor. This Court held the global sentence of seven years imposed by the sentencing judge was not unfit.
- [63] R. v. R.E.L., 2010 BCCA 493 concerned the sexual abuse of a stepdaughter for about six years. The assaults began when the victim was six years of age and continued until she was 12. The assaults included fondling, oral sex and attempted intercourse. The accused pleaded guilty. This Court upheld a five year sentence.
- [64] R. v. K.V.E., 2013 BCCA 521 was a Crown appeal from the sentence imposed on the offender for three counts of incest and one count of sexual interference. The offender pleaded guilty to acts of incest committed against his three daughters between 1974 and 1990 when they were between the ages of four and 18 and to the sexual touching of his granddaughter

between 1996 and 2002 when she was between the ages of seven and 12. The charges were laid in 2012. The offender was 78 at the time of his sentencing. The offender sexually, physically and psychologically abused his children for over ten years and then preyed on his granddaughter. The offender was sentenced to concurrent five-year terms for the incest, and a concurrent two-year term for the sexual touching. The appeal was allowed. This Court held the appropriate individual sentences were five years for each count of incest and two years for the sexual touching all consecutive. However, applying the totality principle the Court imposed a global sentence of 10 years.

- [65] R. v. R.M.D., 2014 BCCA 56 involved an appeal from a global sentence of nine years' imprisonment for sexual assault, incest and invitation to sexual touching against a daughter and stepdaughter. The offences concerning the daughter involved various sexual interactions, including sexual intercourse. The incidents involving the stepdaughter did not involve intercourse, although the appellant did attempt unsuccessfully to have intercourse with her. The accused was convicted by a jury. The trial judge sentenced the appellant to five years for the offence of incest with his daughter. With respect to the stepdaughter, the judge imposed sentences of four years' concurrent for sexual assault and invitation to sexual touching. The sentences for the convictions concerning the two victims were made consecutive to each other. The judge noted that he would have sentenced the appellant to a sentence of five and one-half years concerning the daughter and four and one-half years concerning the stepdaughter but he reduced the sentences by one year, or six months for each set of sentences, to reflect the totality principle. After the sentence appeal was heard it was disclosed for the first time that the accused had been abused by a male adult when he was a child. This Court reduced the global sentence by an additional year to take into account that the newly disclosed events in his young life may well have had continuing adverse psychological effects. The Court commented that if the information had been before the sentencing judge it was possible that it could have had some impact on the length of the global sentence, however, given the nature of the crimes and the trust relationship that existed between the victims and the appellant, the impact would not have been substantial.
- [66] K.R.J. BCCA concerned charges of incest and child pornography. The offender made three videos depicting him having sexual intercourse with his biological daughter, aged three. A binder of photographs kept by the offender depicted incestuous acts with the same daughter and her half-sister. The offender pleaded guilty. He was sentenced to six years' imprisonment for incest, plus three years' consecutive for making child pornography, less credit for time served. This Court held that the sentence imposed was not unfit given the age of the victim, the abuse of parental trust, the video recording of the offence, and the Court's increasing preparedness to accept more severe sentences for sexual abuse of children than were imposed in the past. The Court noted that the global nine-year sentence imposed was a lengthy one, and represented the high end of the appropriate range for the nature and circumstances of the offence and of the offender.

- [67] R. v. L.V.R., 2016 BCCA 86 was an appeal of a sentence of seven years' imprisonment imposed following a conviction for sexual interference, sexual exploitation, sexual assault and making and possessing child pornography. The offender had sexual relations with his former step-daughter from the age of 10 years old through age 16, involving oral sex, anal and vaginal intercourse, taking pictures and making videos. He was sentenced to six years for the sexual abuse and one year consecutive on the pornography charge. The appeal was dismissed, except for varying the sentence for the pornography charge to account for pre-sentence custody.
- [68] In R. v. Athey, 2017 BCCA 350 this Court upheld an eight-year sentence (less time served) on one count of sexual touching, one count of making child pornography, and one count of possessing child pornography. The sentence breakdown was five years for the sexual abuse and three years for the pornography offences. The accused had pleaded guilty. He was the victim's babysitter and he sexually assaulted her from ages four to six. The police recovered approximately 2,300 still images and 27 videos containing child pornography. The child featured in many of the images was the appellant's victim. The appellant had posted images of his victim on the Internet where they were likely to circulate indefinitely. Mr. Athey was Aboriginal and had been raised in a dysfunctional household. This Court found that the trial judge in that case did properly consider and give effect to the Gladue factors.
- [69] R. v. M.P.S., 2017 BCCA 397 concerned six sexual offences involving his two step-granddaughters. One of the victims was abused from ages 10 to 17 years old by protracted, escalating acts of serious sexual misconduct, from touching to oral sex and ultimately to partial penile penetration. The second victim alleged two incidents, one when she was 13 years old and the other when she was 15, both involving digital penetration and oral sex. The first victim reported the alleged misconduct when she was 17 years old. The accused was convicted after a lengthy trial. At the time of sentencing he was 74 years old. The trial judge imposed individual sentences of seven years in regard to the first victim and a two year consecutive sentence in regard to the second victim. Applying the principal of totality she then imposed a sentence of eight years. This Court dismissed the appeal.
- [70] R. v. D.N., 2018 BCCA 190 concerned offences of sexual assault and sexual touching of a step-daughter. The offences were divided into two separate periods. During the first period, in the mid-1980s, the offender engaged in genital touching with the victim when she was between ages six and seven. Between 1989 and 1993, the offender continually sexually abused the victim until the relationship ended between her mother and the offender. The sexual abuse included performing oral sex on her and putting his hands on or in her vagina. In 2014, the offender was convicted and sentenced to an eight-year global sentence. On appeal the appellant did not allege an identifiable error in principle. The court dismissed the appeal, finding the sentence was not demonstrably unfit.
- [71] As demonstrated by the case law review, sexual abuse of children encompasses many different circumstances. Cases may or may not involve a breach of trust, incest, or child pornography. In some cases there is one victim; in others multiple victims. Some accused

plead guilty while others take the matter to trial where their victims must testify. Some accused have related criminal records while others have up until their arrest appeared to be living productive lives. Some accused are Aboriginal, while others are not. Some accused have histories of being subjected to sexual abuse as children. Some cases involve historical assaults that were not disclosed until years later, while others concern cases in which the abuse continued until the offender was charged.

- [72] The facts of the subject case are similar to many others. In this case, the judge sentenced the appellant to individual five year consecutive sentences in relation to the assaults, together with two years on the pornography count for a total sentence of 12 years. What is notable is that the sentence in this case exceeds that in all of the above cited cases.
- [73] In this case I have found that the judge erred in principle by failing to take into account the totality principle. She further erred by failing to consider the background or any of the individual circumstances of the appellant's upbringing as mitigating factors that shed light on his level of moral blameworthiness. Similarly, she ignored that the appellant turned his life around in the mid 80's and became a productive member of society. She further erred in the emphasis she gave to his dated criminal record for sexual offences, particularly given that the circumstances of the alleged sexual offences were largely unknown.
- [74] Those errors cannot however be considered in a vacuum. They have to be examined in the context of the serious crimes that the appellant committed. This case concerns the sexual abuse of two children. In the one case it involved a breach of trust and lasted a number of years. The devastating impact of the appellant's actions on the victims is clearly set out in their victim impact statements. In these circumstances, denunciation and deterrence are the primary sentencing consideration.
- [75] Each crime is committed in unique circumstances. The determination of a just and appropriate sentence is a highly individualized exercise that involves a variety of factors that are difficult to define with precision. As noted in *Lacasse* at para. 57 "everything depends on the gravity of the offence, the offender's degree of responsibility and the specific circumstances of each case".
- [76] In this case while denunciation and deterrence are the primary sentencing consideration, the sentence must also include consideration of the aggravating and mitigating circumstances and the principles of parity and totality. When all the principles of sentencing are taken into account, I am of the opinion that the sentence imposed in this case is not fit. I would reduce the individual sentences on assault counts to four years, which sentences should be consecutive to one another. In regard to the offence of distributing child pornography, the trial judge noted the quantity of child pornography was minimal and it was shared with only one person. It falls at the less severe end of the continuum and I would substitute a sentence of one year consecutive for that offence. The individual sentences would therefore total nine years.

[77] I turn next to the question of totality. This requires the court to consider whether the sentence as a whole is unduly harsh or disproportionate taking into account the gravity of the offence committed and the moral blameworthiness of the offender. This offender was a victim of the residential school system. The offences he committed are indelibly linked to the abuse he suffered as a child, which sheds light on his level of moral blameworthiness. I would reduce the global sentence to eight years. I would achieve this result by ordering the four year consecutive sentence on count eight be reduced to three years. From this global sentence must be subtracted the credit of two years and one month for time served. The total sentence therefore is five years and eleven months.

[78] The sentence imposed in this case reflects the unique features of the appellant's circumstances and should not be thought of as establishing a range of sentence for conduct of this kind in the absence of those features.

D. Challenge to Section 161

[79] When the appellant committed the offences, s. 161(1) of the Criminal Code read as follows:

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
- (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, schoolground, playground or community centre;
 - (b) seeking, obtaining or continuing any employment, whether or not the employment is remunerated, or becoming or being a volunteer in a capacity, that involves being in a position of trust or authority towards persons under the age of 16 years; or
 - (c) using a computer system within the meaning of subsection 342.1(2) for the purpose of communicating with a person under the age of 16 years.

[80] After the appellant committed the offences, but before he was sentenced, s. 161(1) was amended by the Safe Streets and Communities Act, S.C. 2012, c. 1, s. 16 (1), which came into force on August 9, 2012. Section 161(1)(a) and (b) remained unchanged. But the Act modified s. 161(1)(c) to include prohibiting all contact with young persons, no matter the means, and introduced a new Internet prohibition through s. 161(1)(d). These amendments had the effect of expanding the scope of the community supervision measures a sentencing judge can impose on sexual offenders. Section 161(1)(c) and (d) now provide that a sentencing judge can prohibit an 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; or

(d) using the Internet or other digital network, unless the offender does so in accordance with conditions set by the court.

[81] Section 161(1) was further amended in 2014 through An Act to amend the Criminal Code and the Correction and Conditional Release Act (Restrictions on Offenders), S.C. 2014, c. 21, s. 1. Pursuant to that amendment s. 161(1)(a.1) was added, which allows a judge to prohibit an offender from:

Being within two kilometres, or any other distance specified in the order, of any dwelling house where the victim identified in the order ordinarily resides or of any other place specified in the order;

[82] The appellant was sentenced after the 2012 and 2014 amendments came into force. The judge imposed a lifetime ban in relation to each of the s. 161 sections, including those that had come into force after the offences were committed.

[83] The sentence was imposed on May 25, 2016. On July 21, 2016, the Supreme Court of Canada released its decision in K.R.J. SCC.

[84] That case concerned offences that took place between 2008 and 2011. After the 2012 amendments came into force, K.R.J. was sentenced to nine years' imprisonment and a question arose as to whether the 2012 amendments could operate retrospectively and be imposed on him.

[85] This Court, in K.R.J. BCCA, concluded that the amendments to s. 161(1) in 2012 were intended to apply retrospectively. The majority further held that such application did not offend s. 11(i) of the Charter as the legislation did not impose punishment, but was for the protection of the public.

[86] The Supreme Court of Canada held otherwise. They concluded that an order under the new ss. 161(1)(c) and (d) constituted punishment within the meaning of s. 11(i) of the Charter, such that the provisions are subject to s. 11(i) of the Charter. A majority of the Court concluded that the retrospective operation of s. 161(1)(c) could not be justified under s. 1 and therefore as a result, s. 161(1)(c) should apply only prospectively - that is, only to offenders who committed their offences after the 2012 amendments came into force. The majority reached a different conclusion in relation to s. 161(1)(d). In regards to that section, the majority held that retrospective operation of the Internet provision was a reasonable limit that could be imposed. Justice Abella, dissenting in part, would have held that neither s. 161(1)(c) or (d) could be justified. Justice Brown was of the view that the retrospective application of both conditions could be saved under s. 1 of the Charter.

- [87] At the sentencing hearing in this matter, the s. 161 sanctions were dealt with in a summary fashion. The Crown advised the judge that it was seeking a lifetime ban. The defence made no submissions on s. 161. The judge, in her reasons, simply said "I will make the order requested under s. 161 for his lifetime."
- [88] The appellant's statement on sentence devoted two paragraphs to s. 161. Paragraph 25 stated that the sentencing judge erred in making an order under s. 161(1) because the present provisions of the Code were not in force at the time the offending took place. It then cited K.R.J. SCC for the proposition that s. 161 cannot be applied retrospectively and that the sentencing judge erred in imposing s. 161(1) restrictions that were not in force at the time of the offences. The appellant did not mention that the Court in K.R.J. SCC had in fact found that s. 161(d) could be applied retrospectively. The appellant did not challenge the merits of imposing the sanctions.
- [89] In its one paragraph reply on s. 161, the Crown noted that the appellant was sentenced prior to the Supreme Court of Canada decision in K.R.J. and, as a result, the sentencing judge correctly imposed the conditions in ss. 161(1)(c) and (d) based on the majority's decision in K.R.J. BCCA. The Crown then went on to note that in K.R.J. SCC, the Court affirmed that s. 161 applies retrospectively and that the retrospective application of the 2012 amendment in s. 161(1)(c) violates s. 11(i) of the Charter and cannot be saved under s. 1. In the result, the Crown acknowledged that the condition in s. 161(1)(c) should be deleted from the order.
- [90] At the hearing of the appeal, the appellant, without notice to the Crown that it was raising a constitutional challenge, took the position that s. 161(1)(a.1) could not be applied retrospectively. That section had not been considered in K.R.J. SCC, as it was not in force at the time of the sentencing in that case.
- [91] The Crown took the position that this Court could not deal with the constitutional challenge to s. 161(1)(a.1) absent notice. It further advised that if a notice of the constitutional challenge had been given, it would have applied to file fresh evidence so this Court could determine whether the retrospective operation of s. 161(1)(a.1) could be justified under s. 1 of the Charter.
- [92] A party who wishes to raise a constitutional issue must provide notice: *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241; *Guindon v. Canada*, 2015 SCC 41; *Burrardview Neighbourhood Assn. v. Lafarge Canada Inc. et al*, 2004 BCCA 104. The crucial role the notice provisions play in Charter litigation was explained by Justices Abella and Wagner in their dissenting reasons (not on this point) in *Guindon*:

112 Notice provisions play a particularly crucial role in Charter litigation, where, if an applicant successfully establishes a violation of an enumerated right, the burden shifts to the government to demonstrate on a balance of probabilities that the legislation in question is justified under s. 1 of the Charter. The s. 1 inquiry is fact-based. It turns on whether evidence adduced by the government demonstrates that the legislation has a pressing and substantial objective that is being pursued in a manner that is rational, minimally impairing of the affected right, and

proportionate.

[93] In the circumstances of this case, the constitutional issue could not have been raised in the court below because of the state of the jurisprudence at the time of the sentencing decision. It could, on notice, have been properly raised in this Court. No notice, however, challenging the retrospective application of s. 161(1)(a.1) was forthcoming. The failure to provide notice clearly was prejudicial as it deprived the Crown of its right to call evidence to defend the section and is fatal to the appellant's position.

[94] In these circumstances, the appeal insofar as it concerns s. 161(1)(a.1) must fail. For the reasons in K.R.J. SCC, the sanctions set out in s. 161(1)(c) cannot be applied to the appellant and must be deleted. The orders made under ss. 161(1)(a)(a.1)(b) and (d) remain as ordered.

CONCLUSION

[95] In the result therefore I would grant leave to appeal, allow the appeal and impose the following sentences:

- a. Count 1 - four years, less two years and one month of credit for pre-sentence custody;
- b. Count 2 - two years concurrent with Count 1;
- c. Count 4 - one year consecutive to Counts 1 and 2; and
- d. Count 8 - three years consecutive to all other sentences.

[96] The total sentence is five years and eleven months. In addition, I would delete the s. 161(1)(c) condition.

"The Honourable Mr. Justice Goepel"

I AGREE:

"The Honourable Chief Justice Bauman"

I AGREE:

"The Honourable Madam Justice Griffin"

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Prepared on 28 October 2026 · Esheria