
CANADA / JUDGMENT

R. v. K.R.J.

2014 BCCA 382

COURT

British Columbia Court of Appeal

DECIDED

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2014 BCCA 382 R. v. K.R.J.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. K.R.J.,

2014 BCCA 382

Date: 20141008

Docket: CA41300

CA41418

Docket CA41300

Between:

Regina

Respondent

And

K.R.J.

Appellant

Docket CA041418

Between:

Regina

Appellant

And

K.R.J.

Respondent

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Before:

The Honourable Madam Justice Newbury

The Honourable Madam Justice Kirkpatrick

The Honourable Mr. Justice Groberman

On appeal from an Order of the Provincial Court of British Columbia, dated August 8, 2013 (R. v. K.R.J., Salmon Arm Docket No. 22175-3-C) and from an Order of the Provincial Court of British Columbia dated November 15, 2013 (R. v. K.R.J., Salmon Arm Docket No. 22175-3-C)

Counsel for the Crown:

L. Ruzicka

Counsel for K.R.J.:

E. Purtzki

Place and Date of Hearing:

Vancouver, British Columbia

June 4, 2014

Place and Date of Judgment:

Vancouver, British Columbia

October 8, 2014

Reasons Dissenting in Part by:

The Honourable Mr. Justice Groberman

Majority Reasons by:

The Honourable Madam Justice Newbury (p. 28, para. 91)

Concurred in by:

The Honourable Madam Justice Kirkpatrick

Summary:

Mr. J. was sentenced to six years imprisonment for incest and three years consecutive for making child pornography. The judge did not expressly consider the totality principle in imposing the global sentence.

The judge imposed post-release restrictions under s. 161(1) of the Criminal Code, but held that amendments to s. 161(1) made in 2012 were not retrospective, and that only those restrictions contained in s. 161(1) at the date of the offences could be ordered.

Mr. J. appealed, contending that the nine-year sentence was overly harsh and offended the totality principle. The Crown also appealed, arguing that the 2012 amendments to s. 161(1) apply retrospectively.

On appeal, held: Subject to an adjustment for time spent in pre-trial custody, the accused's appeal is dismissed. The judge should have discussed totality, but his failure to do so does not, standing alone, constitute reversible error. The sentence, while long, is not unfit.

The Crown's appeal is allowed (Groberman J.A. dissenting). The amendments to s. 161(1) in 2012 were intended to apply retrospectively. Such application does not offend s. 11(i) of the Charter, as the legislation does not impose punishment, but is, rather, for protection of the public.

Reasons for Judgment of the Honourable Mr. Justice Groberman (dissenting in part):

- [1] These appeals arise out of the sentencing of Mr. J. on one count of incest (Criminal Code, R.S.C. 1985 c. C-46, s. 155) and one count of making child pornography (Criminal Code, s. 163.1(2)). He was sentenced to six years on the incest count, and to three years consecutive on the child pornography count, for a global effective sentence of nine years. He was credited 286 days for time served in custody prior to sentencing.
- [2] The Crown sought an order under s. 161(1) of the Criminal Code prohibiting Mr. J. from engaging in particular activities for a period of ten years following his release from imprisonment. The judge accepted that such prohibitions were appropriate, though he found the appropriate duration to be seven rather than ten years. He held, however, that amendments made to s. 161(1) in 2012 did not apply retrospectively, so he imposed restrictions only under the parts of s. 161(1) that were in force at the time the offences were committed.
- [3] There are three issues raised on these combined appeals. The first is uncontentious, and concerns credit for time spent in custody prior to sentencing. The judge gave Mr. J. credit for time served on a 1:1 basis, in accordance with this Court's decision in *R. v. Bradbury*, 2013 BCCA 280. Subsequently, in *R. v. Summers*, 2014 SCC 26, the Supreme Court of Canada gave

greater scope for credit to be granted on a 1.5:1 basis. Mr. J. argues that the judge should have credited him with 429 days rather than 286. The Crown agrees that the appeal should be allowed to the extent of giving Mr. J. credit for an additional 143 days for time served prior to the imposition of sentence.

- [4] The other two issues are more controversial. The offender contends that while the sentences on the individual counts would be sustainable, the global sentence is too severe, and must be reduced. He says that the judge, in simply making the two sentences consecutive, failed to give effect to what is known as the "totality principle". The Crown does not agree, and says that the consecutive sentences that were imposed were not overly harsh.
- [5] The final issue arises on the Crown's appeal. It says that the judge erred in finding that the 2012 amendments to s. 161(1) did not apply retrospectively. It asserts that the amendments, while enacted after the offences occurred, were intended to apply to anyone sentenced after they were brought into force. Mr. J., on the other hand, says that the judge was correct in finding that the amendments were not intended to apply retrospectively. Further, he argues that retrospective applications of the amendments would offend s. 11(i) of the Canadian Charter of Rights and Freedoms.
- [6] I will turn, first, to Mr. J's appeal from the length of sentence.

The Offences

- [7] Mr. J. pleaded guilty to the two charges, which originally formed part of a 6-count indictment. Exhibits filed at trial included a DVD containing videos made on July 13, 17, and 18, 2009. Each of the videos shows Mr. J. inserting his penis into his biological daughter's vagina. At the time of the videos, the daughter was 3 years old. The judge said this of the video:
- [5] The video, Exhibit 1, is highly disturbing and disgusting. The betrayal of the parental trust that every child has a right to expect and deserves from a parent, is apparent in the video. While physical injury to the child is not immediately apparent, the conduct of the accused is intrinsically violent and degrading.
- [8] A binder of photographs was also entered at the sentencing hearing, without objection. The only one directly relevant to the charges to which Mr. J. pleaded guilty is a photograph, probably taken at the same time of the video, depicting an act that constitutes incest with the same daughter.
- [9] The binder also included numerous photographs from Mr. J.'s child pornography collection. In addition to the photograph depicting incest with his biological daughter, there were many other pornographic photos of infants and young girls. Among these were photos taken by Mr. J of his biological daughter (taken when she was five) and of her half-sister. The judge said:

- [5] ... With respect to the photographs [in the binder], words fail me. I am left to say only that they are pornographic, disgusting, and criminal.
- [10] Mr. J. does not dispute the accuracy of the judge's assessment.
- [11] Not surprisingly, given the disturbing nature of the videos and photographs, little was said by either the Crown or Mr. J. about the circumstances of the offences at sentencing or on appeal. The court was advised that the B.C. Ministry of Child and Family Development received a laptop computer in March 2011 from an anonymous informant, who indicated that the computer had belonged to Mr. J. After the computer was seized by the police, they found that it contained 990 still images and six videos that they considered to be child pornography. Further investigations established that Mr. J's biological daughter was the subject of some of the photographs, as was her older half-sister.
- [12] In October 2012, the RCMP arrested Mr. J. and searched his residence pursuant to a warrant. They found cameras, camcorders, computer equipment, pornographic DVDs and journals. Hidden in the ceiling of his kitchen, they found thirteen disks which comprised Mr. J's child pornography collection.

Circumstances of the Offender

- [13] Mr. J. is thirty-eight years old. He lived most of his life in a small city in the interior of British Columbia, which I will describe as his "hometown". His parents separated when he was eight years old, and he continued to reside with his mother while he was growing up. He reports that his father was a heavy drinker, who was often angry and lashed out verbally. There is some indication in the sentencing material that his father was a violent individual, but no allegation that he physically or sexually abused the offender.
- [14] Mr. J. was shy and suffered from social anxiety as a youngster, and has, throughout his life, suffered from episodes of anxiety and depression. Mr. J. first became aware that he was attracted to pre-pubescent girls when he was seventeen, though he did not act on that attraction at the time.
- [15] Mr. J. completed grade 12 in his hometown and then moved to another city to attend college. He completed two years of college education in science, but suffered an emotional breakdown at the end of the two years, and returned to his hometown. After working in northern British Columbia between 1998 and 2000, he again returned to his hometown where he found employment in a bakery, and gained qualifications as a pastry and bread chef.
- [16] In 2002, Mr. J. was convicted of arson with disregard for human life (Criminal Code s. 433(a)) and was given a twelve month conditional sentence order. That offence is his only previous conviction. At the sentencing hearing on the current offences, Mr. J. indicated that the circumstances of the arson were that he and some friends, after drinking alcohol, set small fires in some dumpsters and a recycling bin.

- [17] In 2004, Mr. J. began a relationship with a woman who had a seven-year old daughter. The relationship between the woman and Mr. J. quickly became an intimate one. It was the first intimate relationship of his life. About one year after the couple met, they were married.
- [18] In January 2006, they had a daughter (the victim of the offences), and in December 2008, they had a son.
- [19] Sometime between 2003 and 2006, Mr. J. began to collect provocative pictures of children on his computer. His wife found the photographs in the summer of 2006, and the Ministry of Child and Family Services and the RCMP became involved in an investigation. They concluded that the photographs fell short of constituting child pornography. The Ministry put in place a risk reduction plan, and Mr. J. attended counselling.
- [20] It appears that the relationship between Mr. J. and his wife became increasingly strained in 2009, and she began to search out other men online. In August 2009 (which would have been shortly after the date of the offences), she left him and moved to Ontario to reside with a man she had met on the Internet. She took the children with her. She had been the subject of frequent attention from child protection authorities in BC for her failure to properly care for the children. Within one week of her move to Ontario, that province's Ministry of Social Services removed the children from her care, as she was not providing them with a satisfactory living environment. With some encouragement from the Ontario authorities, Mr. J. made an application for custody of his biological children, and he became their sole caregiver. In 2012, he also became the sole caregiver of his former wife's older daughter, who had, in the meantime, been living with her biological father. All of the children were permanently removed from Mr. J.'s care when he was arrested in October 2012.

The Judge's Reasons for Sentence

- [21] In its submissions at trial, the Crown sought a global sentence of eight years, while Mr. J. submitted that an appropriate sentence was three years on the incest charge, and twelve months concurrent on the charge of making child pornography.
- [22] The trial judge's reasons were fairly brief. He recognized Mr. J.'s guilty plea and his expressions of remorse as mitigating factors and noted Mr. J.'s desire to undergo treatment for pedophilia. He also recognized that Mr. J. had cooperated with the police, and that his limited criminal record did not include offences similar to those on which he was being sentenced.
- [23] In terms of aggravating factors, the judge mentioned the very young age of the victim, the fact that Mr. J. was the victim's father, and the fact that the offences involved three instances of vaginal penetration. He noted that the offences required significant planning and deliberation, and took place in the family home.

- [24] The judge was of the view that Mr. J. had little insight into the harm that his actions had caused. In that regard, he referred to Mr. J.'s statement (quoted in a presentence report) that he "does not think [his actions] affected [his biological daughter] too badly."
- [25] A psychiatric report filed with the court stated that Mr. J. is aroused by children as young as one year old. The psychiatrist described him as exhibiting "serious sexual deviance", and expressed concern that he minimized or denied sexual violence, instead labelling himself as "a person interested in child pornography and a pedophile who is hoping to obtain treatment."
- [26] In passing sentence, the judge did not expressly discuss the totality principle, nor did he specifically discuss his reasons for making the sentences consecutive.

Do the Sentences Offend 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.
- [30] Mr. J. says that the sentence he received is overly harsh. He relies on *R. v. B.C.M.*, 2008 BCCA 365, a case in which this Court upheld a sentence totalling six years for sexual touching and making and possessing child pornography. He describes the case as involving more prolonged offending than was present in this case.
- [31] He also relies on *R. v. B.C.L.*, 2010 BCCA 183, in which a sentence of seven years was upheld in respect of a repeat sexual offender convicted of sexual touching and making child pornography.
- [32] I am not persuaded that the sentence in this case was unfit. While *B.C.M.* and *B.C.L.* were very serious cases, neither involved a charge of incest, which carries a maximum sentence of fourteen years. Further, the age of the victim in this case is a factor that greatly aggravates the offence.
- [33] I note, as well, that the Court has signalled a preparedness to accept more severe sentences for sexual abuse of children than may have been imposed in the past. In *R. v. Allen*, 2012 BCCA 377, the Court reviewed cases from 2001 to 2012, and concluded:
- [57] While a range may not be detectable from these cases they do reveal the escalation in recent years in severity of sentences imposed where children are the victims of sex offences.
- [34] In *R. v. Rich*, 2014 BCCA 24, this Court reiterated that position, commenting:
- [18] I agree with the Crown's observation that "as society becomes more aware of the impact of sexual abuse on children, there has been an escalation in the severity of sentences imposed where children are the victims of sexual offences"

- [35] Mr. J. was, at the time of the offence, the primary guardian of the victim. His abuse of her appears to have continued into a period where he was, de jure her sole guardian. This Court has recognized that sexual exploitation of a child by the very person entrusted to nurture and protect that child from harm must be seen as a particularly heinous crime: see, for example, *R. v. R.A.J.*, 2010 BCCA 304 and *R. v. R.J.G.*, 2007 BCCA 631.
- [36] I also note that Mr. J. was aware of his attraction to young girls, and had, in 2006, gone through counselling. He should have been acutely aware of the danger that he posed to his daughter and taken steps to ensure that he did not harm her.
- [37] The fact that Mr. J. made a video recording of the offence, and kept it so that he could relive the violent violation of his daughter is a very disturbing aspect of this case. For that reason, the making and retention of the video-recording must not be minimized in assessing an appropriate global sentence.
- [38] The global nine-year sentence imposed in this case was a lengthy one, and, in my view, currently represents the high end of the appropriate range for the nature and circumstances of the offence and of the offender. The various factors that I have mentioned, however, justify a severe sentence, and I am not persuaded that a nine-year sentence is unfit. Apart from the adjustment that the Crown concedes should be made to take into account the Supreme Court of Canada's decision in *Summers*, I would not accede to Mr. J.'s sentence appeal.
- [39] I turn, now, to the Crown's appeal.

The Amendments to s. 161(1) of the Criminal Code

- [40] Section 161(1) of the Criminal Code was originally enacted in 1993. At the date of Mr. J.'s offences, it read as follows:

161.(1) When an offender is convicted 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 , in addition to any other punishment that may be imposed for that offence , 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.

[41] Section 161(1) was amended by s. 16 of the Safe Streets and Communities Act (S.C. 2012, c. 1) by adding a new s. 161(c) and by replacing the old s. 161(c) with a broader restriction (now number 161(d)):

- (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.

[42] The amendment came into effect on August 9, 2012 (SI/2012-48), more than three years after Mr. J. committed the offences for which he was convicted.

The Judge's Reasons for Finding the Amendments Inapplicable

[43] With the concurrence of the parties, the judge did not deal with s. 161 at the initial sentencing hearing on August 8, 2013. That issue was put over to October for additional argument, and the judge delivered written reasons on November 15, 2013.

[44] The judge was persuaded that it was appropriate to make an order under s. 161. He said:

- [7] The offences to which [Mr. J.] has pled guilty are very serious and were committed over a significant period of time.
- [8] While [Mr. J.] has no prior related record, his risk of re-offending is substantial. While he has expressed a desire to engage in treatment, [the Psychiatrist who prepared a report for sentencing] states that: "He does not spontaneously express remorse." [He] further opines that:

When [Mr. J.] is eventually allowed back into the community, it would seem prudent to disallow any access to the Internet and to furthermore restrict his access to any unsupervised children.

[10] The Pre-Sentence Report refers to [Mr. J.'s] apparent lack of understanding that the sexual abuse of his daughter was both violent and coerced and his lack of insight into the impact of that abuse on his family.

[11] While the offence of incest related to one child only, [Mr. J.] also collected photos of other young children in the community. This is concerning.

[12] Finally, [Mr. J.] appears not to have a cadre of family and friends to whom he can look for support and assistance in avoiding recidivism.

[13] On the basis of all the foregoing, I conclude that there is a serious risk to the safety of children under the age of 16 after [Mr. J.] is released. While Sex Offender Treatment will be available to him, the efficacy, if any, of such treatment is unknown. The terms of a s. 161 order constitute a reasonable attempt to minimize [Mr. J.'s] risk to children.

- [45] The judge found, however, that the 2012 amendments to s. 161(1) could not be applied retrospectively. He began his analysis by considering jurisprudence of this Court. In particular, he noted *R. v. Burnett*, [1998] B.C.J. No. 245 (C.A.) and *R. v. P.A.M.*, 2000 BCCA 126, both of which held that s. 161(1) did not apply retrospectively. He held that those cases were not decisive on the issue of whether the 2012 amendments applied retrospectively, concluding the discussion as follows:
- [21] [I]t appears that in neither *R. v. Burnett*, supra, nor in *R. v. P.A.M.*, supra, did the British Columbia Court of Appeal consider section 161 in the context of section 11(i) of the Charter of Rights and Freedoms. It would appear, based on the Nova Scotia Court of Appeal's comments at paragraph 132 in *Farler* [*R. v. Farler*, 2013 NSCA 13], supra, that their conclusion that a section 161 order cannot have retrospective effect may constitute obiter dicta.
- [22] In addition, in both *R. v. Burnett* and *R. v. P.A.M.*, the Court of Appeal would have had no need to consider the 2005 amendments to s. 161(1.1) which allowed a s. 161(1) order to apply to certain historic offences. This amendment imported into the discussion what *R. v. Farler*, supra, holds to be Parliament's clear intention, namely that s. 161(1) should apply retrospectively. Considered in this light the amendments necessitate a re-examination of s. 161(1), including an analysis of the meaning of "punishment" within s. 11 of the Charter.
- [23] I am therefore narrowly persuaded that this Court is not precluded from considering the issue in this case.
- [46] The judge then considered whether a s. 161(1) order is "punishment" for the purposes of s. 11(i) of the Charter, and found that it is. Having made that finding, he held that the 2012 amendments should not be interpreted as operating retrospectively.
- [47] In the result, the judge made an order under s. 161(1), but limited the prohibited activities to those described in s. 161 as it stood at the date the offences were committed. The prohibitions were imposed for a period of seven years from the date of Mr. J.'s release from imprisonment.

New Issue on Appeal

- [48] In the Court below, Mr. J. did not formally seek an order striking down legislation, nor did he seek a constitutional remedy to have s. 161(1) read down in order to bring it into conformity with the Charter. Instead, he presented his arguments as arguments of statutory interpretation, contending that the 2012 amendments should not be interpreted as having retrospective application.
- [49] In the result, had the judge found that the amendments were intended to apply retrospectively, he could not have properly proceeded to determine the constitutionality of such application.

- [50] Mr. J. sought to remedy this deficiency on appeal. His primary argument remains that the 2012 amendments were not intended to apply retrospectively. He says, however, that if such an intent can be found in the 2012 amendments, it is unconstitutional, and the amendments must be read down so as to apply only to offenders who are convicted of offences that took place after August 8, 2012.
- [51] The Crown objected to the formal constitutional challenge being made for the first time on appeal, citing, among other cases, the decisions of this Court in *R. v. Ubhi*, [1996] B.C.J. No. 934 (C.A.); *R. v. Olson* (1993), 23 B.C.A.C. 288 and *R. v. Vidulich* (1989), 37 B.C.L.R.(2d) 391.
- [52] We considered the Crown's objections, and determined that it was appropriate to allow the constitutional challenge to proceed. We did so because, in the circumstances of this case, the failure of the defence to raise the constitutional challenge below caused no prejudice to the parties or to the court, and amounted to a purely technical defect.
- [53] The parties fully canvassed the constitutional arguments in the court below. It does not appear that either defence counsel or the judge recognized that there was a need for a formal constitutional challenge. The judge did not clearly distinguish between the use of the Charter as an aid to interpreting a statute, and its use to strike or read down a statute.
- [54] Subject to what I will say about s. 1 of the Charter, the record below was complete. All evidence relevant to the constitutional challenge was presented to the court. The court below also heard complete argument on the issues - a point of considerable significance - see *R. v. Andel*, 2014 BCCA 179 at paras. 40-41. In short, the absence of a formal challenge in the Court below did not result in any deficiencies.
- [55] The Crown points out that it did not lead evidence relating to issues on s. 1 of the Charter in the court below, and contends that the absence of s. 1 evidence is of some moment on this appeal. While I agree with that proposition, I do not think that it can be said that the deficit was a result of Mr. J.'s failure to properly raise issues in the Court below. It is clear that the trial judge was minded to approach the issues on sentencing in a step-by-step fashion. He would not have addressed the s. 1 issue unless it was necessary to do so. Because he interpreted the 2012 amendments as not applying retrospectively, there would have been no need to proceed to a s. 1 hearing.
- [56] In short, the matter reaches this Court in precisely the same state as it would have if a formal constitutional challenge had been made in the court below. To the extent that there are deficiencies in the evidentiary record, in the findings of fact, or in the analysis of the argument, they are deficiencies that would not have been prevented by the formal raising of a constitutional challenge in the court below.
- [57] In these circumstances, we found that, notwithstanding Mr. J.'s failure to formally raise a constitutional challenge to the legislation in the court below, he should be allowed to include such a challenge in his arguments to this Court.

The Presumption Against Retrospectivity

- [58] The first step in determining whether the 2012 amendments apply to Mr. J. is to ask whether, as a matter of statutory interpretation, the amendments were intended to apply retrospectively. If they were, the Court must then ask whether retrospective application violates s. 11(i) of the Charter, and, if so, whether retrospective application is nonetheless saved by s. 1 of the Charter.
- [59] In general, statutes that affect substantive rights will, in the absence of a clear indication that they are to be applied retrospectively, operate only prospectively - *R. v. Dineley*, 2012 SCC 58.
- [60] There are, however, exceptions to this general proposition. In *Thow v. B.C. (Securities Commission)*, 2009 BCCA 46, this Court considered the presumption against retrospectivity at some length. As the analysis is, in my view, relevant to the case before us, I quote it at some length:
- [10] Laws generally operate only from the date of their enactment. Indeed, the idea that laws operate prospectively is a fundamental aspect of the Rule of Law (see, for example, Joseph Raz, "The Rule of Law and Its Virtue" in *The Authority of the Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979) at p. 214; John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980) at p. 270). As noted by Elizabeth Edinger in "Retrospectivity in Law" (1995), 29 U.B.C.L.R. 5 at 12, "The common theme of judges and scholars throughout the centuries has been that retrospective laws are unfair or unjust."
- [11] The principle that laws should generally operate only prospectively is of particular importance in respect of penal laws. The principle requires that persons not be punished for acts which were lawful at the time they were committed, and also that punishment for unlawful acts not exceed that provided for at the time they were committed. Section 11 of the Canadian Charter of Rights and Freedoms places constitutional limits on retroactivity of penal laws:
11. Any person charged with an offence has the right
- ...
- g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;
- ... and
- i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

[13] In Canadian law, apart from the restrictions imposed by the Charter, retrospective application of laws is limited by applying an interpretive presumption that laws operate only prospectively. The discussion of the presumption in E.A. Driedger, "Statutes: Retroactive Retrospective Reflections" (1978), 56 Can. Bar Rev. 264 has been cited with approval in numerous cases, including decisions of the Supreme Court of Canada .

[20] The presumption against retrospectivity does not apply to all statutes. In his article, at p. 271, Driedger describes the application of the presumption as follows:

[T]here are three kinds of statute that can properly be said to be retrospective, but only one that attracts the presumption. First, there are the statutes that attach benevolent consequences to a prior event; they do not attract the presumption. Secondly, there are those that attach prejudicial consequences to a prior event; they attract the presumption. Thirdly there are those that impose a penalty on a person who is described by reference to a prior event, but the penalty is not a consequence of the event; these do not attract the presumption.

[21] Driedger gives several examples of statutes falling within the third category. Most of his examples involve statutes that disqualify persons who have been convicted of particular criminal offences from engaging in professions or callings.

[24] The common theme of the cases in Driedger's third category is that they impose sanctions against persons not as penalties for past misconduct, but to protect society against future misconduct. Past misconduct is treated as an indicator of propensity or of bad character, and is used to identify people who pose a particular risk to society. Driedger acknowledges difficulties in defining the precise limits of this third category of statutes; after considering and interpreting a number of cases, he concludes at p. 275:

In the end, resort must be had to the object of the statute. If the intent is to punish or penalize a person for having done what he did, the presumption applies, because a new consequence is attached to a prior event. But if the new punishment or penalty is intended to protect the public, the presumption does not apply.

[25] The Supreme Court of Canada had an opportunity to consider this third category in *Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301. Regulatory proceedings had been commenced before the Commission with the object of determining whether Mr. Brosseau should be prohibited from trading in securities, and whether certain exemptions under the statute should cease to apply to him. The jurisdiction of the Securities Commission to impose such sanctions was of recent origin - it had not existed at the time of Mr. Brosseau's alleged contraventions.

- [26] In deciding that the Securities Commission did have jurisdiction to impose sanctions under the new statutory provisions, the Supreme Court of Canada adopted Driedger's analysis of the presumption against retrospectivity. It quoted from Driedger's article, stating, at p. 319, that the presumption against retrospectivity is inapplicable to "enactments which may impose a penalty on a person related to a past event, so long as the goal of the penalty is not to punish the person in question, but to protect the public."
- [41] While some of the language used in *Brosseau* may be interpreted as supporting a very broad "protection of the public" exception to the presumption against retrospectivity, I do not think that that was the Court's intention. The Court's reasons in *Brosseau* draw heavily on Driedger and on the cases he cites. The reasons do not suggest any intention to broaden the exception, and there was no need to do so in order to resolve the issues in the *Brosseau* case.
- [42] Soon after the decision in *Brosseau*, the Federal Court of Appeal rejected the idea that the "protection of the public" exception to the presumption against retrospectivity had been broadened. In *Re Royal Canadian Mounted Police Act*, [1991] 1 F.C. 529, at paragraph 34, MacGuigan J.A., for a unanimous court, noted that a broad "protection of the public" exception to the presumption would effectively eliminate the presumption entirely:
- [I]t must at least be recognized that there cannot be any public-interest or public-protection exception, writ large, to the presumption against retrospectivity, for the simple reason that every statute, whatever its content, can be said to be in the public interest or for the public protection. No Parliament ever deliberately legislates against the public interest but always visualizes its legislative innovations as being for the public good.
- [43] MacGuigan J.A. characterized the exception to the presumption against retrospectivity much more narrowly, at paragraph 32:
- [T]here is an exception to the presumption against retrospectivity where there is (1) a statutory disqualification, (2) based on past conduct, (3) which demonstrates a continuing unfitness for the privilege in question. To my mind this is quite a narrow exception to the general presumption
- [44] I agree, generally, with that characterization of the cases underlying the exception. The cases have all involved situations in which a past conduct is used to identify a person as one who poses a particular risk for the future, and ought, therefore, to be disqualified or otherwise restricted from activities for the protection of the public. In other words, the penal sanction imposed is not intended to penalize past conduct at all (though it may, incidentally, have that effect). Instead, it is designed to directly prevent future offending conduct from occurring.

- [45] The Royal Canadian Mounted Police Act case may be overly restrictive in suggesting that the exception to the presumption against retroactivity extends only to statutory disqualification cases, per se. There is no reason in principle, for example, that it would not extend to a requirement that a person who has violated a regulatory regime resume activities in the regulated area only under supervision, after undertaking training, or with special reporting obligations.
- [46] The exception does, however, appear to be applicable only where a prejudicial sanction is imposed, not for penal purposes, but as a prophylactic measure to protect society against future wrongdoing by that person. While the imposition of such sanctions may, incidentally, inflict hardship on the wrongdoer, the infliction of such hardship is not the goal.
- [61] The case before us raises, again, the scope of the "protection of the public" exception to the presumption against retrospectivity. In some ways, s. 161(1) fits well within the exception. The section uses past conduct to identify persons who pose a particular risk for the future and restricts them from activities for the protection of the public. The restrictions are not intended to penalize past conduct but to prevent future offending conduct from occurring.
- [62] That said, s. 161 differs from most "protection of the public" statutes that have been found to apply retrospectively in certain respects. First, it is not a statute that prevents a person from engaging in a particular regulated activity, or otherwise restricts a person from exercising a privilege. The restrictions that it imposes are broad, and apply to activities that can be characterized as within the liberties generally enjoyed by the public. The restrictions are, in contemporary society, relatively onerous ones. They will affect the offender's ability to fully re-integrate into society, and may seriously limit employment prospects.
- [63] Second, s. 161 provides for restrictions to be imposed as part of the sentencing process. Unlike, for example, s. 810.1 of the Criminal Code, under which similar restrictions can be imposed based primarily on concrete forward-looking evidence, s. 161 is primarily directed at past criminal behaviour, and is imposed as part of the sanction for such behaviour.
- [64] In my view, both the scope of the restrictions that are imposed under s. 161 and their connection with the sentencing process suggest that they are true penal consequences, and that they are subject to the presumption against retrospectivity. Though they are imposed (as are most criminal sanctions) for the protection of the public, they cannot be said to fit within the narrow "protection of the public" exception to the presumption.
- [65] I note that this conclusion enjoys support in this Court's previous decisions in *Burnett and P.A.M.*, both of which applied the presumption against retrospectivity to an earlier incarnation of s. 161. The trial judge, in my view, was in error in describing this court's discussion of retrospectivity in those cases as "obiter dicta". The outcome of the cases depended directly on the Court's conclusions as to whether the statute applied retrospectively.

Does the Language of the Statute Rebut the Presumption?

- [66] This case does not, however, turn directly on the presumption against retrospectivity. Amendments to s. 161 that occurred after this Court's decisions in *Burnett* and *P.A.M.* unequivocally demonstrate that the presumption is rebutted.
- [67] In 2005, Parliament passed An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act, S.C. 2005, c. 32. Section 5 of that statute enacted s. 161(1.1) of the Criminal Code:
- 161(1.1) The offences for the purpose of subsection (1) are
- (a) an offence under section 151, or section 163.1 ;
 - (b) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983; or
 - (c) an offence under subsection 146(1) (sexual intercourse with a female under 14) or section 153 (sexual intercourse with step-daughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988.
- [68] Section 161(1.1) was brought into force on November 1, 2005 (SI/2005-104). In listing historical offences to which s. 161(1) applies, it clearly evinces a parliamentary intention that s. 161(1) be applied retrospectively. There is simply no other way to give meaning to s. 161(1.1)(b) and (c).
- [69] In the result, although the presumption against retrospectivity applied to s. 161(1) of the Criminal Code up until November 1, 2005, the amendments brought into force on that date rebut the presumption. Accordingly, the statute must now be interpreted as applying retrospectively.

The Role of the Charter in Interpreting s. 161(1)

- [70] The judge mentioned s. 161(1.1) in discussing why *Burnett* and *P.A.M.* may no longer be binding authority. He did not, however, return to s. 161(1.1) when he came to interpret s. 161(1). Instead, he relied on s. 11(i) of the Charter as his primary interpretive tool. In my view, he erred in doing so.
- [71] In *R. v. Rodgers*, 2006 SCC 15, Charron J., for the majority, discussed limits on the use of the Charter in interpreting statutes:
- [18] It has long been accepted that courts should apply and develop common law rules in accordance with the values and principles enshrined in the Charter: *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, at p. 603; *Cloutier v. Langlois*, [1990] 1 S.C.R. 158, at p. 184; *R. v. Salituro*, [1991] 3 S.C.R. 654, at p. 675; *R. v. Golden*, [2001] 3 S.C.R. 679, 2001 SCC 83, at

para. 86; *R. v. Mann*, [2004] 3 S.C.R. 59, 2004 SCC 52, at paras. 17-19. However, it is equally well settled that, in the interpretation of a statute, Charter values as an interpretative tool can only play a role where there is a genuine ambiguity in the legislation. In other words, where the legislation permits two different, yet equally plausible, interpretations, each of which is equally consistent with the apparent purpose of the statute, it is appropriate to prefer the interpretation that accords with Charter principles. However, where a statute is not ambiguous, the court must give effect to the clearly expressed legislative intent and not use the Charter to achieve a different result. In *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, at para. 62, Iacobucci J., writing for a unanimous court, firmly reiterated this rule:

to the extent this Court has recognized a "Charter values" interpretive principle, such principle can only receive application in circumstances of genuine ambiguity, i.e., where a statutory provision is subject to differing, but equally plausible, interpretations. [Emphasis in original.]

[19] If this limit were not imposed on the use of the Charter as an interpretative tool, the application of Charter principles as an overarching rule of statutory interpretation could well frustrate the legislator's intent in the enactment of the provision. Moreover, it would deprive the Charter of its more powerful purpose -- the determination of the constitutional validity of the legislation: *Symes v. Canada*, [1993] 4 S.C.R. 695, at p. 752; *Willick v. Willick*, [1994] 3 S.C.R. 670, at pp. 679-80; *Vriend v. Alberta*, [1998] 1 S.C.R. 493, at paras. 136-42; *Bell ExpressVu*, at paras. 60-66; *Charlebois v. Saint John (City)*, [2005] 3 S.C.R. 563, 2005 SCC 74, at paras. 23-24.

[72] As I have indicated, the enactment of s. 161(1.1) eliminated any ambiguity as to whether s. 161(1) is to apply retroactively. There was, in the result, no scope for using s. 11(i) of the Charter as an interpretive tool. The section can only be applied to determine the constitutionality of the legislation.

Infringement of s. 11(i) of the Charter?

[73] Section 11(i) of the Charter provides:

11. Any person charged with an offence has the right

...

i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

[74] For the most part, it is easy to apply the language of s. 11(i) to this case. Mr. J. has clearly been found guilty of offences, and the statutory sanctions that may be imposed for those offences has been varied since the time of their commission. The only question is whether the statutory sanctions set out in s. 161(1) are properly characterized as "punishment".

- [75] There is little direct authority on the question of whether the prohibitions authorized under s. 161(1) constitute "punishment" for the purposes of s. 11(i) of the Charter. The only case cited before us that squarely addresses this issue is *R. v. Farler*, 2013 NSCA 13. In *Farler*, at paras. 127 and 128, the Nova Scotia Court of Appeal found that the prohibitions imposed under s. 161(1) do constitute punishment, though its findings would appear to be obiter, as the court also determined that the pre-conditions for the imposition of a s. 161(1) order had not been met.
- [76] The Supreme Court of Canada's most extensive exploration of the breadth of the concept of "punishment" in s. 11 of the Charter is in *R. v. Rodgers*, 2006 SCC 15. Speaking for the majority of the Court, Charron J. said:
- [62] In its ordinary sense, "punishment" refers to the arsenal of sanctions to which an accused may be liable upon conviction for a particular offence. The Criminal Code uses the words "punishment" or "punishable" to describe the range of sanctions available on sentencing. For example, an offence will be described as "punishable" on summary conviction and the offender will be "liable to a fine . . . or [a term of] imprisonment": s. 787(1). Section 718.3(1) provides that "[w]here an enactment prescribes different degrees or kinds of punishment in respect of an offence, the punishment to be imposed is, subject to the limitations prescribed in the enactment, in the discretion of the court that convicts a person who commits the offence". The words "sentence" and "sanction" are also used interchangeably: see for example s. 718.2.
- [63] This does not mean, however, that "punishment" under ss. 11(h) and 11(i) necessarily encompasses every potential consequence of being convicted of a criminal offence, whether that consequence occurs at the time of sentencing or not. A number of orders can be made by a sentencing court, for example an order for forfeiture, a firearm prohibition, a driving prohibition, or an order for restitution. It is beyond the purview of this appeal to determine whether or not any of these consequences constitutes a punishment. As a general rule, it seems to me that the consequence will constitute a punishment when it forms part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence and the sanction is one imposed in furtherance of the purpose and principles of sentencing. In this respect, the protection afforded by s. 11 must be contrasted with s. 12 of the Charter that protects against cruel and unusual "treatment" or punishment.
- [77] It is instructive that Charron J. begins her discussion by referring to the "ordinary sense" of the word "punishment", and continues by referring to the use of the word in the Criminal Code. In doing so, she recognizes that s. 11 of the Charter is intended to be read generously, in accordance with the usual understanding of the word "punishment".
- [78] It is noteworthy that s. 161(1) describes the restrictions that it authorizes as being "in addition to any other punishment that may be imposed" [emphasis added]. Thus, Parliament itself appears to have considered that the sanctions set out in s. 161(1) come within the ordinary meaning of the word "punishment".

- [79] The "general rule" espoused in *Rodgers*, while not an exhaustive definition of the word "punishment" (see *Canada (Attorney General) v. Whaling*, 2014 SCC 20 at paras. 48 et seq.), provides significant guidance as to its meaning. In general, s. 11(i) will apply to sanctions imposed as part of a sentence where the sanctions are imposed "in furtherance of the purpose and principles of sentencing".
- [80] The use of the phrase "purpose and principles of sentencing" is instructive, as that is the phrase used in the Criminal Code to describe ss. 718-718.2. Section 718, in particular, describes the fundamental purpose of sentencing:
718. 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;
 - (b) to deter the offender and other persons from committing offences;
 - (c) to separate offenders from society, where necessary;
 - (d) to assist in rehabilitating offenders;
 - (e) to provide reparations for harm done to victims or to the community; and
 - (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.
- [81] In my view, the prohibitions that may be imposed under s. 161(1) are sanctions that fall within these objectives. They are designed to "separate offenders from society, where necessary". They contribute to the purpose of sentencing by ensuring that offenders are not allowed to engage in particular activities with the rest of society, because such separation is considered necessary.
- [82] The Crown points out that a number of sanctions that are authorized to be imposed at the time of sentencing have been held not to constitute "punishment" for the purposes of s. 11(i) of the Charter. In particular, it notes *Rodgers* itself, in which a post-conviction order for the provision of a DNA sample was found not to constitute "punishment". As well, it refers to several cases which have held that an order under the Criminal Code that an offender comply with the registration and reporting requirements of the Sex Offender Information Registration Act, S.C. 2004, c. 10 ("SOIRA") does not constitute "punishment" for the purposes of s. 11(i) of the Charter. These cases include this Court's decision in *R. v. S.S.C.*, 2008 BCCA 262.

- [83] These various cases do not, in my opinion, assist in the case before us. DNA orders and orders to comply with SOIRA do not fall within the principles and objectives of sentencing as those are described in the Criminal Code. They are crime prevention and detection measures, but do not constitute "punishment" in the ordinary sense of the word. Further, the effect of such orders on the liberty of the citizen is minimal. These sanctions do not come within the class of penal measures to which s. 11(i) is directed.
- [84] I have, earlier in this judgment, described the limits of the presumption against retrospective application of a statute. As I have indicated, the presumption does not apply directly to s. 161(1) because it is conclusively rebutted by the language of s. 161(1.1). In large part, however, the animating principles behind s. 11(i) of the Charter are identical to those that resulted in the development of the presumption against retrospective operation of statutes. In the result, much of what I have said about the presumption against retrospective operation of statutes also supports the conclusion that s. 11(i) would be infringed by retrospective operation of s. 161(1). The rationale for limiting the scope of the "protection of the public" exception to the presumption also apply to any "protection of the public" exception to s. 11(i)
- [85] Courts in Canada that have considered s. 161(1) have universally refused to apply it retrospectively. While the cases have (with the exception of *Farler*) not engaged in a complete analysis of s. 11(i) of the Charter, they are instructive, because they all find that the principles underlying the presumption against retrospectivity apply to s. 161(1). See, for example, *Burnett*; P.A.M.; *R. v. Mundy*, 2000 BCCA 265; *R. v. Jewell*, (1995), 100 C.C.C. (3d) 270 (C.A.); *R. v. M.E.*, 2012 ONSC 1078; *R. v. Boudreau*, 2012 ONCJ 322; *R. v. Mehanmal*, 2012 ONCJ 681; *R. v. Tavares*, 2013 ONCJ 381.
- [86] I would hold that retrospective application of 161(1) of the Criminal Code infringes s. 11(i) of the Charter. Unless such application can be saved under s. 1, it must be read down, so that the various restrictions can only be imposed if they were included in s. 161(1) at the time the offence was committed.

Conclusion

- [87] In the result, I would hold that the effective global sentence of nine years imposed by the judge was a fit sentence.
- [88] I would allow Mr. J.'s appeal only to the extent of increasing his credit for time spent in pre-sentence custody to 428 days, as the Crown has conceded is appropriate. I note that there was, on this appeal, an application to adduce fresh evidence dealing with the issue of pre-sentence custody. Given that the Crown did not oppose that aspect of Mr. J.'s appeal, it was unnecessary for the Court to consider the application.

[89] With respect to the retrospectivity appeal, I would declare that the retrospective application of the 2012 amendment to s. 161(1) of the Criminal Code constitutes a prima facie infringement of s. 11(i) of the Charter.

[90] As my colleagues find that the retrospective operation of s. 161(1) does not infringe s. 11(i) of the Charter, it will not be necessary for the Court to hear evidence or argument with respect to s. 1 of the Charter.

"The Honourable Mr. Justice Groberman"

Reasons for Judgment of the Honourable Madam Justice Newbury (Madam Justice Kirkpatrick Concurring):

[91] I have had an opportunity to read Mr. Justice Groberman's reasons in draft and am in agreement with them, with one exception. That exception relates to his conclusion that what is now s. 161(1) of the Code constitutes "punishment" and thus engages s. 11(i) of the Charter. To be clear, we are concerned here only with subparas. (c) and (d) of s. 161(1) as it now reads, since those subparagraphs came into force on August 9, 2012, i.e., subsequent to the time-period in which the offences were committed. The sentencing judge noted this fact at para. 3 of his reasons.

[92] Prior to the relevant amendments, s. 161(1) read as follows:

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.

[93] The amendments with which we are concerned were introduced by the Safe Streets and Communities Act, S.C. 2012, c. 1. It revised subpara. (c) and added a new subpara. (d), such that they now read as follows:

- (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.

"Punishment"

[94] The starting point for determining whether subpara. (c) or (d) of s. 161 amounts to punishment and thus engages s. 11(i) of the Charter is of course *Rodgers*. There, Charron J. for the majority considered the meaning of "punishment" in its ordinary sense. She reasoned that:

In its ordinary sense, "punishment" refers to the arsenal of sanctions to which an accused may be liable upon conviction for a particular offence. The Criminal Code uses the words "punishment" or "punishable" to describe the range of sanctions available on sentencing. . . .

This does not mean, however, that "punishment" under ss. 11(h) and 11(i) [of the Charter] necessarily encompasses every potential consequence of being convicted of a criminal offence, whether that consequence occurs at the time of sentencing or not. A number of orders can be made by a sentencing court, for example an order for forfeiture, a firearm prohibition, a driving prohibition, or an order for restitution. It is beyond the purview of this appeal to determine whether or not any of these consequences constitutes a punishment. As a general rule, it seems to me that the consequence will constitute a punishment when it forms part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence and the sanction is one imposed in furtherance of the purpose and principles of sentencing. [At paras. 62-3; emphasis added.]

In *Rodgers* itself, the Court ruled that the imposition of an order for the taking of a DNA sample under s. 487.055 of the Code did not constitute punishment even though it was a "consequence of the convictions on the index offences" and even though a DNA order might have a "deterrent effect" on the offender. The Court quoted with approval the following passage from *R. v. Murrins* (2002) 201 N.S.R. (2d) 288 (C.A.):

The fact that the existence of a DNA profile may deter offenders from committing future crimes is a residual benefit but does not bring the order into the category of a punishment. The order is in furtherance of the legitimate state interest in solving crime rather than its interest in sanctioning the offender. [Para. 102, quoted by Charron J. at para. 64.]

[95] Both the effects of the legislation or an order made thereunder, and the purpose or intention thereof, are relevant to the question of whether the order is "in furtherance" of a purpose other than punishing the offender. In this regard, I agree with the comments of Bateman J.A. in *R. v. Cross* 2006 NSCA 30, who stated:

... while the assessment is an objective one, the "effect" of the consequence cannot be evaluated in complete isolation from its purpose. Whether a measure is, in fact, "a true penal consequence" is not determined simply by assessing the seriousness of the impact on the individual. Relatively minor consequences of a criminal offence may be considered "penal" yet those with a more serious impact on the person may be "non-punitive". The question cannot be answered in the abstract, divorced from the context in which the measure arises. I conclude that if the impact of the sanction aligns with its legislative purpose and is not of such magnitude that it reveals, instead, a punitive intent, it is not "punishment". [At para. 45; emphasis added.]

The Court in Cross went on to suggest that the following principles emerge from the authorities:

- Punishment in s. 11(i) encompasses more than the official sentence of the court;
- In interpreting s. 11(i) one must be alive to practical consideration and not overshoot the purpose of the right;
- The characteristics of punishment generally include some deprivation of liberty; unpleasant consequences; and public condemnation;
- All ex post facto treatments of an offender, consequent on conviction, are not viewed as punishment;
- A true penal consequence is one which, by its magnitude, would appear to be imposed for the purpose of redressing the wrong done to society;
- The Charter does not protect against insignificant or trivial limitations of rights. [At para. 46.]

[96] My colleague has set out at para. 80 of his reasons s. 718 of the Code, which lists the objectives of sentencing. He is of the view that the prohibitions that may be imposed under s. 161(1) are sanctions that fall within these objectives and indeed that they are designed to "separate offenders from society, where necessary". I view the prohibitions as designed to protect the public, and in particular, children, from sexual offences and offenders. It need hardly be said that the Internet has enabled the production and distribution of child pornography: see *R. v. D.G.F.* 2010 ONCA 27 at paras. 21-2. Barring offenders from contact with children and from use (or abuse) of the Internet is, I believe, an important protective measure. Many courts have made the distinction between punishment and protection of the public. In *R. v. Dyck* 2008 ONCA 309, for example, the Court found that "Christopher's Law", which created a provincial counterpart of SOIRA, was not punitive. The Court reasoned that:

Here, the trial judge found that Christopher's Law is not in pith and substance punitive legislation. The summary conviction appeal court judge agreed, as do I. The requirement to report and register with police is not a sanction imposed in furtherance of the purpose and principles of sentencing for the index offence. Nor is it a "true penal consequence": see *Wigglesworth* at 559. Rather, it is a protective measure designed to safeguard the public from recidivist sex offenders and to equip the police with an important investigative tool. [At para. 80; emphasis added.]

[97] Similarly, in *R. v. L.M.* 2008 2 S.C.R. 163, the issue was the proper characterization of the community supervision aspects of a long-term offender designation. Although such orders arguably carried a stigma and restricted the liberty of such offenders, it was held that they were not punitive as they were concerned with protecting the public. In the analysis of the majority:

This Court has held that the procedure for finding an offender to be a dangerous offender forms part of the sentencing process Can it be said that the procedure for finding an offender to be a long-term offender also forms part of the sentencing process? Obviously, since the sentencing judge is the same judge who would make the order so finding. However, the similarities between that finding and a sentencing proceeding end there.

These two types of decisions can be distinguished on the basis of the objectives and methods, and certain technical aspects, of the sentencing process. The principal objective of a prison sentence is punishment, although the sentence must be determined in accordance with the principles set out in the Criminal Code. On the other hand, the objectives of and rationale for the supervision of an offender in the community are to ensure that the offender does not reoffend and to protect the public during a period of supervised reintegration into society. The British Columbia Court of Appeal mentioned this distinction in a recent judgment:

The fixed sentence and supervision orders focus on two different goals: the former on punishment for the predicate offence, the latter on prevention of future criminal conduct. In the latter the predicate offence plays a relevant role as an indicator of risk.

[At paras. 45-6; emphasis added.]

[98] In my respectful view, similar reasoning applies in this case to s. 161(c) and (d). It also bears emphasizing that these provisions are discretionary, requiring only that the court "consider making" an order. The orders can be imposed for life or a shorter period, and may be varied under s. 161(3) on application of the offender or the Crown. They may be imposed either at the time of sentencing or at the time of discharge. They may be tailored to apply to specific locations or circumstances in which there is a risk of committing a particular crime against children by a sexual offender. As the Crown also emphasizes, the case law indicates that an order under s. 161(1) should be made only where there is a serious risk to the safety of a child under the age of 16 after the offender is released, treated or discharged. Thus the Alberta Court of Appeal stated in *R. v. R.K.A.* 2006 ABCA 82:

Section 161 was drafted in response to concerns that restrictions on liberty not be over-broad and thereby infringe s. 7 of the Charter. As a result, the prohibitions are rationally connected to the purpose of protecting children from sexual offences by limiting the prohibition to those places and activities where children are expected to be: see Heywood at paras. 53-65. The section also prevents over-broad application in terms of time by providing for a review or variation of the prohibition: Heywood at para. 57. Its overarching purpose is public protection. [At para. 16; emphasis added.]

- [99] Keeping in mind these features of s. 161, it is my view that subparas. (c) and (d) were enacted to protect the public rather than "in furtherance of" punishment, and that although they impose consequences that may be felt to be "unpleasant", they are not punitive in effect.
- [100] I acknowledge that s. 161(1) states that the court may consider making one of the impugned orders "in addition to any other punishment that may be imposed". However, the phrase "or any other condition prescribed in the order of discharge" also appears immediately after the quoted clause. This case does not, of course, concern an order of discharge, but there is no reason in principle why the intention behind the restrictions should change depending on whether they are being imposed as part of a discharge or as part of a sentence. In any event, the focus must in my view be on the fundamental nature of the restrictions at issue.
- [101] In the result, I would allow the Crown's appeal and impose the conditions in s. 161(c) and (d) of the Code for a term of seven years. I would also, like my colleague, allow Mr. J.'s appeal to the extent only of increasing his credit for time spent in pre-sentence custody to 428 days.

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Madam Justice Kirkpatrick"

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