
CANADA / JUDGMENT

R. v. S.C.W.

2020 BCCA 377

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 377 R. v. S.C.W.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. S.C.W.,

2020 BCCA 377

Date: 20201229

Docket: CA46432

Between:

Regina

Respondent

And

S.C.W.

Appellant

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Before:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Willcock

The Honourable Mr. Justice Butler

On appeal from: An order of the Provincial Court of British Columbia, dated
September 11, 2019 (R. v. S.C.W., Kelowna Docket 77979-4-C).

Counsel for the Appellant
(via videoconference):

D.J. McNamee

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(via videoconference):

C. Lusk

Place and Date of Hearing:

Vancouver, British Columbia

July 15, 2020

Place and Date of Judgment:

Vancouver, British Columbia

December 29, 2020

Written Reasons by:

The Honourable Mr. Justice Butler

Concurred in by:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Willcock

Summary:

After unsuccessful appeals of his conviction and sentence for sexual interference and making child pornography, the appellant applied to vary s. 161(1) orders made at the time of sentencing. He applied under s. 161(1)(c) to appoint his partner, the mother of his young daughter, as an appropriate person to supervise his contact with the daughter. He also applied to vary the Internet prohibition under s. 161(1)(d). The sentencing judge dismissed the application to appoint the mother as supervisor and varied the Internet prohibition to allow the appellant to access the Internet on a device used for work or with an RCMP-approved program. On appeal, the Crown argued that the Court does not have jurisdiction to review the judge's refusal to vary the s. 161(1)(c) order. Held: Appeal allowed in part. The Crown's jurisdiction argument is rejected. The order dismissing the application to appoint the mother as supervisor of contact is upheld. That order is not demonstrably unfit as the application was premature and the judge did not err in concluding

that there was insufficient information to permit the court to craft an order that would adequately protect the child against the risk of sexual violence. The appeal of the Internet prohibition was varied to permit him to use the Internet on condition that he not use it to communicate with a person under the age of 16 years and that he not access pornography.

Reasons for Judgment of the Honourable Mr. Justice Butler:

Introduction

- [1] This appeal concerns the terms of an order made pursuant to s. 161 of the Criminal Code, R.S.C. 1985, c. C-46 after the appellant pleaded guilty to sexual interference with a person under 16 years of age and making child pornography. The appellant sexually abused his stepdaughter over the course of more than a year from 2011 to 2012, when she was 10 and 11 years old. In the reasons for the order from which this appeal is brought (the "Reasons"), the sentencing judge described the offences as "depraved and loathsome". He noted that the stepdaughter was rendered suicidal and that the offences arose "from a fundamental breach of parental trust."
- [2] In 2014, following his arrest, the appellant started dating A.K. They began to cohabit in 2015 when the appellant was on bail awaiting sentencing. In early 2016, their daughter was born. The appellant's bail conditions were varied to permit him to reside with A.K. and their daughter. He did so until he was sentenced.
- [3] On December 30, 2016, the appellant was sentenced to seven years' imprisonment for the offences. The judge also imposed 20-year prohibition orders pursuant to s. 161(1) of the Criminal Code, which would take effect upon the appellant's release from imprisonment. The order made under s. 161(1)(c) prohibits the appellant from having any contact with a person under the age of 16 "unless [he] does so under the supervision of a person whom the court considers appropriate." Without variation, and unless someone is appointed as a supervisor, that order prevents the appellant from having any contact with his biological daughter. The s. 161(1)(d) order prohibits the appellant from using the Internet or other digital network unless he does so in accordance with conditions set by the court. No conditions were set at the time of sentencing.
- [4] In *R. v. S.C.W.*, 2019 BCCA 405, this Court dismissed the appellant's appeal from sentence, which challenged his prison term. He did not appeal the s. 161(1) prohibition orders. On April 29, 2019, the appellant separately applied to vary the terms of the s. 161(1)(c) prohibition order to appoint his partner, A.K., as his supervisor to enable him to have contact with their daughter. A.K. supported the application and was willing to act as a supervisor and Crown consented. The appellant also applied to vary the s. 161(1)(d) prohibition on using the Internet.

- [5] On September 11, 2019, the sentencing judge denied the appellant's application to have A.K. designated as his supervisor. The judge varied the s. 161(1)(d) Internet prohibition to permit the appellant to "use the Internet or other digital network on a device used for work or a device with a RCMP approved program on the condition that while using the Internet or other digital network he will not access pornography": Reasons at para. 31.
- [6] The appellant seeks appellate review of both orders on the basis that the resulting sentence is demonstrably unfit. Despite its earlier consent to the appellant's application to appoint A.K. as a supervisor, the Crown now opposes the appeal. It takes the position that this Court does not have jurisdiction to review the judge's order dismissing the appellant's application to vary the order to appoint A.K. as a supervisor for contact with their daughter. If the Court does have jurisdiction and leave to appeal is granted, the Crown says the judge did not err in refusing to appoint A.K. as a supervisor under s. 161(1)(c) or in varying the s. 161(1)(d) Internet prohibition on the terms he prescribed. If the Court concludes that the sentence is demonstrably unfit, the Crown seeks to adduce new evidence in the form of various reports from the Correctional Service of Canada concerning the appellant's performance and assessment while in custody as well as an updated plan for his application for release on day parole.
- [7] For the reasons that follow, I would conclude that this Court has jurisdiction to hear the appeal and grant leave to hear the appeal of both orders. I would dismiss the appeal of the order designating A.K. as a supervisor in order to enable the appellant to have contact with their daughter at this time; however, it is open to the appellant to bring an application to vary the order at a later date if circumstances change. I would also dismiss the Crown's application to adduce new evidence. Finally, I would vary the Internet prohibition to allow the appellant to access the Internet or other digital network except for the purpose of communication with persons under the age of 16 and on condition that while using the Internet he not access pornography.

Reasons

- [8] The judge began the Reasons by observing:
- [2] [The appellant] applies to qualify [A.K.] as an appropriate supervisor under s. 161(1)(c) and fix conditions under which he can use the Internet pursuant to s. 161(1)(d). These are not applications to vary conditions of a s. 161 prohibition so do not require the proof of a change in circumstances.
- [9] The judge first considered whether A.K. was an appropriate person to supervise the appellant's contact with their daughter. The judge noted that in sentencing the appellant in 2016, he had found him to be unchanged from the time of the offences. The judge had concluded that the appellant was sexually aroused by prepubescent girls and rejected that he was a 'low risk to reoffend'. He found it inexplicable that the Correctional Service of Canada had classified the appellant as low risk and placed him at a minimum security

prison with no sexual offender programming: Reasons at para. 4.

[10] In his application to vary, the appellant relied on a psychological assessment prepared by Dr. Ronald La Torre, dated June 25, 2018. His report was based on a videoconference interview with the appellant and previous testing performed by Dr. Schweighofer, who had conducted an assessment of the appellant at the time of sentencing. In preparing their reports, both doctors relied on two risk assessment measures: the Static-99R and the Stable-2007. The judge summarized the risk assessments and compared the approaches taken by Dr. La Torre and Dr. Schweighofer in their application of the tests. He concluded at paras. 12-13:

At sentencing, I found the appellant had not changed from the time he committed the offences to the time he was tested by Dr. Schweighofer. I asked, "How can a person who is a low risk to reoffend repeatedly victimize a child in a sexual way?" That question remains unanswered.

Both tests are flawed. On the whole, I would dismiss the tests as unhelpful in establishing the risk of the appellant to reoffend.

[11] The judge explained why he did not accept the experts' opinions that the appellant's pedophilic interests were secondary to his primary sexual interest in adult females. In particular, he was concerned about the number of times he had offended against the victim. He also expressed concern that the appellant had been unable to take sexual offender programs recommended by Dr. Schweighofer. The judge was particularly concerned at the appellant's lack of insight into his offences, stating at para. 20:

[The appellant] recognized no wrong, no harm, no inappropriateness, no remorse, and not the slightest hint of compassion. Dr. Schweighofer observed that [the appellant] lacked insight regarding his offence dynamics and he failed to fully acknowledge and take responsibility for his offence.

[12] At paras. 25 and 26, the judge referred to two findings in Dr. La Torre's report that weighed against Dr. La Torre's own conclusion that the appellant was a low risk to reoffend:

If [the appellant] is placed in a similar situation again, [the appellant's] risk may be elevated. I suspect he remains attracted to the victim.

[The appellant] should be monitored when released to the community with respect to any contact with children or other vulnerable individuals. If he is not primarily attracted to children, then he is attracted to those who are vulnerable or whom he can render vulnerable. I would recommend a detailed community assessment of his partner, [A.K.] and there should be a report to the local ministry responsible for the protection of children in regards to his child particularly as he intends to seek a variance of his conditions of no contact that currently applies to that child as well as others.

[Emphasis added.]

With regard to the latter observation, the material before the judge did not include any information from the local ministry responsible for children or any form of community assessment.

[13] Turning to whether A.K. was an appropriate person to supervise contact with their child, the judge questioned A.K.'s judgment in commencing a relationship with the appellant given the nature of his offences. The judge found her submission that she could supervise the appellant's contact with their child 24 hours a day, seven days a week to be "unrealistic": Reasons at paras. 28-29. He concluded at para. 30:

A person who does [not] believe the person she must supervise is a risk will not be vigilant. More importantly, the proposed appointment would put [A.K.] in an impossible conflict between her desire to continue a relationship with [the appellant] and her duty to protect her child. Even though Crown consents to this application, I cannot find that [A.K.] would be an appropriate supervisor. I dismiss that application.

[14] Turning to the application to vary the Internet prohibition under s. 161(1)(d), the judge acknowledged that the Crown also consented to that application. The judge varied the prohibition to permit the appellant to use the Internet or other digital network on a device used for work or a device with an RCMP-approved program on the condition that he not access pornography.

Statutory Framework

[15] The relevant provisions of s. 161 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

...

- (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.

- (3) A court that makes an order of prohibition may, on application of the offender or the prosecutor, require the offender to appear before it at any time and, after hearing the parties, that court may vary the conditions prescribed in the order if, in the opinion of the court, the variation is desirable because of changed circumstances after the conditions were prescribed.

[Emphasis added.]

[16] For the purpose of Part XXI of the Code, "sentence" is defined in s. 673 to include:

- (a) a declaration made under subsection 199(3),
- (b) an order made under subsection 109(1) or 110(1), section 161, subsection 164.2(1) or 194(1), section 259, 261 or 462.37, subsection 491.1(2), 730(1) or 737(2.1) or (3) or section 738, 739, 742.1, 742.3, 743.6, 745.4 or 745.5,
- (c) a disposition made under section 731 or 732 or subsection 732.2(3) or (5), 742.4(3) or 742.6(9),

[Emphasis added.]

[17] Section 675 gives an offender a right of appeal against sentence with leave:

675 (1) A person who is convicted by a trial court in proceedings by indictment may appeal to the court of appeal

- (b) against the sentence passed by the trial court, with leave of the court of appeal or a judge thereof unless that sentence is one fixed by law.

Discussion and Analysis

[18] I first consider whether this Court has jurisdiction to hear the appeal. I conclude that it does and grant leave to appeal under s. 675(1)(b). I then consider the substance of the appeals: whether the judge erred in refusing to appoint A.K. as a supervisor under s. 161(1)(c) and in varying his s. 161(1)(d) Internet prohibition on the terms that he did.

Does this Court have jurisdiction to hear the appeal?

Crown's position

[19] The Crown's argument on jurisdiction is directed at the appeal of the judge's refusal to appoint A.K. as an appropriate supervisor under s. 161(1)(c). The Crown's argument is two-tiered. First, it argues that the application before the judge was an "invocation" of the original order. Under the original terms of the order, the appellant could have contact with a person under the age of 16 only if such contact was "under the supervision of a person whom the court considers appropriate." It says the application before the judge was merely invoking the original terms of the s. 161(1)(c) order by asking the court to designate A.K. as a supervisor. It notes that the judge's order did not formally dismiss or make any other provision with respect to the appellant's application. It says the appellant did have the right

to appeal the order when it was first made but he did not do so. The Crown says his application "invoking" the order does not renew his right to appeal.

- [20] Alternatively, the Crown argues that while there is clearly a statutory right of appeal against the original s. 161 orders imposed as part of the appellant's sentence, there is no right of appeal in the Code from the judge's subsequent refusal to vary the order to appoint A.K. as a supervisor.
- [21] The Crown notes that s. 675(1)(b) provides a right to appeal "against the sentence passed by the trial court". However, it argues that variation under s. 161(3) is not mentioned in the inclusive list of "sentences" in s. 673 for which an appellant has a right of appeal. To advance this argument, the Crown says that s. 673 must be read as a whole. The Crown says that even though a "sentence" is defined to include an "order made under section 161", s. 673 draws a distinction between an "order" and a "disposition". It argues that a decision by a judge to vary (or not vary) a s. 161 order is a disposition, akin to a "disposition made" under s. 732.2(3) (varying probation conditions) and s. 742.4(3) (varying CSO conditions). These "dispositions" are expressly listed as such in s. 673(c). The Crown argues that since s. 673 does not define a "disposition" under s. 161(3) as a "sentence", and it is not otherwise included in the list of sentences in that section, it is not appealable pursuant to s. 675(1)(b).

Appellant's position

- [22] The appellant submits it does not matter whether the appeal concerns an original s. 161(1) (c) order or a subsequent application to vary the terms of that order under s. 161(3): both are appealable. He applied for an order varying the s. 161 order pursuant to s. 161(3). The judge's denial of his application to appoint A.K. as a supervisor and the partial variance of his Internet prohibition results in a "sentence" against which he has a right of appeal, with leave, under s. 675(1)(b).
- [23] The appellant notes that the list of appealable sentences in s. 673 includes an order made under s. 161 and that the Parliament did not parse s. 161(3) from s. 161(1) in the definition of "sentence". This means that the Parliament intended that any order made under s. 161 could be reviewed by an appellate court with leave pursuant to s. 675(1)(b).
- [24] The appellant says that the variation he applied for is fundamentally different from the original s. 161 order made as part of the sentence. Under the current order, he can have no contact with any child under the age of 16. If his application is granted, he would be able to have supervised contact with his daughter. He argues that the Code provisions should not be interpreted in a way that does not permit an offender to appeal an order that has the potential to affect him in such a significant way.

Analysis

[25] It is not controversial that the court was required at the time of sentencing to consider making a prohibition order under s. 161(1)(c) because the appellant was convicted of offences enumerated in s. 161(1.1); specifically, sexual interference contrary to s. 151 and making child pornography contrary to s. 163.1(2). The s. 161(1)(c) order was made in the standard form, including a term:

Prohibiting the offender from having 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.

At the time of sentencing, no order was made appointing an appropriate supervisor.

[26] I am of the view that the Crown's statutory interpretation argument--that the judge's order is a "disposition" under s. 161(3) and is therefore not appealable--is not supported by the statutory language. Parliament chose to include all orders made under s. 161 when defining orders included as a "sentence" in s. 673. These orders have a corresponding right of appeal under s. 675(1)(b). Some of the provisions listed in the definition of "sentence" in s. 673 refer to specific subsections; for other provisions, the entire section is included in the definition of "sentence". Where Parliament wanted to grant a right of appeal from sentences rendered pursuant to specific subsections in the list of appealable sentences, it did so. Similarly, where it intended to grant a right of appeal from sentences that could be imposed pursuant to a particular section of the Code, it chose to include the entire section in the list of appealable sentences. Since the Parliament did not distinguish between original orders made under s. 161(1) or orders to vary under s. 161(3), it is not appropriate for this Court to introduce such a distinction.

[27] This is consistent with this Court's position as set out in *R. v. Williams*, 2019 BCCA 295 [Williams No. 1] (remanded to this Court per [2019] S.C.C.A. No. 270, rev'd on other grounds 2020 BCCA 286 [Williams No. 2]):

[95] Orders made under s. 161 are part of the offender's sentence: Code, s. 673 "sentence". As such, the same principles of appellate review apply. They cannot be varied except where they are demonstrably unfit or the result of an error that impacted their imposition.

[Emphasis added.]

[28] Further, even though the order does not specifically state that the judge dismissed the appellant's application to appoint A.K. as a supervisor, examination of the procedure that led to the decision and the decision itself makes it clear that he made such an order. The appellant brought his application under s. 161(3) by way of a formal notice of application. He informed the Court and the Crown of his intention to have A.K. appointed as a supervisor. He produced evidence in support of his application. A.K. and A.K.'s mother filed affidavits to support the appellant's application to have A.K. appointed as a supervisor. The application was heard by a judge, the same judge who sentenced the appellant in 2016. Counsel for the

appellant and the respondent each made submissions. Finally, the judge, as he was required to do, considered whether to grant the application in light of the evidence and the circumstances before him. He concluded as follows:

[30] Even though Crown consents to this application, I cannot find that [A.K.] would be an appropriate supervisor. I dismiss that application.

[Emphasis added.]

[29] I note that while the judge stated that the application was not brought under s. 161(3), the appellant's notice of application specifically invoked s. 161(3) as the legal basis for the order sought. The Crown, in its response materials, acknowledged that the Court had jurisdiction to vary the s. 161 order "both by virtue of the terms of the Order itself (in which the court retains the jurisdiction to approve of a supervisor), and on account of changed circumstances after the conditions were prescribed pursuant to s. 161(3) of the Criminal Code." On appeal, the appellant affirms that he applied to vary the order pursuant to s. 161(3). The Crown similarly treats the judge's order as a variation made under s. 161(3).

[30] In my view, the jurisdiction of this Court to consider an appeal is not dependent on whether the appellant's application was expressly contemplated by a term of the order itself or as a variation of a fully defined term of that order. Both types of applications would involve the making of an order under s. 161. Any order made under s. 161 is expressly defined as a "sentence" (in s. 673) for which there is a statutory right of appeal (in s. 675(1)(b)). Here, the judge ordered that the appellant's application to appoint A.K. as a supervisor be dismissed and the Internet prohibition varied. The appellant has a right, with leave, to have this Court review both decisions.

[31] Finally, as noted by the appellant's counsel in his submissions to this Court, preserving an appellate avenue for applications to appoint a person as a supervisor pursuant to a s. 161(1)(c) order is also of benefit to the Crown. If this Court were to accept the Crown's position, it would be precluded from appealing a decision similar to the one by the trial judge but ending in a result it did not favour. It does not make sense for such decisions--whether varying or refusing to vary the designation of a supervisor for contact with persons under the age of 16--to be shielded from appellate review.

[32] I conclude this Court has the jurisdiction to review, where leave is granted, the judge's denial of the appellant's application to have A.K. appointed as supervisor pursuant to s. 161(1)(c). I would grant leave to appeal under s. 675(1)(b) and will review the orders and the resulting sentence accordingly.

Did the judge err in dismissing the application to appoint A.K. as a supervisor under section 161(1)(c)?

Standard of review

- [33] The principles applicable to the standard of review were recently summarized in *R. v. Friesen*, 2020 SCC 9. An appellate court may intervene only where a sentence is demonstrably unfit, or the sentencing judge made an error in principle that has any impact on the sentence:
- [25] Appellate courts must generally defer to sentencing judges' decisions. The sentencing judge sees and hears all the evidence and the submissions in person (*R. v. Lacasse*, 2015 SCC 64], at para. 48; *R. v. Shropshire*, [1995] 4 S.C.R. 227, at para. 46). The sentencing judge has regular front-line experience and usually has experience with the particular circumstances and needs of the community where the crime was committed (*Lacasse*, at para. 48; *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 91). Finally, to avoid delay and the misuse of judicial resources, an appellate court should only substitute its own decision for a sentencing judge's for good reason (*Lacasse*, at para. 48; *R. v. Ramage*, 2010 ONCA 488, 257 C.C.C. (3d) 261, at para. 70).
- [26] As this Court confirmed in *Lacasse*, an appellate court can only intervene to vary a sentence if (1) the sentence is demonstrably unfit (para. 41), or (2) the sentencing judge made an error in principle that had an impact on the sentence (para. 44). Errors in principle include an error of law, a failure to consider a relevant factor, or erroneous consideration of an aggravating or mitigating factor. The weighing or balancing of factors can form an error in principle "[o]nly if by emphasizing one factor or by not giving enough weight to another, the trial judge exercises his or her discretion unreasonably" (*R. v. McKnight* (1999), 135 C.C.C. (3d) 41 (Ont. C.A.), at para. 35, cited in *Lacasse*, at para. 49). Not every error in principle is material: an appellate court can only intervene if it is apparent from the trial judge's reasons that the error had an impact on the sentence (*Lacasse*, at para. 44). If an error in principle had no impact on the sentence, that is the end of the error in principle analysis and appellate intervention is justified only if the sentence is demonstrably unfit.

[Emphasis added.]

- [34] Where the sentencing judge makes an error in principle that has an impact on the sentence, the appellate court must perform its own analysis to determine a fit sentence. In doing so, the appellate court must defer to the sentencing judge's findings of fact to the extent that they are not affected by an error in principle: *Friesen* at paras. 27-28. As noted in *Williams No. 1*, the same principles of appellate review apply to an order made under s. 161: at para. 95.

Appellant's position

- [35] The appellant submits that the judge's order dismissing his application to appoint A.K. as an appropriate supervisor resulted in a demonstrably unfit sentence. First, the appellant says the evidence clearly established that A.K. is a responsible person who would be appropriate to supervise contact between the appellant and their daughter. Not only is she the mother of

the child, but she has full knowledge of the appellant's offending history. She attended at the hearing and was questioned at length by the judge about her knowledge of the circumstances of the offence.

- [36] The appellant notes that the Crown did not oppose his application to appoint A.K. as the supervisor; indeed, the Crown and defence presented a joint recommendation. Crown counsel advised the court at the hearing of the application that she had been dealing personally with A.K. for two years and did not have any concerns about her appropriateness to act as a supervisor.
- [37] The appellant argues that the judge erred in law or principle in making adverse findings about A.K.'s character and suitability as a supervisor. He says the judge's conclusions were made on irrelevant factors, including finding that her appointment would put her in a position of "impossible conflict" between her desire to continue a relationship with the appellant and her duty to protect her child.
- [38] While there are no authorities specifically dealing with applications to appoint an appropriate supervisor pursuant to s. 161(1)(c), the appellant cites *R. v. Athey*, 2017 BCCA 350 and *R. v. Mansour*, 2018 BCPC 250 as cases in which courts have granted offenders in the appellant's position the right to have contact with children in their immediate families without supervision.

Crown's position

- [39] The Crown acknowledges that it now takes a different position on the appointment of A.K. as a supervisor from the position it took at the application hearing. However, it says that this Court should not interfere with the judge's order because the appellant cannot establish that the resulting "sentence" is demonstrably unfit or that the judge erred in principle in a way that impacted the terms of the sentence. The Crown stresses that the decision to refuse the variation application was discretionary and emphasizes the high degree of deference owed to the judge's decision absent any error in principle.
- [40] The Crown submits that while the judge was incorrect in stating that the appellant's application did not require him to prove a change in circumstances, this error was to the appellant's benefit such that it could not have had any impact on the decision. The Crown also acknowledges the judge's questioning of A.K.'s judgment in entering a relationship with the appellant and his statement that she was in an "impossible conflict" was "perhaps troubling". However, the Crown submits that even if these were irrelevant factors, it is evident from the reasons as a whole that the judge would have refused the variation at the time of the application. This is because the appellant had yet to attend sex offender counselling, had yet to take responsibility for his actions, and had failed to put forward any evidence of community assessment or ministry involvement for his release plan. In addition, the Crown stresses that the judge was entitled to reject the "low risk" assessment. This is particularly the case as Dr. La Torre's report acknowledged the potential for an

elevated risk if the appellant is placed in a similar situation again.

- [41] The Crown also acknowledges that the judge's ruling would be problematic if the denial of the variation application were intended to be permanent. However, the Crown says that was not the intent of the order. Rather, the judge determined that it was inappropriate to vary the order to approve A.K. as supervisor at that time, when it was unknown what the appellant's living arrangements would be at the time of his release. The Crown took the position at the hearing of the application that conditions regarding the appellant's living and contact arrangements could be imposed as parole conditions. The Crown says the judge understood that position and did not intend to foreclose a future application to vary.
- [42] In the alternative, the Crown says that if this Court determines that the judge erred in principle and undertakes its own fitness assessment, the new evidence should be admitted and considered. This is because the application proceeded on the basis that the appellant had yet to have an opportunity for sex offender programming. Subsequent to the hearing, the appellant began attendance at such a program in November 2019. Further, a community assessment has been done in which the assessor noted A.K.'s acknowledgement of the significant harm caused by the appellant's offending. The assessor also recommended that if A.K. is appointed a supervisor for contact, Child Family Services should be involved to ensure appropriate safety precautions are in place, especially as A.K. was unable to say what safety precautions she herself might take.

Analysis

- [43] As I will explain below, I am of the view the judge erred in principle by focusing on an irrelevant matter--the "impossible conflict" arising from A.K.'s relationship with the appellant--when deciding whether she was an appropriate person to supervise contact between the appellant and his child. Nevertheless, I conclude that this error did not impact the judge's refusal to grant the variation sought. This is for two related reasons: first, it was evident that the application was premature; and second, the judge properly considered other relevant factors which would have led to the same decision even without his concerns about A.K.
- [44] The appellant's application was premature in the sense that the judge had insufficient information about the terms of the appellant's release on probation into the community or details of the proposed contact between him and his child. Without that information, it would not have been appropriate to designate A.K. as an appropriate supervisor without any conditions attached.
- [45] Section 161 has an "overarching protective function: to shield children from sexual violence": *R. v. K.R.J.*, 2016 SCC 31 at para. 44. Orders imposed under that section have been held to constitute punishment: *K.R.J.* at para. 49; *Athey* at para. 41.

- [46] As explained in *K.R.J.*, s. 161 orders should be carefully tailored to the conditions of the offender and must address the nature and risk posed to children once the offender is released into the community:
- [47] As well, the design of s. 161 is consistent with its purpose of protecting children from sexual violence. Section 161 orders are discretionary and "subject to the conditions or exemptions that the court directs" (s. 161(1)). They can therefore be carefully tailored to the circumstances of a particular offender. The discretionary and flexible nature of s. 161 demonstrates that it was designed to empower courts to craft tailored orders to address the nature and degree of risk that a sexual offender poses to children once released into the community. Failure to comply with the order can lead to a term of imprisonment of up to four years (s. 161(4)).
- [48] Further, I agree with the line of cases holding that s. 161 orders can be imposed only when there is an evidentiary basis upon which to conclude that the particular offender poses a risk to children and the judge is satisfied that the specific terms of the order are a reasonable attempt to minimize the risk: see *A. (R.K.)*, at para. 32; see also *R. v. R.R.B.*, 2013 BCCA 224, 338 B.C.A.C. 106, at paras. 32-34. These orders are not available as a matter of course. In addition, the content of the order must carefully respond to an offender's specific circumstances.

[Emphasis added.]

- [47] We have not been referred to decisions where courts have considered s. 161(3) applications where an offender seeks to have contact with his own children. In some cases, exceptions have been granted under s. 161(1)(c) to permit offenders to communicate with their own children or family members without supervision. However, there are no cases considering the particular circumstances before this Court.
- [48] In *R. v. R.R.B.*, 2013 BCCA 224, an appeal was allowed reducing the duration of an order under s. 161(1)(c) to three years because the 20-year prohibition that had been imposed was excessive in the circumstances. In addition, the order was varied to permit the offender to communicate with his own children because, "there was no basis for the prohibition order to apply to communications between R.R.B. and his children": at para. 32.
- [49] In *R. v. Brar*, 2016 ONCA 724, the s. 161(1)(c) order excepted "immediate family members", though the offender himself did not at the time have children. In *Athey*, the sentencing judge made exceptions for contact with the offender's own children, but that exception was not in issue on appeal. Justice Newbury stated at para. 49:

As far as the merits are concerned, the Crown points out that Dr. Stangeland recommended that Mr. Athey be restricted from any form of unsupervised access to children under the age of 16, subject to an exception for his children. The sentencing judge left it to Mr. Athey, at the appropriate time, to apply to court for the appointment of a "person whom the court considers appropriate" to supervise any contact he may have with other young people. Again, an exception

should be made in respect of contact with his own children. Subject to that, I am not persuaded the orders under paras. (a), (b) or (c) were the results of error or otherwise inappropriate.

[Emphasis added.]

[50] The recent decision in *R. v. L.S.N.*, 2020 BCCA 109 provides some guidance on how to approach the issue before this Court. In *L.S.N.*, the offender engaged in three instances of sexual touching of his stepdaughter when she was 11 years old. The Crown sought a s. 161(1)(c) order prohibiting any contact with a person under 16 unless the offender was in the supervision of someone over the age of 18 who was aware of the order. The sentencing judge imposed a three-year probation order that included a no-contact provision for his non-biological children. However, the sentencing judge declined to make any order under s. 161. He was not persuaded that the offender posed a risk to children generally or that a broad-ranging order was necessary: *R. v. L.S.N.*, 2019 BCSC 1619 at paras. 68-70.

[51] On appeal, the Court rejected the lower court's conclusion that the offender posed no risk of sexually reoffending against children. This was contrary to common sense, the judge's own order requiring the offender to take a sex offender treatment program, and the order prohibiting contact with his stepchildren. Justice Fitch explained at para. 92:

The respondent's evidence is incapable of supporting a conclusion that he poses no risk to children. To the contrary, it supports a conclusion that the respondent does have a deviant sexual interest in children. Further, the respondent's evidence raises concerns about the risk he poses to his biological children and step-children. Although he disclaimed any sexual interest in his own children, by offending against the victim in this case he violated the sexual integrity of a person he considered to be his own child.

[52] The Court found that the sentencing judge's exercise of discretion was unreasonable and imposed a s. 161 order accordingly:

[100] To guard against the risk of re-offence in this particular context, I would impose an order under s. 161(1)(c) prohibiting the respondent from being alone in the presence of any person he knows to be or who reasonably appears to be under the age of 16 years, unless he is in the immediate and continuous presence of someone over the age of 18 who is aware of the existence of this order. I would impose this order for a period of 10 years. It is, of course, subject to variation on application made pursuant to s. 161(3) of the Code.

[Emphasis added.]

[53] The essential principle to take from *K.R.J.*, *Athey*, and *L.S.N.* is that in each case, the circumstances of the offender and of the proposed contact with children must be examined carefully in order to tailor an order that properly takes into account the nature and degree of risk. Those circumstances will include the nature of the risk posed by the offender; the character and qualifications of the proposed supervisor; the relationship of the proposed supervisor to the offender; and details about the duration, frequency and particulars of the proposed contact. Where the contact proposed is close and extensive, as it is here, care must

be taken to craft an order with conditions that will satisfy the overarching protective function of s. 161.

- [54] As I have indicated, I am of the view that the judge erred in one respect in considering the appellant's application. He appears to have questioned A.K.'s judgement based on the fact that she commenced a relationship with the appellant when he was charged with a serious sexual offence against a child and remained in that relationship knowing of the details of the offence. Although it is not entirely clear from the Reasons, it appears the judge was of the view that A.K.'s decision to commence this relationship disqualified her as an appropriate supervisor because of the "impossible conflict" between her role as mother and her desire to continue the relationship.
- [55] If the judge arrived at that conclusion for that reason, it was based on a broad generalization rather than on relevant considerations. To apply that logic would mean that it would not be possible for any mother to be an appropriate supervisor under s. 161(1)(c) when she was in a relationship with a sexual offender. In similarly general terms, it would also be possible to reason that the opposite conclusion is correct: a mother would always be an appropriate supervisor of contact between her child and a sexual offender. Obviously, any such generalization is irrelevant to determining the appropriateness of a supervisor.
- [56] However, I am of the view that the judge's error in approach did not impact his decision. The judge properly considered other factors that were relevant: the appellant's risk of reoffending sexually; his lack of sex offender counselling; the lack of any specific plan governing the appellant's contact with the child; the lack of reports from relevant ministry officials in Alberta or a community assessment; and the appellant's continued victim-blaming and apparent lack of remorse.
- [57] Similar to the approach taken by Justice Fitch in *L.S.N.*, the judge applied "common sense" to find there was sufficient evidence to support a conclusion that the appellant has a deviant sexual interest in children and posed some risk, not only to his former stepdaughter but potentially to others, including his own children. The judge properly considered the expert evidence and was entitled to focus on Dr. La Torre's concern that if the appellant was placed in a similar situation, his risk of reoffending might be elevated. He was also entitled to view the proposed contact plan as unrealistic. The only proposal before the court was to approve A.K. as an appropriate supervisor. The application sought to permit the appellant to commence cohabitation with A.K. and their daughter upon his release on parole. Without further exploration by the parole office and appropriate authorities such a situation was, as the judge observed, impractical and unrealistic. As Dr. La Torre noted in his report, the appellant needs to be monitored when released into the community with respect to contact with children and a "detailed community assessment of his partner" should be presented to the court on any application to vary the order.

- [58] In my view, the judge recognized the shortcomings of the application. It was not sufficient for the appellant merely to propose a supervisor. Given the nature of the risk, it would have been inappropriate to grant the order without further details on the nature and extent of the proposed contact. The Crown appears to have recognized this even though it did not initially oppose the application. The Crown accepted that further conditions would be imposed at the time of the appellant's release by the parole office and perhaps by the Ministry for child services. However, in the absence of specific proposed conditions, it would not be possible to determine if the supervision was appropriate. This is particularly true in light of the degree of potential harm.
- [59] To put it another way, the difficulty with the appellant's application is that it was brought at the wrong time and on the basis of inadequate information. As Justice Newbury noted in *Athey*, the onus was on the offender to apply "at the appropriate time" for the appointment of a supervisor: at para. 49. To expand that observation somewhat, I would say that s. 161(1)(c) requires a sexual offender to apply at the appropriate time for the appointment of an appropriate person to act as supervisor taking into account the circumstances of the proposed contact with a child or children generally. Where, as here, the circumstances have the added complication of a proposed continuing relationship with the mother of a young child (whether or not it is the offender's child) particular care will have to be taken to manage the proposed contact.
- [60] Last, to the extent that the judge erred in finding that a change of circumstances was not required because it was not an application to vary, this error was to the appellant's benefit. Even on the judge's apparently lower standard--which did not require proof of a change of circumstances--the judge rejected the appellant's application to appoint A.K. as a supervisor.
- [61] In summary, I would dismiss the appeal of the judge's refusal to vary the s. 161(1)(c) condition to appoint A.K. as a supervisor. That dismissal is without prejudice to the appellant's ability to reapply for a variation under s. 161(3) at the appropriate time for the appointment of an appropriate supervisor based on a change of circumstances. This may be the case if the evidence to support the application is sufficient to allow a judge to make an order with conditions that will adequately protect the child from the risk of sexual violence.

New evidence

- [62] Because I have concluded that the judge did not err in refusing to grant A.K. as an appropriate supervisor, I need not consider the new evidence which the Crown seeks to adduce. That evidence appears to demonstrate that following the judge's order in September 2019, the Correctional Service of Canada determined that the appellant met the override criteria which qualified him to begin attendance at a sex offender program, which he began in November 2019. Further, the evidence suggests that a community assessment has also now been done, although as the Crown notes, A.K. was still not able to identify safety precautions she would take to protect her daughter. Such evidence will be relevant to any future application to vary the s. 161(1)(c) order, as will further details about the appellant's

release into the community or appropriate safety measures to be taken if and when they become known.

Is the section 161(1)(d) Internet prohibition demonstrably unfit?

[63] Under the terms of his original sentence imposed in 2016, the appellant was prohibited under s. 161(1)(d) from using the Internet or other digital network unless he did so in accordance with conditions set by the court. At the application hearing, the appellant and the Crown presented a joint recommendation to allow Internet access on a device used for work or on a device with an RCMP-approved program. During submissions, appellant's counsel indicated that it was possible to have a program installed on the appellant's devices that would monitor or restrict his Internet access and was approved by the RCMP. The judge accepted the availability of such a program and ordered that the appellant "may use the Internet or other digital network on a device used for work or on a device with an RCMP approved program on the condition that while using the Internet or other digital network he will not access pornography": Reasons at para. 31. However, the parties now advise that they are not aware of any such RCMP approved program.

Positions of the parties

- [64] The appellant now appeals, alleging that the terms of his Internet prohibition are overly strict and demonstrably unfit. He cites a number of authorities dealing with the appropriateness of Internet use restrictions in a modern and increasingly digital age. He notes that in *Brar*, the Court concluded that a similar prohibition on Internet use with an employment exception was demonstrably unfit and unreasonable in the circumstances. The appellant submits that his Internet use prohibition should be varied to read exactly as set out in *Williams No. 2*, in which the offender was prohibited from using the Internet or any other digital network for the purpose of communicating with a person under the age of 16 years with an exemption for immediate family members.
- [65] The Crown notes that without an RCMP program, the remainder of the s. 161(1)(d) order allows the appellant to use the Internet or other digital network on a device used for work on the condition that he will not access pornography. The Crown submits that this condition properly addresses the specific risks posed by the appellant. However, it recognizes the Internet is an increasingly indispensable part of everyday life, and notes that upon the appellant's release, the condition may prove too restrictive. As such, the Crown states that "if the appellant is released and the condition proves problematic, that would be information relevant to a new variation application".

Analysis

[66] In *Williams No. 2*, this Court considered whether a similar 20-year s. 161(1)(d) prohibition order was demonstrably unfit. The original prohibition prevented the offender from using the Internet or other digital network without approval of the Court. The Court held that this prohibition was overly broad and demonstrably unfit and varied it to read as follows at para. 77:

Pursuant to s. 161(1)(d) of the Criminal Code, you are prohibited from using the Internet or any other digital network for the purpose of communicating with a person under the age of 16 years, except for immediate family members, without approval from the court.

[67] In *Brar*, the Court considered a 20-year s. 161(1)(d) Internet prohibition. There, the offender had contacted teenaged children via social networks on the Internet for the purpose of luring them into having sexual relations with him. However, the Court noted that the existing order under s. 161(1)(c) prohibited any contact with youth via the Internet, for any purpose, except for immediate family members. With respect to a general Internet prohibition, the offender did not pose many of the risks that s. 161(1)(d) was enacted to prevent:

[22] The record, however, does not indicate that Mr. Brar posed many of the risks that s. 161(1)(d) was enacted to prevent. There is no allegation that he possessed or distributed child pornography, nor that he communicated or collaborated with other adults online to facilitate or plan his offences.

[68] As such, in addition to the order prohibiting the offender from using a computer system to communicate with a person under age 16, the Court imposed a somewhat limited Internet prohibition that prevented the offender from "accessing any illegal content and from participating in any manner in any social network, online forums or chat rooms": at para. 28.

[69] The Court stated that in modern life, at least some form of access to the Internet was unavoidable:

[24] In modern life, at least some form of access to the Internet is simply unavoidable for innocent purposes such as accessing services and finding directions. In many homes, the telephone operates using the Internet, rather than traditional telephone wires. Simply placing a phone call from one such residence would put the appellant in breach of the s. 161(1)(d) order. Further, as Karakatsanis J. stated in *J. (K.R.)* at para. 54, "depriving an offender under s. 161(1)(d) of access to the Internet is tantamount to severing that person from an increasingly indispensable component of everyday life". Internet is used for such commonplace activities as shopping, corresponding with friends and family, transacting business, finding employment, banking, reading the news, watching movies, attending classes and so on.

[Emphasis added.]

- [70] In *Athey*, this Court considered a 20-year s. 161(1)(d) prohibition against an offender convicted of inappropriate sexual contact with a minor and possession and making of child pornography. As in this case and *Williams No. 2*, his original sentence prohibited him from using the Internet or other digital network unless he did so in accordance with conditions set by the court. The Court noted the Supreme Court of Canada's comments in *K.R.J.* that s. 161(1)(d) orders have the potential to exclude offenders from an increasingly indispensable component of everyday life: at para. 46. The Court held that a 20-year prohibition was excessive and reduced the effective period to 10 years. It also varied the s. 161(1)(d) prohibition to allow the offender to use the Internet, if his employment required it, on digital equipment provided by the employer during his working hours for purposes of his employer's business: at para. 51.
- [71] I note that as varied, the Internet prohibition in *Athey* is nearly identical to that which is currently in effect in this case, which allows the appellant to use the Internet or other digital network "on a device used for work". The appellant submits that this Court's later decision in *Williams No. 2* should be given more weight than *Athey*, noting that the latter decision did not focus on the Internet restriction to the same extent.
- [72] As the Supreme Court of Canada noted in *K.R.J.*, access to the Internet has become almost essential for everyday life. The importance of the Internet as a tool for facilitating the activities of everyday life has been magnified in the past year by the COVID-19 pandemic. Most people have increased their use of and reliance on electronic devices to access the Internet for shopping, communicating with friends and family, conducting business, attending classes, banking, accessing news, music and entertainment. The Crown does not dispute this but simply argues that the appellant should bring a new variation application upon his release depending on his future plans.
- [73] I would reject the Crown's position and conclude that regardless of the appellant's future plans, the Internet is of sufficient importance and necessity in everyday life to make the current prohibition overly broad and thus demonstrably unfit. The condition that permitted the appellant to use "a device with a RCMP approved program" has no application. The other condition would restrict the appellant's ability to use the Internet and would prevent him from doing so if he did not possess or have access to a device that he used for work.
- [74] In the present case, the appellant was convicted of making child pornography in connection with his offences against his stepdaughter. He was not charged with the distribution of child pornography but there was evidence that he used the Internet to access stories involving incest and children. Dr. Schweighofer opined that it would be prudent to restrict the appellant's access to pornography. The judge accordingly included the term in the order prohibiting the appellant from using the Internet to access pornography. I see no error in the exercise of discretion to include that term.

- [75] Accordingly, I would vary the s. 161(1)(d) prohibition and tailor it to the circumstances of this case to prohibit the appellant from using the Internet for the purpose of communicating with a person under the age of 16 years and on condition that he not access pornography.
- [76] As with the s. 161(1)(c) order, this variation does not prevent the appellant from bringing a future application to vary if and when the circumstances of the appellant's release become better known. It may be justified to vary the s. 161(1)(d) order to include contact with his daughter, through an appropriate supervisor, over a digital network such as by cellular phone or text message. This would depend, again, on the circumstances of the appellant's release and the supervision that could be incorporated in such a term. At present, however, I decline to make an exception for immediate family members as in *Williams No. 2* and other cases given the nature of the appellant's offence. The prohibition against contact without an appropriate supervisor should apply to all contact, regardless of the method of communication.

Summary and Disposition

- [77] For the foregoing reasons, I conclude that this Court has jurisdiction to review the judge's orders and I would grant leave to appeal under s. 675(1)(b) of the Criminal Code.
- [78] I would dismiss the appellant's appeal of his application to appoint A.K. as an appropriate supervisor at this time. However, this is without prejudice to his ability to bring a similar application in the future if and when the circumstances of his release are better known and appropriate conditions can be put in place.
- [79] I would allow the appeal of the appellant's Internet prohibition under s. 161(1)(d) and amend it to read as follows:

Pursuant to s. 161(1)(d) of the Criminal Code, for a period of 20 years following his release the appellant is prohibited from using the Internet or any other digital network for the purpose of communicating with a person under the age of 16 years and on condition that while using the Internet or other digital network he not access pornography.

This, too, is without prejudice to the appellant's ability to vary the application in the future to facilitate contact with his daughter by digital means, depending on the circumstances and with appropriate supervision in place.

"The Honourable Mr. Justice Butler"

I AGREE:

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Mr. Justice Willcock"

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