

CANADA / JUDGMENT

R. v. Williams

2020 BCCA 286

COURT

British Columbia Court of Appeal

DECIDED

22 October 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCCA 286 R. v. Williams

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Williams,

2020 BCCA 286

Date: 20201022

Docket: CA45799

Between:

Regina

Respondent

And

Kyler Bryan David Williams

Appellant

Restriction on publication: A publication ban has been imposed under ss. 486.4(1) and 486.4(2) of the Criminal Code restricting the publication, broadcasting or transmission in any way of any information that could identify a complainant or a witness. This publication ban applies indefinitely unless otherwise ordered.

Before:

The Honourable Mr. Justice Butler

The Honourable Mr. Justice Abrioux

The Honourable Mr. Justice Grauer

On appeal from: An order of the Provincial Court of British Columbia, dated

October 19, 2018 (R. v. Williams, Surrey Docket 221083-1 and

Abbotsford Docket 87143-1K).

Counsel for the Appellant (via videoconference):

B. Zargarian

Counsel for the Respondent (via videoconference):

S. Elliott

Place and Date of Hearing:

Vancouver, British Columbia

August 21, 2020

Place and Date of Judgment:

Vancouver, British Columbia

October 22, 2020

Written Reasons by:

The Honourable Mr. Justice Abrioux

Concurred in by:

The Honourable Mr. Justice Butler

The Honourable Mr. Justice Grauer

Summary:

Mr. Williams pleaded guilty to two counts of sexual interference with a person under 16 years of age. The trial judge imposed a global sentence of six and a half years, less 18 months' credit for pre-sentence custody. He also imposed five 20-year prohibitions under s. 161 of the Criminal Code. Mr. Williams appealed his custodial sentence, the imposition of one of the prohibitions, the extent of another prohibition, and the duration of all four prohibitions. This Court allowed Mr. Williams' appeal, reduced his custodial sentence and also varied one prohibition and reduced the duration of others. The Crown sought leave to appeal to the Supreme Court of Canada, which remanded the case to this Court "for disposition in accordance with R. v. Friesen, 2020 SCC 9". Held: Appeal allowed in part. The appeal from the custodial sentence imposed by the sentencing judge is dismissed. The appeal from the s. 161 order is allowed to the extent of reducing the duration of certain of the prohibitions from 20 years to 10 years and modifying the Internet access prohibition imposed under s. 161(1)(d). The appellant is to complete the remainder of the

custodial term imposed by the sentencing judge.

Reasons for Judgment of the Honourable Mr. Justice Abrioux:

Introduction

- [1] On July 25, 2018, Kyler Williams pleaded guilty in the Provincial Court of British Columbia to two counts of sexual interference with a person under 16 years of age, contrary to s. 151 of the Criminal Code. The sentencing judge imposed a global sentence of seven and a half years in custody, being three and a half years with respect to the count relating to M.B. and four years consecutive on the other count in relation to N.D., each reduced by six months in accordance with the totality principle for a net sentence of six and a half years. He then applied 18 months' credit for pre-sentence custody, for an effective sentence of five years' imprisonment. He also imposed a prohibition order pursuant to s. 161 of the Code which contained five prohibitions.
- [2] In reasons for judgment indexed as 2019 BCCA 295 ("Williams #1"), this Court reduced the net custodial sentence to a total of four years, being one and a half years with respect to the count relating to M.B. and two and a half years consecutive on the count in relation to N.D. With pre-trial credit, the effective sentence was two and a half years in custody. The Court also varied the s. 161 prohibitions by reducing their duration to two years and by narrowing the scope of the s. 161(1)(d) prohibition which related to Internet access.
- [3] The Crown then sought leave to appeal Williams #1 to the Supreme Court of Canada. On May 7, 2020 by order of Justice Abella, the Court remanded the matter to this Court "for disposition in accordance with R. v. Friesen, 2020 SCC 9" [Friesen]: [2019] S.C.C.A. No. 270. This allows this Court to revisit the issues raised in Williams #1 and hear the appeal afresh: Federal Government Dockyard Trades and Labour Council v. Canada (Attorney General), 2016 BCCA 156 at para. 7.
- [4] For the reasons that follow, I would allow the appeal but only to the extent of varying certain of the s. 161 prohibitions.

The Sentencing Hearing

- [5] What follows is excerpted from Williams #1 at paras. 3-35:
- [3] The following exhibits were filed at the sentencing hearing: an agreed statement of facts made pursuant to s. 724 of the Code; victim impact statements from M.B., N.D. and N.D.'s mother; a letter to the court from Mr. Williams's grandparents; a pre-sentence report authored by Natalie Brugge, a probation officer; and an assessment report by Dr. Sarah Farstad, a psychiatrist with the Forensic Psychiatric Services Commission.

- [4] Mr. Williams was 23 years old at the time of the offence against M.B. and 25 years old at the time of the offence against N.D. He used a social media application called "Whisper" to connect with each of the victims. Whisper is a social media application where individuals post messages anonymously and can anonymously reply to messages posted by others.
- (1) M.B.
- [5] Mr. Williams and M.B. first connected on Whisper in July 2015. M.B. advised Mr. Williams that she was 18. In fact, she had just turned 14 in June 2015. Shortly thereafter, they met in person and commenced a sexual relationship. That relationship continued on and off until July 2017. Four months into their relationship, M.B. informed Mr. Williams that she was 14. Mr. Williams continued their sexual relationship despite knowing M.B.'s actual age. At the time, M.B. was vulnerable and experiencing depression related to personal issues.
- [6] The relationship included multiple instances of sexual intercourse. Mr. Williams exploited M.B.'s vulnerabilities through domineering and controlling conduct. He viewed M.B. as his "slave" and demanded that she do what he asked of her. At one point, M.B. ended their relationship because of his demands. In response, he told her that he would only resume their relationship if she "was obedient and his slave" and that she could not refuse his demands. M.B. returned to him.
- [7] In January 2017, Mr. Williams was charged with the N.D. count and was granted bail subject to conditions. One of the conditions prohibited him from having any contact with a minor. In contravention of that condition, he continued his relationship with M.B.
- [8] In her victim impact statement, M.B. said Mr. Williams wanted her to become pregnant but she always refused because of her age. She ended the relationship after he told her, "If I want you to be pregnant, you will be." M.B. said that she never felt unsafe around Mr. Williams and that "sex was never forced." Nevertheless, the impact of their relationship was traumatic and psychologically damaging for her. She continues to experience serious depression, for which she takes medication. At times, she is suicidal and has engaged in self-harm.
- (2) N.D.
- [9] N.D. also connected with Mr. Williams on Whisper. Initially, she told him that she was 16 years old. The following day, she told him her true age was 15.
- [10] Mr. Williams began a sexual relationship with N.D. on December 8, 2016. The relationship ended on January 15, 2017. It involved eight incidents of unprotected sexual intercourse. Contrary to her wishes, Mr. Williams did not take precautions and she became pregnant.
- [11] As with M.B., Mr. Williams insisted on control and obedience. He referred to N.D. as his "slave" and demanded that she do whatever he said. He told her that she could not be with other men but that he could be with other women. He engaged in dominant sexual activity that included slapping and choking, but stopped the choking when N.D. told him to do so. Mr. Williams acknowledges that he was controlling of N.D., demanded obedience from her,

was jealous of her friends, threatened to leave their relationship, blamed her for his problems, restricted her use of the telephone, and threatened to hurt himself if she ended their relationship.

- [12] When Mr. Williams learned of N.D.'s pregnancy, he told her to say that she was 16 years old in order to keep him out of jail. However, N.D. did report the matter to the police and Mr. Williams was arrested on January 17, 2017. On January 24, 2017, he was released on conditions.
- [13] N.D. gave birth to their child after the relationship ended and placed the child for adoption.
- [14] In her victim impact statement, N.D. said that Mr. Williams would not let her talk to her loved ones or friends unless she first obtained his consent. During the relationship, she felt stressed, used and worthless. After the relationship ended, she had to work hard to win back her loved ones and friends. She developed a lack of trust toward all males, including her father.
- [15] At the time of the pre-sentence report, N.D. was living in a group home. Ms. Brugge reported that N.D. had difficulty socializing, was behind academically and continues to suffer emotionally and in other ways. N.D.'s parents described her experience as "traumatizing." N.D. said that it has "been a rocky, very difficult road since then."
- (3) **Kyler Williams**
- [16] At the time of sentencing, Mr. Williams was 27 years old. He was a first-time offender with no prior criminal record.
- [17] When he was an infant, his mother attempted suicide. His maternal grandparents took over his care for a couple of years and periodically thereafter.
- [18] His father committed suicide when he was eight years old. While Mr. Williams's father was alive, his mother would only allow them limited contact at Christmas.
- [19] His mother was emotionally and physically abusive to him. She left him alone for long periods of time while she was working. He had to get himself ready for school on his own and he had to cook for himself. He said he felt neglected as a child. When his father died, he experienced deep sadness because he felt that his father was the one parent who loved him.
- [20] At age 12, his mother remarried and the family relocated to Bellingham, Washington. His stepfather was also abusive and controlling toward him.
- [21] At age 13, he was in a physical altercation with his mother. Following the incident, he ran away from home. He has not seen or spoken to his mother since then. He described his relationship with his mother as "unhealthy" and says that he felt betrayed by her.

- [22] Between the ages of 13 and 19, he had no fixed address and was homeless. During this period, he coped with extraordinary personal hardship, including being beaten and raped. Remarkably, he managed to attend school. He does not appear to have a substance abuse problem or to have been involved in other criminal offending.
- [23] Three months before his 19th birthday and one course short of graduation, he returned to Canada and moved in with his maternal grandparents. They have continued to be supportive of him and have committed to providing him with a home when he is out of custody.
- [24] Mr. Williams is a tradesman. He has worked as a level one millwright apprentice and periodically in the mining industry. He had a "decent" income and no debts but few assets. While in the Surrey Regional Forensic Clinic for his psychiatric assessment, he completed his General Education Development certificate.
- [25] In his interview with Ms. Brugge, Mr. Williams said all of his friendships took place exclusively on the Internet. He said that he was "a gamer" and that he "[didn't] really have an outside life." He admitted to having abandonment and trust issues stemming from his childhood. He denied any substance abuse. He said that he does not go to bars or go out in general and prefers to stay in. He disclosed to Ms. Brugge that he has an "intense need to feel loved" and that "he seeks to control" his relationships because that "prevents [him] from being hurt," helps him to "stay safe" and to "protect [him]self because of emotional trauma." Ms. Brugge added that "he is afraid of being alone, afraid of betrayal, and tries to avoid being taken advantage of."
- [26] Mr. Williams has a history of depression, anxiety, mood swings, suicidal ideation and self-harming behaviour (e.g., cutting, mutilation such as carving girlfriends' names into his arms and legs, burning, and overdosing on medications). Relationship break-ups trigger this self-harming behaviour, which he engages in so that he can "feel something" because he is numb and needs "to feel pain that is not on the inside." As previously noted, he threatened N.D. with suicide when she left him.
- [27] Mr. Williams reported fragile self-esteem and problems with anger management and impulsivity. For example, he swallowed a bottle of pills after getting into an argument with a girlfriend. He has been hospitalized on multiple occasions under the Mental Health Act, R.S.B.C. 1996, c. 288. He reported having attempted suicide 60 times since he was eight years old, four of which were particularly serious. He has overdosed on prescription medication and attempted to jump off a bridge before he was talked down by the police. He has reported having thoughts of hanging himself.
- [28] Mr. Williams has variously been diagnosed with bipolar disorder, major depressive disorder, adjustment disorder and borderline personality disorder. He has also experienced significant symptoms of post-traumatic stress disorder.

- [29] In his interviews with Ms. Brugge and Dr. Farstad, Mr. Williams accepted that he had mental health issues and demonstrated some insight into them. He acknowledged that he has separation issues, abandonment issues, attachment issues, trust issues, and suicidal ideation. He reported that he struggled to manage all of these issues on a daily basis. He knew that he needed to make changes and had a positive attitude toward personal change. He was receptive to treatment but was unsure if it would help him.
- [30] He has not done well in custody. He has been punched in the face, bullied and harassed by other inmates, eventually asking to be moved to a different unit because of personal safety concerns. He told Dr. Farstad that he was afraid to go to sleep out of fear that he would be physically or sexually assaulted. He reported feeling "very depressed" and sad. He has difficulty sleeping, experiences nightmares and has little appetite. He is apathetic, lacks energy and is pessimistic. He experiences significant intrusive symptoms of post-traumatic stress disorder. He struggles with confinement and a lack of control over his life.
- [31] Peer issues and behavioural concerns have led to institutional charges. He has been sanctioned for two rule-breaking infractions: diverting medication and hiding contraband in his cell. He has also been terminated from a work program because of a poor attitude toward staff and peers and for demonstrating arrogant and disrespectful behaviour.
- [32] When asked about his understanding of the impact of his actions on the victims, he told Ms. Brugge that he was "ashamed at what [he had] done" and said, "I'm trying to change." He told Dr. Farstad that the sexual activity he and N.D. engaged in occurred in the context of "consensual BDSM [Bondage, Discipline, Sadism and Masochism] play." He denied the use of violence with both victims and none was alleged by either one.
- [33] Dr. Farstad found that while Mr. Williams had some insight into his mental health problems, he had limited insight into the links between those problems and these offences. Treating him will be challenging because of his distrust of others, his ambivalence about relationships, his general relationship difficulties, and his lack of hope about the effectiveness of treatment. Dr. Farstad recommended that he receive individual therapy to help him develop emotion-regulation strategies, to tolerate distress and to improve his interpersonal skills. She found that, without treatment, he was at a moderate risk of reoffending.
- [34] Dr. Farstad also found that Mr. Williams displayed prominent symptoms of depression, was preoccupied with feelings of sadness, had lost interest in activities he had previously enjoyed, and was experiencing recurrent and intense thoughts of suicide. In her opinion, Mr. Williams was at risk of: (i) using physical and psychological coercion in sexual activity but not of employing escalating or diverse forms of sexual violence; (ii) minimizing his sexual offending, including attitudes that support sexual violence; (iii) endorsing serious problems with stress and coping mechanisms (e.g., self-harm and suicidal threats/behaviours); (iv) dealing with problems resulting from childhood neglect; (v) endorsing sexually deviant fantasies (e.g., BDSM) and engaging in them with a female who is not

legally old enough to consent; (vi) maintaining a stable intimate relationship due in part to his fear of abandonment; (vii) maintaining a non-intimate relationship due in part from his relationships being largely online; and (viii) issues with self-awareness. She recommended that he not have unsupervised contact with unrelated, underage females.

[35] At his sentencing hearing, Mr. Williams spoke to the court and apologised for his actions. He said:

I'd like to say that I'm deeply sorry for what has happened and the effect of it -- the effect it has had on everyone. Never in my life have I ever meant or intended or wanted to hurt anyone, nor will I ever. I've always tried my best to do the right thing and I regret my actions deeply, more so than anyone will ever know, believe or understand. I will be doing everything in my power to prevent it from happening again. I do understand that not being aware of -- of what I did wrong is no excuse for what happened. I wish I could go back in time and undo all of this. To take back not only the guilt that I feel, but also all the pain, suffering and emotional trauma they have suffered as well. I will never be able to express how sorry I am for that. What I can say is that I will endeavour to do everything I can to change myself for the better and make sure this is never repeated. I will be sure to participate in any counselling or programs as available. My past has not been great, yet I've always tried to do the right thing. This is my first offence and I swear it will be my last. I wish that there was a way to show how I feel and my sincerity beyond the -- beyond what words can do, that you could physically see them instead of simply hearing my words. I'm sorry to say there isn't. So I hope my words will be enough. I hope -- I hope you can see and understand that this -- this was all a mistake, one I have most definitely learned from and will not repeat. One, not only have I hurt and let down my family who I love and cherish as I hope they do me, but I -- but also I have hurt these girls in a way I never meant to, in ways I simply can't undo or take back. All of these facts hurt me more than I can say and I'm sorry for everything that has happened, especially for letting down my family who are all I have. Please know that all I ever wanted is to be happy, to find a partner with whom to share my life and build a family. That was all I meant to do. None of what happened was my intention. So with that said I hope that you can see that I'm doing everything possible to prevent any future pain, stress, grief or sadness to anyone. Thank you for your time.

[6] The significant impact of these offences on the victims is summarized in Williams #1 at paras. 8 and 14-15, quoted above.

Reasons for Sentence

[7] The reasons for sentence are summarized in Williams #1 at paras. 36-43:

[36] The Crown asked for a sentence of three years on the M.B. count and a consecutive sentence of four years on the N.D. count due to the aggravating circumstance of her pregnancy, less 18 months' credit for pre-sentence custody, for a global sentence of five and a half years.

- [37] The Crown directed the judge to appellate decisions from Alberta and Manitoba for the approach to be taken in determining a fit sentence for the offence of sexual interference: *R. v. Hajar*, 2016 ABCA 222; and *R. v. Norton*, 2016 MBCA 79. In those cases, the offence of sexual interference was characterized as a "major sexual offence" and sentencing courts were directed to begin with three years' imprisonment as a "starting point" from which the sentence could be increased or decreased based on aggravating and mitigating factors. The Crown also referred the judge to a range of sentence for sexual assault in this jurisdiction of between two to six years. (As I consider below, the range of sentence for sexual interference is different.)
- [38] The defence asked for a global sentence of three years' imprisonment, less 18 months' credit for pre-sentence custody, followed by a three-year period of probation. Mr. Williams contended that while the nature of the sexual activity was aggravating, it had not been forced and did not involve gratuitous violence or threats of violence. He submitted that his mental health issues reduced his moral culpability.
- [39] The judge followed the approach requested by the Crown. He began with a starting point of three years on each count, which he increased for aggravating circumstances. He made no reduction for mitigating factors, including Mr. Williams's mental health issues. The judge categorized the offences as "major sexual offences against children" and assessed Mr. Williams moral culpability as "very high", stating:
- [44] As noted above, Mr. Williams comes before the court as a young man with no record and very supportive grandparents. He has a significantly troubled childhood and throughout his teenage years. He fended for himself living on the street for six years. He suffers from mental health challenges that have led him to attempt suicide on a number of occasions.
- [45] Despite all of that, I find that his moral culpability for these crimes is very high. He connected with Ms. B. and Ms. D. over the Internet, he learned their ages and pursued the relationships anyways. He chose to engage in unprotected sexual intercourse with these children. He was dominant and abusive in the relationships. He insisted on an overbearing power imbalance in his relationship with Ms. D. These crimes constitute major sexual offences against the children and deserve severe punishment.
- [Emphasis added.]
- [40] The judge identified a number of aggravating factors: (i) the offence itself, which s. 718.2(ii.1) of the Code statutorily mandates as an aggravating factor; (ii) Mr. Williams's continuing sexual relationship with each of the victims after learning of their actual ages, which the judge characterized as predatory; (iii) engaging in multiple acts of sexual intercourse with each of the victims and "gratuitous violence" against N.D.; (iv) engaging in unprotected sexual intercourse with N.D. against her wishes that resulted in her becoming pregnant; (v) conducting himself in an "overbearing, dominant and in some ways threatening [manner] toward both girls", by which he exploited their vulnerability and exacted an emotional and psychological toll on each of them; (vi) encouraging N.D. to tell

the police that she had told him she was 16; (vii) violating the bail condition imposed on the N.D. charge that he not be in contact with any minors by continuing his relationship with M.B.; (viii) posing a moderate risk to reoffend and "appear[ing] ambivalent about getting treatment and help to ensure that he does not reoffend."

- [41] On the M.B. count, the judge noted Mr. Williams's guilty pleas, lack of gratuitous violence, and the fact that his intimidation of M.B. occurred at the very end of the relationship. He applied a starting point of three years, which he increased by six months for aggravating factors, including: (i) the length of the sexual relationship, which began shortly after M.B. turned 14; (ii) multiple occasions of sexual intercourse; and (iii) that the relationship continued after he was informed of M.B.'s true age and while he was subject to a no-contact order with minors on the N.D. count.
- [42] With respect to the N.D. count, the judge also applied a starting point of three years, which he increased to four years for aggravating factors of "gratuitous violence involving actual violence, intimidation and threats", impregnating N.D., and instructing N.D. to say that she told him she was 16.
- [43] In the result, the judge imposed a global sentence of six and a half years: three and a half years on the M.B. count and a consecutive sentence of four years on the N.D. count, which he reduced by six months on each count to give effect to the totality principle. After granting 18 months' credit for pre-sentence custody, the effective sentence was five years' imprisonment. The judge also issued the following prohibitions against Mr. Williams for a period of 20 years, pursuant to s. 161 of the Code:
- a) attending at any public park or pool with those under 16 years of age present;
 - b) being employed in any capacity that involves a position of trust or authority over those under 16 years of age;
 - c) any communication with a person under 16 years of age without approval of the court; and
 - d) using the Internet or other digital network without approval of the court.

Williams #1

- [8] The Court commenced its analysis by emphasizing the overarching importance of the principle of proportionality in sentencing, as well as the "secondary principles of parity and individualization" (para. 51). It then considered the sentencing judge's use of a three-year starting point. While noting that only the judge's application of that starting point was at issue on appeal (para. 50), the Court reiterated its endorsement of sentencing ranges rather than starting points as the proper approach (para. 57). The Court concluded that the appropriate range for sentences for sexual interference was within one and three years (para. 71).

- [9] In light of this sentencing range, the Court found that Mr. Williams' sentence of six and a half years represented "a substantial and marked departure from sentences imposed on similar offenders for similar offences in similar circumstances" (para. 72) and was demonstrably unfit. The Court further found that the judge had erred in principle by (i) failing to give any weight to the appellant's mental health issues; (ii) materially misapprehending the evidence regarding the appellant's "receptiveness to treatment" and characterizing the "dominant sexual activity with N.D. as 'gratuitous violence'"; and (iii) failing to give any weight to the appellant's guilty pleas and lack of a prior criminal record (para. 73). Reviewing the mitigating and aggravating factors anew, the Court reduced Mr. Williams' sentence on each count by six months pursuant to the totality principle, for a net global sentence of four years, less 18 months' credit for pre-sentence detention.
- [10] Regarding the s. 161 order, this Court found that the 20-year duration was excessive and demonstrably unfit. It further found that the condition of the judge's order under s. 161(1)(d) restricting Mr. Williams' access to the Internet was overbroad. Consequently, the Court reduced the duration of each of the s. 161 prohibitions to two years and limited the scope of the s. 161(1)(d) condition to prohibit communications with persons under the age of 16, outside of Mr. Williams' immediate family, without approval from the Court.

Friesen

- [11] Friesen "is about how to impose sentences that fully reflect and give effect to the profound wrongfulness and harmfulness of sexual offences against children" (para. 1). The Court indicated its intention to deliver a "strong message" that sentences for sexual offences against children must increase to respond to clear Parliamentary intent and legislative reform (para. 5).
- [12] In Friesen, the Court explained:
- [50] To effectively respond to sexual violence against children, sentencing judges need to properly understand the wrongfulness of sexual offences against children and the profound harm that they cause. Getting the wrongfulness and harmfulness right is important.
- [51] The prime interests that the legislative scheme of sexual offences against children protect are the personal autonomy, bodily integrity, sexual integrity, dignity, and equality of children.
- [56] This emphasis on personal autonomy, bodily integrity, sexual integrity, dignity, and equality requires courts to focus their attention on emotional and psychological harm, not simply physical harm. Sexual violence against children can cause serious emotional and psychological harm that, as this Court held in *R. v. McCraw*, [1991] 3 S.C.R. 72, "may often be more pervasive and permanent in its effect than any physical harm" (p. 81).

- [60] Sexual violence causes additional harm to children by damaging their relationships with their families and caregivers. Because much sexual violence against children is committed by a family member, the violence is often accompanied by breach of a trust relationship [citation omitted]. Even when a parent or caregiver is not the perpetrator, the sexual violence can still tear apart families or render them dysfunctional [citation omitted].
- [65] The protection of children is one of the most fundamental values of Canadian society. Sexual violence against children is especially wrongful because it turns this value on its head. In reforming the legislative scheme governing sexual offences against children, Parliament recognized that children, like adults, deserve to be treated with equal respect and dignity [citation omitted]. Yet instead of relating to children as equal persons whose rights and interests must be respected, offenders treat children as sexual objects whose vulnerability can be exploited by more powerful adults. There is an innate power imbalance between children and adults that enables adults to violently victimize them [citations omitted].
- [74] It follows from this discussion that sentences must recognize and reflect both the harm that sexual offences against children cause and the wrongfulness of sexual violence. In particular, taking the harmfulness of these offences into account ensures that the sentence fully reflects the "life-altering consequences" that can and often do flow from the sexual violence [citations omitted]. Courts should also weigh these harms in a manner that reflects society's deepening and evolving understanding of their severity [citations omitted].
- [13] The Court emphasized that an accurate understanding of the harmfulness and wrongfulness of sexual offences against children is "key to imposing a proportionate sentence" (para. 75). In this regard, Friesen directs courts:
- to give effect to the inherent wrongfulness, potential harm and actual harm of the offence when considering its gravity; and
 - to consider "the harm the offender intended or was reckless or wilfully blind to" when considering the offender's responsibility, while recognizing that absent exceptional circumstances offenders "will usually have at least some awareness of the profound physical, psychological, and emotional harm that their actions may cause the child" (para. 88).
- [14] The Court in Friesen declined to set a national sentencing range or starting point for sexual offences against children, noting that particular circumstances in given jurisdictions may give rise to legitimate regional variations in sentences (para. 106). However, the Court offered three general points of guidance at para. 107:
- (1) Upward departure from prior precedents and sentencing ranges may well be required to impose a proportionate sentence;
 - (2) Sexual offences against children should generally be punished more severely than sexual offences against adults; and,

- (3) Sexual interference with a child should not be treated as less serious than sexual assault of a child.
- [15] On the upward departure from prior precedents and sentencing ranges, the Court explained that special circumstances are not required to impose a substantial sentence, provided the sentence is proportionate. In this respect, it specifically addressed this Court's decision in Williams #1:
- [111] We thus wish to express our concern about sentencing ranges based on precedents that appear to restrict sentencing judges' discretion, for example, by imposing a cap of three to five years on sentences that can only be exceeded in exceptional circumstances. For instance, the British Columbia Court of Appeal has set a range for sexual interference of one to three years and has suggested that only in "rare circumstances" would a sentence above three years be justified (R. v. Williams, 2019 BCCA 295, at para. 71).
- [112] It is inappropriate to artificially constrain sentencing judges' ability to impose a proportionate sentence in this manner. As this Court's decision in [R. v. L.M., 2008 SCC 31] makes clear, sentencing judges must have the ability to impose substantial sentences for sexual offences against children when the gravity of the offence and the degree of responsibility of the offender so demand (para. 30).
- [16] The Court stated that custodial sentences of mid-single digits or higher are "normal":
- [114] It is not the role of this Court to establish a range or to outline in which circumstances such substantial sentences should be imposed. Nor would it be appropriate for any court to set out binding or inflexible quantitative guidance. Nonetheless, it is incumbent on us to provide an overall message that is clear [citation omitted]. That message is that mid-single digit penitentiary terms for sexual offences against children are normal and that upper-single digit and double-digit penitentiary terms should be neither unusual nor reserved for rare or exceptional circumstances. .
- [Emphasis added.]
- [17] On the relative punishment of sexual offences against children as compared to sexual offences against adults, the Court further directed provincial appellate courts to revise sentencing ranges and starting points where they have treated the two similarly:
- [115] We are also concerned that some courts appear to have adopted sentencing ranges that treat sexual violence against children in a manner similar to sexual violence against adults. For instance, in Alberta, the starting point for both "major sexual assault" of an adult victim and "major sexual interference" with a child victim is three years (Hajar, at paras. 2 and 12). Likewise, the British Columbia Court of Appeal has established a sentencing range for "sexual assault involving intercourse" of two to six years that it has applied in cases involving both child and adult victims (R. v. G.M., 2015 BCCA 165, 371 B.C.A.C. 44, at para. 22 (adult victim); [R. v. Scofield, 2019 BCCA 3], at para. 59 (child victim)).

- [117] Accordingly, we would direct provincial appellate courts to revise and rationalize sentencing ranges and starting points where they have treated sexual violence against children and sexual violence against adults similarly. We agree with the Saskatchewan Court of Appeal that "assaults against a child should normally warrant a stronger sanction" than assaults against an adult ([R. v. L.V., 2016 SKCA 74], at para. 101). As Richards C.J.S. wrote, "sentencing results should reflect this reality" so that they give effect to the will of Parliament as expressed in ss. 718.01 and 718.2(a)(ii.1) and (iii) of the Criminal Code (para. 102). A sentencing range or starting point that does not give effect to Parliament's directions is founded on a false logic and should not be relied on (see [R. v. Stone, [1999] 2 S.C.R. 290], at para. 245).
- [118] The Court stressed that in those jurisdictions where this has occurred, the error should be corrected by "increasing sentences for sexual offences against children--not by decreasing sentences for sexual offences against adults", and that Friesen should not be taken as a "bar against increasing sentences for sexual offences against adult victims" (para. 118).
- [119] On the relative punishment of sexual interference as compared to sexual assault against children, the Court, with specific reference to Williams #1, similarly warned against differentiating between the two offences:
- [119] Finally, we would direct appellate courts not to discount sexual interference in comparison to sexual assault. The British Columbia Court of Appeal appears to have done this by setting a range of two to six years for "sexual assault involving intercourse" in cases involving child victims while setting a range of one to three years for sexual interference (see Scofield, at para. 59; Williams, at para. 71).
- [120] It is an error of law to treat sexual interference as less serious than sexual assault. As stated above, Parliament has established the same maximum sentences for both sexual interference and sexual assault of a person under the age of 16. The elements of the offence are also similar, and a conviction for sexual assault of a child and for sexual interference with a child can frequently be supported on the same factual foundation (R. v. M. (S.J.), 2009 ONCA 244, 247 O.A.C. 178, at para. 8).
- [20] Lastly, the Court in Friesen provided guidance on the factors relevant to sentencing for sexual offences against children. Though not purporting to establish either a checklist or a complete list, or to displace existing provincial appellate jurisprudence, the Court encouraged their use for promoting "the uniform application of the law of sentencing" (para. 121). They include:
- a) the offender's likelihood to reoffend;
 - b) the offender's abuse of a position of trust or authority;
 - c) the duration and frequency of sexual violence;
 - d) the age of the victim; and

e) the degree of physical interference.

[21] The Court highlighted that the victim's degree of participation in the offence is "not a legally relevant consideration at sentencing" (para. 150). Rather, the onus is always with adults to avoid sexual violence towards children:

[154] Finally, a victim's participation should never distract the court from the fact that adults always have a responsibility to refrain from engaging in sexual violence towards children. Adults, not children, are responsible for preventing sexual activity between children and adults [citations omitted]. We would adopt the words of Fairburn J. (as she then was) in *R. v. J.D.*, 2015 ONSC 5857:

Nor is it a mitigating factor that a child appears to acquiesce or even seek out the sexual attention of an adult. Where children appear to be seeking out such attention, it is often an outward manifestation of the child's confusion arising from personal difficulties. It is the legal responsibility of adults who are faced with children who already exhibit signs of struggle, to protect them. Adults who see these situations as opportunities to satisfy their own sexual urges, are no better or worse than those who take steps to actively seek out their victims. [para. 25]

On Appeal

(1) Standard of Review

[22] While they are well known, it is helpful to set out the recent summary of the applicable principles contained in *Friesen*:

[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.

- [27] If a sentence is demonstrably unfit or if a sentencing judge made an error in principle that had an impact on the sentence, an appellate court must perform its own sentencing analysis to determine a fit sentence (Lacasse, at para. 43). It will apply the principles of sentencing afresh to the facts, without deference to the existing sentence, even if that sentence falls within the applicable range. Thus, where an appellate court has found that an error in principle had an impact on the sentence, that is a sufficient basis for it to intervene and determine a fit sentence. It is not a further precondition to appellate intervention that the existing sentence is demonstrably unfit or falls outside the range of sentences imposed in the past.
- [28] However, in sentencing afresh, the appellate court will defer to the sentencing judge's findings of fact or identification of aggravating and mitigating factors, to the extent that they are not affected by an error in principle. This deference limits the number, length, and cost of appeals; promotes the autonomy and integrity of sentencing proceedings; and recognizes the sentencing judge's expertise and advantageous position (Housen v. Nikolaisen, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 15-18).
- [29] Often the sentence that the appellate court determines to be fit will be different from that imposed by the sentencing judge, and the appellate court will vary the sentence. If the sentence chosen by the appellate court is the same as that imposed by the sentencing judge, the appellate court may also affirm the sentence despite the error.
- (2) Issues on Appeal
- [23] The appellant alleges that the sentencing judge:
- (a) erred in assessing the appellant's moral culpability as "very high";
 - (b) erred in his assessment of the appellant's attitude toward treatment and his risk to reoffend;
 - (c) ignored the appellant's personal circumstances by characterizing the offences as 'major sexual assaults' that triggered a three-year starting point; and
 - (d) erred in the duration and breadth of the s. 161 terms imposed.
- (3) Position of the Parties
- [24] The appellant's position is that the judge made certain material errors that impacted the sentence and that the decision in Williams #1 resulted in a fit sentence which is consistent with Friesen.
- [25] For its part, the Crown's position is that the appeal should be dismissed on the basis that, in accordance with Friesen, the sentence imposed by the sentencing judge was fit and no material errors were made that impacted the sentence imposed.

(4) Proportionality and Offences Against Children

[26] In Williams #1, this Court stated:

[51] If the principle of proportionality is at the heart of sentencing, then the secondary principles of parity and individualization are the arteries that ensure its proper application. They are essential factors to consider in order to arrive at a proportionate sentence: Lacasse at paras. 53-54; R. v. Pham, 2013 SCC 15 at para. 8.

[52] Section 718.2(b) of the Code mandates that similar sentences be imposed on similar offenders for similar offences committed in similar circumstances. Embedded within the principle of parity is the recognition that no two offenders are identically situated. The individualized assessment of the circumstances of the offence and of the offender requires that where the offender, the offence, or the circumstances vary, so too does the sentence.

[27] And in Friesen, the Court explained:

[75] In particular, courts need to take into account the wrongfulness and harmfulness of sexual offences against children when applying the proportionality principle. Accurately understanding both factors is key to imposing a proportionate sentence (R. v. Nur, 2015 SCC 15, [2015] 1 S.C.R. 773, at paras. 43-44). The wrongfulness and the harmfulness impact both the gravity of the offence and the degree of responsibility of the offender. Taking the wrongfulness and harmfulness into account will ensure that the proportionality principle serves its function of "ensur[ing] that offenders are held responsible for their actions and that the sentence properly reflects and condemns their role in the offence and the harm they caused" ([R. v. Nasogaluak, 2010 SCC 6], at para. 42).

(5) Did the Sentencing Judge Make an Error in Principle That Materially Affected the Custodial Sentence?

[28] Mr. Williams first ground of appeal is that the sentencing judge erred in finding his moral culpability to be "very high". He argues that the judge, in his proportionality analysis, failed to properly consider his personal circumstances and in particular the extent to which his mental health contributed to the commission of the offences. He relies on R. v. Badhesa, 2019 BCCA 70 at paras. 40 and 42 where Justices Fenlon and Dickson explained:

[40] The criminal law views individuals as autonomous and rational beings and seeks to impose criminal liability solely on those who are responsible for the state they were in when an offence is committed: R. v. Bouchard-Lebrun, 2011 SCC 58 at paras. 48, 68. Similar concerns animate the determination of a fit sentence: R. v. Friesen, 2016 MBCA 50 at para. 18. Impaired reasoning, delusional disorders and other compromised mental conditions distinguish those afflicted from ordinary, fully accountable offenders for sentencing purposes: R. v. Ayorech, 2012 ABCA 82 at para. 12. Where an offender is found to be criminally responsible, but suffering from a serious mental illness or disability, a more lenient disposition than would otherwise be called for may well be appropriate to reflect a diminished level of criminal responsibility: R. v. Ramsay, 2012 ABCA 257 at para. 21.

[42] When mental illness causes or contributes to the commission of an offence, it is a mitigating factor and a sentence may be reduced because the offender's moral culpability is attenuated. In these circumstances, general deterrence is a less weighty consideration because a mentally ill offender is not an appropriate medium for making an example to others: *R. v. Belcourt*, 2010 ABCA 319 at para. 8. Nor does specific deterrence or severe punishment play a significant role in the determination of a fit sentence. The former is meaningless when an offender is out of touch with reality and the latter may be disproportionate to the offender's degree of responsibility: *R. v. Batisse*, 2009 ONCA 114 at para. 38.

[Emphasis added.]

[29] Mr. Williams points to the fact that his mental health issues were not listed in the judge's summary of "Mitigating Factors" and that at paras. 44-45 of the analysis section of his reasons he said:

[44] As noted above, Mr. Williams comes before the court as a young man with no record and very supportive grandparents. He had a significantly troubled childhood and throughout his teenage years. He fended for himself living on the street for six years. He suffers from mental health challenges that have led him to attempt suicide on a number of occasions.

[45] Despite all of that, I find that his moral culpability for these crimes is very high. He connected with Ms. B. and Ms. D. over the Internet, he learned their ages and pursued the relationships anyways. He chose to engage in unprotected sexual intercourse with these children. He was dominant and abusive in the relationships. He insisted on an overbearing power imbalance in his relationship with Ms. D. These crimes constitute major sexual offences against the children and deserve a severe punishment.

[Emphasis added.]

[30] I accept Mr. Williams' submission that the judge erred by not specifically considering the appellant's mental health and personal circumstances as mitigating factors and their potential contribution to the offences. I am also of the view that this error was material in the sense that it impacted the sentence the trial judge decided to impose.

[31] Accordingly, it is incumbent on this Court to engage in its own sentencing analysis with due regard to the factual findings made in the court below (*Friesen* at para. 27-28). Considering the issue afresh, however, requires us to follow the *Friesen* framework.

[32] In doing so, I would conclude, for several reasons, that the custodial sentence imposed by the judge was nonetheless fit.

[33] First, as noted in *Badhesa*, mental health issues may reduce a sentence because the offender's moral culpability is attenuated. But this factor must be considered in light of *Friesen*, in particular the comments of the Court at para. 75, quoted at para. 27 above.

- [34] In my view, while the judge's references to the appellant's troubled background and mental health issues were wanting, he properly gave due consideration to the gravity of the offences and the considerable harm Mr. Williams inflicted on two children. This was entirely in accordance with the Friesen framework, in particular with the understanding of the harmfulness and wrongfulness of sexual violence against children that informs the proportionality principle.
- [35] In that regard, I agree with the Crown's submission that the Court's message in Friesen is clear. It is not sufficient for courts to simply state that sexual offences against children are serious; sentences must be imposed that reflect the normative character of the offender's actions (para. 76) and the consequential harm, which includes both actual and potential harm (paras. 79-86).
- [36] As the judge observed, the offences were not spur-of-the-moment choices. Mr. Williams engaged in prolonged and predatory relationships, which in the case of N.D. involved him impregnating her against her wishes. The duration and frequency of Mr. Williams' sexual offending significantly increased the harm to his victims, which magnified the severity of the offences and increased the appellant's moral blameworthiness. This is specifically the type of conduct referenced in Friesen at paras. 131-133.
- [37] I would add that an offender's personal circumstances cannot be used to reduce a sentence to a point where the sentence becomes disproportionate. As explained by Moldaver J.A. (as he then was) in *R. v. Woodward*, 2011 ONCA 610:
- [76] In so concluding, I wish to emphasize that when trial judges are sentencing adult sexual predators who have exploited innocent children, the focus on the sentencing hearing should be on the harm caused to the child by the offender's conduct and the life-altering consequences that can and often do flow from it. While the effects of a conviction on the offender and the offender's prospects for rehabilitation will always warrant consideration, the objectives of denunciation, deterrence and the need to separate sexual predators from society for society's well-being and the well-being of our children must take precedence.
- [Emphasis added.]
- [38] The second material error alleged by Mr. Williams relates to the judge misapprehending the evidence regarding his risk to reoffend.
- [39] The judge found as an aggravating factor the appellant's moderate risk to reoffend and "ambivalence" toward treatment. Mr. Williams submits that he maintained his willingness to attend treatment and was ambivalent only about its prospects of success. He says he recognized the need for change, had a positive attitude, and agreed to attend treatment.
- [40] The appellant argues that the judge erred by characterizing the appellant as ambivalent toward treatment, and not just its prospects of success. This, he submits, also coloured the judge's assessment of Mr. Williams' risk of reoffending.

- [41] I do not accept that the judge erred on this point. Even if he had, I am of the opinion that the error did not have any effect on the sentence.
- [42] In my view the judge did not materially misapprehend the evidence about the appellant's future risk. In the context of his consideration of aggravating factors, he stated:
- [43] Mr. Williams was assessed by Dr. Farstad, a psychiatrist with the Forensic Psychiatric Services Commission to be a moderate risk to reoffend sexually. Built into that risk assessment, I believe, is Mr. Williams' statement that he is willing to engage in treatment for his sexual offending but he is not certain it will help. That led Dr. Farstad to conclude that Mr. Williams is ambivalent about treatment.
- [43] Dr. Farstad's report contained similar language, that is:
- He also presents ambivalent about treatment; he advised that he is willing to engage in treatment but he is not hopeful that it will help" (Psychological Assessment, pp.13-14).
- [44] When considered as a whole, Dr. Farstad's report was not encouraging. Several aspects of the appellant's presentation made treatment challenging; his plans for managing his risk for future sexual offending were unlikely to be effective; and he minimized or lied about his sexual offending.
- [45] It bears repeating that when Mr. Williams was charged with the count relating to M.B. in January 2017, one of the conditions of his bail was a prohibition of contact with a minor. Notwithstanding this condition, he continued his relationship with N.D. Accordingly, the judge was justifiably concerned about the appellant's risk (para. 56).
- [46] Friesen, furthermore, at paras. 122-124 comments that in relation to offences against children, the likelihood to reoffend calls for emphasis on the sentencing objective of separating the offender from society.
- [47] I am therefore of the view that the judge made no material error on this point that impacted on the sentence.
- [48] The third material error alleged by the appellant relates to the judge characterizing the offences as "major sexual assaults" that triggered a three-year "starting point", which was then adjusted upwards due to the aggravating circumstances he found to apply in the case.
- [49] The issue of sentencing ranges and starting points was comprehensively reviewed by the Court in Friesen commencing at paras. 106-118, cited at paras. 14-18 above. As noted in Williams #1 at para. 57, this Court has adopted the approach of sentencing ranges as opposed to starting points.
- [50] The Court in Friesen declined to set a national sentencing range or starting point for sexual offences against children, leaving it to individual jurisdictions to do so in that legitimate regional variations in sentences may arise (para. 106). The question then becomes whether this appeal should set the appropriate range for British Columbia.

- [51] In my view it should not. It is clear from Friesen that a new analytical framework is to be applied by courts in Canada to the sentencing of sexual offences against children.
- [52] That being the case, insufficient time has passed since Friesen for courts of this province to have considered and applied the decision such that this Court could undertake a purposive analysis of the appropriate range at this time.
- [53] Accordingly, I would not accede to this ground of appeal since it is predicated on what the judge considered to be an appropriate pre-Friesen starting point, notwithstanding the fact that in this Province, the starting point approach has not been followed.
- [54] I would add that in my view, for the reasons explained in Williams #1 at paras. 57-59, it is an error in principle for sentencing judges in British Columbia to use the starting point as opposed to the sentencing range approach.
- [55] When I consider the issue of the custodial sentence imposed by the judge afresh it bears repeating the sentence that was imposed:

- four years on one count;
- three and a half years consecutive on the second count;
- for a total of seven and a half years reduced to six years in total on account of the totality principle, prior to credit for pre-trial custody.

- [56] It is not necessary for me to repeat the mitigating and aggravating circumstances referred to by the judge and which were summarized above in the lengthy extract from Williams #1.

- [57] Suffice it to say that notwithstanding mitigating factors which included Mr. Williams' mental health and personal history, the circumstances of the offences involved:

- an offender who was aged 23 and 25 at the material times when he committed multiple offences against two children aged 14 and 15;
- referring to the children as "slaves" and demanding obedience;
- impregnating N.D. against her wishes and continuing his relationship with M.B. contrary to bail conditions; and
- engaging in dominant sexual encounters with N.D. that included slapping and choking.

- [58] It bears repeating what the Court in Friesen stated at para. 114:

- [114] It is not the role of this Court to establish a range or to outline in which circumstances such substantial sentences should be imposed. Nor would it be appropriate for any court to set out binding or inflexible quantitative guidance. Nonetheless, it is incumbent on us to provide an overall message that is clear [citation omitted]. That message is that mid-single digit penitentiary terms for sexual offences against children are normal and that upper-single digit and double-digit penitentiary terms should be neither unusual nor reserved for

rare or exceptional circumstances.

[59] Mr. Williams received low to mid single-digit penitentiary terms on each count, for a global sentence that was squarely consistent with these comments.

[60] Accordingly, notwithstanding the material error to which I have referred and which impacted the sentence, I am of the opinion that the custodial sentence imposed by the judge was nonetheless fit and I would impose that sentence.

[61] In view of this conclusion, I need not consider whether, apart from any error in principle, the custodial sentence is demonstrably unfit.

(6) Were the Prohibitions in the Section 161 Order Demonstrably Unfit?

(a) Introduction

[62] For ease of reference, the 20-year s. 161 prohibitions in question in the Prohibition Order on this appeal are:

(a) attending at any public park or pool with those under 16 years of age present;

(a.1) being within two kilometers of any residence where M.B or N.D. normally reside;

b) being employed in any capacity that involves a position of trust or authority over those under 16 years of age;

c) any communication with a person under 16 years of age without approval of the court; and

d) using the Internet or other digital network without approval of the court.

[63] These prohibitions are essentially in the terms set out in s. 161((1) (a) to (d) of the Code.

[64] Subsection 161(2) provides that the prohibition may be for life or a shorter period. If the offender is serving a sentence of imprisonment, it commences when the offender is released and, pursuant to s. 161(3), may be varied upon application.

[65] Section 673 of the Code furthermore provides that prohibitions made under s. 161 are part of the offender's sentence. Accordingly, they are subject to the same principles of appellate review. They cannot be varied except where they are demonstrably unfit or the result of a material error in principle.

(b) Position of the Parties

[66] Mr. Williams' position is that the prohibitions made in this case were excessive and overly broad.

- [67] Specifically, he submits that the 20-year duration of the prohibitions in his case is excessive. He also argues that there is a lack of nexus between the prohibition under (b) and his offending, and that the prohibition under (d) is overbroad. Relying on *R. v. R.R.B.*, 2013 BCCA 224 at paras. 31-34 [R.R.B.], he says that a 20-year ban would be "usually reserved for the worst case offender."
- [68] In *R.R.B.*, the offender sexually abused a child over whom he held a position of trust for eight years, starting when he was 36 years old and the child nine. The offender lacked a criminal record, pleaded guilty and complied with his bail. On appeal, the s. 161 orders were reduced from 20 to three years and the scope of the Internet ban narrowed.
- [69] The Crown's position is that the 20-year prohibitions under s. 161 were well justified and necessary to protect children. It points to the fact that Dr. Farstad recognized the appellant's elevated risk factors, recommending that Mr. Williams be restricted from any form of unsupervised access to children under the age of 16 as a risk management tool. It submits that a 20-year prohibition is not reserved for the worst offender and this Court has upheld lifetime bans such as occurred in *R. v. Munro*, 2017 BCCA 141. It recognizes, however, that in *R. v. Athey*, 2017 BCCA 350 at paras. 43-46, the Court concluded that a 20-year ban should be reduced to 10 years.
- [70] Finally, the Crown notes that the s. 161(1)(d) prohibition included a term whereby Mr. Williams could apply to the court to vary the terms of the Internet and digital access order.
- (c) Analysis
- [71] The purpose and scope of s. 161 was stated this way in *Williams #1* at para. 98:
- [98] The overarching purpose of the provision is the protection of children from sexual violence: *R. v. K.R.J.*, 2016 SCC 31 at paras. 45-47. The orders are discretionary and therefore can be carefully tailored to the nature and degree of risk to children upon the offender's release from custody. Justice Karakatsanis, writing for the majority, further explained:
- [48] 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.)*, [2006 ABCA 82] 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.
- [54] Turning to the impact of the amendments, both s. 161(1)(c) and (d) can have a significant impact on the liberty and security of offenders -- potentially for the rest of their lives. This Court has recognized that living in the community under restrictions can attract a considerable degree of stigma (*R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, at para. 105). Further, a prohibition under s. 161(1)(c) on having any contact with persons under the age of 16 could potentially curtail the types of employment an offender can pursue, and an

offender's ability to interact with people (including adults in the company of children) in public and private spaces. And 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

- [72] I recognize that the Court in Friesen did not specifically address s.161 prohibitions. Accordingly, Friesen, in my view, cannot be interpreted as having modified the approach taken by the Court in K.R.J. regarding the imposition of s. 161 prohibition orders. Nonetheless, the analytical approach in Friesen as seen, for example at paras. 65, 75 and 121 of the decision and which focusses in part on the protection of children from sexual exploitation should also, in my opinion, inform the s. 161 analysis. This framework, which identifies the offender's likelihood to reoffend and abuse of a position of trust or authority as key factors in sentencing, includes at para. 5 the third of three "overarching points":
- [5] Third, we send a strong message that sexual offences against children are violent crimes that wrongfully exploit children's vulnerability and cause profound harm to children, families, and communities. Sentences for these crimes must increase. Courts must impose sentences that are proportional to the gravity of sexual offences against children and the degree of responsibility of the offender, as informed by Parliament's sentencing initiatives and by society's deepened understanding of the wrongfulness and harmfulness of sexual violence against children. Sentences must accurately reflect the wrongfulness of sexual violence against children and the far-reaching and ongoing harm that it causes to children, families, and society at large.
- [73] Furthermore, for the reasons set out in Friesen at paras. 108-114, reliance on precedents that predate that decision may well be inappropriate or of limited assistance to the sentencing and appellate courts.
- [74] When I consider the s. 161 prohibitions at issue on this appeal within this framework together with the deferential standard of review, I conclude that some, but not all, of the conditions are demonstrably unfit, that is, "clearly unreasonable", "clearly or manifestly excessive", "clearly excessive or inadequate" or "representing a 'substantial and marked departure'": Lacasse at para. 52.
- [75] In so far as condition (a.1) is concerned I would find that the 20-year prohibition ban in relation to any residence where M.B. or N.D. normally resides is fit. That is because it imposes only to a minimal extent on Mr. Williams and is necessary to protect the psychological and emotional security of the two victims as they move forward in their lives given the devastating impact the offences have had on them.
- [76] I am of the view, however, that the durations of conditions (a), (b), (c) and (d), are excessive. While I recognize Dr. Farstad's view that Mr. Williams' contact with persons under 16 should be avoided as a risk management tool, I am of the opinion that 10-year prohibitions would properly recognize the principle of proportionality in the circumstances.

[77] I also consider the ambit of the Internet prohibition to be overly broad and demonstrably unfit. I understood the Crown's position to be that it did not seriously challenge the variation made to that order at para. 107 of Williams #1 modifying the order prohibiting Mr. Williams from "using the Internet or any other digital network without approval of the court" to read:

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.

In my view, this modification is appropriate.

[78] Accordingly, I would accede to this ground of appeal to the limited extent I have identified.

(7) Should the Appellant Be Required to Complete the Custodial Sentence Imposed By the Sentencing Judge?

[79] As a result of the reduction of his effective sentence to two and a half years in custody arising from Williams #1, the appellant obtained his statutory release on June 18, 2020.

[80] Mr. Williams submits that, owing to the passage of time, the custodial sentence imposed by the sentencing judge should be stayed in the event his appeal against this aspect of his sentence is dismissed.

[81] The Crown's position is that the seriousness of the appellant's offences and their resulting consequences on the victims justifies re-incarceration. Furthermore, it submits that Mr. Williams has presented no evidence regarding the adverse impact of re-incarceration on his rehabilitation and notes that he is still serving his term of incarceration from Williams #1, albeit on statutory release.

[82] The issue was considered by this Court in R. v. Slizak, 2017 BCCA 279 where Justice Harris stated at para. 27-28:

[27] I turn finally to consider whether the sentence I propose should be stayed. Clearly, there are circumstances where to require a person to serve a sentence that has been substituted on appeal would be unjust. Useful guidance is given on how to approach this question in R. v. Veysey, 2006 NBCA 55, beginning at para. 26, but summarized at paras. 31-2 and 34:

In sum, we are left with divergent approaches to the question of whether a jail sentence should be stayed on appeal in circumstances where the offender has served the sentence imposed at trial. One approach is based on the rule that it is unjust ("harsh and oppressive") to reincarcerate an offender who has served fully the sentence imposed at trial. We assume that the rule is a general one and, therefore, an exceptional circumstances category exists. Hence, under this approach the onus would be on the Attorney General to establish that reincarceration of the offender would not amount to harsh or oppressive treatment. Another approach is to accept that there is nothing inherently unjust, harsh or oppressive in requiring an offender to serve the sentence that should been imposed at first instance. This leaves us with the question of whether the rule should be absolute or provide for exceptions. The weight of authority favors recognition

of a rule that provides for exceptions. Under this approach, the onus is on the offender to establish that his or her case qualifies as an exception to the rule under the rubric of "special circumstances".

We find nothing inherently harsh or oppressive in jailing a person who has served a sentence that was demonstrably unfit. The fact that the original sentence has been fully served does not, by itself, warrant special consideration. At the same time, we are left with the Supreme Court's caution that to require an accused to serve a fit sentence after having completed an unfit one may lead to an injustice. Thus, one must be prepared to recognize that in certain instances reincarceration could work an injustice. The difficult task is to identify the circumstances in which reincarceration would work such a result. In short: What constitutes special circumstances? Having regard to the jurisprudence discussed above, we have isolated four factors that one could reasonably consider relevant to the issue of whether a stay should be granted. This is not to suggest that the list is exhaustive. Other pertinent factors may exist. However, for purposes of deciding this appeal, we are content to examine the following: (1) the seriousness of the offences for which the offender was convicted; (2) the elapsed time since the offender gained his or her freedom and the date the appellate court hears and decides the sentence appeal; (3) whether any delay is attributable to one of the parties; and (4) the impact of reincarceration on the rehabilitation of the offender.

[28] It is not necessary in this case to be definitive about the principles or circumstances that would justify a stay. However the matter is approached, and even considering the fresh evidence, I see no proper basis on which to stay the sentence. Although Mr. Slizak is close to the end of completing his intermittent sentence, it is not yet complete. This is not a case of re-incarcerating someone who had completed a sentence or a case effectively requiring someone to serve a second sentence. The appeal has been prosecuted with due dispatch. The offence is a serious one and staying the sentence would be inconsistent with or potentially undermine the goals of denunciation and deterrence. The matter is not simply one of addressing legal issues to deal with their precedential value. And there is nothing to indicate that serving the sentence would undermine Mr. Slizak's rehabilitation or be inconsistent with any other relevant sentencing principle. Accordingly, I would not stay execution of the fit sentence.

[Citation redacted; emphasis added.]

[83] While I accept that the circumstances in Slizak were different from those in this case in that the intermittent sentence in Slizak had not been fully served, I would nonetheless reach the same conclusion here. The offences in question were most serious and Mr. Williams has not presented any evidence or argument, except for the passage of time, that would "indicate that serving the sentence would undermine [his] rehabilitation or be inconsistent with any other relevant sentencing principle".

[84] Accordingly, I would not stay what I consider to be a fit custodial sentence imposed by the sentencing judge.

Disposition

[85] Accordingly, for the reasons I have outlined I would:

(a) dismiss the appeal of the custodial sentence imposed by the sentencing judge; and

(b) allow the appeal of the s. 161 prohibitions to the extent of:

- reducing their duration under ss. 161(1)(a), 161(1)(b), 161(1)(c) and 161(1)(d) from 20 years to 10 years; and

- modifying the s. 161(1)(d) prohibition as indicated at para. 77 above.

[86] I would also not give effect to Mr. Williams' submission that the remainder of his custodial sentence be stayed.

"The Honourable Mr. Justice Abrioux"

I AGREE:

"The Honourable Mr. Justice Butler"

I AGREE:

"The Honourable Mr. Justice Grauer"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/ca/20/02/2020BCCA0286.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-williams-2020>

Prepared on 26 October 2026 · Esheria