

**PROVINCIAL COURT OF NOVA SCOTIA**

**Citation:** *R. v. Ward*, 2023 NSPC 5

**Date:** 20230127

**Docket:** 8563039, 8618570

**Registry:** Truro

**Between:**

His Majesty The King

v.

Gerald Paul Ward

**Judge:** The Honourable Judge Alain Bégin

**Heard:** January 25, 2023, Truro, Nova Scotia

**Decision:** January 27, 2023

**Charge:** CC161(4) x 2, Criminal Code of Canada

**Counsel:** Robert Kennedy for the Crown

Nic Hoehne for the Defendent

**By the Court: All empathises added.**

[1] This is the sentencing of Gerald Paul Ward who pleaded guilty to two charges of failing to comply with a lifetime s. 161 Order prohibiting him from accessing the Internet. As a matter of housekeeping, the 2<sup>nd</sup> and 3<sup>rd</sup> counts on the second Information are being withdrawn by the Crown at the completion of this sentencing.

[2] The first offense was between May 9 and May 18, 2022, which would have occurred less than 2 weeks after Mr. Ward's release from jail after serving the required time of a 6-year sentence (in June 2021) for 2 counts of sexual interference, and 2 counts of making child pornography.

[3] Mr. Ward was arrested on May 25<sup>th</sup> for the first breach, and he was released on a strict Release Order dated May 25, 2022, prohibiting his accessing the internet, which he has pleaded guilty to breaching between the period of July 1, 2022 and October 20, 2022.

[4] The Crown proceeded by Indictment.

[5] For the first breach Mr. Ward was actively operating a Facebook account and had a telephone capable of accessing the internet. This occurred after Mr. Ward had sought Crown consent for a variation in the s. 161 Order, which the Crown refused.

[6] For the second breach, Mr. Ward had multiple devices capable of accessing the internet (PS5, laptop, cell phone) as well as actively operating a Facebook account.

[7] Clearly, Mr. Ward has little respect for Court-ordered restrictions on his accessing the internet. This is troubling as Mr. Ward has a criminal history of sexually abusing young children, having also been sentenced to a period of custody in Alberta in May 2019 on an Invitation for Sexual Touching charge.

[8] As stated at para 19 of *R. v. Benson* 2022 ONCJ 370:

...While I cannot penalize him for crimes that he committed prior to these dates, it is an aggravating fact that these breaches were not isolated or even unusual circumstances. The breaches...were the culmination of a

longstanding, flagrant, and deliberate lack of regard for an important court order intended to protect innocent children.

[9] A s. 161 Prohibition Order is intended to protect young and vulnerable children from people exactly like Mr. Ward. They are intended to be respected and taken seriously.

### **Position of the Parties**

[10] The Crown is seeking a global sentence of 21-months' imprisonment comprised of a sentence of 9-months for the May 2022 offence, and a consecutive period of 12-months for the July-October 2022 offence.

[11] From this would be subtracted remand time of 100 days, increased to 150 days when given credit of 1.5 to 1. The maximum term of imprisonment for an offence under Section 161, when proceeded by Indictment, is 4-years imprisonment.

[12] The Crown further seeks a probation period of 3 years which will include prohibitions on accessing the Internet and being in possession of devices capable of accessing the Internet.

[13] The Crown is further seeking forfeiture of the cell phone seized in May 2022, and the electronic devices seized from Mr. Ward's hotel room in October 2022.

[14] Defence counsel is suggesting a sentence of time served, plus a probationary period. Defence is not consenting to the Forfeiture Order.

### **Sentencing Principles**

[15] As confirmed by the Supreme Court of Canada in the case of *R. v. Nasogaluak* 2010 SCC 6 at paragraphs 39 to 45, sentencing judges are required to consider s. 718 of the Criminal Code:

[39] ...Judges are now directed in s. 718 to consider the fundamental purpose of sentencing as that of contributing, along with crime prevention measures, to "respect for the law and the maintenance of a just, peaceful and safe society". This purpose is met by the imposition of "just sanctions" that reflect the usual array of sentencing objectives, as set out in the same provision: denunciation, general and specific deterrence, separation of offenders,

rehabilitation, reparation, and a recent addition: the promotion of a sense of responsibility in the offender and acknowledgement of the harm caused to the victim and to the community.

[42] For one, it requires that a sentence not *exceed* what is just and appropriate, given the moral blameworthiness of the offender and the gravity of the offence. In this sense, the principle serves a limiting or restraining function. However, the rights-based, protective angle of proportionality is counter-balanced by its alignment with the “just deserts” philosophy of sentencing, which seeks to ensure 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. M. (C.A.)*, 1996 CanLII 230 (SCC), [1996] 1 S.C.R. 500, at para. 81; *Re B.C. Motor Vehicle Act*, 1985 CanLII 81 (SCC), [1985] 2 S.C.R. 486, at pp. 533-34, *per* Wilson J., concurring). Understood in this latter sense, sentencing is a form of judicial and social censure (J. V. Roberts and D. P. Cole, “Introduction to Sentencing and Parole”, in Roberts and Cole, eds., *Making Sense of Sentencing* (1999), 3, at p. 10). Whatever the rationale for proportionality, however, the degree of censure required to express society’s condemnation of the offence is always limited by the principle that an offender’s sentence must be equivalent to his or her moral culpability, and not greater than it. The two perspectives on proportionality thus converge in a sentence that both speaks out against the offence and punishes the offender no more than is necessary.

[43] The language in ss. 718 to 718.2 of the *Code* is sufficiently general to ensure that sentencing judges enjoy a broad discretion to craft a sentence that is tailored to the nature of the offence and the circumstances of the offender. The determination of a “fit” sentence is, subject to some specific statutory rules, an individualized process that requires the judge to weigh the objectives of sentencing in a manner that best reflects the circumstances of the case (*R. v. Lyons*, 1987 CanLII 25 (SCC), [1987] 2 S.C.R. 309; *M. (C.A.)*; *R. v. Hamilton* (2004), 2004 CanLII 5549 (ON CA), 72 O.R. (3d) 1 (C.A.)). No one sentencing objective trumps the others and it falls to the sentencing judge to determine which objective or objectives merit the greatest weight, given the particulars of the case. The relative importance of any mitigating or aggravating factors will then push the sentence up or down the scale of appropriate sentences for similar offences. The judge’s discretion to decide on the particular blend of sentencing goals and the relevant aggravating

or mitigating factors ensures that each case is decided on its facts, subject to the overarching guidelines and principles in the *Code* and in the case law.

[44] The wide discretion granted to sentencing judges has limits. It is fettered in part by the case law that has set down, in some circumstances, general ranges of sentences for particular offences, to encourage greater consistency between sentencing decisions in accordance with the principle of parity enshrined in the *Code*. But it must be remembered that, while courts should pay heed to these ranges, they are guidelines rather than hard and fast rules. A judge can order a sentence outside that range as long as it is in accordance with the principles and objectives of sentencing. Thus, a sentence falling outside the regular range of appropriate sentences is not necessarily unfit. Regard must be had to all the circumstances of the offence and the offender, and to the needs of the community in which the offence occurred.

[16] Section 718 of the Criminal Code explains the purpose and principles of sentencing:

The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
- (b) **to deter the offender** and other persons from committing offences;
- (c) **to separate offenders from society, where necessary;**
- (d) **to assist in rehabilitating offenders;**
- (e) to provide reparations for harm done to victims or to the community;  
and
- (f) **to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.**

[17] Section 718.1 states that, “A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.”

[18] In *R. v. Hamilton* (2004) 186 CCC (3d) (ON CA) the Court stated that proportionality is a fundamental principle of sentencing. It takes into account the gravity of the offence and the degree of responsibility of the offender. In other words, the severity of a sanction for a crime should reflect the seriousness of the criminal conduct. A disproportionate sanction can never be a just sanction. Aggravating and mitigating factors, and the principles of parity, totality and restraint are also important principles that must be engaged in the sentencing process.

[19] The Criminal Code views imprisonment as a sentence of last resort. An offender should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances and all available sanctions other than imprisonment that are reasonable in the circumstances should be considered.

[20] Section 718.2 states the other principles that the sentencing court is mandated to take into consideration, which for the purpose of this case are:

A court that imposes a sentence shall also take into consideration the following principles:

(a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing:

- (ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,

shall be deemed to be aggravating circumstances;

(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;

(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

(e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders...

[21] With regard to the overall sentencing process, I note the words of Chief Justice Lamer in *R. v. C.A.M.* [1996] SCJ No 28 at paras 91 & 92:

91. ...The determination of a just and appropriate sentence is a delicate art which attempts to balance carefully the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offense, while at all times taking into account the needs and current conditions of and in the community. The discretion of the sentencing judge should thus not be interfered with lightly.

92. ...It has been repeatedly stressed that there is no such thing as a uniform sentence for a particular crime...Sentencing is an inherently individualized process and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction. As well, sentences for a particular offense should be expected to vary to some degree across various communities and regions of this country as the 'just and appropriate' mix of accepted sentencing goals will depend on the needs and current conditions of and in the particular community where the crime occurred."

[22] In a rational system of sentencing the respective importance of prevention, deterrence, retribution and rehabilitation will vary according to the nature of the crime and the circumstances of the offender. There is no easy test that a judge can apply in weighing these factors. Much will depend on the judgment and wisdom of sentencing judges whom Parliament has vested with considerable discretion in making these determinations pursuant to s. 718.3.

[23] The Supreme Court of Canada in *R. v. Lloyd* 2016 SCC 13 confirmed that a provincial court judge's determination of the appropriate sentence is entitled to deference. The Supreme Court also stated in *Lloyd* that appellate courts cannot alter a trial judge's sentence unless it is demonstrably unfit, and that an appellate court may not intervene simply because it would have weighed the relevant factors considered by the sentencing judge differently.

[24] As noted in *R. v. Suter* 2018 SCC 34, trial judges have a "broad discretion to impose the sentence they consider appropriate within the limits established by law."

[25] As well, in *R. v. Lacasse* 2015 SCC 64, the Supreme Court of Canada commented on the deference that is to be given to a trial judge's discretion in determining the appropriate sentence by noting at paragraph 48:

First, the trial judge has the advantage of having observed the witnesses in the course of the trial and having heard the parties' sentencing submissions. Second, the sentencing judge is usually familiar with the circumstances in the district where he or she sits and therefore with the particular needs of the community in which the crime was committed.

[26] Denunciation is the communication of society's condemnation of the offender's conduct. A sentence with a denunciatory element represents a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantial criminal law. Society, through the courts, must show its abhorrence of particular types of crime, and the only way in which the court can show this is by the sentences that they pass.

[27] In *R. v. EMW* 2011 NSCA 87, our Court of Appeal affirmed the words of Judge Campbell when discussing the difference between retribution and vengeance, at para 18:

Retribution is punishment. It is objective, measured and reasoned. Vengeance and anger have no place in sentencing. When reason and objectivity give way to expressions of righteous indignation or revenge, a sentence is no longer an expression of a system of values. It has then become an emotional act and not a rational one. It is then not measured or restrained. Justice can be and sometimes should be hard. It must, however, be thoughtfully so. It is important to treat the offender in a way that reflects his level of culpability. Simply put, the punishment, and punishment it is, should fit the crime and the person who committed it.

[28] As also noted by our Court of Appeal in *R. v. EMW*, rehabilitation is a much greater consideration for a sentencing judge when the offender has accepted responsibility.

[29] **From his comments in his Facebook post where he openly displays items that will permit him internet access, his mocking comments on Facebook that "crime really does pay off," and his comment in the Pre-Sentence Report that**



**he “attributed his current charges to others reporting his actions to law enforcement,” it is clear that Mr. Ward does not accept responsibility.**

[30] A court must exercise caution in placing too much weight on deterrence when choosing a sentence, especially incarceration. This caution arises from empirical research which suggests that the deterrent effect of incarceration is uncertain.

[31] I am mindful of the principles of sentencing as outlined in *R. v. Grady* (1973) 5 NSR (2d) 264 (NSAC) where the court confirmed that the primary focus was on the protection of the public and how best to achieve that whether through deterrence or rehabilitation, or both. Protection of the public includes both protection of society from the particular offender as well as protection of society from this particular type of offense.

[32] The same court in *R. v. Fifield* [1978] NSJ 42 stated at para 11, “We must constantly remind ourselves that sentencing to be an effective societal instrument must be flexible and imaginative. We must guard against using...the cookie cutter approach.”

### **Sentencing Principles**

[33] There has been clear instruction from the Supreme Court of Canada, and the Courts of Appeal right across this country, that sentencing Courts are to give denunciation and deterrence priority over rehabilitation when imposing a sentence on those who are guilty of sexually abusing a child.

**[34] In the present charges Mr. Ward is not guilty of sexually abusing children, and he is not being sentenced for that, but such directions from our Superior Courts would equally apply to those individuals who openly, flagrantly, and repeatedly, defy Court Orders that are intended to protect vulnerable children from repeat predators such as Mr. Ward.**

**[35] The Supreme Court of Canada in *R. v. Friesen* 2020 SCC 9 emphasized the need for sentencing Courts to increase sentences for those who sexually abuse children considering the long-term, and likely life-long, effects of such abuse on the victims. I repeat, such directions from the Supreme Court of Canada would equally apply to those individuals who openly, flagrantly, and repeatedly, defy Court Orders that are intended to protect vulnerable children from repeat sexual predators such as Mr. Ward.**

[36] There are no allegations that Mr. Ward attempted to lure, or make contact with, young children with his repeated use of the internet, but that doorway had been opened by his actions. A look at the third page of Exhibit #2 shows 3 of 9 photos of Mr. Ward's Facebook friends included young children. The lifetime s. 161 Prohibition Order is intended to guard against such access to children online by Mr. Ward. By accessing the pages of his Facebook friends, Mr. Ward would have access to any photos of their children. Who knows what would have occurred next.

[37] I am statutorily directed to give primary consideration to the objectives of denunciation and deterrence when sentencing individuals for sexual offenses against children. This would obviously equally apply to breaches of s.161 Prohibition Orders.

### **Victim Impact Statement**

[38] There is no Victim Impact Statement in this matter.

### **Pre-Sentence Report**

[39] In the Pre-Sentence Report update dated January 19, 2023, Mr. Ward does not take responsibility for his actions, but blames those who reported his criminal behaviour.

### **Aggravating Factors**

[40] These were repeated acts in open and flagrant defiance of court Orders intended to protect children from Mr. Ward.

[41] He first breaches within days of being released from custody, and the second time he does so within 6 weeks of being reminded by the Court of his need to abide by the s. 161 order, and also prohibited from internet access in the Release Order dated May 25, 2022.

### **Mitigating Factors**

[42] Mr. Ward has pleaded guilty, but in considering the guilty pleas, I am mindful of the case of *R. v. F.L.* [2018] OJ 482 at paras 22 and 23:

A plea of guilt does not entitle an offender to a set standard of mitigation. The amount of credit a guilty plea attracts will vary in each case...In some

cases a guilty plea is a demonstration of remorse and a positive first step towards rehabilitation. **In other cases, a guilty plea is simply recognition of the inevitable.**

[43] And in *Buschmeyer* 2021 ABQB 1008 at paras 78 and 79:

[He] was clearly aware that he was in breach of the prohibition order on an on-going and continuous basis...

...In terms of mitigating circumstances, I accept that the Accused entered guilty pleas to the offences involving breaches of the prohibition order. However, I do not attach a great deal of weight to this fact in these particular circumstances. [He] was in clear violation of this prohibition order over an extended period of time. As such, there was no viable defence to these charges available to him in these circumstances.

#### **Case Law**

[44] The Crown relies on the following relevant cases: *R v Benson*, 2022 ONCJ 370, *R v Buschemeyer*, 2021 ABQB 1008, *R v Exell*, 2015 ONCA 704, and *R v Bansfield*, 2008 ONCJ 383.

[45] These cases all confirm that deterrence and denunciation are the paramount sentencing principles for those who choose to breach s. 161 Prohibition Orders.

[46] In *Benson* the following statements are applicable to Mr. Ward at paras 105 and 106:

...A sex offender who has repetitively breached a court order, for whatever reason, is unlikely to be specifically deterred by further orders of community supervision without a period of custody... Each case emphasized the predominant sentencing principles of deterrence and denunciation...the recurrent theme was that sentences of substantial periods of incarceration are essential to reflect the seriousness of the offence, the culpability of the offender and the guiding sentencing principles: *R. v. Bale*, [2017] O.J. No. 4791 (Ont.C.A.).

[47] In *Exell* at para 8:

The predominant sentencing principles that control the disposition in cases involving a breach of a s. 161 order are denunciation and deterrence, both specific and general. This was not a technical breach... It would be obvious to any person, who was subject to such an order, that such was its purpose and the conduct in which he engaged breached it.

[48] In *Buschemeyer* at para 94:

...denunciation and deterrence are the primary sentencing objectives when dealing with an offence under s. 161 of the Criminal Code.

[49] In *Bansfield* at paras 14 and 17:

Section 161 orders have therefore been enacted to protect vulnerable children from dangerous convicted paedophiles. They are an important part of our justice system's preventative response to these dangers and harm.

Section 161 strikes an important balance between the liberty interests of a paedophile who has served his sentence and the continuing societal responsibility to protect vulnerable children and our communities from the continuing risk presented by paedophiles.

[50] Mr. Ward is a repeat paedophile, and children need to be protected from him. His criminal record confirms that.

### **Decision**

[51] I have signed the Forfeiture Order. These items were all used by Mr. Ward to repeatedly breach Court Orders. There is no evidence before the Court that Mr. Ward used any of those items for any legitimate work purposes.

[52] I reject any claims for enhanced remand credit beyond the 1.5 to 1. There has been no evidence presented to this Court to confirm any claims by Mr. Ward of excessive hardship related to Covid-19 while in remand. I deal with persons in custody almost every day and I regularly take the time to check-in with these individuals to see how things are in the provincial jails, and I have not received any recent reports that would cause me to believe that matters have gotten worse for people in remand over the past couple of months that would warrant increased remand credit.

[53] Mr. Ward will receive 150 days credit for his 100 days in remand.

[54] I accept the sentencing recommendation by the Crown of a global sentence of 21 months which equals 630 days, from which will be subtracted 150 days for remand credit, for a go-forward sentence of 480 days.

[55] The period of imprisonment is to be followed by a period of probation for 3 years, which is the maximum permissible. Such a lengthy period is required as you have shown a blatant disregard for Court orders so a closer eye will need to be kept on you for an extended period to ensure no further breaches of your lifetime s. 161 prohibition. This is necessary to protect vulnerable children from a repeat sexual predator.

[56] The terms of probation are as follows:

- Report to a Probation Officer at 14 Court Street, Suite 206, Victoria Court, Truro, Nova Scotia within 3 days from the expiration of your sentence of imprisonment and thereafter as directed by your Probation Officer or supervisor.
- Attend for mental health assessment and counselling as directed by your Probation Officer.
- Attend for assessment, counselling or a program directed by your Probation Officer, including for sexual deviance.
- Participate in and co-operate with any assessment, counselling or program directed by the Probation Officer and pay the cost or portion of the cost as directed by your Probation Officer.
- Do not purchase, use or be in possession of a device capable of accessing the internet.
- Do not directly, or indirectly use or access the internet or other digital network, or subscribe to internet service.
- Sign all consents necessary to prove compliance with probation.
- Stay out of Pictou County, Nova Scotia.

[57] It is not for you to unilaterally change the terms of your probation, nor the terms of your s. 161 Prohibition Order. Once you get out and prove yourself over an extended period of time, then, and only then, can some lessening of restrictions possibly occur.

Judge Alain Bégin, JPC