Citation: R v Swanson, 2025 MBCA 29
Date: 20250407
Docket: AR24-30-10074

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Christopher J. Mainella
Madam Justice Jennifer A. Pfuetzner
Mr. Justice James G. Edmond

B E T W E E N:

	)	***J. S. Brar***
HIS MAJESTY THE KING	)	*for the Appellant*
	)	
Respondent	)	***D. N. Queau-Guzzi***
	)	*for the Respondent*
- and -	)	
	)	*Appeal heard and*
TRENT DEAN SWANSON	)	*Decision pronounced:*
	)	***March 10, 2025***
(Accused) Appellant	)	
	)	*Written reasons:*
	)	***April 7, 2025***

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MAINELLA JA (for the Court):

Introduction

[1] This sentence appeal illustrates that the grave harms arising from child pornography offences necessitate a clear judicial message that offenders of such crimes will be severely punished.

[2] The accused received a combined sentence of five years' imprisonment, less credit for pre-sentence custody, arising from his guilty pleas to three counts of voyeurism, one count of possession of child pornography and one count of accessing child pornography. The sentence breakdown is as follows:

- voyeurism in relation to S.S.—one year;
- voyeurism in relation to K.D.—one year concurrent;
- voyeurism in relation to H.H.—one year concurrent;
- possess child pornography in relation to B.J. and D.J.—four years consecutive; and
- accessing child pornography in relation to B.J. and D.J.—three years concurrent.

[3] One of the ancillary orders of the sentence was a fifteen-year order under section 161 of the *Criminal Code*, RSC 1985, c C-46 [the *Code*], prohibiting the accused from attending specific places, having certain types of contact with children and using the internet or other digital network save in accordance with ten conditions set by the sentencing judge (prohibition order).

[4] The accused seeks leave to appeal and, if granted, appeals his sentence. The three summarized grounds of appeal focus on (1) the sentencing judge's approach to sentencing the multiple counts of voyeurism, (2) the fitness of the child pornography sentences, and (3) the fitness of the prohibition order in terms of some of the conditions placed on the accused using the internet or other digital network.

[5] After hearing the appeal, we granted leave to appeal and allowed the appeal in part. The prohibition order was amended, as set out in the appendix attached to these reasons, but the remainder of his appeal was dismissed with reasons to follow. These are those reasons.

Background

[6] In 2020, the accused became the target of an investigation relating to the illegal importation of firearm components from China to The Pas, Manitoba.

[7] In September 2020, the police executed two search warrants on the accused's residence. Numerous restricted and non-restricted firearms, suppressors, ammunition and manufacturing materials were seized. Based on the investigation, police believed that the accused was using 3D printers to convert air guns into firearms; such contraband is colloquially called "ghost guns" because such improvised firearms are unregistered and untraceable, making them highly valued in the underworld for individuals inclined to commit violent crimes (*R c Lefrançois*, 2018 QCCA 1793 at paras 68-69).

[8] The accused was charged with numerous firearms offences. On October 4, 2022, after an unsuccessful challenge to the search warrants (see *R v Swanson*, 2022 MBQB 138, aff'd 2023 MBCA 43), the accused pleaded guilty to five firearms offences and received a combined sentence of three and a half years' imprisonment, less credit for pre-sentence custody, together with three years' probation.

[9] Several computers and electronic storage devices were also seized by police from the accused's residence because of the firearms investigation.

Evidence of sexual offences was found that had an important historical connection.

[10] In 2006, the accused was charged with making child pornography in relation to his adolescent nieces, D.J. and B.J., sexual exploitation of B.J. and three counts of unauthorized possession of a prohibited or restricted weapon. In 2007, he received a combined sentence of eighteen months' imprisonment due to his guilty pleas to these offences.

[11] The historic child sexual abuse offences in relation to D.J. and B.J. arose from an elaborate scheme of the accused based on the ruse that he had a friend who was a talent scout for a popular teen magazine. He convinced D.J., then aged fifteen, to model for him so that he could make her "famous". The accused's photography of D.J. became increasingly sexualized over time and resulted in him taking nude pictures of D.J. until she was seventeen. When D.J. became suspicious, the accused turned his attention to B.J., then aged fifteen. He lied and pressured her into taking nude photographs, using the same deception he previously used with D.J. The accused also sexually touched B.J.

[12] A key fact for the purposes of this appeal is that, while the police lawfully seized the nude images of D.J. and B.J. in 2006, the accused possessed other copies of those nude images that the police did not locate and that he did not destroy or turn over to the police or the court despite being prosecuted and sentenced for the child sexual abuse offences. Instead, the accused secretly retained copies of the nude images of D.J. and B.J., which form the basis of the child pornography offences in this case.

[13] When the police discovered the nude images of D.J. and B.J. on the accused's computers and electronic storage devices, a detailed forensic examination was conducted to compare the nude images seized in 2020 with those that had been seized from the accused previously in 2006. The forensic examination was not completed until after the accused was sentenced for the firearms offences in 2022.

[14] The results of the forensic examination by police revealed sixteen unique images of D.J. and fifteen unique images of B.J. when they were children. The forensic examination also refuted the accused's claim to police that he possessed these nude images due to an innocent error because some of the electronic storage devices on which the nude images were stored did not exist back in 2006 when police first seized them. Additionally, a review of the metadata during the forensic examination confirmed that these nude images of D.J. and B.J. were created, duplicated, accessed and transferred to new electronic devices *after* the accused's release from custody for the sentence arising from his 2007 convictions.

[15] Police also found voyeuristic visual recordings on the accused's computer, most of which related to the accused's stepdaughter, S.S. These voyeuristic visual recordings of S.S. took place over many years until S.S. was into her thirties.

[16] The voyeuristic visual recordings of S.S. took two forms. On several occasions, the accused hid a camera in the bathroom prior to S.S. showering. After capturing a visual recording of her undressing and showering, the accused retrieved the hidden camera. In addition to the bathroom recordings, the accused made an "upskirt" visual recording of S.S. at the kitchen table.

While S.S. was sitting down, the accused used a camera to visually record the buttocks area of S.S.

[17] In one of the visual recordings, the accused is observed placing a hidden camera in a bathroom at a home in Winnipeg, Manitoba. The accused, together with S.S., her cousin, K.D., and S.S.'s best friend, H.H., were staying at the home on a visit from The Pas. During this incident, the accused visually recorded all three women undressing and showering in the bathroom.

[18] The forensic examination by police confirmed that, after the visual recording was made, the accused manipulated the recording to create numerous still nude images of the three women that he transferred to various electronic storage devices and later accessed.

[19] Given the uncertainty as to when the voyeuristic visual recordings occurred, the accused was sentenced on the basis that S.S., K.D. and H.H. were each aged eighteen or older at the time of the voyeurism offences.

[20] The accused was fifty-three years old at the time of sentencing. He was employed as a shipper/receiver before his arrest. No materials were filed at the sentencing hearing to provide insight into his motivations for his criminal conduct. The only background evidence before the Court was that the accused suffered from and was being treated for chronic headaches. His criminal record consisted of the sentences from the 2006 and 2020 sexual, weapons and firearms offences previously mentioned.

[21] D.J., B.J. and S.S. provided victim impact statements detailing the impact of the accused's offences on each of them.

Discussion

Sentencing Judge's Approach to Multiple Counts of Voyeurism

[22] There is merit to the accused's submission that there were irregularities with the sentencing judge's approach to whether the sentences for the three counts of voyeurism should be consecutive or concurrent to each other and to the two child pornography counts (see the *Code*, s 718.3(4)), as well as his application of the principle of totality (see *ibid*, s 718.2(c)).

[23] The sentencing judge declined the Crown's request for "consecutive sentences for the three voyeurism" counts. He said that a "fit and proper sentence pre-totality" was that the accused receive a sentence of two and a half years for voyeurism in relation to S.S. because she was "his step-daughter" and that his actions were "extremely egregious" because of his related record. He said that the voyeurism counts in relation to K.D. and H.H. should be one year each "concurrent" to the voyeurism count in relation to S.S.

[24] However, later in his reasons, the sentencing judge said that the accused's sentence before consideration of the principle of totality would be "11.5 years." The only mathematical way he could reach that combined sentence of 11.5 years is by making the one-year sentences for the voyeurism counts in relation to K.D. and H.H. consecutive to the voyeurism count in relation to S.S. and to the child pornography counts.

[25] When the sentencing judge addressed the principle of totality, he concluded that the 11.5-year sentence would be "excessive" and that he would make an "adjustment" to the sentence by reducing the voyeurism sentence in

relation to S.S. to one year and by making the voyeurism sentences in relation to K.D. and H.H. concurrent to the voyeurism sentence in relation to S.S and the child pornography offences.

[26] The purpose of reasons is to "show why the judge decided as he or she did" (*R v REM*, 2008 SCC 51 at para 17). We are not satisfied that there was a logical or intelligible reason for the sentencing judge to describe whether the voyeurism sentences were consecutive or concurrent prior to the application of the principle of totality in two separate ways as he did. The approach he took does not reasonably "justify and explain the result" (*FH v McDougall*, 2008 SCC 53 at para 98).

[27] However, sometimes errors in a sentencing judge's approach to multiple counts "will produce an unfit sentence but not always" (*R v McFarlane*, 2018 MBCA 48 at para 17 [*McFarlane*]). Given the deferential standard of review, if an error has "no real effect" on the fitness of a sentence, appellate intervention is not permitted (*R v Lacasse*, 2015 SCC 64 at para 45 [*Lacasse*]).

[28] The Crown submitted that the sentencing judge's error was harmless. We agree.

[29] The imposition of concurrent one-year sentences for the three counts of voyeurism was entirely appropriate in light of the sentencing judge's reasonable conclusion that the accused had high moral blameworthiness (given his maturity and that his conduct was pre-meditated, repeated and involved a family member); the accused's prior related record and dim rehabilitative prospects; proper consideration of the "no-free-ride principle" (*R v McLean*, 2022 MBCA 60 at para 78) that would allow for a sentence at

the high end of the applicable range; the psychological harm suffered by S.S. as per her victim impact statement; and the acceptable range of sentences for similar offences committed in similar circumstances (see *R v ALB-C*, 2025 MBCA 19 at para 19 [*ALB-C*]; *McFarlane* at para 25).

[30] The gravity of the accused's conduct is closer to the situation in *McFarlane,* as opposed to the more serious case of *ALB-C*. However, in our view, given the multitude of aggravating factors and the dearth of mitigating factors, we are persuaded that the accused's one-year sentence for the three counts of voyeurism does not unreasonably depart from the fundamental principle of proportionality even though the sentencing judge erred in his approach to sentencing on multiple offences (see *R v Parranto*, 2021 SCC 46 at para 118; *Lacasse* at paras 52-53).

Fitness of the Child Pornography Sentences

[31] The Supreme Court of Canada's decision in *R v Friesen*, 2020 SCC 9 [*Friesen*] was a clarion call for the courts and society to abandon antiquated attitudes towards the harms caused to children by offences involving any abuse of a child in the sentencing of offenders. As the Court explained, it is "important" to get the "wrongfulness and harmfulness" of a sexual offence involving a child "right" (at para 50).

[32] In *R v Alcorn*, 2021 MBCA 101, this Court signalled that crimes that involve some form of sexual exploitation of a child should be treated just as seriously as offences involving the sexual touching of a child, such as sexual assault or sexual interference, stating that "there is no reason why a gross violation of a child's autonomy and integrity should be treated differently merely because an offender's conduct transgressed the norm against sexual

exploitation as opposed to the norm against sexual contact in the absence of consent" (at para 45). That approach was adopted by this Court in relation to sentencing for child pornography offences in *R v Sinclair*, 2022 MBCA 65 [*Sinclair*].

[33] In *R v Pike*, 2024 ONCA 608 at paras 146-56 [*Pike*], Tulloch CJA provided comprehensive reasons highlighting six distinct wrongs and harms, predicated on the discussion in *R v Sharpe*, 2001 SCC 2 that sentencing judges should keep in mind when applying *Friesen* to arrive at a proportionate sentence for a child pornography offence:

(a) the violation of children's dignity;

(b) the direct invasion of children's privacy;

(c) the infliction of severe emotional harm on children;

(d) the instigation of the production and distribution of this illegal material and, thus, the sexual abuse of children (i.e., the creation of a market of exploitation);

(e) the incitement of perpetrators to commit and facilitate the commission of other sexual offences against children; and

(f) the perpetuation of "pernicious messages that attack children's humanity and equality" (*Pike* at para 154).

[34] He also went on to provide the following guidance to sentencing judges, with which we agree (*ibid* at para 160):

> Courts must follow Parliament's direction by placing children and the wrongs and harms that people who possess child pornography inflict on them at the centre of the sentencing process. Courts can give significant weight to the personal circumstances and mitigating factors of people who possess child pornography, and to sentencing objectives such as rehabilitation: *Friesen*, at paras. 91-92, 104. But it is all too easy for those considerations, which focus on the people being sentenced, to overshadow the wrongs and harms they inflict because their victims are all too often invisible. The police struggle to identify the producers of these images and the children they victimize because the producers abuse and exploit those children in private homes or in countries oceans away: *J.S.*, at para. 104; *HM Advocate v. Graham*, [2010] HCJAC 50, 2011 J.C. 1, at para. 45. Courts must overcome this invisibility by making child victims the central focus: *Friesen*, at paras. 53, 67, 74-75; see also *Bertrand-Marchand*, at para. 32. *That is why courts can neither prioritize other objectives to the same degree as or higher than denunciation and deterrence, nor use the personal circumstances and mitigating factors of people who possess child pornography to avoid grappling with the wrongs and harms they cause: Friesen,* at para. 104; *R. v. Porte,* [2015] NSWCCA 174, 252 A. Crim. R. 294, at paras. 88, 128.
>
> [emphasis added]

[35] Finally, he reviewed the jurisprudence across Canada as to sentences for the offence of possession of child pornography after the maximum punishment was raised by Parliament to ten years' imprisonment in 2015. He noted that, post-*Friesen*, the upper end of the applicable range was five years' imprisonment. He declined to identify a lower end to the range because "possession can be committed in a wide variety of circumstances and is sometimes prosecuted summarily" (*Pike* at para 176).

[36] The accused relied on the *obiter* statement in *R v Fedoruk*, 2024 MBKB 31 [*Fedoruk*] that, in *Sinclair*, this Court "identified a sentencing range of four months to two years" (*Fedoruk* at para 19) for the offence of possession of child pornography. We disagree.

[37] In *Sinclair*, the lower court mistakenly identified the sentencing range in Manitoba for possession of child pornography to be "four months to two years" (at para 64). In contrast, this Court said that a proper application of relevant sentencing objectives and principles, considering the discussion in *Friesen*, "called for a significantly higher sentence" (*Sinclair* at para 69). After an adjustment for the principle of totality, this Court raised the accused's fifteen-month sentence for possession of child pornography (164 images and/or videos of 12 children) to two and a half years. That sentence was made concurrent to other sentences as part of a combined sentence of eight years.

[38] In *Sinclair*, this Court adopted the Alberta Court of Appeal's comments in *R v Andrukonis*, 2012 ABCA 148 that "possession of child pornography is itself child sexual abuse" and offenders can expect jail terms that will not be "inconsequential" (at para 65).

[39] Mindful of the relevant sentencing principles and objectives set out in the *Code*, as discussed in *Friesen* and *Sinclair*, we are not convinced that the accused's four-year sentence for possession of child pornography is demonstrably unfit. Three features of this case are important to underscore.

[40] This was a clear situation of the infliction of severe emotional harm on children because of the significant re-victimization of D.J. and B.J., as painfully chronicled in their victim impact statements (see *Pike* at para 149). As the sentencing judge properly noted, it was extremely egregious for D.J. and B.J. to believe that their nude images were destroyed in 2007 when the accused was sentenced, only to learn years later that the accused was undeterred in violating their personal privacy and sexual integrity.

[41] Next, it was reasonably open to the sentencing judge to craft the accused's sentence with significant attention to the objective of specific deterrence (see the *Code*, ss 718(b), 718.01; *Friesen* at para 104). While an offender should not be re-sentenced for past offences, their criminal record may be a relevant consideration to address specific deterrence. As Fraser CJA explained in *R v DG*, 1996 ABCA 191 [*DG*], "proportionality has many aspects, and since one of the key objectives of sentencing is to protect the public, one cannot ignore past conduct as a potential predictor of future risk" (at para 5).

[42] The accused was not deterred by his prior sentence for child sexual abuse offences, which the sentencing judge properly noted was lenient as it was pre-*Friesen*. While the accused's possession of child pornography sentence may appear high when compared to the nature and gravity of larger collections of child pornography in other cases (see e.g., *ALB-C* at para 5), imposing a proportionate sentence is an individualized process that must be "tailored to the nature of the offence and the circumstances of the offender" (*R v Nasogaluak*, 2010 SCC 6 at para 43). The principle of parity is secondary to the fundamental principle of proportionality (see *Lacasse* at para 54). We see no error in the sentencing judge tempering the principle of parity given the accused's deliberate decision to reoffend in the same way in relation to the same victims.

[43] Finally, we are not persuaded by the authorities that the accused relied on where largely first-time offenders received sentences for possession of child pornography that were non-incarceratory, conditional sentence orders or sentences with less than two years' imprisonment (see *R v Tretiak*, 2024 MBPC 30; *Fedoruk*; *R v Jenkins*, 2024 PESC 31; *R v Jongsma*, 2021 ONSC

796; *R v Gardiner*, 2019 MBCA 63). The accused's situation is entirely dissimilar to these offenders.

[44] As the sentencing judge reasonably noted, the accused's "moral culpability is extremely high" and, in terms of his rehabilitative prospects, there is good reason to be concerned going forward given his undiagnosed proclivity to engage in sexual offences relating to young girls and women. We see no basis to interfere with the sentencing judge's judgment call that, to minimize the risk to the public, a lengthy segregation of the accused is necessary (see *DG* at para 5).

[45] In our view, a four-year sentence for possession of child pornography is within the applicable range discussed in *Pike*, particularly for a mature repeat offender who has few rehabilitative prospects. The sentencing judge's reasoning was consistent with this Court's comments in *Sinclair* that possession of child pornography in the digital age is a serious crime that requires a commensurate lengthy sentence. In summary, there is no basis to vary the accused's sentence given the deferential standard of review (see *Friesen* at paras 25-26).

Prohibition Order—Section 161 of the Code

[46] The accused asserts that aspects of the prohibition order made in relation to his use of the internet or other digital network were unfit such that this Court's intervention pursuant to section 687 of the *Code* is required. The relevant principles as to the imposition of a prohibition order and appellate review of such orders were discussed recently by this Court in *R v CPR*, 2024 MBCA 22 [*CPR*].

[47] Clause d(iii) of the prohibition order is a typographical error. The wording of the clause serves no purpose as it duplicates clause d(ii) and therefore should be deleted.

[48] The restriction in clause d(vi) of the prohibition order prevents the accused from using or accessing "any peer – any peer-to-peer or filesharing programs".

[49] In our view, looking at the record that was before the sentencing judge as a whole, we see no evidentiary basis to conclude that clause d(vi) would be a reasonable attempt to minimize the accused's risk to children and it should therefore be deleted (see *CPR* at paras 24-25). There is no suggestion that the accused shared any of the child pornography he possessed with others via the internet or used the internet to obtain any child pornography from others. The proposed restriction is not reasonably tailored to the accused's specific circumstances (see *R v Boucher*, 2020 ABCA 208 at para 34; *R v TF*, 2019 SKCA 82 at paras 106, 110, 113).

[50] Clause d(viii) as originally drafted is uncertain and overbroad and it has been amended as set out in the appendix attached to these reasons to clarify that the restricted use or access of cloud servers or external storage devices prohibits uploading or saving images or videos of children only.

[51] Clause d(ix) of the accused's prohibition order allowed for warrantless searches by the police to monitor his compliance with the prohibition order. The clause reads:

> You shall submit to any demand by a Peace Officer, without warrant or reasonable grounds to do a forensic analysis on any computer system in your possession, up to twice a month, during

> reasonable hours, for the purpose of verifying compliance of the within conditions[.]

[52] Unfortunately, the submissions at the sentencing hearing on clause d(ix) were impoverished. The Crown said nothing to justify the proposed condition and asked the sentencing judge to rubber stamp it. The accused made the more helpful but limited comment that the proposed condition was beyond the ambit of section 161 as that provision does not allow for the ordering of "warrantless searches" as that "would, effectively, be a breach of [the accused's] section 8 [*Charter*[1]] rights."

[53] While the sentencing judge somewhat misdescribed the accused's position in his reasons for decision, he did recognize the argument made to him that "section 161 does not authorize a search under any circumstances." He went on to say that he was going to "deny the Crown's request for warrantless searches as part of the section 161 order."

[54] Nevertheless, despite apparently denying the Crown's request for a warrantless search condition, the prohibition order that was signed provided for such a condition. In our view, this administrative error between the terms pronounced by the sentencing judge and its subsequent incorrect memorialization in the prohibition order requires the deletion of clause d(ix) (see *R v JH*, 2018 ONCA 245 at para 54).

[55] One final comment on clause d(ix) is necessary. We heard more detailed submissions from the parties than the sentencing judge did about the accuracy of the accused's position that section 161(1)(d) of the *Code* cannot

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[1] *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11

authorize warrantless searches to ensure compliance with a prohibition order under any circumstances.

[56] We note that section 161(1)(d) of the *Code* restricts an offender's internet use "unless the offender does so in accordance with conditions set by the court." In *R v KRJ*, 2016 SCC 31 [*KRJ*], the Supreme Court highlighted that the amendments to section 161 in 2012 served to address outdated legislation in the ever-changing digital age. The current wording of section 161(1)(d) allows for the reasonable monitoring of sexual offenders to limit their opportunities to offend and prevents such behaviour (see *KRJ* at para 108).

[57] The thorny issue of whether reasonable monitoring of a sexual offender's internet use can include searches done by a peace officer of the offender's electronic devices pursuant to a properly worded section 161(1)(d) condition is a question best left for another day.

Disposition

[58] In the result, leave to appeal the sentence was granted and the accused's appeal was allowed in part. The prohibition order was amended in accordance with the appendix attached to these reasons. The remainder of the accused's appeal was otherwise dismissed.

Mainella JA

Pfuetzner JA

Edmond JA

APPENDIX

AMENDED FIFTEEN-YEAR ORDER OF PROHIBITION (see *Criminal Code*, RSC 1985, c C-46, s 161(1))

a) You are not to attend any public park or public swimming area where persons under the age of sixteen years are present, or can reasonably be expected to be present, or a daycare center, school ground, playground or community center.

b) You are not to seek, obtain or continue employment or become a volunteer in a capacity that involves being in a position of trust or authority over a person under the age of sixteen.

c) You must not have any contact, including communication by any means, with a person who is under the age of sixteen years except in unavoidable public encounters.

d) You must not use the internet or other digital network for any of the following:

(i) to access, possess or distribute any material that meets the definition of pornography or obscenity;

(ii) to communicate with any person under the age of eighteen years of age;

(iii) [DELETED];

(iv) to communicate with S.S., K.D., H.H., B.J. or D.J.;

(v) to possess, distribute, publish, post or make publicly available in any way information, including comments, images or videos, that refers to or depicts any person under the age of eighteen;

(vi) [DELETED];

(vii) to possess or use any software for the purpose of encryption, including but not limited to VPN, or to password protect any device in your possession;

(viii) to use or access any cloud server or similar external storage device for the purpose of uploading or saving images or videos that depict any person under the age of eighteen;

(ix) [DELETED]; and

(x) you may use a telephone for communication with persons confirmed to be over eighteen years of age other than S.S., K.D., H.H., B.J. or D.J.

Subject to section 161(3), at any time, these conditions may be varied if the Court hears an application for variation and subject to further conditions being imposed.