COURT OF APPEAL OF YUKON

Citation: *R. v. McCrimmon*,
2022 YKCA 1

Date: 20220112
Docket: 21-YU877

Between:

Regina

Appellant

And

Allan Donald McCrimmon

Respondent

Before: The Honourable Madam Justice Bennett
The Honourable Madam Justice Charlesworth
The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Territorial Court of Yukon, dated June 23, 2021 (sentence) (*R. v. McCrimmon*, 2021 YKTC 28, Whitehorse Docket 19-00194).

Counsel for the Appellant:	N. Sinclair
Counsel for the Respondent:	L. Fadden
Place and Date of Hearing:	Whitehorse, Yukon November 25, 2021
Place and Date of Judgment:	Vancouver, British Columbia January 12, 2022

Written Reasons by:
The Honourable Madam Justice DeWitt-Van Oosten

Concurred in by:
The Honourable Madam Justice Bennett
The Honourable Madam Justice Charlesworth

Summary:

The Crown appeals from a sentence of 20 months' imprisonment and two years' probation for possession of child pornography. It says the judge committed material errors in principle and the sentence is demonstrably unfit. The Crown asks that the sentence be increased to a penitentiary jail term of at least three years. Held: Appeal allowed in part. Appeals from sentence are subject to a deferential standard of review. Although the judge could have imposed a longer custodial sentence in the circumstances of this case, the Crown has not established an error in principle that impacted the prison term nor shown that a sentence of 20 months' imprisonment and two years' probation unreasonably departs from the principle of proportionality. However, the five-year prohibition order that forms part of the sentence is demonstrably unfit and increased to 15 years. A prohibition of that length is necessary to adequately minimize the risk of Mr. McCrimmon committing further offences involving child pornography.

Reasons for Judgment of the Honourable Madam Justice DeWitt-Van Oosten:

Introduction

[1] In June 2021, Allan Donald McCrimmon was sentenced to 20 months' imprisonment and two years' probation for possession of child pornography contrary to s. 163.1(4) of the *Criminal Code*, R.S.C. 1985, c. C-46. The judge also imposed a five-year prohibition restricting Mr. McCrimmon's access to children in certain circumstances and his use of digital networks.

[2] The Crown has appealed the sentence. It asks that the prison term be increased to at least three years. The Crown also asks to extend the length of the prohibition to 20 years.

[3] For the reasons that follow, I would allow the Crown's appeal in part. I would not interfere with the 20 months' imprisonment and two years' probation. However, I would increase the s. 161(1) prohibition to 15 years.

Background

The Offence

[4] Mr. McCrimmon pleaded guilty. At sentencing, an agreed statement of facts detailed the circumstances. The Crown proceeded by indictment, rendering

Mr. McCrimmon liable to a maximum punishment of 10 years' imprisonment: *Code*, s. 163.1(4)(a).

[5] In 2018, Mr. McCrimmon uploaded an image of child pornography from his computer to the Internet. The upload was detected by the police. The Whitehorse R.C.M.P. was notified and obtained a warrant to search Mr. McCrimmon's residence in March 2019. Various items were seized from his home, including four computer towers, a tablet and a mobile phone.

[6] The police found 33,605 unique images and 4,696 unique videos of child pornography on Mr. McCrimmon's devices. The material depicted male and female victims ranging in age from six months to 17 years. It showed highly exploitive and sexually invasive conduct, including young children in erotic poses with their genitals exposed, urination, anal intercourse, fellatio, vaginal intercourse, group sex, cunnilingus, use of sex toys, masturbation, ejaculation and digital penetration of the vagina and anus. There were images of children engaged in sexual activity with other children, as well as images of penetrative and non-penetrative sexual activity between children and adults. Some of the material showed bondage, sadism and bestiality.

[7] Mr. McCrimmon's devices also contained "Collateral Material"—images and videos that do not meet the *Code* definition of child pornography. The Collateral Material included 21,980 unique images and 298 unique videos of children under the age of 18 whose genitals were not visibly exposed. In some of this material, the children were nude.

[8] The child pornography was downloaded from Internet web sites outside of the Yukon.

[9] While the police were at Mr. McCrimmon's home, he told them he was addicted to child pornography. That same day, he gave a statement to the police in which he admitted to saving images and videos on his devices for subsequent viewing.

[10] The judge found that the child pornography seized from Mr. McCrimmon's home had likely been "viewed over a period of approximately a decade". An Image/Video Analysis Summary was attached to the agreed statement of facts. In addition to the material described earlier in these reasons, there were "artifacts/traces" of child pornography found on Mr. McCrimmon's devices. "The oldest dated from 2006 and [the] more recent being [from] March 2019."

[11] Mr. McCrimmon was on bail for more than two years while awaiting sentencing. During that time, he was prohibited from accessing the Internet, was prohibited from owning any devices capable of accessing the Internet, and had limited use of a phone.

Victim Impact

[12] Victim impact statements were filed on behalf of various individuals who appear in the material found on Mr. McCrimmon's devices. These statements were compiled by the Canadian Centre for Child Protection.

[13] With courage and in compelling terms, the victims describe the physical, emotional and psychological suffering they have experienced and continue to experience as a result of the creation, distribution and repeated viewing of the child pornography in which they appear.

[14] They speak of depression, fear, anxiety, thoughts of suicide, broken relationships, an inability to trust and constant worry whether the people around them will recognize them and know of their abuse and exploitation. This is only some of what they deal with, often on a daily basis. They feel hopeless, as the images and videos continue to circulate, and powerless to remove them from the Internet.

[15] The victims are revictimized with each download, viewing and choice by a perpetrator to share the material. They worry that sexual predators who view the material will feel empowered to do the things they see there to other children. As aptly stated by a parent of one of the victims, the enormity of the burdens borne by

those who fall prey to the makers, distributors and viewers of child pornography is unfathomable.

The Offender

[16] At the time of sentencing, Mr. McCrimmon was 64 years old.

[17] A letter he provided to the police within days of his arrest was filed at the hearing. The letter expressed remorse for his conduct, acknowledged its wrongfulness and emphasized a commitment to rehabilitation.

[18] A clinical psychologist who has worked with Mr. McCrimmon also provided a letter for sentencing. Dr. Baumbach described a childhood of “poverty, hoarding, physical abuse by [Mr. McCrimmon’s] father, and domestic violence.” Mr. McCrimmon has struggled with anxiety and depression as an adult. He has experienced health issues and financial problems. Prior to his offence, he used alcohol and “sexual excitement/gratification, mostly in the form of pornography” to cope with his challenges. He was drawn to and began relying on child pornography for sexual release in the early 2000’s. He made attempts to stop but was not successful.

[19] Dr. Baumbach described Mr. McCrimmon as having shown a “remarkable” commitment to treatment. At the time of sentencing, he self-reported a “significant reduction in sexual preoccupation and a lessening of his previously high sex drive to a level more typical of a man of his age”.

[20] Several people who know Mr. McCrimmon provided letters of support. They variously describe him as a kind, caring and good person. They believe he is genuinely remorseful for his offence and committed to rehabilitation. He has been open about his conduct with them, has accepted responsibility and has not tried to minimize the seriousness of his crime.

Reasons for Sentence

[21] Sentence was imposed on June 23, 2021. The judge's reasons are indexed as 2021 YKTC 28.

[22] The Crown sought a jail sentence in the range of three to four years. Crown counsel conceded that a prison term of this length was longer than the sentences imposed in the case authorities placed before the judge. However, the Crown submitted that its position was justified in light of: (a) the volume of child pornography found on Mr. McCrimmon's devices; and (b) *R. v. Friesen,* 2020 SCC 9, which calls for increased sentences for offences involving sexual violence against children.

[23] The Crown also sought a 20-year s. 161(1) prohibition. Section 161(1) of the *Code* allows a judge to impose a prohibition that, among other things, prevents an offender from attending places where children are likely to gather, enjoins them from working or volunteering with children, and imposes restrictions on their use of the Internet.

[24] The lawyer representing Mr. McCrimmon urged the judge to impose a one-year jail term, followed by 12 months' probation. She submitted that a five-year s. 161(1) prohibition would be adequate.

[25] Before pronouncing sentence, the judge reviewed the circumstances of the offence, the victim impact statements and Mr. McCrimmon's personal circumstances. He noted that Mr. McCrimmon pleaded guilty, has no criminal record and has had a "long and consistent work history" (at para. 23). Material filed by the defence revealed community support for Mr. McCrimmon (at para. 23). The psychologist's letter confirmed that in accessing treatment, Mr. McCrimmon had found "a path forward" to help protect the public from future offending (at para. 32). The judge noted that Mr. McCrimmon was remorseful (at para. 34) and prior to sentencing he had been on bail for over two years on restrictive terms with which he had fully complied (at para. 36).

[26] The judge summarized his findings this way:

> [33] In summary, on the circumstances of the offence and the offender, we have a terrible offence. It is clearly aggravated by the quantity of the images, which indicate Mr. McCrimmon's engagement with those images. They indicate the amount of time he spent at it and they indicate the seriousness of the behaviour he was prepared to watch.
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> [34] On the other hand, we have an offender with no record who has support in the community and has clearly shown remorse. Mr. McCrimmon has taken active steps and the results of those steps were positive.

[27] The main issue for the judge to decide was proportionality:

> [37] The question comes down to, really, how do these issues get balanced in order to create a proportional and individualized sentence. How do I arrive at that individualized sentence while recognizing that we have in this case, in the circumstances of the offence, an industry-sized destruction of children? That is extremely important to acknowledge, recognize, and respond to, for the law must respond to it.
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> [Emphasis added.]

[28] To answer that question, the judge reviewed a number of sentencing decisions cited by the Crown and the defence. From those authorities, he drew the following conclusions. First, a penitentiary sentence is not out of the question for possession of child pornography, especially given the importance of general deterrence (at para. 42). Second, in sentencing for this offence, courts must pay closer attention to the harms caused by the offence (at paras. 43–44, citing *Friesen*). Finally, the Supreme Court of Canada has indicated that sentences "ought to go up" for sexual offences against children (at para. 49, again citing *Friesen*).

[29] The judge turned his mind to appellate consideration of the generally accepted range of sentences available for possession of child pornography (at paras. 53–54). In that regard, he cited *R. v. Hagen*, 2021 BCCA 208. In *Hagen*, the British Columbia Court of Appeal upheld a 10-month jail term for possession of child pornography. In the course of its analysis, the Court noted that:

> [69] A 10-month term of conventional imprisonment and three years' probation [fell] squarely within the generally accepted range of sentences for possession of child pornography, namely, four months to two years' imprisonment ….
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> [Emphasis added; internal references omitted.]

[30] The range cited in *Hagen* was established pre-*Friesen*. See *R. v. R.L.W.*, 2013 BCCA 50 at paras. 43, 49. The judge inferred from the Court of Appeal's reference to it that *Friesen's* call for more severe penalties has not resulted in a "dramatic change" in sentences for possession of child pornography. Instead, from his perspective, "[i]t appears, certainly at this stage in the development of the case law, that the change of sentences to a more serious sentence must be considered to be more incremental" (at para. 55, emphasis added).

[31] The judge rejected the defence position that a one-year jail term would be a fit sentence for Mr. McCrimmon (at para. 59). He concluded that a sentence of that length would not adequately respond to the seriousness of the offence (at paras. 60–61). Nor would it properly reflect the harm caused by the offence or Mr. McCrimmon's moral blameworthiness (at para. 62).

[32] On the other hand, there were mitigating circumstances for him to consider, including the steps taken by Mr. McCrimmon to address the factors that contributed to his offending (at para. 63) and his progress in treatment (at paras. 63–64).

[33] Ultimately, the judge concluded that a penitentiary sentence was "not necessary" for Mr. McCrimmon (at para. 65). Instead, he imposed 20 months' imprisonment, followed by two years' probation. Probation with continued treatment was recommended by Mr. McCrimmon's psychologist. Moreover, the judge was of the view that the liberty restrictions accompanying a probation order would have a deterrent effect (at para. 67). He imposed terms of probation that include regular reporting to a probation officer and participation in assessment and counselling programs, including programs that address "psychological issues" (at para. 76).

[34] The judge concluded that the two years spent on bail while awaiting sentencing, plus 20 months' imprisonment and two years' probation, would effectively amount to "five years of consequences" for Mr. McCrimmon (at para. 69). That, in addition to various ancillary orders, would satisfy the principles of general deterrence and denunciation (at para. 69).

[35] The judge imposed a five-year s. 161(1) prohibition, a 20-year order under the *Sex Offender and Information Registration Act,* S.C. 2004, c. 10, and a victim surcharge (s. 737(1), *Code*), and he ordered that Mr. McCrimmon provide a sample of his DNA for the national DNA databank (s. 487.051(1)). Finally, the judge ordered forfeiture of Mr. McCrimmon's electronic devices on terms to be settled by counsel (at paras. 78–82).

Grounds of Appeal

[36] The Crown says Mr. McCrimmon's sentence reflects material errors in principle. Specifically, the Crown contends that the judge:

a) did not adequately consider: (a) the size and gravity of Mr. McCrimmon's child pornography collection; and (b) the fact that he uploaded an image to the Internet;

b) misapprehended two facts: (a) that Mr. McCrimmon had been viewing child pornography for close to two decades, rather than one; and (b) that some of the children in the images and videos were as young as six months, rather than two years old as stated by the judge;

c) "inexplicably" treated the serious nature of the images and videos as something that either weighed in Mr. McCrimmon's favour or was mitigated by his personal circumstances;

d) misunderstood and misapplied the sentencing principles in *Friesen*;

e) wrongly treated probation as a punitive, rather than rehabilitative, sentence; and,

f) crafted insufficient terms for the s. 161(1) prohibition.

[37] If the Crown is not able to establish material errors in principle, it submits that, in any event, the sentence is demonstrably unfit.

Discussion

Standard of Review

[38] Appeals from sentence are subject to a highly deferential standard of review. As explained in *Friesen*:

> [26] … an appellate court can only intervene to vary a sentence if (1) the sentence is demonstrably unfit, or (2) the sentencing judge made an error in principle that had an impact on the sentence. Errors in principle include an error of law, a failure to consider a relevant factor, or erroneous consideration of an aggravating or mitigating factor. … 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. 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.
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> [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. 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.
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> [Internal references omitted.]

See also *R. v. Parranto*, 2021 SCC 46 at paras. 29–30, 36, 117–19, 122, 205–06, 229–33.

Application of Standard

[39] I am not persuaded the judge committed a material error in principle. Nor has the Crown satisfied me that 20 months' imprisonment and two years' probation is a demonstrably unfit sentence in the circumstances of this case.

[40] In assessing the Crown's fitness argument, this Court must look to the sentence as a whole. The jail term does not stand in isolation from the remainder of the sanctions that were imposed. A sentence of 20 months' imprisonment and two years' probation allows for a cumulative 44 months of state intervention, supervision and monitoring of Mr. McCrimmon. I accept that the judge could have imposed a

penitentiary jail term as requested by the Crown and it likely would have withstood appellate scrutiny. However, applying a deferential standard of review, I cannot say that the combined effect of imprisonment and probation imposed here unreasonably departs from the principle of proportionality: *Code*, s. 718.1; *Friesen* at paras. 30–33; *Parranto* at para. 10. That is the test this Court is bound to apply in deciding whether the sentence is demonstrably unfit.

[41] I *am* satisfied that the s. 161(1) prohibition must be varied. I would increase the prohibition to 15 years. A prohibition of this length is necessary to address the risk posed by Mr. McCrimmon once he is released into the community and no longer subject to probationary supervision. His counsel has not suggested that the terms of the order as fashioned by the judge are inappropriate.

No Material Errors in Principle

[42] As noted, the Crown alleges a number of errors in principle. To justify a variation of Mr. McCrimmon's sentence on that basis, the Crown must establish that the judge erred in law, failed to consider a relevant factor or took an erroneous approach to an aggravating or mitigating factor. In addition, the Crown must show that any such error had an impact on the sentence. If it did not, "that is the end of the error in principle analysis and appellate intervention is justified only if the sentence is demonstrably unfit": *Friesen* at para. 26.

[43] The first alleged error in principle is that the judge did not adequately consider the volume of pornography found on Mr. McCrimmon's devices or the fact that he uploaded an image to the Internet. In my view, the reasons demonstrate that the judge was alive to both of these issues.

[44] The agreed statement of facts set out the volume of Mr. McCrimmon's cache. The size of the collection was also emphasized by Crown counsel at sentencing. Among other things, the judge was told that the "large number of images" distinguished Mr. McCrimmon's case from many other prosecutions involving possession of child pornography. The judge was also told that the volume of material meant there were "almost 40,000 victims" associated with Mr. McCrimmon's

conduct. From his reasons, it is clear the judge understood the Crown's position that volume and the fact that some of the images or videos were of the "most serious kind" weighed heavily in favour of a penitentiary jail term (at paras. 2, 6–7, 11, 56, 61). He specifically recognized the "quantity of the images" as an aggravating factor (paras. 33, 37). It cannot be said, on this record, that the judge ignored or failed to consider this aspect of the case.

[45] The judge would have also been aware from the agreed statement of facts that Mr. McCrimmon's offending was detected by the police because he uploaded an image of child pornography to the Internet. However, Mr. McCrimmon was not charged with transmitting, distributing or otherwise making child pornography available to others. Nor did Crown counsel suggest at sentencing that the fact of an upload should be treated as an aggravating feature of the case. In that context, it is not surprising the judge made no mention of it in his reasons. The Crown did not rely on this fact to justify a penitentiary term.

[46] The second alleged error is that the judge misapprehended the facts of the case in two ways: he mistakenly thought Mr. McCrimmon had been viewing child pornography for only 10 years, rather than 20, and that the youngest children in the collection of images and videos were two years old.

[47] These suggested misapprehensions are not borne out by the record.

[48] At para. 8 of his reasons, the judge said "it appeared that the images, certainly from page 4, extended over a four-year period and, when the totality of the circumstances were reviewed, it appears that, in fact, these images were viewed over a period of approximately a decade" (emphasis added). In making this comment, the judge appears to have been referring to the Image/Video Analysis Summary attached to the agreed statement of facts rather than to Mr. McCrimmon's viewing of child pornography *generally*. The Summary indicated that Mr. McCrimmon's devices contained "artifacts/traces" of child pornography from as early as 2006. This was 13 years prior to execution of the search warrant. In that context, the judge's statement that Mr. McCrimmon viewed the material found on his

devices “over a period of approximately a decade” (emphasis added), does not constitute a misapprehension.

[49] The same is true of the judge’s reference to children as young as “two to three years of age”. The paragraph pointed to by the Crown in support of an error in principle reads this way:

> [11] The actual images seen and the videos seen supported and formed part of what I have already described from the Agreed Statement of Facts as the analysis of what was seized, so in short, these images show bondage, bestiality, and sexual activity with children who were clearly as young as two to three years of age. The bondage included mechanisms used in order to hold a child’s mouth open. They were of the most serious kind.
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> [Emphasis added.]

[50] As I read this paragraph, the judge’s reference to children as young as “two to three years” was specific to the images or videos of “bondage, bestiality, and sexual activity” he was shown for the purpose of sentencing, not to Mr. McCrimmon’s *overall* collection of child pornography.

[51] Indeed, the portion of the Image/Video Analysis Summary that addressed bondage and bestiality (under the heading “Concerning Behaviours”), described one of the children involved in those images as “under the age of 12” and another as “under the age of 3”. Again, I do not see that the judge misapprehended the record. Instead, the Crown has interpreted the impugned comment more broadly than is warranted. It is apparent from para. 7 of the judge’s reasons that he knew children as young as six months old were depicted in some of the material found on Mr. McCrimmon’s devices. That fact formed part of the agreed statement of facts.

[52] As a third error in principle, the Crown contends that the judge wrongly and “inexplicably” treated the serious nature of the material on Mr. McCrimmon’s devices as somehow weighing in his favour or mitigated by Mr. McCrimmon’s personal

circumstances. In support of this argument, the Crown points to paras. 61–63 of the reasons, in which the judge said this:

> [61] I do agree with the Crown that the seriousness of the images are a very important factor here, and they are an important factor in at least two ways.
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> [62] First and foremost is the harm to the victims and to society at large by the seriousness of these images, the number of images, and the encouragement to those images that is created by the users who possess them. It is also important to take into account, when considering the seriousness of the images, what they say of the particular offender who is before the court and what is the moral culpability of that offender. Certainly that was very important to Madam Justice Gerow in the case before her.
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> [63] It is my view that this aspect of it does tell in the defendant's favour. As was stated by the psychologist, he was an individual who has, for many years, dealt with the issues of depression and anxiety. He did take immediate steps to deal with that which brought him before the Court and that he has been, to some extent, successful.
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> [Emphasis added.]

[53] I agree with Mr. McCrimmon that the Crown has misread this part of the reasons. In paras. 61 and 62, the judge acknowledges that the "seriousness of the images" possessed by Mr. McCrimmon is an important factor for him to consider. The harms associated with the volume and the type of material seized from Mr. McCrimmon's home are significant. Moreover, the egregious nature of the images and videos he was downloading and viewing elevates his moral culpability.

[54] As I read para. 63, the words "this aspect of it" are not referring to the "seriousness of the images". Rather, in that paragraph, the judge moved to the mitigation he was obliged to consider in the proportionality analysis, namely, the steps taken by Mr. McCrimmon to deal with the issues underlying his criminality. *That* is what weighed in Mr. McCrimmon's favour. This is clear once para. 63 is read in conjunction with the paragraph that follows:

> [64] I accept that what the psychologist has said is not a formal risk assessment, but certainly the application of common sense that an individual who has developed empathy for the victims, who has taken steps, who has followed those steps, is surely on the road to success. Common sense dictates this is the position that we are now at. …

The Crown does not take issue with the fact that efforts made to seek treatment and rehabilitate are appropriately treated as mitigation at sentencing.

[55] The Crown's fourth alleged error is that the judge failed to comply with the Supreme Court's direction in *Friesen* that the courts impose longer sentences, including penitentiary terms, for child sexual offending. In my view, this contended error is without merit.

[56] The judge accepted, "particularly in light of *Friesen*", that a penitentiary sentence was open to him (at para. 42). He understood that "in a general sense … *Friesen* has directed [sentencing judges] to require closer consideration of the harm done to individuals as a result of [a child pornography] offence" (at paras. 43–44). He also understood that sentences for child sexual offending "must be more serious as a result of *Friesen*" (at para. 55). However, he concluded that "at this stage in the development of the case law", there has not been a "dramatic" change in the range of sentences imposed for possession of child pornography. Instead, the imposition of more severe sentences is likely to occur incrementally (at para. 55). He then proceeded to fashion a proportionate sentence for Mr. McCrimmon, balancing the factors he identified as relevant to that analysis.

[57] I see nothing wrong with the judge's comments or his analytical approach in deciding on an appropriate sentence for Mr. McCrimmon. It is well-established that generally accepted sentencing ranges "are not embedded in stone", and, although they may shift suddenly because of a new or more robust understanding of the harms caused by an offence, they may also be altered over time "as a consequence of a series of decisions made by the courts which have that effect": *R. v. Wright* (2006), 83 O.R. (3d) 427 at para. 22, 2006 CanLII 40975 (C.A.), cited in *Parranto* at para. 26. The judge was not saying anything other than that.

[58] The judge appreciated *Friesen's* call for more severe sentences, and, importantly, he did not consider himself precluded from giving effect to that call. Indeed, he expressly recognized that a penitentiary sentence was open to him.

[59] However, as he properly instructed himself, the judge's "ultimate goal" (and obligation) in sentencing Mr. McCrimmon was to impose a penalty that constitutes a "proportionate response" to the gravamen of the offence and Mr. McCrimmon's moral culpability, as made manifest in the particular circumstances of this case (at para. 58). *Friesen* emphasizes the harmfulness of sexual offences against children. However, it also affirms the fundamental principle of proportionality: *Friesen* at para. 30.

[60] The Crown's fifth alleged error is that the judge wrongly viewed probation as a punitive rather than rehabilitative form of sentence and he assumed that, like a prison term, it can have a deterrent effect. This concern is directed at para. 67 of his reasons, in which the judge said this:

> [67] [Probation] is something which, in my view, is also a part of what ought to occur as a restriction of his liberty into the future. It is something which would impact any consideration of deterrence as well.

[61] I see no error of principle here. The judge was correct at law. Probation orders are principally focused on rehabilitation; however, they can also have a deterrent and denunciatory effect, particularly if they contain terms that significantly curtail liberty: *R. v. Voong*, 2015 BCCA 285 at para. 61; *R. v. Kodimyala*, 2020 BCCA 275 at para. 42; *R. v. Aguilera Jimenez*, 2020 YKCA 5 at para. 52.

[62] Finally, the Crown says the judge erred in principle by not including a term on the s. 161(1) prohibition that allows for someone like a probation officer to monitor Mr. McCrimmon's compliance with the prohibition by accessing his devices and viewing his browsing history.

[63] At sentencing, Crown counsel did not ask for any such condition. This was acknowledged at the hearing of the appeal. Instead, the Crown asked for "an order that's as wide-ranging as possible and provides the best level of comfort going forward for other potential victims or children in general", one that "basically hits on all of the sections except the one … that is specific to victims that could be identified." Crown counsel did not assist the Court with an articulation of possible

terms for the prohibition, other than referring in a general way to the matters enumerated in s. 161(1).

[64] After the defence made its submissions about the necessity of a s. 161(1) prohibition, the judge asked Crown counsel whether any restrictions on Mr. McCrimmon's use of the Internet should be worded as set out at para. 60 of *R. v. Brar*, 2016 ONCA 724, namely, that he not:

> a) access any content that violates the law; and
>
> b) directly or indirectly access any social media sites, social network, Internet discussion forum or chat room, or maintain a personal profile on any such service (e.g. Facebook, Twitter, Tinder, Instagram or any equivalent or similar service).

[65] This term did not include monitoring Mr. McCrimmon's browsing history. Crown counsel told the judge that the *Brar* term "seem[ed] to make sense". He also agreed that in crafting a s. 161(1) prohibition, courts should be "careful in the way [they limit] one's access to the [I]nternet because the [I]nternet has become a more vital part" of daily life.

[66] Ultimately, the judge included the *Brar* wording as part of the prohibition. In light of the manner in which this issue unfolded and the exchange with Crown counsel, I cannot say that non-inclusion of a monitoring condition constitutes an error in principle. I note the judge did allow for monitoring of Mr. McCrimmon's browsing history as part of the probation order when he will be subject to direct supervision. At the hearing of the appeal, the Crown acknowledged that direct supervision will cease once the probation order has run its term.

Twenty Months' Imprisonment Is Not Demonstrably Unfit

[67] There is no question that by downloading and viewing child pornography, Mr. McCrimmon committed a grave offence that has long been recognized to cause significant and lasting harm.

[68] Indeed, as noted twenty years ago in *R. v. Sharpe*, 2001 SCC 2:

> 28 … no one denies that child pornography involves the exploitation of children. The links between possession of child pornography and harm to children are arguably more attenuated than are the links between the manufacture and distribution of child pornography and harm to children. However, possession of child pornography contributes to the market for child pornography, a market which in turn drives production involving the exploitation of children. Possession of child pornography may facilitate the seduction and grooming of victims and may break down inhibitions or incite potential offences. …
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> …
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> 88 … exposure to child pornography may reduce paedophiles' defences and inhibitions against sexual abuse of children. Banalizing the awful and numbing the conscience, exposure to child pornography may make the abnormal seem normal and the immoral seem acceptable.
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> …
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> 91 … The ability to possess child pornography makes it available for the grooming and seduction of children by the possessor and others. … Criminalizing the possession of child pornography is likely to help reduce the grooming and seduction of children.
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> 92 … Children are used and abused in the making of much of the child pornography caught by the law. Production of child pornography is fueled by the market for it, and the market in turn is fueled by those who seek to possess it. Criminalizing possession may reduce the market for child pornography and the abuse of children it often involves. The link between the production of child pornography and harm to children is very strong. The abuse is broad in extent and devastating in impact. The child is traumatized by being used as a sexual object in the course of making the pornography. The child may be sexually abused and degraded. The trauma and violation of dignity may stay with the child as long as he or she lives. Not infrequently, it initiates a downward spiral into the sex trade. Even when it does not, the child must live in the years that follow with the knowledge that the degrading photo or film may still exist, and may at any moment be being watched and enjoyed by someone.
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> …
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> 94 … Possession of child pornography increases the risk of child abuse. It introduces risk, moreover, that cannot be entirely targeted by laws prohibiting the manufacture, publication and distribution of child pornography. Laws against publication and distribution of child pornography cannot catch the private viewing of child pornography, yet private viewing may induce attitudes and arousals that increase the risk of offence. Nor do such laws catch the use of pornography to groom and seduce children. Only by extending the law to private possession can these harms be squarely attacked.

[69] The concerns spoken of in *Sharpe* were reiterated in *Friesen*:

> [48] Technology can make sexual offences against children qualitatively different too. For instance, online distribution of films or images depicting sexual violence against a child repeats the original sexual violence since the child has to live with the knowledge that others may be accessing the films or images, which may resurface in the child's life at any time.
>
> …
>
> [51] The prime interests that the [*Criminal Code*] scheme of sexual offences against children protect are the personal autonomy, bodily integrity, sexual integrity, dignity, and equality of children. This Court recognized the importance of these interests in *Sharpe* in the context of the production of child pornography. As this Court reasoned, the production of child pornography traumatizes children and violates their autonomy and dignity by treating them as sexual objects, causing harm that may stay with them for their entire lifetime. Sexual violence against children is thus wrongful because it invades their personal autonomy, violates their bodily and sexual integrity, and gravely wounds their dignity.
>
> [Emphasis added; internal citations omitted.]

See also *Hagen* at para. 38, citing *R. v. Inksetter*, 2018 ONCA 474 at para. 22.

[70] In light of the harms caused by this offence, the Crown rightly emphasizes the importance of ensuring that the sentence imposed on Mr. McCrimmon, as well as sentences imposed on others who may be of like mind and proclivity, adequately respond to the gravamen of the offence and its consequences. I agree with the Crown that the *Friesen* principles, including the call for increased sentences, apply to child pornography offences: *Friesen* at para. 44, footnote 2; *Hagen* at paras. 37–41; *R. v. R.J.H.*, 2021 BCCA 54 at para. 20.

[71] Accordingly, the judge was correct to note that a penitentiary jail term was open to him. In my view, he could have imposed a longer prison term and it likely would have withstood appellate review. The Crown's suggested sentence of at least three years was not unrealistic given the gravity of Mr. McCrimmon's conduct, his substantial moral culpability and the *Friesen* principles. For recent appellate authority recognizing the potential for a penitentiary term in possession cases, see *R. v. Gerbrandt,* 2021 ABCA 346 at para. 98. The principles of denunciation and general deterrence are paramount in these cases: *Code*, s. 718.01; *Hagen* at para. 40; *R.L.W.* at para. 49.

[72] *Hagen's* reference to a sentencing range of four months to two years' imprisonment for possession of child pornography does not stand as a post-*Friesen* endorsement of a generally accepted range for this offence. Whether the applicable range should increase or remain as it was before *Friesen* was not at issue in *Hagen*. The Court of Appeal was not asked to consider that issue. Rather, in response to a defence argument that a 10-month jail term should be reduced, the Court noted that the sentence imposed in that case was not out of step with other authorities in existence at the time of sentencing. There is nothing about *Hagen* that should cause a sentencing judge to treat two years' imprisonment as the top end of the range of available sentences for possession of child pornography post-*Friesen*, even for a first-time offender.

[73] Having said that, the question before this Court is not whether the judge *could* have imposed a higher sentence. Instead, it is whether the sentence *he did impose*, a combined 20 months' imprisonment and two years' probation, unreasonably departs from the principle of proportionality in the circumstances of this case.

[74] The Crown has not persuaded me that it does.

[75] The facts surrounding Mr. McCrimmon's offence were grave. His collection of child pornography was extensive and included images and videos that, in other cases, have been categorized as the most serious form of this material: *R. v. Missions*, 2005 NSCA 82 at para. 14, citing *R. v. Oliver*, [2002] E.W.J. No. 5441 (Eng. C.A.). Mr. McCrimmon's moral culpability was high. He perpetrated and perpetuated child sexual abuse by his choice to download and view a substantial volume of appalling material. The terrible effect this offence has on its victims is palpable. The victim impact statements unequivocally bring that home.

[76] However, Mr. McCrimmon has taken responsibility for his offence and acknowledged its wrongfulness. He pleaded guilty. He has no criminal record, is remorseful and has support in the community. He is committed to treatment, his efforts to follow through with treatment have been confirmed, and there is evidence of progress that the judge accepted as genuine. Mr. McCrimmon spent two years on

bail awaiting sentencing and complied with all terms. His liberty was restricted throughout. The judge provided considered reasons for why he settled on 20 months' imprisonment and two years' probation with supervision and counselling in the community. Finally, the length of imprisonment was more substantial than many of the sentences imposed in other Yukon cases involving possession of child pornography. Those cases have tended to fall within a broad range of six to eighteen months, with many of them attracting 10–12 months' imprisonment: *R. v. Nowazek*, 2009 YKTC 51 at para. 20; *R. v. Cafferata*, 2009 YKTC 95 at para. 28.

[77] As aptly noted by Justice Marchand in *R. v. Laflamme*, 2021 BCCA 401, "[s]entencing judges have 'front-line' experience, see and hear all the evidence and submissions in person, and are generally familiar with the circumstances and needs of the local community" (at para. 18). Consequently, this Court will not lightly interfere with the sentences they impose. Their discretion is entitled to considerable deference, recognizing the inherently individualized nature of the sentencing process. The Supreme Court has said, more than once, that "an appellate court should only substitute its own decision for a sentencing judge's for good reason": *Friesen* at para. 25.

[78] I see no principled basis on which to interfere with the combination of imprisonment and probation imposed here.

The Section 161(1) Prohibition Must Be Increased

[79] That brings me to the s. 161(1) prohibition. These orders are protective in nature and intended to shield children from sexual violence: *R. v. K.R.J.*, 2016 SCC 31 at para. 44. That includes, in my view, access to and use of child pornography. These prohibitions may only be imposed "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": *K.R.J.* at para. 48 (emphasis added).

[80] The "scope and duration of [a] prohibition is informed primarily by the nature and extent of the risk, with emphasis on the risk factors particular to the offender and the pool of potential victims": *R.J.H.* at para. 19. The length of the prohibition should also account for "the length of the sentence, the age of the offender upon release into the community, and the prospects for rehabilitation": *R.J.H.* at para. 19.

[81] The judge was alive to these principles (at para. 71). However, his choice to impose a prohibition of only five years has resulted in an order that unreasonably departs from the principle of proportionality. Accordingly, it is demonstrably unfit.

[82] I reach this conclusion based on the volume of child pornography possessed by Mr. McCrimmon, the grotesque nature of the images and videos viewed by him, and, most importantly, the fact that he had been viewing child pornography since the early 2000's. This was obviously a longstanding and entrenched behaviour on his part, one that only escalated in severity over time. It escalated notwithstanding Mr. McCrimmon's acknowledgement that he knew from the start that what he was doing was highly problematic. He understood the wrongfulness of his conduct, but he continued to engage. There is no evidence of Mr. McCrimmon suffering from a cognitive impairment or other form of disability that somehow lessened his capacity to appreciate the nature of what he was doing or the need to stop.

[83] In his March 2019 letter to the police, Mr. McCrimmon said that when he first began viewing child pornography, it was not "hard core". He knew it was wrong, but he continued to view the material. He later came across more graphic and sexually intrusive images and, although the material "shocked and disgusted" him, he carried on. He did not reach out for help. On the evidence, that choice was motivated by self-interest. Mr. McCrimmon thought anyone he told about the situation would have to "turn [him] in". Although he understood that the images and videos were "disgusting and wrong", he "lost empathy for the victims" and continued to download and view. We know from the agreed statement of facts that there was at least one occasion on which Mr. McCrimmon did more than download. He uploaded child

pornography to the Internet. That conduct, although not the subject matter of the charged offence, is relevant to his risk.

[84] In his letter, Dr. Baumbach described Mr. McCrimmon's commitment to treatment as "remarkable". However, he also acknowledged that in reaching that conclusion, he had "only [Mr. McCrimmon's] self-report to rely on". Dr. Baumbach confirmed that Mr. McCrimmon was drawn to child pornography, at least in part, because "he was able to imagine interactions with young girls as more emotionally safe than those with adult women." "[O]ver time he became more tolerant of and able to be aroused by images he knew were wrong and by which he had initially felt disgusted." He made attempts to stop viewing the material, "one of which lasted one-and-a-half years", but he was not successful.

[85] Dr. Baumbach said the research in this area suggests that child pornography offenders are "more likely than other sexual offenders to have high levels of sexual preoccupation, deviant sexual interests, and interpersonal deficits" (emphasis added). When Mr. McCrimmon started seeing Dr. Baumbach in August 2019, he was "struggling with recurrent memories and fantasies about the images from the child pornography he had viewed, as well as occasional sexual imaginings as he went about his daily life." This was just over two years ago.

[86] At the time of Dr. Baumbach's letter (April 2021), Mr. McCrimmon reported a "significant reduction in sexual preoccupation". Dr. Baumbach attributed this development to Mr. McCrimmon's newfound understanding of the impact of child pornography on its victims, *but also* to the fact that he has had "no access to child pornography" since his arrest (emphasis added). Court-ordered restrictions on Mr. McCrimmon's ability to access child pornography have obviously had an effect in mitigating his risk.

[87] Dr. Baumbach said his observations of Mr. McCrimmon are consistent with the self-reported progress; however, the letter does not opine on future risk. Nor has there been any independent testing of Mr. McCrimmon's statements about his improvement and, importantly, the reported reduction in his "sexual preoccupation".

[88] The judge found that Mr. McCrimmon has taken "steps on his own to deal with the issues that led to his offending behaviour" and those steps have "had success and … show a path forward for him" (at paras. 32, 34, 63, 71). I accept those findings. The judge appreciated that Dr. Baumbach's letter did not constitute a "formal risk assessment" (at para. 64). However, he found as a matter of "common sense" that "an individual who has developed empathy for the victims, who has taken steps, who has followed those steps, is surely on the road to success" (at para. 64, emphasis added.) Again, I take no issue with that proposition. Finally, I recognize that s. 161(1) orders are discretionary and subject to a deferential standard of review: *R.J.H.* at para. 13.

[89] However, it is my view that on the record in this case, considered as a whole, a five-year s. 161(1) prohibition does not adequately protect children from sexual violence in the circumstances of Mr. McCrimmon, who bears a longstanding and entrenched addiction to child pornography, amassed a significant collection of egregious images and videos, was unsuccessful in previous attempts to stop viewing that material (including relapsing after a one-and-a-half year hiatus), and, at the time of sentencing, was only "on the road to success". In other words, he is not rehabilitated. His early acceptance of responsibility for his offence and the treatment taken prior to sentencing are commendable; however, I am satisfied that a significantly longer period of time restricting his access to children in defined circumstances and use of the Internet is warranted.

[90] In *K.R.J.*, the record before the Supreme Court established that "the Internet is increasingly being used to sexually offend against young people and that sex offenders who target children are more likely to reoffend" (at para. 113). In my view, a five-year prohibition does not reasonably minimize the risk presented by Mr. McCrimmon, as made manifest through the nature and duration of his offending.

[91] Instead, I consider a 15-year prohibition to be fit in the circumstances of this case. A court order directing that Mr. McCrimmon have no access to child pornography for a substantial period into the future is necessary to avoid a

perpetuation of the harms spoken of by the victims in this case, as recognized by the Supreme Court in *Sharpe* and *Friesen.* The existence of the prohibition and the potential for prosecution for breach will function as an important deterrent from reoffending: *Code*, s. 161(4). As stated earlier, Mr. McCrimmon has not appealed from the terms of the prohibition. It is only the length of the order that is at issue on appeal.

Disposition

[92] For the reasons provided, I would grant the Crown leave to appeal from the sentence and allow the appeal, but only in part.

[93] I would not interfere with the 20 months' imprisonment and two years of probation.

[94] However, I would increase the length of the s. 161(1) prohibition from five to fifteen years, with the terms prescribed at sentencing.

[95] All other ancillary orders would remain intact.

"The Honourable Madam Justice DeWitt-Van Oosten"

I AGREE:

"The Honourable Madam Justice Bennett"

I AGREE:

"The Honourable Madam Justice Charlesworth"