

CANADA / JUDGMENT

R. v. 32992

2025 BCSC 75

COURT

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2025 BCSC 75 R. v. 32992

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. 32992,

2025 BCSC 75

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32992

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Before: The Honourable Mr. Justice Crerar

Oral Reasons for Sentence

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B. Martland, K.C.

Place and Date of Hearing:

Vancouver

January 10, 2025

Place and Date of Judgment:

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January 17, 2025

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I. Introduction

- [1] These are my reasons for sentence, after a jury found the accused guilty of the sexual assault of his intimate partner of one and a half years. The circumstances of the case, both in terms of the underlying allegations, and the legal issues arising during the proceedings, are unique and difficult.
- [2] Section 724 of the Criminal Code, RSC 1985, c. C-46, requires the sentencing judge to discern, as best as is possible, the facts, express or implied, that were essential to the jury's guilty verdict. Those reasons, indexed as 2024 BCSC 2073, summarise those factual findings, which will not be repeated here. That said, it is critical that these reasons be read closely in conjunction with the s.724 reasons.
- [3] As set out in those reasons, the s. 724 process was rendered almost impossible by the grouping of the approximately 21 alleged sexual assaults, of differing character, spanning from September 2016 to November 2017, into a single count.
- [4] Those reasons also set out the many significant evidentiary anomalies that cumulatively raised considerable doubt with respect to each category of alleged sexual assault: both the alleged sexual assaults while the complainant was sleeping, as well as the more overt and violent alleged sexual assault in the kitchen.
- [5] I must emphasise here that the finding of reasonable doubt does not equate to disbelieving the complainant, who, again, presented at trial and the sentencing hearing as a sympathetic and careful witness. Rather, that conclusion reflects the duty of the judge, in a s. 724 fact finding exercise, not to find that an alleged aggravating fact occurred unless the cumulative evidence establishes that fact beyond a reasonable doubt, or that a disputed fact occurred unless established on a balance of probabilities. Under s. 724, that principle is qualified by the requirement that the facts found cannot contradict any facts inherent in the jury guilty verdict: guidance blurred, again, by the grouping of the alleged incidents into a single count. As those reasons state at para 89: "some jurors may have believed the kitchen incident to have been proven beyond a reasonable doubt, while others may have rejected that incident and have been satisfied of the first or multiple sleep assaults beyond a reasonable doubt, while others may have surmised that some form of nonconsensual intentional sexual touching likely would have occurred over the 18-month relationship."

- [6] The s. 724 reasons concluded that the only permissible finding was the essential elements of the charge: that the accused intentionally sexually touched the complainant without consent at some point during the period alleged. The particular circumstances of the sexual assault are almost entirely hypothetical and acontextual. Specifically, the Court could not conclude, on the totality of the evidence, which raised reasonable and indeed significant doubt, that, apart from the complainant being the intimate partner of the accused, any aggravating circumstances, including forced or any penetration, or breach of trust in the form of sexual assault on the sleeping complainant, occurred.

II. Law

- [7] Crown and defence largely agree on the governing law.

A. Sentencing generally

- [8] Part XXIII of the Criminal Code codifies the principles of sentencing. Section 718 sets out its purposes:

718 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.

- [9] Under s. 718.1, the fundamental principle is that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

- [10] Section 718.2 sets out further sentencing principles. The court must increase or reduce the sentence based on relevant aggravating or mitigating circumstances: s. 718.2(a). A sentence should be similar to those imposed on similar offenders for similar offences in similar circumstances: s. 718.2(b).

- [11] Section 718.2(e) confirms that imprisonment should generally be imposed as a last resort: all available sanctions other than imprisonment that are reasonable in the circumstances, and consistent with the harm done to the victim or the community, must be considered for all offenders.

B. Sexual assault sentencing

- [12] Section 271 of the Criminal Code imposes a maximum sentence of 10 years' imprisonment for the sexual assault of a person 16 years or over that is prosecuted by indictment. There is no minimum sentence.
- [13] "Absent exceptional or unique circumstances", deterrence and denunciation are the primary sentencing considerations for a serious sexual assault: *R v GM*, 2015 BCCA 165 at paras 17-18.
- [14] The typical range of sentences for sexual assault involving intercourse is two to six years: *GM* at para 22, *R v BSB*, 2010 BCCA 40 at para 6; *R v Pouce Coupe*, 2014 BCCA 255 at para 31.
- [15] Recently, in *R v Maslehati*, 2024 BCCA 207, Madam Justice DeWitt-Van Oosten, writing for the Court, confirmed:
- [83] I agree. As with child sexual assault, the penalties imposed for sexual assault against adults must reflect society's contemporary understanding of the harmfulness and the wrongfulness of sexual violence, generally. It is not enough to simply acknowledge these harms. The sentences must actually take them into account, recognizing that the harmfulness and the wrongfulness of sexual assault impact both the gravity of the offence and the offender's personal responsibility: *Friesen* at para. 75. See also, *R. v. Kolola*, 2021 NUCA 11 at paras. 28, 36, and the comments of Justice Trotter in *R. v. Brown*, 2020 ONCA 657 at para. 59.
- [16] While the typical sentencing range is an important consideration, ranges constitute guidelines rather than hard and fast rules: *Maslehati* at para 84; *GM* at para 22; *R v Lacasse*, 2015 SCC 64 at para 60. Exceptional circumstances may justify a sentence outside the range: *R v De Silva*, 2018 BCSC 1496 at paras 34-35; *R v Sellars*, 2018 BCCA 195 at para 34.
- [17] Sexual assault under s. 271 is defined broadly and covers a wide spectrum of conduct: *Maslehati* at para 75. Even in the highly individualised exercise of imposing a fit sentence, sexual assault is a crime particularly committed in unique circumstances, each with a unique context. Accordingly, the determination of a just sentence is a highly individualised exercise and not merely the application of a rigid calculation based on an expected range of sentences: *R v Azim*, 2023 BCSC 482 at para 88; *Maslehati* at paras 3, 5.

C. Conditional sentences for sexual assault

- [18] As s. 271 does not mandate a minimum term of imprisonment, a conditional sentence is available for adult sexual assault as long as a judge finds that: (1) a sentence of less than two years' imprisonment falls within the available range of sentences for the offence; (2) serving that sentence of imprisonment in the community would not endanger the safety of the community; and (3) a conditional sentence would be consistent with the fundamental purpose and principles of sentencing in ss. 718-718.2 of the Criminal Code: *Maslehati* at para 2.

- [19] Our Court of Appeal has thrice in the past year confirmed the availability of conditional sentences for adult sexual assaults prosecuted by indictment: *Maslehati* para 105, *R v TH*, 2024 BCCA 123 at paras 59-60; *R v Henry*, 2024 BCCA 132 (*Henry BCCA*). Because of the individualised nature of sentencing, there will even be cases in which a non-penitentiary term for an adult sexual assault with one or more aggravating circumstances may be justified, particularly where the offender's individual circumstances indicate that such an order is appropriate: *Maslehati* at para 85.
- [20] That said, a conditional sentence will rarely constitute a fit sentence for a sexual assault involving aggravating circumstances, such as penile penetration: *Maslehati* at para 9; *TH* at paras 6, 60; *Henry BCCA* at para 32. This reflects the greater appreciation by society and by the courts of the wrongfulness of sexual violence and the harm it inflicts: *Maslehati* at para 111.

D. Conditional discharge for sexual assault

- [21] Section 730 permits a judicial discretion to order a conditional discharge on terms, instead of a conviction, where an accused is found guilty of an offence with no prescribed minimum punishment and a maximum punishment below 14 years' imprisonment. A conditional discharge may be granted if the court considers it to be in the best interests of the accused and not contrary to the public interest:

730 (1) Where an accused, other than an organization, pleads guilty to or is found guilty of an offence, other than an offence for which a minimum punishment is prescribed by law or an offence punishable by imprisonment for fourteen years or for life, the court before which the accused appears may, if it considers it to be in the best interests of the accused and not contrary to the public interest, instead of convicting the accused, by order direct that the accused be discharged absolutely or on the conditions prescribed in a probation order made under subsection 731(2).

- [22] In *R v Elmazini*, 2019 BCSC 41, Justice Mayer dismissed the appeal of a Provincial Court sentence of a conditional discharge on a restaurant owner convicted of sexually assaulting his new 23-year-old employee through squeezing of her breasts and forced kisses. The Court helpfully provides an overview of the principles set out in *R v Fallofield*, 1973 CanLII 1412, [1973] B.C.J. No. 559 (BCCA):
- [44] There are two conditions precedent to the court's exercise of discretion to grant a conditional discharge under s. 730 of the Criminal Code, both of which were referenced by the trial judge in her reasons for sentence of *Badr Elmazini*. Those conditions are set out in para. 21 of the decision in *Fallofield*, and are as follows:

- (1) The first is that the Court must consider that it is in the best interests of the accused that he should be discharged either absolutely or upon condition. If it is not in the best interests of the accused, that, of course, is the end of the matter. If it is decided that it is in the best interests of the accused, then that brings the next consideration into operation.
 - (2) The second condition precedent is that the Court must consider that a grant of discharge is not contrary to the public interest.
- [45] The first branch of the test in Fallofield presupposes that the accused is a person of good character, without previous conviction, that it is not necessary to enter a conviction against him in order to deter him from future offences or to rehabilitate him and that the entry of a conviction against him may have significant adverse repercussions.
- [48] Under the second branch of the test for a conditional discharge set out in Fallofield, the court must consider the public interest in the deterrence of others, and give this factor due weight, without precluding the judicious use of the discharge provisions. The principle of proportionality is to be applied under this branch of the test.

III. Discussion and decision

A. Crown position

- [23] The Crown submits that an appropriate sentence for a sexual assault within the context of a relationship is 6 months' imprisonment, along with the following ancillary orders: a DNA order pursuant to s. 487.051, an order to comply with the Sex Offender Information Registration Act, SC 2004, c. 10 ("SOIRA") for 20 years pursuant to s. 490.012, and a s. 109 firearms prohibition order.
- [24] The Crown responsibly acknowledges that a conditional sentence order is available as a sentence for this accused, and that the range of sentence for sexual offences is a broad and highly individualised process.
- [25] That said, the Crown notes the repeated jurisprudential recognitions that sexual assault is an inherent attack on the victim's personal autonomy, sexual integrity, and dignity. As set out in Maslehati:
- [72] It is now generally recognized that all sexual assaults are "serious", irrespective of the nature of the physical acts involved. As aptly noted in *R. v. Merasty*, 2023 SKCA 33 at para. 23: "[n]o matter what form it takes, a sexual assault is a forceful subjection of the victim to their assailant's sexual desires" (emphasis added). Writing for the Court in *R. v. A.J.K.*, 2022 ONCA 487 [A.J.K.], Associate Chief Justice Fairburn described all forms of sexual assault as "serious acts of violence" because: "They reflect the wrongful exploitation of the victim whose personal autonomy, sexual integrity, and dignity is harmfully impacted while being treated as nothing more than an object": at para. 74. These comments are consistent with the Supreme Court of Canada's more recent jurisprudence on sexual assault, including *Kirkpatrick* at para. 51 (set out above).

[73] Accordingly, rather than describe some sexual assaults as "serious" and other sexual assaults as something other than that, I consider it constructive when distinguishing between cases for purposes of sentencing to focus on the circumstances surrounding the offence at issue, including the nature of the sexual contact, its duration, the context in which it occurred, and the actual and reasonably foreseeable harms that flowed from it. The more aggravating the circumstances, the objectively graver the offence.

[26] The Crown notes that the victim impact statement prepared by the complainant establishes that the sexual assault has inflicted significant emotional pain. Via video, the complainant read her prepared statement out in Court. She described herself prior to the offence as a "very bubbly, playful, colorful, and trusting person, with an ease for love and building connections with others." She stated that she "had hopes and dreams of building a nuclear family with my son and more children."

[27] The complainant states that the damage has been long lasting:

When [the accused] moved out of the house seven years ago, I was eager to heal and once again be the person I was before meeting him. Sadly, I soon realized that I could not "just get over it", that he broke very important parts of me, and those would NEVER be fixed; no amount of self-determination, work, or therapy, would ever change what he did to me and undo the harm. This realization caused me a lot of emotional pain. If his actions caused this, why should it be *me* carrying the burden? Why should *I* do the work? But I took ownership of this journey, made my peace, and I am healing and learning to exist, love and forgive as I am now.

[as in original]

[28] She states that after the offence, "I started feeling dirty and extremely ashamed of my body and my sexual desire. I developed anxiety and recurrent panic attacks and started disassociating during sexual contact. All of this severely affected my entire sense of self in my capacity to build intimacy with and trust with others, including my family and friends." Her experience hindered her intimate relationships: "[w]hen I decided to start dating again, I was terrified of other men doing the same thing again to me." Even though she has since remarried, this anxiety remains. She has even grown distrustful of medical care, suffering anxiety at the birth of her second child: she described her fear of "disassociating during the birth due to being touched by nurses and doctors, making what is already a physically exhausting journey, even more challenging by the feeling of having to protect myself." She concludes:

I have little hope that [the accused] will acknowledge or care about the harm that he caused me; yet at least I hope this evokes some introspection. I tried my best to capture what this journey and the emotional impacts have been for me, even though I know I wasn't able to truly communicate what this offence has done to me, what it has cost me - the pain, the sadness, the sense of having lost a beautiful part of myself - and the extra burden I had to carry as I tried to go on with my life, create new intimacies, and build a family.

- [29] The Crown submits that there are three aggravating factors. First, the sexual assault occurred within an intimate partner relationship: s. 718.2(a)(ii). Second, layered into the first, it constituted a breach of trust. Third, as set above, the actions had a significant and ongoing impact on the complainant: s. 718.2(a)(iii.1).
- [30] In support of its sentencing position, the Crown cites several cases involving sexual assault on a sleeping victim: *Henry BCCA*; *R v WB*, 2014 ONCJ 799; *R v Tuffs*, 2011 SKQB 441; *R v Jamerson*, 2024 BCPC 65. While that provided the context for 20 of the roughly 21 sexual assaults alleged, the s. 724 reasons concluded that the multiple and significant evidentiary problems surrounding that allegation raised considerable doubt, and could not establish that aggravating fact. Again, it is important to remember that none of the aggravating facts alleged by the Crown or listed in *Maslehati* at para 74 (apart from their intimate relationship) were confirmed in the s. 724 reasons.
- [31] In his usual responsible submissions, Mr. Fullerton for the Crown acknowledges that there are significant mitigating circumstances: the lack of a criminal record, the accused's socially positive role in the community, with a strong history of education and employment, his complete adherence to bail conditions, as well as his letters of support.

B. Decision: sentence

- [32] The defence seeks a conditional discharge under s. 730 of the Criminal Code, with a six-month probation order, with no-contact and counselling conditions. Unlike a conditional sentence, a conditional discharge would mean that the court record would show a finding of guilt, but no conviction would be entered.
- [33] Defence cites several sexual assault cases where conditional or absolute discharges were granted or upheld: *Elmazini*; *R v Rony Cubilete-Pereyra*, 2022 ONSC 1823 (a conditional discharge where the 28-year-old janitor grabbed the buttocks of a 15-year-old co-op student at work); *R v Henry*, 2019 ONSC 4978 (*Henry ONSC*) (an absolute discharge where the offender grabbed the throat of the complainant while touching her genitals over her clothing); and *R v Berseth*, 2019 ONSC 888 (a conditional discharge where the offender, a stranger, groped the complainant's vagina). It is acknowledged that these are all summary offence decisions, where sentences are generally lower than those issued on indictable offences before superior courts. That said, as indicated by the parenthetical factual summaries, the facts in each of those cases are more aggravated and predatory than the facts established in the present case.
- [34] I agree that the highly unusual and rare circumstances of this case make a conditional discharge under s. 730 of the Criminal Code appropriate. The considerable doubt raised by the totality of the evidence calls into question almost all of the disputed facts. As expanded below, the exceptional pro-social life of the accused, past and present, coupled with the intractable and disproportionate effects that incarceration or a criminal record would inflict on the accused's young children, drive this result.

- [35] These unique circumstances satisfy the test for a conditional discharge set out in s. 730 and Fallofield and Elmazini. It is in the best interests of the accused that he should be discharged, not absolutely, but on conditions. Further, the grant of discharge is not contrary to the public interest.
- [36] In *R v Li*, 2019 BCSC 648, Justice Brundrett canvasses the jurisprudence to show that "public interest" in this context is a broad enquiry that includes society's interests in the fair treatment and reintegration of the offender into society:
- [28] Moreover, while the term "public interest" is not defined in the Criminal Code, it is fair to say that it encompasses broader considerations in addition to deterrence such as an offender's mitigating circumstances (*R. v. Dennis*, 2013 BCCA 153 at para. 27), his or her character (*R. v. Tan* (1974), 1974 CanLII 1608 (BC CA), 22 C.C.C. (2d) 184 (B.C.C.A.) at para. 17), the community's attitude towards the offender's conduct (*R. v. Calderwood* (1995), 1995 CanLII 361 (BC CA), 57 B.C.A.C. 237 (C.A.) at para. 14), whether the crime was committed as a matter of impulse (*R. v. MacFarlane*, 1976 AltaSCAD 6 at para. 19), and the offender's moral blameworthiness (*Jeremiah* at paras. 21-22); see also: *R. v. Samson*, 2015 YKCA 7 at para. 13. A more comprehensive interpretation of the public interest is consistent with the principle in *Fallofield* that while the deterrence of others must be given due weight, it does not preclude the judicious use of the discharge provisions.
- [29] As noted by D. Smith J.A.: in *R. v. Chatur*, 2012 BCCA 163 at para. 21, the granting of a conditional discharge is a discretionary order based on the weighing and assessing of many factors including the principles of sentencing and the public interest; see also: *R. v. Nasogaluak*, 2010 SCC 6 at para. 43. Thus, while deterrence is an important part of the public interest analysis, the inquiry also calls for a contextual assessment of the particular circumstances of the offender and the offence in light of the applicable principles of sentencing relevant to the public interest. Here, the omission to more fully consider public interest considerations amounted to an error in principle.
- [37] Li also recognises that a conditional discharge still imposes punishment and deterrence:
- [39] The significance of a discharge as opposed to a suspended sentence is that pursuant to s. 730(3) of the Code, the offender is deemed not to have been convicted of the offence upon completion of the terms of the discharge. It would be wrong, however, to assume that a conditional discharge with appropriate terms can have no deterrent effect: *R. v. Sanders* (1993), 39 B.C.A.C. 157 (C.A.) at para. 11. For instance, a prior discharge can be taken into account when a sentence is imposed for another offence (*Jeremiah* at para. 18), if the offender reoffends during the attached probationary term the discharge can be revoked (s. 730(4)), and the imposition of a conditional discharge may restrict future travel or employment.
- [38] In *Li*, the Court, acting in an appellate capacity, substituted a conditional discharge. The offender's violence--grabbing and shaking his spouse by the neck--was offset by his lack of prior record or history of abuse, his positive social history, his bail compliance and good

behaviour since the incident, and the disproportionate effects upon his career that could result from a permanent conviction: para 41. This observation applies to the present case. Further, again, the aggravating facts supported by the evidence in Li exceed those established in the present case.

- [39] In the present case, the accused has never before been charged, let alone convicted of a criminal offence. He has fully complied with bail conditions, and there is no evidence of negative, let alone criminal, activity since he was charged.
- [40] Beyond leading a baseline pro-social life of maintained employment, the accused has led an exemplary and successful professional life as an academic, teacher, and mentor. The head of his academic department describes him as "exceptional" in his field, as well as "one of our most trusted and dependable colleagues".
- [41] His letters of reference are united in describing him as fair, caring, peaceful, conscientious, gentle, easy-going, calm, thoughtful, and non-confrontational: qualities that came through during trial, including, to some extent, from the complainant's own testimony.
- [42] An important letter of reference comes from a woman who was in an intimate relationship with the accused in the two years immediately following his break-up with the complainant. Although they have not been together romantically for some four years, she wrote compellingly of his honest, natural, gentle, and kind manner:

[The accused] is one of the best people who have come into my life. I respect and admire him not only as a person but also as a father and friend. I fully trust him, and regardless of the jury's decision, I believe in his innocence based on my own judgment and knowledge of him.

- [43] She wrote at length of his compassionate and nurturing demeanour and actions as a father, including the following:

He is a very good person, loving and responsible with his children. His children mean everything to him: they are his world and greatest priority.

- [44] Her account of the accused's demeanour and behaviour as an intimate partner stood in stark contrast to that provided by the complainant with respect the immediately preceding years:

With [the accused], it was very easy for me to express myself and be myself without feeling judged. Rather, he encouraged me to keep doing so. He has always given me his support, made me feel safe, and helped me gain confidence in myself during the toughest times. His emotional intelligence is something I have always admired about him. In all the time we have spent together, including the lockdown during the pandemic, living together 24/7 with two small children, I need to emphasize this: NEVER! I have never seen him get upset or lose his temper or patience. He is a very calm, wise, simple, and humble man.

[The accused] is not a violent or threatening man, much less intimidating. [The accused] is a man of science, rational thinking, fair, honest, and kind. He speaks clearly without escalating things into an argument or making you feel defensive (which I consider an art on his part). He is a father, protector, tender, and very loyal. He still has many wonderful things to contribute to society.

[45] The accused's treating psychologist of many years set out the profound difficulties the accused has faced in his life, despite his professional successes. After the birth of their second child, his wife's mental health profoundly deteriorated, manifesting itself in the form of paranoia and verbal attacks on the accused: she has been diagnosed with bipolar schizoaffective disorder, leading to involuntarily hospitalisation. She has since moved to the United States. In addition to his wife's mental health difficulties, and the resultant breakdown of their marriage, the 2013 suicide of a close childhood friend continues to haunt him, in the form of survivor's guilt questioning whether he could have done anything to prevent the death. His psychologist states that "kindness and intuitive sympathy towards vulnerability and other people are features of his personality." With respect to his parenting, the psychologist states:

To him, the most important aspect of his identity is that he is a father. My consistent impression has been that he is a father first and a professor second. There is no question that he is devoted to his children. They are at the core of his sense of purpose in life. He spoke about them in the manner of a conscientious parent who is closely involved in the details of the daily lives of the children .

[46] A sentence of imprisonment, even in the community, would have a profoundly disproportionate effect on the accused. He would likely lose his academic position. He would likely be barred from or at least significantly hindered in applying for other academic positions, or presenting at international academic conferences, which he does frequently, and which are professionally important to his role.

[47] Incarceration would also have a devastating impact on his family. He is the sole caregiver and financial provider to his two pre-teen children. He has no close relatives in British Columbia. His own parents live outside of the country. The children's mother's severe mental illness renders her unable to serve as their caregiver. Further, she resides in the United States. The accused dutifully brings his children for regular visits to their mother; those visits must be supervised given the nature of her condition. He comforts them when she acts erratically, including making hurtful and bizarre accusations to her children.

[48] These impacts are discussed in a second compelling letter of recommendation from a person who might not be expected to harbour kind or supportive feelings towards the accused. The brother of the accused's ex-wife writes:

The potential consequences of a prison sentence for [the accused] extend far beyond his own life. His children, who are already struggling with the complexities of their young lives, will be deeply affected by the absence of their father. I am gravely concerned about the long-term impact this could have on their mental and emotional well-being. They have already endured so much at such a tender age, and losing their father, even temporarily, would be a devastating blow.

I trust in your wisdom and fairness as you deliberate on [the accused]'s sentence. I hope that, in making your decision, you will consider the full picture of who [the accused] is -- a devoted father, a respected educator, and a man who has consistently demonstrated his commitment to his family and community. My plea is not for leniency, but for understanding of the far-reaching effects this sentence may have on two innocent children who depend on their father.

- [49] Defence submitted a Child Impact Statement on a template created by the International Centre for Criminal Law Reform, completed by the accused. He confirms that he is the sole care provider for the children. He brings his children to and from school and their social and sports activities. He prepares nutritious meals with them. He assist them with their schoolwork. He has never been separated from them for any significant period of time since the hospitalisation and departure of his ex-wife.
- [50] Although the accused has done his best to protect his children, these criminal proceedings have adversely affected them. Due to their father's bail conditions, they were unable to leave the country, such that they could not see their grandparents or cousins in the United States and Israel. The accused perceives increased anxiety in his children since the charges were laid, and throughout the criminal proceedings. His preliminary discussions about the risk that he will not be able to be with them has understandably exacerbated his children's anxiety.
- [51] One child suffers from ADHD, and needs special attention. As a reflection of his qualities as a parent, upon that diagnosis, the accused sought out his own assessment for that condition, and was also so diagnosed: he did so in order to provide empathy and reassurances to his child.
- [52] Defence provides an independent medical assessment of the accused by Dr. David Morgan, a psychiatrist. Based on interviews, and a consideration of his past and present circumstances, and the results from a battery of diagnostic tests and instruments, Dr. Morgan concludes that "[i]n my clinical opinion, the actuarial and structured professional judgement risk assessments identify that [the accused] is at low risk for committing further sexual offences." Specifically, "scientific research has identified that sexual deviance and antisocial orientation are the most important predictors of sexual recidivism in adult males. There is nothing which leads me to conclude that [the accused] is sexually deviant or antisocial." This evidence speaks to the circumstances of the accused, as well as the need to deter his future actions.

- [53] With respect to the fitness of the punishment, as well as the need for denunciation and deterrence, it is clear that the criminal charge, prosecution, and guilty verdict have in themselves already inflicted significant punishment and significant adverse impacts on the accused. This started with the shock of his arrest in May 2022, with no warning, 4.5 years after the alleged sexual assaults. The police did not ask for his side of the story before arresting him, in front of his children, at home. On receiving the guilty verdict, he collapsed and moaned in court in a manner, as best as one can discern, exhibiting genuine despair and shock. The arrest, prosecution, and verdict have inflicted anxiety and low energy on the accused, leading to pharmaceutical prescriptions and many hours of psychotherapy since his arrest. Apart from such need for therapy, he voluntarily consents and commits to ongoing counselling as a term of probation.
- [54] All of this must be tempered by the stated effect of the offence on the complainant. One must acknowledge, again, that the offence inflicted, in her words, "the pain, the sadness, the sense of having lost a beautiful part of myself - and the extra burden I had to carry " While her disassociation and flashbacks, and this pain, have "improved over the years, it is still present to a certain degree."
- [55] With a complete consideration of the offence and the offender, as well as the need for deterrence, but also other sentencing principles, including the safety of the public and the complainant and the rehabilitation of the accused, I find that a conditional discharge can be ordered in a manner that would not be contrary to the public interest.
- [56] I will follow Li at para 44 in extending the period of probation, in order to "alleviate any residual concerns over the public interest." It would keep him under community supervision for a longer period during which he is subject to having his discharge revoked. I accordingly impose a probationary period double that sought by the defence: one year total.

C. Ancillary orders

1. SOIRA

- [57] The Crown seeks an order that the accused comply with the requirements of SOIRA for 20 years, pursuant to s. 490.012.
- [58] As I have directed a conditional discharge, an issue arises as to whether s. 490.012 applies as a matter of statutory interpretation. The parties did not make submissions on this issue during the sentencing hearing. There is recent authority of the Provincial Court of British Columbia that s. 490.012 does not apply where a conditional discharge has been granted as the accused is deemed not to have been convicted of an offence: see *R v Bansil*, 2020 BCPC 34. In *Henry* ONSC, the Ontario Superior Court also concluded at para 40 that the prior version of s. 490.012(1), which was amended in October 2023, does not apply to discharges. The judges in *Henry* ONSC and *Bansil* declined to follow *R v DK*, 2009 QCCA 987, in which the Quebec Court of Appeal reached the opposite conclusion. was In *R v Barber*, 2024 BCPC 155 at para 14 Gouge PCJ considered the wording of the current version of s. 490.012, and

concluded that it did not apply to discharges.

[59] Based on the British Columbia and Ontario authorities, I conclude that no SOIRA order should be imposed in the circumstances.

[60] In the event I am wrong about the application of s. 490.012 to a conditional discharge, I agree with defence that this is a rare sexual assault conviction where a SOIRA order is neither proportionate nor necessary, for the reasons enunciated above.

[61] The Criminal Code sets out the presumptive mandatory SOIRA order:

Order

490.012 (1) Subject to subsection (5), when a court imposes a sentence on a person for a designated offence, it shall make an order in Form 52 requiring the person to comply with the Sex Offender Information Registration Act if

- (a) the designated offence was prosecuted by indictment;
- (b) the sentence for the designated offence is a term of imprisonment of two years or more; and
- (c) the victim of the designated offence is under the age of 18 years.

[62] Subsection (3) sets out the SOIRA exemption, for which the offender bears the persuasive burden:

- (3) Subject to subsection (5), when a court imposes a sentence on a person for a designated offence in circumstances in which neither subsection (1) nor (2) applies it shall make an order in Form 52 requiring the person to comply with the Sex Offender Information Registration Act unless the court is satisfied the person has established that
 - (a) there would be no connection between making the order and the purpose of helping police services prevent or investigate crimes of a sexual nature by requiring the registration of information relating to sex offenders under that Act; or
 - (b) the impact of the order on the person, including on their privacy or liberty, would be grossly disproportionate to the public interest in protecting society through the effective prevention or investigation of crimes of a sexual nature, to be achieved by the registration of information relating to sex offenders under that Act.

[63] Subsection (4) sets out factors guiding the consideration of an exemption:

- (4) In determining whether to make an order under subsection (3) in respect of a person, the court shall consider
 - (a) the nature and seriousness of the designated offence;
 - (b) the victim's age and other personal characteristics;
 - (c) the nature and circumstances of the relationship between the person and the victim;

- (d) the personal characteristics and circumstances of the person;
- (e) the person's criminal history, including the age at which they previously committed any offence and the length of time for which they have been at liberty without committing an offence;
- (f) the opinions of experts who have examined the person; and
- (g) any other factors that the court considers relevant.

[64] Although s. 490.012(3) only required the offender to establish one of the two factors, I agree that both are established on these facts.

[65] With respect to (a), based on the totality of the evidence, including Dr Morgan's psychiatric report, there is little chance of future offences and, for that matter, of past offences that would require investigation. The present is not a case of a sexual assault committed by an unknown stranger where DNA would assist in investigation of past or future sexual assaults. The victim was not a child. The accused has no criminal history, let alone sexual assault convictions.

[66] In this, I follow the conclusions of Justice A. Ross in another recent sexual assault case, *R v Menezes*, 2024 BCSC 448, in exempting from SOIRA an offender of otherwise good character, with no (in that case, "relevant") criminal record, no allegations of further criminal activity, and no breaches of bail conditions: para 91.

[67] With respect to (b), I join Madam Justice Donegan (before her translation to the Court of Appeal) in *R v MKM*, 2024 BCSC 575 at para 139, in finding that "the impact of a compliance order on his privacy and liberty would be grossly disproportionate to the public interest in protecting society through the effective prevention or investigation of crimes of a sexual nature." As in that case, the accused poses a low risk to reoffend or ever appearing before the court again: para 135.

[68] In striking down the earlier iteration of SOIRA as overbroad, *R v Ndhlovu*, 2022 SCC 38 set out the onerous impositions of that regime:

[39] Registered offenders are subject to many reporting requirements. Following an order made pursuant to s. 490.012(1), offenders must report in person to a registration centre, which are police stations designated with administering the registry in a geographic region. At the centre, the offender must provide extensive personal information, including their name, date of birth, gender, the address of their principal and secondary residences, the address of every place of employment or volunteer location, the name of their employer or volunteer supervisor and a description of the work done, the address of every educational institution at which they are enrolled, their height and weight, a description of every physical distinguishing mark that they have, and the licence plate number, make, model, body type, year of manufacture and colour of every vehicle registered in their name or that they use regularly (SOIRA, s. 5(1)). They must also report a contact phone number for each location

where they can be reached and every mobile phone and pager in their possession (s. 5(1)(f)). They must supply information relating to all driver's licenses and passports they may hold. The registration centre may take their photograph and record their eye colour and hair colour.

- [40] Offenders must update their information in person yearly (ss. 4(3) and 4.1(1)). They must also report in person at the registration centre any changes in primary or secondary address and name. They must also report in person if they receive a driver's licence or passport (s. 4.1(1)).
- [41] Moreover, offenders must notify the registration centre within seven days of any change regarding their employment or volunteering information (ss. 5(1)(d) and 5.1). They must also notify the registration centre if they intend to be away from their primary or secondary residence for seven or more consecutive days (s. 6(1)). Specifically, offenders must notify the registration centre, before departure, of their departure and return dates and of every address or location at which they expect to stay, whether the addresses or locations are in or outside Canada (s. 6(1)(a)). Similar reporting requirements are imposed on offenders who decide, after departure, not to be at their primary or secondary residence for seven or more consecutive days (s. 6(1)(b)).
- [42] Failing to comply with SOIRA brings serious consequences for offenders. The Criminal Code makes it an offence for an offender to fail to comply with SOIRA's reporting obligations without "reasonable excuse" (s. 490.031(1)). Non-compliance with any of these conditions may result in prosecution, with penalties of up to 2 years' imprisonment, up to \$10,000 in fines, or both (s. 490.031(1)). The risks are clearly high for offenders if they fail to adhere to SOIRA's numerous requirements.
- [69] The impact of these requirements for 20 years, as sought by the Crown, on the professional and parenting duties of the accused would be grossly disproportionate to the public interest represented by compliance with the SOIRA regime. While the SOIRA list is confidential, with limited access, the scope of its accessibility was unclear, and there is no guarantee that in future it would not be accessible by a wider range of governmental bodies, such as border security: the stated concern of the accused. The lingering presence of the accused's name in a SOIRA database or watchlist will disproportionately hinder the personal and professional life of the accused, particularly with respect to necessary international travel for work and with his children.

2. Firearms prohibition

- [70] The Crown argues that a s. 109 mandatory firearms prohibition applies, as s. 271 bears a maximum imprisonment of 10 years ((a)), and as "violence was used, threatened or attempted against ((a.1)(i)) the person's intimate partner, ((iii)) who resides with the person."
- [71] The relevant parts of s. 109:

Mandatory prohibition order

109 (1) Where a person is convicted, or discharged under section 730, of

(a) an indictable offence in the commission of which violence against a person was used, threatened or attempted and for which the person may be sentenced to imprisonment for ten years or more,

(a.1) an indictable offence in the commission of which violence was used, threatened or attempted against

(i) the person's intimate partner,

(ii) a child or parent of the person or of anyone referred to in subparagraph (i), or

(iii) any person who resides with the person or with anyone referred to in subparagraph (i) or (ii),

[72] The defence argues that the s. 724 factual findings in the case do not trigger a s. 109 mandatory firearms ban, and that it would be unnecessary and inappropriate to impose such a ban on the accused. This argument is not premised, as is often the case, on an impingement of the accused's hunting or firearms lifestyle: there is no indication that this accused has any interest in or history with weapons, and all indications, including the letters of reference, and the personal history of the accused, are markedly to the contrary. Rather, the concern is the same as with SOIRA: even with a conditional discharge, the presence of his name in a database will have lingering effects, potentially lifetime effects, and presently unknown effects, on his life and livelihood, and on his children.

[73] As noted by Madam Justice Fleming (before her translation to the Court of Appeal) in *R v Hackett*, 2016 BCSC 1424 at para 49, "All sexual assaults are inherently violent." That said, in that sentencing case, it was noted that the sexual assault in question "although serious by its very nature, did not involve any gratuitous violence", leading to a lesser sentence of imprisonment for a period of two years less a day, followed by two years' probation.

[74] Despite the violation inherent in a sexual assault, the jurisprudence and wording of s. 109 indicates that not all instances of sexual assault will constitute "violence" for the purposes of that section. *R v Lonerger*, 2009 BCSC 1678 is the leading case on the issue. There, the offender was convicted of sexual interference based on a single brief stroking of the nine-year-old complainant's buttocks while she was sleeping. The offender had an otherwise socially positive life, and had already suffered considerable adverse publicity, as well as job loss, as a result of the prosecution.

[75] At para 21, Justice Barrow reiterated the observation of the Ontario Court of Appeal in *R v Schell*, [2002] O.J. No. 749 that it would have been clear and simple for Parliament to have expressly stated that the s. 109 mandatory firearms prohibition applies to every sexual assault conviction, had it intended that effect, rather than generally referring to "violence":

Section 109(1)(a) does not direct that a firearms prohibition is mandatory upon conviction on a charge of sexual assault. Rather, it directs that the prohibition is mandatory where any offence involves "violence against a person". It may be that virtually all sexual assaults, particularly those perpetrated against children, will involve violence against the victims...

- [76] Justice Barrow then exhaustively canvassed the jurisprudence, which indicated that in certain circumstances, the offence of sexual interference may not involve "violence" in the sense employed in s. 109. Where force is applied, or there is penetration, or where the offence inflicts a profound impact on the victim, violence triggering the mandatory s. 109 prohibition will generally be found but absent those factors, s. 109 may not apply:
- [39] The principle I take from that case, and the comments of Abella J.A. in relation to the nature of sexual abuse, is that the absence of physical violence, whether actual or threatened, is not a basis upon which to plot the gravamen of the offence at the lower end of the sentencing spectrum. In one sense sexual abuse is violent, in that it may violate both the physical and mental integrity of the complainant. The fact that it does, however, does not, in my judgment, lead inexorably to the conclusion that sexual assault or sexual interference is necessarily violent within the meaning of s. 109. The Court of Appeal of Ontario, among other courts, has expressly left open that possibility.
- [43] Turning to the circumstances of the matter at hand, there was no penetration of the complainant's anus or vagina. There was no oral sex and no touching by the complainant of the accused's sexual organs. There were no threats of violence. There was no striking, hitting, or other conduct which ordinarily would be characterized as violent. It was a single event that lasted only a brief period of time. I am, in the result, not satisfied that the accused's conduct falls within s. 109, and I decline to make the order sought.
- [77] In reaching that conclusion, Barrow J cited at para 32 the following passage from *R v LH*, [2002] N.J. No. 59 (Nfld. & Lab. Prov. Ct.), also endorsed in *R v Bossé*, 2005 NBCA 72 at para 15:
- [52] The offence of sexual assault has been defined as an assault of a sexual nature. An assault is the intentional application of force without the consent of the victim. The strength of the touching is irrelevant. As a result, a sexual assault does not require that violence be used. Interestingly, Parliament chose to use a word in section 109 that involves an element beyond what is required for a conviction for sexual assault. Therefore, a conviction for a sexual assault cannot automatically lead to the application of section 109 of the Criminal Code. Parliament could have used the word "force" if it deemed it appropriate to do so. This does not mean however, that a sexual assault that involves minimal force will not be considered an act of violence. Though not every sexual assault will be subject to a section 109 prohibition most sexual assaults against children will be.

[emphasis added]

- [78] The Crown makes a compelling argument that the fifteen-year-old Lonergan must be read cautiously in light of recent pronouncements that courts should not downgrade the wrongfulness of non-penetrative sexual assault, citing *R v Friesen*, 2020 SCC 9 at paras 141-146, and especially the following:
- [144] Specifically, we would strongly caution courts against downgrading the wrongfulness of the offence or the harm to the victim where the sexually violent conduct does not involve penetration, fellatio, or cunnilingus, but instead touching or masturbation. There is no basis to assume, as some courts appear to have done, that sexual touching without penetration can be [translation] "relatively benign" (see *R. v. Caron Barrette*, 2018 QCCA 516, 46 C.R. (7th) 400, at paras. 93-94). Some decisions also appear to justify a lower sentence by labeling the conduct as merely sexual touching without any analysis of the harm to the victim (see *Caron Barrette*, at paras. 93-94; *Hood*, at para. 150; *R. v. Iron*, 2005 SKCA 84, 269 Sask.R. 51, at para.12). Implicit in these decisions is the belief that conduct that is unfortunately referred to as "fondling" or [translation] "caressing" is inherently less harmful than other forms of sexual violence (see *Hood*, at para. 150; *Caron Barrette*, at para. 93). This is a myth that must be rejected (*Benedet*, at pp. 299 and 314; *Wright*, at p. 57). Simply stating that the offence involved sexual touching rather than penetration does not provide any meaningful insight into the harm that the child suffered from the sexual violence.
- [79] Friesen emphasises at para 118 that "[a]ll forms of sexual violence, including sexual violence against adults, are morally blameworthy". That said, Friesen at para 114 and Friesen in its entirety, specifically arise in the context of the heightened moral evil represented by sexual abuse of children. As stated at para 65: "Sexual violence against children is especially wrongful " Friesen does not address the present issue of whether the wrongfulness inherent in any form of sexual assault or its description as "sexual violence" should deem all sexual offences to constitute "violence" for the purpose of s. 109.
- [80] Further, the Schell observation above speaks even more profoundly given recent legislative action. Parliament has recently spent considerable focus, time, and effort extensively considering and amending sexual assault provisions in the Criminal Code, and had before it the appellate pronouncements in *Bossé*, and yet did not make what would have been a simple and clarifying amendment to s. 109: making it applicable to all convictions for any form of sexual assault, to replace the more malleable term "violence."
- [81] The Crown also cites *R v DRP*, 2021 BCSC 1563 at para 99, where in another case of sexual abuse against a child, a s. 109 prohibition was imposed on the basis that "any form of sexual assault is considered a violent assault." It does not appear that Lonergan was cited to the Court, and a single sentence comprises the total discussion of the firearms prohibitions.
- [82] As matter of horizontal stare decisis, I will follow Lonergan.

[83] The s. 724 reasons found that the aggravating circumstances of penetration and force had not been proven beyond a reasonable doubt. Following the factual and statutory conclusions of Lonergan, the s. 109 mandatory firearms prohibition order is inapplicable. For the reasons set out above, I agree that the imposition of a ban is unnecessary. The accused poses a negligible risk to reoffend or ever appear before the court again. As with SOIRA, "the impact of a compliance order on his privacy and liberty would be grossly disproportionate to the public interest in protecting society through the effective prevention or investigation of crimes of a sexual nature."

IV. Conclusion

[84] Please stand.

[85] The Court orders a conditional discharge, pursuant to s. 730, with a one-year probation order, with the following conditions:

- You must have no contact or communication, directly or indirectly, with the complainant.
- You must continue to undergo counselling during the period.
- You must keep the peace and be of good behaviour.
- You must report in person to a probation officer by January 30, 2025, and after that you must report as directed by the officer.
- You must appear before the court when required to do so by the court or by your probation officer.
- You must provide your current address and phone number to the probation officer.
- You must not change your address or phone number without prior written permission from the probation officer.
- You must notify the court or your probation officer of any change of employment or occupation.
- You must present yourself immediately at the door to your residence or answer the phone when any peace officer or your probation officer or supervisor attends or calls to check on you.

[86] [86] The Court also issues the mandatory victim-fine surcharge (s. 737) and DNA orders (s. 487.051(1)). You must appear on Friday, January 24, 2025, at 9 am at the RCMP Detachment at [redacted for publication], for the purpose of the taking of bodily substances by means of the investigative procedures set out in s 487.06(1) of the Criminal Code.

"Crerar J"

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