

CANADA / JUDGMENT

R. v. C.K.

2023 BCCA 468

COURT

British Columbia Court of Appeal

DECIDED

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2023 BCCA 468 R. v. C.K.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. C.K.,

2023 BCCA 468

Date: 20231214

Docket: CA49269

Between:

Rex

Appellant

And

C.K.

Respondent

Corrected Judgment: The cover page of the judgment

was corrected on January 5, 2024.

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

Before:

The Honourable Justice Griffin

The Honourable Madam Justice DeWitt-Van Oosten

The Honourable Mr. Justice Voith

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

July 14, 2023 (sentence) (R. v. C.K., Vancouver Docket 262178).

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Place and Date of Hearing:

Vancouver, British Columbia

October 12, 2023

Place and Date of Judgment:

Vancouver, British Columbia

December 14, 2023

Written Reasons by:

The Honourable Madam Justice DeWitt-Van Oosten

Concurred in by:

The Honourable Justice Griffin

The Honourable Mr. Justice Voith

Summary:

This is a Crown appeal from sentence for sexual interference. The respondent received a conditional sentence of two years less one day, followed by three years' probation for repeated and highly invasive sexual touching of his younger step-brother while in a position of trust. The Crown says the sentence is demonstrably unfit because it fails to reflect the gravity of the respondent's conduct and his high moral blameworthiness.

HELD: Leave to appeal is granted; the appeal is allowed; and the sentence is increased to three-and-one-half-years' imprisonment. In the circumstances of this case, a conditional sentence of two years less one day plus probation constitutes an unreasonable departure from the principle of proportionality. Given the gravity of the offence and the respondent's high moral

blameworthiness, a penitentiary term is necessary to meet the paramount objectives of denunciation and deterrence in cases involving child sexual abuse. If not for the respondent's concerted efforts at rehabilitation since the offence came to light and his low risk to reoffend, a sentence closer to five years' imprisonment would have been a fit sentence.

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

Introduction

- [1] In January 2022, the respondent, C.K., was charged in Alberta with four sexual offences under the Criminal Code, R.S.C. 1985, c. C-46. The Crown proceeded by indictment on all counts.
- [2] The respondent waived the charges to Vancouver for plea and sentencing. In September 2022, he entered a guilty plea in the British Columbia Provincial Court to count 1 of the Information. This count alleged sexual touching (or interference) contrary to s. 151 of the Criminal Code, with a date range of January 2004 to April 2006. The remaining three counts were stayed by the Crown.
- [3] The victim of the offence is the respondent's younger step-brother. He was 12-14 years old when the respondent committed the acts underlying count 1. The respondent was 20-22 years old. There is an eight-year age gap.
- [4] At the time of the offence, the Criminal Code prescribed a maximum punishment of ten years' imprisonment when the Crown proceeded by indictment. That penalty is now a maximum 14 years' imprisonment: Tougher Penalties for Child Predators Act, S.C. 2015, c. 23.
- [5] On July 14, 2023, the respondent received a conditional sentence of two years less one day for his offence, followed by three years' probation. The judge made various ancillary orders, including a 10-year firearms prohibition. He exempted the respondent from the Sex Offender Information Registration Act, S.C. 2004, c. 10 [SOIRA] on constitutional grounds. He also declined to issue a s. 161 prohibition under the Criminal Code restricting the respondent's contact with children.
- [6] The Crown appeals from the conditional sentence and probation order. It says the sentence is demonstrably unfit in light of the gravity of the offence and the respondent's high moral blameworthiness. The Crown asks this Court to impose a penitentiary term of four years. The Crown does not challenge the SOIRA exemption or the judge's decision to decline a s. 161 prohibition.
- [7] For the reasons that follow, I would grant the Crown leave to appeal from sentence. I would allow the appeal and vary the sentence on count 1, increasing it to three-and-one-half-years' imprisonment (42 months).

- [8] I consider three-and-one-half-years to be at the low end for child sexual offending of the nature and duration that occurred here. If not for the respondent's substantial efforts at rehabilitation and the progress he has made, a sentence closer to five years' imprisonment would have been a fit sentence for him as a first-time sexual offender.

Background

- [9] An agreed statement of facts was adduced at sentencing. It is not necessary to detail all of the facts.
- [10] However, the nature and duration of the respondent's offending is important to this Court's fitness review. As such, I will highlight the more salient facts:
- The victim's mother passed away when he was 10 years old.
 - When the victim was 11, his father began dating the respondent's mother. They married a short time later.
 - The victim was 11 when he first met the respondent, who was then 19.
 - With the marriage, the two families "joined households" and the respondent became the victim's step-brother.
 - The respondent began sexually touching the victim when he was 12.
 - The first incident involved stroking the victim's penis. The respondent also had the victim stroke his penis.
 - The respondent "groomed" the victim. He showed him pornography and treated the victim as his "boyfriend". He would often take the victim to movies and other activities. The respondent would frequently "gaslight" the victim as a "method of exerting control". The respondent would provide the victim with drugs and alcohol.
 - The respondent told the victim "that if he ever brought up the sexual abuse, their parents would separate and they would lose their family". The victim was "terrified of this happening as a consequence of the loss of his biological mother".
 - The victim thought of the respondent as "his 'cooler older brother' who let him do stuff that he wouldn't otherwise be able to do".
 - The respondent continued to stroke the victim's penis and had the victim stroke his penis. "This would often continue until one or both ejaculated."
 - The sexual touching "escalated".
 - The respondent "repeatedly" performed oral sex on the victim and "repeatedly" had the victim perform oral sex on him. This would continue until one or both ejaculated. The victim was under 14 the first time this took place.

- The respondent "repeatedly" penetrated the victim's anus with his penis. He "repeatedly" had the victim penetrate the respondent's anus with his penis. The victim was 14 or 15 when this first happened.
- On one occasion when the victim was 13 or 14, the respondent provided him with hard alcohol and the victim became highly intoxicated. The respondent touched the victim's penis and performed oral sex on him. The victim recalls throwing up on the bed.
- On another occasion when the victim was the same age, he shared a hotel room with the respondent while on a family trip. The respondent had the victim lay on top of him and grind against him. This continued to the point of ejaculation. The victim cried.
- On another family trip, when the victim was 14 or 15, the respondent performed oral sex on him while under a blanket in the backseat of the van. There were other family members in the vehicle.
- Later that same night, the respondent penetrated the victim's anus with his penis. This was the first time it occurred. The respondent ejaculated on the victim. They went into the bathroom to clean up. The victim was embarrassed and afraid they would get caught.
- While visiting a relative in another province, the respondent and victim shared a room together. The victim was 14 or 15 at this time. The respondent was drunk. He told the victim to "stick it in [his] butt". The victim did not do that.
- The respondent did not use "overt physical force" to commit the sexual acts. At times, the victim would cry while it was taking place.
- The sexual touching continued until the victim turned 16. By the age of 14, it had become normalized for him and because of the grooming, the victim continued to comply.
- He estimated that the sexual touching occurred seven to nine times per week and there "were hundreds of incidences".
- When the victim was 13 or 14, he began using drugs to "help him disassociate and forget about the abuse".
- He discussed the abuse with the respondent after he turned 16. The victim was angry and the respondent asked him if he wanted him to tell their parents. The victim said "no" because "it would ruin the [respondent's] life". The victim was also embarrassed to talk about it.
- The victim reported the abuse in December 2020.

[11] As noted, the sexual touching began when the victim was 12 years old. He turned 12 in April 2004. The respondent was born in March 1984. Consequently, he was 20 years old when he began to abuse his step-brother.

[12] The respondent pleaded guilty to only one of the four counts on the Information. This count had a specific date range of January 2004 to April 2006.

- [13] In April 2006, the victim turned 14. However, the sexual abuse continued for an additional two years and did not stop until April 2008, when the victim turned 16. The touching occurred in British Columbia, Alberta, Saskatchewan, and Newfoundland and Labrador.
- [14] As part of his plea arrangement, the respondent agreed that although a conviction would be entered for only one count, the circumstances underlying all four of the charged offences were properly before the judge as an aggravating factor and could inform the sentencing analysis. The respondent accepted the circumstances surrounding the four counts as "proven facts".
- [15] From the start of the sexual touching to when it stopped in April 2008, the age of legal consent to sexual activity in Canada was 14. That changed in May 2008 when the age of consent increased to 16: Tackling Violent Crime Act, S.C. 2008, c. 6. It is not suggested here that the victim consented to any of the sexual touching that occurred after he turned 14. The agreed statement of facts makes it clear that his physical participation in sexual activity with the respondent between the ages of 14 and 16 continued because of grooming and the breach of trust.

Positions Taken at Sentencing

Crown

- [16] The respondent was 39 years old when sentenced and had no prior criminal record.
- [17] The Crown sought four years' imprisonment. The judge was told that in formulating this position, the Crown "awarded significant mitigation for the guilty plea and the [respondent's] youthfulness at the time of the offence".
- [18] The Crown identified the aggravating factors to include: a breach of trust; the victim's young age; the frequency and duration of the sexual touching; the nature of the acts; and significant harm to the victim.
- [19] The Crown submitted that someone "who intentionally applies force of a sexual nature to a child is highly morally blameworthy because the offender is or ought to be aware that this action can profoundly harm the child" (citing *R. v. Friesen*, 2020 SCC 9 at para. 88). From the Crown's perspective, the only factor that somewhat "ameliorated" the respondent's moral blameworthiness was his "youthfulness" at the time of the offence.
- [20] A victim impact statement was filed at sentencing. The respondent's offence has profoundly affected the victim's life. He wrote:

Here I am to tell you about what your actions did to affect me. Let me first say, I take no pleasure in calling you out. And I hate just about every aspect of going through with legal action. But I would be far more displeased with myself with letting you be a threat to other children. [As well] your families striving to cover this up and shut me up pushed me to go to the police. [I] absolutely refuse to keep cow towing to people who would rather see to the man who molested me, than care about me. And who's interactions with me are only in his interest.

You taught me how to lie to my family. How to be ashamed of myself.

You told me often, so much so it resonates with my whole childhood. That If I spoke up our family would be torn apart. Which being a kid whose mom died not more than a year or so before meeting you was a big worry and strong controlling factor. Your words have actually become true to me at least. And it pains me. But boy do I wish I closed my heart to you and your family when I was a teen.

I can't tell you how many times I prayed my mom couldn't see me from heaven. How sad or disgusted she must be.

You taught me every wrong way to love.

My body shakes with just how much you duped me. How you played me for the fool of a kid I was. How you used me and fed me your wack ideology.

Physically, the stress you've given me has tied my stomach in knots ever since the first molestation. I get physically sick and puke with anxiety. I disassociate so often I wonder if [I'm] living my life or just watching it. [It has] impacted my sexuality and created a chasm between me and everyone I've ever loved. Until I came out I was told by an ex lover I would never be able to truly love someone till I jumped this [hurdle] and exposed my truth. And you didn't help one iota with me moving forward and being open.

Defence

[21] In the Provincial Court, the respondent sought a conditional sentence of two years less one day, followed by probation.

[22] Defence counsel described the offence as "historical". The time period underlying the count to which he pleaded guilty ended in 2006, 17 years prior to sentencing. The respondent submitted that his moral blameworthiness was "somewhat diminish[ed]". He had been sexually abused on one occasion by an older male cousin when he was five years old; he was "very youthful" when he committed the offence; and he had been struggling with a home and community environment that did not accept him as a gay male. He was "bull[ied]" because of this.

[23] The respondent acknowledged the seriousness of his offence. He acknowledged he stood in a position of trust towards the victim. However, he submitted there was significant mitigation that justified a conditional sentence. This included: pro-social behaviour since the offence; the respondent has long been willing to take responsibility for his actions; he

pleaded guilty; he has expressed sincere remorse and has insight into his offending; he has made substantial efforts at rehabilitation by taking counselling specific to sex offenders; he has been significantly impacted by disclosure of the crime, including public "shaming" and ensuing mental health challenges; and he has support in the community from family members, friends, and acquaintances.

- [24] The judge received character letters confirming that support. A text message was also produced at sentencing in which the respondent expressed remorse directly to the victim as early as July 2019, before the sexual touching was reported to the police.
- [25] In seeking a conditional sentence, the respondent relied upon a risk assessment prepared by Dr. Bartel, a clinical psychologist who specializes in forensic psychology.
- [26] In the assessment, Dr. Bartel described the respondent as " prosocial with no indication of persistent antisocial features or traits". There is "no indication of antisocial personality traits such as lack of remorse, irresponsibility, repeated criminality, deceitfulness, impulsivity, early onset delinquency or recurrent aggression. Nor is there evidence [of] additional personality pathology or disorder". The respondent "does not appear to present with any paraphilic disorder, in other words, a pattern of recurrent, intense, sexual urges, fantasies, or behaviours that involve deviant or illegal sexual conduct".
- [27] Dr. Bartel described the respondent as " presently at low risk to engage in sexually offending behaviours in the future". This is the lowest risk category used in the forensic assessment process. The respondent has "likely participated in a sufficient amount of counselling and treatment to address his past sexual offending behaviour".
- [28] Finally, Dr. Bartel reported that in light of the respondent's "relatively good functioning in the community, a high level of disruption to this success could result in a deterioration [in] psychological functioning and adjustment, which could have the unintended effect of raising his risk to some degree".
- [29] A clinical counsellor who worked with the respondent in 2019-2020 provided an opinion similar to Dr. Bartel. In his view, the respondent would be suitable for "low-intensity sexual offender treatment" in the community; however, he is a "low risk offender".
- [30] At sentencing, the defence also tendered a "Treatment Summary" from Dr. Thomas, a clinical psychologist who has worked with sexual and violent offenders since 2003 and is a service provider for British Columbia's Forensic Sexual Offence Program.
- [31] By the time of sentencing, the respondent had participated in 13 sessions with Dr. Thomas (October 2022-March 2023). Dr. Thomas saw " minimal indication that [the respondent] has a paraphilia such as pedophilia (or hebephilia)". She did not consider it necessary for the respondent to be referred to the Forensic Sexual Offence Program after sentencing as he " has already received an individualized version of it".

Reasons for Sentence

- [32] The reasons for sentence have not been published. For purposes of this judgment, I will canvass only those portions I consider germane to the issues on appeal.
- [33] The judge began his analysis of the case by noting that sentencing can be an "extremely complicated and difficult matter": at para. 10.
- [34] In this case, for example, the respondent committed a very serious crime--child sexual violence. The judge found the victim impact statement "compelling". The victim has been "deeply affected" by the respondent's conduct: at para. 11. The judge recognized the "length and the breadth of the [respondent's] conduct" as an aggravating feature of the case: at para. 39. There were "hundreds of instances of sexual touching": at para. 7.
- [35] Denunciation and deterrence take priority in cases of child sexual offending. The judge made note of this. He instructed himself that the "wrongfulness and harmfulness of sexual offences against children" must inform a court's proportionality analysis: at para. 28.
- [36] The judge noted that in *Friesen*, the Supreme Court of Canada "reiterated in the strongest of terms that sexual exploitation of children is morally reprehensible conduct that must be reflected in the application of the proportionality principle": at para. 29. He also recognized that because of this emphasis, the "personal circumstances of the offender necessarily have a reduced role": at para. 32 quoting from *R. v. Nystrom*, 2023 BCCA 232 at para. 50.
- [37] At the same time, sentencing is an individualized process: *R. v. Parranto*, 2021 SCC 46 at para. 12, 38. It is informed by the nature and the circumstances of the offence, but also by the personal circumstances of the offender, even where the offender has committed a serious offence of personal violence.
- [38] In this case, the sentencing judge made note of the fact that the respondent took "responsibility early" and sought out counselling: at para. 13. A "long period of time" elapsed between the offending and sentencing and the respondent presents as a "low risk to engage in sexual offending behaviours in the future": at para. 19. From the judge's perspective, there were also "many factors in mitigation" that weighed in the respondent's favour:
- [40] [C.K.] was a very young man at the time of the offences. The offences occurred a very long time ago, 17 to 19 years ago. Since that time, he has lived a life that can only be described as one of exhibiting very good character. When he was a young child, he was sexually abused himself. He is a gay man and suffered bullying from a father figure as well as others when he was growing up and trying to come to terms with his sexuality. He has no criminal record prior or since. He disclosed the offence to his family prior to police involvement which shows a high level of remorse and a willingness and a capacity for rehabilitation. He accepted responsibility and was remorseful and expressed that to the complainant prior to police involvement.
- [41] He is a wildlife biologist. He is required to travel for work.

- [42] He sought out counselling prior to the approval of this charge. Since that time -- and this is a rare circumstance, I have never seen it, but it may have happened before -- he has effectively complete[d] the entire forensic sex offenders[] program on an individualized basis prior to his sentencing hearing. He turned himself into the police when they asked him to.
- [43] He suffers from some medical issues. He suffers from clinical depression. He has been prescribed antidepressants. He is described as suffering from self-loathing and shame. He has significant support in the community as a result of his prosocial lifestyle, including from his parents and the father of the complainant. He was willing to suffer the public accountability and shame by coming forward with his acceptance of responsibility to the closest ones to him.
- [44] The doctors here who have provided reports indicate that he, essentially, is at the lowest risk possible for future offending. They also conclude that specific deterrence is not an issue given his very significant rehabilitation efforts.
- [45] His mother indicates in her letter he accepted responsibility, in her mind, without concern as to what happened to him. He was expressing to her and throughout that his concern was with the welfare of the [victim]. He offered to [the victim] that he would disclose his transgressions to their parents prior to any police involvement. Again, he was a young man, not nearly as mature as some of the offenders that have been referred to, all the offenders that have been referred to, in the caselaw.
- [46] The charge period is prior to any penetrative sex. I am only sentencing him on the conduct in question prior to that with due regard to the Supreme Court of Canada's direction that sexual interference is treated the same as sexual assault. There are no breaches since his release.
- [39] Ultimately, after conducting his proportionality analysis, the judge invoked s. 742.1 of the Criminal Code and determined that a fit sentence would be a sentence of two years less one day to be served conditionally in the community. The judge also imposed probation:
- [47] The question is not what the sentence could be. It is not what could be imposed and could withstand appellate scrutiny as far as its appropriateness. The question is, what is the most appropriate sentence given the unique set of circumstances in this case? In my mind, this is one of those rare cases where a sentence that includes serving a jail sentence in a carceral institution is not necessary to meet the principles of sentencing.
- [48] In my mind, a sentence of two years less a day is the appropriate sentence and applying the sentencing caselaw, even post-Friesen, from the Supreme Court of Canada it seems to me that this sentence can be served by way of a conditional sentence order and that that sentence can have the necessary denunciatory and deterrent effect that is so important when it comes to these types of offences.

[Emphasis added.]

- [40] Among other terms, the conditional sentence includes "house arrest" for the first 12 months of the order, although the judge allowed for a number of exceptions. For the second 12 months, the respondent must obey a daily curfew of 11:00 pm to 6:00 am. Again, there are permitted exceptions.

Standard of Review

- [41] Appeals from sentence are subject to a highly deferential standard of review.
- [42] Appellate courts may only interfere with a sentence where the appellant establishes an error in principle that is shown to have materially affected the sentence, or the sentence is demonstrably unfit: *R. v. Lacasse*, 2015 SCC 64 at para. 11; *Friesen* at para. 26.

Positions on Appeal

Crown

- [43] Relying on the second of these routes to appellate intervention, the Crown argues that the respondent's sentence is demonstrably unfit. It says both the length and form of the sentence do not adequately reflect the gravity of the respondent's crime or his high moral blameworthiness.
- [44] The Crown emphasizes that a court's assessment of moral blameworthiness in cases of child sexual offending must account for the intentional risks taken by the offender and the serious harm caused by their conduct. That analysis did not occur. Instead, says the Crown, the respondent's personal circumstances and mitigating factors overwhelmed the assessment of fitness. This led to a sentence that unreasonably departs from the principle of proportionality: *Lacasse* at para. 53.

Respondent

- [45] The respondent says his sentence reflects a rare "constellation of exceptionally mitigating circumstances" that justified a community-based disposition. The judge was alive to the statutory and jurisprudential principles that govern sentencing in child sexual offences; considered all relevant factors; understood the gravity of the respondent's conduct; and contrary to the Crown's submission, he did assess the respondent's moral blameworthiness.
- [46] The respondent says conditional sentences are not prohibited for sexual touching and in fact, this type of sentence has been imposed by some trial courts post-*Friesen*. The judge had considerable latitude in crafting a sentence in light of the compelling mitigation. His exercise of discretion is entitled to substantial deference. The judge was entitled to "apply the principles of sentencing in any manner that suit[ed] the features of a particular case": *Friesen* at para. 38.

- [47] The respondent argues that on the evidence, a penitentiary term of imprisonment is not necessary to achieve specific deterrence or to protect the public. By the time of sentencing, the respondent had made significant efforts at rehabilitation and presented a low risk to reoffend. Furthermore, from his perspective, the principles of denunciation and general deterrence have already been achieved through the respondent's public "shaming" and the impact of being prosecuted.
- [48] For purposes of the appeal, the respondent seeks to introduce fresh evidence showing that he continues to rehabilitate and "atone for his offence". He has completed 89 hours of community work service in accordance with the terms of his conditional sentence. He is reporting as required to his sentence supervisor; he is employed; and he "continues to have significant mental health issues associated with the shame and stigma of his offence".
- [49] The Crown opposes the fresh evidence, arguing that it simply repeats or affirms evidence already before the judge at sentencing. The Crown says the fresh evidence would not have affected the result and is inadmissible on appeal.

Discussion

Moral blameworthiness requires close examination

- [50] The Criminal Code stipulates that all sentences must be proportionate to the gravity of the offence and the degree of responsibility of the offender: s. 718.1. In *R. v. Bissonnette*, 2022 SCC 23, the Supreme Court of Canada explained what this means:
- [50] The sentence must be severe enough to denounce the offence but must not exceed "what is just and appropriate, given the moral blameworthiness of the offender and the gravity of the offence" Proportionality in sentencing is considered to be an essential factor in maintaining public confidence in the fairness and rationality of the criminal justice system. The application of this principle assures the public that the offender deserves the punishment received
- [51] It follows that "a person cannot be made to suffer a grossly disproportionate punishment simply to send a message to discourage others from offending" In a similar vein "striving for exemplarity to the detriment of evidence of the merit of rehabilitation objectives is incompatible with the principle of individualization" ... Proportionality has a restraining function, and in this sense serves to guarantee that a sentence is individualized, just and appropriate.

[Internal references omitted.]

- [51] Specific to child sexual offences, judges are mandated to prioritize the sentencing objectives of denunciation and deterrence: s. 718.01. The meaning of denunciation and deterrence was also addressed in *Bissonnette*:

- [46] the penological objective of denunciation requires that a sentence express society's condemnation of the offence that was committed. The sentence is the means by which society communicates its moral values. This objective must be weighed carefully, as it could, on its own, be used to justify sentences of unlimited severity.
- [47] As for the objective of deterrence, it has two forms. The first, specific deterrence, is meant to discourage the offender before the court from reoffending. The second, general deterrence, is intended to discourage members of the public who might be tempted to engage in the criminal activity for which the offender has been convicted. When this objective is being pursued, the offender is punished more harshly in order to send a message to the public or, in other words, to serve as an example. General deterrence is an objective that must be weighed by a court, but the effectiveness of which has often been questioned. These legitimate reservations notwithstanding, the fact remains that the certainty of punishment, together with the entire range of criminal sanctions, does produce a certain deterrent effect, albeit one that is difficult to evaluate, on possible offenders.

[Internal references omitted; emphasis added.]

- [52] In accordance with s. 718.2(a) of the Criminal Code, sentences should be "increased or reduced to account for any relevant aggravating or mitigating circumstances". Specific to child sexual offences, certain factors are statutorily deemed as "aggravating": abuse of a family member (s. 718.2(a)(ii)); abuse of a person under the age of 18 (s. 718.2(a)(ii.1)); breach of trust or authority in relation to the victim (s. 718.2(a)(iii)); and evidence of a significant impact on the victim, considering their age and other personal circumstances (s. 718.2(a)(iii.1)).
- [53] The Criminal Code's sentencing framework is supplemented by case law. This includes Friesen, which is currently the leading authority on sentencing for child sexual offences in this country and directs sentencing courts to pay particular attention to the harms caused by child sexual abuse: Friesen para. 50.
- [54] Friesen established a new analytical approach to sentencing for child sexual violence. It is an approach that "places children, and the harm they suffer, at the centre of the discussion": R. v. Bertrand Marchand, 2023 SCC 26 at para. 32, emphasis added. The Friesen framework reflects society's deeper understanding of the immediate and long-term impacts of sexual abuse on children, their families, their communities, and society at large: at paras. 50, 60-67, 74-86.
- [55] These impacts include: harm to children's "personal autonomy, bodily integrity, sexual integrity, dignity, and equality"; damage to their relationships with their caregivers and other social relationships; "profound harm" to parents, caregivers, and family members who may be left "feeling powerless and guilty" over their child's experience; and "broader harm to the communities in which children live and to society as a whole": Friesen at paras. 51, 60-64.

- [56] On the latter point, Friesen recognizes that " children who are victims of sexual violence may be more likely to engage in sexual violence against children themselves when they reach adulthood ": at para. 64. These offences " can thus fuel a cycle of sexual violence that results in the proliferation and normalization of the violence in a given community ": Friesen at para. 64.
- [57] The harms identified and accepted as true in Friesen " impact both the gravity of the offence and the degree of responsibility of the offender": Friesen at para. 75. See also R. v. P.R.J., 2023 BCCA 169 at paras. 53-55 [P.R.J.].
- [58] Consequently, the harmfulness and the wrongfulness of an offender's conduct must be closely examined when determining a fit sentence for a child sexual offence. It is not enough to acknowledge the relevance of these considerations. The harms that flow from the conduct and the wrongfulness (or blameworthiness) of the offender's actions must be analyzed and applied to the individual circumstances of the case. Critically, they must be reflected in the sentence itself: R. v. SADF, 2021 MBCA 22 at para. 34; Nystrom at para. 53.
- [59] As aptly noted by the Ontario Court of Appeal in R. v. T.J., 2021 ONCA 392 [T.J.]:
- [39] Friesen does not simply contain a list of principles and factors to be mentioned in a sentencing decision; it insists that those factors be reflected in a sentence that is of sufficient length to recognize them.
- [Emphasis added.]
- [60] Specific to moral blameworthiness, the Supreme Court of Canada said this in Friesen:
- [87] Courts must also take the modern recognition of the wrongfulness and harmfulness of sexual violence against children into account when determining the offender's degree of responsibility.
- [88] Intentionally applying force of a sexual nature to a child is highly morally blameworthy because the offender is or ought to be aware that this action can profoundly harm the child. In assessing the degree of responsibility of the offender, courts must take into account the harm the offender intended or was reckless or wilfully blind to
- [89] All forms of sexual violence, including sexual violence against adults, are morally blameworthy precisely because they involve the wrongful exploitation of the victim by the offender -- the offender is treating the victim as an object and disregarding the victim's human dignity Courts must give proper weight in sentencing to the offender's underlying attitudes because they are highly relevant to assessing the offender's moral blameworthiness and to the sentencing objective of denunciation

- [90] The fact that the victim is a child increases the offender's degree of responsibility. Put simply, the intentional sexual exploitation and objectification of children is highly morally blameworthy because children are so vulnerable. Offenders recognize children's particular vulnerability and intentionally exploit it to achieve their selfish desires.
- [91] These comments should not be taken as a direction to disregard relevant factors that may reduce the offender's moral culpability. The proportionality principle requires that the punishment imposed be "just and appropriate . . . and nothing more." First, as sexual assault and sexual interference are broadly-defined offences that embrace a wide spectrum of conduct, the offender's conduct will be less morally blameworthy in some cases than in others. Second, the personal circumstances of offenders can have a mitigating effect. For instance, offenders who suffer from mental disabilities that impose serious cognitive limitations will likely have reduced moral culpability.
- [92] Likewise, where the person before the court is Indigenous, courts must apply the principles from *R. v. Gladue*, [1999] 1 S.C.R. 688, and *Ipeelee*. The sentencing judge must apply these principles even in extremely grave cases of sexual violence against children. The systemic and background factors that have played a role in bringing the Indigenous person before the court may have a mitigating effect on moral blameworthiness ... Similarly, a different or alternative sanction might be more effective in achieving sentencing objectives in a particular Indigenous community ...

[Internal references omitted; emphasis added.]

- [61] A sentencing analysis that does not give proper effect to moral blameworthiness is likely to result in a skewed proportionality analysis, one that "risks the offender's personal circumstances overwhelming the determination of a fit sentence": P.R.J. at para. 53. The risk was explained this way in T.J.:
- [33] Where the overall focus of a sentencing decision is on the personal circumstances of the offender and the need for restraint, so as to underestimate the gravity of the offences and their harm, the sentencing decision is not consonant with Friesen's message.
- [62] I agree. In those circumstances, the sentence will not properly reflect society's "deepened understanding of the wrongfulness and harmfulness of sexual violence against children and the far-reaching and ongoing harm that it causes to children, families, and society at large": Friesen at para. 5.

This sentence does not adequately reflect moral blameworthiness

- [63] The Crown says that is what happened here. The judge imposed a sentence that does not adequately reflect the respondent's personal responsibility for his offence or the harms that flowed from it. The sentence imposed in the Provincial Court is more about the respondent's mitigation than the serious crime he committed.

- [64] In his reasons, the judge recognized denunciation and deterrence as primary considerations in cases involving child sexual abuse.
- [65] He correctly noted that Parliament has increased the maximum sentences for child sexual offences over time because it "wants such offences to be punished more harshly": at para. 23. He acknowledged the Supreme Court of Canada's direction that judges must give meaningful effect to Parliament's "legislative initiatives and the contemporary understanding of the profound harm that sexual violence against children causes": at para. 23 (citing para. 107 of Friesen).
- [66] The judge understood Friesen to have "re-established the importance of properly considering the wrongfulness and harmfulness of sexual offences against children in determining a proportionate sentence": at para. 28.
- [67] He acknowledged that Friesen has called for an "upward departure from precedent" and that the "sexual exploitation of children is morally reprehensible conduct that must be reflected in the application of the proportionality principle": at para. 29. He understood that to "properly give primary consideration to the principles of denunciation and deterrence in the circumstances of sexual assault offences, the personal circumstances of the offender necessarily have a reduced role": at para. 32 citing Nystrom at para. 50.
- [68] However, the Crown contends that acknowledging these principles is not enough. The sentence must actually reflect their application. This is where the judge fell short. The Crown says he did not apply the principles he recited, or, at the very least, he failed to prioritize them and ultimately gave them insufficient focus and weight. The Crown says a conditional sentence of two years less one day and three years' probation may respond to the respondent's personal circumstances at the time of sentencing and to the mitigating factors, but it does not give meaningful effect to the harms committed by him and critically, it does not reflect the degree of his personal responsibility for the offence.
- [69] I appreciate how difficult the sentencing process can be, particularly in the context of a case in which an offender pleads guilty and avoids the necessity of the victim's testimony, is genuinely remorseful, has insight into his offending, has made substantial efforts at rehabilitation and presents as a low risk, and there is evidence that incarceration may have a detrimental psychological effect, potentially undermining the progress made.
- [70] However, on a fair reading of the judge's reasons, considered as a whole, this is a case in which there was no substantive or meaningful assessment of the respondent's moral blameworthiness at the time of his offence. The judge paid considerable attention to the respondent's acceptance of responsibility and to his remorse after the fact. These are appropriately accounted for as mitigating factors at sentencing. However, they do not obviate the need to analyze moral blameworthiness at the time of the offence.

- [71] Assessing an offender's personal responsibility for a crime must consider the offender's state of mind and acts at the time of the offence: *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500 at para. 79, 1996 CanLII 230. Relevant factors include: the level of planning and/or intentionality brought to the crime; the degree, nature and extent of the offender's personal participation in the offence; the means or method by which the crime was committed; the motive or reasons for the offender's participation; the offender's awareness of the legal and moral wrongfulness of their conduct; their awareness of the actual or reasonably foreseeable harms flowing from their conduct (immediate and long-term); and their persistence in perpetrating the offence despite that awareness. See, for example, *R. v. Okimaw*, 2016 ABCA 246 at para. 85 and *R. v. Vader*, 2019 ABCA 488 at para. 16.
- [72] Undoubtedly, there may be aspects of an offender's background that attenuate their moral culpability. As explained in *R. v. Hills*, 2023 SCC 2:
- [58] The offender's moral culpability or degree of responsibility should be measured by gauging the essential substantive elements of the offence including the offence's mens rea, the offender's conduct in the commission of the offence, the offender's motive for committing the offence, and aspects of the offender's background that increase or decrease the offender's individual responsibility for the crime, including the offender's personal circumstances and mental capacity

[Internal references omitted.]

- [73] However, to determine whether such is the case, there has to be an examination of the issue. Respectfully, there is no indication in this case that the judge analytically grappled with these various factors to properly assess their impact on the respondent's blameworthiness or the length and form of a fit sentence. The circumstances surrounding the respondent's offence, as laid out in the agreed statement of facts, cried out for a close examination of moral blameworthiness consonant with the harm-focused framework established by Friesen.
- [74] On the evidence, the respondent was indisputably aware of the wrongfulness of his conduct and the resultant harms but elected to continue sexually abusing his step-brother for a prolonged period. Moreover, in the course of doing so, he actively took steps to ensure that the victim remained available to him for that purpose and did not disclose the offending. These are aspects of the case that received passing reference by the judge but little or no analytical attention. They should have. Friesen has provided a clear framework for sentencing in cases of child sexual offending and the offender's moral blameworthiness, considered in the context of the actual and foreseeable harms, is integral to the analysis.
- [75] According to the agreed statement of facts, the respondent would frequently "gaslight" the victim to exert control. He groomed him. He told the victim that if he ever brought up the sexual abuse, their parents would separate and they would lose their family. The respondent was aware that the victim lost his mother as a child. At times, the victim would cry while the sexual touching took place. He was manifestly vulnerable, not only because of his age, but

because of his personal circumstances and the trust relationship. Those personal circumstances were known to the respondent and he exploited them.

- [76] The respondent not only understood that what he was doing was palpably wrong and detrimentally affecting the victim, he took intentional steps to facilitate the abuse, to preserve the opportunity to commit the abuse, and to prevent disclosure and detection. When speaking with Dr. Bartel, the respondent acknowledged that he appreciated the wrongfulness of his conduct from the outset and was "... in constant fear of being caught". He clearly understood the legal and moral reprehensibility of his actions and he turned his mind to that fact throughout the duration of his offending.
- [77] Notwithstanding this awareness, the respondent continued with the sexual touching. He did so frequently and over a prolonged period and the touching escalated in its severity. The agreed statement of facts accepts that there were hundreds of incidents.
- [78] On this point, it is unclear to me whether the phrase "hundreds of incidences" was intended to capture the respondent's conduct over the entirety of the four-year period of sexual abuse, or the two-year period that underlies the count to which he pleaded guilty. However, no one has suggested anything other than extensive and repeated sexual touching between the date parameters of count 1 of the Information.
- [79] When meeting with Dr. Bartel, the respondent suggested that he sexually touched the victim "less than 100 times". However, he did not want to challenge the victim's recollection of its frequency. Instead, he agreed to the victim's estimate of frequency as a "fact" for the purpose of sentencing. He also agreed that this fact could properly inform the judge's analysis. Finally, even if the "hundreds of incidences" was intended to capture four years of sexual misconduct, as opposed to the two years underlying count 1, the respondent agreed that the entirety of his offending was open for consideration as an aggravating factor. As such, this case was properly before the judge as one involving extensive and prolonged sexual abuse of a child, which is highly relevant to the assessment of moral blameworthiness.
- [80] As explained in Friesen:
- [131] The frequency and duration [of sexual offending] can significantly increase the harm to the victim [and] magnifies the severity of the offence. It also increases the offender's moral blameworthiness because the additional harm to the victim is a reasonably foreseeable consequence of multiple assaults "
- [Internal references omitted.]
- [81] The respondent admitted to being in a position of trust while offending. The victim looked up to the respondent as a "cooler older brother". This too increased the respondent's moral blameworthiness. Paragraph 129 of Friesen makes this clear: "[t]he abuse of a position of trust exploits children's particular vulnerability to trusted adults, which is especially morally blameworthy " (emphasis added, internal references omitted).

- [82] The victim was a child. This also "increases the offender's degree of responsibility": Friesen at para. 90.
- [83] In my view, the respondent's moral blameworthiness is properly characterized as very high.
- [84] The Crown acknowledged at sentencing that his "youthfulness" attenuated his blameworthiness. The Supreme Court of Canada has accepted that "age plays a role in the development of judgment and moral sophistication": *R. v. D.B.*, 2008 SCC 25 at para. 62 [D.B.]. "Adolescence can be a confusing and challenging time for young people as they grow and mature, navigate friendships and peer groups, and discover their sexuality": Friesen at para. 153. Consequently, adolescent offenders are presumed to have diminished moral culpability for the purpose of sentencing. It is understood that these offenders may "lack a fully developed adult sense of moral judgment", as well as the "intellectual capacity to appreciate fully the consequences of their acts": Nicholas Bala, *Youth Criminal Justice Law* (Toronto: Irwin Law, 2003) at 3-4 (footnotes omitted), as cited in *D.B.* at para. 62.
- [85] However, while the respondent was young at the time of his offence, he was not an adolescent. He was 20 years old when the sexual touching began and 24 when it ended. He has acknowledged he knew his offending was wrong, that the sexual abuse lasted for four years, and that it escalated in severity. There was no evidence that the respondent lacked the intellectual or emotional capacity to appreciate the consequences of his acts, or to exercise restraint or moral judgment. In fact, the evidence was to the contrary.
- [86] At sentencing, the respondent also submitted that his moral blameworthiness was attenuated by the fact he had been sexually abused when five years old and bullied in his teenage years for identifying as a gay male.
- [87] I accept that these factors could be considered as mitigating in the overall sentencing analysis and in fact, the judge noted both of them in his reasons. However, I do not consider that they justify a finding of diminished moral blameworthiness in the particular circumstances of this case. At least not to a material degree.
- [88] Friesen recognizes that sexual abuse as a child can render that child "more likely to engage in sexual violence against children themselves when they reach adulthood": at para. 64. However, when conversing with Dr. Bartel, the respondent "implied" that this abuse experience wasn't overly traumatic for him. More importantly, there is no evidence that this single experience, although certainly unacceptable and tragic, normalized sexual abuse for the respondent in a manner that impacted his ability to appreciate the "profound physical, psychological, and emotional harm" his actions might cause: Friesen at para. 88.
- [89] To the contrary, the evidence is clear that the respondent was well aware of the effect of his actions. The behaviour he engaged in, both in its intrusiveness and duration, far surpassed the severity of his own childhood experience.

- [90] The same is true of the fact that the respondent was bullied for identifying as a gay male. In no way do I wish to minimize or diminish this experience. However, the evidence did not suggest that because one or more family members and his larger community did not accept his sexual orientation, or reacted negatively towards him, the respondent had a lessened capacity to appreciate the wrongfulness of his conduct or to foresee the harm arising from it. In fact, he told Dr. Bartel that although the negativity "affected him greatly", he did not "ruminate on the perceived slights and bullying".
- [91] It was Dr. Bartel's view that the offence "largely occurred because of proximity and familiarity with his victim, with whom [the respondent] felt emotionally close, combined with a selfish need for sexual gratification" (emphasis added). Dr. Bartel described the respondent as demonstrating "low empathy and selfishness" at the time of the offence.

Conclusion on fitness

- [92] This was undoubtedly a difficult case for the judge. As aptly noted in Bissonnette, "[t]here is no mathematical formula for determining what constitutes a just and appropriate sentence": at para. 49.
- [93] However, the respondent's appreciation of the actual and reasonably foreseeable harms associated with his conduct was a critical piece of the proportionality analysis and had to be given meaningful effect when determining both the length and form of his sentence.
- [94] The Crown has persuaded me that the sentence imposed in this case does not adequately reflect the respondent's high moral blameworthiness and unreasonably departs from the principle of proportionality. In the context of the aggravated circumstances, a term of imprisonment of two years less one day with probation (let alone a conditional sentence), is disproportionately skewed towards the respondent.
- [95] With this finding, it is not necessary to address other issues raised by the Crown that it says are also problematic, including the judge's methodological approach to s. 742.1 of the Criminal Code.
- [96] Once this Court has concluded a sentence is demonstrably unfit, it is entitled to perform its own sentencing analysis, with deference to the judge's findings of fact and their identification of aggravating and mitigating factors, to the extent that those factors are not affected by legal error: Friesen at paras. 27-28; Lacasse at para. 43.

What then, is a fit sentence?

- [97] In Friesen, the Supreme Court of Canada declined "to create a national starting point or sentencing range for sexual offences against children": at para. 106.

- [98] In *Nystrom*, this Court noted that British Columbia does not have an established range for child sexual offending post-Friesen: at para. 45. The generally accepted range of sentence for one count of sexual interference in British Columbia prior to Friesen was one to three years' imprisonment: Friesen at para. 111, citing *R. v. Williams*, 2019 BCCA 295 at para. 71.
- [99] In support of its position of four years' imprisonment, the Crown has cited several post-Friesen cases at the appellate level involving offenders with no prior record for sexual offending.
- [100] Although the respondent's offence occurred 17 years ago, it is appropriate to consider these cases in assessing fitness. In *R. v. R.O.*, 2023 BCCA 65 [R.O.], the Court accepted that in "historical cases", the principle of "proportionality demands recognizing the increased gravity with which today's society understands sexual offences against children": at para. 49. Consequently, "[p]rior precedents from previous eras that do not reflect this deepened understanding should not be determinative or seen as 'imposing a cap on sentences'": *R.O.* at para. 49, citing Friesen at para. 110.
- [101] Of the Crown's cases, I consider the ones involving a Crown appeal from sentence the most informative because when an appeal court interferes with a sentence based on a material error in principle or a conclusion that a sentence was demonstrably unfit, it sentences afresh and through this process, develops the law of sentencing, including ranges, unencumbered by a deferential standard of review on the issue of quantum: Friesen at para. 34.
- [102] The Crown's cases include:
- *P.R.J.*--in which this Court overturned a 23-month conditional sentence followed by two years' probation and imposed three years' imprisonment for a mother convicted of one incident of sexual interference against her seven or eight-year-old daughter. The only mitigating factor was the lack of a criminal record;
 - *Nystrom*--this Court overturned a two-year sentence with three years' probation and imposed a global three-and-one-half-years' imprisonment for a "youthful" 19-year-old offender with an "unfortunate background" who committed three sexual assaults against a 14-year-old girl. There was no trust relationship;
 - *R. v. B.M.*, 2023 ONCA 224--the Ontario Court of Appeal overturned a conditional sentence of two years less one day and two years' probation for highly invasive sexual offending against two children over a 43-month period, and imposed a global seven years' imprisonment. The offender was between 18-22 years old and the victims were around 12 years of age. The offender stood in a position of trust; he showed adult and child pornography to one of the victims and demanded intimate photographs from the other. He instructed one of them to lie to the police. He was diagnosed with a schizoaffective disorder. The evidence supported a finding of "some relationship" between his mental illness and the criminal conduct (at para. 25), but it was not a significant contributing factor; and,

· R. v. Lemay, 2020 ABCA 365--the Alberta Court of Appeal increased a 30-month prison term for sexual touching to four years for an Indigenous offender who pleaded guilty. On five occasions, the offender had sexual contact with the 15-year-old daughter of his close friend. He stood in a position of trust.

[103] To this list, I would add the following cases. They also involved first time sexual offenders:

· R. v. A.B., 2023 ONCA 254--the Ontario Court of Appeal reduced a sentence of seven years' imprisonment to five years for repeated sexual touching of the offender's step-daughter between the ages of 10-15. The offender groomed the victim and was in a position of trust. The sexual abuse continued for more than four years. The Court described a five-year sentence as a "significant penitentiary" term for a first-time offender (at para. 55);

· R. c. X, 2022 QCCA 266--the Quebec Court of Appeal overturned a one-year prison term in a case involving a 40-year-old sexual offence against the offender's minor sister and imposed a sentence of two years less one day. The Court ordered that the sentence be served consecutive to a four-month term for another sexual offence against the same victim (meaning the global term was 28 months). The victim was 12-15 years old. The sexual misconduct occurred "regularly" and included approximately 15 incidents in the offender's bedroom;

· R. v. BAJN, 2021 MBCA 32--the Manitoba Court of Appeal overturned a 15-month conditional sentence and imposed a conventional prison term of two years less one day on an 18-year-old offender who had a sexual relationship with a 13-year-old. The victim became pregnant and had a child. The offender had cognitive limitations; a dysfunctional childhood and family life; and there was no trust relationship;

· SADF--the same Court increased a global four-and-one-half-year sentence to six years' imprisonment for two counts of sexual touching against a six and eight-year old. The offender was 32. The facts involved repeated sexual abuse in the context of a relationship of trust. The offender had a difficult background. He was in foster care as a young child and sexually abused; and,

· T.J.--the Ontario Court of Appeal set aside a nine-month custodial sentence and imposed a two-year prison term, which was the maximum sentence sought by the Crown on appeal. On one occasion, the offender engaged in sexual touching of a six-year-old child and demanded that she perform fellatio (which did not occur).

[104] This list of cases is not exhaustive and no two cases will ever be exactly alike. As such, I accept there will be cases involving child sexual abuse in which the particular circumstances may appropriately attract a sentence of lesser duration than the ones captured here or justify a conditional sentence order. As stated, sentencing is an individualized process and multi-factorial in nature. Consequently, mitigating factors and the personal circumstances of an offender can make a material difference, even where denunciation and deterrence have been prioritized by statute or by the courts.

- [105] R. v. Pauloosie, 2022 NUCA 3 exemplifies the point. In that case, decided post-Friesen, the Nunavut Court of Appeal dismissed a Crown appeal from a global sentence of two years less one day and two years' probation for four counts of sexual touching against one victim (including sexual intercourse). The offender was 20 years old and the victim was 12. There were several mitigating factors, including Gladue factors. The offender's parents attended residential schools and he had "experienced and witnessed significant violence in his home and community": at para. 11. He also witnessed substance abuse; he was impacted by poverty; and he began consuming alcohol and using marijuana in his late teens: at para. 8. The appeal Court accepted that a longer sentence would have to be served in a correctional institution outside of the offender's community and would have a "more significant impact" on him than others. Removing him from Nunavut "would diminish his prospects for rehabilitation and undermine the long-term safety of the community": at paras. 11, 18, 27, 55.
- [106] As Pauloosie demonstrates, Friesen does not oust a court's consideration of personal circumstances or direct that an offender's circumstances can only ever attract minimal weight. This is especially so with evidence of significant diminished moral culpability:
- [91] The proportionality principle requires that the punishment imposed be "just and appropriate . . . and nothing more" as sexual assault and sexual interference are broadly-defined offences that embrace a wide spectrum of conduct, the offender's conduct will be less morally blameworthy in some cases than in others. Second, the personal circumstances of offenders can have a mitigating effect. For instance, offenders who suffer from mental disabilities that impose serious cognitive limitations will likely have reduced moral culpability
- [92] Likewise, where the person before the court is Indigenous, courts must apply the principles from The sentencing judge must apply these principles even in extremely grave cases of sexual violence against children The systemic and background factors that have played a role in bringing the Indigenous person before the court may have a mitigating effect on moral blameworthiness Similarly, a different or alternative sanction might be more effective in achieving sentencing objectives in a particular Indigenous community
- [Friesen, internal references omitted.]
- See also R. v. L.S.N., 2020 BCCA 109 at para. 52; R. v. Williams, 2020 BCCA 286 at para. 33; P.R.J. at para. 57; Nystrom at paras. 21-22.
- [107] It is also the case that the principle of rehabilitation remains a live (albeit secondary) principle when sentencing for a child sexual offence. As explained in Bissonnette, "[r]ehabilitation is one of the fundamental moral values that distinguish Canadian society from the societies of many other nations in the world ": at para. 48, quoting from Lacasse at para. 4. Prioritizing the principles of denunciation and deterrence "does not exclude consideration of other sentencing objectives, including rehabilitation ": Bertrand Marchand at para. 28.

- [108] The respondent is correct--a sentence of less than two years and/or a conditional sentence is not prohibited for a child sexual offence. However, prior to Friesen, this Court held that it will be the "rare case" where the principles of deterrence and denunciation can be achieved through a conditional sentence in a case involving child sexual abuse: *R. v. Safaee*, 2009 BCCA 367 at para. 26. That principle, it seems to me, carries even greater resonance in the post-Friesen era, with society's deepened understanding of the immediate, long-term, and broad-scoped harms that flow from this crime. See also the comments in *B.M.* at para. 2 and *R. v. M.M.*, 2022 ONCA 441 at para. 16.
- [109] The respondent has cited four post-Friesen cases in which conditional sentences were imposed by a trial court for sexual offending against one or more children: *R. v. T.J.H.*, 2022 YKSC 45, leave refused 2023 YKCA 2; *R. v. B.L.M.*, 2022 BCPC 187; *R. v. WMW*, 2023 ABPC 14; and *R. v. Gunaratnam*, 2021 ONSC 8270.
- [110] In the first three of these cases (one of which was a summary conviction prosecution), Gladue factors informed the sentence. Remedial in nature, these factors are well-recognized to mitigate or reduce moral blameworthiness. In the fourth case, the Crown and the defence advanced a joint submission for a conditional sentence. The sentencing court was entitled to reject that submission only if the sentence would "bring the administration of justice into disrepute or [was] otherwise contrary to the public interest": *Gunaratnam* at para. 35 quoting from *R. v. Anthony-Cook*, 2016 SCC 43 at para. 32. It is a high threshold.
- [111] The judge also cited two trial-level post-Friesen decisions in which conditional sentences were imposed: *R. v. P.S.*, 2021 ONSC 5091 and *R. v. K.K.*, 2020 ONSC 7198. Both of those cases involved offenders in their 60s and 70s with serious medical issues at the time of sentencing. In the second case, the Crown did not seek a sentence of greater than two years.
- [112] My review of appellate cases in which the court has sentenced afresh post-Friesen, although certainly not exhaustive, indicates that a substantial penitentiary term is no longer treated as unusual or reserved for rare or exceptional circumstances, even for a first-time sexual offender: *Friesen* at para. 114.
- [113] In light of this jurisprudential reality, the aggravating features of this case, and the respondent's high moral blameworthiness, I am of the view that a three-and-one-half-year term of imprisonment is a fit sentence.
- [114] When the respondent committed his offence, the maximum prescribed penalty was 10 years' imprisonment, rather than the current 14. As a result, it would be unconstitutional to impose a carceral sentence of more than 10 years (*R.O.* at para. 51); however, the fact that the maximum penalty was lower at that time does not mean this Court must pull back in its *Friesen* analysis.

- [115] The respondent is properly subject to the " current sentencing law on sexual offences against children": R.O. at para. 53. This Court has recognized that " by their very nature, cases of historical sexual offences against children often involve an adult coming forward about abuse they suffered as a child that was not disclosed at the time of the offences": R.O. at para. 54. That is what occurred here.
- [116] As I noted at the start of these reasons, I consider three-and-one-half-years to be at the low end for child sexual offending of the nature committed by the respondent, even as a first-time sexual offender.
- [117] If not for the respondent's guilty plea; his genuine remorse "paired with insight", which gives the remorse "added significance" (Friesen at para. 165); his substantial and independently confirmed rehabilitation since the offence, and importantly, the fact that he presents a low risk to reoffend, a sentence closer to five years' imprisonment would have been a fit sentence.
- [118] There was evidence at sentencing that the respondent has likely undergone sufficient counselling and treatment to address his sexual offending. The Crown has not appealed the decision to exempt the respondent from SOIRA or to decline a s. 161 prohibition order. From this, I infer the Crown takes no issue with the sufficiency of the therapeutic intervention received thus far. Friesen recognizes that rehabilitation can weigh in favour of a reduced term of incarceration: at para. 124. See also Bertrand Marchand at para. 28.
- [119] There was also evidence that because of the respondent's ongoing mental health challenges, " a high level of disruption to [his rehabilitative] success could result in a deterioration [in] psychological functioning and adjustment, which could have the unintended effect of raising [the respondent's] risk to some degree". This too, in my view, supports a sentence at the lower end. "Courts should consider the effect of a sentence on the particular offender. The principle of proportionality implies that where the impact of imprisonment is greater on a particular offender, a reduction in sentence may be appropriate ": Hills at para. 135, italics in the original.
- [120] However, over the two-year period captured by count 1 of the Information, the respondent repeatedly sexually abused his younger step-brother in highly invasive ways. Sexual violence that is committed on multiple occasions and for longer periods properly " attract significantly higher sentences that reflect the full cumulative gravity of the crime": Friesen at para. 133.
- [121] The respondent groomed the victim and psychologically manipulated him in his own home, where he was entitled to feel safe and where he looked to the respondent as a trusted older brother. The respondent did this fully aware of the wrongfulness of his conduct and the harm he was causing. He did not stop. To the contrary, the abuse increased in severity over time. The respondent was "youthful" at the time of the offence but he was 20 years old when the sexual touching began, 22 by the end date of count 1, and 24 when it stopped. The duration and frequency of sexual violence, as well as the degree of physical interference

involved, are relevant factors in determining a fit sentence for child sexual abuse: Friesen at paras. 121-154.

[122] The respondent has harmed the victim in profound ways, leaving him to often disassociate and wonder if he is "... living [his] life or just watching it". The offending has resulted in " a chasm between [the victim] and everyone [he has] ever loved ...". The respondent's and victim's blended family has been fractured. The immediate and long-term impacts of child sexual offences are palpable in this case. Those impacts cannot and must not be understated.

[123] In Friesen, the Supreme Court of Canada described sentencing law as an "important mechanism" through which Parliament seeks to " protect children from sexual violence, to hold perpetrators accountable, and to communicate the wrongfulness of sexual violence against children": at para. 45. In my view, the sentence imposed in this case failed to meet those objectives, notwithstanding the presence of mitigation, and it must be increased.

Disposition

[124] Accordingly, I would grant the Crown leave to appeal from sentence.

[125] I would set aside the sentence and impose a penitentiary term of imprisonment of three-and-one-half-years (42 months).

[126] The fresh evidence sought to be introduced by the respondent simply affirms the judge's findings of the respondent's efforts to rehabilitate, his remorse, and his pro-social behaviour. Those findings have been accounted for in my analysis and I see no principled basis for admitting the evidence, applying the criteria in *Palmer v. The Queen*, [1980] 1 S.C.R. 759 (S.C.C.), 1979 CanLII 8. Accordingly, I would dismiss the fresh evidence application.

[127] The sentence would run from July 14, 2023. I would leave it up to the correctional authorities to calculate the amount of credit the respondent is statutorily entitled to for time already served on the conditional sentence. The intention is that for purposes of the respondent's release, he be treated as an offender who received a three-and-one-half-year penitentiary term when the sentence was first imposed.

[128] Given the length of this sentence, it cannot be served conditionally and there cannot be a probation order: Criminal Code, ss. 742.1, 731(1)(b).

[129] Consistent with the terms of the sentence imposed below, I would attach a non-communication order for the duration of the sentence under s. 743.21 of the Criminal Code. Pursuant to that order, the respondent is to have no contact, directly or indirectly, with the victim.

[130] All other aspects of the sentence imposed in the Provincial Court would remain intact.

"The Honourable Madam Justice DeWitt-Van Oosten"

I AGREE:

"The Honourable Justice Griffin"

I AGREE:

"The Honourable Mr. Justice Voith"

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