

CANADA / JUDGMENT

R. v. J.F.D.V.

2025 BCCA 4

COURT

British Columbia Court of Appeal

DECIDED

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COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. J.F.D.V.,

2025 BCCA 4

Date: 20250109

Docket: CA49961

Between:

Rex

Appellant

And

J.F.D.V.

Respondent

Corrected Judgment: The cover page and header of the judgment were corrected on May 14, 2025.

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Before:

The Honourable Madam Justice DeWitt-Van Oosten

The Honourable Justice Winteringham

The Honourable Justice Donegan

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

May 23, 2024 (sentence) (R. v. J.F.D.V., Richmond Docket 65927-1).

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Place and Date of Hearing:

Vancouver, British Columbia

October 15, 2024

Place and Date of Judgment:

Vancouver, British Columbia

January 9, 2025

Written Reasons by:

The Honourable Justice Winteringham

Concurred in by:

The Honourable Madam Justice DeWitt-Van Oosten

The Honourable Justice Donegan

Summary:

Following a trial in provincial court, the respondent was convicted of sexual interference and sexual assault against his 12-year-old niece, an Indigenous girl living with her grandmother (the respondent's mother) at the time of the offences. The judge imposed a sentence of two years less a day, to be served pursuant to a conditional sentence order, followed by three years of probation. The Crown appeals the sentence.

Held: Leave to appeal is granted and the appeal is allowed. The length of the sentence remains the same but imprisonment is substituted for the conditional sentence order. The sentence was demonstrably unfit and the judge erred in principle in the assessment of denunciation and deterrence. A conditional sentence order is not consistent with the purposes and principles of sentencing where the victim is an Indigenous child with a disability and the offences occurred in circumstances of a breach of trust.

Reasons for Judgment of the Honourable Justice Winteringham:

Introduction

- [1] Following a nine-day trial in the Provincial Court of British Columbia, the respondent was convicted of sexual interference (s. 151 of the Criminal Code, R.S.C. 1985, c. C-46) and sexual assault of P.D., a person under the age of 16 years (s. 271, Criminal Code, later conditionally stayed through the application of the Kienapple principle): *R. v. J.F.D.V.*, 2023 BCPC 210.
- [2] On May 23, 2024, the judge imposed a sentence of two years less a day, to be served pursuant to a conditional sentence order (s. 742.1, Criminal Code) ("CSO"), followed by three years of probation: *R. v. J.F.D.V.* (23 May 2024), Richmond 65927-1 (B.C.P.C.).
- [3] The offences occurred between December 2015 and July 2016 when P.D. was 12 years old and the respondent, her uncle, was 39 years old. When P.D. was an infant, she and her twin sister and older brother were placed in the home of their grandmother (the respondent's mother), where the respondent also resided. P.D.'s parents were "not in the picture" while she was growing up, although P.D. recalled her father "coming home drunk" and sometimes spending the night: reasons for conviction at para. 5. The judge found that over the span of a few months, the respondent sexually assaulted P.D. four times by touching her breast under her clothes while in a car; pressing his penis against her while on his bed; touching her vagina while on his bed; and placing his hand on her vagina while in a swimming pool.
- [4] The Crown asserts the judge's findings are incompatible with the imposition of a CSO; the respondent committed numerous acts of sexual touching; he committed a serious breach of trust; and he had a "high degree of moral blameworthiness": reasons for sentence at paras. 24, 96, 100. She also found the respondent's conduct was "egregious" (at para. 123), demonstrated "profound wrongfulness and harmfulness" (at paras. 73, 76, 100); and had a significant impact on the vulnerable victim.
- [5] The Crown seeks leave to appeal the sentence, submitting that the judge erred in principle because the CSO failed to recognize and reflect the inherent wrongfulness and harmfulness of the respondent's conduct, and that the sentence is demonstrably unfit. In its factum, the Crown sought a penitentiary sentence of two and a half to three years. During oral submissions, the Crown focused its submissions on changing the mode of serving the sentence, rather than its length.

- [6] As these reasons explain, I would grant leave to appeal the sentence and allow the appeal. The judge committed errors in principle that impacted the sentence. She also imposed a sentence that was demonstrably unfit. I would not reduce the length of the sentence imposed but would substitute the mode of serving the sentence to be imprisonment and not a CSO.
- [7] In allowing this appeal, I recognize the judge's comprehensive reasons for sentence and her effort to examine the many factors at play. However, where the victim is an Indigenous child with a disability and the offences occurred in circumstances of a significant breach of trust, as is the case here, a CSO is not consistent with the purposes and principles of sentencing. Nor is a CSO consistent with the principles articulated by the Supreme Court of Canada in *R. v. Friesen*, 2020 SCC 9 and by this Court in *R. v. C.K.*, 2023 BCCA 468 [C.K.]; *R. v. G.J.M.*, 2024 BCCA 82 [G.J.M.]; *R. v. P.R.J.*, 2023 BCCA 169 [P.R.J.]; and *R. v. Nystrom*, 2023 BCCA 232.
- [8] Although it has been said before, it is not the case that a CSO is unavailable for sexual offences involving children. It is. By allowing this appeal, I do not suggest otherwise. However, this is a case that demanded more than notional consideration of the victim's Indigeneity and vulnerabilities, particularly where the judge found there to be a "serious breach of trust" and "high degree of moral blameworthiness" (at paras. 24, 96, 100) on the part of the respondent. At trial, P.D. was 16 years old, describing events that had occurred some four years earlier. P.D. had faced many challenges in her young life. The impact of the offences on P.D. was profound, and classically mirrors many of the harms of childhood sexual violence identified by the Supreme Court of Canada in *Friesen*.

Reasons for sentence

- [9] The parties presented detailed and thoughtful submissions to the judge. The judge's reasons for sentence were thorough as she worked through the many issues presented. The Crown sought a sentence of two and a half to three years' imprisonment and the respondent presented a comprehensive submission in support of a two-year less a day CSO, followed by probation. Early in her reasons, the judge observed how difficult this case was.
- [10] The judge commenced her reasons for sentence by setting out the circumstances of the offences and summarized her findings that the respondent sexually touched his niece four times when she was 12 years old and while they lived together as an extended family in her grandmother's home. The four incidents were described in greater detail in the reasons for conviction:
- a) The respondent touched his niece's breast when they were alone in a parked car: at para. 133;
 - b) While they were laying on their stomachs watching television, the respondent slid his hand beneath his niece and touched her vagina, over her clothing: at para. 137;

- c) While they were at a public pool, the respondent came up to his niece and put his hand on her vagina, overtop of her shorts: at para. 145; and
 - d) While they were laying on the respondent's bed, he grabbed her hips and pressed his penis against her [buttocks] as she was trying to get off the bed: at paras. 152-154.
- [11] The judge then cited portions of the victim impact statement, which highlighted the emotional effects of the offences on P.D. and the complicated dynamics of sexual offending in families: at para. 4.
- [12] Next, the judge listed several matters about the respondent and his circumstances, including:
- a) He is now 47 years old and does not have a criminal record: at para 6;
 - b) He has worked in the construction industry for many years: at para. 6;
 - c) He has eight children (seven biological and one adopted child), currently lives with four of his children, and is financially supporting five of them. With his current wife, he has two biological children under the age of 10 years. They live in a shared family home with his mother and other extended family members, including his niece and nephew (siblings of the victim): at para. 6;
 - d) He was described by members of the community as a "good person who loves his family and serves his religious community": at para. 7; and
 - e) A psychiatrist provided a report indicating that the respondent was at a low risk of committing another sexual offence against a child: at para. 7.
- [13] The judge then turned to the principles of sentencing, identifying denunciation and deterrence and the applicable statutory provisions: at paras. 9 and 10. She accepted that the Crown had proven the following aggravating factors beyond a reasonable doubt:
- a) The offences occurred in places where P.D. was entitled to feel safe: at para. 14;
 - b) The respondent was in a position of trust, considered "to be at the higher end of the trust spectrum because [the respondent] was an important member of the family" and a "father figure" to P.D. (s. 718.2(1)(ii)): at para. 14;
 - c) P.D. was a 12-year-old Indigenous female (ss. 718.2(a)(ii.1) and 718.04): at para. 15-16;
 - d) P.D. was vulnerable due to her disability and because "her biological parents were unable to care for her due to substance misuse". She was raised by her grandmother and "had a relatively high degree of dependence on the adults in her life": at para 17; and
 - e) Considering her age and other personal circumstances, "th[e] offence[s] had a significant impact on [P.D.]" (s. 718.2(a)(iii.1)): at para. 18.

- [14] As she addressed mitigating factors, the judge identified four: the respondent did not have a criminal record, he had been assessed as posing a low risk of re-offending, he had strong family and church support, and he had not committed further offences while on bail. The judge examined each mitigating factor and discussed the weight she gave to each.
- [15] With respect to the respondent's lack of criminal record and good character, the judge found the "mitigating effect is somewhat reduced" because the nature of the crime he committed is of such gravity that it demonstrates a high degree of moral blameworthiness on his part: at para. 24. On this point, the judge relied on *R. v. R.M.*, 2019 BCCA 409 at para. 22 and stated "he used his good character as a trusted member of this family to commit this crime. He cannot now rely on that good character as mitigating": at para. 24.
- [16] The judge discussed the respondent's risk of re-offending. Dr. David William Morgan, a forensic psychiatrist, performed a risk assessment and his report was presented as an exhibit. Dr. Morgan's opinion was that the respondent was at a "very low risk" of committing a sexual offence in the future: at para. 27. However, the judge noted several concerns with the report, including that the report contained inaccuracies regarding the offences and the respondent did not have the benefit of an interpreter when he was interviewed by Dr. Morgan. The judge concluded that the impact of her concerns was unclear and she gave the risk assessment less weight as a result: at paras. 27-33.
- [17] The judge noted family and community support as a mitigating factor and acknowledged the respondent "asks for consideration of his wife and children given how dependent they are on him": at para. 35. As well, the judge agreed that she could find some mitigation because of the respondent's time spent on bail, stating that "[w]hile [it was] not significant, it cannot be ignored either": at para. 43.
- [18] The judge then turned to consider the parties' submissions on the range of sentence and the post-Friesen cases provided in support of their positions.
- [19] After considering the cases cited by the Crown and the respondent, the judge concluded that "[o]verall, these cases support a sentencing range from two years less one day to two and half years": at para. 72.
- [20] Next, the judge applied the principle of proportionality. She commented on the difficulty in determining an appropriate sentence in this case and acknowledged that the sexual offence had forever altered the life of a young and vulnerable girl. The judge turned to the framework set out in Friesen to guide her determination of a fit and appropriate sentence, noting that Friesen did not establish a minimum sentencing range but held that "a sentence imposed for child sexual violence must reflect and give full effect to the profound wrongfulness and harmfulness of the offence, in accordance with the modern understanding": at para. 76.

- [21] With respect to the gravity of the offence, the judge found that "the nature, duration, and frequency of the sexual violence [placed this offence] at the lower end of the spectrum": at para. 79. The degree of physical interference was at the lower end, given only one of the four incidents of touching were under P.D.'s clothes (when the respondent touched P.D.'s breast). The incidents were short and discrete and the sexual offending stopped shortly after P.D. reported the abuse to her grandmother, placing the duration at the lower end. The location of the sexual violence, the family home, and the respondent's abuse of his position of trust were at the higher end of the spectrum. With respect to the respondent's position of trust, the judge emphasized that "[a]lthough he was her uncle, she considered him to be a 'father figure'": at para. 84. On this point, the judge cited paras. 125-130 of Friesen, which provides that higher sentences must be imposed on an offender who breaches a position of trust.
- [22] In assessing the harm caused by the sexual offence, the judge found the offence to have had a significant impact on P.D. The judge noted the harm to her bodily integrity and the emotional and psychological harm she experienced. The judge highlighted the harm that flowed from P.D.'s grandmother telling her not to tell anyone and blaming P.D. for letting it happen, when P.D. was just 12 years old. The judge found the most significant harm flowed from P.D. being severed from important familial relationships and subsequently experiencing a deep sense of loneliness: at para. 91. However, the judge found there was insufficient evidence to find that the damage to each of the familial relationships was caused by the offences. The judge stated "Although P.[D.] worried that she would be abandoned by her family in coming forward, to some extent, she already was abandoned by her family when she came forward": at para. 92.
- [23] The judge highlighted P.D.'s unique vulnerabilities as an Indigenous girl who was placed in her grandmother's home because her biological parents could not care for her. Being placed in foster care at age 16, the judge found, was evidence of her pre-existing vulnerability, and was not due to the offences. The judge found that P.D.'s "vulnerability constitutes an aggravating factor deserving of significant weight": at para. 93. The judge highlighted aspects of P.D.'s vulnerability:
- [95] The one factor that is uniquely present in this case is the special vulnerability of P.[D.] as an Indigenous girl who was placed in the home of her grandmother to ensure she was loved, cared for, and protected. She was raised by her grandmother because her biological parents were unable to care for her due to substance misuse. She is vulnerable because of her age. She is vulnerable because she is Aboriginal and [f]emale, and therefore, belongs to a group that is vulnerable to increased risk of sexual violence. She is also vulnerable because of other personal circumstances, including that she has a disability. She had a relatively high degree of dependence on the adults in [her] life. Her vulnerability made it easier for a father figure in her life to target and exploit her.

- [24] Turning to the respondent's responsibility, the judge found that he bore a relatively high degree of moral blameworthiness. While he had no prior criminal record and strong family and community support, the respondent used the trust placed in him and his good character to commit these offences: at para. 96. However, the judge found that given the opportunistic nature of the offences and his personal circumstances, the respondent "presents a low risk to reoffend and has demonstrated compliance with court-ordered conditions": at para. 99.
- [25] The judge concluded that the sentence should be two years less a day because this "balances the relatively high degree of moral blameworthiness of [the respondent] with the gravity of this offence[s]": at para. 100.
- [26] Because the sentence was under two years, the judge turned to the question of whether serving the sentence in the community would be consistent with the fundamental purpose and principles of sentencing. She began her analysis by acknowledging that denunciation and deterrence are the primary objectives of sentencing, but that she has discretion to consider other factors in arriving at her decision (citing Friesen at para. 104).
- [27] The judge noted the Crown's argument that Friesen is clear that CSOs should only be available to offenders of child sexual violence in exceptional circumstances and that no such circumstances exist in this case. On this point, the judge stated she was not departing from Friesen in determining the length of the sentence.
- [28] The judge considered the defence submission that the collateral consequence of a jail sentence would be exceptional in this case, as incarceration would cause P.D.'s family to suffer. The judge disagreed, as it was a predictable outcome of his offences, but found the collateral consequence did carry some weight. Here, the judge found that loss of financial or social support resulting from a conviction can make a path to rehabilitation harder, which is a live (although secondary) principle in sentencing of child sexual offences. In considering the need for restraint, the judge highlighted that an offender should not be deprived of their liberty if a less restrictive sanction is appropriate: at paras. 112-114.
- [29] The judge then discussed specific deterrence and found that serving the sentence in the community would not pose a risk to the safety of the community as the respondent demonstrated a low risk of re-offending and could be managed through conditions on court orders. She found that the respondent's offending was opportunistic and could be mitigated through restricting his access to locations that would provide him the opportunity to be alone with girls under the age of 16 years. Further, the respondent had no prior criminal record and had demonstrated compliance with bail conditions: at paras. 125-126.
- [30] In conclusion, the judge found this to be one of the rare child sexual abuse cases mentioned in Friesen and C.K. where the principles of deterrence and denunciation could be achieved through a conditional sentence. She added that this principle "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": at para 128, citing C.K. at para. 108. The judge was satisfied that "[c]onsidering the overall circumstances a conditional

sentence order of the maximum duration of two years less one day -- with appropriately punitive conditions - can meet the principles of denunciation and deterrence" (at para. 129), followed by a three-year probation order. The CSO and probation order included a curfew for the duration of both, with an exception that permitted the respondent to be outside of his residence for employment purposes only: at paras. 130-131.

Grounds of appeal

[31] The Crown advances two grounds of appeal:

- a) The judge erred in principle in imposing a conditional sentence order by:
 - i. failing to give meaningful effect to Friesen;
 - ii. improperly overemphasizing mitigating factors; and,
 - iii. failing to take into account aggravating factors including the fact that the respondent, "a father figure" to his niece, committed multiple sexual acts against a vulnerable young Indigenous child with a disability in circumstances the judge found to be a significant breach of trust.
- b) The judge erred by imposing a sentence that is demonstrably unfit, having regard to the circumstances of the offence and the offender.

[32] The Crown takes the position that the factual matrix of this case cannot lead to a CSO. The Crown submits that it sought a relatively low sentence of two and a half to three years to account for the fact that the sexual conduct was not more serious, violent, or prolonged, the respondent did not have a criminal record, and Dr. Morgan found the respondent was at a low risk to reoffend. Otherwise, submitted the Crown, "mid to high single digit" terms of imprisonment should be imposed, as instructed by Friesen at para. 114.

[33] The Crown submits that a CSO is not justified by the sexual acts being at the "lower end of the spectrum" when the breach of trust is severe and the harm significant. On this point, the Crown notes that this was not a guilty plea and there were no mitigating factors or personal circumstances that lower the respondent's moral blameworthiness to the extent that a "rare" CSO is justified. The Crown argues that allowing the respondent to serve his sentence in the community is inconsistent with the principles articulated in Friesen and applied by this Court.

[34] In its factum, the Crown sought an order setting aside the CSO, and the imposition of a penitentiary sentence of up to three years. During the hearing, the Crown focused its submission on the mode of serving the sentence; that is, that the CSO be set aside and a jail sentence of the same length (two years less a day) be imposed.

[35] The respondent takes the position that the judge did not make any of the errors alleged and that the sentence was not unfit. The respondent asserts that the judge "carefully crafted an individualized sentence" that addressed the sentencing principles applicable in this case for this offender. He submits that the reasons for sentence "are devoid of the sort of error in principle that would permit this [C]ourt to alter the sentence". He submits the sentence is fit and appropriate and the Crown's appeal of the sentence should be dismissed.

Standard of review

- [36] The standard of review applicable to sentencing decisions is not controversial. It is highly deferential. An appellate court may intervene to vary a sentence only if the sentencing judge made an error in principle that had an impact on the sentence, or if the sentence is demonstrably unfit: Friesen at para. 26.
- [37] In *R. v. Milne*, 2021 BCCA 166, Justice Dickson made clear that "[a]n error in principle may include an error in law, a failure to consider a relevant factor or the overemphasis of a relevant factor": at para. 44. A sentence is demonstrably unfit where it is clearly or manifestly excessive or inadequate, or represents an unreasonable or marked departure from the principle of proportionality: *R. v. Lacasse*, 2015 SCC 64 at paras. 52-53.
- [38] Finally, if an error is found that has impacted the sentence, this Court may sentence afresh. Justice Fisher in *Nystrom* stated:
- [16] Where an error in principle has impacted the sentence, or where the sentence is demonstrably unfit, this Court may inquire into the fitness of the sentence and replace it with the sentence we consider appropriate, giving less deference to the sentencing judge. In doing so, we are to defer to the judge's findings of fact and identification of aggravating and mitigating factors, except to the extent they are affected by an error in principle: *Lacasse* at paras. 43-44; *Friesen* at paras. 27-29; *Agin* at paras. 48, 52; *R. v. Parranto*, 2021 SCC 46 at para. 122.

Analysis

- [39] I agree with the Crown that the sentence imposed by the judge reflects errors in principle and was demonstrably unfit. I also agree that this conclusion follows directly from the application of the principles set out in *Friesen*, from the notional consideration given in this case to factors deemed to be "aggravating", and from the failure to prioritize denunciation and deterrence. Relevant here are two features of the message in *Friesen*: (1) the importance of properly considering the wrongfulness and harmfulness of sexual offences against children in determining a proportionate sentence; and, (2) the priority given by Parliament to the sentencing objectives of denunciation and deterrence for these offences.

Error #1: Application of Friesen principles

- [40] In Friesen, the Supreme Court of Canada sent a strong message about how courts must impose sentences in cases involving sexual violence against children:
- [5] sexual offences against children are violent crimes that wrongfully exploit children's vulnerability and cause profound harm to children, families, and communities. Sentences for these crimes must increase. Courts must impose sentences that are proportional to the gravity of sexual offences against children and the degree of responsibility of the offender, as informed by Parliament's sentencing initiatives and by society's deepened understanding of the wrongfulness and harmfulness of sexual violence against children. Sentences must accurately reflect the wrongfulness of sexual violence against children and the far-reaching and ongoing harm that it causes to children, families and society at large.

Specific to the case at bar, Friesen informs our understanding about the profound harm sexual violence causes children.

Wrongfulness and harmfulness

- [41] In Friesen, the Supreme Court of Canada described in considerable detail the importance of "[g]etting the wrongfulness and harmfulness right". To that end, the Court emphasized that to effectively respond to sexual violence against children, sentencing judges need to properly understand the wrongfulness of sexual offences against children and the profound harm that they cause. The Court stated, "[p]roperly understanding the harmfulness will help bring sentencing law into line with society's contemporary understanding of the nature and gravity of sexual violence against children and will ensure that past biases and myths do not filter into the sentencing process": at para. 50, internal citations omitted.
- [42] The Court identified several factors relevant to our greater understanding of harmfulness. Four of those factors feature in this case: P.D. was an Indigenous girl living with a disability who was exploited by her uncle, a person very much in a position of trust to her, and she suffered damage to her already fragile family relationships. As these reasons will explain, these factors did not garner sufficient weight in the judge's sentencing decision.
- [43] Firstly, and significant to this appeal, P.D. is an Indigenous girl. In Friesen, the Court highlighted the disproportionate impact of sexual violence on Indigenous peoples and other vulnerable groups:
- [70] Children who belong to groups that are marginalized are at a heightened risk of sexual violence that can perpetuate the disadvantage they already face. This is particularly true of Indigenous people, who experience childhood sexual violence at a disproportionate level. We would emphasize that, when a child victim is Indigenous, the court may consider the racialized nature of a particular crime and the sexual victimization of Indigenous children at large in imposing sentence.

[Internal references omitted.]

- [44] Section 718.04 of the Criminal Code was not in force at the time of this offence. However, as noted by Justice Ker in *R. v. Milne*, 2020 BCSC 2101, s. 718.04 represents a codification of applicable sentencing principles in cases involving the abuse of a vulnerable person. To denounce and deter sexual offending is but one way to reduce violence against Indigenous girls: *R v. C.C.C.*, 2021 BCSC 599 [C.C.C.], at para. 34.
- [45] The second factor identified by the Court in *Friesen* as relevant to understanding harmfulness is the disproportionate impact of childhood sexual violence on people living with disabilities. Here, the Court recognized that "[c]hildren and youth with disabilities are especially vulnerable because they may be perceived as easier to victimize, may not be able to fully understand or communicate what has happened to them, and face barriers reporting": at para. 72, internal citation omitted. In this case, the judge specifically recognized that P.D. was vulnerable because, among other reasons, she has a disability: at para. 17. Although the specifics of the disability are not revealed in the reasons for sentence, P.D. had testified about experiencing her disability while at school. The judge agreed that this disability formed a part of P.D.'s vulnerability.
- [46] The third factor to consider is the relational harm caused to P.D. The Court in *Friesen* stated that childhood sexual violence can cause additional harm and trauma to children by damaging their relationships with their families and communities: at paras. 60-61. I acknowledge the judge did not find that the damage to P.D.'s family relationships or that her move into foster care were caused directly by the offences or her decision to report the offences. However, *Friesen* highlights that relational harm can occur in less obvious ways; the "ripple effects" of the offence may cause the child to withdraw from family and community, or to be reluctant to make new friends or participate in school activities: at para. 61. *Friesen* also highlights that a breach of trust can have a relational impact on a child victim of sexual violence.
- [47] The fourth factor relevant to the harmfulness of the offence is the respondent's position of trust. *Friesen* speaks about an offender who abuses a position of trust to commit a sexual offence against a child, concluding that such an offender "should receive a lengthier sentence than an offender who is a stranger to the child": at para. 130. The Court stated it this way:
- [129] The abuse of a position of trust is also aggravating because it increases the offender's degree of responsibility. An offender who stands in a position of trust in relation to a child owes a duty to protect and care for the child that is not owed by a stranger. The breach of the duty of protection and care thus enhances moral blameworthiness

[Internal citation omitted]

In this case, P.D. was sent to live with her grandmother at a very young age with her twin sister because her parents were not able to care for her. P.D. described the respondent as a father figure. The judge considered the respondent's position of trust "to be at the higher end of the trust spectrum because he was an important member of the family": at para. 14.

[48] In the case at bar, the judge mentioned each of these factors. However, in my view, the judge discounted these factors in a manner not consistent with the message from Friesen. The judge failed to give these factors meaningful weight in her assessment of wrongfulness and harmfulness.

Proportionality principle

[49] Following this discussion about harmfulness, the Court in Friesen emphasized that sentences must recognize and reflect both the harm that sexual offences against children cause and the wrongfulness of sexual violence. In particular, courts must take into account the wrongfulness and harmfulness of sexual offences against children when applying the proportionality principle: at para. 75. As Friesen explains, the wrongfulness and harmfulness of sexual offences against children are pivotal to both aspects of the assessment of proportionality: *R. v. T.J.*, 2021 ONCA 392 [T.J.] at para. 19.

[50] With respect to determining a proportionate sentence, the Court in Friesen makes it clear that it would not be appropriate "for any court to set out binding or inflexible quantitative guidance" and that "judges must retain the flexibility needed to do justice in individual cases and to individualize the sentence to the offender who is before them": at para. 114, citing *R. v. D. (D.)*, 58 O.R. (3d) 788, 2002 CanLII 44915 (C.A.) at para. 33. However, the Court went on to discuss what may, or may not, be a "usual" sentence:

[114] Nonetheless, it is incumbent on us to provide an overall message that is clear. That message is that mid-single digit penitentiary terms for sexual offences against children are normal and that upper-single digit and double-digit penitentiary terms should be neither unusual nor reserved for rare or exceptional circumstances.

[Internal citation removed.]

[51] When considering the gravity of the offence, courts must recognize and give effect to the inherent wrongfulness of these offences, the potential harm that flows, and the actual harm that children suffer: Friesen at para. 76. Regarding conduct that might fall at the lower end of the wide spectrum of conduct that can be captured by a sexual offence, the Court stated:

[77] any physical contact of a sexual nature with a child always constitutes a wrongful act of physical and psychological violence even if it is not accompanied by additional physical violence and does not result in physical or psychological injury. Courts must always give effect to this inherent violence since it forms an integral component of the normative character of the offender's conduct

[Internal reference omitted.]

- [52] In the case at bar, the judge was entitled to place the acts themselves at the lower end of the spectrum. However, as stated at para. 145 of Friesen, "courts must recognize the wrongfulness of sexual violence even in cases where the degree of physical interference is less pronounced". See also *R. v. D.N.*, 2018 BCCA 190, where Justice Dickson wrote:
- [25] the seriousness of a sexual assault is not dictated by the existence (or non-existence) of penetration. In cases involving a breach of trust in the context of a child-parent relationship, the primary measure of the offence is the extent to which the offender violated the relationship, the duration of the violation, and the offender's appreciation of that violation as the abusive behaviour continued.
- [53] Since it is always inherently exploitative for an adult to apply physical force of a sexual nature to a child, courts "must always give effect to the wrongfulness of this exploitation in sentencing": Friesen at para. 78. Failure to properly consider the wrongfulness and harmfulness of sexual offences against children "can result in unreasonable underestimations of the gravity of the offence": Friesen at para. 50, internal citations omitted.
- [54] The judge acknowledged that her sentencing decision must "give full effect to the profound wrongfulness and harmfulness of his crime": at para. 73. On this point, she stated the following:
- [76] The Supreme Court of Canada in Friesen did not prohibit a sentence of under two years' imprisonment or establish a national sentencing range for serious child sexual offences. However, its central message was clear and unequivocal. To be fit, a sentence imposed for child sexual violence must reflect and give full effect to the profound wrongfulness and harmfulness of the offence, in accordance with the modern understanding.
- [55] After considering the respondent's moral blameworthiness and the gravity of the offence, the judge concluded that the length of sentence should be two years less one day.

The "leap" to a CSO

- [56] The Crown does not concede the appropriateness of the length of sentence imposed in this case. However, the Crown, fairly in my view, focused its submission on the "leap" the judge made to a CSO once she determined the sentence would be under two years. Respectfully, it is at this point of the judge's analysis where the Friesen message slips away and an erroneous discounting of factors relevant to the assessment of wrongfulness and harmfulness reveals itself as having affected the sentence.
- [57] The judge carefully analyzed the impact of a jail sentence on the respondent. She concluded "collateral consequence carries some weight in this sentencing through the application of the principles of individualization and parity": at para. 115. The judge found that the consequences of a jail sentence would mean a disruption to the "stability of his family

relationships": at para. 117. She recognized that rehabilitation is not a strong sentencing objective in this case, though "still relevant", and cited C.K. for the proposition that "the principle of rehabilitation remains a live (albeit secondary) principle when sentencing for a child sexual offence": at para. 118. Again, turning to C.K., the judge was satisfied that this was one of those rare cases justifying the imposition of a CSO, with punitive conditions.

- [58] When it came to the CSO, the judge found that the objective of specific deterrence was satisfied in this case because the respondent did not have a criminal record, was a low risk to reoffend and could be managed through conditions on court orders, and he had abided by bail conditions: at paras. 121, 125-126. However, she did not discuss general deterrence nor did she examine how it was that denunciation could be satisfied in light of the wrongfulness and harmfulness of the respondent's conduct.
- [59] The respondent reminds this Court that the judge's reasons are to be read as a whole and in the context of the record, the live issues at trial, and the positions taken by the parties: *R. v. G.F.*, 2021 SCC 20 at para. 69. The respondent asserts that in these lengthy reasons, the judge mentioned the aggravating factors more than once, including the fact that P.D. was Indigenous, vulnerable, and that the respondent abused his position of trust. Similarly, the judge assessed denunciation and deterrence at several points in the reasons for sentence.
- [60] I agree with the respondent's assertion that it was not an error of law for the judge to not discuss in detail each factor in her reasoning regarding the fitness of a CSO. The judge was not required to "set out every finding or conclusion in the process of arriving at the verdict", nor did she have to detail her finding on each piece of evidence before her: *R. v. R.E.M.*, 2008 SCC 51 at paras. 18, 20.
- [61] However, I agree with the Crown's submission that the judge does not fully grapple with the aggravating factors at this important stage of her analysis. In this case, there were four sexual acts committed over a period of some months by a father figure. Friesen makes clear "[t]he abuse of a position of trust exploits children's particular vulnerability to trusted adults, which is especially morally blameworthy": at para. 129, internal citations omitted. When concluding that a CSO was appropriate, the judge's attention to these factors was cursory.
- [62] These were the very factors that the Court identified in Friesen as relevant to a judge's assessment of wrongfulness and harmfulness. The Court carefully explained what it was about these factors that should inform the understanding of wrongfulness and harmfulness. Each of the four factors present in this case causes harm in its unique way, as explained by the Court. P.D. was removed from her parent's care as an infant to live at her grandmother's home and a person in a position of trust then sexually abused her. The harm to P.D., as an Indigenous child, needed greater recognition than afforded here.
- [63] Moreover, Parliament has deemed these factors to be aggravating.

[64] In my view, in addition to discounting factors that properly informed the wrongfulness and harmfulness of the respondent's conduct, the judge elevated the mitigating factors beyond that which Parliament (and Friesen) demands. The judge highlighted P.D.'s "special vulnerability" earlier in her reasons, but gave notional consideration to these factors in her consideration of a CSO. She also did not properly "consider the racialized nature of a particular crime and the sexual victimization of Indigenous children at large in imposing sentence": Friesen at para. 70. With respect, it was an error in principle to downplay these factors in this case and for this offender.

Error #2: Denunciation and deterrence

[65] The Crown contends that in this case, the judge failed to fully account for s. 718.01 of the Criminal Code which mandates judges to prioritize the sentencing objectives of denunciation (societal condemnation of the offence) and deterrence (specific and general) for child sexual offences. In its factum, the Crown submitted:

Specific to child sexual offences, certain factors are statutorily deemed as "aggravating". All of them are present in this case: 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). Section 718.04 provides further that when the abuse is against a vulnerable Indigenous female, the objectives of denunciation and deterrence shall be given primary consideration. This applies through the common law as this section was not in force at the time of the offence

[66] The respondent correctly asserts that a CSO can provide significant denunciation and deterrence. The Supreme Court of Canada made this clear in *R. v. Proulx*, 2000 SCC 5. The respondent contends that the CSO imposed in this case was "the most onerous CSO allowed under law by duration and imposed strict house arrest conditions" for five years (including the three-year probation order). The respondent objects to the Crown's suggestion that the CSO was somehow lenient because it allowed the respondent to leave his residence for employment-related purposes. The intent of this exception was to permit the respondent to maintain his employment so he could continue to support his large family. I need not determine whether employment exceptions to house arrest conditions render a CSO less onerous. I agree that the judge attempted to craft a CSO that contained punitive terms.

[67] I do not disagree with the respondent's submission regarding the Supreme Court of Canada's statement in *Proulx*, and what has been repeated many times since--a properly crafted CSO will contain denunciatory features, especially when it contains house arrest terms.

[68] However, in one of the companion cases to *Proulx*, *R. v. R.A.R.*, 2000 SCC 8 [*R.A.R.*], the Court found that a CSO (albeit of much shorter duration than here) did not fully address the principles of denunciation and deterrence. In *R.A.R.*, the accused was convicted of sexual assault and common assault against an employee. Writing for the majority in *R.A.R.*, Justice L'Heureux-Dubé said this:

- [26] While the Court of Appeal was entitled to review the respondent's sentence, it ought to have recognized that the trial judge's finding that the fit and proper sentence for the sexual assault under the old provisions - one year's incarceration plus three years' probation - was a relevant reflection of the gravity of the acts in question and the need for denunciation and general deterrence in this case. (On the gravity of sexual assault as an offence and its pervasiveness in Canadian society more generally, see: *R. v. Osolin*, [1993] 4 S.C.R. 595, at p. 669; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at paras. 68 to 75, per L'Heureux-Dubé J.; on problems relating to sentencing in sexual assault cases, see: P. Marshall, "Sexual Assault, the Charter and Sentencing Reform" (1988), 63 C.R. (3d) 216.)
- [27] The Court of Appeal substituted a six-month conditional sentence for the one-year sentence of incarceration imposed at trial, thereby imposing a significantly more lenient sentence (see Proulx, *supra*, at para. 44). In my opinion, this showed a serious disregard for the need to give significant weight to denunciation and deterrence in cases such as this one.
- [69] In Proulx, the Supreme Court of Canada stated:
- [114] Where punitive objectives such as denunciation and deterrence are particularly pressing, such as cases in which there are aggravating circumstances, incarceration will generally be the preferable sanction. This may be so notwithstanding the fact that restorative goals might be achieved by a conditional sentence.
- [70] In *R.A.R.*, Justice L'Heureux-Dubé highlighted the aggravating factors at play. She concluded that the offender's "abuse of his position of authority, combined with the demeaning and violent nature of the assaults, make the punitive objectives of denunciation and deterrence particularly pressing in this case": at para. 33. The Court thus restored the sentencing judge's sentence of imprisonment.

C.K. and "rare" cases warranting a CSO

- [71] To support her decision to impose a CSO in this case, the judge relied heavily on C.K. as authority for the proposition that a CSO is an available sentence for child sexual offences, albeit in "rare case[s]". She stated the following, paraphrasing para. 104 of C.K.:
- [109] I found this case helpful, because despite imposing a jail sentence, the [C]ourt of [A]ppeal stated that there will be cases involving child sexual abuse in which the particular circumstances may justify a conditional sentence order, and mitigating factors and the personal circumstances of the offender can make a material difference, even where denunciation and deterrence have been prioritized by statute or by the courts

The judge spent the balance of this part of her decision explaining what made the respondent's case a rare one justifying a CSO.

- [72] Regarding the relationship between CSOs and the objectives of denunciation and deterrence, the Court in C.K. said this:

[108] 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.

[73] In *C.K.*, this Court accepted that:

[104] 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.

[74] *C.K.* definitely leaves the door open to a CSO in child sexual abuse cases and the Court provided examples of cases involving child sexual abuse in which the circumstances may attract a sentence of lesser duration or which justify a conditional sentence order. In my view, those cases had significant mitigating factors not present for the respondent.

[75] For example, in *R. v. Pauloosie*, 2022 NUCA 3, the Nunavut Court of Appeal dismissed a Crown appeal from a global sentence of two years less one day of imprisonment and two years' probation for four counts of sexual touching by a 20-year-old against a 12-year-old (including sexual intercourse). There were several mitigating factors, including Gladue factors, which are summarized in *C.K.*:

[105] The offender's parents attended residential schools and he had "experienced and witnessed significant violence in his home and community" He also witnessed substance abuse; he was impacted by poverty; and he began consuming alcohol and using marijuana in his late teens

[Internal citations omitted.]

The Court of Appeal accepted that a longer sentence would have to be served in a correctional institution outside of Mr. Pauloosie's community and this additional isolation would have a more significant impact on him than other "like" offenders. The "shorter" jail sentence in Pauloosie was thus justified because of the presence of these highly mitigating factors.

[76] In addition, in *C.K.*, Justice DeWitt-Van Oosten, writing for this Court, considered four post-Friesen cases in which conditional sentences were imposed by a trial court for sexual offending against one or more children. She explained why those cases were distinguished from the circumstances present in *C.K.*:

- [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.
- [77] In my view, this case review demonstrates well that there must be something unique or "rare" in the circumstances presented before a CSO can fairly be characterized as fit. The examples cited in *C.K.* included Gladue factors, early guilty pleas, and/or an extreme separation from community. In the case at hand, Gladue factors were not present nor were the age-related factors evident in the Ontario decisions of *R. v. P.S.*, 2021 ONSC 5091 and *R. v. K.K.*, 2020 ONSC 7198.
- [78] I do not suggest there are not other situations warranting strong support for a CSO. However, in this case, I agree with the Crown that the circumstances fell far short of reaching that "rare" or "unique" case such that the objectives of denunciation and deterrence achieved what was required. In sum, it is my view that the Court in *C.K.* did not intend to preserve the "residual availability" of a CSO for a person representing the respondent's circumstances.
- [79] Despite recognizing the importance of appreciating the harm caused to P.D. and the wrongfulness of the respondent's offence, those factors did not feature in the judge's analysis regarding the appropriateness of a CSO. Rather, the judge's primary focus was on the collateral consequences of a jail sentence on the respondent.
- [80] The Crown correctly highlights that in this case there were no mitigating factors or personal circumstances of the respondent rendering this one of those cases warranting a CSO:
- a) There was not a guilty plea;
 - b) There were no Gladue factors;
 - c) The offending conduct constituted a breach of trust;
 - d) There was no evidence of any diminished moral culpability;

- e) This was found to be "egregious" behaviour;
- f) P.D. was young, vulnerable, and living with a disability; and,
- g) The conduct was repeated over a number of months.

[81] As the Court in Friesen concluded, prioritizing the objectives of denunciation and deterrence "confirms the need for courts to impose more severe sanctions for sexual offences against children": at para. 101. That need is directly related to the form of sanction required, as separation from society reinforces and gives practical effect to denunciation and deterrence: T.J. at para. 103.

[82] Section 718.01 and Friesen and C.K. and the plethora of cases that follow make clear that denunciation and deterrence are particularly pressing objectives in a case like this. The imposition of a CSO, in these circumstances with this offender, diminished the objectives of denunciation and deterrence.

[83] The aggravating factors present in this case are difficult to reconcile with the sentence that was ultimately imposed. That is despite the judge's statement that she was not departing from a range of post-Friesen sentencing cases in deciding on a two year less a day sentence. I agree with the Crown that it is not clear how the judge then jumps to the appropriateness of a CSO--other than to prioritize the collateral consequences of a jail sentence to the respondent. In my view, the judge erred in principle when she crafted a sentence that avoided any collateral consequence to the respondent at the expense of denunciation and deterrence, which are the primary sentencing objectives. This error is pronounced in this case, where the victim is Indigenous and 12 years old at the time of the offence.

Did the errors impact the fitness of the sentence imposed?

[84] Friesen does not intend to diminish nor undermine the important role of judges when determining a just and fit sentence for those convicted of sexual offences against a child. The length and form of the sentence is very much within the purview of the judge, who has observed first-hand the impact of the offending behaviour.

[85] In my view, there were features in this case that demanded greater adherence to the Friesen message. When determining the length of the sentence, the judge's reasons were thorough and she attempted to apply many of the sentencing principles enunciated in her review of the cases. However, it is not clear how the judge arrived at the length of the sentence to be two years less a day (despite the range of post-Friesen sentencing cases suggesting otherwise) and then leapt to her conclusion that the sentence could be served in the community. In my opinion, the reasons do not give the inherent wrongfulness of the conduct--including its highly morally blameworthy nature and the extent of harm caused to P.D.--the significance that Friesen requires. In addition, the reasons do not give paramountcy to the principles of denunciation and deterrence. It is my view that those errors impacted the sentence imposed.

- [86] In the lengthy reasons, the judge's analysis of proportionality, principles of sentencing, aggravating and mitigating circumstances, and review of the case law, focused on the length of the sentence to impose. However, she did not account for the Friesen message when she determined that a CSO was the appropriate form of the sentence in the circumstances. I agree with the Crown's submission that she appears to have placed great weight on the consideration of the collateral consequences to the respondent, the application of the restraint principle, and the idea that incarceration was not necessary for the safety of the community: at paras. 128-134.
- [87] The gravity of the harm caused to P.D. was also overlooked during this part of the judge's analysis. That is, she focused on the collateral consequences of a jail sentence at the expense of other factors. In this case, a CSO (even with punitive conditions) fails to sufficiently recognize P.D.'s indigeneity, age, vulnerability, disability, and the respondent's breach of trust.
- [88] For these reasons, I conclude that the errors had an impact on the sentence she imposed.

Was the sentence demonstrably unfit?

- [89] The Crown also asserted that the sentence was demonstrably unfit. Although not necessary to a resolution of this appeal, I agree with the Crown that a CSO was a demonstrably unfit sentence in the circumstances presented here. This offence was a breach of trust involving a 12-year-old Indigenous girl with various vulnerabilities, that occurred four times over several months in her family home. In my view, the sentence is inadequate because it fails to respect the primacy of the sentencing objectives of denunciation and deterrence. The CSO was a substantial and marked departure from the principle of proportionality: Lacasse at paras. 52-53.

What is a fit sentence?

- [90] Where an error in principle has impacted the sentence or where a sentence is demonstrably unfit, this Court may determine a fit sentence, applying the principles of sentencing afresh, with due deference to the judge's findings of fact and the aggravating and mitigating factors that are untainted by error: Friesen at paras. 27-28; G.J.M. at para. 74.
- [91] The respondent abused his position of trust with his 12-year-old niece, in her home, on four occasions over a period of several months. At the time of the offence, P.D. was a child, was vulnerable, and living with a disability. As found by the judge, "the one factor that is uniquely present in this case is the special vulnerability of P.D. as an Indigenous girl." As an infant, she had been placed in the care of her grandmother, the respondent's mother, when her own parents were unable to care for her (reasons for sentence at para. 95). At the time of the trial, the judge found that she had lost her relationship with her twin sister and grandmother, although the judge found that there were many reasons for the destruction of these relationships. Regardless, the evidence in this case demonstrates well the resultant damage to a child's relationship with their family and communities, recognized in Friesen.

In this case, the judge was not satisfied that the respondent's criminal offences caused P.D.'s removal from her home. However, her vulnerability was evident for reasons identified by the judge including the fact that P.D. " had a relatively high degree of dependence on the adults in her life. Her vulnerability made it easier for a father figure in her life to target and exploit her": at para. 17.

- [92] The respondent's conduct was inherently wrongful. He abused his position of trust as a father figure by sexually interfering with his 12-year-old niece, four separate times over several months in their shared family home.
- [93] Giving priority to the objectives of deterrence and denunciation and placing adequate weight on the harm inflicted on P.D., I conclude that a period of imprisonment is required. Although on the low end for this type of offence, I would not interfere with the length of sentence imposed by the judge.

Disposition

- [94] For all of these reasons, I would grant leave to the Crown to appeal the sentence, allow the appeal from sentence, set aside the two years less a day conditional sentence order, and replace it with a sentence of two years less a day imprisonment. The length of the sentence will remain the same.
- [95] I also would not interfere with the probation order of three years. In accordance with s. 743.21 of the Criminal Code, I would impose a non-communication order that the respondent have no contact, directly or indirectly, with P.D.
- [96] All of the other ancillary orders remain in effect.
- [97] This sentence would run from May 23, 2024. I would leave it up to the correctional authorities to calculate the amount of credit the respondent is statutorily entitled to for time served on the conditional sentence order. For the purpose of statutory release, the respondent is to be treated as one who received a two year less a day term of imprisonment when the sentence was first imposed. We heard no submissions as to whether P.D. wishes to receive information regarding the sentence pursuant to s. 726.3 of the Criminal Code. From that, I would infer that it need not be addressed here.

"The Honourable Justice Winteringham"

I AGREE:

"The Honourable Madam Justice DeWitt-Van Oosten"

I AGREE:

"The Honourable Justice Donegan"

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